

**STATE BOARD OF LAW EXAMINERS
MINUTES OF THE COMPREHENSIVE COMPETENCY COMMITTEE MEETING**

Wednesday, October 6, 2021
Minnesota Board of Law Examiners - Committee

Present at the meeting via Zoom were the following members of the Committee: John Koneck, Board President; Tom Boyd, Committee Chair; Hon. Juan Hoyos, Board Secretary; Wilbur Fluegel; and Shawne Monahan. Also present were staff members Emily Eschweiler, Director; Natasha Melchionne, Managing Attorney; AJ Dordel, Staff Attorney; Emily Corson, Bar Admission Administrator; and Mariah Colvard, Executive Assistant.

Additional guests in attendance: Carol Chomsky, Eder Castillo, Kim Ronning, Joel Nichols, Nancy Mischel, Tim Wong, Dena Sonbol, Leanne Fuith, Lynn LeMoine, and Sophie Martin.

Unable to attend the meeting was Patricia Beety.

Tom Boyd started the meeting at 2:32 p.m.

Tom provided the Committee with an overview of the agenda and thanked Carol Chomsky for accepting the Committee's invitation to present.

Determining Competency: Discussion of current exam and possible alternatives to the examination – Guest: Carol Chomsky, University of Minnesota

Carol Chomsky began her presentation by thanking the Board for inviting her and for undertaking this study. She provided her background and noted (later in her discussion) that although a professor at the University of Minnesota, she was speaking today on her own behalf and not on behalf of the University of Minnesota. Professor Chomsky has been part of a working group on bar licensing issues with 11 members (the Collaboratory on Legal Education and Licensing) and she has been studying this issue for more than 20 years. She recommended that others in the Collaboratory would also be able to provide information to the Committee as it studies this issue.

Professor Chomsky outlined that she would cover three topics: 1) what minimum competence means, including the national study conducted by IAALS; 2) what she sees as deficiencies in the current exam and how to create a better exam, including reference to the NextGen plans of the NCBE; and 3) alternative pathways for licensing that have been proposed or suggested (not as a replacement to the exam but as an alternative to the exam.)

Professor Chomsky recognized that the NCBE had also conducted a nationwide practice analysis, but noted that the methodology for the IAALS study was different. IAALS

conducted its study with 50 focus groups in 18 locations (5 of the focus groups took place in Minnesota.) The focus groups were comprised of new lawyers, with a few separate focus groups comprised of those who supervise new lawyers, with most of the participants being new lawyers in the first two years of practice. The focus groups were demographically diverse and included a mix of job settings and practice areas. Participants were asked to provide information about what they did in their first year of practice and then based on that what knowledge and skills they needed, how they developed those, what mistakes (if any) they made and the knowledge that would have helped them to avoid those mistakes, and finally questions related to the bar examination. Professor Chomsky noted that the study was on minimum competence, not focused on the bar exam but that the study provided valuable insights with respect to the examination.

Some of the researchers' findings included:

- Many new lawyers engage directly with clients with very little supervision.
- New lawyers need more training on how to communicate with clients to solicit the information needed to represent the client effectively; new lawyers also need better training to know what information they need to solicit.
- Lawyering skills matter more than doctrinal knowledge. (Focus group participants learned a lot by trial and error.)
- New lawyers do not rely on memorization.
- New lawyers rely on recognizing threshold concepts and then looking up the specific information.
- Care and preparation matters more than speed.

Based on the study, IAALS developed twelve building blocks of interlocking competencies:

- The ability to act professionally and in accordance with the rules of professional conduct.
- An understanding of legal processes and sources of law.
- An understanding of threshold concepts in many subjects.
- The ability to interpret legal materials.
- The ability to interact effectively with clients.
- The ability to identify legal issues.
- The ability to conduct research.
- The ability to communicate as a lawyer.
- The ability to see the "big picture" of client matters.
- The ability to manage a law-related workload responsibly.
- The ability to cope with the stresses of legal practice.
- The ability to pursue self-directed learning.

Professor Chomsky noted that in her opinion, the current written examination tested only 5 of the 12 building blocks. It is missing key components such as interviewing clients and conducting research. Additionally, the exam asks examinees to remember the law

instead of understanding the law. The multiple-choice questions require significant ability to recall.

In addition to the deficiencies, it also is problematic that the exam asks applicants to memorize rules with exceptions to exceptions and to answer the questions rapidly. She suggests that there is a mismatch between what is currently tested to show minimum competency.

Professor Chomsky referenced a [white paper](#) by Steven Foster (Ohio State) in which he provides his notes on a study in Ohio where he asked 16 licensed lawyers to take a simulated MBE without preparation and all failed to achieve a passing score.

Professor Chomsky also provided the national data indicating disparate bar passage rate impacts based on race¹ and noted that the examination has become a test of resources as not all candidates have the ability to purchase a bar preparation course or take two months off from work.

This was supported by a recent study conducted for the New York Board of Law Examiners by AccessLex: [Analyzing First-Time Bar Exam Passage on the UBE in New York State](#). Graduates who worked for pay during the study period were significantly less likely to pass the exam. Graduates who purchased a bar review course were significantly more likely to pass.

Professor Chomsky recommends that the Board continue to keep a focus on the questions and provide pressure to the NCBE to reflect on the concerns that have been raised as it continues studying this issue. The NCBE has noted that it will test fewer subjects and focus on threshold concepts, which is good. She encourages the NCBE to provide more detailed subject matter outlines on what the test will cover. She would discourage multiple choice type questions as they are least effective to replicate what lawyers do. She also would encourage testing the ability to conduct research, eliminating harsh time limits, and providing for an open book format. Professor Chomsky also encourages the Board to provide input into how the ultimate cut score would be determined on an integrated examination, noting that Minnesota has done a good job of setting a reasonable cut score (unlike California). She also noted that it is problematic that it will take the NCBE four to five years to conduct its work and encouraged the Board to consider whether there are any alternatives in the meantime. The Board could also propose alternative pathways to the examination.

Professor Chomsky provided an overview of the [Daniel Webster Scholars Program](#) in New Hampshire. This program provides a strong curriculum, but is resource heavy. Each examiner that participates is assigned four or five students whose portfolios they review. Another route is a clinical pathway where students would participate in a specific number of supervised clinical hours. Supervised practice following graduation is another route. Portfolios could be reviewed following rubrics or standards could be set for what must be

¹ Note: Additional national breakdowns can be found at the ABA's website: [2020 and 2021 Bar Passage Data by Race, Ethnicity, and Gender \(americanbar.org\)](#)

certified through supervision. Those who participated in this type of program in 2020 in Utah noted that it was a positive experience for both the recent graduates and the organization.

Tom Boyd thanked Professor Chomsky for her presentation, noting that he was thankful for her presence both at the meeting and in the state. He wondered whether Professor Chomsky knew of any studies related to testing speediness. Professor Chomsky did not know if a study had been done on this, but that the IAALS study suggested the damaging impacts of training individuals to test based on speed. In the practice of law, you should flesh out a full response and not act quickly. It is not consistent with how lawyers should handle their work.

Tom noted that one of the benefits of the review course was that it did a good job of providing a summary of all the key concepts that he had learned over his three years of law school. He wondered whether there were any studies on the benefit of that synthesis.

Professor Chomsky noted that the participants in the IAALS study did comment that there was a benefit from seeing the whole picture. The challenge is that because of the level of detail, the concern was too much of a focus on the trees, branches, and even leaves rather than on the entire forest. Another participant commented that the value that she saw in the bar preparation was that compared to the stress of bar preparation and taking the exam, anything that happened in the first year of practice would be a breeze. Professor Chomsky countered that we shouldn't view that as a positive.

Tom wondered whether there were studies on differences in practice readiness between those who had participated in a clinic and gone into court and those who had participated in a mock trial. Professor Chomsky noted that hands down the IAALS responses led to the conclusion that clinics provide invaluable experiences. Clinics provide the opportunity to have client contact, juggle workload, make oral arguments, and much more all with the benefit of having an instructor guide you through the process and provide feedback to be even better in the future.

Professor Chomsky also recommends that the examination be open book, with a specific set of materials. Additionally, exam delivery will be important. One small test window where you both read materials and write answers can be challenging, even for candidates who have grown up with technology.

John Koneck asked whether the IAALS study had considered the issue of portability, which is a benefit of administering the UBE. Professor Chomsky noted that it wasn't part of the study and that she would agree that most states do not want to do anything that creates challenges for portability. A number of applicants don't know at the time they register for the exam where they will ultimately practice and we don't want to create a process that will make portability harder. This is an added reason why it is important to make sure that the next version of the bar exam coming from NCBE responds to the concerns discussed today, while also evaluating alternatives to the exam.

John noted how important it is that we have the law schools participate in this process because of the law schools focus on training. Unless we have uniform standards, it will be hard to evaluate to make sure that the applicant's participation has been evaluated to ensure that they have the skills to practice.

The Committee Chair concluded this portion by thanking Professor Chomsky for her time. Professor Chomsky noted that this is something that she is passionate about and she is happy to provide any additional information or to participate in further discussions if it would be helpful.

Update on timeline from Next Generation Exam

Emily Eschweiler provided a few updates from the Next Generation's Implementation [Timeline](#) and how the timeline may impact the Board's report to the Court.

Brief updates on work in other jurisdictions

Emily Eschweiler advised that the jurisdictions we are aware of that are studying this issue are: California, Georgia, Utah, New York, Oregon, and Washington State. Jurisdictions have taken slightly different approaches. We're reviewing the work of other jurisdictions to determine what we may be able to learn from work already completed.

The meeting adjourned at 3:59 p.m.