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Rethinking Assessments and Alternatives to Assessments from the Perspective of a Bar Examiner

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RETHINKING ASSESSMENTS AND ALTERNATIVES TO ASSESSMENTS FROM THE PERSPECTIVE OF A BAR EXAMINER

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Rethinking the licensing of new attorneys is a healthy exercise, and it is commendable that this Symposium presented a forum for doing so. The lawyer licensing process can be improved only through challenge and refinement. There is danger in settling for the status quo and danger in complacency. Reexamining the bar examination is appropriate, and there is no heresy in questioning its content and efficacy. Any risks associated with imagining innovative approaches are worth taking.

Of course, not every proposed solution will yield a process that is better than that which currently exists. New ideas are appropriately tested and tempered. My reaction to the ideas floated at this Symposium is that they all deserve discussion, and after discussion, some should not survive—at least as alternatives to current licensing processes. Moreover, while some of the ideas presented here may prove to be worthy adjuncts to the bar examination, I see in the better-developed alternatives more about "*and*" and less about "*or*"; that is, the better ideas lend themselves more favorably as additions to, rather than as substitutions for, the bar examination.

To establish a foundation for discussion, perhaps we can agree that the bar examination must be more than a rite of passage. Licensing processes, including most significantly the test instruments that are administered, should exist solely to meet the objectives of consumer protection. When licensing processes stray from that objective—whether for economic reasons, or for socially positive purposes such as public service, or for something else—they fail us. This is not to say that the bar examination as we know it cannot be improved;

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indeed, the purpose of the National Conference of Bar Examiners (my organization), since its formation in 1931, has been to foster better bar examining.

Any alternative to the bar examination must meet the essential measurement criteria of reliability and validity. Achieving an acceptable score on a bar examination—or an alternative—must result from something other than the luck of the draw on a particular test date and must relate to requisite entry level competencies that have been determined through a broad-based collective effort. These are the linchpins of any assessments that deserve our reliance and respect and that affect the destiny of the license-seeker. In a high-stakes tests, and the bar examination certainly qualifies as high-stakes, any alternative to the bar examination that falls short in terms of reliability or validity should be rejected.

In addition, any process that is advanced as an alternative to the bar examination must, beyond meeting the objective of consumer protection, be fair to the would-be entrant to the profession and must be administered and evaluated in a manner that is consistent across all applicants, including those with special needs covered by the Americans with Disabilities Act.

There are many ways in which to muddy the waters when alternatives to the bar examination are discussed. I will treat only a few in this Commentary, and then I will make a few observations about the ways in which a better bar examination—rather than no bar examination—might be a preferable alternative for serious exploration.

The proposals under discussion at this Symposium tend to fall into two categories: (1) those that are offered up as alternative vehicles for assessment and (2) those that are not designed as licensing tests at all, but rather as vehicles for some perceived good. The rationales underlying the proposals differ, with some focusing quite negatively on the contemporary bar examination (understanding that the bar examination is actually not a monolith but a product of each jurisdiction's determination) and others focusing on value-laden justifications such as public service, better use of a new graduate's

time, the filling in of certain educational gaps, and other similar goals.

Some of the alternatives presented at this Symposium do not incorporate much in the way of an assessment at all; they appear to be advanced more in the way of arguing that a law degree and some contribution of public service should be sufficient *per se* for entry to practice. In fact, the arguments for these approaches are really arguments that law should depart from other professions and offer unregulated, or very loosely regulated, entrance to the profession. I believe that the completion of a J.D., even one from an accredited institution, does not serve to establish dispositively that every law graduate of every law school should be licensed to practice law without further assessment, and I find it to be self-serving for law deans and others to assert a contrary position.

Others argue that a series of observations of candidates by an assortment of raters, who are of necessity not uniformly coached to apply similar fine-grained performance criteria, will tell us enough about a candidate to winnow the capable and prepared from the incapable and unprepared. This approach accords confidence to judgments unaided by the benefit of applicant volumes and assumes that an isolated mentor or observer can make decisions that are ultimately consistent across an applicant population. Curiously, some critics belittle the experience and the ability of bar examiners to make judgments about candidate competencies even as they would entrust a much narrower field of applicants to limited scrutiny by persons of no greater or better (and perhaps lesser and weaker) experience.

Some argue that evaluation of candidates for a license should be subjected to a standardized set of interactions with coached "clients," citing developments in the professional entrance requirements for physicians. These simulations, which are quite expensive on a per-candidate basis, offer facial validity that holds understandable appeal; however, what is often lost in the discussion is that the structured simulations in medicine are designed to come toward the end of a series of assessments of substantive knowledge that have been administered in stages. No one, including the physicians, seriously

advances that we should be licensing physicians on the basis of these exercises alone.

Some advocate alternatives to the bar examination out of concern that students spilling out of law school hit the streets, often as solo or small-firm practitioners, too poorly prepared for the responsibilities and skills required for the practice of the profession of law. This begs the question as to whether some of the enthusiasm for alternatives to the bar examination would be better directed at remedying deficits perceived in the bedrock legal education in which students have invested three years of their lives, and out of which they often carry huge loan burdens. The placement of public service initiatives and monitored practice opportunities in law school—perhaps in the oft-maligned third year—might permit new lawyers to identify and address deficiencies in an educational context.

Finally, even the best of the alternatives—or the best elements of the worst—must be workable. Experimentation can of course occur in a fairly small petri dish; however, viable solutions will only be feasible if they can be scaled to meet the needs of over 50,000 first-time test takers each year. Furthermore, the acceptability of alternatives to the current licensing structure needs to give the candidate in a particular state a license that is "good currency" for use in securing a license elsewhere, especially in an age when portability of licenses is increasingly significant.

Now as to what might be done to the current bar examination: first, it may be time to think in terms of a staging of the assessments such that candidates are tested, as are medical students, on substantive matters after their exposure to core areas of law—with testing of more skills-related competencies toward the end of their educational experience. Nowhere is it ordained that the bar examination must be administered at the end of each July following law school graduation, for example. The test—or, in a staged assessment setting, the terminal test—could be administered closer in time to law school graduation.

There is a need for greater efficiencies in grading the essay products on the bar examination, and some innovative thinking will be needed for licensing to achieve this goal. Some critics of the bar

examination condemn the loss of time as candidates prepare and wait for their results. Devising grading methodologies and grading processes that accelerate the grading of essay-type tests could release new lawyers to practice sooner. Perhaps we should pause to consider ways in which to lessen the time drain that currently exists before and after the bar examination.

Full participation of the academy, the courts, and those in the profession with interest in what new lawyers should actually be expected to know and perform could play a major role in shaping better assessments. It may be that the product of such an initiative might draw on some of the elements noted in some of the alternatives promoted, whether as opportunities for learning or as aspects that would lend themselves to some type of assessment.

The gulf between the bar examination and what legal educators know about the contemporary bar examination is matched by the gulf between law schools and the perception of bar examiners about the contemporary curriculum and teaching and research methodologies, some of which have shifted drastically over the last decade. These twin gulfs must be bridged. As examples, the rise of clinical education and the enhancement of legal writing as an important element in the formation of lawyers are unknown to many bar examiners.

A constructive bombardment of ideas, as well as broad-based participation in a national discussion, will aid in the development of viable solutions. This Symposium has offered a wonderful beginning and an excellent framework within such dialogue can take place.