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May 16, 2023

State Bar of California Board of Trustees
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Blue Ribbon Commission on the Future of the Bar Exam -
Report and Recommendations

Dear Members of the Board of Trustees:

On behalf of the California Association of Certified Family Law Specialists, a non-profit organization with 694 members who are certified family law specialists by the State Bar of California, Board of Legal Specialization, we write to express concerns about the March 7, 2023, Blue Ribbon Commission on the Future of the Bar Exam Report and Recommendations (hereafter referred to as the "Report").

ACFLS recognizes the time, commitment and effort of the Blue Ribbon Commission in evaluating potential changes to the bar exam and pathways to licensure as an attorney. The Report demonstrates a robust discussion about ways to increase access to licensure for many people who have the intellectual and personal qualities desired in the legal profession, though passing the bar exam is an obstacle to joining that profession. The discussion in the Report included simplifying the bar exam by reducing the number of topics tested such as community property (see the Report, at p. 2). Increasing access to joining the legal profession is a laudable goal, but ACFLS has significant concerns that such goal should not be achieved by not requiring examinees to understand core legal principles embodied in California community property law.

Prior to California's statehood, Spanish community property law applied in what is now California and carried over under Mexican law after its independence from Spain. After the

California territory became part of the United States, at California's constitutional convention of 1849 the question of whether to adopt a community property system was debated, and the convention voted in favor of that system. Community property law has been a fundamental facet of California law since its statehood, and even before. What is often overlooked is that community property law is not just limited in application to legal separation or dissolution of marriage proceedings. Community property law affects many aspects of the lives of people that live and conduct business in California outside of the context of a marital breakdown. For attorneys to provide competent services to the public, attorneys must have a foundational knowledge of California's core community property principles. To allow new attorneys admittance to the practice of without testing for such foundational knowledge would not serve the interests of the public.

The recommendation to remove community property law as a bar exam topic might come from data that suffers from an error in a survey process. It appears from the Report that the basis for removing community property as a topic on the bar exam is findings from surveys by the California Attorney Practice Analysis Working Group (hereafter referred to as CAPA; see Report at pages 17-18). The surveys themselves are not included in the Report, but the Report does reference the CAPA findings at footnote 29 on page 18. Those CAPA findings were based on collected survey data to determine the frequency, criticality, and performance expectation in select topics of law. (See May 11, 2020, CAPA Report, at p. 7.) As to topics of law, those CAPA findings indicate that survey participants were requested to provide feedback as to "Family Law." (See May 11, 2020, CAPA Report, at p. 6, table 2; p. 14, table 4.) A definition of what was meant by "Family Law" was not provided in the CAPA findings (and it is not known if a definition was provided to the survey participants), but the usual understanding of that term would not only include community property law, but also child support, spousal support, parentage determination, surrogacy law, and child custody and visitation. Other than community property law, these other topics are not tested on the bar exam. A survey participant might have given less weight to the importance of "Family Law" in their responses than they might if they were asked about community property law. This is because in practice fewer attorneys deal with more specialized "Family Law" issues (e.g., child custody) than with general community property issues.

Another consideration from the CAPA findings is that the topics were treated as though all might have similar resources for new attorneys to learn from once in practice. For example, if a new attorney were to have a question about civil procedure, then that question could be as easily answered as a question about community property. The CAPA findings showing that civil procedure is a topic more often encountered than "Family Law" does not equate to similar resources to learn the topic once in practice. Many topics in civil procedure are just that – procedure. A new attorney might rely on experienced paralegals at a firm to help calendar deadlines or advise on when documents need to be filed. New attorneys can review numerous secondary materials,

or even court websites, to learn or review rules of procedure. There is no equivalent for community property. Staff at a firm cannot advise on the community nature of an asset or debt, nor is there secondary material that provides an outline of exactly what an outcome should be. Application of community property principles relies heavily on the law school adage, "It depends." Addressing many client community property issues requires foundational knowledge of the topic coupled with the ability to analyze the facts and applicable law. The topics on the bar exam are different not only in what they are, but also in how they are learned and the scope of resources available to new attorneys to learn from. Removing community property as a topic from the bar exam would put new attorneys at a significant disadvantage and the result might very well be poor or wrong advice provided to clients.

Many attorneys help clients form and operate small businesses, which are the backbone of our economy. It is essential for such attorneys to properly advise their clients and to do so in a way that prevents issues from arising in the operations of such business. Under California's community property law, spouses and domestic partners owe each other fiduciary duties of care, and such duties transcend into the formation and operations of a business. Attorneys that advise clients who are forming or operating small businesses must understand such duties, as well as how to effectively ensure the duties are fulfilled. It is believed that most attorneys who advise on the formation and operation of small businesses would agree that spousal consents, spousal waivers, and spousal disclosures are within their scope of practice. For example, a married business owner might want to obtain financing, and the owner needs legal advice as to how to obtain such financing while limiting their spouse's personal liability from any new debt. While not all aspects of community property law might arise in a business law practice, many aspects do arise. Moreover, if an attorney has been trained and tested in community property law, then they would more likely be able to recognize community property issues that need to be addressed, and either know how to address them or know to refer the client out to someone that can. It would not serve the business client's interest – or the public as a whole – in having licensed attorneys who did not learn community property in law school, who did not study community property for the bar exam, and who were not tested on community property on the bar exam.

Many attorneys help clients go through a bankruptcy proceeding. While such proceedings are procedurally driven by federal law, substantive state law on issues of property ownership apply. California community property law must be known, understood and applied by bankruptcy attorneys who represent a spouse or domestic partner that is going through bankruptcy. For example, determining what property is or is not subject to the proceeding for purposes of reporting a client's assets, ability to pay debts, and other information to the bankruptcy court requires knowledge of what property and income is community or separate in nature. If a bankruptcy attorney has been trained and tested in community property law, then they would more likely be able


to recognize community property issues that need to be addressed, and either know how to address them or know to refer the client out to someone that can. It would not serve the bankruptcy client's interest – or the public as a whole – in having licensed attorneys who did not learn community property in law school, who did not study community property for the bar exam, and who was not tested on community property on the bar exam.

Community property law is a foundational aspect of estate planning in California. It should go without saying that attorneys that practice in estate planning must know and understand community property law. The issues arise in every estate plan, and not just those of a married couple, since rights to transfer upon death depend on the separate or community nature of property. Also, characterizing property as community or separate in an estate plan can have important tax consequences. As with attorneys in other fields of practice, it would serve no good to estate planning clients – or the public at large – to allow attorneys to be licensed without being tested on their knowledge of community property

As noted above, community property law is not confined to a specialized field of “Family Law” practice, and pervasively applies to many aspects of people’s lives. While there might be a need for greater access to licensure, the ultimate clientele the State Bar should be concerned about is the public. The public is not just some ethereal, conceptual term. The public consists of hardworking families, hardworking businesspeople, people going through traumatic experiences, people that are desperate for legal help, and others that rely on and deserve the highest quality legal advice. The public deserves to have attorneys that have studied the bedrock principles of California community property law and have been tested by the State Bar on the subject. That form of testing (including the rigorous studying leading up to it), cannot be substituted with continuing education classes or webinars. The public deserves more. While many attorneys might not apply community property law in their practices, knowledge of it should be a qualification to be an attorney in California.

For the above reasons, ACFLS opposes removing community property from the California bar exam.

Sincerely,



Justin M. O'Connell, Esq.
ACFLS Legislative Director