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Times Union Center, Albany, NY, preparing to host the Bar Exam.

Is It Time for Real Reform?

NYSBA's 20 Years of Examining the Bar Exam

By Mary A. Lynch and Kim Diana Connolly

The New York State Bar Examination (NYSBE) acts as a key gatekeeping device to the practice of law in New York. Opening the gate to become a licensed lawyer requires a passing score of 665 or more. For more than two decades, the New York State Bar Association (NYSBA), local bar associations and many others have raised evidence-based concerns about the inadequacy of this solely written, largely multiple-choice and primarily knowledge-focused examination as the only assessment mechanism for licensing lawyers in New York. This criticism reflects the fact that the exam fails to measure the full range of competencies needed to practice law. Likewise, repeated concerns have been raised about the disparate impact this assessment method has on the diversity of our profession and our justice system. After summarizing two decades of reports, studies, and recommendations that have critiqued or defended the bar exam, this article suggests that the time has come to implement the real reform that many stakeholders and experts have been urging for years.

1992–1996

The MacCrate, Davis, Millman Reports and NYSBA Response – “Rote Memorization,” “Practice Skills,” and Eliminating “Disparate Impact”

In 1992, two reports from prestigious bar organizations critiqued professional preparation and licensure of the legal profession’s newest members. The American Bar Association’s Taskforce on Law Schools and the Profession issued *Legal Education and Professional Development – An Educational Continuum*, commonly known as the “MacCrate Report,” which called for renewed emphasis on practical lawyering skills and inculcation in fundamental professional values.¹ At about the same time, the Association of the Bar of the City of New York (NYCBA) issued its “Davis Report,” which proposed several changes to the bar examination, including decreasing doctrinal areas tested, devising competency assessments for more lawyering skills, and infusing ethical issues throughout. The Davis Report also noted concern about whether the bar exam had a disproportionately negative impact on

minority candidates, and recommended analysis and, potentially, revision of the bar exam.²

NYSBA's Committee on Legal Education and Admission to the Bar (CLEAB)³ endorsed the Davis Report in 1992 and again in 1995. Also in 1995, CLEAB issued its own "Recommendations for Implementation of the MacCrate Report" and endorsed the Davis Report's suggestion that the bar exam be "altered in form and substance" to "move away from testing rote memorization of substantive law and towards measuring skills which can be learned in law school and are important to the practice of law."⁴

In 1993, the New York State Court of Appeals commissioned a study of the bar examination. Finding substantial differences in bar passage rates between Caucasian and black applicants, what became known as the "Millman Report" concluded that, although the exam did not appear to be facially biased, there was "the possibility of potential sources of bias which we were unable to study."⁵ The report found the exam valid and reliable as

Davis Report was issued. Concluding that the MPT did not remedy the bar exam's "shortcomings," they declared that "other than testing legal reasoning and analysis and memorization," the exam "ignores a wide range of other essential skills . . . [and] tests only a few of the core competencies required to practice law and that it does so largely out of context."¹⁰ They also noted the National Longitudinal Bar Study, which showed a "*substantial disparate effect on minority law graduates*, thus undermining the profession's efforts to increase diversity in the bar."¹¹ The joint report recommended implementation of a pilot project called "Public Service Alternative to the Bar Exam," to "more fairly judge competence of both majority and minority applicants."¹²

2002–2005

The Klein Study, NYSBA's Opposition to Increased Bar Passage Score and the Increased Disparate Impact

Meanwhile, in 2002 the BOLE recommended increasing the NYSBE passing bar score from 660 to 675 over

“Any change, even a change for the better, is always accompanied by drawbacks and discomforts.”

– Arnold Bennett

to "legal knowledge" and "legal reasoning" but stated it was "far from a perfect sampling of all important lawyering skills" and recommended "experimentation to increase the measurement of skills important for public protection."⁶

1994–2002

Professional Education Project (PEP), Multistate Performance Test (MPT), and Public Service Alternative Bar Exam (PSABE)

In April 1994, Chief Judge Judith Kaye convened a Professional Education Project to respond to the MacCrate Report's call for "a coordinated approach to legal education" from law school through bar admissions into transition to practice and beyond.⁷ Two years later, PEP issued its report, *Legal Education and Professional Development in New York State*, calling for development and adoption of "*non-traditional testing techniques that permit effective appraisal of a wider range of lawyering skills than are tested on the traditional Bar Examination.*"⁸ Meanwhile, the Board of Law Examiners (BOLE) reduced some content matter and added the Multistate Performance Test (MPT) in 2001 to "test an applicant's ability to complete a task which a beginning lawyer should be able to accomplish" such as drafting a client letter using simulated case-file materials.⁹

In 2002, the NYSBA and NYCBA Committees on Legal Education and Admission to the Bar together issued a report pointing out that little had changed since the 1992

a period of several years.¹³ This recommendation was based on two short studies by Dr. Stephen Klein. Critics attacked Klein's methodology and "unfounded assumptions" that increasing the requisite score would improve lawyer competence and not have a disparate impact on minority candidates.¹⁴ The NYSBA issued an Opposition Statement as did deans of New York law schools.¹⁵ However, the BOLE proceeded with the first of the three proposed five-point increases.

A 2006 BOLE study of the effects of the first increase in the passing score elicited a letter to Chief Judge Judith Kaye from then-NYSBA President Mark Alcott stating that "*our worst fears have been realized. The increase in the passing score has indeed had a disparate impact on minorities and any further increases would exacerbate that disparity.*"¹⁶ Additional proposed increases in minimum scores have not (yet) been implemented.

2005–2013

The Kenney Report's Four Proposals for Change; Best Practices in Legal Education; Report of the Task Force on the Future of the Legal Profession; and CLEAB's Recommendations on Kenney Report Implementation

In May 2005, then-NYSBA President Kenneth G. Standard created the Special Committee to Study the Bar Examination and Other Means of Measuring Lawyer Competence. Chaired by John J. Kenney, this Special Committee worked for five years, meeting regularly and gathering

information by reviewing reports and speaking with experts. The resulting Kenney Report made recommendations to improve the licensing of New York lawyers.¹⁷

Suggested reforms sought both to “streamline the current exam to test more realistically for knowledge of legal rules that lawyers need to memorize” and to find ways to test skills not assessed by the current examination.¹⁸ The Kenney Report Committee outlined four specific proposals that warranted further consideration: (1) creation of a sequential licensing system; (2) development of an examination that more *broadly* assesses “test-takers’ knowledge, skills, and values”;¹⁹ (3) experimenting with public service alternatives to the bar exam; and (4) adjusting grading to include credit for “a successfully completed clinical experience in an accredited law school under faculty supervision and duly certified by that faculty.”²⁰

Meanwhile evolution in legal education concepts reached a transformative tipping point in 2007 with the almost simultaneous publication of the Clinical Legal Education Association’s *Best Practices in Legal Education: A Vision and a Road Map*²¹ and the Carnegie Foundation’s professional preparation initiative titled *Educating Lawyers*.²² *Best Practices* reflected more than six years of collaborative work involving interdisciplinary and expert input from around the nation to encourage law schools to (1) identify institutionally what students are expected to have learned and be capable of doing and valuing upon graduation; (2) assess whether students have actually achieved these objectives; and (3) subsequently revise curriculum, program development and teaching support. The expert team that published *Educating Lawyers* likewise concluded that “despite some very fine teaching in law schools, often they fail to complement the focus on skill in legal analyses with effective support for developing ethical and practice skills.”²³

In 2010 then-NYSBA President Steve Younger, responding to the radical changes occurring in legal education and the legal profession, created the Task Force on the Future of the Legal Profession. The Task Force’s Report, issued in April 2011, urged CLEAB to “participate in serious study of important potential licensing reforms including those recommended in the Kenney Report” and stressed need for “continued commitment to the central values of diversity and inclusion for our profession, as well as serious attention to how licensing shapes diversity of the legal profession.”²⁴ That summer, CLEAB began its assessment of how to implement the Kenney Report’s recommendations regarding New York’s bar exam. In addition to reviewing and debating the merits of the Kenney Report and all the reports leading up to it, the Committee also considered the issue of “speededness,” citing William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*,²⁵ as well as Professor Claude Steele’s work on stereotype bias.

After much consideration and debate, CLEAB recommended the following (although some of the recommendations commanded only a slim majority of the committee):

1. Incorporate “criteria-referenced assessment” recommended in *Best Practices*, such as those used in law school clinical courses for transparent and fair evaluation.²⁶
2. Develop a pilot project for a Practice Readiness Evaluation Program (PREP), which would grant credit toward the bar exam score from a limited group of pre-approved, specially assessed, clinical courses.
3. Develop a pilot project for the Public Service Alternative to the Bar Exam (PSABE), through which a limited number of applicants could provide meaningful legal services while being assessed on a range of lawyering competencies.
4. Authorize CLEAB to study the feasibility of a pilot program to assess speededness and its potential contribution to disparate impacts of the bar exam.
5. Revise bar examination content, and explore the appointment of a time-limited NYSBA task force composed of varied private and public interest practitioners to provide input on streamlining the bar exam content to “realistically test a candidate’s essential knowledge” and ensure the New York portion is focused only on skills and knowledge that new attorneys *must* possess.

Conclusion

More than two decades of detailed and expert assessments of the bar exam have consistently recommended reform. Multiple committees have issued reports setting forth the same concerns: the existing bar exam fails to assess the wide range of competencies needed to effectively practice law and produces a disparate impact on racial minorities which undermines the diversity of the profession. Groups of diverse stakeholders have presented options to address these failures. Legal education is dramatically changing; law schools are increasingly adapting their curricula to produce more profession-ready graduates. This shift within law schools makes it particularly timely for the NYSBA to address meaningful bar exam reform now. ■

1. American Bar Association Section of Legal Education and Admission to the Bar, *Legal Education and Professional Development – An Educational Continuum* (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) (1992) (MacCrate Report).

2. Committee on Legal Education and Admission to the Bar, *Report on Admission to the Bar in New York in the Twenty First Century—A Blueprint for Reform*, 47 Record Ass’n B. City N.Y. 464, 467–70 (1992) (Davis Report).

3. The Committee on Legal Education and Admission to the Bar was formed on June 1, 1952, and is tasked with “studying the various aspects of and developments in legal education and admission to the bar, in the maintenance of adequate standards of legal education and in the prevention of admission to the bar of unworthy candidates.” N.Y. State Bar Ass’n, Committee on Legal Education and Admission to the Bar, Committees, <http://www.>

nysba.org/AM/Template.cfm?Section=Committee_on_Legal_Education_and_Admission_to_the_Bar_Home (last visited June 11, 2013) (summarizing the Committee's work over the past 21 years).

4. See N.Y. State Bar Ass'n, Report of the Special Committee to Study the Bar Examination and Other Means of Measuring Lawyer Competence, 16-17 (Sept. 13, 2010) (Kenney Report); see also N.Y. State Bar Ass'n Comm. on Legal Education and Admission to the Bar, *Recommendations for Implementation of the MacCrate Report* 15 (1995).

5. This report was named after the lead evaluator Professor Jason Millman of Cornell. Jason Millman et al., *An Evaluation of the New York State Bar Examination* ES-1, ES-3, ES-4, 10-15 (May 1993) (Millman Report); see also Kenney Report, *supra* note 4, at 19.

6. Millman Report at 10-15; see also Kenney Report, *supra* note 4, at 19.

7. Kenney Report, *supra* note 4, at 20.

8. *Id.* at 21.

9. *Id.* at 7, 9.

10. Committee on Legal Education and Admission to the Bar of the Association of the Bar of the City of New York & Comm. on Legal Education and Admission to the Bar of the N.Y. State Bar Ass'n, *Joint Committee Report: Public Service Alternative Bar Examination* (June 14, 2002) (Joint Report). John Holt-Harris, the former Chair of the New York Bar Examiners, believed that "the PSABE will enable law graduates to provide meaningful service to both the courts and litigants. We envision evaluating PSABE participants using a variety of assessment methods, on a broad range of the MacCrate lawyering competencies. . . ." John A. Holt-Harris, Jr., *Examining Ourselves: Observations of a Bar Examiner*, 65 B. Examiner 4, 6 (1996).

11. Joint Report at 4.

12. *Id.*

13. Kenney Report, *supra* note 4, at 22-23.

14. *Id.* at 22-27.

15. Susan Saulny, *Case for Tougher Bar Exam Prompts a Forceful Rebuttal*, N.Y. Times (Apr. 13, 2003), <http://www.nytimes.com/2003/04/13/nyregion/case-for-tougher-bar-exam-prompts-a-forceful-rebuttal.html>.

16. See Michael Kane, et al., *Impact of the Increase in the Passing Score on the New York Bar Examination*, Report Prepared for the New York Board of Law Examiners (Oct. 4, 2006); Letter from Mark H. Alcott, President of The New York State Bar Association, to Honorable Judith S. Kaye (Nov. 29, 2006).

17. Kenney Report, *supra* note 4, at 1-3.

18. *Id.* at 4.

19. *Id.* at 32.

20. *Id.* at 33 (quoting Robert MacCrate, *Yesterday, Today and Tomorrow: Building the Continuum of Legal Education and Professional Development*, 10 Clinical L. Rev. 805, 831 (2004)).

21. Roy Stuckey et al., *Best Practices for Legal Education: A Vision and a Road Map*, vii (2007) (Stuckey).

22. William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching 2007).

23. Carnegie Foundation for the Advancement of Teaching, *Carnegie Examines the Education of Lawyers and Calls for Change*, Press Releases (Jan. 2007), <http://www.carnegiefoundation.org/press-releases/carnegie-examines-education-lawyers-and-calls-change>.

24. N.Y. State Bar Ass'n, *Report of the Task Force on the Future of the Legal Profession* (Apr. 2, 2011).

25. William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 Tex. L. Rev. 975 (2004).

26. See Stuckey *supra* note 21 at 181; see also The N.Y. State Bar Ass'n Comm. 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* 12 (Feb. 2012).

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