

THE TESTING COLUMN

HOW TO HELP REPEATERS IMPROVE THEIR MBE SCORES

by Susan M. Case, Ph.D.

In an earlier column, I wrote about how providing raw subscores to candidates might actually provide misleading information as they prepare to retake the bar. (See the August 2005 Testing Column, which can be found at www.ncbex.org under "THE BAR EXAMINER Article Archive.") While we have historically provided MBE total raw scores and raw scores for each separate subject (Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Real Property, and Torts) to the jurisdictions, we discourage jurisdictions from providing them to examinees, especially examinees who are trying to improve their scores on the next examination. Because these raw scores are simple counts of the questions answered correctly, they are not scaled to take into account the difficulty of the questions on the particular form of the exam that was taken. A low raw score in a subject might in fact be the result of adequate or even good performance if the questions in that subject were more difficult than those in other subjects. A second reason for not providing raw subscores is that because there are relatively few questions in each subject area, raw scores in individual subjects are not very reliable. If examinees were to take a second test with similar questions, the examinee scores would likely fluctuate by five or so points (out of 31 or



33 points) just because of a different selection of questions. Finally, even if an examinee did in fact perform better in one area than another, that examinee might be better advised to devote additional study to the MBE content area of his or her intended practice, since improvement in any area will increase the total score on the next examination.

We strongly recommend providing to examinees only the MBE total scaled score, which is not affected by the difficulty of the questions on the particular exam form. While a total scaled score does not provide a breakdown of scores by topic, it does provide a good indication of how much the examinee needs to study in order to pass the next time.

Recently, our research and testing departments conducted a series of studies for the New York Board of Law Examiners focused on the performance of bar examinees educated at U.S. law schools. Reports of these studies are available on the New York Board's website (<http://www.nybarexam.org/ncberep.htm>) and those reports are summarized in another article in this magazine (see p. 6). The data set included both MBE and written scores as well as overall pass/fail results. The New York results showed that repeaters gained about eight points on average (on the MBE scale), and that approximately half of those who failed the first time passed when they retook

MBE-AP SAMPLE QUESTION WITH ANNOTATIONS

An owner of vacant land contracted to sell it to a buyer for \$100,000, with an earnest money deposit of \$1,000 that was paid to the seller at the time the contract was signed. The contract further provided that the seller could retain the earnest money in the event of default by the buyer as the seller's sole remedy. The contract, drafted by the buyer, said nothing concerning the buyer's remedies in the event of default by the seller. The closing was to be 30 days from the date the contract was signed. The contract expressly stated that time was of the essence.

The next day, a man approached the seller concerning the land. The seller told him of the contract with the buyer. The man told the seller to contact him if, for any reason, the buyer did not purchase the land. The seller related this conversation to the buyer, who reiterated that she wanted the land.

Although title to the land was marketable, the buyer did not appear at the closing and defaulted under the contract for personal reasons. The seller then sold the land to the man for \$100,000.

The buyer now wants the seller to return the \$1,000 earnest money to her. The seller refuses, accurately telling her that he incurred damages exceeding that amount in preparing for the sale to her.

Is the seller entitled to retain the \$1,000?

(A) No, because a seller must seek a judicial determination to retain earnest money.

Incorrect. Forfeiture of earnest money, like a liquidated damages clause, is a contractual agreement. It allows the earnest money to be retained without first seeking a court order. In like manner, a requirement that the earnest money be returned to the buyer does not require a court order. The seller in this case was entitled to keep the earnest money.

(B) No, because the property was promptly resold to a known potential buyer.

Incorrect. This was a contractual agreement which would allow the seller to retain the earnest money whether the property was resold or not. In some cases, where a seller has not been damaged by the buyer's breach, or has in fact benefited from the buyer's breach because of an immediate resale for a higher price, courts will not allow the seller to keep the contractual earnest money because it would amount to a "windfall" to the seller. In this case, while the seller resold the property for the same price, he incurred actual expenses as a result of the buyer's breach that exceeded the amount of the earnest money. Further, the amount of the earnest money in this case is only 1% of the sale price. Accordingly, this is not a "windfall" to the seller, and the parties' contractual agreement will stand.

(C) Yes, because the buyer drafted the contract.

Incorrect. It is true that a contract often will be construed against the drafter, who in this situation is the buyer. However, the issue in this case is not one of construction. The clause benefits the seller, and there is no disagreement regarding its interpretation. The only question is whether the clause should be enforced. Because the facts do not indicate a "windfall" to the seller, the forfeiture is enforceable as expressly provided in the parties' contract. The drafter is not relevant to the outcome of the dispute on these facts.

(D) Yes, because the contract expressly provided for such retention.


Correct. Some states will allow the seller to retain the earnest money even without an express clause. With an express clause, the concern often is whether the retention is a reasonable estimate of the damages. The amount here is 1% of the sale price. It is a reasonable estimate especially when it is noted that the seller's actual damages exceeded the amount retained; i.e., it does not amount to a "windfall" to the seller.

the exam. These results are consistent with our analysis of MBE-only results, available on a national sample of examinees. Those who scored less than a scaled score of 140 on a July MBE and then retook the MBE in February on average raised their MBE total scaled scores by almost 8 points. Examinees with July scores above 126 but still under 140 had at least a 50/50 chance of scoring above 135 on the February exam. While the average repeater gained almost 8 points, some gained more than 8 points and, on the flip side, approximately 22 percent of the repeaters received lower scores than they had received originally.

In December 2006, we offered a new product that we believe is very useful to those who are preparing to take the MBE. The MBE-AP (“Annotated Preview”) provides 100 MBE questions along with annotations regarding why the correct answer is correct and why each distractor is incorrect. A sample question is provided in the sidebar on page 43.

Examinees may purchase subscriptions for \$26 each. Subscriptions offer unlimited electronic access to the MBE-AP from the date of subscription to the date of the next MBE administration. Examinees can take the 100-item MBE online and receive feedback on correct and incorrect answers. Examinees also receive estimates of their actual MBE performance based on their MBE-AP performance. The questions that appear on the MBE-AP provide the most accurate representation of a half-length MBE, in terms of both content and format, available today from any source. In addition, the annotations were all written by members of the MBE drafting committees, thus providing an accurate representation of the drafting “thought process.”

In summary, for bar examiners, we recommend the following regarding those examinees who fail the bar exam:

1. Provide them with their MBE total scaled scores.
2. Do not provide raw scores.
3. Tell those who plan to retake the examination that repeaters, on average, gain about 8 points on the subsequent attempt, but some gain more points and some actually score lower than before.
4. For those who are planning to retake the examination, recommend that they purchase the MBE-AP and take it repeatedly up until the exam date to obtain the rationales for why the options they select are either correct or incorrect. 

SUSAN M. CASE, PH.D., is the Director of Testing for the National Conference of Bar Examiners.