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Via E-Mail: Andrea.Sinner@americanbar.org

Dear Ms. Sinner and Members of the Commission:

Thank you for inviting comments relating to the Commission’s ongoing work. This letter is intended to set out some working assumptions and to offer several important recommendations that, together, address the key questions to which the Commission sought responses.

Key Questions. The Commission has recently solicited comments on licensure,¹ future skills,² and access to justice.³ We hope it will be helpful to the Commission for us first to set out our working assumptions, and then to offer a set of four, interrelated, complementary recommendations that comprehensively address the issues the Commission has under review.

Working Assumptions. In reflecting on the issues facing the Commission it is important to recognize the institutional context in which these problems arise. It is therefore worth stating relevant working assumptions at the outset, since context inevitably shapes possible solutions.

- **Institutional inertia and bar examinations.** The current system of bar examinations and licensure is not likely to change given institutional inertia and financial incentives associated with maintaining the current examination and licensure system.
- **Bar examinations and accreditation requirements.** Bar examination and accreditation requirements create a system that drives up student debt and contributes to problems with access to justice, albeit unintentionally. Students must pay three years of tuition before they can sit for the bar exam and seek licensure. While a three-year course of study is warranted for securing a JD and general license, a shorter course of study might be appropriate if “limited license” options designed to foster access to justice could be pursued.
- **High debt loads.** High debt loads deter potential students interested in serving those in greatest need because the students recognize that jobs focusing on access to justice do not pay enough to service significant law school debt. As a corollary, students who wish to gain a legal education

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1 **Licensure:** Better understand recent bar passage trends and explore different examination and certification models which align with a forward-looking definition of entry-level competence. More specifically: How well does the current bar exam (please specify your state) correlate to entry-level competence for the 21st century attorney?

2 **Future Skills:** Explore the law jobs of the future, with associated required competencies, across the coming two decades. Highlight the shifts needed in education and licensure to serve that future view and explore models more agile to the pace of change.

3 **Access to Justice:** Address the systemic structures in education and licensure which limit the ability of the profession—and society—to make greater progress on access to justice. More specifically: How can law schools prepare students for the law jobs of the 21st century? What are the new skillsets not traditionally included in law school curriculum?
but who want to devote themselves to professional ideals of serving those of limited means may think it infeasible to attend law school at all, given current costs.

• **Methodology of bar examinations.** Bar examinations have improved but remain methodologically flawed in important ways. As currently constituted, bar examinations are not well-validated against basic competence in professional practice. They focus largely on testing content while ignoring most professional skills. The widely embraced Uniform Bar Examination (UBE) tests “the law of nowhere” and creates problematic disincentives for law schools to avoid wasting time and confusing students by teaching jurisdiction-specific legal doctrine. Because each state establishes its own cut score, states around the country vary significantly, casting doubt on the claim that the UBE measures “entry level competence.”

• **Perpetuation of inequality.** Bar examinations and accreditation practices perpetuate inequality associated with disparate pre-college and college academic experiences. Bar examiners, accreditors, and law schools have also failed to recognize the effects that weak or segregated K-12 public schools have had on preparing applicants for college, law school, and the legal profession. To the extent that bar examiners look to the LSAT (a test of pre-law-school critical thinking and reading skills) as a reference point in building bar exams, they perpetuate such inequities. Law schools increasingly devote significant energy and resources to addressing critical thinking skills through academic support programs, but fresh ideas are needed to help students recognize the nature of such skills and develop them while in law school, rather than focusing primarily on memorizing content to pass the bar exam.

• **Potential for change.** Change is possible, but only if institutional impediments, existing blind spots, and the need for fresh ideas and fresh alliances are recognized.

**Recommendations.** Based on the premises stated above, the Commission should consider the following multi-faceted solutions that address each of its several concerns.

a. **Facilitate creation of a new national post-1L year “pre-bar” or “early-bar” exam, designed to assess law students’ critical thinking abilities and legal writing/research skills in the context of first year subject matter.**
   i. **Multiple Benefits.** Such an exam would have several benefits including the following:
      o **Student Achievement and Remediation.** Provide law schools and law students with objective benchmarks about students’ initial development of critical thinking, writing and research skills. As a consequence of this benchmark, law students and law schools would be better able to address students’ shortcomings and enhance their likelihood of ultimate success on the bar exam much earlier in law school, rather than after students accrue three years of debt.
      o **Criterion Based Assessment.** The assessment of lawyer competence inherently requires “criterion based” judgments (has a candidate achieved a basic level of competency?) rather than “norm-based” judgment (how does a candidate stand in comparison to others?). Using a criterion-based approach will set a clearer standard for law student candidates for admission to the bar and help clarify what is ultimately expected of them.
      o **Assessment of Program Learning Outcomes in Response to ABA Accreditation Requirements.** Development of a standardized test to assess students’ critical thinking, writing and research skills would provide an effective means for law schools to address obligations under updated ABA accreditation requirements relating to learning outcomes.
Liberating the Law School Curriculum. If law schools can confirm that students have developed crucial thinking, writing and research skills after the first year of law school, they might feel freer to engage in curricular innovation in the second and third years of law school.

Consumer Protection. The California Bar has long employed a similar “baby bar” system in order to protect law students at non-ABA accredited law schools from going deeper in debt if they run significant risks about ultimate success on the state bar at the end of their law school experience.

Reassessing the LSAT Regime. Such an approach would facilitate more intensive review of LSAT frameworks, particularly insofar as a post-first-year test would use a criterion-based rather than norm-based assessment of student accomplishment after the first year of law school.

Providing an Initial Assessment for Potential Candidates for Limited Licensure. If an initial examination is developed that would allow law students to be judged on as to their “competence,” “lack of competence,” or “uncertain” competence after the first year, that examination can provide a framework for determining which law students might qualify for limited licensure to advance the cause of access to justice, following further training in their second year, as discussed below.

Methodology.

Expert Test Developers. Encourage LSAC to develop and pilot such a test working with other organizations such as AALS and AccessLex, and expert faculty including subject matter experts, academic support professionals, and legal research and writing faculty.

Relation to Bar Examination. Start now with the law schools. In due course, bar examiners might come to agree that such an examination could constitute the first stage of a multiple-stage bar examination.

Access to Justice Concerns and Pathway to Limited Licensure

What’s the Problem? The current requirement that law students must complete three years of legal education before applying for the bar examination and gaining a license to practice means that JD graduates who pass the bar examination at the end of their third year of law school need to find jobs that pay enough to allow them to retire law school debt in a reasonable time. Loan repayment programs currently temper these obligations and give graduates some hope about retiring debt. But federal law is in flux and such loan repayment programs may not continue. It is therefore imperative to consider whether other systems might be adopted to reduce student debt load and to enhance incentives for providing legal services to those with limited means.

What’s the Solution? Washington State has led the way in creating a limited licensure system to address areas of high need (in family law) where the practicing bar has failed adequately to respond to access to justice concerns. A range of other states are considering whether limited licensure solutions are worth pursuing, as described in the 2016 ABA Commission on Legal Services report. The Commission on the Future of Legal Education could recommend that such limited licensure models be more widely adopted throughout the country, while at the same time opening a new pathway for students with two years of legal education to respond to such needs before being buried in three years of debt.

Considering the Details. A potential strategy for fostering law student competence, reducing debt, and facilitating access to justice, would involve reshaping the second year...
of law school so that in the fall semester students who had achieved a strong showing in the post-first-year critical thinking/writing/research exam could then spend a semester concentrating on courses related to potential areas of high-need limited licensure practice (e.g., family law, debtor-creditor, immigration law). Then, in the spring semester of their second year, they could engage in a well-supervised semester-long residency/clinic/externship program. At the end of their second year, such students could receive a masters’ degree, pass an addition exam relating to their proposed field of limited practice, and then be certified to engage in that limited practice area. Such students could also be designated as candidates for completing a third year of law school in residence or by distance education at a later date if they choose to pursue a full JD.

c. **Skills-based education and residencies.** Encourage development of semester-long “residency” requirements (that could be satisfied all in one semester or through an equivalent number of units spaced throughout the course of law school) as a pre-requisite to full-time licensure. Many law schools are already providing their students with a combination of clinical, externship, and pro bono activities. Individual jurisdictions could consider imposing a one-semester “residency” requirement that can be met during law school, during periods of supervised practice connected with “limited licensure” programs or following graduation.

d. **Improvement of bar examination practices.** Improve bar examination practices, drawing upon emerging best practices in other fields and countries. Encourage the National Conference of Bar Examiners, working with individual state jurisdictions, to undertake significant reforms in the current model for bar examinations. Such reforms could include adopting better practices to validate bar exams with an eye to core competence, embracing a two-stage bar exam system similar to that used in some other countries, allowing applicants in an advanced stage exam to opt for examination in several broad areas of intended practice (rather than on all subjects), and incorporating better methods of examination such as have been introduced in Canada (open book), and England and Wales (skill-oriented simulations).

Each of us is a long-time law professor who has devoted extensive time helping students develop professional competence in a range of fields. We have also thought, written, and spoken about legal education, the legal profession, and bar examination reform. We would be happy to share additional thoughts with the Commission and others if desired. Thanks for considering these observations and proposals.

Sincerely,

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