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PERSPECTIVE

What will the California Attorney Practice Analysis group recommend?

By Joseph Robert Giannini

The ACLU of California, Impact Fund and California ChangeLawyers in a chapter and verse letter dated Sept. 23, 2019, sent to the California Supreme Court, aver that the California bar exam cut score has a “deeply troubling” disparate racial impact that decreases diversity in the State’s legal community and is inexplicably high. California Government Code Section 12944 prohibits licensing tests with disparate impact. These public interest groups further question

with their fiduciary duty to their clients to conform with the Rules of Professional Responsibility. A would-be lawyer disqualified from admission on the basis of an artificially elevated cut score is a member of the public who also deserves public protection. There is little difference to a victim between a highway robber who uses a gun to appropriate another’s property, and a licensing test that accomplishes the same with a highly subjective high-stakes licensing test that is not narrowly tailored to ascertaining entry level competence. It cannot be doubted

California bar exam is the California Supreme Court and the federal district courts in California that rely on it to determine federal admission. The user of the test to make the best decision must look at the pluses and minuses of any public protection measurement process in light of the big picture, including what it does with other profession, and what other states are employing in similar licensing paradigms.

The concept of *validity* has to do with whether the test measures the construct it is supposed to measure. For example, if a test for AIDS has a standard error of measurement greater than flipping a coin, it is by definition not a valid test. The concept of *reliability* is intertwined with validity and is concerned with repeatability of test results. Testing experts have concluded that reliability score of .85 is necessary. The concept of *fairness* seeks to identify bias in favor or against a particularly identifiable sub-group. For example, 1% of men are taller than 6’4” and 1% of women are taller than 5’10.” If the cut-off qualification for some occupation is 5’10”, than only 1% of women will qualify but more than 50% of men will qualify. This is the reason why according to testing standards cut off qualifications must be carefully and narrowly tailored to a particular entry level trait.

We already know that the 100% subjective tests that have been used to disqualify two out of three already licensed attorneys have a standard error of measurement greater than 50%. We further know

that testing experts have concluded that it is almost impossible to get subjective test readers to agree on the quality of an answer. If the state bar has failed two out of three experienced lawyers on fundamentally flawed entry-level subjective tests for years, and these subjective tests have a standard error of measurement greater than 50%, then these subjective tests which comprise 50% of the bar exam for recent graduates are not valid or reliable measuring devices. The experienced attorney pass percentage is consistent with the pass percentage of those minority groups that are righteously and lawfully complaining of disparate impact and lack of diversity at the bar.

The largest obstacle CAPA faces to a fair assessment to the bar admission process is not the overwhelming evidence of a fundamental need for change. The largest obstacle is the entrenched orthodoxy of a historically isolationist tradition. The vast majority of California lawyers oppose changing tradition that has provided them with a monopoly and the badge of “exceptionalism.” As Oliver Wendell Homes has stated, “it is in the nature of man’s mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.”

If the cut score is changed does that mean the present cut score in the past was not fair? It should not matter. CAPA’s commission is to

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whether the present bar exam cut score effectively measures minimum “entry-level” competence and request immediate action.

According to the chair and vice-chair of the State Bar Board of Trustees, the public is not now being protected because there is an enormous justice gap between the need for civil legal services and most people’s ability to access legal help.

The public consists of many classes of people, all of whom are struggling to survive in a market that rewards self-interest. Lawyers are the public’s voice of justice. Every lawyer admitted to the bar has an active and on-going self-interest to do their best and comply

that students facing tens of thousands of dollars in student loans, who have invested years in preparing for bar admission, deserve a full and fair opportunity in obtaining bar admission.

CAPA has been commissioned to study fairness and the cut score. With that in mind, nationally recognized testing standards have been developed by various educational and psychometric organizations and adopted by the courts. Several well-known testing concepts have been identified to weed out measurement error so that test users can make an informed decision. There is inherent measurement error in the testing process. The *user* of the

determine whether the present bar examination process is fair to ensure public protection for all people in light of the justice gap and Business and Professions Code Section 6001.1's purpose of increased access and inclusion.

Several converging lines of scientific evidence plainly demonstrate that California's having the second highest cut score does not have any meaningful relationship with fairness or providing public protection. Only Delaware has a higher cut score. According to the 2010 census, Delaware's total population was 897,934. Delaware does not have a single city with a population over 100,000. Delaware is famous for providing a welcoming domicile for corporations. One of out of eight Americans live in California. Comparing Delaware to California is a poor fit.

There is little meaningful correlation with having the "highest" standards, fairness and public protection. Many smoke marijuana to get high. It's legal. Many reasonably suggest the public is not protected by such laws. The question of fair standards and public protection is one of degree. Many famous musicians have been heroin users. James Taylor, Jerry Garcia, Keith Richards, Kurt Cobain are examples. Yet, one does not have to use heroin to be a good musician or to appreciate good music.

Similarly, Harvard and other elite Ivy League-caliber law schools may have the highest standards for admission. That does not mean that lawyers who graduate from an institution with lower

admission standards are not qualified or a threat to the public. The vast majority of California citizens did not graduate from an Ivy League institution and they do not need, want, or can afford an Ivy League graduate to represent them and vice-versa. One size does not fit all. Similarly, many outstanding lawyers and Supreme Court justices have not graduated from an ABA-accredited law school. Abraham Lincoln, Justices Benjamin Cardozo and Robert Jackson are examples.

A reasonable person might suggest the best evidence of a fair licensing process are the cut score standards in the states with the largest populations. Why? Science has provided clear and compelling evidence of the wisdom of the crowd as a mathematical fact. This process, while not new to the Information Age, has been pushed into the mainstream spotlight by social information sites that rely on collective human knowledge. An explanation for this phenomenon is that there is idiosyncratic noise associated with each individual judgment, and taking the average over a large number of responses will go some way toward canceling the effect of this noise. The classic wisdom-of-the-crowds finding involves point estimation of a continuous quantity. At a 1906 country fair in Plymouth, 800 people participated in a contest to estimate the weight of a slaughtered and dressed ox. Statistician Francis Galton observed that the median guess, 1,207 pounds, was accurate within 1% of the true weight of 1198 pounds. This has contributed to the insight

in cognitive science that a crowd's individual judgments can be modeled as a probability distribution of responses with the median centered near the true value of the quantity to be estimated.

A higher-than-average cut score is also not necessary in light of the cognitive science of expertise and expert performance, which demonstrates excellence is the product of experience and that it cannot be predicted. See K. Anders Ericsson, Ed., "The Cambridge Handbook of Expertise and Expert Performance" (Cambridge University Press 2006). K. Anders Ericsson is the leading pioneer in this cross-disciplinary field. Some say it takes 10,000 hours to develop true expertise in any field, taking the brain this long to assimilate all that it needs to know to achieve true mastery. Experienced experts surpass novices, those new to a profession, in seven major ways: (a) generating the best solution; (b) pattern recognition; (c) qualitative analysis; (d) self-monitoring skills in terms of their ability and knowing what they do not know; (e) choosing appropriate strategies; (f) seeing and exploiting opportunities; and (g) cognitive effort, meaning they work faster, with less effort, and greater control. *Id.* at 27. True expertise is based on pattern recognition skills that are intuitive and developed with experience, much like an athlete's skill increases from beginner, to novice, to professional. One does not reach the highest levels overnight. A high entry level cut score prevents on the job learning and diminishes market competition. A high cut score also arbitrarily

presupposes that an attorney who achieves a 135 cut score that is the median standard will categorically disserve their professional responsibilities as a member of the bar without a shred of evidence.

The undisputed evidence presented by the ACLU of California, Impact Fund and California ChangeLaw shows that a cut score of 135 will increase diversity. Science proves diversity increases fitness (more minds at work), innovation (creativity), levels of trust, and robustness in organizations; diversity reduces error because all of us together are smarter than any of us individually; it prevents dominant coalitions from taking over because everyone has the opportunity to participate. Societal advancements are often the product of cross-pollination between fields. The subject of diversity encompasses more than differences in skin color, national origin, gender, ethnicity, age, or sexual orientation. It also includes diversity in life experiences.

The question presented is what will CAPA do in light of indisputable evidence that the present California licensing process is an outlier, not remotely fair, it decreases diversity, promotes exclusion, and it is not lawfully tailored to public protection? ■

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