

April 10, 2023

Blue Ribbon Commission on the Future of the Bar Exam
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Blue Ribbon Commission on the Future of the Bar Exam - Report and
Recommendations

Dear Members of the Blue Ribbon Commission:

On October 11, 2022, we submitted comments on behalf of the California Lawyers Association (CLA) expressing our concerns with the proposal that was under consideration by the Blue Ribbon Commission (BRC) to establish a “non-exam pathway” for licensure to practice law in California as an alternative to the California Bar Exam. CLA urged the BRC not to recommend a non-exam pathway. At the same time, we encouraged the BRC’s continued exploration of other issues under consideration, including potential revisions to the California Bar Exam.

We have reviewed the BRC’s March 7, 2023 Report and Recommendations. As an initial matter, CLA commends the tremendous effort of the BRC and the work that went into preparing the Report and Recommendations. We note that no consensus could be reached on a bar exam alternative pathway and that none of the five separate motions voted on was able to garner a majority of commissioners present and voting. Therefore, as of the writing of the Report and Recommendations, the BRC is not advancing any recommendation regarding a bar exam alternative.

CLA endorses the determination to not advance any recommendation regarding a bar exam alternative, specifically what has been referred to as a “non-exam” pathway. As we stated in our previous comments, CLA is concerned with an alternative pathway to licensure that would eliminate testing entirely as a method of determining minimum competence. Our concerns are set forth below.

1. A Non-Exam Pathway Would Eliminate Any Form of Objective Testing

We recognize that the current California Bar Exam is not a perfect method of measuring the qualities, training, and capabilities necessary to ensure that an individual is competent to practice law in this state. The bar exam is, however, an objective and controlled test. A non-exam pathway would eliminate testing entirely as a method of

determining minimum competence. Instead, various proposals would rely upon other elements, including a combination of experiential education units and post-graduation, supervised practice.

A non-exam pathway would not ensure substantive knowledge of foundational legal concepts, legal writing skills, or analytical skills under an objective and uniform standard. Experiential education and supervised practice would vary widely and allow licensure based on vague and subjective standards. Given these wide variations, the State Bar would not be able to implement a single standard of competence. In addition, experiential programs are generally designed to achieve completion of the program, or some set number of hours, which is fundamentally different than testing minimal competence. We believe consumers of legal services will not be adequately protected if there is no requirement that a person seeking to be licensed to practice law in California demonstrate a basic working knowledge of key legal principles and concepts under some objectively measurable standard.

2. A Non-Exam Pathway Raises Significant Implementation and Integrity Concerns

CLA is concerned about the ability to implement and maintain the integrity of a non-exam pathway.

A non-exam pathway could open the door to supervision by unqualified and potentially unscrupulous law firms and lawyers. Experience with Ontario's Articling Program, an experiential training component of their lawyer licensing process, illustrates the nature of these concerns. *Options for Licensing*, the May 24, 2018 consultation paper from the Law Society of Ontario, Professional Development & Competence Committee, noted that the "power imbalance inherent in articling can lead to abuses." (*Options for Licensing* at p.11.) A survey conducted about the program revealed the extent to which candidates were subject to sexual harassment, as well as racial, gender, and other forms of discrimination, and felt they had received differential or unequal treatment due to personal characteristics.

Even without actual misconduct by supervising lawyers, there are considerable questions and concerns relating to approval, oversight, and consistency of supervising lawyers. As noted in the Ontario report:

The nature of the articling experience depends on the individual circumstances of the candidate and the Articling principal, and therefore consistent exposure to competencies can be an issue.

(*Options for Licensing* at p.11.)

Finally, we note that effective monitoring and quality control of experiential programs will be time-consuming, labor intensive, and costly. We question whether sufficient resources would be available to adequately ensure that individuals licensed to practice through such programs are competent to practice law in this state.

3. A Non-Exam Pathway May Have an Adverse Impact on Efforts to Increase Diversity in the Legal Profession

CLA's mission is promoting excellence, diversity, and inclusion in the legal profession and fairness in the administration of justice and the rule of law. We are deeply committed to increasing diversity in the legal profession and understand that one goal of establishing a non-exam pathway would be to increase diversity within the profession. We believe that establishing a non-exam pathway is not the right way to increase diversity and that it could—at least indirectly—exacerbate the problem.

Given the sheer number of California licensure applicants every year, we anticipate a gap between the demand for supervisors and the available opportunities to secure a supervisor. It is likely that the demographics of the pool of available supervisors would skew toward those who are currently the most represented in the legal profession and against those who are the least represented. Some may easily secure a colleague or have ready access to a supervisor while others may be far removed from any such possibilities. Equity issues related to securing a supervisor could therefore create a two-tiered system, undermining any effort to increase diversity in the profession.

4. CLA Supports the Pursuit of Other Potential Reforms to the Bar Exam

After lengthy deliberations, the BRC has recommended continued use of a bar exam to assess minimum competence, and development of a California-specific exam. CLA supports this recommendation. CLA endorses continued exploration of ways to ensure that the bar exam is an effective tool for testing the knowledge, skills, and abilities required of entry-level California attorneys. Consistent with the views CLA has expressed elsewhere, such as in connection with the work of the California Civility Task Force, CLA supports proposals aimed at improving civility in the legal profession and encourages further exploration of including in a revised bar exam a function to test civility in the practice of law. Finally, CLA strongly endorses the recommendation that the design of the bar exam be consistent with the guiding principles adopted by the BRC, including crafting an exam that is fair, equitable, and minimizes disparate performance impacts based on race, gender, ethnicity, disability or other immutable characteristics.

The impact of bar exam reformation efforts should be studied before California introduces an entirely new process that would eliminate the bar exam. Ultimately,

experiential education or post-graduation, supervised practice may be a desirable component as an adjunct to, but not a substitute for, the California Bar Exam.

We appreciate your consideration of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Evans', with a stylized, cursive flourish.

Jeremy M. Evans
President