New York State Bar Association
Committee on Legal Education and Admission to the Bar

Recommendations for Implementation of the Report of the Special Committee to Study the Bar Examination and Other Means of Measuring Lawyer Competence

To: The NYSBA Executive Committee
February 2012

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Introduction

In the summer of 2011, the NYSBA Committee on Legal Education and Admission to the Bar was asked to report on how a recent set of recommendations regarding the New York Bar Exam might be advanced. The Committee has now had a rich and lively discussion about some of our profession's most important issues relating to admission to the New York bar during a time of almost unprecedented public attention to legal education. While the bench and bar have long expressed concern that law graduates and young lawyers are not adequately prepared for the practice of law, that concern has been spotlighted by the downturn in the economy, changes in the legal marketplaces and escalating, often crushing, student debt. Over the past months, there has been unprecedented media coverage highlighting these issues, which have even drawn sustained attention from several United States Senators.

These are complex issues and there is much room for reasonable divergence of views, as this report reflects. But the Committee begins with widespread agreement that law graduates can and must be better prepared for our ever changing profession. The challenges of today and tomorrow demand creative lawyers with deep knowledge, a broad range of skills, and insight into the values that undergird our role. The Board of Law Examiners maintains, and the Committee agrees, that despite the many strengths of the current Bar Exam, it cannot directly test the full range of skills good lawyers need. The recommendations in this report are modest proposals that, if undertaken, would at least incrementally broaden the linkage of licensing to more of the skills with which young lawyers must be conversant.

The Committee also agrees that responding to these complex issues will likely require change from all. This report focuses on the New York Bar Exam, reflecting the charge to this Committee from the Executive Committee of the Association. But we have already agreed that we must also continue our discussion of law schools, the role of the organized bar, governmental actors and others. These problems require collaboration among many stakeholders.

Background and Charge to the Committee

As a profession, lawyers are committed to continuous improvement. The organized bar has long been a locus for those aspirations. In recent years, committees of the New York State Bar Association and the Association of the Bar of the City of New York have issued reports suggesting how to chart the way to a more capable, diverse bar while recognizing the value of the New York State Bar Exam and the critical role of the Board of Law Examiners (BOLE). Those reports include specific recommendations which address important questions and incorporate current best thinking and practices in professional licensure. Among the most recent and comprehensive of these reports was the New York State Bar Association's Special Committee to Study the Bar Examination and the Other Means of Measuring Lawyering Competence (hereafter called the "**Kenney Report**" after its Chair, John J. Kenney, Esq.) issued on September 13, 2012. A complete list and discussion of the valuable committee reports upon which the Special Committee relied can be found on pages 15-22 of the Kenney Report.

The Kenney Report noted, in sounding one of its major themes, that "although the current exam does an adequate job of testing knowledge of the law, legal analysis and legal writing, it remains much too heavily focused on test takers' ability to memorize an enormous volume of legal rules and principles rather than to deploy other important skills." Kenney Report at 4. That report suggested changes that would help assess a broader range of skills and could also help to ameliorate some of the burdens placed on applicants of lower socioeconomic status. The Report recommended two sets of reforms:

> (1) "streamlin[ing] [of] the current exam to test more realistically for knowledge of legal rules that lawyers need to memorize before beginning practice"; and
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> (2) "experiment[ation] with ways for testing other important skills not covered by the current exam," with the particular goals of (a) "identifying and admitting those students who will be competent lawyers but are unable to pass the bar examination without great difficulty under the existing regime," (b) "identifying additional requirements that can be tested using time and effort saved by modifying the existing exam," and (c) "identifying requirements that law schools can satisfy." *Id.*

The Special Committee identified the following four specific proposals "as illustrative of ideas that may be worth further consideration":

1. The possibility of conditional licensing, whereby new members obtain a conditional license to practice, and would have an opportunity to seek full licensing later based on additional instruction and training.

2. The development of new evaluation techniques to assess legal knowledge, skills and values. Such new evaluation techniques could take advantage of resources such as the learning from clinical courses in law schools.

3. A public service alternative exam. Such an exam could significantly ameliorate exclusionary effects of the current bar licensing process.

4. A point boost program. Such a program could provide credit for a successfully completed clinical experience in an accredited law school under faculty supervision and duly certified by the faculty.

Id. at 5. The Kenney Committee explained that these four proposals "focus on persistent concerns regarding the bar exam process that could potentially be addressed in a more effective fashion" and that the proposals recognize "the wide variety of skills required for lawyer competency," "the fact that there may be multiple paths to acquiring such skills," and that there have been persistent concerns about "issues that arise in relation to the bar exam and minority candidates." *Id.* at 4.

The Executive Committee of the State Bar Association referred the Kenney Report to the

Association's Task Force on the Future of the Legal Profession and the Committee on Legal Education and Admission to the Bar for further study, with instructions that the two groups should report back to the Executive Committee by November 2011.

The Task Force on the Future of the Legal Profession, which issued its final report on April 2, 2011 and thereafter "sunsetted," made the following recommendations with regard to the Kenney Report:

> [W]e recommend that the Legal [Education] and Admission to the Bar Committee of NYSBA give very serious consideration to the analysis and recommendations of the Kenney Report. In particular, we urge attention to the very difficult issue of disparate results for test takers of color and note recent work suggesting that purely situational factors may play a larger role than previously thought in the underperformance of certain groups. We also urge experimentation to build capacity to expand the scope of competencies assessed. Valid testing is complex and demanding. The urge to leave well enough alone in so technical an area is strong and rapid change is probably unwise. But we must seriously examine our assumptions about the Bar Exam if we are to make progress in meeting the challenges we face.

New York State Bar Association, Report of the Task Force on the Future of the Legal Profession 52-53 (April 2, 2011) (footnote omitted). While the Task Force thus focused attention on concerns about "disparate impact," "situational factors," and the "competencies assessed" in the Bar Exam itself, the Task Force also devoted considerable attention to the question of how legal education might better prepare new lawyers for practice.

In response to the Executive Committee's referral, the Committee on Legal Education and Admission to the Bar has discussed the Kenney report and related issues in meetings of the full Committee and in a series of subcommittee meetings. Our discussions have persuaded a majority of Committee members that recent developments in our profession and in legal education make modest and promising reform of the Bar Exam both timely and promising. Many members are persuaded that advances in the theory and practice of professional assessment and licensure open up new possibilities that are directly responsive to current calls for increasing both access to and the quality of the legal services our profession delivers to our communities, although a variety of concerns and reasonable differences of opinion persist. The Committee worked hard to understand where we agreed and, when we did not, the sources of our different views. In this report we offer both our recommendations and, where we could not reach agreement, a summary of the varied insights offered by members. We hope the Executive Committee will find our work useful.

Before moving on to the specifics, we must acknowledge that much careful thought and discussion are behind our report and recommendations. Of course, most of the work was done by others, including the Kenney Report drafters, those upon whom they relied and others who have thought and written about this area. We stand at the end of a long line of careful deliberation and have benefited greatly from the work of our colleagues.

I. *Implementation of the Kenney Report's Recommendation to Revise the Content of the*

Bar Exam

The Kenney Report recommended that the current exam be "streamlin[ed] . . . to test more realistically for knowledge of legal rules that lawyers need to memorize before beginning practice." Kenney Report, at 4. After lively deliberation, there remains wide difference of opinion on the Committee about "streamlining." As a preliminary matter, Committee members hold different views on how to best characterize the breadth of the current exam or even the number of subjects it tests. [1] Some think it evident that we now rely too much on testing a candidate's ability to memorize an overly technical set of legal issues chosen more by history than by a careful analysis of the needs of new lawyers in our profession today. They emphasize that contemporary lawyers almost always have ready access to legal materials and argue that reducing the role of doctrine committed to memory will create space for testing other skills and aptitudes.

Others see the current exam as a dynamic, validated instrument that tests the cognitive core of lawyering. They highlight that the New York portion of the exam, as distinguished from the Multistate portion over which the BOLE has no direct local control, tests important, New York-specific issues. They note that the BOLE regularly receives requests to add yet more subjects. And, they point out, the bulk of the New York portions of the exam consist of essay questions, where answers are evaluated for the strength of the analysis, not merely for recitation of memorized facts. They express confidence that those who identify the correct principles and issues can attain a passing score even if those candidates cannot recall every bit of the legal minutiae, and they consider the current exam to test a core of cognitive skills as well as knowledge of the law.

Not surprisingly, divergent views of the impact and role of the exam flow from the different characterizations of the exam. Generally, those who see the exam as stressing memorization worry that too many applicants who would be fine lawyers cannot devote resources and time to intensive preparation immediately before the exam. Such disadvantage is most likely to fall on minorities and persons of low socio-economic status, and thus negatively impact the commitment to increasing the diversity of the bar which has been such an important goal of the NYSBA. They also understand the content of the exam as among the most powerful incentives for law schools and law students to continue to focus too much on doctrinal work. On this view, the current system unwisely slows the growth of a more integrated law school curriculum that would be responsive to the widespread calls for melding theory and practice needed to help young lawyers better respond to contemporary demands.

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[1] The effort to categorize, list and describe the law has confounded many deep thinkers over the years. The Board of Law Examiners lists 13 subjects as those currently tested on the New York portion of the exam. This is a reduction from the list of 23 subjects formerly provided by the BOLE. But some question the significance of that change from the perspective of test takers, many of whom continue to study a large, varied set of technical topics such as remedies, UCC Articles 3 and 9, partnership, no-fault insurance, federal civil jurisdiction and procedure, and workers compensation as part of their New York-focused bar review work, while not considering any type of administrative law, anti-discrimination or civil rights law, laws relating to intellectual property, or any area of international law.

While others agree that diversity is critical and that law schools must better prepare young lawyers, they view the bar exam as only tangentially related to these issues. They argue that diversity is much better pursued through other programs and that law schools should be reformed directly rather than by the indirect and uncertain route of changing an exam that has served the New York Bar so well for so many years. On this view, the problem is not the exam; the problem is that law schools are not meeting the challenge of graduating students who are ready for the profession. The exam is just the messenger, not the problem.

Committee members agree that the current bar exam is a reliable test, professionally developed and administered. Committee members also agree that a thorough understanding of key doctrinal areas, the ability to analyze and apply legal rules, and the ability to express this analysis clearly and precisely are core attributes of the profession. Disagreement on whether and how to streamline the bar exam includes disagreement on the value of the extent of memorization candidates do to prepare for the exam and whether the current exam tests core concepts or detailed recollection of specialized rules.

Positions on whether or not to streamline the bar exam were, for some, strongly connected to views about whether law schools are currently providing the necessary preparation for students in the skills and knowledge tested on the bar exam. Others expressed the opinion that the content of the bar exam drives law school and law student choices about what to teach and what to take in law school, concurring with the Kenney report that streamlining the current exam will leave space for testing some of the many other skills necessary for competent practice.

While there is much difference of opinion, the Committee does note that since there is no current impetus to change New York's use of the Multistate Bar Exam (MBE), both the depth and breadth of doctrine of the six subjects tested on the MBE must be treated as a given.[2] Thus, the debate on streamlining occurs within the confines of the portion of the New York Bar Exam under the BOLE's control. Any effort to reform the MBE is quite distinct from the changes discussed in this report. The doctrine currently tested on the bar exam is a function of three components of the New York Bar Exam: (1) the doctrine tested in the six MBE subjects on the MBE portion of the exam, (2) the New York "distinctions" (i.e., the New York rules) for the six subjects on the MBE portion of the exam, and (3) the New York law tested on the New York short answer (multiple choice) questions and the New York essay.

Noting the disagreement among Committee members about whether change is warranted, we offer a more practical observation about the Kenney Committee recommendation that the State Bar "appoint a Standing Committee" to advise the Board of Law Examiners on the content of the bar exam. Although we did not reach full consensus, a substantial majority agreed that it was crucial to think concretely about how a new "Standing Committee" would fit into the current scheme of regulation and consultation in this area. While the Kenney Committee endorsed the creation of a "Standing Committee" charged with working with the BOLE to assure that the New

[2] The Committee notes that the NCBE is considering the addition of a section on Civil Procedure, as well as a test of candidates' Legal Research skills. With respect to Legal Research, implementation of a closed or virtual, open library might enable examiners to test both the attainment of research skills and candidates' ability to spot and analyze issues in doctrinal areas without requiring resort to memorization.

York portion of the Bar Exam focuses on the information with which new attorneys must be familiar when embarking on relatively unsupervised general practice, this Committee grew concerned about the workability of that formulation.

We emphasize that our Committee's recommendation is for a time-limited New York State Bar Association Taskforce composed of practitioners from varied private and public settings around the state including clinical professors engaged in practice, to provide input and suggestions to the Board of Law Examiners on the legal knowledge and skills necessary for competent practice by new lawyers. We recognize that this Committee has neither the mandate nor power to create another layer of authority with respect to the bar exam. The Taskforce envisioned by those on the Committee who seek its creation would be a resource to explore and collect information and empirical data to better ensure, through collegial dialogue with the BOLE (itself largely composed of practitioners), that the exam emphasizes those general rules, principles, and practice points that new lawyers must know to practice competently.

II. *Implementation of the Kenney Report's Recommendation to Develop New Evaluation Techniques to Assess Legal Knowledge, Skills and Values.*

A. Criteria-Referenced Assessment of Lawyering Skills and the Future of the NY Bar Exam

Bar exam reform advocates bear a heavy burden. They must demonstrate that any new version of the licensing exam will be fairly and consistently evaluated. Candidates and the public must have confidence in the results. While expanding the range of assessment is a challenging task, it is also one many Committee members believe we are now well positioned to advance. While some voice concern about compromising the psychometric validity of the current exam, many think those concerns can be addressed. While both the reality and perception of the fairness of the licensing process are of foundational importance, some Committee members are also quite concerned that technical issues of test validity not drive our shared professional vision. Not everything worth knowing is subject to exact measurement, nor is everything measurable worth knowing.

Over the last ten years, American education has learned a great deal about student assessment[3] at all levels.[4] More recently, the Carnegie Report,[5] Best Practices[6] and likely revisions of the ABA Accreditation Standards[7] have all spurred significant interest in assessment among law faculty. There is a growing understanding of how law schools can improve student

[3] Diane Ravitch, The Death and Life of the Great American School System (2010).
[4] Catherine Palomba & Trudy Banta, Assessing Student Competence in Accredited Disciplines (2001).
[5] http://www.carnegiefoundation.org/publications/educating-lawyers-preparation-profession-law
[6] http://cleaweb.org/best-practices
[7] http://www.americanbar.org/groups/legal_education/committees/standards_review.html

assessment.[8] An active community of scholars and teachers are engaged in developing and refining assessment practices.[9]

One important area of development has been in the assessment of lawyering skills beyond analytic reasoning and the important subset of skills well tested by essay and multiple choice exams. Many law faculty, particularly clinicians, have applied lessons learned in other professions to develop useful tools to assess student competence in clusters of important lawyering skills, such as interviewing, counseling, oral advocacy, negotiation, mediation and similar activities. Many of these tools share a core of features that are important hallmarks of good student assessment in professional schools.

These **criteria-referenced assessment**[10] tools start with the **explicit identification of student goals**. Building on more than thirty years of scholarship about lawyering, the assessment project begins with identifying the core, transferable skills or abilities a student should display to demonstrate competence in a given area. For example, it is widely recognized that successful legal interviewing requires the ability to form and intentionally sequence combinations of open and closed questions. Thorough, useful, responsible interviewing is also characterized by movement through one of several possible sequences of topics (e.g., incidents of professional relationship, problem identification, goal definition, fact development, potential legal theories, initial plan or advice, identification of next steps), the abilities to manage both factual and emotional content, to be able to identify and work with relevant legal theories, to identify and respond to ethical and role issues, and to accomplish a limited set of other tasks. Thus, when teaching legal interviewing, the careful teacher identifies a set of specific goals the students should achieve or, to put it another way, a set of specific competencies the students should display at the end of the teaching and learning episode. *Goals must focus on what the student will be able to do in the end, not what the teacher does during the class.*

Once goals have been established, the teacher is well positioned to define the criteria by which students will be measured. Contemporary legal education tends to measure students against each other, particularly when grades are "curved," as they are for almost all first year law students. So one way of measuring student progress toward educational goals is to line the students up, relative to one another, from highest performing to lowest performing. This is useful to make judgments about students' performances as they compare to each other. This is **norm-referenced assessment**.

Another approach, contrasting with norm-referenced assessment, is to measure student performance against subject-based criteria. In this approach, student performances are evaluated for evidence that a student is competent in a given domain in the sense of determining whether or not the student is able to perform a given task, or set of tasks, to an identified standard. The approach of **criteria-referenced assessment** is described this way in Best Practices:

> Criteria-referenced assessments rely on detailed, explicit criteria that identify the abilities students should be demonstrating (for example, applying and

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[8] ABA Section of Legal Education, Report of the Outcome Measures Committee (2008).
[9] We attach a selected bibliography on Student Assessment in Appendix 1.
[10] Roy Stuckey, Best Practices at Ch. 7, (3)(C), available at: http://cleaweb.org/best-practices.

distinguishing cases) and the bases on which the instructor will distinguish among excellent, good, competent, or incompetent performances. "Ideally, criteria should be subject-based and geared specifically to the assessment to which it relates." [11]

If one goal of a legal interviewing class is for students to have the ability to form and intentionally sequence combinations of open and closed questions, the teacher would develop criteria reflecting that goal. In other words, students would be assessed on whether or not they plan to and actually employ an appropriate spectrum of open and closed questions when they interview. The criteria would also focus on whether the sequencing is logical and appropriate to the settings and goals – that is, on whether they purposively move (or plan to move) from open to closed questions to develop factual detail, whether they move from closed to open questions to address issues of motivation or novel topics and so on.

Contemporary assessment of professional skills and values across a range of professions has two core elements. The first is a set of goals that focuses on what the student does, not what the teacher does. The second is the use of criteria that accurately specify the desired competencies. We attach a small selection here to offer a sense of this growing field, but we do not yet endorse any particular tool or model of criteria-referenced assessment.[12]

The development of criteria-referenced assessment has gone hand in hand with **portfolio style assessment**. The basic idea of portfolio assessment is that a student produces a range of work over the course of a semester or other time period. The work might include simulations of lawyering episodes captured on video, live client/real matter interactions recorded or observed in real time and a variety of written products produced both individually and in small groups. Each item is subject to criteria-referenced assessment close in time to the performance and the whole set can then be evaluated to get a comprehensive overview of the student's competence. The student's work is also available for assessment by others which can be a great aid in training teachers and evaluators and in validation studies.

Many members of the Committee are persuaded that properly done, criteria-referenced assessment, particularly in the case of a well structured portfolio, addresses gaps in our current assessment practices. First, it is responsive to the call for assessment that measures important lawyering skills beyond analytic reasoning and associated skills, all of which are important but incomplete. While there is not perfect agreement among experts about the proper formulation of goals and criteria across all lawyering activities, there is fair agreement about a well accepted core. There are already a number of useful examples of goal driven, criteria-based assessment tools for a number of important lawyering activities, including: client interviewing, fact witness interviewing, basic client counseling in both litigation and transactional settings, two party negotiation, trial advocacy, appellate advocacy, mediation and legislative advocacy. This is not an exhaustive list, but it certainly offers enough opportunity for insight into much that we demand of young lawyers today.

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[11] *Id.*

[12] We attach some sample assessment material in Appendix 2. Other examples are discussed at: http://lawteaching.org/assessment/rubrics/index.php ; http://www.albanylaw.edu/sub.php?navigation_id=1753

Second, carefully done, criteria-referenced assessment offers a transparent and fair method of assessment. Student performances can be preserved as video and documents. These products can be reviewed by others and intergrader reliability can be measured and used as feedback. Much work has already been done to develop goals and criteria for a variety of lawyering skills.

Others noted concerns with these newer modes of assessment. One concern, widely shared among the Committee, was the work that remains to be done to implement this promising idea. Although much has been done, these methods are very much still a work in progress and require substantial additional development. A second concern that seems less widely shared is whether these assessment methods can be fairly and efficiently used in contemporary legal education. And, third, there are a variety of views of the extent to which criteria-referenced assessment can be incorporated into the Bar Exam or used in lieu of the current exam, however essential it may become to graduating competent lawyers from law schools.

B. Putting Assessment Theory into Practice - New Hampshire's Performance-Based Approach to Licensing Lawyers

Among the most well developed examples of the use of criteria-referenced assessment in an alternative licensing scheme that emphasizes practice readiness is New Hampshire's Daniel Webster Scholars Honors program at the University of New Hampshire School of Law. The program offers a well integrated program of both traditional and experiential learning in the final two years of law school, integrating doctrinal work with training in professional skills and judgment through simulated, clinical and externship settings. Successful completion of the program substitutes for passing the traditional two day New Hampshire Bar Exam. We highlight the New Hampshire program as a model for alternative licensure, although we acknowledge that there are too many differences between the jurisdictions to permit New York to adopt the New Hampshire model. Nevertheless we are convinced that New York can learn much from the New Hampshire program and the experience they have gained.

The program was launched in 2005, after the New Hampshire Supreme Court amended its rule on admission to the bar to authorize a performance-based variant of the bar exam "to consist of rigorous, repeated and comprehensive evaluation of legal skills and abilities." This "rigorous, repeated and comprehensive evaluation" occurs during the second and third years of law school for students participating in the program. Participants are required to maintain a high grade point average and to complete an intensive curriculum that includes a number of specially designed practice courses and at least six credits of externship and/or clinical experience. The courses and the rubrics used to evaluate performance track the fundamental lawyering skills identified in the MacCrate Report. Students develop an extensive portfolio, including videos of the student conducting simulated interviews, negotiations, and components of trial practice. Evaluation and assessment is done not only by the law school faculty but also by members of the New Hampshire Board of Bar Examiners who repeatedly review the student portfolios and meet personally with the students to evaluate their progress.

This program was designed through a collaborative effort of the New Hampshire

Supreme Court, the New Hampshire State Bar, the New Hampshire Board of Bar Examiners, and the law school. The judges supported the program because of their concern that recent graduates appearing in court lacked the training in essential lawyering skills. This concern led to the development of a licensing mechanism that more closely evaluated the knowledge, skills and values required for effective lawyering.

One of the best indices of the program's success is the feedback from employers. They report that graduates of the program are far better prepared for practice and far more "client-ready."

The New Hampshire model demonstrates the feasibility of assessing a broad range of lawyering skills. It reinforces the points made in subsection "A" above that criteria-based assessment can and has been used to evaluate a far broader range of lawyering skills than is currently assessed by the traditional bar exam.

The Committee finds much that is very attractive in the New Hampshire approach, which addresses so many of the persistent concerns about the traditional bar exam:

- that it measures too few of the skills essential to lawyering;
- that it promotes and rewards rote memorization at the expense of deep learning;
- that it drives law schools to tailor their curricula and pedagogy to the bar exam at the expense of experiential and contextualized learning; and
- that it negatively impacts on minority students.

There are, of course, very serious logistical challenges that prevent implementation of this approach in a state with fifteen law schools and tens of thousands of bar applicants annually. Implementation in New York would require resources that are not currently available. However, most Committee members think the New Hampshire program provides an excellent model of criteria-based assessment in action and thus offers many valuable models and lessons, should New York experiment with alternatives, as we suggest in the next two sections of this report. We recommend that those who implement those recommendations conduct an in-depth analysis of the sophisticated ability-based outcome measures used in the New Hampshire program.

III. *Implementation of the Kenney Report's Proposal to Grant Bar Exam Credit for Participation in Clinical Courses during Law School*

The Kenney Report presented the following recommendation regarding what it called a "point boost" system for adjusting the bar exam grading scheme to grant what amounts to "advanced placement" credit for a test-taker's having previously taken "duly certified" clinical courses during law school:

> An[ ] alternative option that is worthy of consideration, which was proposed by Robert MacCrate in a 2004 article, would be for the Board of Law Examiners to adjust "the bar examiner's grading system" to "give credit in the admissions process

for a successfully completed clinical experience in an accredited law school under faculty supervision and duly certified by that faculty." [Robert MacCrate, *Yesterday, Today and Tomorrow: Building the Continuum of Legal Education and Professional Development*, 10 CLIN. L. REV. 805, 831 (2004).] A "point boost" of this sort – which would be akin to the "advanced placement" concept that has long been a firmly-ingrained component of the secondary education system of this country – would be consistent with what legal educators and bar examiners have long said about the relative roles and responsibilities of the academy and the licensure process. As is readily apparent, the bar examination is not in and of itself a sufficient measure of competence to allow the practice of law alone.

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Furthermore, as was recognized in the MacCrate Report in 1992 and more recently in the "Best Practices" and Carnegie Foundation reports, experiential education courses on lawyering skills and professional values offer opportunities for particularly effective preparation of students for competent practice of law. [*See* ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007); WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (Carnegie Foundation for the Advancement of Teaching 2007).]

Accordingly, it seems reasonable to take such highly relevant preparation for practice into account in the licensure process. Notably, the MacCrate proposal does not suggest that clinical instruction would substitute altogether for the bar examination. Rather, the proposal continues to treat the bar examination as the central criterion for licensure while permitting a degree of "advanced credit" for successful performance in a suitably designed and implemented clinical course. Moreover, the MacCrate proposal's concept of a "duly certified" clinical course could be implemented in a manner that ensures uniformity of instruction and assessment across law schools in New York State. Law schools could be required to seek certification of such courses by the Board of Law Examiners or perhaps by a special commission created by the Court of Appeals for this purpose.

Kenney report at 33-34 & nn.92-93 (footnotes omitted and integrated directly into text in brackets).

After careful deliberation and by a slim majority, the Committee on Legal Education and Admission to the Bar endorses this proposal. As the Kenney Report explained, the proposal is consistent with the best thinking in legal education – the MacCrate Report, the Best Practices Report, and the Carnegie Report – all of which point to the need for more contextualized learning.

All members of the Committee agree that law graduates should be better prepared for the challenges of contemporary law practice, and most if not all believe that additional clinical, experiential, problem based and other contextualized teaching and learning opportunities should play a bigger role in legal education. The majority of the Committee views this proposal as a promising, manageable step in the right direction. But a substantial minority of the Committee view the proposal as ineffective and likely to have unintended negative consequences.

Many of those who oppose this proposal urge a direct approach to the underlying problem: applicants should simply be required to take clinics or other integrative, experiential opportunities. Simply put, if those kinds of courses are necessary to prepare for practice, they should be required of all law students. And law schools will quickly adjust their curricula to insure that their graduates are qualified to sit for the New York Bar Exam. Supporters of the point boost suggest that requiring that all students take clinics would be far too costly and that such a requirement underestimates the impact of the bar exam on law school curricula. They see this proposal as an incentive for incremental change that will lead to welcome innovation by some in the short term and possibly longer term reforms.

Members also voiced concern about how this proposal would interact with the current exam. Some worried that the plan would be rendered wholly ineffective if it led to a decision to raise the cut score for those who lacked the clinical qualifications – quite the reverse of a "point boost." Another concern was that this change was too blunt and relied far too much upon students to sort themselves into the right classes. In particular, there was worry that many students who are strong candidates under the current format would crowd out those who might not even appreciate that these specialized offerings would be of particular benefit. Others argue that many students benefit more from additional work at the doctrinal core of the traditional curriculum.

Another concern is that it would be unwise to graft this innovation onto the psychometrically validated current exam. In this view, it is unfair to introduce an evaluative scheme that has not yet been developed, let alone tested, into a system that relies upon quantitative analysis as its touchstone. While, in some views, two assessment regimes simply do not align, others understand that the two parts, PREP and the Bar Exam, can work together to give us a fuller picture of a given candidate's qualifications to become a member of the bar.

The significant opposition to this proposal in the Committee is based upon real and weighty concerns and there is much room for varied interpretations, predictions and evaluations. But given our charge and majority support, albeit slim, among the Committee, we offer discussion of how this proposal could be implemented, were that deemed advisable.

Our first suggestion is quite modest. We would rename the proposal the "Practice-Readiness Evaluation Program" or "PREP." We believe that this alternative title helps to focus attention on the key characteristics and benefits of the proposal and acronyms are a helpful aid to memory.

Many on the Committee agree that in an ideal world, the Bar Exam would be reconfigured to test a broad range of lawyering skills of the type that are used in legal practice

and that calls upon test-takers to use such skills in ways that simulate the nature of actual practice. In other words, an ideal evaluation would replicate law school clinics' assessments of student work in fieldwork and simulations. The Committee recognizes, however, that there are financial and practical impediments to recreating this type of assessment system on the large scale necessary for a bar exam in a state like New York. PREP is a practicable and affordable way to integrate clinical assessments of law students into the New York Bar Exam process.

PREP is voluntary: it rewards those already interested in skills education, whether students or schools, and it creates incentives to place more students – especially weaker test takers – in clinical courses that will help them become better lawyers. PREP thus also furthers an objective identified in the State Bar Association's recent Report of the Task Force on the Future of the Legal Profession: "encourag[ing] students to participate in clinical and other courses that will provide them with the necessary skills to apply their knowledge in practical settings." New York State Bar Association, Report of the Task Force on the Future of the Legal Profession 49 (April 2, 2011).

Some Committee members also believe the proposal will help to ameliorate some of the racial disparities in the current Bar Exam system.[13] Although there is as yet no global data concerning differential performance of groups in clinical settings, the personal experience of the legal educators on this Committee (representing many decades of experience at many law schools) provides a solid anecdotal basis for recognizing that a significant number of students who do not do well on standardized tests or speeded exams do very well in clinical settings and will be competent lawyers.

An essential precondition for a program like PREP is the development of a formalized process for certification of law school clinical programs. The Committee believes that the best structure would be a model that includes the following stages and tiers of review:

(1) In the initial stage, a panel of experts develops the certification process. The panel should include nominees from each law school, a member of the Court of Appeals, one or more attorneys from public service, and one or more attorneys from private practice. The panel should consider, *inter alia*, (a) which skills, values and other knowledge must be addressed; (b) what grading systems and/or other evaluative mechanisms should be used to assess the requisite level of proficiency in the relevant skills, values, and other knowledge; and (c) whether the requisite learning can take place in a single clinical course (and, if so, how many credit hours are necessary in order to do so) or is best provided by sequential learning in two or more clinical courses spread out over two or more semesters.

(2) Each law school will then be tasked with developing courses that demonstrate student learning of skills, knowledge, and values, referenced to the criteria set at the state level by the panel.

(3) The schools' programs and plans will be reviewed, approved, and thereafter overseen

[13] The recent report of the Institute for Inclusion in the Legal Profession documents the continuing problem of underrepresentation of minorities in the profession. Karen Sloan, *New Review of Attorney Demographics Shows Slow Growth in Firm Diversity,* NATIONAL LAW JOURNAL (9/6/11).

by the panel, which will function as essentially an accrediting body and will be expected to conduct periodic reviews of each school, including site visits. The panel will also serve as a resource for providing information to schools about best practices.

A timeline for implementing a pilot project appears below at Part VI.

IV. *Implementation of the Kenney Report's Proposal for a Public Service Alternative to the Bar Exam*

In 2002, the Committees on Legal Education and Admission to the Bar of the NYSBA and the New York City Bar Association (then the Association of the Bar of the City of New York) endorsed the idea of a pilot Public Service Alternative[14] Bar Exam ("PSABE"),[15] drawing on a proposal previously made in the academic literature.[16] The Kenney Report likewise highlighted the PSABE proposal as one worthy of further consideration,[17] writing "[I]t has been suggested that a public service alternative examination could eliminate or at least significantly ameliorate the exclusionary effects of the current bar licensing practice." (Kenney, supra at pp 32-33).

The Kenney Report somewhat mischaracterizes the PSABE proposal as, essentially, an apprenticeship model[18] whose primary purpose is to decrease disparate impact and increase minority admission to the profession,[19] the latter a goal long supported by the NYSBA. Indeed,

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[14]The PSABE was never intended to replace the existing Bar Exam (nor could it, given the numbers involved) but to provide an alternative means of assessment available for selection by those graduates with the appropriate pre-requisites, who were, in addition, willing to make a substantial three year pro bono commitment to the court system or other possible public service placements.

[15]*See* Committee on Legal Education and Admission to the Bar of the Association of the Bar of the City of New York & Committee on Legal Education and Admission to the Bar of the New York State Bar Association, *Joint Committee Report: Public Service Alternative Bar Examination* (June 14, 2002).

[16]*See* Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696 (2002). For a fuller exposition, *see* Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343 (2003) ("Out of the Box"). The proposed pilot was included as an alternative worth studying in Society of American Law Teachers, *Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 451 (2002).

[17]A similar recommendation is included in the "Futures Report" which proposed that this Committee "participate in serious study of important potential licensing reforms" including "permitting licensure after a period of closely supervised [and presumably carefully assessed] public service work." NYSBA, *Report of the Task Force on the Future of the Legal Profession,* 7 (April 2, 2011).

[18]The Kenney Report dissent criticizes and mischaracterizes the PSABE as "focused on nurturing the development of skills and not on assessment of acquired legal learning and professional skills" (Kenney, supra at 40, Dissent of Bryan R. Williams).

[19]Reducing bias and increasing diversity were clearly a goal of the proposal, but these were complementary and secondary to the end of a better means of evaluation and assessment for admitting law graduates to the profession. The PSABE proposal drew on the work, *inter alia*, of Claude Steele on the "stereotype threat" that disadvantages minority takers on high stakes, paper and pencil tests, see, *e.g.* Claude M. Steele, J. Aronson, *Stereotype Threat and the Test Performance of Academically Successful African-American* in The Black-White Test Score Gap 401, Christopher Jencks & Meredith Phillips, eds., (1998); Claude M. Steele, *Expert Report in Gratz v. Bollinger*, 3 MICH. J. RACE & L. 439 (1999), as a possible explanation for the disparate impact of the current Bar Exam, extrapolating that an experiential assessment would, as the Kenney Report writes "admi[t] those students who will be competent lawyers but who have great difficulty passing the current bar examination regime." (Kenney at p 4)

it describes the proposal as a "PSAE", omitting the "B" (or "Bar") modifying "Exam" in the original proposal. (Compare Kenney at p 22, describing the prior report, with Kenney, p. 32, recommendations for further study).

As originally formulated, however, the PSABE endeavored to be a *better* bar exam, that is, a real examination, albeit experientially based, to test the legal skills identified by the MacCrate Report as necessary for the competent practice of law. The proposal grew out of many of the now familiar criticisms of the existing Bar Exam, and sought to imagine a model for effectively assessing the majority of MacCrate skills in a way that met the criteria of validity (actually testing that which was established as necessary for practice) and reliability (a guarantee of relatively uniform assessment that could satisfy the needs of consumer protection). It located this assessment/testing in an actual practice setting, at least initially within the public service sector[20] and, for the proposed pilot, more specifically within the court system.[21] In addition to the MacCrate lawyering skills, the PSABE proposal anticipated the opportunity to assess knowledge of substantive law in a variety of areas,[22] as well as those professional values that have been the focus not only of the MacCrate Report, but also a longstanding commitment of the NYSBA.

The premise was that, over a period of ten weeks,[23] applicants would be actually engaged in lawyering tasks, and that the skills involved in those tasks could be assessed in a real life setting.[24] While the public service placement was expected to provide other benefits[25] it was and

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[20]The public service sector was selected for many reasons including: the needs of institutions like District Attorneys and legal services offices; their existing training and assessment capacity; the legitimacy such institutions would offer the program; and the commitment to the values of public service and improvement of the profession which services there could further.

[21]The court system was chosen for a number of practical reasons including: the needs of that system, now much exacerbated by budget cuts and layoffs, as well as the full range of lawyering skills required in the courts: legal analysis; legal research; problem solving; oral and written communication; fact gathering; familiarity with litigation and alternative dispute resolution; time management; and recognition and resolution of ethical issues.

[22]For example, were the pilot to be located, as originally proposed, in the Civil Court of the City of New York, applicants would be required to know and employ civil procedure, evidence, contract, torts, property, administrative and business associations law, and, to a lesser extent, family, tax and agency law. A court of general jurisdiction, like Supreme Court, Civil Term, would require knowledge in even more substantive law areas. The PSABE proposal also anticipated, much like the Kenney Report, that there might still need to be a more limited written exam, focused on basic knowledge that the profession would agree that all lawyers need to *know*, e.g. statutes of limitations, rather than be able to locate.

[23]That time was proposed as approximately the period of full-time study for the existing Bar Exam, so as not to disadvantage potential applicants on financial grounds, as many unpaid apprenticeship programs would. This is in accord with the Kenney Report's concern for unnecessarily increasing the burden on Bar Exam takers. (*See* Kenney p 4). In addition, it proposed that the required ten weeks might be further split up, but not reduced, to accommodate work and family obligations.

[24]The idea of an experientially based bar exam is not new. In a 1980 experiment, the Bar Examiners in California videotaped and assessed applicants in practice simulations, *Out-of-the-Box*, *supra* at pp 408-410. While the Bar Examiners found this a superior test for practice, the same time, volume and financial consideration that face the Board of Law Examiners in New York resulted in their rejection of the model as impractical.

[25]In addition to the hoped-for service to the courts (amplified by a corresponding commitment of 150 pro bono hours over the next three years) these included: creating a culture of commitment to public service and pro bono; experience of the MacCrate values of promotion of justice, fairness and morality, and improvement of the profession and the justice system; and finally, the learning opportunities inherent in doing legal work under supervision and with regularized feedback.

is, at its core, simply an alternative arena in which evaluation of professional competence could occur.[26]

Although it preceded both the "in-house" New Hampshire model,[27] and the point-boost proposal,[28] the PSABE falls along the same continuum,[29] involving assessment of lawyering skills now even more generally accepted as necessary for post graduation practice. What was largely undeveloped in the original proposal - and what the report of the two bar committees recognized needed further study - was a model of assessment that would meet the criteria of reliability and validity, avoid bias, and satisfy public and professional concerns. This is precisely the thread that unites the various proposals deemed worthy of further study by the Kenney Report, and that is a critical component of the changes the Report envisions.

Almost ten years have passed, during which legal education and the testing domain have benefitted from, *inter alia*, the Carnegie Report and Best Practices. During that decade, many models of experiential assessment have been developed, primarily by clinicians, but also by law firms and practicing attorneys.[30] The "development of new evaluation techniques to assess legal knowledge, skills and values" promoted by the Kenney Report is a critical focus of the work described in these recommendations, *see* Point IV, *supra*. A more fully developed assessment model should make it possible to prepare a fully fleshed out, robust proposal for a pilot PSABE. A substantial majority of the Committee believes that the PSABE continues to provide promise in meeting the Kenney Report's goal of a bar exam that better tests lawyering skills and values, without further burdening takers, substantially increasing costs, or creating/perpetuating disparate impact. A proposed timeline for implementation of a pilot project appears below in Part VI.

V. *Recommendation to Study Issue of Speededness*

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[26]The initial proposal anticipated that the assessment(s) would be done by trained court personnel using an evaluation protocol developed by clinicians and others.

[27]As the discussion of the New Hampshire model, *supra*, explains, evaluation occurs at various points throughout the course of the program, which takes place entirely within the traditional three year law school residency. Unlike current clinical programs, where individual teachers devise and apply their own assessment methodology, however, there is significant bench and bar input into, and involvement with, the assessment process. The PSABE would also require the participation and cooperation of legal education, the judiciary, and the bar in creating and employing an agreed-upon model of assessment.

[28]The point boost depends on developing criteria (whether by a Blue Ribbon Committee or otherwise) for approval of clinical courses and the evaluation techniques/assessment they employ. A benefit of the point boost proposal, shared by the PSABE, is incentivizing law schools to offer more clinical and practical education because participation in a PSABE would have, as a prerequisite, some pre-determined number of clinical hours.

[29]This continuum includes assessment done entirely within the period of legal education (New Hampshire); assessment done partly during law school and partly thereafter (point boost; sequential learning); the PSABE (after law school, but with a requirement of experiential evaluation in clinical courses) and a simulated client model, similar to that utilized in medical professional certification, that would occur after, and outside of the law school, and that depends on standardized assessment. *See, e.g.* Lawrence M. Grosberg, *Standardized Clients: A Possible Improvement for the Bar Exam,* 20 GA. ST. U. L. REV. 841 (2004), as well as the "portfolio" component proposed by Judith Wegner.

[30]*See, e.g.* Heather Bock & Robert Ruyack, *Constructing Core Competencies: Using Competency Models to Manage Firm Talent* (ABA - CLE Career Resources Center 2007)

In discussions about the clear disparate impact of the current bar exam on minority takers, the Committee has, on several occasions, considered the question of the "speededness" of the exam. Those discussions were prompted, in part, by a provocative law review article by William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 Texas L. Rev. 975 (2004) ("Henderson"), by findings in a study commissioned by the Court of Appeals in 1992, Jason Millman et al, *An Evaluation of the New York State Bar Examination* (May 1993) ("Millman Evaluation"), and by Professor Claude Steele's work on stereotype bias, *supra*. On each occasion the Committee determined that further study was necessary, but, for a variety of reasons, that did not occur. In light of the Kenney Report's strong emphasis on determining ways to "identify and admit law graduates who will be competent lawyers but who have great difficulty passing the current bar exam regime," we believe that study of the speededness issue should now be foregrounded.

If, as discussed below, it is reasonable to believe that the Bar Exam is an unnecessarily speeded test, and that speededness, an independent, confounding variable, discriminates against minority test-takers, then making the bar exam *un*-speeded, or, at the least, employing a pilot to test these assumptions, is the means *least* disruptive of the current bar exam regime with a high likelihood of increasing pass rates for otherwise qualified minority applicants. With little cost and minor adjustment, this hypothesis could be tested and, if validated, could result in a significant increase in minority lawyers with only a relatively small change in the administration of the Bar Exam.

Understanding Speededness

Henderson set out to demonstrate that the LSAT, used almost universally to determine admission to law school, is a "speeded" test, and that its "speededness," which disadvantages minority takers, is inadequately correlated to law school success.[31] He began by providing a useful explanation of psychometric literature and theory on speededness, explaining the difference between tests intended to measure "power" - or possession of the ability tested for - and "speed" - that is, the effect of time pressure on accuracy and test completion. General psychometric theory holds that power and speed are "distinct, separate abilities with little or no correlation" and that there is "general consensus that the results of an aptitude test can be confounded if the speededness component is too [great]."[32]

Psychometric literature also demonstrates that speeded tests have a disparate impact on minority test-takers.[33] Although the *cause* of the negative impact of speededness is nowhere

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[31]He demonstrated that the correlation between LSAT scores and first year law school grades (themselves based on timed tests) used to justify the LSAT as a valid prediction disappears in the second and third years, when students are evaluated in different ways - for example, on seminar papers or, though Henderson does not discuss clinics, by experiential assessment.

[32]Henderson, *supra* at 991, and note 64, citing, *e.g.* David J. Scrams & Deborah Schnipke, *Making Use of Response Times in Standardized Tests: Are Accuracy and Speed Measuring the Same Thing,* 11 (LSAC, Computerized Testing Rep. 97-04, May 1999) (utilizing a "two state mixture model" and finding that speed and accuracy were unrelated on the logical and analytical reasoning portion of the GRE and that comparative scores of takers can vary if the speededness is too great.)

[33]Henderson, *supra* at 982, and note 35, citing Deborah L. Schnipke & Peter J. Pashley, *Assessing Subgroup Differences in Item Response Times*, 2 (LSAC, Computerized Testing Rep. 97-03, 1999); Linda F. Wightman &

explained, the work of Claude Steele and others may provide a basis for understanding how and why this happens, and equally important, why removing speededness would not affect the validity of a test for "power" - or the abilities and competencies which the test purports to assess.

Claude Steele and Stereotype Threat

In the early 1990's, psychologist Claude Steele and colleagues began a series of experiments testing what they called "stereotype threat."[34] They hypothesized that when members of a group that was stereotyped as lacking competence in a particular domain[35] took a high stakes, timed examination including difficult questions in that domain, they would significantly *under*perform their natural ability. Their results have been replicated by others in a variety of fields,[36] and demonstrate that when group stereotyping is in effect the true ability of test takers may not be accurately measured.

While the existence of performance-depressing stereotype threat is now well established, theories of *how* stereotype threat operates are less well developed. Steele describes finding significantly decreased accuracy in the stereotype threat setting, writing that stereotype threat seems to exert its influence by reducing efficiency. Participants who experience stereotype threat spend *more* time doing fewer items less accurately. This reduction in the efficiency of mental processing is probably the result of dividing their attention; a herniating between trying to answer the items and trying to assess the significance of their frustration.[37]

Whatever the precise mechanism, the efficiency/accuracy disparity that occurs when stereotype threat is present (but which disappears when it is not) strongly suggests that stereotype threat accounts for the otherwise puzzling disparate impact of speeded tests like the LSAT on non-majority takers. That is, if the bar exam is a test which, at least in part, measures speededness, and speededness causes minorities to underperform, minorities will do worse on the test than their colleagues of equal ability.

The Bar Exam is a Speeded Exam

Applying Henderson's and Steele's work to the Bar Exam requires evidence (as opposed to anecdotal or self-evident observations). This evidence can be found in the Millman Evaluation, which specifically considered whether the Bar Exam was speeded, and then whether such speededness was relevant to, or important for, competence as a lawyer.

David G. Muller. *Comparison of LSAT Performance Among Selected Subgroups*, 6 (LSAC, Statistical Rep. 90-01, 1990) and Franklin R. Evans & Richard R. Reilly, *A Study of Speededness as a Source of Test Bias*, 9 J. Educ. Measurement 123, 127 (1972) (parentheticals omitted).

[34]Steele and Aronson, *supra; see also* Claude M. Steele, *Whistling Vivaldi* (2010).

[35]While Steele's work is thought of as dealing primarily with racial minorities, and African Americans in particular, he also did experiments with, *e.g.*, women (purporting to lack competence in math), and white men vs. Asians (alleged superiority of the latter in math).

[36]*See, e.g.* Michael Inzlicht and Talia Ben-Zeev, *A Threatening Intellectual Environment : Why Females are Susceptible to Experiencing Problems - Solving Deficits in the Presence of Males*, Psychological Science 365, Vol. 5 (2000); Jeff Stone, Mike Sjomeling, Christian L. Lynch & John M. Darley, *Stereotype Threat Effects on Black and White Athletic Performance*, 77 J. PERSONALITY & SOC. PSYCHOL. 1213 (1999).

[37]Steele & Aronson, *supra* n. 19 at 407.

Bar Exam test-takers generally believe that they need more time, and that with more time they would do better. Evidence from a California study, cited in the Millman evaluation, bears out the validity of these beliefs, demonstrating that "doubling the time allowed for the MBE would produce a mean change equivalent to 30 New York common scale points."[38] Research on the essay portion of the California exam produced similar results.[39] While no data was collected on how an increase in time affected applicants by racial or ethnic categories, this finding argues for a less-speeded test - unless, that is, the "speededness" required by the test is also required for competence as a lawyer. Intuitively, this is false, and the panels utilized by the Millman Evaluation came to this conclusion, summarizing their findings as "speed in reading fact patterns, selecting answers, and writing essay responses [is] not the kind of speed needed to be a competent lawyer."[40]

The question of whether speed of the sort required by the bar exam (*and* the LSAT, *and* first year law school exams) is important to competent practice requires further development, especially because of an ongoing debate on time-extending accommodations under the Americans with Disabilities Act (ADA).[41] Assuming, however, that test-taking speed, as opposed to the ability to perform lawyering skills under time pressure in a real life practice setting[42] is *not* necessary to competent practice, that it is a characteristic that the bar exam tests, and that it creates a disparate impact on minority takers, there is a simple solution - give takers more time. This hypothesis could be tested relatively easily[43] by a pilot in which, for example, test-takers were offered time and a half; if the scores of minorities disproportionately increased, the hypothesis (whether the result of stereotype threat, or otherwise) would be confirmed and,

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[38]Millman Evaluation, *supra* at 9-8 6 b. 11 citing Stephen Klein, *The Effect of Time Limits, Item Sequence and Question Format on Applicant Performance on the California Bar Examination*, [1981] [Report prepared for the Committee of Bar Examiners of the State of California and the National Conference of Bar Examiners].

[39]Millman Evaluation, *supra* note 7, at 5-18.

[40]Millman Evaluation, *supra* at 9-8. In an earlier section, looking primarily at accommodations for people with disabilities, the Evaluation tied the issue of speededness to construct validation, writing:

> It is generally believed that the defense of what constructs should be measured on a licensure exam should be based on an analysis of the tasks on which an individual must be competent to not endanger the public. We are unaware of any *formal* documentation that speededness is an essential component of a minimally competent attorney.

Id. at 5-20 (original emphasis).

[41]In an analogous area, the Committee has recently supported Recommendations to the ABA Section on Legal Education that would end the L.S.A.C.'s practice of "flagging" test results taken with accommodations.

[42]We acknowledge a 1994 study on disability accommodations prepared for the Court of Appeals by Millman who conducted surveys of practicing lawyers and Law Examiners, and concluded that "the ability to work under time constraints" was at least of "some importance" and, in some instances, "very important to meet the legal needs of their clients." Jason Millman, *Is Working Under Tight Time Constraints a Legitimate Component of the New York State Bar Examination? : Results of Three Surveys* (Report for the New York State Court of Appeals, May 1994). Millman concluded "For those who think the present time limits in the Bar Examination are reasonable, the data provides very strong evidence for maintaining those limits." *Id.* p. 11. He continues, however, "[e]ven though working under tight time constraints is an important skill, it does not follow that it must be measured in a Bar Examination, that is, generous time limits could be given to all." *Id.* The apparent flaw in Millman's general approach, however, is conflating the work of lawyering with the skills of test-taking, an issue which is discussed by Henderson.

[43]We recognize that there would be logistical and potential security problems, which further study should resolve without great difficulty.

without any change other than the time allotted for administration, an unnecessary barrier to entry to the profession[44] could be eliminated.

Thus, although this topic was not addressed by the Kenney Report, the Committee believes that further study of speededness is consistent with the Report's goals and other recommendations, especially in its emphasis on decreasing disparate impact and increasing the diversity of the profession, and that such study provides a promising opportunity for meeting those goals.

VI. *Conclusion and an Action Plan for Implementation*

We appreciate the opportunity to study the recommendations of the Kenney Committee. Our discussions are ample proof that these are complex and important issues. Pursuant to our charge from the Executive Committee, we have identified a number of concrete steps that we hope the Executive Committee will consider in order to move this important project forward:

A. Develop a Pilot Project for the Practice Readiness Evaluation Program (PREP)

The Practice Readiness Evaluation Program (described in Part III above) would recognize a limited group of preapproved, specially assessed courses within the law school curriculum. Students who successfully completed such courses would receive a modest credit toward their bar exam score.

Creating such a program could be done in five stages:

Year 1 - Fall – Draft Request for Proposals – A PREP Coordinating Committee would be established. The Committee would study the New Hampshire model, become familiar with the current assessment literature and draft a request and specifications for proposals from the law schools for courses to certify for PREP credit.

Year 1 – Winter - Call for applications – Law schools would be asked to submit proposals for skills courses assessed through goal driven, criteria-referenced norms in which students compile portfolios that can be reviewed by multiple assessors.

Year 1 - Spring/Summer - Dialog and evaluation – The Coordinating Committee would analyze the law school submissions and meet with law school representatives to refine course designs and program design. Courses would be chosen for an initial, non-credit pilot.

Year 2 - Fall semester – Initial pilot project - The Coordinating Committee would monitor, collect and analyze data.

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[44]There is at least anecdotal evidence that minorities' performance on the bar exam acts as a disincentive to their choice of law as a potential profession, and that it may also be a factor in the disproportionate rejection rates for minority law school applicants. Eliminating the bar exam disparity could, accordingly, also increase law school matriculants and thus have a double effect on increasing the diversity of the profession.

Year 2 - Spring semester – Second pilot semester - Adjust courses and programs as indicated, monitor, collect and analyze new data.

Year 3 - Fall - Begin awarding Practice Readiness Evaluation Program credits.

We expect most or all of this first group of courses would be simulation or live client/real matter based experiential classes. A coordinating group of faculty, practicing lawyers and judges and others would work together to develop the request for proposals and to work with the law schools and other stakeholders to develop, administer and maintain the standards of the Practice Readiness Credit Program. The trial semesters will permit the development of some initial data on intergrader reliability and similar issues.

B. Develop a Pilot Project for the PSABE

Year 1 – Fall – Program Design – Establish a PSABE Coordinating Committee of academics, judges and lawyers from practice. The Coordinating Committee would identify a site or sites for a pilot project and personnel willing to be trained to supervise and assess candidates. The Coordinating Committee would work with the pilot sites to identify the lawyering tasks through which applicants would be assessed.

Year 1 – Spring - Develop site-specific goals, lawyering tasks and assessment tools – The Coordinating Committee will work with the pilot site or sites to identify the set of lawyering tasks to be assessed and to develop the assessment tools.

Year 2 – Pilot Project 1 – Qualified applicants would begin 10 week, post graduation placements at the pilot sites. Applicants would practice at the pilot site and their activities would be assessed. A portfolio would also be developed for joint review at or near the end of the placement period. The multiple assessments and portfolio review would be combined at the end to determine whether the applicant had the minimum competency to practice unsupervised. The Coordinating Committee would monitor, collect and analyze data. The process would be reviewed, and all participants interviewed about their experiences.

Year 2 – Pilot Project 2 – A second group of qualified applicants would begin a second round of 10 week, post graduation placements at pilot sites. The program would repeat as described above, with adjustments as deemed appropriate based upon the experience of the first group.

Year 2 – Monitoring and Evaluation – Successful applicants from the two pilot groups would be followed for a minimum of two years and their employers would be interviewed. The program would be evaluated, improved as indicated and expanded.

C. Other Concrete Steps

*Continue discussion of the appointment of a time limited Taskforce to advise the Board of Law Examiners on the content of the New York portion of the Bar Exam.

*Authorize the NYSBA Committee on Legal Education to study the feasibility of a pilot program to assess the effect of speededness.

New York State Bar Association

Committee on Legal Education & Admission to the Bar

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Dissent by James A. Beha II

In its present form the Committee's report contains a great deal of useful information and discussion, particularly with respect to the topics of assessment tools, the value of clinical and other skill-directed training for candidates for the Bar, and the possible unintended consequences of the New York Bar Exam being a "speeded" test. And the Bar Exam, including the New York portion of that examination, is far from perfect, whether assessed as a "gatekeeper" intended to assure the public that newly admitted lawyers have what has elsewhere been called "minimum competence" or even by the more limited standards that the Board of Law Examiners sets for itself. Nonetheless, I do think that John McAlary is absolutely correct in saying (if I may paraphrase) that both the Kenney Report and this Committee's report, issued as a follow-up to that report, are by-and-large barking at the wrong door: if there is a concern that new lawyers are not adequately prepared for practice, the answer is to prepare them better, not to test them differently. This does not mean that the Bar Exam cannot be improved or that BOLE should not be vigilant in assuring that the questions used to test candidates on the New York portion of that examination are demonstrably relevant to the issues new practitioners are likely to encounter. But it does mean, in my view, that we have spent too much time talking about what the Bar Exam should test (and how) rather than about what should be *required* as part of the credentials of candidates to admission to the Bar.

The complaint that law school does not adequately prepare graduates for the realities of practice has been a recurring one, and reflects in some measure a misunderstanding of what legal education seeks to achieve. Nonetheless, within this Committee there is a broad recognition that both law students and the public would be better served if more of *each* student's legal education were devoted to a broader segment of what have become known as "MacCrate skills," the fundamental skills of *practicing*, rather than *studying* law. The irony to the current round of hammering on this point is that most law schools with which I am familiar actually already offer students far more in the way of opportunities to develop these skills – in "clinical" practice settings or in specialized courses intended to better equip them for particular areas of practice – than ever before. While those courses also no doubt could be improved, and the Committee report's extensive discussion of "criteria assessment" usefully explains one direction from which such improvement might come, to me the real issue is whether New York should be *requiring* applicants to the New York Bar to have, as part of the package of their credentials, some demonstrated training in these areas. Adding such requirements would at last put real teeth into all that wailing and gnashing about the qualifications of new lawyers. And because, as John McAlary says, admission to the New York Bar is the "gold standard," there can be little doubt that if New York announced the addition of such requirements then law schools throughout the country would quickly take steps to insure that their graduates are properly equipped to be candidates for admission here.

For these reasons, even though I appreciate much of the discussion in the Committee's report and I particularly appreciate the extent to which this final version of the Committee's report has attempted to describe inclusively the areas of debate and disagreement within the Committee on the topics covered in the report, I do dissent from the report, in part.

I cannot support the "point boost" proposal, even though I appreciate both of the motives that prompt it. If New York is not going to require candidates to include a "clinical assessment" course in their legal education (and, as set out above, in my view New York should consider requiring just that), then I do not see merit, and I do see risk, in proposing that one set of curricular choices rather than another should entitle a candidate to a "boost."

The Committee report describes at some length but does not actually endorse the New Hampshire experiment with a "diploma privilege" that requires special bells and whistles to be built into the diploma in order to earn the privilege, Since my focus here is on legal education rather than the Bar Examination, I do have to comment that I believe the creation of such a program for New York might have many benefits, and that a "diploma privilege" might be just the incentive necessary to bring law schools (and law students) around to providing, and obtaining, a much better set of practice skills by the time of graduation. But that said, in a state like New York where the program would have to be available to all its law schools and where the pressures within the law schools to rate students as qualified rather than have them "forced" to take the Bar Examination would be intense, the "diploma privilege" approach carries enormous cost implications and faces great difficulties in implementation. That does not mean that it should not be considered, but rather that it should be considered as part of the package of re-focusing what happens in law school and is to be required of new lawyers.

The Committee report carries forward a long-standing proposal for a "public service" alternative to the Bar Examination, in which candidates would be assessed by their supervisors in performing a variety of concrete practice tasks over an extended period in lieu of taking the present Bar Examination. This proposal has served a very useful function over the years in focusing attention on measuring candidate's performance and skills in lieu of requiring that they pass yet another written examination. I do not endorse the proposal at this time not because it does not have its own merits and not because performance-assessment might well be superior to a written examination, but because I think it has become apparent over the same years that this "pilot" proposal will never gain the necessary traction to become a reality. I respectfully suggest that it is time to focus our attention on the acceptable standards for the legal education of candidates for admission in New York, and that further pursuit of this proposal is simply not an efficient use of this Committee's, or this Association's, resources.

I do endorse two recommendations made in the report.

First, I agree that the issue of whether "speediness" disproportionately disadvantages minority candidates taking the Bar Examination (*all* of the Examination – and especially the multi-state multiple choice portion ("MBE")) deserves further study. I consider the evidence for this proposition mustered in the Committee report to be thin, and some of the discussion of why speediness might have a disparate impact to be speculative at best, but the avoidance of cultural or ethnic bias, however unintentional and subtle, is too important a goal for the examination and admission process not to pursue this topic further.

Second, I do feel that it would be useful to establish a panel of practitioners from around the state, representing a variety of practices, that could provide feedback to the BOLE at a very concrete level about the extent to which the New York portion of the examination is in fact asking questions that are relevant to the legal issues likely to be faced by new practitioners. To the extent that this Committee's recommendation that a panel be created to "advise" BOLE with respect to the Examination is intended to serve this purpose, and to do so in a cooperative and collegial way, I endorse the proposal. I do recognize that the BOLE is composed of practitioners, and I have no doubt that their intent is to test candidates on just that sort of knowledge, but I have a strong sense that this is an area which improvements could occur, particularly if there is *collegial* dialogue on the subject with other practitioners that focuses on the specifics of the examination and does not get mired in debates over grand principles or broad content outlines.

Every recent candidate has anecdotes about Bar Examination questions that seemed arcane or esoteric, and some of these anecdotes may even be correct. All candidates have to do is *pass* the examination, a requirement that leaves room to flub plenty of esoteric details if the candidate has a fundamental grasp of the law and can apply that knowledge analytically. Nonetheless, the reputation of the examination, the results of the examination, and the process of preparing for that examination are all best served when candidates and the public feel assured that the examination is, to the extent the BOLE can control it, focused on the knowledge and skills that new lawyers need in order to embark on a practice that may be in many respects unsupervised.

Although I have felt compelled to record these points in dissent, I do again want to commend the Committee leadership and the drafters of the report for their efforts to assure that this final report reflects the diversity of views that were expressed in the course of considering the various recommendations of the Kenney Report and this report.

James P. Duffy III joins in this Dissent except that portion that supports the advisory committee.

Dissent by Mary Campbell Gallagher

The authors of the Kenney Report have worked long and hard, and I am grateful for their work. They are especially to be commended for confronting questions about measuring students' clinical skills. The drafters of this new version of our Committee's Recommendations have skillfully reported our Committee's hard work and divergent views. They deserve our thanks. I am most grateful that our Committee has had such fruitful discussions. I look forward to discussing these issues further.

While the analytic bar exam is imperfect, however, the Kenney Report and our Committee's Recommendations present proposals that would not in my view strengthen it. The profession may wish to add a test of clinical skills to the qualifications for law practice, but I think that test should come after the analytic bar exam, rather than being part of the same exam. I therefore join in the dissents of James A. Beha II and John J. McAlary.

My views are based on more than two decades of reading the New York bar exam essays of unsuccessful bar candidates, twice a year, year after year, in the bar exam classes that my company, BarWrite, offers. These are my students, and I love them, and they come from many law schools, so I neither criticize them nor point at our academic colleagues. But I must tell you that, contrary to what a reader of the Kenney Report might surmise, the fact that people fail the bar exam does not imply that we should reduce the number of subjects on the analytic bar exam or otherwise change the exam. Instead, those bar exam failures should provoke us, first, to re-examine the weaknesses in the link between law school programs and the bar exam and, second, to consider moving the bar exam into the three years of professional school, thus sparing students wasted time and additional indebtedness if the law is not the right profession for them. A similar system is good enough for physicians and veterinarians, so why not lawyers?

An apparently minor issue, "speededness," illustrates weaknesses in the link between law school programs and the bar exam.

Unquestionably, some bar candidates fail the bar exam because they cannot complete the parts of the exam within the given time limits. After thoughtful consideration of the literature, however, this Committee's Recommendations treat slow speed as a fixed characteristic of certain law graduates, perhaps especially of minority graduates, and something they may be powerless to change. The Committee also treats speededness on exams as unrelated to the demands of law practice. It recommends experimenting with allowing candidates more time on the bar exam.

As matters now stand, however, bar candidates simply must complete the parts of the bar exam within tight time limits, so I have no choice about whether or not to help students increase their speed. Thus compelled to help students change, I have discovered that students' speed is not fixed at all. Students can increase their speed by strengthening a bundle of skills that include legal analysis, time-tracking, editing and, most important, outlining. Indeed, I have just published a book that teaches bar candidates methods, including a graphic outlining system that saves them time, the MPT-Matrix,™ for finishing the Multistate Performance Test (MPT) in the 90 minutes

allowed. Nor am I persuaded that these skills are unrelated to law practice. I wonder in any event whether the students who fail the bar exam because they cannot finish the essays or the MBE or MPT did not also sometimes receive low grades in law school because they could not finish law school exams. If so, what did their law schools do to teach them skills that would help them speed up? And if students can learn to increase their speed in a retaker course, why can't they learn these skills in law school, instead?

One focus of our discussions has been the number of subjects tested on the bar exam, which the Kenney Report suggests reducing. In my experience, the people at the bottom of their law school class who fail the bar exam do not fail because they are weak in some arcane area of the law. More often, and again, I speak only in general and only from my own experience, they fail because despite spending three years in law school, they do not understand how even the most basic principles of law work. They too often seem to have been moved forward from one year to the next of law school like seventh graders shunted forward to the eighth grade by social promotion. From what I can see of the law school essays they show me, they have used ill-understood legal vocabulary, leading the faculty to credit them with "spotting issues." In writing their essays, they struggle, furthermore, with a sort of literary-critical rubric called IRAC that the law schools all teach but that offers students at the bottom of the class none of the guidance they need as to what to write down first, second, or third: they thus consume time on exams trying to figure out how to write issue statements for problems where they do not adequately understand either the facts or the law. No number of subjects tested on the bar exam might be few enough for some of them, because the penny has never dropped. But if, again, a class for retakers can help them pass the second or third time, why can't law schools do that work, instead?

While I hold with those who consider the bar exam more a test of analysis than of memorization, I think the Kenney Report attacks rote memorization with the fervor of new converts to the dogmas of John Dewey. The more a bar candidate learned the law in law school, the less is the need for memorization. Where students or bar candidates lack a foundation in an area of law, however, memorizing the basic rules provides a foundation. It is invaluable. But in fact, memorization is useful for all of us. Psychological research suggests that memorizing helps us organize the world. Physiological research suggests that memorizing physically changes the brain, priming it for additional learning. For non-academic references, see my blog post "Can Memorizing Law Make You Brilliant?" <http://www.barwriteblog.com/2011/05/memorizing-is-it-good.html#more> http://www.barwriteblog.com/2011/05/memorizing-is-it-good.html#more

For their sake, not ours, we should be requiring more of law students, not less. For their sake, they might well memorize more, rather than less.

Dissent by John J. McAlary

I commend the drafters of the Committee's Report for their care in reporting the divergence of Committee members' views with respect to the proposed Recommendations. However, I cannot support all of the recommendations and therefore dissent for the reasons discussed below. My comments in this dissent are in alignment with the views of Bryan R. Williams in his earlier dissent to the Kenney Report, which I endorse and encourage the reader to review. In the interest of disclosure, I am the Executive Director of the New York State Board of Law Examiners. Mr. Williams is a Member of the State Board of Law Examiners.

While I applaud the Committee for acknowledging the attention that the media has cast on legal education, I am disappointed that the Committee has missed an opportunity in its Recommendations to call for improvements in legal education that will better prepare new lawyers for the practice of law. While I understand that the majority of the Committee thought its charge should be limited to making suggestions related to the bar examination, we should not be deferring until another day the discussion of what is successful with current legal education and what are its perceived failings. If the complaints that recent law school graduates are not adequately prepared for the practice of law are true, then we should be discussing and examining what changes ought to be made in the provision of legal education to better train new lawyers for the practice of law. Making changes to the bar examination is not going to alter the education that graduates receive or better prepare them for the practice of law. There are obvious limitations to what can be examined in a two-day bar examination, but if we are truly committed to better preparing new lawyers for the practice of law I believe that the New York bar would be better served if this Committee examined what is being taught and how law students receive training during the three years (or longer for part-time students) they invest in a legal education.

While both the Kenney Report and the Recommendations of this Committee acknowledge the challenges faced in New York in examining such a large testing population with thousands of candidates from out-of-state and foreign law schools, unfortunately the recommendations in both reports largely ignore these challenges. Any modification to the New York bar exam must be considered in light of the size and geographical diversity of New York's candidate population. New York examines over 15,000 candidates per year, from all 50 states, whose legal education was obtained at over 150 different U.S. law schools, and from over 100 countries. In 2010, New York examined 15,558 candidates; 34% were graduates from New York law schools, 36% were graduates from out-of-state law schools and 30% were graduates of foreign law schools. It is also imperative to understand that one day of the two-day examination is devoted to the national Multistate Bar Examination (MBE) and 90 minutes of the other day is devoted to the national Multistate Performance Test (MPT) so New York only controls the content of less than one day of the examination.

I. Recommendation for the Creation of a Committee to Advise the Board of Law Examiners on the Content of the Bar Examination.

I disagree with the recommendation of the majority of the Committee members for the creation of yet another committee to provide advice to the State Board of Law Examiners on the legal knowledge and skills necessary for competent practice by new lawyers. As I understand, the Kenney Committee was to study the content of the bar examination and although the Kenney Report made some recommendations for improving the bar examination, it was unable to reach a consensus on what content should or should not be tested on the exam. As the majority report recognizes, there are wide differences of opinion among the members of this Committee on charactering the breadth of the current exam and the number of subjects that should be tested. There are critics of the bar exam who contend that the number of subjects tested on the exam should be substantially reduced, but there are also many others who question why the State Board of Law Examiners does not test other subjects such as, administrative law, workers' compensation, taxation, international law, etc. I have serious reservations whether another committee will have better success at reaching a consensus on the appropriate content for the bar examination.

New York is unique in that we have extensive statutory civil and criminal procedural rules that differ from the federal rules. It is essential that attorneys who seek bar admission in this State have some familiarity with New York's rules if they are to competently represent clients. New York is also a leader in international commerce and finance and New York bar passage has become the international "gold" standard. In 2010, 4,596 foreign-educated candidates (30% of the testing pool) took the bar exam in New York. In order to ensure that such candidates are competent in New York law, it is critical that New York State law continue to be included on the bar exam in order to assure that all candidates have a basic knowledge of critical aspects of New York law.

The members of the State Board of Law Examiners are experienced practitioners from different regions of the State, appointed by the Court of Appeals. They possess the good sense and judgment to determine what is appropriate content for the bar exam. They are experienced in weighing the diverging schools of thought on the subjects tested on the bar examination and they have been receptive to change. The current bar exam is not the same examination that most members of the profession took in the past. A number of significant changes have occurred during the past 20 years in both the administration and the content of the bar examination. Anyone who sat for the exam more than 10 years ago would not be familiar with the national Multistate Performance Test, which was added to the New York bar exam in 2001. The MPT tests a range of fundamental lawyering skills similar to those which were identified in the 2002 MacCrate Report. With the inception of the MPT, the number of New York law essay questions was reduced from six to five. The number of subject areas covered on the bar exam is now 13 as compared to 23 subjects in 1990.[45] Most candidates now take the written portions of the examination on a laptop computer, an option that was not available to candidates prior to 2003.

[45] Although some members of the Committee took issue with the manner in which the Board calculates the number of subject areas tested on the bar exam, a comparison of the current list of subject areas with the list of subjects from 1990 confirms that the current exam examines fewer subjects than it did 20 years ago. See, New York State Board of Law Examiners Content Outline For the Bar Examination, as revised May 2010.

The State Board of Law Examiners has taken several important steps in recent years to obtain the comments of legal educators and the bar regarding the potential subjects tested on the bar exam. The Board published a Content Outline and provided copies to the law schools. The Board encourages distribution of the Content Outline to law students. At any time during their legal education, law students anywhere in the world can access the Content Outline on the homepage of the Board's website to review the potential subjects that can appear on the bar exam. The Board solicited comments on the Content Outline from the state bar and the law schools. Members of the Board also are willing to make presentations at law schools about how to successfully prepare students for the bar exam.

The Board would welcome the New York State Bar Association submitting the Content Outline to the relevant practice area committees for comment. What would be particularly valuable would be comment from such committees as to what are critical points of New York law that vary from the generally accepted views of other jurisdictions - - looking forward to ultimate acceptance of the Uniform Bar Examination and the need to assure that New York lawyers are exposed to those particular principles. This would, in my view, be more useful to the goal of testing what it is new lawyers need to know than the creation of yet another committee.

I would also note that the National Conference of Bar Examiners is currently pursuing a content validity study for the bar exam. The first phase of that study, a job analysis, is underway. This is the first time such a study has been undertaken with regard to the practice of law, and the results of the study will be important to an evaluation of what it is new lawyers do and need to know. What will follow is an evaluation of bar exam content and structure. The Board is closely following the progress of the study and will be evaluating its results with regard to the scope and format of the bar exam.

II. Recommendation to Develop New Evaluation Techniques on the Bar Exam to Assess Legal Knowledge, Skills and Values.

I agree with the Committee that "skills training" is an important and necessary component of the learning experience for new members of the legal profession, and expanded testing of skills is desirable. Indeed, as recommended by the Report on the Future of the Legal Profession, and as emphasized in the recent public attention criticizing legal education, we need more skills experienced new lawyers entering the legal profession. However, I cannot support the Committee's recommendation because the suggested means of assessment offered by the Committee would be prohibitively expensive and impractical in light of the number of candidates tested in New York, the limits of testing time and resources, and the need for uniform assessments and grading protocols, which have national implications. Certainly, law schools are the more appropriate laboratory for expanding student's exposure to skill experiences and to properly evaluate students' performances.

Given the size and diversity of New York's candidate population, the use of the type of "criteria-referenced assessment" discussed in the Recommendations to assess interpersonal lawyering skills such as, client interviewing, fact witness interviewing, client counseling,

negotiations, etc., would be impossible to implement as part of a licensing system in this State without unreasonably increasing costs and delaying the admission process for many candidates. The testing methods that can be adopted for the bar exam are also limited by available testing time and resources. We must also consider the need to keep the costs to the candidates reasonable. We certainly could not transfer these costs to law students who are already graduating with large debt loads. It is also important to note that bar exam application fees, which are set by statute, are not retained by the Board; those funds are required to be transferred to the State's general fund. The Board's expenses related to the development and administration of the bar exam are funded by an appropriation that is part of the Judiciary budget. There is no easy way to increase expenditures for testing.

Some members of the Committee suggest that the law school curriculum is driven by the bar exam and that the exam is hindering the promotion of such interpersonal lawyering skills in law schools. I disagree with this conclusion. An ABA Curriculum Committee Study published in 2005, and which is currently being updated, concluded that the bar exam was generally not a determining factor in curriculum offerings. The ABA Curriculum Study found that with few upper-division requirements students are free to design their own curriculum from a wide range of specialized electives including courses in intellectual property and international law. The curriculum for first year students usually consists of required courses that are tested on the bar exam. Although many upper-year students take courses such as corporations or estates and trusts because those subjects are tested on the bar exam, they are also taking a number of courses in areas in which they wish to specialize, many of which are not tested on the exam. A quick review of the course catalogs on the websites of most law schools reveals a substantial list of courses covering specific areas of law which would never be tested on the bar exam, and many of which touch on other academic disciplines.

These may well be worthwhile courses for students who wish to specialize in specific areas of practice. But the volume of courses that are available and the large numbers of students taking such courses suggests that many students are simply not taking basic legal subjects in the absence of mandated curriculum. There is undoubtedly a number of available credits within current law school requirements (most schools require between 86 and 90 credits to graduate) for upper-year students to take "skills" courses.

Given the obvious limits to the types of measurement assessments that can be used on a two-day bar exam administered to over 15,000 candidates annually, the law schools, which have the candidates for three or more years, are the more appropriate venues for the teaching and assessment of the interpersonal lawyering skills recommended in the majority's Recommendations. Requiring clinical legal education as part of the law school program of every student is one way to promote learning of critical lawyering skills, including interpersonal skills.

I also take exception to the observation made by several members of this Committee that the bar exam is simply a test of rote memorization. To the contrary, the current bar exam tests critical lawyering skills such as legal analysis, reasoning and writing in a legal context. Candidates are not simply asked to memorize and regurgitate law rules but rather to apply basic

legal principles to a set of facts and provide critical legal analysis of the pertinent issues. These are crucial lawyering skills that should not be eliminated from the bar exam. Indeed, these same skills are tested on the Multistate Essay Examination section of the Uniform Bar Examination (UBE), which has been endorsed by many law school administrators, and that has now been adopted in several jurisdictions across the country.[46]

Many of the applicants who fail the bar exam do so because despite having spent three years in law school, they are not able to understand, analyze and apply basic concepts in law and they are not able to adequately write in a legal context. Law school students can memorize all the law that they wish, but if they are not able to provide critical legal analysis in a written legal context they will struggle to pass the bar examination - - and in their careers.

The best predictor of success on the bar exam is law school grade point average. Surely, it is not suggested that what the law schools measure is rote memorization of legal principles.

The bar exam is not a perfect assessment tool. It has limitations. Not all lawyering skills can be tested on the bar exam because of restrictions in testing time, cost and the size and makeup of the testing population. The bar exam is a test of "minimum competence" for licensing and it was not intended to, nor can it, duplicate actual practice and experiences. The bar exam was never intended to be, nor does it currently portend to be, the sole assessment for admission to practice law in this State. It is neither possible nor necessary for the bar exam to test all of the competencies required for effective law practice. As the MacCrate Report noted, every lawyer need not be versed in all of the identified lawyering skills and values before admission to practice. Rather, such skills and values are acquired over a continuum spanning one's legal career.

The bar exam is but one step in the admission process in this State. Each applicant is required to have specified law school training as required by the ABA Standards for Approval of Law Schools and the Rules of the Court of Appeals. Law school training is an important and necessary component of the admission process. It is in law schools that the continuum for learning legal skills and knowledge commences. It is in legal education and not the bar exam that experimentation of testing techniques for legal skills can occur. The law schools have greater time and capacity for individualized assessment of a wide range of skills than is possible on a standardized examination.

III. Recommendation to Grant Bar Exam Credit for Participation in Clinical Courses during Law School – "The Point Boost Proposal."

[46] As of December 28, 2011, the Uniform Bar Examination has been adopted by seven jurisdictions: Alabama, Arizona, Colorado, Idaho, Missouri, North Dakota and Washington, and has been conditionally approved in Montana and Nebraska. See, The website of the National Conference of Bar Examiners at www.ncbex.org/multistate-tests/ube/.

I agree with the majority of the Committee that that we need to better prepare law graduates for the challenges of practicing law and that we should expand clinical learning opportunities for law students. However, giving a "point boost" on the bar exam to students that elect to take a clinical course is not the appropriate way to promote clinical learning. It is a proposal that will be costly to implement and may likely have unintended consequences. I note that there were also a number of other members of the Committee that did not support this idea and the proposal passed by only a very slim majority.

It is critical that applicants to the bar examination be assured of a uniformity of standards. A "point boost" that is given only to select candidates would not be a uniform measurement of assessment. It would disadvantage those students who did not have an opportunity for a variety of reasons to enroll in a clinical program or in an externship sponsored by the law school, or who chose not to participate in a clinical experience.

Some schools may not have the financial resources to institute clinical programs or to expand existing clinical programs in order to offer such experiences to all its students. Most law schools do not have enough clinical slots to accommodate their entire student body because clinical education is expensive due to the law instructor to student ratio necessary in this type of program. This proposal may have the unintended impact of creating competition between students for limited clinical opportunities in law schools. Since the State Board of Law Examiners examines applicants from law schools throughout the United States, what type of review would be contemplated for clinical courses that would qualify for the "point boost?" Given that there are about 200 approved law schools in the United States and the vast number of applicants to the bar exam each year, it will certainly require a time-intensive and expensive review process, with uncertain and unequal results.

Some law schools have evening divisions which are attractive to individuals with full-time day jobs and who cannot afford to take time off from work to participate in a clinical or externship program. Are these graduates to be disadvantaged because they did not have time to commit to a clinical experience? The State Board of Law Examiners examines more than 4,000 foreign applicants each year. How would the Board offer these "point boosts" to graduates of foreign law schools? Is it is fair to give point boosts to students who complete clinical programs, and not to those who participate in judicial and other externships outside the law school?

Measurement experts also counsel against "point boosts or bonus points" because such bonuses would negatively impact the validity of test scores. In order to be a valid measurement of assessment, all examinees need to be judged on the same standards. Adding bonus points will affect the median score and may disadvantage test-takers who would have otherwise passed the exam but for the extra points awarded to applicants who took a clinical course.

In an effort to try and accommodate certain students that some members of the Committee believe are not able to pass the bar exam, the point boost suggestion would instead compound the problems by creating a non-uniform assessment measure that will disadvantage large groups of applicants to the bar examination. Since candidates will be treated differently

based on what law school they attended or because they did not have an opportunity to pursue a clinical experience, I suspect that such a proposal would not survive legal challenges. The State Board of Law Examiners strives to evaluate all applicants uniformly - - the proposal for point boosts will create serious discriminatory results.

Moreover, the institution of a "point boost" for candidates who have taken clinical programs would be unique in New York. No other jurisdiction in the United States or its territories permits a "point boost." As correctly noted by the majority, this is particularly critical given the development of the Uniform Bar Examination (UBE). The UBE is beginning to take root and if New York were to adopt it in the future, a "point boost" would impact the portability of scores achieved by New York candidates. New York candidates admitted based on a "point boost" who subsequently seek admission on motion or reciprocity in other U.S. jurisdictions may be disadvantaged if those other jurisdictions were to determine that the applicant's admission was based on assessment criteria different than in other jurisdictions.

The proposal is simply impossible to administer in a uniform and consistent manner, and is not fair to those candidates to whom a clinical experience is unavailable.

IV. Recommendation for a Public Service Alternative to the Bar Exam (PSABE).

As Bryan R. Williams noted in his dissent to the Kenney Report, "a licensing test must be fair . . . the same standards of assessment must apply to all candidates." For these reasons, I believe it wholly inappropriate to establish separate bar admission standards for certain groups of candidates. As such, I dissent from the Committee's recommendation to propose a Public Service Alternative to the Bar Exam (PSABE). For the same reasons, I also oppose the recommendation to adopt a program similar to the New Hampshire Webster Scholars Honors program. I question the message we would be sending to the public about a licensing system for graduates of law schools where some candidates are required to sit for the bar exam while others are not because of concern that these individuals may not pass the exam. We run the risk of labeling new lawyers as those who qualified to take a bar exam versus those who did not.

I believe that proposals such as the PSABE and programs based on the New Hampshire Model may be worthy ventures but not as alternatives to the bar examination. They seem more akin to a mentoring program, which may have its value in developing the kinds of "skills" being taught in clinics and externships. But these proposals would be available only to a select few, and given the vast number of candidates that annually apply for the New York bar exam, it is not an appropriate or feasible alternative to the bar exam in this State. If adopted as alternatives to the bar examination, these proposals will result in a patchwork of bar admission standards that also fail to meet the psychometric requirements of reliability, validity and fairness, which are essential to any licensing test.

Several states have adopted mentoring proposals, and they are worthy of consideration, but such programs are not a substitute for a uniform exam of established validity and reliability.

V. Recommendation to Study the Issue of Speededness

I further dissent from the Committee's recommendation to study the impact of speededness on candidate performance on the bar examination. I do not disagree with the theory that given more time on the exam, minority performance would likely improve, as it would for all groups of persons taking the examination. I understand that the issue of speededness was studied on the California bar exam in the early 1980's and the result was that extra time generally leads to higher scores and benefits everyone, to the same degree.[47]

The majority suggests implementing a pilot in which certain test takers would be given time and one-half while others are administered the exam under regular testing conditions. Such a proposal would result in an exam that would not only be unfair to those taking the exam under a regular-timed schedule, but it would also violate all sound psychometric testing practices.

In any event, it is impossible for New York to provide extra testing time. The State Board of Law Examiners is required to administer the MBE under defined conditions, and except for individuals who require extra testing time on the basis of a disability under the Americans with Disabilities Act, it cannot extend the time for the exam. Even if we assume that the Board was able to grant time and one-half to certain applicants who are not disabled, candidates who receive extra testing time based on a disability under the Americans with Disabilities Act may be disadvantaged and may require additional testing time.

There are also practical considerations. The State Board of Law Examiners does not have the financial resources to fund such a study. The Board also cannot test for nine hours instead of six hours per day, given the burden on staff, proctors and the candidates themselves. Expanding the bar exam for one additional day will greatly increase administrative expenses related to the rental of facilities and expenses for proctors and security measures and would likely cause a revolt among candidates. Furthermore, many candidates pay for hotel accommodations so an extra night would impose further expenses on them, and would eliminate the possibility many take advantage of, to take an additional bar exam on the day following the conclusion of the New York exam.

Finally, even assuming the Board could extend the time for the bar exam as a pilot project, as the Committee suggests, we do not believe that a study could adequately control for the variables presented. The population of candidates taking the exam under normal time constraints would be a different test group than the population taking the exam under extended time, as the same candidate pool cannot be tested twice, and the groups would vary in significant respects, including aptitude, preparation, law schools attended, and effort.

The proposal for a study of speededness is, I respectfully submit, neither practical nor well-founded.

Conclusion

[47] See, Footnote 38 of the Committee's recommendations.

I understand and fully support the Committee's goal of increasing minority admission to the profession. But I believe it is unfair and inaccurate to suggest, as some members of the Committee have, that the problem is the result of the bar exam. The State Board of Law Examiners has no control over the background of individuals applying to sit for the bar exam in New York. The Board's charge is to examine the candidates that apply to it irrespective of their race, ethnicity, gender, sexual orientation, etc. It is true that minorities historically have performed less well on the bar exam than non-minority candidates, an unfortunate socio-economic result that is consistent with results on other standardized examinations, and with performance in law school.

After the implementation of the five point increase in the passing score on the New York bar exam in 2005, the passing rates actually increased for all categories of test-takers. The passing rates for all racial/ethnic groups for domestic-educated first-time takers improved in the interval since the passing score was increased, with African-American candidates registering the greatest gains. There are now more minority candidates sitting for the July bar exam for the first time in New York than before the passing score was increased in 2005.

But, we can do better for the profession. I believe that this Committee could have more of an impact on diversifying the legal profession by focusing its collective efforts on developing programs to encourage more minorities to consider the law as a profession and by mentoring these individuals during their education to meet the existing standards.

James P. Duffy III and Daniel C. Brennan join in this Dissent

Appendix I

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