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NOTE

TESTING BASIC FEDERAL INCOME TAX ON THE BAR EXAM TO
PREPARE ATTORNEYS TO PRACTICE LAW COMPETENTLY

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NOTE

TESTING BASIC FEDERAL INCOME TAX ON THE BAR EXAM TO PREPARE ATTORNEYS TO PRACTICE LAW COMPETENTLY

*Lou Kettering**

To practice law in every state in the United States of America besides Wisconsin, which has a diploma privilege,¹ states generally require new attorneys to pass an exam to demonstrate that they have the requisite knowledge of law to practice competently. However, the vast majority of state bar exams do not test on tax law, and the only states that currently test tax are Mississippi and Wisconsin.² This Note argues that if bar exams genuinely aim to test whether lawyers are prepared to practice competently, then they should ensure future lawyers have basic knowledge of federal income tax because it is an area of law that impacts all Americans and all areas of U.S. law in some way. Competent attorneys must be familiar with the tax consequences of their legal advice.

This Note will first briefly discuss the history of the bar exam in the United States and how it got to where it is today. Then, this Note will weigh the justifications of having such an exam against its criticisms and discuss if these justifications are being fulfilled by having an entry exam. Finally, this Note will argue that if an exam is going to be used to ensure that new lawyers are minimally competent to practice law, some fundamental tax-related

* JD, May 2024, University of Pittsburgh School of Law. Thank you to the student and faculty editors of the *Pittsburgh Tax Review* for their comments and edits on this Note.

¹ WIS. SUP. CT. R. 40.03 (“An applicant who has been awarded a first professional degree in law from a law school in this state that is fully, not provisionally, approved by the American bar association shall satisfy the legal competence requirement . . .”).

² See *The Wisconsin Bar Exam*, THEMIS BAR REV., <https://www.themisbar.com/pass-the-bar-exam/wisconsin-bar-exam> (last visited Nov. 10, 2024); *Mississippi Bar Exam Details*, BARBRI, <https://www.barbri.com/resources/states/mississippi-bar-exam> (last visited Nov. 10, 2024).

issues should be tested to ensure that new attorneys can competently and confidently practice law. This final part of the Note will also provide ideas for incorporating some basic tax concepts into the current bar exam without requiring a complete overhaul.

I. BRIEF HISTORY OF THE BAR EXAM IN THE UNITED STATES

In early colonial America, local courts determined bar admission for attorneys by deciding that an applicant would be admitted, usually after an apprenticeship.³ Scholars credit Delaware for having the first modern-day bar exam in the United States, as early as the eighteenth century.⁴ By the early twentieth century, most states had central boards of bar examiners that conducted written examinations as part of the bar admission process to become a licensed attorney.⁵ To create uniformity in these exams and ensure that competent attorneys were being admitted to state bars, the American Bar Association (ABA) created the National Conference of Bar Examiners (NCBE).⁶ In 1958, the NCBE and ABA created a Code of Recommended Standards for Bar Examiners to test applicants' knowledge of fundamental legal principles and to apply those principles to presented facts.⁷ In the 1970s, the NCBE developed a six-hour, multiple-choice exam that could be given in all jurisdictions and be graded by a machine, known as the Multistate Bar Exam (MBE).⁸

Over the next two decades, the NCBE introduced the Multistate Performance Test (MPT) and the Multistate Essay Exam (MEE) to add a writing component to the bar exam that could be given across multiple jurisdictions.⁹ These written portions of the test are now fundamental

³ Daniel Hansen, *Do We Need the Bar Examination—A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives?*, 45 CASE W. RESV. L. REV. 1193, 1194 (1995).

⁴ See *A Brief History of the Bar Exam*, UWORLD, <https://legal.uworld.com/bar-exam/history-and-changes/> (last visited Nov. 10, 2024).

⁵ Margo Melli, *Passing the Bar: A Brief History of the Bar Exam*, 21 WIS. L.F. 3, 4 (1990).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *A Brief History of the Bar Exam*, *supra* note 4.

portions of the modern Uniform Bar Exam (UBE) exam.¹⁰ The MPT usually involves a simulated memo assignment in which the examinee is given all the facts of a hypothetical case and has to apply the relevant law from a “Library” containing all the relevant law to write on the issue.¹¹ On the other hand, the MEE does not provide the relevant law to the examinee, and the examinee must answer the questions in essay form based on their knowledge of the subject being tested.¹²

In 2011, the NCBE combined the MBE, MPT, and MEE to create the UBE, which, as of November 2024, has been adopted by thirty-nine states and the District of Columbia.¹³ Some jurisdictions have partially adopted the UBE by combining the MBE for the multiple-choice portion of the exam with a state-specific essay portion.¹⁴ An example of this is California, which uses the MBE and has a state-specific essay day that tests California-specific laws like the California Code of Civil Procedure, the California Evidence Code, and the California Rules of Professional Conduct.¹⁵ Another example is Florida, which uses the MBE alongside a separate multiple-choice and essay portion that tests Florida-specific laws like Florida constitutional law, the Florida Rules of Civil Procedure, the Florida Rules of Criminal Procedure, and the Florida Rules of Judicial Administration.¹⁶ Still, these two deviations

¹⁰ *Id.*

¹¹ *Preparing for the MPT*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/mpt/preparing-mpt> (last visited Nov. 10, 2024).

¹² *About the MEE*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/mee/about-mee> (last visited Nov. 10, 2024).

¹³ *About the UBE*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/mee/about-ube> (last visited Nov. 19, 2024).

¹⁴ Melli, *supra* note 5, at 4–5; *Adoption of the Uniform Bar Examination with NCBE Tests Administered by Non-UBE Jurisdictions*, NAT’L CONF. OF BAR EXAM’RS (Oct. 10, 2023), https://www.ncbex.org/sites/default/files/2023-11/UBE-Adoption-with-Other-NCBE-Tests_111323.pdf.

¹⁵ *Scope of the California Bar Examination*, STATE BAR OF CAL., <https://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/California-Bar-Examination-Scope> (last visited Nov. 10, 2024).

¹⁶ *Exam Information, Test Specifications, Study Guide, and Virtual Tour*, FLA. BD. OF BAR EXAM’RS, <https://www.floridabarexam.org/web/website.nsf/52286AE9AD5D845185257C07005C3FE1/125BA5AFD5EB7D2385257C0B0067E748> (last visited Nov. 10, 2024).

from the basic UBE format do not include any tax subject on the state-specific writing portion.

The UBE tests contracts, constitutional law, criminal law and procedure, evidence, real property, torts, civil procedure, business associations, conflict of laws, family law, U.C.C. Article 9 (secured transactions), and trusts and estates.¹⁷ The subjects of business associations, conflicts of laws, U.C.C. Article 9 (secured transactions), and trusts and estates are only tested in the MEE portion of the UBE.¹⁸ This means that these subjects are only tested in essay form and do not appear on the MBE multiple-choice portion of the UBE. Notably, the UBE does not test tax in any way.

II. REASONING BEHIND HAVING A BAR EXAM REQUIREMENT AND CRITICISMS OF THE EXAM

Lawyers must be competent to ethically engage in the practice of law. According to Rule 1.1 of the Model Rules of Professional Conduct, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹⁹ Additionally, the Model Rules note:

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.²⁰

Competency is perhaps the most important skill for an attorney, and the legal industry depends upon professionals understanding the legal issues a

¹⁷ NAT’L CONF. OF BAR EXAM’RS, UNDERSTANDING THE UNIFORM BAR EXAMINATION 5 (2022), https://www.ncbex.org/sites/default/files/2023-01/Understanding_the_UBE_2022.pdf.

¹⁸ *Id.*

¹⁹ MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS’N 1983).

²⁰ *Id.* r. 1.1 cmt. 1.

client faces and counseling them adequately. To meet this competency requirement, new attorneys generally have to obtain a J.D. degree from an accredited law school and achieve a passing score on a bar exam.²¹ Thus, the general purpose of the bar exam is to ensure that new lawyers are minimally competent to practice law.²² That said, scholars have questioned this purpose, and alternatives have been proposed to replace the bar exam.²³

In 1992, the ABA's Task Force on Law Schools and the Profession: Narrowing the Gap created a report titled *Statement of Fundamental Lawyering Skills and Professional Values*.²⁴ This report became known as the "MacCrate Report," which comes from the name of the chair of the task force, Robert MacCrate.²⁵ The stated purpose of this report was to narrow the gap between the education offered at ABA-approved law schools and the expectations of the bar association.²⁶

The report identified ten fundamental lawyering skills and four fundamental values of the legal profession. The ten fundamental lawyering skills identified in the report were problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute-resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas.²⁷ Additionally, the report found that the fundamental values of the profession are provision of competent representation; striving

²¹ *Bar Exams*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/bar-admissions/bar-exams/ (last visited Nov. 11, 2024).

²² See Andrea Curcio et al., *Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 447 (2002).

²³ *Id.* at 446.

²⁴ Thomas M. Steele, *The MacCrate Report: Its Impact on Education in Law Firm Management*, 23 PACE L. REV. 613, 617 (2003).

²⁵ *Id.* at 616 (explaining the task force).

²⁶ Scott E. Thompson, *Developing a Comprehensive Approach to Teaching Lawyering Skills: A Response to the MacCrate Report Fifteen Years Later*, 3 LIBERTY U. L. REV. 47, 47 (2009).

²⁷ *Id.*

to promote justice, fairness, and morality; striving to improve the profession; and professional self-development.²⁸

Especially relevant to the bar exam is the fundamental value of competent representation. The report concluded that the skills above are necessary for an attorney to represent a client competently.²⁹ After the task force published its report, law schools and scholars began to rethink how to prepare new attorneys for the practice of law.³⁰ Additionally, scholars began to question the purpose of a bar exam that only covers a few of the skills that are necessary for an attorney to represent a client competently.³¹

In 2002, largely in response to the MacCrate Report, the Society of American Law Teachers issued its “Statement on the Bar Exam.”³² This statement criticized the effectiveness of the exam, questioned its purpose, and asserted that “[b]ar examinations . . . fail to adequately measure professional competence to practice law, negatively impact law school curricular development and the law school admission process, and are a significant barrier to achieving a more diverse bench and bar.”³³ The statement also criticized the exam for not screening for several skills identified in the MacCrate Report, including the ability to perform legal research, conduct factual investigations, communication, counseling, and negotiation.³⁴ Additionally, the statement admonished that the exam overemphasizes the importance of memorizing legal doctrine, fails to recognize that most practitioners are specialists rather than generalists, and is not geared toward fostering an “in-depth understanding of important legal concepts.”³⁵ On the law school side, the statement denounced the exam for encouraging students to take classes that are tested on the exam rather than participate in clinics

²⁸ Graham Lily, *Skills, Values, and Education: The MacCrate Report Finds a Home in Wisconsin*, 80 MARQ. L. REV. 753, 755 n.10 (1997).

²⁹ See Thompson, *supra* note 26.

³⁰ See Curcio et al., *supra* note 22, at 447–49.

³¹ See *id.* at 447.

³² See *id.*

³³ *Id.* at 446.

³⁴ *Id.* at 447.

³⁵ *Id.* at 448.

that help students hone many of the skills that attorneys use in actual practice.³⁶

This issue is present in the tax realm, with most law school students opting out of taking any tax classes while in law school because it is not tested on the UBE. This is especially unfortunate because of the vast benefits law students get from taking an introductory tax course in law school. Not only does every activity of the law involve tax impacts for the client, but a course in federal income tax is invaluable to teaching students how to read and think like lawyers.³⁷ To succeed in this course, students have to read the intricate and complicated language of the Internal Revenue Code closely, which is vital for lawyers in deciphering statutory language as a whole.³⁸ Federal tax law Professor Reginald Mombrum also discusses how a course in tax law teaches lawyers to have a helpful amount of “fear” when practicing as an attorney.³⁹ Tax courses teach students to respect the text of the law, which requires a careful reading of the dense and challenging text while, at the same time, teaching the importance of careful reading, an invaluable skill in effective legal analysis. A federal income tax course is just as valuable as any required first-year course, and law students should be encouraged to take tax courses to be well-rounded attorneys. Refusing to take a tax course in law school because the subject is not tested on the UBE is a missed opportunity to improve crucial legal skills and obtain knowledge that will impact how these future lawyers will counsel their clients. Having this subject on the UBE would encourage students to take an extremely beneficial basic federal income tax course.

The Society of American Law Teachers’ statement also expressed concern over the overreliance by law schools on the Law School Admission Test (LSAT) in admissions because it is correlated with higher bar exam passage rates, rather than considering other factors when admitting

³⁶ *Id.* at 449.

³⁷ Reginald Mombrun, *The Relevance of Federal Income Tax Courses in the Law School Curriculum and in Law Practice: Now More than Ever*, 59 TAX LAW. 1079, 1100 (2006).

³⁸ *See id.*

³⁹ *See id.* at 1100–01.

students.⁴⁰ The statement discussed how the exam damages diversity in state bars because it delays the entry of people of color into the profession.⁴¹ Lastly, the statement offered alternatives to the bar exam that would help to fix these problems with the exam.⁴² These alternatives include the diploma privilege, which is used in Wisconsin and grants a law license to all graduates of the state's ABA-accredited law schools without having to pass an exam.⁴³ The other proposed alternatives include a practical skills teaching term that covers the assessment of more skills; a public service alternative to the bar exam, which gives applicants the option to work a specified number of hours with a court system and completion of several assignments; and computer-based training alternatives.⁴⁴

This Note does not call for the abolition of the bar exam. In defense of the bar exam, it is important to note that it has some positive qualities for the legal profession. Although the Society of American Law Teachers' statement criticized the current bar exam structure and provided alternatives to completely replace the exam, the current exam does accomplish the task of ensuring that lawyers meet the requirements for some of the skills identified in the MacCrate Report. Importantly, the MacCrate Report notes that it "should not be used as a source for bar examinations," which would lead to a complete change in the bar exam as we know it.⁴⁵ Rather, the report was meant to enumerate the skills and values a lawyer should be familiar with before taking on a client, not create a list of subjects that every attorney must be versed in before being admitted to the bar.⁴⁶ With this in mind, it seems more important that law schools bear the burden and equip their students with the tools and resources to develop and refine the MacCrate skills and values after they enter the legal profession. Even so, the bar exam does test a new attorney's ability to engage in a certain level of legal analysis and reasoning.

⁴⁰ Curcio et al., *supra* note 22, at 449.

⁴¹ *Id.* at 450.

⁴² *Id.* at 451–52.

⁴³ *Id.* at 451.

⁴⁴ *Id.* at 451–52.

⁴⁵ AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 132 (1992).

⁴⁶ *Id.* at 133.

In both the multiple-choice and essay portions of the exam, test-takers must apply their knowledge of the law to given facts and provide a sound conclusion. Additionally, a test that can be given across many jurisdictions is a practical way to ensure that new lawyers are at an acceptable level of competency across the United States. Even with its many limitations, a standardized bar exam does have some arguable benefits in ensuring that new attorneys are sufficiently competent to practice law ethically under the Model Rules of Professional Conduct.

That said, if the bar exam truly aims to ensure that new attorneys have a base level of competency, it would be wise to test an area of law that touches all the main subjects already tested on the exam. A new attorney's clients will be concerned about their legal issues' tax implications. Because of this, the UBE should test some of the fundamentals of federal income tax to ensure that new lawyers being admitted to the bar are competent to provide this advice to their clients.

Even acknowledging the criticisms of the bar exam, a passing score is still needed to practice in almost all states in the United States. It seems more realistic to change the existing test rather than abolishing the exam as a requirement to practice law. Fortunately, tax is an area of law that touches almost every other area of law, so it would not be too difficult for the NCBE to add basic federal income tax questions to the exam. Because of this, the NCBE should add basic federal income tax principles to the bar exam to prepare new attorneys for the practice of law.

III. TAX ON THE BAR EXAM

For better or worse, the bar exam is likely here to stay in the United States for now. Because of this, the exam should achieve the goal that it purports to achieve, which is to ensure that new lawyers are minimally competent to practice law. Tax law is ubiquitous. Virtually all potential clients are taxpayers who will likely have tax questions that they will expect their attorneys to have some basic knowledge about.⁴⁷ To provide competent advice to clients, the bar exam should ensure that new lawyers are minimally competent in this area. To accomplish this, a lawyer does not need an

⁴⁷ See Julie Manasfi, *The Reasons Why Every Law Student Should Take a Tax Class*, L. SCH. TOOLBOX (Aug. 28, 2019), <https://lawschooltoolbox.com/the-reasons-why-every-law-student-should-take-a-tax-class/>.

extensive level of tax knowledge rising to an L.L.M. level. Instead, attorneys should be familiar with different forms of taxable income and some common deductions that apply to their clients.

The concept of what is and what is not taxable income that is included in a taxpayer's gross income is a section of basic federal income tax law that could be added to the UBE. With this knowledge, new attorneys would be better able to advise and counsel their clients competently by looking at legal issues from a more three-dimensional viewpoint, like the tax ramifications of a course of action. For instance, knowledge of the types of income that are included in a taxpayer's gross income is particularly important in the context of torts (damages awarded in lawsuits), estates and trusts (income from gifts and inheritances), and family law (child support payments and alimony payments), as described below. These areas all have major federal income tax ramifications that can play a role in advising a client, and tax could be intertwined with these subjects on the MEE portion of the bar exam. This is like how conflict of laws is tested on the exam.⁴⁸ Conflict of laws questions are never stand-alone questions and are always tested alongside other areas on the MEE.⁴⁹

A. Torts

Currently, the UBE tests torts. This makes sense because tort law is a base-building law school course that teaches law students many of the foundations that carry over into other areas of law. It is also an area of law that many attorneys work in. Most cases, including personal injury cases, end in settlement before litigation. How personal injury settlement agreements are structured can have significant federal income tax ramifications for plaintiffs. Under the Internal Revenue Code, a taxpayer can exclude from gross income damages (other than punitive damages) received as a result of a court judgment or settlement on account of personal physical injuries or physical sickness.⁵⁰ It is crucial that personal injury attorneys are familiar with the precise scope of this provision, which will determine how much of

⁴⁸ *How Is Conflict of Laws Tested on the MEE?*, JD ADVISING, <https://jdadvising.com/conflict-of-laws-tested-mee/> (last visited Nov. 11, 2024).

⁴⁹ *Id.*

⁵⁰ I.R.C. § 104.

their damages are taxable. A plaintiff's attorney unfamiliar with this provision and the legal issues associated with it may end up causing their client to bear a large federal income tax bill if a settlement agreement or verdict does not allocate which portion of the settlement amount is for what purpose. A defense attorney should likewise be aware of the extent to which a payment of a settlement or judgment might be a deductible expense for their client.⁵¹

This knowledge also plays a role in litigation strategy for personal injury attorneys. Knowing that compensatory damages resulting from physical injury are awarded to plaintiffs tax-free, attorneys may shape their litigation strategy to focus on the compensatory damages the plaintiff suffered rather than the punitive damages that serve more to punish the defendant for their actions that caused the physical injury. Although punitive damages are included in an individual's gross income, punitive damages are somewhat of a windfall to plaintiffs, who are generally still better off after paying taxes. Still, it is important for personal injury attorneys to be aware of these ramifications so they can competently advise their clients during settlement negotiations. Therefore, the bar exam should ensure that attorneys know the income tax ramifications of compensation resulting from a personal injury claim.

On top of this, it is important to be aware of this rule and its limitations for civil lawsuits outside of personal injury. Attorneys should know that if damages are awarded to their client in a case that is not based on a personal physical injury or physical sickness, then that award is taxable income to the client.⁵² For example, in a contract dispute, if a plaintiff is awarded damages for lost wages because the defendant breached a contract, those damages will likely be included in the plaintiff's gross income for tax purposes. This subject could be easily added to the essay portions of the exam for a contract or tort question. The essays in the MEE almost always contain a hypothetical fact pattern with multiple issues. The examiners could "tag on" to the end of a question, "If the individual receives court-awarded damages in a lawsuit arising from these facts, would the damages be taxable income to the individual?"

⁵¹ See, e.g., *id.* § 162.

⁵² See *id.* §§ 61, 104.

B. Estates and Trusts

Additionally, the bar exam could easily test an examinee's knowledge of income tax implications from gifts and inheritances. Under § 102 of the Internal Revenue Code, "gross income does not include the value of property acquired by gift, bequest, devise, or inheritance."⁵³ Yet gross income does include income from property received via gift, bequest, devise, or inheritance and the assignment of income by these means.⁵⁴ The exam should ensure that examinees know when gifts and inheritances are taxable income and when they are not, as well as what exactly qualifies as a gift or inheritance for this purpose. Much like with awarded damages in a lawsuit, the exam could easily add this information in the MEE portion with an additional question at the end of a wills and trusts question or a real property question. For example, in an estates and trusts essay question, the examiners could add another question asking something like, "If this individual receives Greenacre through a devise in the decedent's will, will the individual be subject to paying federal income tax based on the value of Greenacre?" A similar question could also be asked at the end of a real property essay question. In fact, the Pennsylvania Bar Exam used to test federal income tax on its estates and trusts essay questions before adopting the UBE. For example, the February 2015 Pennsylvania bar exam estates and trusts essay contained, along with the estate and trust ramifications of the fact pattern, a question on the federal income tax consequences, asking, "How should the \$10,000 Roger gave to Ted and the \$15,000 scholarship Ted was awarded from the university be treated by Ted, as a cash-basis taxpayer, on his federal income tax returns in calendar years 2014 and 2015?"⁵⁵ This underscores how doable it is to add some basic federal income tax into MEE estates and trusts essay questions.

On the topic of estates and trusts, it is hard to ignore the significant impact that the federal estate and gift tax has on this area, which is the basis of estate planning. Nevertheless, this area likely need not be tested on the bar

⁵³ *Id.* § 102(a).

⁵⁴ *Id.* § 102(b).

⁵⁵ Pa. Bd. of Bar Examiners, Pennsylvania Bar Exam Essay Test, question no. 1(4) (Feb. 2015) (on file with author).

exam to ensure competency. In 2024, the lifetime exemption⁵⁶ for the unified federal estate and gift tax is \$13,610,000.⁵⁷ Because of this amount, it is less likely that an attorney will need to know about the estate and gift taxes because they impact very few Americans. Thus, knowledge of federal estate and gift taxes seems less important for new attorneys. Additionally, estate and gift taxation is a more complicated area of law in comparison to basic federal income tax, involving complex trusts and wealth planning strategies to minimize an individual's tax burden. Consequently, high-level estate planning positions often prefer an L.L.M. in tax law, a C.P.A. certification, or several years of estate planning experience. Thus, this area of law is more specialized and generally requires more training after law school, rendering it less necessary to be tested on the bar exam because lawyers will likely refer these issues to attorneys specializing in estate planning.

Additionally, still concerning the topic of estates and trusts and real property, the bar exam should test a basic understanding of the tax implications of a gain on the disposition of property. Generally, a gain on the disposition of property is measured by the difference between the amount realized on the disposition and the taxpayer's adjusted basis in the property.⁵⁸ The amount realized on a disposition of property is the amount of cash received and the fair market value of any property or services received, or obligation satisfied.⁵⁹ Typically, a taxpayer's basis in property is the cost of the property to the taxpayer when they bought it.⁶⁰ This basis is adjusted upward for capital expenditures put into the property by the taxpayer and is adjusted downward for depreciation deducted by the taxpayer with respect to the property.⁶¹

⁵⁶ Although referred to as an exemption, it is no longer a true exemption but a credit against the tax which may be viewed as an exemption equivalent. *See id.* § 2010.

⁵⁷ *What's New—Estate and Gift Tax*, INTERNAL REV. SERV. (Nov. 4, 2024), <https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax>.

⁵⁸ I.R.C. § 1001(a).

⁵⁹ *Id.* § 1001(b).

⁶⁰ *Id.* § 1012.

⁶¹ *Id.* § 1011.

A taxpayer's basis in the property is different if they received the property as a gift or through a devise, bequest, or inheritance. In the case of property received as a gift, the taxpayer generally retains the same basis in the property that the donor had.⁶² On the other hand, property acquired by the taxpayer through a bequest, devise, or inheritance takes a basis equal to the property's fair market value at the date of the decedent's death.⁶³ This is often referred to as a "step-up" in basis. These issues could be combined with estates and trusts or real property essay questions on the UBE. For example, in an essay question that involves an individual who receives a house through an inheritance from a decedent without a will, the question, in addition to asking about the present issues under the common law laws of intestacy, could also question the examinee on the recipient's basis in the property as a result of their inheritance. Income tax is an essential aspect in estates and trusts and real property law that often presents issues for attorneys involved in these areas. Thus, new attorneys should be familiar with some basics of the federal income tax consequences resulting from property dispositions.

C. Family Law

Staying on the topic of taxable gains from the disposition of property, the exam should test the taxation of transfers associated with a divorce. Generally, a transfer between divorcing spouses is treated as a nontaxable disposition of property and does not have an immediate impact on either spouse's tax return.⁶⁴ At the same time, the receiving spouse takes a basis in the property equal to the basis the transferor had in the property.⁶⁵ This is important to know because this can have major consequences if the recipient decides to sell the property. Because the basis in property impacts how much the property will be taxed upon resale, it is an important consideration in what assets a spouse would want pursuant to the division of assets upon a divorce, and attorneys representing divorcing spouses should take account of this tax liability when determining an equitable division of the couple's property.

⁶² *Id.* § 1015.

⁶³ *Id.* § 1014.

⁶⁴ *Id.* § 1041(a).

⁶⁵ *Id.* § 1041(b).

Lastly, the bar exam should test the income implications of child support payments and the changes that the Tax Cuts and Jobs Act (TCJA) made to the taxation of alimony payments.⁶⁶ On the issue of child support payments, the payments are not deductible by the payor and are not includible in the recipient's gross income.⁶⁷ For alimony, the TCJA made its inclusion in gross income dependent on when the underlying divorce or separation instrument was executed.⁶⁸ For instruments executed before January 1, 2019, alimony payments are deductible by the payor and taxable to the recipient.⁶⁹ On the other hand, alimony payments made based on instruments executed on or after January 1, 2019, are not deductible by the payor and are not taxable to the recipient.⁷⁰ These issues could easily be added to family law essay questions on the bar exam to test the subject more practically.

These are just a few ideas and suggestions for how the UBE could assess a student's knowledge of basic federal income tax law that would be helpful for any attorney to know. These ideas are not exhaustive, and the NCBE could incorporate federal income tax questions into other areas already tested on the bar exam, like property and how the federal government taxes property transactions. With these questions added to essay questions on the exam, the test starts to require examinees to think about these hypothetical situations in a more practical way because income tax issues are always lurking around common legal issues. The suggestions also help examinees to begin to think more about the impact their advice has on their clients financially. Thinking about tax consequences at the time of representation can save clients a lot of time, heartache, and especially money if these consequences are planned for in advance—not to mention that it ensures that attorneys provide competent legal counsel to their clients. The suggestions provided here related to adding

⁶⁶ Pub. L. No. 115-97, 131 Stat. 2054 (2017).

⁶⁷ *Alimony, Child Support, Court Awards, Damages 1*, INTERNAL REV. SERV. (Oct. 9, 2024), <https://www.irs.gov/faqs/interest-dividends-other-types-of-income/alimony-child-support-court-awards-damages/alimony-child-support-court-awards-damages-1>.

⁶⁸ TCJA § 11051, 131 Stat. at 2090–91.

⁶⁹ *Id.* § 10051(c); *see* I.R.C. §§ 71, 215 (prior to repeal by the TCJA).

⁷⁰ H.R. REP. NO. 115-466, at 277 (2017) (Conf. Rep.).

tax to the essay portion of the UBE, but taxation could also be tested in the multiple-choice portion of the exam as well.

IV. CONCLUSION

While the bar exam purports to ensure that new lawyers are ethically competent to provide adequate representation to their clients, the test falls short of accomplishing this task in some areas, especially by completely excluding tax law from the exam. Tax is an area of law that spills over into the other bodies of law that are tested on the bar exam, as illustrated by the examples explored in this Note regarding the tax consequences associated with torts, contracts, estates and trusts, and family law. If the goal of the bar exam is to ensure that new lawyers are minimally competent to provide adequate legal counsel, it should require that new attorneys are minimally familiar with the federal tax consequences of legal issues. Because tax touches so many other areas of law, it could easily be incorporated into the bar exam. With tax added to the bar exam, the exam becomes more practical because it appreciates the role tax plays in almost every area of the law tested on the UBE. With a better knowledge of tax law, attorneys see legal issues three-dimensionally as they will confront them in practice rather than in a stilted two-dimensional context that does not reflect reality.