

**INVALIDATION OF USMLE STEP 1 AND STEP 2 SCORES AND LITIGATION  
BETWEEN NBME, FSMB AND OPTIMA**  
(rev. 7-26-2010)

The National Board of Medical Examiners (NBME) and the Federation of State Medical Boards (FSMB) began challenging scores from medical students and others who had used or attended review courses allegedly sponsored by an organization known as "Optima University" in New Jersey and in Tennessee in the summer of 2008. Pursuant to these challenges, an applicant may have had his or her Steps 1 exam or Step 2 exam or both exams invalidated. In most cases, the applicant is allowed the opportunity to retake the invalidated examinations, to request a hearing on the matter or both. We strongly recommend that the applicant who finds him or herself in this or any similar type of situation retain the services of a capable, experienced health care attorney who is familiar with this type of proceeding and with the consequences such actions may have and, preferably, an attorney with experience in appearing before the hearing committee in such cases.

The NBME is an independent, not-for-profit organization. It has for its membership approximately 80 individuals who are selected from national medical organizations, healthcare professions, medical education and regulation communities, and the public. It also has a "national faculty of medicine" of hundreds of volunteers and a large professional staff who support the volunteers serving in its membership and on its test development and other committees. The NBME states that it serves the public through its high-quality assessments of healthcare professionals. The NBME develops and manages the United States Medical Licensing Examination (USMLE). The NBME and the Federation of State Medical Boards (FSMB) (see below) co-sponsor the USMLE. The Educational Commission for Foreign Medical Graduates (ECFMG) is the third collaborator in the USMLE program. Its headquarters office is located in Philadelphia, Pennsylvania.

The FSMB is a non-profit organization which represents the 70 medical boards of the states, commonwealths and territories of the United States of America. The FSMB states that it leads by promoting excellence in medical practice, licensure, and regulation as the national resource and voice on behalf of state medical boards in their protection of the public.

**Summary of Background of Litigation Between NBME, FSMB and Optima**

In February 2009, the NBME and the FSMB, joint sponsors of the USMLE filed federal suit requesting an injunction and other relief against Optima University for alleged copyright infringement. It has been alleged that students had been paid students to take the USMLE, Step 1 and Step 2 examinations for the purpose of obtaining actual test questions and providing them to Optima. It is alleged that this material was made available to students who paid to attend the Optima course at its facilities located first in New Jersey. Optima allegedly later moved to Tennessee. The federal complaint claimed that Optima exposed the students who attended review courses to exam questions that were improperly obtained by using examinees who recorded the tests questions. It is believed that Optima may have also paid students in

Eastern European Countries to take the examinations for the purpose of copying or obtaining the questions. This became the basis for the claims of impropriety. The actual allegations can be read in the copy of the federal complaint. Soon thereafter, notice letters were sent out to students whom the NBME and FSMB were able to determine had attended an Optima course.

You may click on links to the actual court complaint filed in this case at the end of this article.

### **What to Do If You Receive a Letter from USMLE Regarding Optima or Any Alleged Testing Improprieties**

Letters have been being sent out from some time in 2008 through the present. The letters regarding the Optima course allege that the medical student recipient participated in taking Optima review courses prior to taking the Step examinations. The letter will usually include certain data and analysis including the number of times the student took the Step examination previously, the percentage of actual test questions to which the student was exposed, how well other test-takers did on the same individual questions, the time spent on the questions, and other information the committee believes may be relevant regarding concerns about the validity of the scores received. Details on the rights the individual has to retake the tests or to challenge the findings by requesting a hearing are also included. These are contained in a section of the letter or in a separate attachment called: "Policies and Procedures." If requested in writing in a timely manner, the Committee on Score Validity will schedule a time to review the facts surrounding the allegations (a hearing) and the student may attend the hearing before the committee, either in person or through an attorney, if he or she so desires. This takes place in Philadelphia. Evidence may be submitted by the student, including his or her own testimony. The student may have legal representation (an attorney) with him or her at the hearing. Hearings have resulted in students having their test scores validated.

### **Hearing Before the Committee on Score Validity**

Attending a hearing before the Committee on Score Validity is not a process that should be lightly undertaken, nor is it a procedure that you should attempt without experienced counsel. We do not recommend attending such a hearing without an attorney and plenty of advance preparation.

The counsel that will be representing the organizations involved as well as the members of the committees involved appear to have a negative view of the Optima review course, and anything that is done by a test taker that would appear to give him or her an unfair advantage over others. If Step 1 or Step 2 test scores show that less than ten (10) percent of your questions were in the exposed category, and the passing rate and time per question were in order, you may have a good chance at having your test scores upheld if you appear before the USMLE Committee on Score Validity. However, this will also depend on a number of other factors. As the percentage of exposed questions climbs higher and higher, so does the likelihood that your test scores will be invalidated. With a finding that your test scores are "indeterminate,"

you will, in most cases, be given the opportunity to retake the exams in question or a validating examination at no additional cost (except travel, preparation time, etc.). There is no appeal process.

When deciding whether or not to hire an attorney to represent you in this matter, consider the cost and time you expended in preparing for and taking these examinations. In addition, consider the time you will lose from your medical education, residency, internship or future career if your passing scores are not validated and your studies and career are delayed. It would seem most illogical not to retain the services of an attorney experienced with this type of matter and this type of hearing. Even if you have some knowledge of law, evidence and civil procedure, it is difficult to represent yourself while also being your own witness. Those who are not experienced in such matters will make fundamental mistakes that will harm, their presentation of evidence of their case.

Procedural guidelines furnished by the committee need to be followed regarding how evidence is furnished to the committee and presented at the hearing. Preparation for the hearing would include meetings in advance, preparation of questions and answers and other matters to help ensure a proper presentation. One who is not familiar with such proceedings may overlook key issues and concentrate on issues that are not relevant to the committee's determination. Any presentation of documents for consideration at the hearing must include excellent organization and a professional presentation. This must be done well in advance of the hearing. In certain cases, it may be necessary to hire an expert witness if the issues and facts require. The Committee will have its own attorney present at the hearing.

For a copy of the federal court complaint filed in NBME & FSMB v. Optima University, LLC, Case No. 1:09-cv-01043, in the United States District Court for the Western District of Tenn, [click here](#). [Note: Link to NBME v. Optima.pdf].

For a copy of the federal court complaint filed in American Board of Internal Medicine (ABIM) v. Arora, Case No. 2:09-cv-05707, in the United States District Court for the Eastern District of Pennsylvania, [click here](#). [Note: Link to ABIM-Arora Complaint.pdf]. For a copy of the Motion for a Temporary Restraining Order and its supporting Memorandum of Law in the same case, [click here](#). [Note: Link to ABIM-Arora Motion for TRO.pdf].

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