

Raising the Bar: The NextGen Bar Exam and Contract Drafting

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I. Introduction

Set to debut in July 2026, the NextGen Bar Exam will test a broad range of foundational lawyering skills needed in today's practice of law, including contract interpretation, drafting, and revising. According to the National Conference of Bar Examiners ("NCBE"), this exam is designed "to balance the skills and knowledge needed in litigation and transactional legal practice."¹ More specifically, the foundational skills that will be tested include drafting and revising contract provisions consistent with the facts, the law, and the client's objectives, interests, and constraints.² The NCBE has indicated that the examinees' knowledge of the doctrinal subject matter topics, like Contracts, will be tested using these, and other, foundational skills.³ Bar takers will therefore be required to perform these lawyering skills as a way of proving their knowledge on topics such as contract formation, contract modification, interpretation, breach, and remedies.⁴ For the first time, in order to succeed on the bar exam, every law student will need to know how to draft and revise contract provisions.

This article discusses and dissects the content scope for the NextGen Bar Exam, outlining the areas of legal knowledge, practical skills, and abilities that will be covered. As this overview illustrates, law schools can no longer ignore contract drafting skills or relegate the teaching of contract drafting to an elective, upper-level legal writing course of 20 students or less. To facilitate incorporation of contract drafting skills into a range of courses, this article

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¹ Press Release, NCBE, *NCBE Announces NextGen Exam Structure, Sunset of Current Bar Exam* (Aug. 28, 2023), <https://www.ncbex.org/news-resources/ncbe-announces-nextgen-exam-structure-sunset-current-bar-exam> [<https://perma.cc/5U6R-E3LH>].

² NCBE, *BAR EXAM CONTENT SCOPE* (July 2023).

³ *Id.* at 1–4, 16–20.

⁴ *Id.* at 16–20.

presents examples of a wide variety of in-class and out-of-class exercises and assignments along with possible assessment methods that law professors can integrate into their existing courses, whether that course is a first-year required course, an upper-level doctrinal subject-matter course, a skills course, or a clinic. This article will then present an in-depth analysis of simulated NextGen-style prompts and questions based upon a single hypothetical that allows students to complete a number of client-centered lawyering tasks. Transactional skills are finally getting the recognition they deserve. This article provides concrete guidance to ensure that law schools—and law students—are ready for it.

II. The NextGen Bar Exam

As a member of the legal profession, a lawyer represents clients, serves as an officer of the legal citizen, and is “a public citizen having special responsibility for the quality of justice.”⁵ One of the most fundamental responsibilities is found in Rule 1.1 of the Model Rules of Professional Conduct: “A lawyer shall provide competent representation to a client.”⁶ This commitment to client representation appears throughout the model rules. This commitment is also recognized in the licensing process.

The goal of attorney licensing is two-fold. One goal is to protect the public. Clients rely on lawyers to make important decisions that impact their personal and professional lives. Although decision-making will be a shared responsibility, clients will rely upon the advice, counsel, and evaluation of lawyers. Another goal is to foster accountability. A lawyer has a responsibility to continue to seek professional development opportunities and to manage their client files. Law schools are also accountable to provide learning opportunities for students to gather the knowledge, skills, and values necessary to become a member of the legal profession.

Jurisdictions are exploring alternative paths to licensure, such as adopting or expanding diploma privilege.⁷ These discussions are informed by

⁵ MODEL RULES OF PRO. CONDUCT Preamble (AM. BAR ASS’N 1983).

⁶ *Id.* at Rule 1.1.

⁷ See, e.g., Leanne Fuith, *Building a Better Bar Admissions Process*, 76 BENCH & BAR MINN. 14 (Aug. 2022); Milan Markovic, *Protecting the Guild or Protecting the Public? Bar Exams and the*

the pandemic-driven temporary responses that some jurisdictions took⁸ and the recognition of barriers for entry into the legal profession.⁹ Despite the discussions of alternative paths to licensure, a bar exam will remain a critical step in attorney licensing in the vast majority of jurisdictions.¹⁰ Nevertheless, a significant change to licensing is coming in the form of a new bar exam called the NextGen Bar Exam.

The NCBE will launch this new bar exam with changes to content, format, and time to better determine whether an examinee is competent to practice law. As of this writing, the NCBE will launch the NextGen Bar Exam in July 2026.¹¹ For a time, the current bar exam will continue to be developed and distributed by NCBE. The last administration of the NCBE bar exam, which includes the Multistate Bar Examination (MBE), Multistate Essay Examination (MEE), and the Multistate Performance Test (MPT),¹² is anticipated to be in July 2027; however it “will remain available to jurisdictions through the February 2028 administration.”¹³ Accordingly, only the NextGen Bar Exam will be provided by NCBE in July 2028 and onwards.¹⁴ The Multistate Professional Responsibility Exam (MPRE) will continue to be offered, but the NextGen Bar Exam will incorporate aspects of the rules of professional conduct into the NextGen Bar Exam questions.¹⁵

Diploma Privilege, 35 GEO. J. LEGAL ETHICS 163 (2022); Carsen Nies, *For More Equitable Licensure, Washington State Needs Diploma Privilege, Not the Bar Exam*, 20 SEATTLE J. FOR SOC. JUST. 287 (2021).

⁸ Steven R. Smith, *COVID and Bar Admissions*, 75 ARK. L. REV. 527, 538–46 (2022).

⁹ See, e.g., Nicola “Nicky” A. Boothe, *Black and BarRed: The Bar Examination’s History of Exclusivity and the Threat of Further Exclusion Posed by ABA Standard 316*, 74 S.C. L. REV. 179 (2022); Eileen Kaufman, *The Lawyers Justice Corps: A Licensing Pathway to Enhance Access to Justice*, 18 U. ST. THOMAS L.J. 159 (2022); Carol L. Chomsky et al., *A Merritt-orious Path for Lawyer Licensing*, 82 OHIO ST. L.J. 883 (2021).

¹⁰ See generally Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363 (2002); see also Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 69 GEO. J. LEGAL ETHICS 359 (1996) (summarizing the history of “the bar exam’s rise from humble formality to career-threatening ordeal”).

¹¹ Press Release, NCBE, *supra* note 1.

¹² These sections are collectively known as the Uniform Bar Exam, abbreviated as UBE.

¹³ Press Release, NCBE, *supra* note 1.

¹⁴ *Id.*

¹⁵ *Id.*

The goal is to be a more valid, reliable assessment device to evaluate the competency of new lawyers that brings together all aspects of lawyering rather than focusing almost exclusively on knowledge acquisition. In broad brushstrokes, the NextGen Bar Exam will assess a broader range of lawyering skills while focusing on a narrower range of acquired knowledge. The tasks to be assessed reflect the NCBE's analysis of the most commonly performed and least commonly performed lawyering tasks.¹⁶

As to content, the number of subjects tested will decrease from twelve to nine.¹⁷ Specifically, the following three subjects will no longer be tested: Conflict of Laws, Secured Transactions, and Trusts & Estates.¹⁸ The remaining nine subjects are as follows: Business Associations (including Agency), Civil Procedure, Constitutional Law (including proceedings before administrative agencies), Contracts (including Article 2 of the Uniform Commercial Code), Criminal Law, Evidence, Property, Torts, and Family Law (starting in July 2028).¹⁹ Jurisdictions may, however, continue to use or develop a jurisdiction-specific component that tests on all of these subjects or additional subjects.

As to format, the exam will be divided into three sessions. Each session will consist of two "integrated question sets," a series of multiple-choice questions, and a performance test.²⁰ A jurisdiction-specific component may include additional question formats. Each question type of the NextGen Bar Exam is described more fully below.

The "integrated question sets," which many consider to be one of the most innovative aspects of the NextGen Bar Exam, combine knowledge and skills. These question sets will include a series of questions and prompts

¹⁶ CYNTHIA L. MARTIN ET AL., NCBE, FINAL REPORT OF THE TESTING TASK FORCE 2 (2021).

¹⁷ See *NCBE Exams*, NCBE, <https://www.ncbex.org/exams> (last visited Feb. 17, 2024); Press Release, NCBE, *supra* note 1.

¹⁸ *NCBE Exams*, *supra* note 17; Press Release, NCBE, *supra* note 1.

¹⁹ Press Release, NCBE, *supra* note 1.

²⁰ For a sample of typical NGBE questions, see *NextGen Bar Exam Sample Questions*, NCBE, <https://nextgenbarexam.ncbex.org/nextgen-sample-questions/> [<https://perma.cc/FZA6-EQFV>] (last visited Feb. 17, 2024).

that relate to a common set of facts and may include legal sources, such as excerpts of statutes or judicial opinions, and additional documents, such as legal practice-based documents and contract clauses.²¹ The questions and prompts will be a mix of multiple-choice questions and short-answer questions.²² The integrated question sets will require application of existing knowledge, review of materials, and preparation of a range of legal documents.²³ For example, the integrated question set may begin with an excerpt from an initial client interview, supply a copy of a lease agreement, and present an excerpt of a statute. The examinees will be placed in the role of a lawyer who is representing a particular client or performing a certain role. Using the provided materials, examinees will complete lawyering tasks. Examinees may find that some facts have been intentionally omitted such that the examinees must identify gaps. The facts may also evolve or change over the sequence of prompts and questions with new facts being added or facts being changed.

The multiple-choice questions may appear as stand-alone questions or be components of integrated question sets.²⁴ The multiple-choice questions will have 4 to 6 potential responses with some questions asking that more than one correct answer be designated by the examinee.²⁵ The NCBE has stated as follows: “Initially, many of these [multiple choice] questions will closely resemble Multistate Bar Examination (MBE) questions; this will ensure stability between scores for the current and NextGen bar exams. In future administrations, the variety of multiple-choice question types will increase.”²⁶

The performance test is described by NCBE as a “longer writing task.”²⁷ These questions will ask the examinees to perform fundamental

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

lawyering skills in light of acquired knowledge and review of provided materials.²⁸ The NCBE then references the existing MPTs.²⁹

As to time, the exam will be administered over a period of one and a half days.³⁰ The three sessions will each be three hours long.³¹ Day One will be six hours of examination time, and Day Two will be three hours of examination time.³² Accordingly, the total examination time will decrease from twelve hours to nine hours.³³ Jurisdictions may choose to offer a state-specific component on Day Two or offer a state-specific component virtually. The jurisdiction-specific portion, as is currently the situation, would be written and assessed by the jurisdiction's board of bar examiners.

A 42-page preliminary content scope outline was published by NCBE in 2023.³⁴ The outline identified four groups of foundational skills.³⁵ Each of the groups is listed below with a brief recitation of the focus of each group. As demonstrated below, the range of lawyering skills has been broadened from prior and current iterations of the bar exam.

Group A: Issue Spotting and Analysis, Investigation and Evaluation³⁶

Purpose: Applying fundamental legal principles and using legal reasoning to analyze fact patterns³⁷

Group B: Client Counseling and Advising, Negotiation and Dispute Resolution, Client Relationship and Management³⁸

Purpose: Using lawyering skills that reflect relevant rules and recognize a client's objectives, interests, and constraints³⁹

²⁸ *Id.*

²⁹ *Id.*

³⁰ Press Release, NCBE, *supra* note 1.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ NCBE, BAR EXAM CONTENT SCOPE (July 2023).

³⁵ *Id.* at 1–4.

³⁶ *Id.* at 1.

³⁷ *Id.*

³⁸ *Id.* at 2.

³⁹ *Id.*

Group C: Legal Research⁴⁰

Purpose: Identify and implement legal research strategies to spot issues, work with provided resources, develop and refine a theory of the case, and reach closure on research questions⁴¹

Group D: Legal Writing and Drafting⁴²

Purpose: Complete a writing or drafting task that reflects relevant rules and is consistent with a client's objectives, interests, and constraints⁴³

Each group lists particular tasks. For Group D, the following five tasks are identified:

- “Draft or edit correspondence to a client explaining the legal implications of a course of action, updating the client on the status of the client’s matter, and/or providing advice on the next steps to be taken in the matter.”⁴⁴
- “Given draft sections of a complaint or an answer to a complaint in a matter, identify language that should be changed, and make suggestions for how the language should change, consistent with the facts, the relevant legal rules and standards, and the client’s objectives, interests, and constraints.”⁴⁵
- “Given draft sections of affidavits that must be submitted to a court or other tribunal in a matter, identify the best affiant and best language to support each element to be proved, consistent with the facts, the relevant legal rules

⁴⁰ *Id.* at 3.

⁴¹ *Id.*

⁴² *Id.* at 4.

⁴³ *Id.*

⁴⁴ *Id.* at 4.

⁴⁵ *Id.*

and standards, and the client's objectives, interests, and constraints."⁴⁶

- "Given draft provisions of a contract, identify language that should be changed, and make suggestions on how that language should change, consistent with the facts, the relevant legal rules and standards, and the client's objectives, interests, and constraints."⁴⁷
- "Given a collection of legal sources, draft specified section(s) of a document, demonstrating skill at formulating an original legal analysis. This task may include:
 - an objective memo;
 - a persuasive brief or letter; or
 - another common document, such as a mediation brief, an opinion letter, or a draft proposal for a contract."⁴⁸

The subject matter outline identifies topics for which the examinee is expected to rely solely on recalled knowledge and understanding and topics for which the examinee may be provided legal resources. The foundational concepts and principles for contracts are five pages long with the following topics:

1. Identification of governing law⁴⁹
2. Formation of contracts⁵⁰
3. Defenses to enforceability⁵¹
4. Contract content and meaning⁵²
5. Performance⁵³
6. Breach and discharge⁵⁴

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 16.

⁵⁰ *Id.* at 16–17.

⁵¹ *Id.* at 17–18.

⁵² *Id.* at 18.

⁵³ *Id.* at 18–19.

⁵⁴ *Id.* at 19.

7. Remedies⁵⁵
8. Third-party rights and obligations⁵⁶

As identified on the subject matter outline, the examinee would still be required to memorize foundational concepts and principles.⁵⁷ Although the topics may be narrower, the examinees would still be required to recall this acquired knowledge.⁵⁸ Focus solely on acquiring knowledge would not, however, be sufficient preparation for the NextGen Bar Exam.

While the NextGen Bar Exam is still in development, what is known is that the NextGen Bar Exam will focus on the application of doctrine with a focus on client-centeredness.⁵⁹ The examinees will be required to draft fewer descriptive essays and perform more client-centered lawyering tasks. This change could be a tacit acknowledgment that a litigation bias has existed in legal education.⁶⁰ Transactional skills will feature in multiple components of the exam.⁶¹ Professors in all courses will need to support preparation for the NextGen Bar Exam, which includes incorporating transactional skills, such as contract drafting and revising, into courses across the law school curriculum.⁶²

⁵⁵ *Id.* at 19–20.

⁵⁶ *Id.* at 20.

⁵⁷ *Id.* at 5.

⁵⁸ *Id.* at 16.

⁵⁹ *NextGen Bar Exam Sample Questions*, *supra* note 20.

⁶⁰ For a general discussion about litigation bias in legal education, see Adam N. Eckart, *Litigation Bias*, 101 OR. L. REV. 51 (2022); see also Deborah Burand, “Building the Case” for the Business Lawyer of Tomorrow: Putting Impact into Practice, 56 WILLAMETTE L. REV. 425 (2020); Stephanie Hunter McMahon, *What Law Schools Must Change to Train Transactional Lawyers*, 43 PACE L. REV. 106 (2022).

⁶¹ For an exploration of the key skills for transactional lawyers, see Task Force on Defining Key Competencies for Business Lawyers, *Defining Key Competencies for Business Lawyers*, 72 BUS. LAW. 101 (2016).

⁶² See, e.g., O.J. Salina, *Secondary Courses Taught by Secondary Faculty: A (Personal) Call to Fully Integrate Skills Faculty and Skills Courses into the Law School Curriculum Ahead of the NextGen Bar Exam*, 107 MINN. L. REV. 2663 (2023); Melissa Bezanson Shultz, *Professor, Please Help Me Pass the Bar Exam: #NextGenBar2026*, 71 J. LEGAL EDUC. 141 (2021); see also L. Danielle Tully, *What Law Schools Should Leave Behind*, 2022 UTAH L. REV. 837 (2022) (exploring opportunities for modern legal education to change).

III. Opportunities to Incorporate NextGen Bar Assessments into a Range of Law School Courses

Professors may support learning and preparation for the NextGen Bar Exam with in-class and out-of-class assessments. As this section highlights, professors may find that they can modify or refine existing assessments to sync to the format and content of the NextGen Bar Exam. Most law schools do not need to revamp their existing curriculum entirely or offer many new courses. Instead, the existing curriculum could be adapted to better prepare students for the NextGen Bar Exam. To illustrate this point, this article focuses on courses already offered in most law schools that could be used to introduce and reinforce contract-drafting related skills. This article then presents a range of exercises, which can be assessed in a variety of ways.

The following first-year courses offer opportunities to introduce contract drafting-related skills: Contracts, Legal Writing, Property, and Torts. Upper-level subject matter doctrinal courses that could incorporate related skills include the following: Sales, Business Organizations, Employment Law, Family Law, Environmental Law, Entertainment Law, Sports Law, Wills, Trusts & Estates, Negotiations, and Alternative Dispute Resolution. The following advanced skills courses are ripe for inclusion of contract-drafting skills: Contract Drafting, Transactional Drafting, Legislative Drafting, Legal Research, Trial Advocacy, and Appellate Advocacy. Lastly, clinics, both transactional and litigation-focused, present additional opportunities.

A. Doctrinal Subject Matter 1L and Upper-Level Courses

There are a variety of ways that law professors teaching doctrinal subject matter in 1L and upper-level courses can incorporate the contract drafting knowledge and skills that will be tested on the NextGen Bar Exam into their courses. Of course, law schools may choose to respond to the NextGen Bar Exam by adding new courses to the curriculum or overhauling the content of already-offered courses by, for example, including a foundational skills module in courses that relate to contracts (such as Contracts, Sales, and Employment Law). But completely overhauling classes is not required; professors can incorporate the skills and testing methodology from the NextGen Bar Exam in much simpler ways. In fact, incorporating these skills

does not even necessarily need to be addressed in an exam or graded assignment, as can be seen from several of the examples below. The following sets forth a wide array of ways law professors can include these skills in existing classes:

- *Include a drafting assignment in addition to a final exam.* Professors can require students to draft a contract or portion of a contract as part of their course assessment, such as a sales contract in a Sales course or an easement in an environmental law course.
- *Include a foundational skills component within an essay exam question.* For example, in an essay question about warranties or disclaimers of warranties, professors can ask students to draft or revise a disclaimer for inclusion in a sales contract.
- *For any hypothetical fact pattern, create questions that place law students in a particular role, such as a lawyer representing a specific party.* One key difference between traditional law school exams and NextGen Bar Exam questions is that the bar exam focuses on placing students in the role of a particular party while traditional law school exams seek objective analysis from students, generally from the perspective of both parties.
- *For any exam question or exercise, instead of a fact pattern, provide the actual contract clause and other practical documents.* Another key difference is that the NextGen Bar Exam will provide students with practice-based documents and not rely solely on hypothetical descriptive fact patterns. For example, law professors can provide students with a lease agreement and witness interview notes and ask them to analyze a client's legal problem.
- *For any exam question or exercise, create a fact pattern that is dynamic and changes over a series of questions.* The NextGen Bar Exam's integrated question sets will provide students with additional facts over a series of related questions. In the example provided above, professors can provide students with the lease only for some questions and then introduce the witness interview notes for additional questions.
- *For any exam question or exercise, ask students to evaluate the facts provided to them.* Professors can ask students to identify the contract language

that is more helpful (or harmful) to their client's position or to identify missing facts that would help them make stronger arguments for their client, i.e., additional questions to ask the client or witnesses.

- *Create a classroom exercise or homework assignment where students are asked to draft or revise a contract clause.* For example, ask students to draft or revise a covenant not to compete to be included in an executive employment agreement or to revise a sample clause in class.
- *When discussing a case in class that relates to a breach of contract, ask students to draft or revise a sample clause.* For example, if the case includes the contract language, ask students to revise the clause at issue. Alternatively, if the case does not include the specific contract language, ask students to draft it in a way that could have avoided the legal dispute.
- *When discussing a case that relates to a breach of contract during class, ask students questions about how the contract could have been drafted to avoid the dispute.*

B. Skills Courses and Clinics

Law professors teaching skills and clinical courses can also incorporate the contract drafting knowledge and skills that will be tested on the NextGen Bar Exam into their courses in a number of ways. Again, law schools may choose to offer new courses or clinics directly relating to these skills and knowledge areas to their curriculum. Alternatively, a contract drafting component can be included in every 1L or upper-level legal writing course. Doing so would better ensure that every law student would be introduced to these foundational skills, but there are a wide variety of ways these skills can be incorporated into the courses already offered. Several illustrations are set forth below:

- *Create writing assignments that relate to a contract-based issue and ask students to draft or revise the relevant contract clause.* For example, ask students to draft a memo or trial brief analyzing the enforceability of a covenant not to compete and also require students to draft or revise a sample clause.

- *Incorporate timed drafting or revising assignments and exercises.* To prepare students for drafting or revising contract language in the context of the timed NextGen Bar Exam, ask students to draft or revise a contract clause in a set time period.
- *For drafting assignments, place students in the role of a lawyer representing one party to the transaction.* For example, in a contract drafting course, divide the class in half and assign each group to represent a different party in the transaction.
- *Incorporate ethical considerations into drafting assignments and class discussion.* The NextGen Bar Exam will test students on professional responsibility and attorney ethics. Professors can ask students to evaluate the ethical ramifications of certain drafting choices.
- *Include assignments and exercises focused on revising and editing and not only the drafting of contract language.* For example, professors can ask students to revise a model contract, or a contract drafted by the other party's counsel. This would incorporate the skill of contract revision and place the students in the role of lawyer for a particular client.
- *Include contract interpretation skills in any drafting course.* The NextGen Bar Exam questions may require students to anticipate how certain contract language may be interpreted by a court or to suggest revisions to contract language based on how it may be interpreted by a court, so they should be introduced to the basic principles of contract interpretation.
- *Ask students to draft a letter to their client explaining the contract language that they drafted on their behalf.* A key difference between the NextGen Bar Exam and past bar exams is the new focus on client representation.
- *Ask students to draft a letter to their client recommending revisions to a contract term drafted by the other contracting party.*
- *Include a component on contract drafting in clinical courses.* For litigation-based clinics, professors can focus on contracts such as settlement agreements or expert retention contracts.
- *Include a component on contract interpretation in clinical courses.* Since many types of litigation revolve around contract language, students would

benefit from understanding the basic principles of contract interpretation applied by courts.

- *Create an assignment or exercise where students must provide advice to their client involving contract language.* Such an assignment would incorporate a variety of foundational skills relating to contract drafting, contract interpretation, client communication, and professional responsibility.

C. **Methods of Assessment**

Assessment is a critical component of the learning process. These assignments and exercises can be assessed by the respective professors in a number of ways. Many can be graded as part of an exam or as a separate graded assignment. But many can also be completed as an in-class exercise or ungraded homework assignment. In those circumstances, the professor has various options available to provide students with an understanding of how well they performed. Professors can provide individualized feedback to each student, or they can instead provide a model answer to students so they may assess their own performance. The professor should consider also including an assessment rubric for students. Alternatively, the professor may review a model answer during class or have a teaching assistant hold a review session where the model answer would be reviewed. Lastly, the professor can simply discuss the assignment and model answer during an in-class discussion.

IV. **Analysis of Simulated NextGen Contract Drafting Assessment**

This section aims to support and inspire professors to design NextGen-type assessments that focus on getting their students NextGen-ready in the area of contract drafting skills. Below is a hypothetical that can be used for a wide array of questions, as illustrated:

Your client Elaine Benes has contacted you concerning an issue she is having with her HOA. She owns a townhouse in New Surprise, Calisota and would like to install solar panels on her roof. When she ran into the HOA Vice President at the community pool a few weeks ago, she mentioned her desire to install solar panels. He told her that was a great idea, and he wished more homeowners cared about the environment like Elaine. She then

immediately contacted a solar energy company, and last week she provided them with a \$1000 non-refundable deposit to install solar panels on her roof. However, yesterday she received a letter from the HOA Board of Directors advising her that solar panels are not permitted in their community and threatening to evict her if she proceeds with installation. Her HOA agreement provides as follows: “Homeowners are not permitted to install any structure on their property that would negatively affect the look of the property’s exterior.” Elaine told you that her next-door neighbors will likely be able to see the solar panels from their townhouses, but that they would not be visible from street level. You have already determined that there are no state or city statutes regarding the installation of solar panels.

The hypothetical above could lead to the development of a number of discussions and assessments that could reference the format and content of the NextGen Bar Exam. Those discussions and assessments, which are presented below, include issue spotting, researching, counseling, drafting, revising, and contract interpretation.

As to issue spotting, the professor may begin with a multiple-choice question.

Example Question: Identify the issue(s). Select all that apply.

- A. Nuisance
- B. Ambiguity
- C. Formation
- D. Parol Evidence

Answer: The correct answers would be B. Ambiguity and D. Parol Evidence. Although this hypothetical draws from property and contracts, the issues raised are contract issues, specifically contract interpretation. Nonetheless, presenting a hypothetical combining multiple areas of the law reflects the NextGen Bar Exam’s attempt to draw across law school courses to better replicate the practice of law.

A short-answer style question could ask the students to describe the ambiguity in the agreement.

Example Question: Focusing only on the supplied portion of the agreement, identify the potential ambiguities. For purposes of this question, do not consider any extrinsic evidence.

Answer: The agreement includes three potential ambiguities. First, the agreement states that “homeowners are not permitted to install any structure.” An argument could be raised that a homeowner could hire a company, like the solar panel company, or have another designee install. Second, the agreement states homeowners are “not permitted to install any structure on their property.” The facts state that Elaine wishes to affix the solar panels to her roof rather than install them as freestanding structures in her yard. The provision may have anticipated the construction of a garage, pool house, or a tree house. An extension or addition to an existing structure may not be covered by this agreement. Third, the agreement states that the structure may not “negatively affect the look of the property’s exterior.” Reasonable people may differ as to whether solar panels do “negatively affect the look” of the exterior. An argument could be made that the perspective for which to evaluate this component of the agreement is not clear. The facts state that the solar panels would not be visible from street level. The solar panels would, however, probably be seen from the townhouses of the next-door neighbor. Given that many HOA rules are to preserve the uniform appearance of the exterior, a partially visible view of the solar panels may not “negatively affect the look.”

Another short answer style question might ask students to identify additional facts needed to analyze the legal issues. Students may identify additional facts by seeking additional documents that need to be reviewed, such as the full HOA agreement, with special attention given to the procedure to petition for a variance and the process to amend the agreement. The students may ask to see the agreement with the solar panel company to determine whether Elaine may be able to request a return of the deposit in this situation. Other facts relate to the client’s interests, such as questions about Elaine’s financial need to better understand whether Elaine’s goals are to obtain the \$1000 deposit, install the solar panels on this property no matter

the cost or move so that she can install solar panels on a newly acquired property. Students may also consider whether any other homeowner in the community has installed solar panels, the timing of elections for the HOA Board, the number of properties in the community that are on the market, and the overall status of the real estate market.

Another question format would be the performance-style task. The professor may ask students to revise the agreement to avoid the identified ambiguities. To maintain the client-centered focus of the NextGen Bar Exam, the professor may ask the students to compose an email to Elaine. That email must include an explanation of the legal issues and outline all options that Elaine may consider. Those options would include having the lawyer respond to the HOA to describe the ambiguity and the relevance of the parol evidence. Another option may be for the lawyer to write a letter to the solar panel company requesting the return of the deposit in light of the HOA letter to the homeowner. Other options include having the lawyer file for an adjudication to receive a declaration about the meaning and enforceability of the provision. Students may recognize additional options like amending the agreement or waiting until the HOA Board of Directors changes, with a new HOA Board potentially interpreting the provision differently to allow solar panels.

This hypothetical could also change over the series of prompts and questions. For example, the professor may supply a newly enacted statute that promotes solar panels and ask students how their analysis may change in light of the new statute. Students would need to analyze the statute to determine whether the statute could supersede the HOA agreement. Likewise, the professor may add facts about Elaine's financial needs or desire to move.

As the NextGen Bar Exam will incorporate professional rules, the professor may also ask students to consider the ethical considerations of advising Elaine to proceed with the solar panel installation. For example, Elaine may write an email to the lawyer stating, "I hear that you are saying the provision is ambiguous and probably not enforceable. I'm going to just

go ahead with the installation.” The student could respond by sharing the legal and non-legal implications of such a decision.

The hypothetical above, along with the prompts and questions, gives an idea of how professors could adapt existing materials to prepare students for the NextGen Bar Exam. While some courses may require substantial redesign, many courses may be poised to be NextGen ready with some intentional adaptations of instructional strategies and refinements of assessments.

V. Conclusion

The NextGen Bar Exam recognizes that the licensing exam should focus on evaluating the knowledge, skills, and values that a lawyer needs to effectively and ethically represent clients. The foundational skills form the core competencies that every new lawyer should have to be able to provide client-centered legal representation. As this article shows, contract drafting is to be heavily featured in the NextGen Bar Exam, which recognizes the number of practicing lawyers who engage in transactional work. Transactional skills are a critical aspect of lawyering, and the NextGen Bar Exam is giving transactional skills the recognition they deserve. Now it’s time for law schools and law professors to do the same.
