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LETTER FROM THE CHAIR

The Conference is proposing to add Civil Procedure to the subjects tested on the Multistate Bar Examination. It's about time.

Our president, Erica Moeser, wrote to chief justices, bar examiners, and the deans of law schools across the country to solicit their thoughts about adding Civil Procedure to the MBE. The overwhelming response was favorable; a few voiced concern about added burdens for law students—as if first-year curriculum did not cover the subject.

One respondent expressed concern that adding Civil Procedure would tilt the emphasis of the exam toward trial practice. Civil Procedure, of course, is not just about trial practice. If that is what some law schools are teaching, then they are missing the point, and so are their students.

A Civil Procedure course begins by introducing the concept of jurisdiction—the power of a court to adjudicate over persons and subjects—and also its limits, constitutional and statutory. Then it takes up the subject of pleading; the focus is not on how to draft a pleading, but on understanding the fundamental notion of notice, and the relationship between notice and the right to be heard. These are the cornerstones of due process in the common law system in this country.

Civil Procedure certainly has a direct application in trial practice. But I believe that Civil Procedure is required basic knowledge for all lawyers, and especially for nonlitigators. Not only does it impart an understanding of the courts, our society's device to resolve disputes; it also enables lawyers to be objective managers of the inevitable tensions that arise in an adversarial system in which each lawyer's fiduciary duty is to the legitimate interests of his or her client.

The fundamental lesson of Civil Procedure is that substance is inseparable from process, viz., the substance and quality of the result is a product of the process used to reach that result. Good lawyers apply this maxim every day in practice. Every lawyer understands, or should understand, why fundamental fairness and due process are critical to resolving a trial or a hearing. Process is equally important to the law outside of the courtroom. A lawyer negotiating a contract has to be willing to listen to the other party, or any compromise feels forced. A lawyer drafting a dispute resolution clause in a contract must consider the kinds of disputes that might arise, as well as what process would suit the parties to lead to a generally acceptable outcome. A lawyer learns to listen to a client describe his case, not only because it is one way to learn some facts about the case, but also because the client's act of telling his or her story is part of the process of developing a relationship of trust.

The bar exam is supposed to test those subjects that a first-year lawyer should know. Every lawyer should understand the importance of due process in our system of law, and that it is more than a lofty ideal enshrined in the U.S. Constitution and echoed in state constitutions. Civil Procedure is the subject in which the rubber of due process meets the road of law practice every day.

It isn't asking a lot to expect new law graduates to understand Civil Procedure on some level. This expectation isn't justified simply because a newly minted lawyer is likely to be sent to the



local courthouse and should know how to try a case. It is a rare student who learns how to try a case competently in law school, and many law students have no interest in trying cases for a living. The expectation is justified because procedure and process are the basic vocabulary of the legal profession, and understanding Civil Procedure is as fundamental as understanding a contract or a tort.

It will likely be a couple of years before we see the first Civil Procedure questions on the MBE. When we do, I hope the questions won't simply test whether the examinee has memorized the minutiae of the Federal Rules of Civil Procedure.

Testing Civil Procedure is not just an idea whose time has come; it is overdue. 📖

Best regards to all.

Sincerely,

A handwritten signature in black ink that reads "Frederick Y. Yu". The signature is written in a cursive, flowing style.

Frederick Y. Yu