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PERSPECTIVE

What will the California Attorney Practice Analysis group recommend?

By Joseph Robert Giannini

State Bar of California Board of Trustee Chairman Alan Steinbrecher and Vice-Chairman Sean SeLegue citing the California Justice Gap Study of 4,000 residents spotlight a harsh reality. They write there is an enormous gap between the need for civil legal services and most people's ability to access legal help. More than half of California households had civil legal issue problems last year, but nearly 70% of received no legal help. Only 27% of low-income Califor-

greater access to, and inclusion in, the legal system, shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory." In light of this legislative mandate, the California Supreme Court has commissioned the California Attorney Practice Analysis Working Group to study the "knowledge, skills and abilities needed by entry-level attorneys" in order to provide public protection. CAPA is expressly appointed to study whether the present bar examination process is fair, and whether the infamous Califor-

organization dedicated to investigating and disclosing the "latest data and evidence on the most critical issues facing legal education."

Despite this focus on the "latest data and evidence," many CAPA members appear to be playing ostrich to prior State Bar studies and legislative enactments concerning entry-level sister-state attorney licensing, carefully considered judgments by other respected arms of the bar including the American Bar Association and the National Conference of Bar Examiners, the latest data and evidence concerning measurement error in the California bar exam testing, and ongoing federal litigation and threatened disparate impact litigation concerning the California attorney-admission process. This "latest data and evidence" has been directly presented to the CAPA members. Some of this data and evidence will be presented in this Daily Journal column.

The Future of the California Bar Report was issued in 1995 after a study that likely cost over a million dollars. The Futures Commission was composed of 30 members, which included five federal judges, former California Supreme Court Justice Cruz Reynoso, four other California state court judges, two former State Bar presidents, and the former public defender of San Francisco. The Futures Commission unanimously recommended that the California Supreme Court should adopt bar admission on motion for experienced attorneys with three years of experience and support a national lawyer

licensing program (Recommendations 12-13). The Futures Commission study is now 25 years old and no closer to implementation than the day it was finalized.

The California Legislature also enacted Senate Bill 1782 in 2000 by a vote of 99-0 that was signed by the governor, recommending the Supreme Court study and adopt reciprocal admission for out-of-state attorneys. The court thus appointed a commission to implement SB 1782. Their conclusion was that this reciprocal licensing issue should be re-examined in the future after other states have adopted reciprocity. That was 17 years ago. No further California review has been undertaken.

However, in the last 17 years other national organizations have studied this entry level attorney licensing issue. The ABA Commission on Ethics 20-20 (2012) recommended that all states adopt admission on motion for experienced lawyers with three years of experience. It entered a factual finding that there was no evidence that experienced lawyers were a threat to the public or needed to take another bar exam. It "found no reason to believe that lawyers who have been engaged in the active practice of law for three of the last seven years will be any less able to practice law in a new jurisdiction than a law school graduate who recently passed the bar." The ABA squarely recommends that in light of ever-increasing advances in technology that all states should adopt bar admission on motion for lawyers with three years of

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nians received legal services when needed. Four million civil lawsuits were filed in a recent year where one or both of the parties were in pro per in California. Lawyers are the voice of justice. Their voice is necessary to protect against the deprivation of life, liberty and property. Justice for all requires equal access to justice for all.

Recognizing this pervasive deprivation of civil rights in concert with multiple public missteps by the California Bar Association, the Legislature enacted California Business and Professions Section 6001.1 which became effective Jan. 1, 2019. This new law provides: "Protection of the public, which includes support for

nia "cut score" should be changed.

So is CAPA going to put the same old wine in the same old bottle, with a new label? Or is CAPA going to recommend another new study to study the same old bottle of wine without a new label, as the bar has done in the past? The answer is important. The attorney licensing process in California is under attack as mismanagement of public resources can never cease to generate opposition in a constantly maturing and technologically advancing society where information has been democratized by the internet. The answer also matters because this CAPA study is being funded by a grant from the AccessLex Institute, an

experience. The ABA concluded the failure to have admission on motion injures the public and the profession; *women lawyers are further disproportionately injured*. Forty-two states have adopted reciprocal admission on motion. California lawyers are generally not eligible for reciprocal licensing in these states because of California's isolationist policy. The American Bar Association has essentially concluded that if all men are created equal then all licensed lawyers are created equal. It's hard to argue with this logic.

The National Conference of Bar Examiners has also this century pioneered the Uniform Bar Exam. Thirty-five states have adopted the UBE. The UBE enables entry-level attorneys licensed in a UBE states the opportunity for reciprocal entry level licensing elsewhere in other UBE states.

The California Legislature's treatment of other learned professionals also demonstrates the professional licensing standards in other states provide an excellent yardstick for public protection. California provides reciprocal licensing in other professions: CPA's, engineers, psychologists, veterinarians, geologists or geophysicists, licensed nurses, doctors of chiropractic, physicians and surgeons who have a diploma from the National Board of Medical Examiners, physicians and surgeons licensed under comparable standards receive California reciprocity after an oral exam, and doctors may be given a test on California ethics. California also has an iron-clad public policy favoring free competition in the professions: "Except as provided in this chapter,

every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void." Business and Professions Code Section 16600.

The California Bar Association has also recently admitted that lawyers licensed in other states are as equally competent as lawyers licensed in California.

This public protection attorney licensing issue that CAPA is studying is also not taking place on a small, isolated island in the middle of the ocean. Most of the CAPA members are lawyers. All lawyers know the U.S. Constitution was ordained to create a more perfect union and to establish justice. The central purpose of the First Amendment freedoms of speech, association and to petition the government for the redress of grievances is to enable the people to govern themselves. The Supreme Court has in recent years has filed many First Amendment decisions, overturning government restrictions that have stood for decades under the First Amendment, employing expanded esoteric content, viewpoint and speaker discrimination concepts. Many are familiar with the Supreme Court's decision in Citizens United holding that corporations have First Amendment rights. There are a host of similar cases holding that government-imposed restriction on the First Amendment freedoms, in the context of lawyers and judges, are subject to strict scrutiny review, where the government has the burden of proof.

CAPA members and the individual justices of the California Supreme Court have both been

provided with notice that the California bar exam for experienced is presently being challenged in *Lawyers United Inc. v. Roberts et al.*, District of Columbia docket 19-3222. This author is pro hac vice counsel. This 80-page lawsuit filed with extensive supporting exhibits challenges the Local Rules in 56 of the 94 U.S. district courts that deny reciprocal *general* admission privileges to out-of-state licensed attorneys based on forum state law, as in California. The remaining U.S. district courts generally do not discriminate for or against any class of lawyers. American soldiers are being sent off to fight wars in foreign countries and when they return to America they are being treated as foreigners in these 56 federal district courts. The law in these 56 federal district courts remain stuck in a "separate but equal" time warp. This subject will not be addressed in this column in light of space limitations.

Except, the plaintiffs in *Roberts* have submitted to CAPA and Article III courts empirical evidence excerpted from the State Bar reports that proves beyond any doubt that California 100% subjective entry-level bar examination that already licensed attorneys must hurdle is not a valid or reliable test according to nationally promulgated testing standards. This entry-level licensing test has a standard error of measurement greater than 50%. Numerous nationally recognized testing experts, including the State Bar's former testing expert Dr. Stephen Klein, have concluded that 100% subjective licensing tests should never be used in isolation for high-stakes licensing decisions, such as

a bar exam. This 100% subjective putative test is employed to fail two out of three licensed attorneys on the July bar exam.

The trait CAPA is seeking to identify is "entry-level competence" necessary for public protection. The ABA has concluded that already licensed attorneys are not a threat to the public and do not need to take another bar exam to establish entry level competence. The California legislature has already recommended reciprocal licensing for sister-state attorneys. The best evidence of entry level competence is actual experience practicing law. Many areas of law are not tested on a bar exam.

Based on the evidence, it is suggested that CAPA should recommend that the California Supreme Court adopt admission on motion for experienced attorneys with three years of experience. This is the standard adopted by the California Futures Commission and the ABA. It is consistent with California's treatment of other learned professions. Adoption of this standard will facilitate reciprocal admission on motion for California lawyers in other states.

On Monday, part two of this column will continue with an examination of the fairness of the present cut score for recent law school graduates. ■

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