Blue Ribbon Commission on the Future of the Bar Exam

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Re: Public Comment for January 4, 2022 hearing

To The Commission:

Recent BRC hearings leave unanswered some important questions. This public comment will address the "all or none unanswered question" and the issue of whether California should devise its own bar examination.

First, the question is whether the *BRC* should deny reciprocity to all sister state attorneys and not adopt the UBE because some states may deny comity to California's licensed lawyers who are not ABA accredited graduates or attorneys licensed without taking a bar exam?

It may be helpful to review information presented to this BRC by some of its own members and other experts presenting their findings. The purpose of the *California Attorney Practice Analysis Working Group* (CAPA) was to take a fresh look at the knowledge, skills, and abilities needed by entry-level attorneys in

California to practice law ethically and competently. The *Standards* definition of licensure, provides:

> The process by which an agency of government grants permission to persons to engage in a given profession or occupation by certifying that those licensed have attained the minimal degree of competency necessary to ensure that the public health, safety and welfare will be reasonably well protected. *Standards*, p 7)

The California legislature has also weighed in on the issue by defining public protection, as set forth in BPC 6001.1[1] and BPC 6001.3 (a):[2] "Public protection" thus means "greater access to, and inclusion in, the legal system" and to "enhance access, fairness, and diversity in the legal profession and the elimination of bias in the practice of law." The Bar's 2019 study reports 85% of Californians get no help or inadequate help for their legal problems. State Senator Umberg has recently told the Daily Journal: "Disputes that are less than $300,000 can't be solved because they are too expensive." *See* Daily Journal P.3 December 22, 2021.

Based on the BRC purpose, the definition of licensure, the California legislature's definition of public protection, the first order of business should be the California goals of increasing access, decreasing bias, and increasing diversity in California. How other states treat California lawyers and citizens is secondary and far less important than how California treats its own citizens.

The Hon. Glen Reiser has stated in his long experience serving on the California bench that attorneys licensed elsewhere and admitted *pro hac vice* were always competent. The reason is obvious. They have a self-serving interest in their

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[1] "Protection of the public, which includes support for 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, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount."

[2] "It is the intent of the Legislature that the State Bar maintain its commitment to and support of effective policies and activities to enhance access, fairness, and diversity in the legal profession and the elimination of bias in the practice of law."

own competence and financial future. Their clients also have a self-serving interest in hiring the most experienced and qualified attorney they can find regardless of geographic location. We can call this prior experience practicing as a lawyer — "the best evidence rule."

Likewise, Prof. Merritt has told this BRC that best evidence of "competence" is experience practicing law. As Prof. Merritt stated licensed lawyers know how to "fish."

Likewise, Dean Howarth has recommended that this BRC "License lawyers through clinical residencies, not written exams." She confirms the best evidence rule and submits the public comment:

> "Why would you ever operate on someone for the first time as a doctor? Please do it observing and a thousand times before I'm put under. It's the same thing with a lawyer, right? . . . You need hands on experience."

The "all or none" question is a red herring that undermines the "best evidence rule." It is fundamentally "unfair" to lump already licensed attorneys with recent law school graduates who have never practiced law because the cognitive science of *expertise* and *expert performance* proves over and over again that 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. Cognitive scientists have concluded that 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.

It is also fundamentally unfair because the science of *expertise* and *expert performance* proves that it is well known that 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.

Historically, there have been two justifications for rejecting the best evidence and denying reciprocity to out-of-state licensed attorneys: Competence and public

protection. The CAPA Commission admitted attorneys licensed in other states are not less competent or trustworthy than attorneys licensed in California. There is no evidence that California's licensed lawyers with less than three years of experience are more or less competent and trustworthy than attorneys licensed elsewhere for less than three years. If all men and women are created equal, it follows all attorneys are created equal. To suggest that an already licensed attorney who has passed an entry-level bar exam in another state has less knowledge, skills and abilities than a California licensed lawyer who has passed an entry level turns the "best evidence rule" on its head.

If California wants other states to adopt and grant admission to its non-ABA accredited graduates, then the first step is for California to accept comity with other states. The Fourteenth Amendment, like the Constitution itself as Justice Cardozo famously put it, "[is] framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 523 (1935)

This BRC should also adopt the UBE. Dean Howarth recommends portability and uniformity as an important goal. The UBE allows all states to determine who is and who is not permitted to sit for the UBE exam. Thus, if California adopts the UBE process, all of its bar applicants will be subject to this uniform licensing examination. This will enhance their status and increase diversity and decrease the Justice Gap.

The argument that a non-ABA California accredited graduate who exceeds the UBE qualifying score in another state should be denied reciprocity is virtually identical to one state saying to another state that we are not going to recognize your marriage licenses because we don't believe non-ABA accredited graduates should be treated equally in our state. This, by definition, is a licensing barrier erected by one state against citizens from another state. The United States Supreme Court has repeatedly held as a matter of law that an out of state attorney's opportunity to practice law is a *fundamental right and constitutionally protected*. The Supreme Court has repeatedly held that it will not presume that licensed attorneys will violate the rules of professional conduct or betray their public trust or not familiarize themselves with local law. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Frazier v. Heebe*, 482 U.S. 641 (1987). The Supreme Court has recognized: "Many of the states that have erected fences against out-of-state lawyers have done so primarily

to protect their own lawyers from professional competition. ….This reason is not 'substantial.' The Privileges and Immunities Clause was designed primarily to prevent such economic protectionism." *Piper*, 470 U.S. at 285 fn. 18.

An attorney licensed without taking a bar exam presents a more complex question, but the answer is the same. For example, in Wisconsin, this BRC was informed an out of state citizen who graduated from a law school not located in Wisconsin challenged the "diploma privilege." It was not told the Seventh Circuit held that he stated a claim, remanded, and the case was settled. My understanding is the applicant was admitted. Abraham Lincoln and Justice Cardozo and Justice Robert Jackson did not graduate from ABA accredited law schools and they are widely recognized in the highest echelon.

If the United States Supreme Court will not presume out-of-state licensed lawyers will violate their professional responsibilities or not familiarize themselves with local law as in *Piper* and *Friedman*, for the California Supreme Court Justices and this BRC to presume the opposite without substantial empirical admissible evidence is evidence of "economic protection." Economic protection is not a legitimate state interest.

The second question is whether California should adopt its own bar exam? On September 4, 2021, Dr. Bolus in a slide presentation, discussing replacing the MBE listed the following challenges:

> Cost!!!
> Creating and managing a qualified initial development team
> Length of time to develop & implement
> Establishing the psychometric quality & characteristics of the test
> Creating organizational infrastructure
> Design & test new content
> Maintain technical & psychometric quality
> IT support
> Test security
> Training
> Establishing the meaning of scores relative to other states examination performance.

It is not feasible or practical for California to pioneer and develop its own bar exam separate and apart from the rest of America. Dr. Montez and Dr. Henderson have stated any test designed would have to conform to the *Standards*. *The*

Standards for Educational and Psychological Testing, (2014), Published by the American Educational Research Association, American Psychological Association, and the National Council on Measurement in Education) (*Standards*) have been incorporated into federal law*; see* 34 CFR 668.148(a)(2)(iv**) (“**This document [*Standards*] has been duly INCORPORATED BY REFERENCE into federal regulations and shall be considered legally binding upon all citizens and residents of the United States of America.) In *AMERICAN SOC. FOR TESTING v. Public. Resource. Org*, 896 F. 3d 437 – D.C. Cir. 2018, the publisher of the *Standards* was a party and the Court held its *Standards* were published in the federal register and incorporated into federal law”) *Affirmed Georgia v. Public. Resource. Org, Inc*., 140 S. Ct. 1498 (2020).

The Standards were developed to “provide criteria for the development and evaluation of tests and testing practices and to provide guidelines for assessing the validity of interpretations of test scores for the intended test uses…. All professional test developers, sponsors, publishers, and users should make reasonable efforts to satisfy and follow the *Standards* and should encourage others to do so. All applicable standards should be met by all tests and in all test uses unless a sound professional reason is available to show why a standard is not relevant or technically feasible in a particular case.” *Id*. at 1.

The *Standards* incorporate three benchmarks: *validity, reliability, fairness*. The probability that a brand-new entry level licensing test designed by the State of California will meet the *Standards* is slim and none. It will require both reinventing the wheel and puncturing the tires of the National Conference of Bar Examiners and the UBE tests presently used in 38 states. The UBE states have already determined that familiarity with local law should not be a condition precedent for an entry level licensing test. Any attorney can look up the necessary state law. What some states have done, including Arizona, is use the UBE and then require the applicant to attend a one-day course on Arizona state law. This same paradigm can be easily adopted in California.

Some on this BRC may also recollect that many licensing experts have opined that the present California 100% subjective tests given to already licensed sister-state attorneys fails to meet licensing *Standards*. *See* Stephen P. Klein, “What Do Test Scores in Texas Tell Us?” (Published 2000 by RAND) Dr. Klein admits:

> “Our research results illustrate the danger of relying on statewide test scores as the sole measure of student achievement when these scores are used to

make high-stakes decisions about teachers and schools as well as students. We anticipate that our findings will be of interest to local, state, and national educational policymakers, legislators, educators, and fellow researchers and measurement specialists."

Likewise, Dr. Susan Case, the Director of Testing for NCBE, avows that non-multiple choice format tests, such as *essay* and *performance tests* "because of their limitations, such as low reliability, lack of anonymity, and lack of standardization, should not be used in isolation." *See* Susan M. Case, "Licensure In My Ideal World," *The Bar Examiner*, p. 27 November 2005.

Dr. Tracy Montez has repeatedly said the same thing and stressed the California Board of Consumer Affairs is moving always from subjective tests. She has also stated is "uncomfortable" with California low bar exam passing percentage.

Likewise, Dr. Geoff Norman is a nationally recognized testing expert with over 30 years of experience. Dr. Norman is one of the experts writing a chapter in the *Cambridge Handbook of Expertise and Expert Performance*. Dr. Norman writes:

"Study after study has shown that it is almost impossible to get judges to agree on scores for essay answers."

See "So What Does Guessing the Right Answer Out of Four Have to Do With Competence Anyway?" *The Bar Examiner*, p. 21 (Nov 2008).

In sum, this BRC should recommend the California Supreme Court to adopt both the UBE and reciprocal admission on motion for all licensed sister-state attorneys with three years of experience and require the attendance of a one-day class on California law. The ABA has recommended three years. To do otherwise, trespasses the delegated purpose of this Commission as well as the California Legislature's definition of public protection set forth in BPC 6001.1 and BPC 6001.3 (a). Many members of this BRC have expressed an intent that California should be a national leader and a beacon of light for other states to follow. The time to act is now. California should join the rest of our Union.

Please contact the undersigned if I can be of any further assistance. Thank you for your consideration and attention.

Respectfully submitted,

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