IN THE SUPREME COURT OF FLORIDA

FLORIDA BOARD OF BAR EXAMINERS RE AMENDMENT TO RULES OF THE SUPREME COURT RELATING TO ADMISSIONS TO THE BAR	)	Case No. 96,869

Response to the Florida Board of Bar Examiners' Proposal: There Better Alternatives Than Simply Raising the Passing Score on A Exam That Inadequately Tests Bar Applicant Competence

INTRODUCTION

As we stand at the dawn of a new century and its technological revolution, and the Florida Bar celebrates its fiftieth anniversary, the gateway to Florida's legal profession remains tied to an pre-licensing exam that may be antiquated. Although the use of performance exams by approximately 20 other state bars demonstrates that it is possible to require applicants to demonstrate the ability to prepare basic pleadings, wills, contracts, or perform similar types of the day-to-day practical skills required of even minimally competent lawyers, Florida's adherence to a multistate and Florida essay and multiple choice combination fails to directly test the skills most directly connected to entry-level lawyering. The problem is compounded by law school pressure to teach and study "what's on the bar exam". This educational emphasis skews legal education away from enabling law students to acquire the skills required to be a competent lawyer, and towards the acquisition of test-taking skills, and arcane knowledge that will rarely be used or needed as a practicing attorney. Although the Florida Bar has long been regarded as a leader of the legal profession, after a two decade lull, bar exam revision is confined to a numerical revision to raise our state's comparative ranking, rather than an innovative approach to the public's and our profession's need for a meaningful screening exam.

The attorneys who file this response in their individual capacities as interested members of the Florida Bar, and not on behalf of any Bar group or organization they participate in. The background of these attorneys does include work involved in the study of Bar Exam issues, and participation in activities including extensive discussions with representatives and members of the Board of Bar Examiners, law schools, and minority bars, at meetings and the academic conclave on the Bar Exam issue presented during the Florida Bar's January 2000 mid-year meeting in Miami.

A New Beginning - Letting the Bar Exam Proposal Serve as a Catalyst for Reexaming the Exam

The authors of this report do not support the Board of Bar Examiners' proposal to raise to pass/fail line on the existing exam. This disagreement with the Board is based on a conclusion that other bar exam enhancement alternatives are preferable to simply raising the pass/fail line on the existing exam, particularly in view of its impact on minority applicants, and the lack of evidence that any minimal benefits of the raised score outweigh its impact on bar applicants and legal education. Despite this disagreement, the Board's participation and comments during meetings and the recent academic conclave strongly indicate that there is more consensus between the Board of Bar Examiners, the law schools and members of the legal profession, than discord. Everyone professes to want new lawyers to be better prepared for the practice of law, and for the bar exam to strive to measure that intangible. Many of the differences lie in opinions about the availability, timing and economics of the means necessary to accomplish that goal.

The process of consensus-building has been endangered by the pending proposal, as each faction has taken a position to either support or oppose the proposal, and has gathered its best arguments in favor of that position. In such an atmosphere it is easy for questions and concerns about the exam to appear to be a total rejection of the work and hard choices made by the Board of Bar Examiners prior to submitting the pending proposal, and for the response to questions and concerns about the current exam to lead to a defense of the exam that attempts to portray the existing bar exam as the greatest invention since sliced bread, and any alternatives as options that would lead the bar to professional Armageddon.

Lost in that process has been the willingness to concede the limitations of each position, despite continued discussions between the interested parties about how law school education, bar exam testing, and the legal profession should move forward towards the challenges of this

century. Regardless of the ultimate decision on the pending proposal, it is hoped that the Court's decision will include a mandate for a task force to continue the discussion of the shape that the Bar Exam should take in this and the next few decades of this Century.

Initial Conclusions About the Bar Exam Proposal

The attorneys filing this response recognize that the current proposal has a proverbial "camel's nose in the tent" appeal due to the small difference between the current passing score and the proposed score. The "just a few extra points" appeal of the proposal has led of widespread support among Florida editorial boards. The ability of state journalists to frame the issue in terms as a debate over whether to increase diversity in the legal profession at the expense of increased lawyer competence, may place the court in an untenable position where rejection of the proposal could be portrayed by the media as a vote for incompetence.

It is also recognized that the limited access of volunteer lawyers to retain the type of experts and commission the type of statistical research studies that have been used to support the current proposal, makes any attempt to challenge the proposal a David and Goliath proposition. We submit these conclusions, not as Bar Exam experts, but as legal foot soldiers who daily witness the work product of lawyers who have graduated from law school without taking electives that would have taught them basic lawyering skills, and who attained admission to the bar through an exam that does not directly measure a bar applicant's attainment of those skills. We hope our comments are received in the manner intended: As insight from the field to the generals who must ultimately chart the battle plan.

While recognizing those limitations, it is contended that this Court should reject the "quick-fix/raise the bar score " approach to Bar Exam revision because:

1. Both Dr. Klein's research and the tracking data from Florida law schools strongly indicate that the raised score will not weed out potentially incompetent bar applicants, or reduce the number of applicants admitted to the bar. The raised score's primary impact will be to delay the admission of less affluent applicants who must either work while studying for the bar exam, or cannot afford to enroll in a for-profit bar exam cram course. The ultimate admission of these applicants primarily results from improved test-taking skills, rather than increasing mastery of legal knowledge.

2. Raising the score rather than reforming the exam will exacerbate the evolving transformation of law school education towards multiple choice analysis of legal issues and exams intended to emulate the Multistate portion of the bar exam.

3. Raising the score on an exam which does not test the day-to-day lawyering skills of an entry-level trial or office practice, will further motivate students to bypass clinical education and other lawyering skills electives, and concentrate on courses that teach "what's on the bar exam".

4. Increasing the initial failure rate on a test-taking skills oriented bar exam reduces the ability of repeat exam takers to become competent lawyers, by increasing the number of new lawyers who will become sole practitioners. This career path redirection occurs when their initial bar exam failure results in (a) the loss of employment in law firms offering direct mentoring; and (b) rejection by other potentially mentoring firms, that are unwilling to hire lawyers who initially failed the bar exam. The shift from apprenticeship to the typical "fools rush in" format of the untrained and financially strained new sole practitioner, harms the public (which trusts us to protect them from incompetent lawyers) the reputation of the profession, and our new lawyers' prospects for successful and lengthy legal careers.

5. Lawyering skills and performance based testing is not only an available alternative, but is likely to experience the most rapid expansion of its feasibility and reliability, as technological advances make this previously impractical form of testing more cost-effective.

6. While we do not advocate allowing minority or any other bar applicants into the Florida Bar if they are not competent to practice law, the attorneys filing this response cannot ignore the strong indication from their study of the Bar Exam, programs to increase minority admissions to the Bar, and the findings of law schools that have dedicated a part of their mission to increasing diversity in Bar membership, that the proposed increased score will adversely impact minority applicants, without yielding lawyers better trained to practice law. The Klein study contends that the increased score will have no greater impact on minority applicants than non-minority applicants. This conclusion ignores the reality that any increase in the number of minority

applicants eliminated from first time passage by a higher score exacerbates the existing problem of recruiting minorities into the legal profession.

Law school tracking of graduates evidences that Bar exam performance is improved through bar-exam preparation programs that improve applicants' test-taking skills, rather than their knowledge of Florida law and lawyering skills. The loss of employment opportunities for repeat test-takers cited in prior paragraphs, further reduces these applicants' opportunities to obtain the skills and economic resources necessary to competently practice law. In addition to increasing the risk of reducing the number of minority attorneys through bar discipline resulting from inadequate training, the decreased prospects for success in the profession are likely to diminish the ability of law schools to recruit the minority candidates, as these candidates weigh the prospect for failure and delayed entry into the job market against the active encouragement and recruitment offered to the top minority candidates by professions other than law.

7. While these challenges do not justify lowering or preserving low standards for admission to the bar, in the absence of evidence that a higher pass/fail score improves the legal abilities of applicants, minority applicants, the profession and the public are ill-served by remedial measures that create the appearance of improving the quality of entry lawyers. Such public-relations gimmicks may temporarily pacify the public's and the profession's desire for improved bar applicant testing. These measures are, however, no substitute for a commitment by the Florida Bar and the Florida Supreme Court to a multi-decade evolutionary reform of the bar exam so that it more accurately tests the basic minimal lawyering skills that an applicant should possess before he or she is authorized to offer services to the public without supervision, and thereby motivates law schools to provide basic lawyering skills as part of legal education.

Is Our Bar Exam Just a Variation of the Diploma Privilege?

Fifty years ago, the Florida Bar Association was transformed into the Florida Bar we know today. Shortly afterwards, Florida abolished the diploma privilege (which allowed graduates of Florida law schools to be admitted to practice in Florida without taking a bar exam). The mandatory exam is directed towards testing the retention of legal facts, and the understanding of legal principles, not the application of these facts and principles to fashion remedies for legal problems. Thus the exam more closely resembles a comprehensive law school exit exam, rather than a verification that an applicant is capable of representing clients, and protecting their rights in adversarial transactions and court proceedings. Regardless of how high we set the passing score, in the absence of a lawyering-skills component, the bar exam measures the ability of applicants to serve as minimally competent counselors of law, rather than practicing attorneys.

The diploma privilege and the mastery of theoretical rather than practical law have their roots in a style of legal apprenticeship that rarely exists in modern legal practice. At the time when Florida had a limited number of law schools, the vast majority of law students were children of lawyers, who were destined to enter their parents' firms upon graduation. Within the confines of those law offices, the law school graduate would undergo the gradual metamorphosis from case book researcher to practicing attorney. The elder members of the firm would decide when the young lawyer was ready to emerge from the cocoon of the firm's law library and fly through the courtroom as its newest trial butterfly.

This law school educational system, devoid of practical training, served to discourage lawyer-hopefuls from attempting to enter the profession without the benefit of a sponsoring law firm's offer of a gestationing associate apprenticeship. In most communities with a handful of lawyers however, the occasional stray practitioner could at least be assured of community mentoring by local practitioners and judges. The combination of per stirpes inheritance of law practices, and local policing and mentoring of new admittees, bridged the gap between a theoretical education and the public's need for lawyers with adequate practical training. With this safeguard in place, the deficiencies of the diploma privilege, and its progeny: a non-skills directed bar exam, could be overcome without subjecting substantial numbers of clients to potential harm from untrained and unqualified lawyers.

The current bar exam at best, has a minimal connection to the practical skills and day-to-day tasks required of an entry-level lawyer. While many of the exam's testing techniques (such as multiple choice questions) vary from the traditional law school exam (a tradition which is receding in the face of pressures to increase law school bar passage rates), the scope of the exam remains primarily geared towards the theoretical or case-law analysis of law, rather than the skills

a lawyer must demonstrate to apply theory to the practical challenges of trial or office practice.

This type of exam was a necessary compromise in prior decades when the need to test competency had to be balanced against the need for an efficient, inexpensive exam that could be reliably graded within a reasonable period of time. With limited technology, the Multistate bar exam, prepared by a national entity that could divide its preparation cost between the bars of almost fifty states, was a pragmatic approach to balancing those concerns. What we gained in cost savings however, came at a hefty professional price: Use of the Multistate exam, with its multiple choice testing of mythical Multistate law concepts, came at the expense of deceasing the content and scope of Florida law tested on our bar exam. Today's rapidly evolving technological advances may soon make the need for such pragmatic compromises unnecessary.

Will A Higher Score Make the Bar Exam a Better Lint-Filter or Simply a Holding Pen? Does The Holding Pen Fatten or Sicken the Herd of Florida Lawyers?

The implicit assumption of the "Raise the Score" proposal is that the exam serves a lint filter function, to screen out unqualified applicants. That assumption leads to the inevitable conclusion that by raising the passing score, we will improve the exam's filtering effect. The report of Dr. Klein, (the Board of Bar Examiner's expert) refutes this assumption. In his response to concerns about failing applicants, Dr. Klein asserts that virtually all applicants who fail as a result of the higher score will pass either the second or third time the applicant takes the exam. If Dr. Klein is correct, the higher score will not make the Bar Exam an improved filter. For the group of applicants who would have passed the first time under the existing passing score, the exam's higher score will only serve as a holding pen.

When cattle or other livestock are kept in a holding pen, the primary purpose is to fatten them up before bringing them to market. When Bar applicants are held in the pen, however, they emerge leaner, less capable of surviving the rigors of the legal profession and less likely to be capable of providing competent legal services to the public. Where does the failed applicant turn to acquire an increased ability to pass the Bar exam? ABA accreditation standards prohibit law schools from providing Bar passage courses. No law schools offer post-graduation refresher courses to their graduates. A failed bar applicant's only study resource is the materials and course offered by professional bar exam preparation services. These materials and courses do not teach applicants how to practice law; they teach applicants how to pass a bar exam which because of its standardized Multistate component can no longer be considered an exam whose primary focus is Florida law. Recent minority-based programs that have increased minority bar passage through funding for bar exam prep courses, and other means of increasing standardized test-taking skills, and law school data which indicates that economically disadvantaged graduates who either can't afford the bar exam courses, or must work while studying for the exam, are further evidence that test-taking skills rather than knowledge and competence are the greatest variables affecting the passage rate of law school graduates.

Aside from the test taking aspect, the practical effect of bar failure is a diminished capacity to acquire the skills and resources necessary to competently practice law. High bar passage rates have been the norm in Florida for so long, that the first practical outcome of bar failure for most applicants is the loss of a job offered with Bar exam passage as a condition for continued employment.[1]

The first impact of lost employment is the magnification of the financial strain of law graduates with unpaid college loans and decreased resources resulting from the lack of employment during law school. As great a concern as this is to the personal and emotional well being of the delayed-career lawyer, the greater impact is the loss of hands-on mentoring and training. It is very easy for a prospective employer to determine that a new lawyer didn't pass the bar exam on his or her first try. That determination normally ends the prospects for employment by firms with the capacity to train and mentor new lawyers. The unemployed lawyer is also

[1] In his article analyzing the Multistate and New York Bar Exam, Maurice Emsellem notes: "Available data also demonstrates that the bar exam is inextricably tied to the hiring and retention of minority law graduates, creating a problem of employers in all areas of the profession. For example, at The Legal Aid Society in New York City, an organization which employs nearly one thousand attorneys, the number of staff positions held by minority law graduates hired in 1987 was reduced by one-third to one-half as a result of bar failures. M. Emsellem, *Racial and Ethnic Barriers to the Legal Profession: The Case Against the Bar Examination*, New York State Bar Journal, April 1989, 42, at p. 43

unlikely to be hired in a non-legal capacity. The first question out of the mouth of those employers (many of whom would not have survived the rigors of law school, let alone the bar exam), is: "I see you went to law school. So why aren't you practicing law? (or "Why did you leave the law firm of Green and Green, and decide to seek a job outside of the legal profession?" An honest answer of: "I lost my job when I failed the bar exam." is a guarantee of a quick end to the job interview.[2]

What is the likely employment vehicle for the "pass on the second or third try" lawyer? Solo practice! The rigors of a sole practitioner's career are hazardous enough for an experienced attorney with an established clientele, who decides to venture forth on his or her own. The new lawyer who like most law school graduates never took a clinical education course (because it didn't cover material that is on the bar exam), and who has been unemployed an additional six months to a year from the time of his first failure, until his final admission, lacks the training and financial resources required to offer his or her services to the public. So long as (1) The bar exam doesn't test the type of skills and knowledge utilized in the practice of law, (2) law schools under pressure to increase their bar passage rate are forced to offer more exam-related courses, at the expense of lawyering-skills courses; and (3) bar passage can be achieved through improved test-taking skills, rather than the acquisition of lawyering skills, a passing score that increases the bar exam's holding pen function places the welfare of the public and the legal profession in jeopardy.

Why Are We Letting an Apples and Oranges Comparison Goad Us into a "Follow-the-herd/We've Got to Be Number One" Mentality?

One of the many sources of pride for Florida attorneys has been the Florida Bar's and the Florida Supreme Court's leadership on important issues of the legal profession. Florida should continue to lead, rather than be prodded to an act whose primary justification is to avoid a ranking status based on a meaningless comparison.

The layman's comparison of bar passing scores from state to state is based on the erroneous assumption that the same exam is given in every state, and as such, the comparison of passing scores is a comparison of demonstrated proficiency on the same exam. Members of the legal profession know that each state's bar exam must be unique, due to the need to test knowledge of each state's law, and the roughly 50/50 split of states that use or do not use performance exams. The Multistate component of the bar exam is just one component of the overall measuring tool we use to assess the competency of bar applicants. The Board of Bar Examiners has presented no factual or statistical evidence to document that the current bar exam passing score has caused a competency crisis, or that there is a correlation between bar exam scores and lawyer discipline arising from incompetence. If we allow a state-to-state comparison of Multistate scores drive our decisions about the overall standards for bar passage, we may be in for a cyclical roller coaster ride.

Law school representatives allege that Florida was not in the lower third of state bar passing scores when our last decision on the passing score was made. They allege that the change occurred when other states with lower scores used Dr. Klein as their expert and were persuaded to raise their scores. They also allege that after a state is convinced to raise its pass/fail line, Dr. Klein then markets himself to law firms in that state as a consultant for dealing with the problem of increased bar failure. (They allege his primary cures are weighed towards detecting and expelling students who are likely to fail, rather than cures which would improve the quality of legal education.)

In time as Dr. Klein's limited analysis of state bar exams has changed the national average, states with a passing line that has proven adequate for their exam, have fallen lower in this state by state ranking. As Dr. Klein continues to visit states, and state Supreme Courts accept the apples and oranges comparison of non-uniform bar exams, it will simply be a matter of time before Dr. Klein returns to Florida and we are once again told we have to raise the score because our neighbors raised theirs. We can place ourselves on this cyclical version of Disney's "Mr.

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[2] Information gathered by the Florida Supreme Court's Racial and Ethnic Bias Study Commission confirms that this problem (which they describe as the "superstar syndrome"), is likely to haunt applicants who obtain admission after subsequent attempts to pass the bar exam. As an example it quotes the following Commission testimony of African-American attorney Cynthia Everett: "On several occasions I've been asked [by private firms] for LSAT scores even after five years of experience. . . You know the door is closed and locked . . ." *Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission ,* December 11, 1991, at p. 81.

Toad's Wild Ride", or we can look at what is really relevant: What does our exam measure, and how can it be improved so that it does a better job of screening applicants to determine who is competent to serve the public.

Even if the state-to-state bar score comparison was valid, the "panelist study" has a basic logical flaw that undercuts its use as a justification for raising the passing score of the Florida Bar Exam score. To accept the results of the Panelist Study as a basis for raising the pass/fail score, we must accept the following syllogism:

1) The Florida Bar Exam has thee components: A multiple choice multistate component, a Florida multiple choice component and a Florida Essay component.
2) The panelists studied the Florida Essay portion and concluded that the score for a passing answer should be six points higher than the existing pass/fail score.
3) Therefore, the pass/fail score for the entire exam should be raised six points.

Premises 1 and 2 do not support Conclusion 3. At best, Premise 2 supports an increase in the pass/fail score for the Florida Essay portion of the exam. As discussed later in this report, even that change is not supported by the manner in which the panelists were prodded into their conclusions.

Dead Canaries in the Bar Exam Minefield

Before our world became increasingly high-tech, our predecessors devised many low-tech common sense mechanisms for determining when a problem existed. The placement in coal mines of bird cages filled with canaries is an example of this type of solution. If the birds died, it was a good indication the air was too contaminated, and it was time for the miners to leave the mine. Several aberrations of the bar exam and its consequences should be generating a warning that our bar exam is generating dead canaries.

The repeat exam taker/test skills correlation referred to previously is one canary that strongly indicates the exam is separating applicants by test-taking skills rather than legal knowledge and ability.

A second canary can be found in the correlation between bar exam failure and economic circumstances. The Florida Bar Foundation and MPLE programs aimed at improving minority bar passage rates have centered on providing funds for bar exam courses, and by providing test-taking skills development courses, or stipends that minimized the need to work during the traditional bar exam study period. Dean Lynch's September 13, 1999 letter to Kathryn E. Ressell, describes the University of Miami's study that finds a similar link between the need to work, the inability to afford bar exam courses, and a diminished capacity to pass of the bar exam. To the extent that a higher percentage of minority applicants are impacted by the economic component of bar failure, it would explain why more minority applicants with only slightly lower GPA's than non-minority applicants have a lower bar passage rate.

This correlation does more than raise questions about the relation between economic ability and the gateway to a legal career. Many of these working applicants work in law firms. If the exam accurately measured the ability of bar applicants to understand Florida law and the basics of legal practice, it would be logical to assume that individuals working in the actual practice of law should be acquiring knowledge which would increase their legal competency. This increased legal competency, and knowledge of Florida law should translate into higher bar scores on an exam that reliably measures the ability of a bar applicant to practice law in Florida. Instead, Florida law schools tracking their graduates have found that the only way these applicants can pass the exam that will enable them to practice law, is to quit their jobs in law offices (and thus remove themselves from the actual practice of law) and devote their time to studying the materials and attending the classes offered by bar exam prep courses. In other words, to demonstrate competency, you must do the very things which will decrease your ability to acquire lawyering skills.

An additional canary arises from the disparity between law school and bar exam performance. We are told that our bar exam score must be raised because it is the equivalent of a 52% grade on the exam. If it was possible to graduate law school with a D average on law school exams, we would expect to see a portion of bar applicants whose bar exam scores fall in

a failing range. No law school in Florida allows an applicant to graduate with less than a C average. Thus to graduate from law school, a bar applicant must attain an average exam grade of 70. If that average represents the minimum level of competence that a bar applicant must demonstrate to graduate from law school, there should not be an almost 20 point variance between bar exam and law school performance. A reliable bar exam should net a seventy percent score for virtually all applicants, rather make it necessary to curve the passing score down the equivalent of a D exam grade.

The final and most alarming canary is the extent to which the bar exam is driving law schools and law students away from courses involving lawyering skills. Both law schools and law students find themselves in similar dilemmas. While the ABA prohibits law schools from teaching bar exam preparation, it also bases accreditation in part on the bar passage rate of the school's graduates. The most notorious law school casualty of this Catch 22 was the City University Law School. After designing a clinically based educational program, CUNY was forced to redesign its curriculum when faced with a high number of graduates who could not pass the bar exam. If the intent of the bar exam is to test the ability of applicants to possess sufficient knowledge to practice law, CUNY's graduates should have had one of the highest bar passage rates.

A similar but more subtle shift in law school education has been reported by Florida law school deans, and law school representatives. In meetings with the attorneys who file this response, law school representatives have confirmed an increasing trend toward the use of multiple choice/Multistate style exam questions on law school exams. They also report that with the exception of those law schools which require clinical or skills training, students faced with a choice between electives that would provide skills training and electives that focus on possible test questions for the bar exam (such as Florida Constitutional law), opt for courses related to the bar exam. Like the graduates who must leave work in a law office to pass the bar exam, students are forced to sacrifice valuable long-range training to attain a short range goal that does not reward or test an applicant's acquisition of lawyering skills.

Did the Panel of Experts Measure the Wrong Criteria?

An additional justification for raising the bar score is the data compiled by a review of bar exam essays by law school faculty, attorneys and judges. Dr. Klein's study contends the panel rated exam answers that currently attain the passing score as failing exam answers. A noted previously the only part of the bar exam reviewed by the panel was the Florida essay component of the exam.

In addition to the problems with this study outlined in University of Miami School of Law Dean Dennis Lynch's September 13 letter to Kathryn Ressel, no meaningful analysis of bar applicant competence can be determined from a review of bar exam answers which compares the answers prepared under exam conditions with a model answer prepared under ideal conditions. Additionally, by limiting the scope of the panel's input to the sole issue of the quality of exam answers, a valuable opportunity to gain input on the panel's thoughts on the content of the exam's questions was lost. Critical issues that the panel were not allowed to address include:

(1) Do the essay questions provide comprehensive coverage of the areas of Florida law that minimally competent lawyers should be familiar with, and do they test the legal skills that competent lawyers should possess?

(2) Do the reviewed essay questions focus on critical areas of Florida law, or obscure provisions of law that few attorneys will encounter in their practices?

(3) Do the applicant answers graded as failing by the reviewers reflect inadequate knowledge of the subject matter, inadequate legal analysis of the issues, an inability to articulate legal arguments, or inadequate essay-writing skills?

(4) What are the primary weaknesses of those essay answers which fall just above or below the current pass/fail line (i. e. if the line was raised, what deficiencies of the newly failed applicants cause them to be considered to be incapable of being minimally competent lawyers)?

There are several ways that the panel's work should be supplemented to provide input into these issues. First, if the conclusions of the panel are used to determine whether the exam is

measuring minimal competence to practice law in Florida, a review of answers to the questions in their existing form only provides a partial analysis of the abilities of the tested applicants. It is not unusual for bar examiners to add experimental components to a bar exam, to test the reliability of other forms of questions. If the essay questions used for Dr. Klein's panel review would have included an additional performance-based component the panel's input could have provided a better assessment of the limitations of the existing bar exam's format. For example, a practical component could be added to the basic question, in a manner similar to the following:

> "After assessing the rights of the parties, draft a complaint to seek relief in the trial court for a party to this controversy."
>
> or;
>
> After assessing the rights of the parties, draft a clause to be inserted into the parties' contract to prevent the type of dispute which arose in this situation."

If the law school contentions about students taking bar exam-related courses rather than skills oriented courses, and about graduates who fail the exam because they are working in law firms while studying for the bar exam is accurate, we could expect that some of the exam answers which the panel rated as failing would pass the practical component, and some of the answers with the highest grades would receive the lowest grades on the practical component. Those results would provide better clarification about the exam's ability to measure minimal competence than a law school-style evaluation of essay answers.

Second, evaluating the competency of test takers by comparing the quality of essay answers prepared under bar exam conditions, to a the model answer prepared in a non-stress environment, with access to full legal resources, virtually guarantees the conclusion that applicants are not producing satisfactory answers to bar exam question. A more realistic baseline for evaluating the quality of bar applicant answers might have been obtained from a sample group of bar applicants who sat for the exam immediately prior to the exam in which the evaluated answers were used. If this sample group was given an opportunity to answer the Florida essay questions under circumstances where they were permitted to study for and answer questions on one subject at a time, we would now have a basis of comparison that could measure the bar exam factor, as well as the applicant's ability to answer an essay question. The panel's grading of the answers prepared under non-bar exam circumstances could then be compared to the applicant's score on his or her answers to similar questions on his or her bar exam. If there was no variance between the quality of the non-bar exam answers and the bar-exam answers, there would be a valid basis for contending that the passing score was too low. If, however, the same applicant scores significantly lower when exposed to bar exam multi-subject cramming and other test-taking pressures, we could conclude that the passing score reflects a curving factor intended to minimize the bar exam's impact on the applicant.

Another means of evaluating the bar exam factor could be obtained by using the panel members as a control group, prior to seeking their evaluation of applicant answers. This baseline could be generated by asking the panel to participate in a series of exam simulations. In the existing study, the panels were divided by specialty. We can expect that each panel was composed of some of Florida's best experts on these areas of law. These experts should, therefore, be capable of producing the best answers to the questions they were reviewing.[3]

The panel members would be given an opportunity to answer these questions under three different sets of circumstances. First they would be required to answer the full Florida portion of the bar exam, under the same time constraints as bar applicants, with only their answers on the

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[3] In testimony on March 15, 1990, before the Standing Commitee on Judiciary, New York State Assembly, Dr. Richard S. Barrett, a senior technical representative of the E. E. O. C. testified that he conducted this type of experiment with an expert panel (page 3). The expert panel's average score was 86% (or a mid-B grade for A grade experts). He also notes that he took part of the exam, with no prior legal or law school experience, but only his knowledge of test-taking skills. His raw (unscaled) score was 62%, a score sufficient to pass even under the Board's proposed raised pass/fail line. (pages 4 and 5) Using normal multistate scaled scoring, it is likely that his score would have scaled even higher.

questions pertaining to their area of expertise being graded by the panel. The panel members would know in advance that they were being tested on the entire Florida portion of the bar exam, and would be given the same three-month period, and access to bar exam prep materials that is provided to bar applicants.

Next. the panel's test would be limited to a few essay questions pertaining to their area of expertise. Again the panel would be informed in advance of the scope of the exam, and would be given time for advanced preparation.

Finally, the panel would then be given access to a computer equipped with CD ROMS containing the Florida Statutes and Constitution, and Florida case law, and would take an exam consisting of essay questions from all subjects covered on the Florida essay portion of the bar exam. It would also be an interesting comparison to provide these same resources to a sample of post-exam bar applicants with scores above and below the pass/fail line, and then compare their exam-condition answers with the quality of their writing and analysis under conditions that simulate the law office environment.

After the three sets of exams were completed, the exam answers would be mixed in with exams from actual bar applicants. No panel member would be given his or her own exams to grade. While we would expect the grades of the panels' exam answers to be higher than those of most applicants, it is likely that we would also see a wide disparity between grades on the answers prepared when the experts were required to prep for a multi-subject exam and could not use resource materials, and the grades on the exams which were taken when the expert only needed to prepare for an exam involving his or her area of expertise. Neither set of answers would be likely to come close to the quality of the answers prepared when the panel members had access to the type of research resources used every day when lawyers practice law. Comparing the answers prepared under test conditions to the answers of bar applicants would provide a better benchmark for evaluating the quality and competency of the answers provided by bar applicants when faced with the rigors of the bar examination.

The use of the third type of exam circumstance may seem to be an unrealistic benchmark for evaluating exam questions and answers. From discussions with members of the Board of Bar Examiners, however, it appears likely that because of technological advances, this fantasy exam may be the shape of the exam of the future. Members of the Board of Bar Examiners have studied tests that are being devised to use these technological resources. While it is still cost-prohibitive, those barriers are continually broken. Once it is cost effective, this type of exam is a better way to test lawyer competence. Even the best memorizer of the Florida Statutes and case law is apt to discover that as soon as he or she leaves the exam, a bill will be signed into law, or a court will render a new decision that makes today's legal knowledge obsolete. The true test of a lawyer's ability is not how much of the existing law he or she can commit to memory and recite in an essay, it is the lawyer's ability to adapt his or her advice, pleadings, and trial practice to the ever-changing state of the law.

We don't even need advanced technology to create exam questions that measure these abilities. After providing the applicant with a fact situation, the exam would contain a text of a real or fabricated Florida Statute. The applicant would either be asked to assess the client's rights under that statute, or to draft a complaint, or a provision of a will or contract to cover the issues of the client's fact situation. As a second part to the question, the applicant would either be given a hypothetical revision of that statute resulting from the enacting of a bill, or an appellate court opinion interpreting the statute. The applicant would then be asked to explain how the new bill or case would affect the client's rights, and to make any revisions necessary to enable the previously drafted complaint or contract or will clause to comply with the new statute or case law. This ability to assess and respond to changes in the law is one of the most critical skills that an entry-level lawyer must possess, to provide competent services to the public.

This shift in the focus of bar exam questions is far preferable to revising the exam by raising the passing exam score for answers to non-performance based questions. In discussions with law schools it was revealed that certain bar exam prep instructors are known for their knack of anticipating what questions will be on the bar exam, based on their review of unresolved issues of law. If this is true, those types of questions have no place on an exam testing minimal lawyer

competence. An entry-level lawyer has no business attempting to represent a client petitioning the Florida Supreme Court for a decision about an unresolved area of law. The only ethically proper answer for an entry-level lawyer to give to a prospective client who seeks representation in such a proceeding is:

> "I have just started practicing law. I am not competent to handle this type of case. I will help you find a lawyer who has sufficient expertise to properly protect your legal rights in this matter."

In the real world practice of law, any other answer by an entry-level lawyer should not only earn a failing grade: it should merit disciplinary action.

SUGGESTIONS FOR FUTURE ACTION

In stating our reasons for opposing the current proposal of the Board of Bar Examiners, the attorneys filing this response recognize that responsible criticism of this proposal, should also provide the court with alternative courses of action which could be implemented to achieve the goal of increasing lawyer competence, and ability of law schools and the bar exam to assure that lawyers enter the profession with the skills necessary to adequately protect the interests of the public and the legal profession. Accordingly, the following alternatives are submitted:

1. Although the Board of Bar Examiners has limited its Bar Exam revision proposal to a mathematical change in the passing score, Board representatives have clearly indicated that the Board has, and continues to explore performance and technologically based changes to the bar exam. To date the Board has concluded that existing performance exams have not reached the level of perfection that justifies adding them to the Florida Bar exam. That is not the same thing as saying that the Board has concluded that performance-based testing should never become part of the exam. The Board has begun experimenting with quasi-performance questions in the Florida portion of February 2000 exam. The Board should be encouraged to continue to do phase in these and true performance-style questions into the exam..

Even if the Florida Supreme Court decides that the proposed change in the passing score of all or a portion of the exam is the best available short-term remedial revision, the court should convey a strong and explicit message that the process of bar exam review and revision must not end with the change in the passing score, and that efforts aimed at increasing reliable means of utilizing performance components should be pursued. If it is true that law school course content and law student decisions on course electives are influenced by the content of the bar exam, then the bar exam can be our profession's best vehicle to lead law schools towards including lawyering skills in course content, and towards motivating law students to drink from that new source of legal water. A movement towards increasing the performance-based components of the exam will not only bring the exam closer towards the goal of measuring the extent of an applicant's lawyering skills, it will increase the prospects that law students will graduate with increased knowledge of the skills they will need to practice law.

The worst possible scenario would be for the court to raise the score without advocating the need for additional exam revisions. Though the means to fully implement this goal may not be immediately available, the profession and the public cannot afford to wait another twenty years for the next wave of bar exam revisions.

2. Short term solutions to the disparity between the knowledge and skills required for entry-level attorneys and the skills tested on the bar exam may lie in a deceased use of the Multistate portion of the exam, and a return to an exam with a more extensive Florida component. The lure of Multistate exam convenience, economy and efficiency, has come at a price: a decrease in testing knowledge of Florida law, and a reduction of passing grades from a seventy-percent (or C grade) benchmark, to a fifty to sixty percent (or F to D grade) plateau. If our goal is increased proficiency of bar applicants, that goal is better achieved by broadening the base of the Florida law component of the exam.

3. It is time that the mystery of bar exam performance comes out of the shadows. Decades ago

we lost access to valuable insight about bar applicant performance when case law held that providing applicants with an unlimited right to retake the exam, is an acceptable due process alternative to bar applicant review of the exam. The result has been speculation by educators as to what educational skills must be provided to law students, misleading speculation about the disparity between minority and non-minority bar passage rates, speculation about potential law school grade inflation and unqualified graduates, and speculation by failing bar applicants as to how to supplement their studies to attain sufficient knowledge to pass the exam. None of this speculation has any documented basis, because we are prohibited from looking behind the scores to determine the cause of bar exam failure or success. We remain the epitome of the classic fable of the blind men and the elephant.

This court, law schools, bar applicants, and other groups interested in improving bar applicant competence, and increasing minority participation in the legal profession need real answers to the question of why there is a disparity between the ability of law students to obtain seventy-percent performance in law school, and the inability of bar applicants to attain more than a fifty to sixty percent average on the bar exam. Those answers can only be obtained when bar applicants, law schools, and other interested groups can review an applicants' entire exam. Such review has to be conducted under circumstances which preserve the integrity of the exam, and need not include a right of an applicant to use the review as grounds for appealing his or her exam score. The procedures used by other states to provide this type of review demonstrate that this change can be accomplished without the need to reinvent the wheel.

4. Law school contentions of a link between efforts to work during the bar exam study period and bar exam failure should be evaluated. If the law schools are correct in their belief that employment during the bar examination preparation period should conform to the ABA work limitations for law students, there is a need for the Florida Bar and the Florida Supreme Court to provide ethical guidance to law school graduates and their potential employers. Clearly, neither the court nor the Bar can mandate these employment limitations. If the problem truly exists, however, the Bar and the Court can heighten the awareness of bar members to the hazards of this practice. As a profession, we are moving towards a return to mentoring. Part of that mentoring needs to be a recognition that part of the investment law firms make in their associates should be the provision of adequate time for bar exam preparation, and a recognition that associates who are capable of becoming good lawyers may not pass the exam on their first try (especially if the passing score is increased).

5. Evolutionary change in the bar exam may require an investment of resources above and beyond the Board of Bar Examiners' operating budget. Limiting the Bar Examiners' budget to revenues generated from applicant fees is a reasonable means of paying for the normal operating expenses of administering the Bar Exam. If substantial changes to the exam need to be implemented, the legal profession and the public need to be prepared to invest the resources needed to create and review the exam, and wean Florida from a Multistate exam.

6. One byproduct of a commitment by the Florida Supreme Court to increasing the Florida component and decreasing the Multistate component of the Bar Exam may be its catalytic effect on the National Conference of Bar Examiners (NCBE) which prepares the Multistate exam. Florida's use of the Multistate exam generates a large share of the exam's revenue. The NCBE has demonstrated a willingness and ability to generate new exams, when states have shown an intent to implement new exam formats. The decisions of states to implement ethics and performance-based exams, has resulted in the creation and marketing of Multistate versions of these exams. To date technological limitations have weighed against the use of these resources to create customized state exams. We daily witness how fast technology is changing, and how once prohibitively expensive tasks can now be performed economically. A decision by Florida to expand its Florida exam component and decease its dependence on the Multistate exam is likely to become a motivation for utilizing technology to make state-by-state exam customization cost-effective. If Florida's efforts have that effect, we will once again be leading the legal profession to new heights, rather than blindly riding the "avoid the bottom third" bar exam score roller coaster.

Conclusion

Eleven years ago, the undersigned author of these comments submitted an analysis of the Bar exam entitled: "In Search of Virgil's Dream". The title was selected in recognition that Virgil Hawkins' saga serves as a reminder that good intentions alone are not enough to create a good lawyer. Educated before law schools offered clinical training, Virgil Hawkins lacked the lawyering skills necessary to journey down the road traveled by sole practitioners.

The justices' notes (copy attached) during deliberations on the Hawkins' request for a diploma privilege admission clearly state our present dilemma: One justice notes that the Court lacks the means to measure Hawkins' ability to practice law. Though intended as a means of offsetting the damage of past discrimination, in hindsight it is clear that the decision to admit Hawkins without the training necessary to competently practice law, not only exposed the public to needless harm; it exposed Hawkins to the potential of harm that ended his career, and destroyed his reputation and final years of his life. The Hawkins tragedy demonstrates the danger of allowing inadequately trained bar applicants to enter the legal profession, and offer their services to the public.

If Virgil Hawkins were alive today, he would not chastise the Court or the Bar for a fate for which he accepted personal responsibility. His concern for future lawyers and law students would, however, lead him to echo the ABA's McCrait report[4], and make this plea to the court: "Give the next generation of lawyers a fighting chance to become the lawyer I aspired to be. Shape their legal training and bar examination so that bar applicants enter Florida's legal profession with the knowledge and skills necessary to properly serve their clients." We owe it to the future of Florida's legal profession and to the public we serve, to strive to attain that goal.

Respectfully Submitted,

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[4] The formal title of the report is: *Report of The Task Force on Law Schools and the Profession: Narrowing the Gap,* American Bar Association Section of Legal Education and Admissions to the Bar, July, 1992