

# C L E A

## Clinical Legal Education Association

### COMMENT OF CLINICAL LEGAL EDUCATION ASSOCIATION ON THE CALIFORNIA BAR EXAM CUT SCORES August 23, 2017

The Clinical Legal Education Association, with more than 1,300 dues-paying members, is the nation's largest association of law professors. We commend the State Bar of California for commissioning the Standard Setting Study to evaluate its bar exam including its cut score. At the same time, we urge the State Bar of California to consider the limitations of the current format of the bar exam and weigh alternative assessment options that would more accurately reflect the range of lawyering competencies that are required for legal practice.

The Final Report of Dr. Chad Buckendahl of ACS Ventures, which conducted the Standard Setting Study, noted that the "meeting results and evaluation feedback generally supported the validity of the panel's recommended passing score for use with the California Bar Examination." Final Report at 4. The external evaluators who were asked to observe and determine whether the standard setting procedure met professional guidelines and technical professional standards, however, identified shortcomings of the study.

Dr. Mary J. Pitnoiak's report presented several shortcomings of the standard setting process including its implementation methods and the failure to provide a rubric or adequate training for participants regarding the method for establishing performance standards.<sup>1</sup> The California Department of Consumer Affairs' external evaluator, Dr. Tracy Montez, applied the *Standards for Educational and Psychological Testing* and raised concerns with the standard setting methodology.<sup>2</sup> In particular, Dr. Montez "highly recommended" that the State Bar of California conduct a comprehensive occupational analysis to determine the knowledge and skills necessary for effective practice to determine what should be assessed by a licensing examination.

The bar exam has long been criticized, by CLEA and others, for its ineffectiveness in assessing whether applicants will be competent and professional attorneys.<sup>3</sup> As long ago as the Reed Report in 1921,<sup>4</sup> law schools have been found lacking in their skills and professionalism training. Echoing the 1992 MacCrate Report<sup>5</sup> of the ABA Section of Legal Education and Admissions to the Bar, the 2007 Carnegie Foundation Report also documented the need for integration of

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<sup>1</sup> <http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Review-CalBar-Standard-Setting-MaryPitoniak.pdf>

<sup>2</sup> <http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Tracy-Montez-ReviewBarExamstudy.pdf>

<sup>3</sup> Roy Stuckey, et al., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 8-10 (2007).

<sup>4</sup> Alfred Z. Reed, Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States, With Some Account of Conditions in England and Canada, Bulletin No. 15 (1921).

<sup>5</sup> Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass'n, Legal Educ. and Prof'l Dev. - An Educ. Continuum (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, 1992).

“theoretical and practical legal knowledge and professional identity.”<sup>6</sup> Law schools are now offering more experiential education, spurred on by the ABA’s recent adoption of a six-credit experiential course requirement. Under Standard 301, the ABA demands that law schools “maintain a rigorous program of legal education that prepares students, upon graduation” not only for admission to the bar, but also “for effective, ethical, responsible participation as members of the legal profession.” A licensing test that is solely focused on substantive law and legal analysis cannot guarantee competency in the range of skills that are necessary for competent law practice.

In considering how to assess these more foundational skills, the State Bar of California and the California Supreme Court can be guided by the recent study, *Foundations for Practice: The Whole Lawyer and the Character Quotient*, published in July 2016 by the Institute for Advancement of the American Legal System (“Foundations for Practice”).<sup>7</sup> The study documents categories of necessary lawyering skills that include interviewing, counseling, negotiation, trial advocacy and contract drafting. And the Foundations for Practice research study concludes that new lawyers “need more than we once thought. Intelligence, on its own, is not enough. Technical legal skills are not enough. They require a broader set of characteristics (or, the character quotient), professional competencies, and legal skills that, when taken together, produce a whole lawyer.” *Foundations for Practice* Report at 38.

Other professions in the United States, and the legal profession in other countries, demand deeper experience in practice for professional licensing.<sup>8</sup> For example, in England and Wales, barristers and solicitors are required to take practical training skills classes and one or two years of training under the close supervision or “pupilage” of a solicitor or barrister prior to admission. In six Australian states, there is a practical training requirement that can be fulfilled with either a practical training course that can take up to two years to complete or an in-house clerkship under a supervising attorney. In the United States, doctors must complete a residency of three to six years before their final licensing exam; an engineer must have at least four years of post-college work to be eligible to sit for the licensing exam; and an architect must document training under a registered architect. The State Bar of California should engage experts and begin to develop and model more comprehensive and skills-focused licensing strategies for the legal profession.

The State Bar of California should seize this opportunity to become an innovative leader in the professional licensing of lawyers by examining the bar exam’s effectiveness in assessing the knowledge and skills necessary for practice. By modeling lawyer licensing practices on those of other professions with more uniform and holistic assessment methods, California can assess bar applicants on foundational lawyering skills and competencies, not just substantive legal knowledge and analysis. A licensing scheme that better assesses the needed competencies of the profession will allow California to better guarantee that those admitted to practice will offer competent legal assistance to those they serve.

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<sup>6</sup> William M. Sullivan, et al., *EDUCATING LAWYERS* (2007).

<sup>7</sup> Ali Gerkman and Logan Cornett, *Foundations for Practice: The Whole Lawyer and the Character Quotient*, available at

[http://iaals.du.edu/sites/default/files/reports/foundations\\_for\\_practice\\_whole\\_lawyer\\_character\\_quotient.pdf](http://iaals.du.edu/sites/default/files/reports/foundations_for_practice_whole_lawyer_character_quotient.pdf)

<sup>8</sup> Yoonsuk Choo, et al., *Admission to the Bar: A Cross-Jurisdictional and Cross-Professional Survey*, a paper prepared for Harvard’s Legal Profession Course (*on file with CLEA*) (Spring 2011).

We appreciate the opportunity to comment on the Standard Setting Study and we share your commitment to improving the process of bar licensing.

Sincerely,

/s/

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/s/

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