

**When the Gatekeeper Challenges Your Test Scores:  
The High Stakes and Hefty Burden Examinees Face in Defending Their Scores  
on the U.S. Medical License Examination**

by Sherri Katz and Bob Bennett<sup>1</sup>

The United States Medical Licensing Examination (USMLE) is one of the crucial gates an aspiring medical doctor must successfully enter to gain professional licensing, and in some cases, graduate from medical school. A doctor of osteopathic medicine (DO) candidate may also be required to pass the USMLE for licensure as well.

Recent developments have increased scrutiny of examinees' scores on the USMLE placing many examinees who acted in good faith and with complete propriety in jeopardy of having their scores labeled "indeterminate"<sup>2</sup>, which is basically the same thing as invalidated or revoked. The USMLE also has the power to have an examinee's score reports reflect "irregular behavior"<sup>3</sup>, which could mean being barred from future testing, and forcing USMLE examinees to suffer collateral consequences such as delay in licensing, graduation, or participating in a residency program. In addition, recent development now includes a high-stakes copyright infringement lawsuit<sup>4</sup> for damages and an injunction, filed by the National Board of Medical Examiners (NBME) and the Federation of State Medical Boards (FSMB) against Optima University, a popular test preparation course provider, its founder, Eihab Mohamed Suliman, and ten John Doe defendants. This lawsuit was filed on February 23, 2009.

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<sup>1</sup> The Bennett Law Firm would like to acknowledge the contribution of Law Clerk Whitney Campbell's research for this article.

<sup>2</sup> See USMLE Policies and Procedures Regarding Indeterminate Scores

<sup>3</sup> See USMLE Policies and Procedures Regarding Irregular Behavior

<sup>4</sup> NBME and FSMB v. Optima University, et al, filed in the United States District Court, Western District of Tennessee, Cause No. 09-cv-1043-JDB.

At the present time, the USMLE is calling examinees before their Committee on Score Validity and/or their Committee on Irregular Behavior to ascertain whether examinees who attended the Optima University test preparation were exposed to questions, and thus should have their scores classified as “indeterminate”, or their record reflect “irregular behavior”. Other allegations may be investigated as well. These examinees, if called before the USMLE Committee on Score Validity or the USMLE Committee on Irregular Behavior, have the right to rebut the USMLE accusations against them in person, but they could face a tremendous presumption against their innocence.

Although contrary to traditional American notions of fair play and substantial justice, the accused examinee bears the full burden of proving their own innocence by a standard of proof that is unclear and poorly defined. The USMLE and an accused examinee are in unequal bargaining positions. The USMLE exercises absolute power over the validation of an examinee’s scores on the USMLE step examinations, and ultimately over the fate of the examinee’s ability to obtain professional medical licensing in the United States. Competent counsel may be the only hope the unfortunate examinee can rely on in opposing such a hefty burden. Filing of a lawsuit may also have to be considered.

### **The Content of the USMLE**

The USMLE “is a three step examination for medical licensure in the United States.”<sup>5</sup> Each Step uses a timed computer-based multiple-choice assessment format.<sup>6</sup> Step 1 assesses the basic science concepts required in the field of medical practice. Step 2 tests “medical knowledge, skills, and understanding of clinical science” and has two

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<sup>5</sup> United States Medical Licensing Examination 2009 Bulletin of Information, page 1.

<sup>6</sup> United States Medical Licensing Examination 2009 Bulletin of Information, page 2.

parts, the multiple choice component called the Step 2 Clinical Knowledge (CK), and the Step 2 Clinical Skills (CS).<sup>7</sup> The Step 2 CS assesses clinical skills through encounters with “standardized patients” who are actually people trained to portray patients, and the examinee must “gather information from patients, perform physical examinations, and communicate their findings to patients and colleagues.”<sup>8</sup> Step 3 evaluates whether an examinee “can apply medical knowledge and understanding of biomedical and clinical science essential for the unsupervised practice of medicine, with emphasis on patient management in ambulatory settings.”<sup>9</sup>

### **Those Who Rely on the USMLE**

There are a total of seventy state and territorial medical licensing authorities which set their own rules and regulations regarding licensure, but rely on an applicant’s performance on the USMLE as a component of determining qualification for licensure.<sup>10</sup> The USMLE helps provide a nationally uniform minimum standard of professional knowledge among doctors. The USMLE serves functions beyond licensure as “many medical schools in the United States require students to pass USMLE Steps 1 and 2 prior to graduation.”<sup>11</sup>

The two accrediting authorities overseeing medical schools in the U.S. and Canada are the Liaison Committee on Medical Education (LCME) for the MD degree and the American Osteopathic Association (AOA) for the DO degree.<sup>12</sup> The USMLE “provides a single pathway for primary licensure of all graduates of LCME-accredited

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<sup>7</sup> United States Medical Licensing Examination 2009 Bulletin of Information, page 2.

<sup>8</sup> United States Medical Licensing Examination 2009 Step 2 Clinical Skills (CS), page 3.

<sup>9</sup> United States Medical Licensing Examination 2009 Bulletin of Information , page 2.

<sup>10</sup> United States Medical Licensing Examination 2009 Bulletin of Information , page 1.

<sup>11</sup> USMLE Policies and Procedures Regarding Indeterminate Scores, CC 1/03, 1.

<sup>12</sup> United States Medical Licensing Examination 2009 Bulletin of Information, page 4.

medical schools.”<sup>13</sup> While DO licensure candidates may satisfy “state licensure requirement through completion of the three components of the osteopathic licensure examination program,” the single pathway is open to them as well.

In addition, because their medical schools are not accredited by these two organizations, foreign medical school graduates “use USMLE Steps 1 and 2 for purposes of the medical science examination requirement for Education Commission for Foreign Medical Graduates (ECFMG) certification, which is required to enter an accredited graduate medical education program in the United States.”<sup>14</sup> The ECFMG “assesses whether international medical graduates are ready to enter residency or fellowship programs in the United States that are accredited by the Accreditation Council for Graduate Medical Education (ACGME).”<sup>15</sup> The ECFMG will consider foreign medical school graduates of schools listed in the International Medical Education Directory (IMED), a publication of the Foundation for Advancement of International Medical Education and Research (FAIMER).<sup>16</sup>

### **Organization of the USMLE**

The USMLE “is sponsored by the Federation of State Medical Boards (FSMB) and the National Board of Medical Examiners (NBME).”<sup>17</sup> The FSMB and the NBME administer the USMLE through the Composite Committee which establishes USMLE policies, appoints examination committees to create the exam content, and ensure test quality through the Committee on Score Validity and the Committee on Irregular

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<sup>13</sup> Comprehensive Review of the USMLE Committee to Evaluate the USMLE Program (CEUP): Summary of the Final Report and Recommendations (2009), 2.

<sup>14</sup> United States Medical Licensing Examination (USMLE) Polices and Procedures Regarding Indeterminate Scores, CC 1/03, 1.

<sup>15</sup> <http://www.ecfm.org/about.html>.

<sup>16</sup> United States Medical Licensing Examination 2009 Bulletin of Information, page 4.

<sup>17</sup> United States Medical Licensing Examination 2009 Bulletin of Information, page 1.

Behavior. USMLE examinees who have attended Optima University are currently being called before the USMLE Committee on Score Validity and/or the USMLE Committee on Irregular Behavior.

### **Current Externalities Affecting the USMLE**

At least two current events are focusing attention on the validity of USMLE scores and the design and content of the USMLE examinations. First, the USMLE recently underwent a comprehensive review.<sup>18</sup> Implemented between 1992 and 1994, the USMLE replaced the Federation Licensing Examination (FLEX) program, and “there has been no in-depth review of overall program design and structure since ... [the step examinations] were first conceived.”<sup>19</sup> The Composite Committee appointed the Committee to Evaluate the USMLE Program (CEUP), which is comprised of a wide range of members representing perspectives of parties who prepare students for or rely on the results of the USMLE.<sup>20</sup> The purpose of the CEUP was to “determine if the mission and purpose of the USMLE ... [were] effectively and efficiently supported by the current design, structure, and format of the USMLE.”<sup>21</sup>

The report generated by the CEUP received “substantial review by the staff and governing bodies of the ECFMG, FSMB, and NBME.”<sup>22</sup> The report was published on the USMLE website on June 22, 2009 after having its recommendations endorsed by the ECFMG, the house of delegates of the FSMB, and the full board of the NBME.<sup>23</sup> Recent years’ USMLE results would have received an enhanced level of statistical evaluation as

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<sup>18</sup> United States Medical Licensing Examination 2009 Bulletin of Information (2008), 3.

<sup>19</sup> United States Medical Licensing Examination 2009 Bulletin of Information (2008), 3.

<sup>20</sup> United States Medical Licensing Examination 2009 Bulletin of Information (2008), 3.

<sup>21</sup> United States Medical Licensing Examination 2009 Bulletin of Information (2008), 3.

<sup>22</sup> United States Medical Licensing Examination 2009 Bulletin of Information (2008), 3.

<sup>23</sup> [http://www.usmle.org/General\\_Information/CRU/CRU-2009-06-19.html](http://www.usmle.org/General_Information/CRU/CRU-2009-06-19.html).

part of the review. Statistical evaluation of 2007 results lead to the discovery of the other external force currently affecting the USMLE: security of its copyrighted examination content.<sup>24</sup>

### **The Optima University Lawsuit**

The NBME and the FSMB, which are the joint sponsors of the USMLE, initiated a lawsuit against Optima University, its owner, and ten John Doe defendants in the United States District Court for the Western District of Tennessee on February 23, 2009. In this lawsuit, the Plaintiffs claim three (3) copyright infringement causes of action<sup>25</sup>, and are seeking both monetary damages and an injunction against Optima University. Optima University is a for-profit limited liability corporation providing several USMLE review course options including its recommended 7 week program where students “are expected to put in a minimum of 10 hours of studying per day attending lectures and self study” at Optima’s facilities.<sup>26</sup> Optima University advertises student “access to over 3,000 USMLE style questions.”<sup>27</sup>

When preparing to take the USMLE step examinations, the USMLE makes it known that step examinations are made up of copyrighted material and that examinees may not reproduce or distribute test questions by any means including memorization and recording.<sup>28</sup> The USMLE reuses some questions appearing on previous examination forms.<sup>29</sup>

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<sup>24</sup> NBME v. Optima Complaint. Paragraph 34.

<sup>25</sup> NBME and FSMB v. Optima University, et al, filed in the United States District Court, Western District of Tennessee, Cause No. 09-cv-1043-JDB.

<sup>26</sup> Optima University Brochure: Optima Review (2007) 4.

<sup>27</sup> Optima University Brochure: Optima Review (2007) 4.

<sup>28</sup> United States Medical Licensing Examination 2009 Bulletin of Information (2008), 2.

<sup>29</sup> NBME v. Optima Complaint. Paragraph 27.

In the lawsuit filed against Optima University, its owner, and ten John Doe defendants, the plaintiffs, which is the NBME and the FSMB, claim that Optima University has exposed its students to exam questions that were improperly obtained by using examinees who recorded test questions while receiving “anomalously low scores.”<sup>30</sup> The USMLE, on its website, clearly states that “[t]here are no test preparation courses affiliated with or sanctioned by the USMLE ... [i]nformation on such courses is not available from the ECFMG, FSMB, USMLE Secretariat, or medical licensing authorities.”<sup>31</sup>

However, even though the investigation before filing the lawsuit presumably began in 2007, the USMLE did not publicize the action against Optima University on its website until March 11, 2009.<sup>32</sup> The USMLE waited until March 11, 2009 to give the following warning on its website: Individuals who attended Optima's programs or are considering doing so risk having their USMLE scores delayed and/or classified as indeterminate.<sup>33</sup> Based on this, the USMLE is now in the process of calling examinees who have attended an Optima University course before the USMLE Committee on Score Validity, in an effort to try and ascertain whether the examinees' test scores should be validated or classified as “indeterminate”. It is also possible that any allegation of irregular behavior may be reviewed by the USMLE Committee on Irregular Behavior.

### **Representation of an USMLE examinee**

In a letter to a recent medical school graduate who attended Optima University and has taken Step 1 and Step 2 CK examinations, the USMLE claimed that 17% of Step

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<sup>30</sup> NBME v. Optima Complaint. Paragraph 36.

<sup>31</sup> United States Medical Licensing Examination 2009 Bulletin of Information (2008), 14.

<sup>32</sup> [http://www.usmle.org/General\\_Information/Announcements/Optima.html](http://www.usmle.org/General_Information/Announcements/Optima.html).

<sup>33</sup> [http://www.usmle.org/General\\_Information/Announcements/OptimaAlert.html](http://www.usmle.org/General_Information/Announcements/OptimaAlert.html).

1 questions from our client's examination form were questions "subject to unauthorized reproduction and dissemination through Optima prior to June 2008" in its course materials. The same examinee's December 31, 2008, Step 2 CK examination form questions were similarly classified.

The *USMLE Policies and Procedures Regarding Indeterminate Scores* defines "indeterminate score" as "passing level examination results that cannot be certified as representing a valid measure of an examinee's **competence** in the domains assessed by the examination." The USMLE Policies goes on to state that "Aberrancy(ies) in performance for which there is no reasonable and satisfactory explanation result in passing scores being classified as indeterminate."

The *USMLE 2009 Bulletin of Information* provides that the USMLE assures the validity of scores reported for USMLE examinations by every means available, and that scores may be classified as indeterminate if "the scores are at or above the passing level and the USMLE program cannot certify that they represent a valid measure of your **knowledge or competence** as sampled by the examination." *USMLE Bulletin*, page 32, emphasis added.

The *USMLE 2009 Bulletin of Information* provides the standard it uses as "a classification of indeterminate may result from irregular behavior or from other factors, such as unexplained inconsistency in performance within a Step or Step Component or between takes of the same Step or Step Component." See *USMLE Bulletin*, page 32.

The examinee, along with potentially thousands of other Optima University attendees, have the opportunity to appear before the USMLE Committee on Score Validity in an effort to confirm the validity of the score(s) through a hearing. At this

hearing, the examinee bears the burden of proving to the USMLE Committee on Score Validity's satisfaction that the examinee does possess the requisite knowledge and competence to have his Step scores validated. The examinee does have another option at his disposal: retake the questioned step examination(s).

The copyright lawsuit has certainly motivated increased scrutiny over test score validity and a larger number of indeterminate scores. The extent to which the Comprehensive Review of the USMLE has influenced the larger number of indeterminate scores is unclear. It is clear, however, that there is a wide range of stakeholder organizations, agencies, and education institutions relying on the validity of the USMLE scores. The stakes are high for the USMLE because these stakeholders depend on the USMLE to help ensure the public welfare of medical patients in the United States.

### **Test Preparation is a Legitimate Practice**

Although never openly endorsed by standardized testing administrators, it is common for graduating professionals of all types to seek out preparation courses or materials for exhaustive licensing exams. This test preparation usually comes in the form of professional test preparation programs offered mostly by for-profit companies. There is no particular stigma attached to this practice. Law school graduates seek out test preparation services from BarBri and Kaplan, and many law students take a school taught bar preview courses in preparation for examinations for admission to state bar associations.

Teachers, pilots, engineers, nurses, and countless other professionals take preparation courses on the path to professional licensure. The general presumption is that

course providers use authorized materials and prepare an individual for success, and are not in the business of teaching test takers how to cheat on the standardized test. These test preparation courses refresh areas of knowledge upcoming examinees may have not reviewed recently but have a foundation in already.

As eloquently pointed out by Aaron E. Goldschneider, “we live in an age in which standardized testing has become the principal means to judge the capabilities, educational level, and potential of young Americans.”<sup>34</sup> In response to students’ efforts to gain advantages on standardized tests either through sophisticated test-prep coaching or various forms of cheating, testing agencies have responded by reserving the right to invalidate scores they consider suspect, whether it is from evidence of actual cheating, or by evidence that a test taker may have been privy to leaked test questions or information gathered from prior tests.<sup>35</sup>

Because courts have traditionally given great deference to testing agencies, a test taker who wishes to challenge a testing agency’s intention to invalidate test scores faces an extremely burdensome task. For example, as noted by Goldschneider, testing agencies have for many years been locked in intellectual property battles with traditional test prep organizations such as Kaplan and Princeton Review, and they have accused them of improperly using copyrighted materials from previous exams and even sending in dummy test-takers with the express purpose of copying questions from exams.<sup>36</sup>

No one questions the USMLE’s Committee on Score Validity overriding concern that an examinee’s test scores must reflect his or her knowledge and competence of the

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<sup>34</sup> “Cheater’s Proof: Excessive Judicial Deference toward Educational Testing Agencies May Leave Accused Examinees No Remedy to Clear Their Names”, 2006 *BYU Educ. & Law Journal* 97 (2006).

<sup>35</sup> *Id.* at 100.

<sup>36</sup> See, e.g., *Educ. Testing Serv. v. Stanley Kaplan Educ. Ctr.* 965 F. Supp. 731, 734-35 (D. Md. 1997).

material covered in the examination(s). However, the USMLE Committee on Score Validity must also be aware of an examinee's concern that there are times when a testing agency's harsh determination can affect a person's entire future. An example of this is *In re Singh*, 576 S.E.2d 899, 900 (Ga. 2003), in which a Georgia Bar examinee contested the way examiner ACT rounded and scaled his raw scores on the Multistate Bar Exam, leaving him with a 269.9 total score, short of the 270 points he needed for admission to the bar. The Georgia Supreme Court simply found that "applicant Singh achieved a score of 269.9, not a passing score." *Id.*

**The Benefits of Professional Advocacy Before the Licensing Board:  
Eight Reasons to Hire an Attorney**

If the USMLE or any other testing agency has called the validity of your test scores into question, either in a situation like the Optima University attendees, or through some allegation of misconduct, it is wise to consider the option of obtaining competent counsel to represent you before any hearing committee. Typically, you might receive a letter from the USMLE informing you that you have a right to a hearing on the issue or allegation, but you must usually request the hearing in writing. In addition, if you want to present any additional evidence, you will probably need to request a hearing.

The typical letter might also ask you to contact the staff attorney for the USMLE if you would like to negotiate a stipulation of facts or an agreement in lieu of a hearing. The initial contact letter will also usually include the USMLE rules or guidelines regarding their hearing policies and procedures, and the rules or guidelines related to the issue that will be before the hearing committee. At this point, the following top eight reasons you need an attorney may be helpful:

### **#1: Knowing the System**

Any process is easier when you know the system. Obtaining an attorney means you have the advantage of their previous experience. Your attorney will know where to be, who to talk to, and how to manage your hearing. Try to find out how familiar your prospective attorney is with the USMLE process, and the USMLE Committee that you have been summoned to appear before. Does your attorney represent clients before similar boards or agencies on a regular basis? Do you really want to be making decisions about what evidence to present, which witnesses to call, and facing cross examination on your own?

### **#2: Organize Your Defense**

Properly preparing for your hearing is arguably the most important thing you can do. In some cases this can include gathering and presenting extensive amounts of materials to be presented to the USMLE as evidence or exhibits. In some cases it is also important to obtain witnesses, both lay and expert, who can attest to your character or your fitness or both. In most cases, the use of an expert should also be considered, especially when appearing before the USMLE Committee on Score Validity. An attorney will be able to properly organize your defense by helping you and any witnesses to be prepared for the possible questions that will be asked in your hearing. If you have never done this before, how do you know what questions any board member, hearing panel member, or the board staff attorney will ask you and what is the best way to answer the tough questions? Further, an attorney will also know what kinds of evidence will be most appreciated by the USMLE.

### **#3: Dispassionate Response**

In the USMLE Committee on Score Validity hearing, the USMLE staff attorney and the hearing panel members are likely to ask you questions that are personal and very direct in order to strenuously explore your background, character, and scoring results. Serving as both a witness (to your own character) and as your own advocate can be too much, even for a practiced attorney. These stressful and potentially embarrassing situations can cause cloudy judgment and result in unclear answers to the USMLE Committee on Score Validity's questions. Having an attorney with you means you have someone that can make sure that the best information comes to light in your defense. Through practicing how the USMLE staff attorney might cross examine you and proper preparation of your defense, your attorney will make sure you give clear and appropriate answers that present the best picture of you.

#### **#4: Stipulation of Facts**

An important part of proper organization is knowing how to use stipulations. Your attorney can provide valuable insight into how the USMLE Committee on Score Validity will generally rule, which battles to fight, and when to reach a resolution. Disclosure and candor are of the utmost importance in building rapport with the USMLE, but in some cases, it is appropriate to oppose certain evidence presented against you. An attorney will be able to ensure that your hearing proceeds and concludes in a timely fashion, while preserving every opportunity to defend your character and scores, and seek the most advantageous outcome.

#### **#5: Personal Relationships**

One of the greatest advantages an attorney can offer you is the personal relationships he or she has built with the staff, attorneys, and USMLE committee panel

members. Obtaining an attorney who is familiar with the people involved in this process is very important. A personal relationship with the USMLE staff attorney will help streamline the flow of information between parties, facilitate stipulations and agreements as to facts and help create a seemingly less hostile environment. The professional relationship between the USMLE and your attorney built on handling cases together can act as a doorway to bring about a fair and desirable outcome.

#### **#6: Hiring an Attorney Demonstrates that You Take This Hearing Seriously**

A hearing in front of the USMLE Committee on Score Validity or the USMLE Committee on Irregular Behavior is a serious matter. The USMLE committee is charged with the mandate to protect the public from potential doctors who do not have the fitness or the requisite competence and knowledge to engage in their profession. Not only will an attorney help prepare your presentation or defense, the attorney's presence will help to show the USMLE that you take the matter seriously, you do possess the requisite knowledge and competence in the subject tested by the USMLE examination, and that you are taking a proactive approach.

#### **#7: Emotion is a Factor from Start to Finish**

A hearing before either the USMLE Committee on Score Validity or the USMLE Committee on Irregular Behavior can be stressful, especially in hearings pertaining to character and fitness or allegations of misconduct or cheating. This process will lead you to feel overwhelmed when you first receive the notification letter, and that feeling will not go away. You have probably spent years in undergraduate and graduate school, and your future career and livelihood is being decided on facts that may or may not have been within your control. Having an attorney can make sure the stress and the emotions

involved do not harm the preparation that is necessary to properly present your side of the story.

**#8: First in Line: The Attorneys Usually Get to Go First!**

One distinct advantage to having an attorney with you when you appear before the USMLE is that your name might be moved to the top of the docket. Individuals who are represented by attorneys can facilitate the hearing time. Individuals who choose to attend their hearings pro se (without an attorney) sometimes will be called only after all individuals with representation are heard. If you want to get on with your life and your anticipated professional medical practice, an experienced attorney can help move you along and certainly provide a comfort factor that you will not have by yourself.