NEW YORK STATE BAR ASSOCIATION

Journal

SEPTEMBER 2013
VOL. 85 | NO. 7

The Future of Legal Education and Admission to the Bar

A Special Issue Edited by Eileen D. Millett and Eileen R. Kaufman

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NYSBA

NEW YORK STATE BAR ASSOCIATION
Journal

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EDITED BY EILEEN D. MILLETT AND EILEEN R. KAUFMAN

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DAVID M. SCHRAVER

Change Is Upon Us

As Yogi Berra said, "The future ain't what it used to be." The same might be said about the future of legal education and of the legal profession.

For a number of years, and more frequently lately, we have heard in essence that there are too many lawyers compared to available and projected legal jobs, that law school is too expensive, and that legal education is not practical and does not prepare law school graduates to be "client-ready," "practice-ready," or "profession-ready."

I have asked the New York State Bar Association's Committee on Legal Education and Admission to the Bar, to work with legal educators, practicing lawyers, the Board of Law Examiners, and the courts to take a hard look at these issues in view of recent experience, forecasts and commentary. The Committee collected the articles in this special issue of the *Journal* which, we hope, will help to educate and inform all of us about what is happening in legal education and in the profession generally, as well as more specifically in New York State. Although the State Bar has not adopted positions on many of the issues discussed here, we are confident that this compilation will be an invaluable resource as we continue to explore these topics.

"The future ain't what it used to be."
– Yogi Berra

These issues are important to the profession and to the public. Projections of the numbers of law school graduates and projections of law-related jobs between now and 2020 indicate that there will be enough law-related jobs for about 20% of the graduates. At the same time, the indigent and people of modest means continue to face very substantial unmet legal needs related to maintaining basic life necessities. And the average debt of those coming out of law school is in the six figures, which discourages them from taking jobs that might address these unmet legal needs or perhaps even from pursuing a legal career, which can still be a rewarding and satisfying career choice. There are no easy answers. These issues require serious study and discussion, and it is important that the New York State Bar Association be part of that discussion.

"Change is the law of life. And those who look only to the past or present are certain to miss the future."
– John F. Kennedy

I thank the Committee on Legal Education and Admission to the Bar, and its co-chairs Eileen R. Kaufman (Touro Law Center) and Eileen D. Millett (Epstein Becker & Green, P.C.), and all of the authors who have contributed to this special issue.

Change is upon us. "Change is the law of life. And those who look only to the past or present are certain to miss the future" (John F. Kennedy). We must look to the future. ■

DAVID M. SCHRAVER can be reached at dschraver@nysba.org.

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September 16 New York City

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September 17 Albany
October 10 Long Island
October 29 New York City

Hot Topics in Real Property Law
September 19 Albany
September 26 Buffalo
November 8 New York City
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Bridging the Gap
October 1–2 New York City (live program)
Albany, Buffalo
(videoconference from NYC)

The Freedom of Information and the Open Meetings Laws: The Brave New World of Open Government
(9:00 a.m. – 12:00 p.m.; live and webcast)
October 2 Albany

Protecting Your Practice – Risk Management for Lawyers
(9:00 a.m. – 1:00 p.m.)
October 4 Buffalo; Long Island
October 18 Albany; New York City
October 25 Westchester

Gain the Edge
October 9 Albany
October 10 New York City

Practical Skills: Basic Matrimonial Practice
October 16 Buffalo; Long Island
October 17 Westchester
October 18 Syracuse
October 21 Albany; New York City

Women on the Move
(1:00 p.m. – 4:50 p.m.)
October 17 Albany

The First Line of Defense: Advocating for the Best Immigrant Outcomes in Criminal and Family Law Cases
(9:00 a.m. – 1:00 p.m.)
October 18 New York City

Tax Aspects of Real Property Transactions
(9:00 a.m. – 1:00 p.m.)
October 22 Long Island
October 23 Albany
October 24 New York City

Litigating the Products Liability Case: Law and Practice
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November 1 Albany

Matrimonial Trial Institute IV: A Mock Financial Trial
October 25 Buffalo
November 1 Long Island
November 15 Syracuse

Practical Skills: Introduction to Estate Planning
October 28 Rochester
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October 30 Albany; Long Island; New York City
October 31 Syracuse

Special Education Law Update 2013
November 1 Buffalo
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The Future of Legal Education and Admission to the Bar

Edited by Eileen D. Millett and Eileen R. Kaufman

The September 2013 issue of the New York State Bar Association *Journal* is dedicated to exploring a variety of challenging issues facing legal education including whether market forces will reshape legal education and affect the cost of law school and the resulting debt students bear; whether the law school curriculum should mandate experiential learning to better prepare students for entry into the profession; and whether the traditional bar exam serves as the best measure of a young lawyer's readiness for practice.

Eileen R. Kaufman (ekaufman@tourolaw.edu) is Professor of Law at Touro Law Center where she teaches Torts, Constitutional Law, Sex-Based Discrimination, and Comparative Constitutional Law. She received her undergraduate degree from Skidmore College and her J.D. and LL.M. from New York University School of Law. Professor Kaufman was Touro's Vice Dean from 1996–2000 and is the Director of Touro's Summer Abroad Programs.

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The Committee on Legal Education and Admission to the Bar (CLEAB), formed in 1952, is charged with the duty of studying the various aspects of and developments in legal education and admission to the bar, in the maintenance of adequate standards for legal education and in the prevention of admission to the bar of unworthy candidates. For 60-plus years this committee has been tasked by the Association to study these issues. Now, however, we see a variety of market forces, including a weak job market, technological advances, changes in client expectations, and a vast unmet need for legal services for the poor shaking the foundations of legal education and bar admission.

As co-chairs of the Committee on Legal Education and Admission to the Bar, we invited a number of distinguished members of the profession to start the discussion.

Some of the articles explore the effect of current market forces on legal education. Brian Tamanaha offers statistics on what law schools charge and the results they get – such as how many students find full-time employment and how much law school debt they owe. Jack Graves looks at return on investment and proposes a new, less expensive model for legal education. Peter Joy challenges the conventional wisdom that clinical education is unduly expensive and suggests economically feasible ways to incorporate experiential learning.

Many of the articles focus on the link between licensing and the skills and competencies needed by new lawyers.

Diane Bosse gives us an overview of the New York bar exam including a statistical overview of who takes the exam, while Mary Gallagher and Carol Buckler discuss the possibilities for early administration of the bar exam. Mary Lynch and Kim Connolly describe the NYSBA's decades-long call for reform of the bar exam and Edna Wells Handy looks at the persistent racial gap in bar exam pass rates and urges the exploration of new strategies to close that gap. William Sullivan urges linking licensing to a performance-based curriculum, and John Garvey describes how that is being done in New Hampshire. Court of Appeals Judge Victoria Graffeo discusses New York's requirement that law students perform 50 hours of pro bono service in order to be licensed and Adele Bernhard asks whether skills training should similarly be required for licensing (as California is currently considering). ABA President James Silkenat proposes a Job Corps to address both our nation's unmet legal needs and the unemployment crisis faced by young lawyers.

Finally, Michael Martin and Ian Weinstein discuss the overlapping forces buffeting legal education and offer ideas about how to harmonize the competing forces in a way that ensures quality representation. Even the *Journal*'s regular columnists, David Horowitz (Burden of Proof), Gertrude Block (Language Tips) and Judge Gerald Lebovits (The Legal Writer), have contributed their thoughts on legal education.

We anticipate a hearty turnout and a robust discussion of these issues at the 2014 Presidential Summit, where Bill Sullivan (primary author of the Carnegie Report) will be delivering the keynote address, Jim Silkenat (ABA President) will be serving as moderator, and Phoebe Haddon (Dean of University of Maryland School of Law), Jenny Rivera (Associate Judge of the N.Y. Court of Appeals), and Kent Syverud (Dean of Washington University School of Law) will be participating as panelists.

This special *Journal* issue is meant to begin a dialogue with the larger bar. We believe that the NYSBA is well positioned to urge thoughtful coordination of the various forces, many of which are already in movement, to move our profession to a better educated, more diverse, less financially pressured future in which we can better meet the legal needs of all Americans. Our Committee will be working to develop concrete, realistic proposals to move us toward that goal. We welcome your thoughts (journaleditor@nysba.org). ■

Brian Z. Tamanaha (btamanaha@wulaw.wustl.edu) is the William Gardiner Hammond Professor of Law, Israel Treiman Faculty Fellow at Washington University Law School. The author of eight books and numerous scholarly articles, he received his B.S. from the University of Oregon, his J.D. from Boston University and his doctorate of juridical science at Harvard Law School.

The Mismatched Economics of Legal Education

By Brian Z. Tamanaha

These days, the cost of a law degree exceeds the economic return it provides for many graduates. A clear sign of this mismatch is that, for the class of 2011, a law graduate with the average debt nationwide ($100,000 plus) who earns the median salary ($60,000) cannot manage to make the standard monthly loan payments. This mismatch between cost and return exists because law school tuition has increased at a rapid pace, far above the rate of inflation, while the legal job market has contracted severely in recent years, bringing layoffs and falling wages. Meanwhile, law schools continue to produce a substantial oversupply of graduates per available position.

To convey the magnitude of this economic mismatch, core statistics about tuition, debt, jobs, and salaries are provided below. For example, annual tuition at about a dozen law schools is at or above $50,000, with others poised to follow. The full cost of attendance – including tuition and living expenses – for a single year at the most expensive law schools, Columbia University being the costliest, exceeds $80,000.[1] Annual cost of attendance at the tenth most expensive law school, New York Law School, is nearly $75,000. The total cost of a law degree at these and several dozen other law schools approaches or even exceeds $200,000 for full-tuition payers, as well as for many students with scholarships.

While tuition rose to these remarkable heights in a relatively brief period, law school tuition has been rising steadily for decades. In 2001 average tuition at a private law school was $22,961; by 2011, just a decade later, it had reached $39,184.[2] Public law schools are cheaper, but their prices went up swiftly as well, with average tuition rising from $8,419 in 2001 to $22,115 in in 2011.

Higher tuition results in rising debt levels for law students, about 90% of whom borrow to finance their legal education. The average debt of private law school graduates went from $70,147 in 2001 to $124,950 in 2011; over the same period, the average debt of public law school graduates increased from $46,499 to $75,728.[3] Over the past few years, debt has risen by alarming

amounts – at private law schools it jumped from $91,506 (2009), to $106,249 (2010), to $124,950 (2011). Moreover, these figures understate the actual student debt load, because they exclude undergraduate debt, which averages around $25,000,[4] and they do not account for the interest accrued on debt while in school. On graduation day, the total average debt carried by law graduates is much higher than the figures provided.

Tuition and debt have climbed relentlessly at the same time that law graduates have struggled through the worst market for legal employment in decades. Only 55% of 2011 law school graduates had obtained permanent, full-time lawyer jobs within nine months of graduation.[5] Many recent graduates have failed to land lawyer jobs, unprecedented numbers of graduates have taken part-time or temporary jobs, and many earn relatively low salaries.[6]

To illustrate the severity of the situation, I've listed the 20 law schools with the highest average debt for the graduating class of 2011, followed by the percentage of the class in debt.[7] (Remember, the figures exclude undergraduate debt and the interest accrued on the loans.) After that figure, highlighted in bold is the percentage of graduates from each of these law schools who obtained permanent full-time jobs as lawyers within nine months of graduation.[8]

California Western School of Law $153,145 (89%) – **39.3%**

Thomas Jefferson School of Law $153,006 (94%) – **26.7%**

American University (Washington College of Law) $151,318 (80%) – **35.8%**

New York Law School $146,230 (82%) – **35.5%**

Phoenix School of Law $145,357 (92%) – **37.4%**

Southwestern Law School $142,606 (80%) – **34.6%**

Catholic University of America (Columbus School of Law) $142,222 (92%) – **43.7%**

Northwestern University Law School $139,101 (73%) – **77%**

Pace University School of Law $139,007 (87%) – **36%**

Whittier Law School $138,961 (89%) – **17.1%**

Atlanta's John Marshall Law School $138,819 (91%) – **40.9%**

University of Pacific (McGeorge School of Law) $138,267 (93%) – **43.6%**

St. Thomas University School of Law – Miami $137,721 (81%) – **49.3%**

Barry University (Dwayne O. Andreas School of Law) $137,680 (90%) – **39.2%**

University of San Francisco School of Law $137,234 (79%) – **34.2%**

Vermont Law School $136,089 (86%) – **48.9%**

Golden Gate University (GGU School of Law) $135,645 (82%) – **22%**

Florida Coastal School of Law $134,355 (92%) – **36.6%**

Stetson University College of Law $133,082 (88%) – **57.1%**

Syracuse University College of Law $132,993 (80%) – **50.3%**

The financial devastation is plain. At the majority of these law schools, less than half their 2011 graduating class had obtained permanent, full-time jobs as lawyers nine months after graduation. Furthermore, many graduates who landed lawyer jobs failed to earn enough to make the monthly payment on their debt. Most of the schools on this list are low-ranked law schools (low-ranked law schools tend to graduate students with high average debt because the students are from families with less wealth). These graduates typically land low-paying lawyer positions, if they get jobs as lawyers at all. But it is important to recognize that this economic mismatch is not directly tied to the ranking of a law school. There are low-priced, low-ranked law schools (particularly public, schools) that have reasonably good placement records, and there are law schools in the top 100 that charge high prices but have poor results (Washington College of Law, for example).

"Can anybody remember when the times were not hard and money not scarce?"
– Ralph Waldo Emerson

The standard monthly payment on $150,000 debt is over $1,700; on $125,000 debt (the average amount private law school grads owe) the monthly payment is over $1,400.[9] To manage monthly payments this large (after taxes, rent, and other basic expenses) requires a salary well above $100,000, which fewer than 15% of the 2011 graduates nationwide obtained.[10] In 2011, the median starting salary of graduates in private law jobs was $60,000.[11] Many graduates from the law schools listed above will be forced by financial necessity to enroll in Income Based Repayment (IBR), a new federal government-sponsored debt relief program which pegs monthly loan payments to salaries (the amount due is 10% of monthly income above 150% of the poverty rate) and forgives the remaining balance of the loan after 25 years. This sounds like a good deal, and it is, but the amount forgiven is treated as taxable income to the debtor, who will be hit with a tax bill that can run tens of thousands of dollars.

These numbers cover 2011, but the situation did not start then. Employment for law graduates has been abysmal since 2009. In fact, in the past decade, roughly a third of law graduates nationwide have not obtained jobs as lawyers.[12] The U.S. Bureau of Labor Statistics estimates

there will be about 22,000 law job openings annually through 2020 (counting departures and newly created jobs), while law schools will graduate more than 40,000 lawyers a year.[13]

It is easy to lose sight of the concrete human reality beneath these aggregate statistics, so I will offer a few specifics about the fate of the class of 2011, nine months after graduation. The information was supplied to the ABA by the law schools themselves.[14]

At Whittier Law School, for example, out of a graduating class of 123 students, only 21 had landed long-term full time jobs as lawyers (including judicial clerkships) nine months out. The primary employment setting for Whittier grads who obtained lawyer jobs was in firms of two to ten lawyers. These typically are the lowest paid associate positions, with salaries ranging from $50,000 to $60,000, far below what is necessary to manage the average $139,900 debt. Or consider New York Law School, whose graduates had average debt of $146,000. Only 183 graduates from a class of 515 had landed full-time long-term jobs as lawyers, the largest group, again, placing in firms of two to ten lawyers. At American University's Washington College of Law, usually ranked around 50th among U.S. law schools, by nine months out only 167 out of 467 graduates had landed long-term full-time lawyer jobs (average debt over $150,000).

The problems of high debt and low return are not limited to the 20 law schools on the list. Half or more of the 2011 graduating class at 70 law schools did not obtain full-time lawyer jobs, and the students from most of these schools had average debt above $100,000. Owing to the astronomical increase in tuition and the contraction in the legal job market, the combination of high price and low return is now systemic.

These problems are especially acute for New York lawyers, for two reasons: First, law schools in and around New York City charge among the highest tuition rates in the country and have the highest cost of living for students; six of the ten most expensive law schools in the nation to attend are New York law schools (Columbia, Fordham, Brooklyn, New York University, Cornell, and New York Law School). Second, New York City is the most desirable corporate legal market in the country, and graduates from law schools all over the country flock to the city seeking work, which, when added to the substantial number of law schools in and around the area, make the competition for legal jobs intense. This combination means that, in general, graduates from New York law schools pay the most and face the toughest employment market.

What might solve the broken economics of legal education? Some legal educators have recently argued that IBR solves the problem by making the debt payments manageable. I disagree. At best IBR is a bandage that helps law graduates who are struggling with debt, but it leaves the broken economics intact. The only solutions are to bring down substantially the cost of a law degree and to reduce the number of law graduates. These changes lie in the hands of legal educators, but they go against our self-interest. ■

1. *See The 10 Most Expensive Law Schools in America*, Business Insider, http://www.businessinsider.com/the-10-most-expensive-law-schools-in-america-2012-9?op=.

2. *See* Legal Education Statistics From ABA Approved Law Schools, Law School Tuition, *at* http://www.americanbar.org/groups/legal_education/resources/statistics.html.

3. ABA Legal Education Statistics, Average Amount Borrowed for Law School, 2001-2010.

4. *See* Tamar Lewin, *Student Loan Borrowers Average $26,450 in Debt*, N.Y. Times, Oct. 18, 2012, http://www.nytimes.com/2012/10/18/education/report-says-average-student-loan-debt-is-up-to-26500.html?hpw.

5. *See* Joe Pallazolo, *Law Grads Face Brutal Job Market*, Wall St. J., June 25, 2012, http://online.wsj.com/article/SB10001424052702304458604577486623469958142.html?mod=rss_economy. According to the National Association for Law Placement (NALP), 56.7% of grads had obtained long-term full-time jobs as lawyers.

6. *See* James G. Leipold, Executive Director of NALP, *Truth or Dare: The New Employment Market*, NALP Bull., Oct. 2012, http://www.scribd.com/doc/110113683/NALP.

7. The debt and percentage in debt numbers are at "Which Law School Graduates Have the Most Debt," U.S. News, http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/grad-debt-rankings. I have excluded John Marshall from the list because of an evident error in the numbers reported for the school.

8. These numbers are from the chart produced by Law School Transparency (LST), which obtained the underlying numbers from ABA data on employment results for the class of 2011. "Permanent employment" includes all jobs with a duration of at least one year, which includes judicial clerkships. When calculating the percentage of these jobs, LST subtracts new graduates who enter "solo practice," because this is a tenuous economic path for new graduates to take. The chart is at http://www.lawschooltransparency.com/clearinghouse/?show=compare&sub=jobs.

9. These figures are derived from the loan calculator on Finaid, at http://www.finaid.org/calculators/loanpayments.phtml. To come up with the monthly payment, I use a conservative blended interest rate of 7.25%, which combines Stafford loans (6.8%) and Graduate Plus loans (7.9%). The monthly payment on the standard 10-year plan at this rate is $1,761; on $130,000 it is $1,526.

10. The earnings for the class of 2011 can be estimated based on the information provided by NALP, at http://www.nalp.org/uploads/NatlSummChart_Classof2011.pdf. There were 44,495 J.D. graduates that year, about 40% of whom obtained jobs in private law firms (17,666). The larger law firms pay the highest salaries. Firms with 500 or more lawyers hired 2,856 grads; firms with 250-500 lawyers hired 891; firms with 101–250 lawyers hired 1,010 – for a total of 4,757 lawyers. In addition, 888 grads were hired in firms with 51–100 lawyers, for a median salary of $88,000. Adding half of this number to the above total is 5,201 lawyers, or 11.7%. This is an estimate because it is possible that a number of grads in smaller law firms also earned above $100,000, although this is unusual, and will not show up in the salary data.

11. *See* NALP, http://www.nalp.org/uploads/Classof2011SelectedFindings.pdf.

12. *See* Brian Z. Tamanaha, Failing Law Schools 114–18 (Univ. of Chicago Press 2012).

13. *See* Deborah Jones Merritt, "Labor Day," Sept. 1, 2012, Inside the Law School Scam, http://insidethelawschoolscam.blogspot.com/2012/09/labor-day.html; Deborah Jones Merritt, "More Bad News from the BLS," Sept. 5, 2012, Inside the Law School Scam, http://insidethelawschoolscam.blogspot.com/2012/09/more-bad-news-from-bls.html; Employment Projections, Table 1.7, US Bureau of Labor Statistics, http://bls.gov/emp/ep_table_107.htm (projecting 21,880 openings a year through 2020).

14. The ABA provides specific job data on each school, *at* http://employmentsummary.abaquestionnaire.org/.

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A More Cost-Effective Model for Legal Education

By Jack Graves

In *Tomorrow's Lawyers*, Richard Susskind focuses on three primary drivers of change in the market for legal services: (1) the "more-for-less" challenge; (2) the "liberalization" of the regulatory environment; and (3) the effective use of information technology.[1] These same three drivers provide the keys to unlocking a more efficient and effective system of legal education. The price of a legal education must be significantly reduced at the vast majority of law schools, and we must deliver a better education at this reduced price. Together, these two objectives make up the obvious, yet daunting, more-for-less challenge we face as educators. Meeting this challenge will require a liberalization of the law school regulatory environment, along with the effective use of information technology. It will also require a willingness on the part of educators to move beyond the status quo and, for many of us, out of our comfort zones. This essay suggests the basic outlines of one model for doing so.[2]

Most readers are likely familiar with the current bimodal salary distribution curve of first-year legal employment. This bimodal distribution reflects a small minority of graduates grouped tightly around $160,000, with the vast majority in a more widely distributed group centered around $50,000. The basic problem with current law school economics is that the cost of tuition generally reflects the high side of this curve, while students are paying that tuition retroactively (i.e., their law school debt) with income generated on the low side. And that's assuming they find employment in the legal field.

For the vast majority of law school graduates, finding employment on the high side of this curve is the rare exception. Tuition must reflect more accurately real employment outcomes available to the majority of graduates. Reducing law school tuition (and resulting debt) will also make it far easier for graduates to consider the sort of endeavors likely to improve access to justice.

In his authoritative article on law school tuition and return on investment (ROI), Jim Chen, the former dean of the University of Louisville law school, provides a useful rule of thumb suggesting that, for adequate financial viability, total law school tuition should not exceed a graduate's starting salary.[3] For purposes of this essay, I adopt Chen's rule of thumb and further assume a median starting salary of $50,000. This assumption is likely generous when one considers all graduates – not just those reporting employment and income. Thus, my "target" for *total* law school tuition is $50,000 or less – a very substantial reduction for many law schools. Before addressing the proposed model, however, one additional issue is worthy of note.

About 10% of J.D. graduates take but fail to pass the bar exam, leaving approximately 150,000 law graduates (as of 2010) with a 0% chance of securing employment requiring bar passage.[4] And this does not include students who begin law school but fail to complete it, often incurring significant financial costs in the process. The percentage of law school dropouts and bar exam failures will likely increase as law schools dip more deeply into a shrinking pool of applicants. Thus, in addition to providing a reasonable return on invested tuition dollars for successful students, an improved model should also minimize the financial risk for unsuccessful students.

"Some people, short of money, have set upon new paths and saddled themselves with new debts. For the need to make a living is the root of all education."
– Jim Chen

With the foregoing in mind, the model objectives can be outlined as follows:

- provide an education leading to a J.D. degree for $50,000 or less in total tuition;
- do so in a manner that reasonably minimizes the risk of failure; and
- improve the overall quality of the education provided.

Yes, this represents a serious challenge – one that likely requires a significant reduction in total faculty compensation (the primary cost driver in legal education) derived from J.D. student tuition. However, if we focus squarely on improving legal education – and not on preserving the status quo – then I believe these objectives are achievable.

It can be helpful to break legal education into distinct stages. Stage 1 focuses on basic doctrine and analytical skills, along with legal research, writing and professional responsibility – in short, everything a law student needs to pass a current bar exam.[5] Stage 2 focuses on further development of the skills, values, and judgment a graduate will need to practice law – all of which a prospective attorney should acquire prior to licensure. Ideally, stage 1 would be relatively inexpensive and would be followed immediately by the bar exam. A student would begin the necessarily more costly stage 2 only after successful completion of stage 1, thereby allowing a student to begin to specialize and focus on practice-oriented course work without further concerns about "bar preparation." However, licensure would require the successful completion of both stages 1 and 2 – providing at least the functional equivalent of a current J.D. program.[6]

The proposed model would deliver the first half of the J.D. curriculum at a dramatically reduced price and would do so over 12 consecutive calendar months. Cost reductions would be achieved by moving to a 12-month academic year and improving the efficiency of doctrinal course delivery, likely utilizing larger classes and including significant online components. While research, analysis, and writing instruction would continue to be delivered in relatively smaller classes, this too would likely benefit from greater efficiencies through the use of online components. Faculty would generally be expected to teach increased individual loads to reduce costs further.[7] All of the doctrinal content necessary to prepare for the bar exam, as well as the necessary analytical and writing skills, would be delivered in three successive trimesters (or four quarters) within these first 12 calendar months.

This stage 1 program could serve multiple objectives, all of which would potentially generate law school revenue from a common nucleus of courses, thereby reducing the required individual tuition price per student. First and foremost, stage 1 would lay the basic doctrinal and analytical foundation for a J.D. and prepare the student to take the bar exam upon completion. However, the completion of stage 1, by itself, could also be recognized in a "Certificate" or "Master of Legal Studies" program intended for those interested in a basic legal education without the actual practice component of and predicate to licensure, or as an ideal introduction to U.S. law and legal methods for a foreign trained lawyer (i.e., as the primary basis for an LL.M. program in U.S. law for foreign-trained lawyers).

This combination of reducing costs and broadening revenue sources would allow for a lower tuition cost per student. Such changes are fully achievable without sacrificing educational quality – provided we are willing to

take full advantage of available information technology and employ new pedagogical innovations. The tuition for stage 1 should be no more than $15,000.[8]

Having successfully completed stage 1, a student would then, ideally, be allowed to sit for the bar exam – not as a final step to licensure, but as an intermediate gateway to stage 2 of the J.D. program. After the successful completion of stage 2, the graduate would then (and only then) be eligible for licensure, without further examination. The typical student would likely spend three to six months outside of the J.D. program between stages 1 and 2, depending on the time required for bar exam results. Students might spend the time between exam administration and announcement of the results in a variety of ways, including positions analogous to current summer internships or clerkships. However, a student would not be eligible to begin stage 2 until he or she had successfully passed the bar exam.

For students who ultimately failed to pass the exam, the cost of the experience would be far lower than under the current model. Thus, the financial cost of failure would be significantly reduced. This approach could more fully realize the goals of providing increased "access" to a legal education, while minimizing the risks associated with such increased access and significantly reducing the collateral financial casualties associated with the current model.

Once a student had successfully passed the bar exam, he or she could focus more fully on learning how to practice law during the final 12 months of the J.D. program, delivered in stage 2.[9] The second stage would focus on practical skills, employing simulations, clinics, externships, and other practical experiences, all in combination with additional doctrinal development (including seminars) in students' chosen areas of focus.

The resulting cost of delivering stage 2 in an appropriate small group setting would be significantly greater than stage 1, though it might be partially subsidized by revenue-generating clinics, as part of a law-school-as-law-firm (similar to the medical or dental school model). Practice-focused stage 2 curricular content would be, to a large degree, delivered by faculty simultaneously engaged in the practice of law.[10] The tuition for stage 2 might be in the range of $30,000. However, no student would incur this amount without having first passed the bar exam. Total J.D. tuition would thus be less than $50,000. Another advantage is that a student would be eligible for licensure almost a full year earlier than under the current model.[11]

For the most part, this entire model can be realized under current ABA and state licensure rules. However, two crucial changes are needed to maximize its potential:

- State bar examiners must allow early administration of the bar exam – not as a final step to licensure, but as an intermediate gateway to continued legal studies.
- The ABA and state licensing bodies must allow broad use of effective online instruction throughout the J.D. program.

The information technology necessary to meet the more-for-less challenge in legal education is here today and improving constantly. All that is needed is a liberalization of the regulatory environment and a willingness on the part of the academy to face and meet the challenge. ■

1. Richard Susskind, Tomorrow's Lawyers: An Introduction to Your Future (2013).

2. This model was first described in an earlier essay, Jack Graves, *An Essay on Rebuilding and Renewal in American Legal Education*, 29 Touro L. Rev. 375 (2013), which was also submitted as a Comment to the ABA Task Force on the Future of Legal Education, on March 5, 2013. The current essay borrows liberally from the aforementioned publication (with permission of Touro Law Review), but omits many of the citations for the sake of brevity.

3. *See generally* Jim Chen, *A Degree of Practical Wisdom: The Ratio of Educational Debt to Income as a Basic Measurement of Law School Graduates' Economic Viability*, 38 Wm. Mitchell L. Rev. 1185, 1203 (2012).

4. Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam*, 60 J. Leg. Ed. 3 (2010).

5. Reforming the bar exam is another admirable objective, but beyond the scope of this essay.

6. In my earlier essay, I also addressed optional post-licensure training in stage 3. *See* Graves, *supra* note 2. However, stage 3 is omitted from this essay for the sake of brevity.

7. This may require us to reimagine other faculty roles, perhaps reducing the time spent on law school governance and focusing more on writing related directly to our teaching or related practice areas.

8. One might reasonably compare this price to the final three semesters of a hypothetical undergraduate degree in law.

9. This practice-focused approach might be analogized, in some respects, to the highly acclaimed Daniel Webster Scholar Honors Program at the University of New Hampshire School of Law. While not avoiding the bar exam, the experience could be quite similar after its completion and would be available to all students.

10. The intent here is not necessarily to suggest "adjunct" faculty (though they too may have a role to play), as much as professional faculty grounded in both practice and teaching, as is generally the case with current clinical faculty.

11. Under this proposed model, the graduate could be licensed immediately upon graduation, 27–30 months after beginning law school, while the current model requires approximately 33 months, plus the time required to take and pass the bar exam and receive results, generally about 38–40 months in total.

Considering the Cost of Clinical Legal Education

By Peter A. Joy

Introduction

The softening demand for legal education is forcing most law schools to cut expenses. The 2012 entering classes at approximately half of the American Bar Association (ABA)-approved law schools were 10% smaller than the 2011 entering classes.[1] As of May 2013, the number of applicants for the 2013 entering class was down by 13.2% compared with applicants in 2012, and the number of persons applying to law school in 2013 is projected to hit a 30-year low.[2] Historically, "[w]hen faculties feel pressure to reduce budgets or to restrain the rates of increase, they look first to, and often not beyond, the clinical curriculum."[3] But that would be a mistake. This article explains why and raises questions one should consider when examining the cost of legal education, including the cost of in-house clinics, wherein students represent clients under the supervision of faculty.

The Problem: Law Schools Need More Experiential Education

At the same time that there is mounting economic pressure on law schools to do more with less, legal employers and clients are increasingly unhappy with the failure of most law schools to prepare law students better for the practice of law. A 2010 survey by the *American Lawyer* found that 47% of law firms had clients who demanded that no first- or second-year associates work on their cases.[4] As one general counsel of a technology company explained, law schools are producing "lawyers in the sense that they have law degrees, but they aren't ready to be a provider of services."[5]

These complaints are not new. In 1921, the Carnegie Foundation for the Advancement of Teaching found that law schools needed to incorporate more practical skills training, noting: "The failure of the modern American law school to make any adequate provision in its curriculum for practical training constitutes a remarkable educational anomaly."[6] More than 80 years later, a 2007

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Carnegie study, titled *Educating Lawyers*, reached a similar conclusion – the emphasis on the cognitive or theoretical aspect of law has limited the emphasis on lawyering practice skills.[7]

In addition to the Carnegie studies, other studies and several prominent individuals have throughout the decades focused on the gap between law school education and preparation for law practice.[8] This, too, is the premise of *Best Practices for Legal Education* – most law school graduates "are not as prepared as they could be to discharge the responsibilities of law practice."[9] *Best Practices* argues that law schools can improve their education of students by engaging them "in context-based learning in hypotheticals as well as real life contexts."[10] The best way to accomplish this is to "present students with progressively more challenging problems as their self-efficacy, lifelong learning skills, and practical judgment develop."[11] *Educating Lawyers* concurs with this thesis.[12]

Most law schools have partially responded to these calls for change. A 2010 survey of law school curricula found that since 2002 law schools had increased all lawyering skills instruction, with half of the respondents listing ten or more types of lawyering skills courses.[13] The survey found that the greatest growth was in transactional drafting courses and upper level writing courses. Over 85% of responding schools offered in-house, live-client clinical courses, almost all offered externships, "and without exception, placement opportunities have increased in each externship category since 2002."[14]

This good news, though, does not tell the whole story. Today, only 14 out of more than 200 ABA-approved law schools require credit-bearing in-house clinics or externships for graduation.[15] Some of these law schools require as few as two or three credits of these types of experiential learning courses. Only an additional four more law schools guarantee students a credit-bearing in-house clinic or externship course.[16]

Although the consensus among the practicing bar and some legal educators is that law schools should require law students to engage in more professional skills and values instruction – especially in a progressive way, including real life contexts – most law schools have not developed their curricula to require significant experiential professional education. Nor has the ABA been proactive in using the accreditation process to require significant professional skills and values instruction in law schools. While an ABA Accreditation Standard states that it requires "substantial instruction" in professional skills, such as interviewing and client counseling, trial and appellate advocacy, negotiation, drafting, and organization and management of legal work,[17] in practice it does not in any meaningful way. An ABA Consultant on Legal Education Memorandum explains that "substantial instruction" in professional skills may be accomplished by requiring as little as *one credit hour* of skills training where "instruction in (other) professional skills must engage *each* student in skills *performances* that are *assessed* by the instructor."[18] Unlike every other profession, law does not require law schools to have one-quarter to one-half of the educational program devoted to the type of hands-on professional skills development found in architecture, medicine, nursing, pharmacy, and other professions.

"Let us all be happy and live within our means, even if we have to borrow the money to do it with."
– Artemus Ward

Understanding Why Law Schools Increase Tuition

University tuitions have climbed dramatically, and many law schools have imposed even steeper tuition increases. These tuition hikes have been spurred on by the perception of quality and made possible by the availability of increasing amounts of federal student loans.

Most universities and law schools have set tuition based on "wannabe" pricing, in which each university bases its tuition on what the competition charges, following price signals from the most prestigious universities.[19] Higher education tuition is a "marketing, not a cost accounting decision."[20] When demand for law school was strong, even less prestigious law schools could raise tuition by double digits. One dean at a lower ranked law school explained why he admitted an entering class in 2009 that was 30% larger, with tuition priced higher than that of Harvard Law School: "'The answer is that we exist in a market. When there is a demand for education, we, like other law schools, respond.'"[21]

But is the market a sufficient justification to raise tuition to the highest level law students are willing to pay, especially when most fund their legal education with loans? And now, with the market for legal education softening, where will law schools make the cuts necessary for their survival?

Comparing Costs of Legal Education Before Cutting Them

Once the tuition started rolling in at higher levels, law schools started spending it. The major initiatives included decreasing faculty teaching loads, thereby giving faculty more time to produce scholarship; increasing law professor pay; increasing the size of faculties; increasing scholarships to attract students with higher credentials, thereby seeking to rise in law school rankings; upgrading law school buildings; and, if affiliated with a university, often contributing a greater percentage of net revenues to subsidize other university operations.[22] Cutting back now will be hard.

Today, law faculties teach approximately half as much as they did decades ago.[23] One estimate says that the average salary for a full professor increased by 45% from 1998 to 2008,[24] and law faculties grew almost 40% during this same period.[25] In 2010–2011, law schools awarded over $1 billion in scholarships, an increase of 14.8% over the prior year.[26] New law school buildings also represent huge one-time expenditures, with some recent law school building projects costing in the range of $85 million to $250 million.[27]

Most of the tuition increases have gone to support larger faculties and lower teaching loads, the rationale being that this system provides law faculty with more time for scholarship. One commentator estimates that a law review article written by a full professor over a one-year period could cost a law school more than $100,000, assuming that as much as 50% of that faculty member's job is to produce scholarship.[28] Considering that the law school's mission is to prepare students for the practice of law, this commentator concluded that the current business model for law schools is unsustainable. In his view, the trend toward reduced teaching loads has come at the expense of educating students in how to practice law.[29]

In light of the need to better educate law students for the practice of law, there is every reason for law schools to be expanding clinical legal education instead of looking to cut it. The argument for cutting in-house clinics focuses on the costs of the low student/faculty ratios necessary for the intensive teaching that takes place while supervising students representing clients. But this argument ignores the fact that other aspects of legal education are as costly, or more costly. Other types of experiential education, especially adjunct-taught simulation courses such as trial practice, or higher enrollment externships, are usually less expensive than most non-clinical or simulation courses. Just as larger enrollment in-classroom classes help support the more faculty-intensive lower enrollment writing seminars, the lower per-student cost of simulation courses and externships should help support the more faculty intensive in-house clinical courses.

Law schools should look for cost reductions that can be attained without sacrificing the quality of legal education, including quality experiential education in clinical courses. For example, cost savings can come from expanding regional law library consortiums and shifting from print materials to electronic databases. Schools should also analyze the cost of courses and seminars that are consistently underenrolled due to lack of enthusiasm for the professor or interest in the subject matter, and offer these classes less frequently instead of every year. In these and other cost-cutting efforts, the emphasis should be on ensuring that the law school focuses on the mission of better preparing students for the practice of law.

Conclusion

To contain costs, law school faculties and administrators must carefully consider budgetary restraint in every aspect of legal education, including in-house clinical courses, but not lose sight that their primary mission must be educating law students to become practicing lawyers. Law schools need to develop a reliable and consistent way to measure the relative benefits of different courses and teaching methodologies for preparing law students for practice; otherwise, selecting the courses to restructure or eliminate will be a hit-or-miss proposition based on conjecture rather than on the evidence.

Law schools have never been under greater scrutiny, and law faculties should respond even if the ultimate answer involves doing more. With legal employment at historic lows and tuition at historic highs, the value of legal education is being questioned. The longer law faculties delay addressing these issues, the more difficult the conversations and choices will be. ■

1. Bernard A. Berk, *Still More on What Matters Most (Or, a Guided Tour of Pandaemonium)*, The Faculty Lounge, Jan. 13, 2013, *available at* http://www.thefacultylounge.org/2013/01/still-more-on-what-matters-most-or-a-guided-tour-of-pandaemonium.html.

2. Law School Admission Council, Three-Year ABA Volume Comparison, Law School Admissions Council, *available at* http://www.lsac.org/lsacresources/data/three-year-volume.asp.

3. Mark V. Tushnet, *Scenes from the Metropolitan Underground: A Critical Perspective on the Status of Clinical Educatio*n, 52 Geo. Wash. L. Rev. 272, 271 (1984).

4. Ethan Bronner, *Law Schools' Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. Times, Jan. 31, 2013, at A1.

5. *Id*. (quoting Jeffery W. Carr, General Counsel of FMC Technologies).

6. Alfred Z. Reed, Training for the Public Profession of the Law 281 (1921).

7. William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law 89-91 (2007) (Educating Lawyers).

8. *See* AALS Proceedings (168) (1944), quoted in Robert Stevens, Law School: Legal Education in America from 1850s to the 1980s at 214; Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 Fordham L. Rev. 227, 232 (1973); American Bar Association Task force on Professional Competence, Final Report and Recommendations of the Task Force on Professional Competence 6 (1983); American Bar Association, Section of Legal Educ. & Admissions to the Bar, Legal Education and Professional Development – An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap 138-41, 233-36 (1992).

9. Roy Stuckey et al., Best Practices for Legal Education: A Vision and a Road Map 1 (2007).

10. *Id*. at 105.

11. *Id*.

12. Educating Lawyers, *supra* note 7, at 95.

13. ABA Section of Legal Educ. & Admissions to the Bar, A Survey of Law School Curricula: 2002–2010, at 15–16 (Catherine L. Carpenter ed., 2012).

14. *Id*. at 16.

15. Email from Karen Tokarz, Professor of Law, Washington University School of Law, to Robert Kuehn, Professor of Law, Washington University School of Law (May 27, 2013, 12:20 PM CST) (on file with author).

16. *Id*.

17. American Bar Association Section of Legal Educ. & Admissions to the Bar, 2012-2013 ABA Standards and Procedure for Approval of Law Schools Standard 302(a)(4) (2012).

18. American Bar Association Consultant on Legal Education, Consultant's Memo 3, Standards 302(a), Standard 304, Standard 504, Standard 509 (Mar. 2010), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf.

19. Henry E. Riggs, *The Price of Perception: Cost Has Nothing to Do with Tuition. It's Economics, Stupid.*, N.Y. Times, Apr. 17, 2011, at SS1-33.

20. *Id*.

21. David Segal, *Law School Economics: Ka-Ching!*, N.Y. Times, Jul. 17, 2011, at BU1, 1 (quoting Richard A. Matasar, Dean of New York Law School).

22. Brian Z. Tamanaha, Failing Law Schools 126–30 (2012).

23. *Compare* Benjamin Franklin Boyer, *The Smaller Law Schools: Factors Affecting Their Methods and Objectives*, 20 Or. L. Rev. 281, 284-85 (1941) *with* Theodore P. Seto, *Understanding the U.S. News Law School Ranking*, 60 SMU L. Rev. 493, 546 (2007).

24. Jack Crittenden, *Why Is Tuition Up? Look at All the Profs*, Nat'l Jurist, Mar. 2010, at 40, 40.

25. *Id*.

26. American Bar Association, Section of Legal Educ. & Admissions to the Bar, Internal Grants & Scholarships, *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/internal_grants_scholarships_awarded.authcheckdam.pdf.

27. Segal, *supra* note 21, at BU 1. The University of Baltimore and Michigan Law School have building projects over $100 million each, and Fordham Law School is building a new $250 million facility. Even the smaller Marquette University Law School spent $85 million for its new building. *Id*.

28. *See* Richard Neumann, Professor of Law, Hofstra University School of Law, Remarks at the Boston College Journal of Law & Social Justice Symposium: The Way to Carnegie: Practice, Practice, Practice – Pedagogy, Social Justice, and Cost in Experiential Legal Education (Oct. 28, 2011), *available at* http://www.bc.edu/schools/law/newsevents/events/conferences/carnegie_symp_twlj/carnegie_video.html.

29. *Id*.

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The New York Bar Exam by the Numbers

By Diane F. Bosse

Among the ties that bind us as lawyers is the shared experience of having taken the New York bar exam. Whether we viewed it as a hazing or a rite of passage, we all remember that moment in our quest for admission to our chosen profession. But if you haven't been to a bar exam test site recently, you might not recognize the place. The size and composition of the candidate pool, the administrative procedures and the test itself have changed significantly over the years. This article describes some of those changes and reports on current initiatives.

15,745

That is the number of candidates tested on the New York bar exam in 2012 – 4,011 in February and 11,734 in July. Of those, 11,038 were graduates of American Bar Association (ABA)-approved law schools, and 4,675 received their legal education in foreign countries. The remaining 32 candidates qualified to take the exam based either on graduation from a non-ABA-approved law school plus five years of practice[1] or one year of legal education and a prescribed period of law office study.[2]

The graduates of ABA-approved law schools came from 48 states and the District of Columbia and from 195 (of the then 201) ABA-approved schools. New York law schools accounted for almost exactly half of all candidates taking the exam who graduated from ABA-approved schools (5,514), with out-of-state law schools contributing the balance (5,524).

The foreign-educated candidates sitting for the New York bar exam in 2012 came from every corner of the globe – from Australia to Azerbaijan, Canada to Cameroon, El Salvador to Eritrea, Iran to Ireland and Venezuela to Vietnam – 125 countries in all.

Expansion of the Candidate Pool

Over the last 15 years, the number of candidates sitting for the New York bar exam has increased by over 40%. This tremendous growth has been fueled primarily by the influx of foreign-educated law graduates seeking admission to the New York bar. The number of foreign-educated candidates sitting for our bar exam in 2012 was 2.75 times the size of that group in 1997. Now fully 30%

of all our candidates are foreign-educated. In 2012, 79% of all foreign-educated candidates who took a bar exam in the United States took the bar exam in New York.[3]

More candidates from China now take the New York bar exam than from any other foreign country. From 2000 to 2012, the number of candidates seeking admission in New York based on their education in China increased by 636%. In 2012, 846 Chinese-educated candidates took the New York bar exam, exceeding by far the next largest country contingent – the 538 candidates hailing from the United Kingdom. We are seeing significant increases in the number of candidates from Brazil, India, the Republic of Korea, Ireland and Taiwan. The number of candidates from the U.K. increased slightly from 2000 to 2012; the numbers from Canada, Israel and Germany notably declined.

"There is no end to education. It is not that you read a book, pass an examination, and finish with education. The whole of life, from the moment you are born to the moment you die, is a process of learning."

– Jiddu Krishnamurti

Educational Eligibility to Take the New York Bar Exam

Domestically Educated Candidates

The Court of Appeals has established the educational eligibility requirements to sit for the New York bar exam.[4] For domestically educated candidates, under Rule 520.3, graduation from an ABA-approved law school is required. An ABA-approved law school is one that is accredited by the Council of the ABA Section of Legal Education and Admissions to the Bar in accordance with the ABA Standards and Rules of Procedure for Approval of Law Schools (the Standards).[5] A law school must be in full compliance with all of the Standards to achieve full approval[6] and is thereafter subject to annual interim monitoring and a full sabbatical review three years after the granting of full approval and every seven years thereafter.[7]

While graduation from an ABA-approved law school is necessary under the Court's Rule, it is not sufficient. A law student intending to sit for the New York bar exam must follow a course of study that complies with the programmatic and instructional requirements of the Rule.[8] Recent amendments have served both to liberalize the Rule and to largely conform it to the Standards. However, some significant differences remain. Responding to requests from the New York law schools to permit more clinical legal education, the Court amended the Rule, now permitting a candidate to count up to 30 credit hours of clinical courses, field placement programs and externships toward the required 83 credit hours.[9] The number and type of distance education credits that may be counted are limited,[10] and the Rule requires two credits of study in professional responsibility.[11]

Foreign-Educated Candidates

Rule 520.6 sets forth the educational requirements to sit for the New York bar exam based upon a foreign legal education.[12] There are two primary routes by which foreign-educated candidates may qualify to take our exam, depending upon whether the candidate obtained a first degree in law in a common law or non-common law country.

A candidate who successfully completed a program of legal education in a common law country that was sufficient to qualify the candidate for admission to practice law in the candidate's home country may sit for the bar exam in New York, without further education, provided that the program and course of study was substantively and durationally equivalent to that of an ABA-approved law school.[13]

A candidate whose legal education was in a non-common law country may qualify to sit for the New York bar exam if the candidate completed a program and course of study that would qualify the candidate for admission to practice in the candidate's home country, and the education the candidate received was either substantively or durationally equivalent to that of an ABA-approved law school. Typically, that means that the candidate had three years of legal education. The substantive deficiency may then be cured by successfully completing an LL.M. program of study in the United States.[14]

The ABA does not accredit LL.M. programs. It acquiesces in the establishment of such programs, provided the proposed program does not detract from the school's ability to maintain a J.D. program that meets the requirements of the Standards.[15]

New York regulates the content of LL.M. programs that are intended to qualify the student to take the bar exam in New York. Among the requirements are a minimum of 24 credit hours, including specified numbers of credit hours in legal research and writing, professional responsibility, American legal studies and other courses in subjects tested on the New York bar exam.[16]

The eligibility rules in New York do not require foreign admission as a prerequisite for sitting for the bar exam. In many countries, legal education (which is often undergraduate education) must be followed by a period of

employment under a practice contract and/or requires passing a bar exam with such a low passing rate that admission to practice in New York is often more readily achieved than admission in the candidate's home country.

Many of the foreign-educated candidates who sit for the New York bar exam do not do so with the intention of practicing law in New York; rather, admission to the New York bar is a valued credential for job seekers in international law firms around the world. New York law is the law of choice in many international contracts, and admission to practice in New York enhances employment opportunities for many foreign-educated law graduates.

Passing Rates

Domestically Educated Candidates

Our most closely watched statistic is the one that tells us how the May graduates of our New York law schools perform in July, when they take the bar exam for the first time. That passing rate has ranged over the past five years from a high of 91% in 2008 to a low of 85% last year – an impressive showing, and a credit to the high quality of legal education offered in New York. The passing rate of graduates of out-of-state ABA law schools taking the July New York bar exam for the first time has varied over that same time period from a high of 90% in 2008 to a low of 82% last year.[17]

Foreign-Educated Candidates

In 2012, among foreign-educated candidates, the first-time taker passing rate was 44% and the overall passing rate was 34%, which rates are both consistent with the year-to-year performance of that group. Eleven countries sent 100 or more candidates to take our bar exam in 2012, with the following results:

Country	Number of Candidates	Passing Rate
Brazil	139	32.4%
Canada	156	58.3%
China	846	40.2%
France	233	46.4%
India	213	26.8%
Ireland	123	35.0%
Nigeria	140	14.3%
Japan	351	42.7%
Rep. of Korea	322	25.2%
Taiwan	181	22.7%
United Kingdom	538	28.3%

Content and Structure of the Bar Exam

The bar exam is a two-day test designed to assess minimum competence. We sample the candidate's knowledge on an array of subjects covered by the license. The inquiry is broad but not very deep.

On the first day, candidates take five essay and 50 multiple-choice questions, generally based on New York law, and the Multistate Performance Test (MPT). The New York questions test these subjects: Contracts; New York and Federal Constitutional Law; Criminal Law; Evidence; Real Property; Torts; Business Relationships; Conflict of Laws; Criminal Procedure; Family Law; Remedies; New York and Federal Civil Jurisdiction and Procedure; Professional Responsibility; Trusts, Wills and Estates; and UCC Articles 2, 3 and 9. The scope of the test is defined by the Content Outline, available on our website.[18] We invite comments regarding the Outline[19] and specifically encourage comments as to what new lawyers need to know for effective practice and where New York law may vary from the common law and/or prevailing views.

The MPT is a test of lawyering skills developed by the National Conference of Bar Examiners (NCBE). The candidate is given a set of file materials and a library to use in completing an assigned task.[20]

Candidates are able to type their essay answers and their answers to the MPT using laptop computers.[21] Over 80% of the candidates avail themselves of that option, to the relief of the 42 attorneys selected from around the state to grade the exam.

On the second day of testing, candidates take the Multistate Bar Examination (MBE), a multiple-choice exam developed by the NCBE. It contains 200 questions on Contracts, Constitutional Law, Criminal Law, Evidence, Real Property and Torts. Civil Procedure will be added to the mix in 2015.[22]

Current Developments

Two national initiatives deserve brief mention. The Uniform Bar Examination (UBE),[23] adopted in 13 states, consists of the MBE, MPT and the Multistate Essay Examination, a battery of tests designed to measure fundamental legal knowledge and lawyering skills. The score achieved on the bar exam in one jurisdiction can be transported to another, allowing a new lawyer to gain admission in another jurisdiction without taking another bar exam, provided the score satisfies the importing jurisdiction's passing score and the candidate completes local testing and/or CLE and character and fitness requirements. That portability is a worthy goal, especially in the current job market, and the Board of Law Examiners is following the progress of this movement with great interest.

Another current national initiative is a content validity study being undertaken by NCBE. The first step in the process was a job analysis, completed in 2012.[24] Identi-

fied through that analysis were the tasks, knowledge domains, skills and abilities that new lawyers rated as significant in their practices. The results of that analysis are now being considered as the bar exam of the future is imagined.

Conclusion

Next July, if you see legions of young people around the Javits Center in New York, the Empire State Plaza in Albany or the Convention Center in Buffalo wearing green wristbands and carrying clear plastic one-gallon bags containing their worldly goods (minus cell phones, iPods, highlighters and other prohibited items[25]), remember back to the day you endured the ritual and give them a warm welcome to the profession. ■

1. Rules of Ct. of Appeals, 22 N.Y.C.R.R. § 520.5.
2. Rules of Ct. of Appeals, 22 N.Y.C.R.R. § 520.4.
3. http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2013/8201132012statistics.pdf.
4. Rules of Ct. of Appeals, 22 N.Y.C.R.R. §§ 520.3–520.6.
5. The Standards are available at http://www.americanbar.org/groups/legal_education/resources/standards.html.
6. Standard 103(a) of the Standards for Approval of Law Schools, 2012–2013.
7. Rules 3(c) and 12(a) of the Rules of Procedure for Approval of Law Schools, 2012–2013.
8. Rules of Ct. of Appeals 22 N.Y.C.R.R. § 520.3(c), (d).
9. Prior to April 1, 2012, credit for clinical courses was limited to 20 of the then-required 80 credit hours. *See* archived Rule 520.3, *at* http://www.nybarexam.org/Rules/3203-6archive.htm#520.3.
10. Rules of Ct. of Appeals, 22 N.Y.C.R.R. § 520.3(c)(6).
11. Rules of Ct. of Appeals, 22 N.Y.C.R.R. § 520.3(c)(1)(iii).
12. Rules of Ct. of Appeals, 22 N.Y.C.R.R. § 520.6.
13. Rules of Ct. of Appeals, 22 N.Y.C.R.R. § 520.6(b)(1)(i).
14. Rules of Ct. of Appeals, 22 N.Y.C.R.R. § 520.6(b)(1)(ii).
15. Standard 308 of the Standards for Approval of Law Schools, 2012–2013.
16. Rules of Ct. of Appeals, 22 N.Y.C.R.R. § 520.6(b)(3).
17. Passing rates and other statistics are available at http://www.nybarexam.org/ExamStats/Estats.htm.
18. *Available at* http://www.nybarexam.org/Content/ContentOutline.htm.
19. Address comments to Outline.Comments@nybarexam.org.
20. For a complete description of the MPT, *see* http://www.ncbex.org/multistate-tests/mpt/.
21. *See* Laptop Program for the Bar Exam, *at* http://www.nybarexam.org/TheBar/TheBar.htm#laptop.
22. For a complete description of the MBE, *see* http://www.ncbex.org/multistate-tests/mbe/.
23. For a complete description of the UBE, *see* http://www.ncbex.org/multistate-tests/ube/.
24. *See A Study of the Newly Licensed Lawyer*, *at* http://www.ncbex.org/publications/ncbe-job-analysis/.
25. *See* New York Bar Exam Security Policy, *at* http://www.nybarexam.org/Docs/secpolicy.pdf.

Alternatives for Scheduling the Bar Exam

By Mary Campbell Gallagher, J.D., Ph.D., and Professor Carol A. Buckler

For decades, freshly minted law school graduates have taken the New York State bar examination at the end of July following graduation. Recently, there has been discussion about allowing bar candidates to take the bar exam earlier. The NYSBA Committee on Legal Education and Admission to the Bar has taken several options under study.

One proposal would offer law students the choice of taking the bar exam in its current form in the summer following their second year of study or during the third year. Bar candidates could still choose to take the exam in July after graduation. Another proposal, one with possibly far-reaching consequences, would be to divide the bar exam into two parts: the first part would be taken after the first year of law school, and the second following graduation. All of these plans have advantages; they also have possible adverse consequences for law students.

Reasons to Reschedule the Bar Exam

Offering applicants the option to take the bar exam earlier could help them in several ways. Many students have the skills and knowledge to pass the bar earlier in their law school careers. Indeed, if students could take the exam closer to taking foundation courses in law school, they might need less time for review. Those who pass an earlier administration of the exam would no longer need to worry about the exam, freeing them to pursue clinical courses, specializations, and upper-level skills courses.

Some students would realize a substantial financial benefit because they would be eligible to be licensed as soon as they graduated. Some employers, especially smaller law firms, will not hire applicants who cannot counsel clients immediately and possibly represent them

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in court. Some firms will not even interview applicants who lack a license. A delay of many months in a law graduate's ability to advise and represent clients can make a painful difference to his or her ability to start earning money and repaying student loans. Now, however, months pass between taking the July bar exam and the successful New York candidates being sworn in.

Bar Exam During the Second Summer

One proposal is to leave the test itself unchanged but give students the option of taking the exam in July following the second year of full-time studies.[1] The advantage for students who take the exam early and pass might include earlier entry into the job market and a reduced debt load. An additional advantage is that having the bar exam behind them could permit them to focus their third year on externships, job searches, more skills instruction or study for greater specialization. Students with externships or part-time jobs during their third year might be more attractive job candidates if they have already passed the bar exam and would be ready immediately to begin work as a practicing lawyer.

Once the second-year law student takes and passes the bar exam, the only further steps to being a licensed attorney would be the Character and Fitness interview and the swearing-in, which would take place after graduation. Students could graduate from law school one week and, at least in theory, be sworn in the next. They might even take another state's bar exam in the July following graduation.

For bar candidates who fail an early administration of the bar exam, there is a possible advantage as well. Those students could spend time in their third year working on acquiring additional knowledge and analytical skills, aiming to improve their chances of passing the exam on their second try the following July or as early as February. They would have two chances to pass the exam within the traditional schedule, rather than one, and, if successful, such students might still pass the bar exam before they have to begin repaying student loans.

One administrative advantage is that this option does not require changing either the exam itself or the July date.[2] It would cause minimal administrative disruption for the Board of Law Examiners (BOLE) and thus could be implemented quickly. The disadvantage, on the other hand, is that many students now use the second summer of the three-year program to gain valuable work experience: studying for the bar exam could eliminate this option. Students might lose that opportunity to work in a law office, to earn money to help support themselves through the final year of school, to study abroad, or to take an internship or another clinical experience. Students also would have to make decisions about their second-year course work during the spring of their first year, which might be too early to assess their job prospects and the relative value of taking the bar exam early versus using the second summer to gain practical experience.

A Two-Part Bar Examination

Another plan would be for New York to offer the bar exam in two parts, along the lines of the medical or veterinary boards, which aspiring medical professionals take in two steps during their professional training. The BOLE might offer one part of the bar exam at the end of the first year, and the second part after graduation. This two-part plan would require aggressive rethinking of the relationship between what is tested on the bar exam and what is taught in the first year. Like the second-summer option, this plan would have the advantage of testing the students closer to when they take core bar exam courses. It would also allow students who pass the first part of the exam to plan their elective course work after the first year with less worry about additional study of the subjects tested on the bar exam.

"Examinations are formidable even to the best prepared, for the greatest fool may ask more than the wisest man can answer."

– Charles Caleb Colton

Another advantage would be that the law students who are most at risk of failing the bar exam – generally those who do least well in the first year of law school – would get an early message that they need to strengthen their legal knowledge and analytic skills in order to pass. Some might see this as a sign from a neutral third-party gatekeeper that they might not be suited for the practice of law. This might encourage students to seek guidance from their law schools and other advisors to assess their chances of success in the remaining two years of law school and ultimately on the bar exam, and decide whether it might be worthwhile to pursue another professional path.

A significant practical challenge is that this plan might require designing a new first-year bar exam or extensively revising most first-year programs, or both. If the present Multistate Bar Examination (MBE) were used for the first-year part of the bar exam, most law schools would have to change their first-year curricula, since the MBE includes Evidence, which is rarely taught in the first year, and Constitutional Law, which only some schools offer in the first year. In addition, even the subjects currently

offered in the first-year curriculum are frequently taught with heavy emphasis on building skills in legal analysis, with less emphasis on the doctrinal rules also tested on the bar exam. The "depth versus breadth" discussion is perennially a lively one among law faculty, and this change would intensify and give greater urgency to that debate. At many law schools relatively recent curricular reforms have introduced training in practical lawyering skills into the first-year program, and this plan might undercut those changes.

This plan might also require designing a new test for the second part of the bar exam. In light of the many new courses aimed at making students more practice ready, the time for re-designing the bar exam may come soon, in any event. Many in the law schools and the practicing bar would welcome the opportunity to rethink how to coordinate work in law school and the bar exam. The process might encourage law faculties and bar examiners to work together more closely on pedagogy and curriculum. The process, however, would take substantial effort and time.

In addition, New York State probably cannot adopt a two-step plan by itself. Many law schools in other states send graduates to take the New York bar exam, and a significant restructuring of the exam would affect those law schools and their students.

The Arizona Option: Bar Exam During the Third Year

Another proposal is for law students to take the bar exam in February of the third year, while they are still law students.[3] At the behest of the three Arizona law schools, the Arizona Supreme Court has issued an amended rule permitting eligible law students to take the bar examination after the first semester of their third year of law school.[4] The trial runs from January 1, 2013, through December 31, 2015.

To be eligible, law students must have completed all but 10 units of their programs before beginning the second semester of the third year. Thus, the University of Arizona James E. Rogers College of Law has changed the school calendar to allow those students two months to prepare for the February bar exam and has designed a menu of new courses with emphasis on practical skills for the weeks following the February bar exam.[5]

This plan seems to offer some of the same advantages as the second-summer plan: it could accelerate admission to the bar for those who pass; it also could give law schools the opportunity to develop a curriculum for the last semester of the third year, following the February bar exam, that focuses on the transition from theory to practice. Without making such changes in the curriculum, however, allowing students to take the bar exam during their third year would risk distracting them from their course work. We will be interested to see the effect of this plan on participation in law review, moot court competitions, and other co-curricular activities as well. Implementing this option in Arizona, with three law schools graduating several hundred bar candidates each year, is dramatically different from implementing it in New York, where thousands of law graduates take the bar exam annually, from 15 law schools within, and dozens of schools outside, the state. The results of the Arizona pilot program will be worth watching.

Conclusion

We must assess the impact of all of these plans on part-time students, on students who attend law schools outside of New York, and on foreign lawyers applying for admission to the New York bar. As the NYSBA Committee on Legal Education and Admission to the Bar continues its ongoing study of these interesting alternatives, it will carefully take account of the implications for the law schools, for the practicing bar and for the thousands of law graduates who seek admission to the bar of the State of New York. ■

1. Samuel Estreicher has proposed that students be eligible to take the bar exam after two years of a three-year J.D. program, and be admitted if they pass the exam without a J.D. degree. *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. Legis. & Pub. Pol'y 599 (2012). That proposal was the subject of a day-long conference on January 18, 2013, sponsored by the Institute of Judicial Administration of New York University Law School. It generated considerable debate. In this article, we consider a version that would allow taking the bar exam early but still require a J.D. degree for admission to the bar.

2. It is compatible with either the present New York bar exam or with the Uniform Bar Examination (UBE). The present New York bar exam is composed of 50 New York multiple-choice questions, five New York essays, one Multistate Performance Test (MPT) task, and the Multistate Bar Examination (MBE), http://www.nybarexam.org/TheBar/TheBar.htm#descrip (last visited May 11, 2013). The UBE, as proposed by the National Conference of Bar Examiners and adopted to date in 13 jurisdictions, is composed of a Multistate Essay Examination (MEE), two MPT tasks, and the Multistate Bar Examination. It is graded uniformly and provides a portable score, http://www.ncbex.org/multistate-tests/ube/ (last visited May 11, 2013).

3. The President of the National Conference of Bar Examiners, Erica Moeser, proposed this solution in 2009. *The President's Page*, B. Examiner (Aug. 2009), p. 4.

4. Order Amending Rule 34, Rules of the Arizona Supreme Court (Dec. 10, 2012).

5. Telephone interview by Mary Campbell Gallagher with Sally Rider, Associate Dean for Administration & Chief of Staff; Director, The William H. Rehnquist Center on the Constitutional Structures of Government, University of Arizona James E. Rogers College of Law, Tucson, Ariz. (May 30, 2013).

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Times Union Center, Albany, NY, preparing to host the Bar Exam.

Is It Time for Real Reform?

NYSBA's 20 Years of Examining the Bar Exam

By Mary A. Lynch and Kim Diana Connolly

The New York State Bar Examination (NYSBE) acts as a key gatekeeping device to the practice of law in New York. Opening the gate to become a licensed lawyer requires a passing score of 665 or more. For more than two decades, the New York State Bar Association (NYSBA), local bar associations and many others have raised evidence-based concerns about the inadequacy of this solely written, largely multiple-choice and primarily knowledge-focused examination as the only assessment mechanism for licensing lawyers in New York. This criticism reflects the fact that the exam fails to measure the full range of competencies needed to practice law. Likewise, repeated concerns have been raised about the disparate impact this assessment method has on the diversity of our profession and our justice system. After summarizing two decades of reports, studies, and recommendations that have critiqued or defended the bar exam, this article suggests that the time has come to implement the real reform that many stakeholders and experts have been urging for years.

1992–1996

The MacCrate, Davis, Millman Reports and NYSBA Response – "Rote Memorization," "Practice Skills," and Eliminating "Disparate Impact"

In 1992, two reports from prestigious bar organizations critiqued professional preparation and licensure of the legal profession's newest members. The American Bar Association's Taskforce on Law Schools and the Profession issued *Legal Education and Professional Development – An Educational Continuum*, commonly known as the "MacCrate Report," which called for renewed emphasis on practical lawyering skills and inculcation in fundamental professional values.[1] At about the same time, the Association of the Bar of the City of New York (NYCBA) issued its "Davis Report," which proposed several changes to the bar examination, including decreasing doctrinal areas tested, devising competency assessments for more lawyering skills, and infusing ethical issues throughout. The Davis Report also noted concern about whether the bar exam had a disproportionately negative impact on

minority candidates, and recommended analysis and, potentially, revision of the bar exam.[2]

NYSBA's Committee on Legal Education and Admission to the Bar (CLEAB)[3] endorsed the Davis Report in 1992 and again in 1995. Also in 1995, CLEAB issued its own "Recommendations for Implementation of the MacCrate Report" and endorsed the Davis Report's suggestion that the bar exam be "altered in form and substance" to "move away from testing rote memorization of substantive law and towards measuring skills which can be learned in law school and are important to the practice of law."[4]

In 1993, the New York State Court of Appeals commissioned a study of the bar examination. Finding substantial differences in bar passage rates between Caucasian and black applicants, what became known as the "Millman Report" concluded that, although the exam did not appear to be facially biased, there was "the possibility of potential sources of bias which we were unable to study."[5] The report found the exam valid and reliable as to "legal knowledge" and "legal reasoning" but stated it was "far from a perfect sampling of all important lawyering skills" and recommended "experimentation to increase the measurement of skills important for public protection."[6]

1994–2002

Professional Education Project (PEP), Multistate Performance Test (MPT), and Public Service Alternative Bar Exam (PSABE)

In April 1994, Chief Judge Judith Kaye convened a Professional Education Project to respond to the MacCrate Report's call for "a coordinated approach to legal education" from law school through bar admissions into transition to practice and beyond.[7] Two years later, PEP issued its report, *Legal Education and Professional Development in New York State*, calling for development and adoption of "*non-traditional testing techniques that permit effective appraisal of a wider range of lawyering skills than are tested on the traditional Bar Examination*."[8] Meanwhile, the Board of Law Examiners (BOLE) reduced some content matter and added the Multistate Performance Test (MPT) in 2001 to "test an applicant's ability to complete a task which a beginning lawyer should be able to accomplish" such as drafting a client letter using simulated case-file materials.[9]

In 2002, the NYSBA and NYCBA Committees on Legal Education and Admission to the Bar together issued a report pointing out that little had changed since the 1992 Davis Report was issued. Concluding that the MPT did not remedy the bar exam's "shortcomings," they declared that "other than testing legal reasoning and analysis and memorization," the exam "ignores a wide range of other essential skills . . . [and] tests only a few of the core competencies required to practice law and that it does so largely out of context."[10] They also noted the National Longitudinal Bar Study, which showed a "*substantial disparate effect on minority law graduates*, thus undermining the profession's efforts to increase diversity in the bar."[11] The joint report recommended implementation of a pilot project called "Public Service Alternative to the Bar Exam," to "more fairly judge competence of both majority and minority applicants."[12]

2002–2005

The Klein Study, NYSBA's Opposition to Increased Bar Passage Score and the Increased Disparate Impact

Meanwhile, in 2002 the BOLE recommended increasing the NYSBE passing bar score from 660 to 675 over a period of several years.[13] This recommendation was based on two short studies by Dr. Stephen Klein. Critics attacked Klein's methodology and "unfounded assumptions" that increasing the requisite score would improve lawyer competence and not have a disparate impact on minority candidates.[14] The NYSBA issued an Opposition Statement as did deans of New York law schools.[15] However, the BOLE proceeded with the first of the three proposed five-point increases.

A 2006 BOLE study of the effects of the first increase in the passing score elicited a letter to Chief Judge Judith Kaye from then-NYSBA President Mark Alcott stating that "*our worst fears have been realized. The increase in the passing score has indeed had a disparate impact on minorities and any further increases would exacerbate that disparity.*"[16] Additional proposed increases in minimum scores have not (yet) been implemented.

"Any change, even a change for the better, is always accompanied by drawbacks and discomforts."
– Arnold Bennett

2005–2013

The Kenney Report's Four Proposals for Change; *Best Practices in Legal Education; Report of the Task Force on the Future of the Legal Profession;* and CLEAB's Recommendations on Kenney Report Implementation

In May 2005, then-NYSBA President Kenneth G. Standard created the Special Committee to Study the Bar Examination and Other Means of Measuring Lawyer Competence. Chaired by John J. Kenney, this Special Committee worked for five years, meeting regularly and gathering

information by reviewing reports and speaking with experts. The resulting Kenney Report made recommendations to improve the licensing of New York lawyers.[17]

Suggested reforms sought both to "streamline the current exam to test more realistically for knowledge of legal rules that lawyers need to memorize" and to find ways to test skills not assessed by the current examination.[18] The Kenney Report Committee outlined four specific proposals that warranted further consideration: (1) creation of a sequential licensing system; (2) development of an examination that more *broadly* assesses "test-takers' knowledge, skills, and values";[19] (3) experimenting with public service alternatives to the bar exam; and (4) adjusting grading to include credit for "a successfully completed clinical experience in an accredited law school under faculty supervision and duly certified by that faculty."[20]

Meanwhile evolution in legal education concepts reached a transformative tipping point in 2007 with the almost simultaneous publication of the Clinical Legal Education Association's *Best Practices in Legal Education: A Vision and a Road Map*[21] and the Carnegie Foundation's professional preparation initiative titled *Educating Lawyers*.[22] *Best Practices* reflected more than six years of collaborative work involving interdisciplinary and expert input from around the nation to encourage law schools to (1) identify institutionally what students are expected to have learned and be capable of doing and valuing upon graduation; (2) assess whether students have actually achieved these objectives; and (3) subsequently revise curriculum, program development and teaching support. The expert team that published *Educating Lawyers* likewise concluded that "despite some very fine teaching in law schools, often they fail to complement the focus on skill in legal analyses with effective support for developing ethical and practice skills."[23]

In 2010 then-NYSBA President Steve Younger, responding to the radical changes occurring in legal education and the legal profession, created the Task Force on the Future of the Legal Profession. The Task Force's Report, issued in April 2011, urged CLEAB to "participate in serious study of important potential licensing reforms including those recommended in the Kenney Report" and stressed need for "continued commitment to the central values of diversity and inclusion for our profession, as well as serious attention to how licensing shapes diversity of the legal profession."[24] That summer, CLEAB began its assessment of how to implement the Kenney Report's recommendations regarding New York's bar exam. In addition to reviewing and debating the merits of the Kenney Report and all the reports leading up to it, the Committee also considered the issue of "speededness," citing William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*,[25] as well as Professor Claude Steele's work on stereotype bias.

After much consideration and debate, CLEAB recommended the following (although some of the recommendations commanded only a slim majority of the committee):

1. Incorporate "criteria-referenced assessment" recommended in *Best Practices*, such as those used in law school clinical courses for transparent and fair evaluation.[26]
2. Develop a pilot project for a Practice Readiness Evaluation Program (PREP), which would grant credit toward the bar exam score from a limited group of pre-approved, specially assessed, clinical courses.
3. Develop a pilot project for the Public Service Alternative to the Bar Exam (PSABE), through which a limited number of applicants could provide meaningful legal services while being assessed on a range of lawyering competencies.
4. Authorize CLEAB to study the feasibility of a pilot program to assess speededness and its potential contribution to disparate impacts of the bar exam.
5. Revise bar examination content, and explore the appointment of a time-limited NYSBA task force composed of varied private and public interest practitioners to provide input on streamlining the bar exam content to "realistically test a candidate's essential knowledge" and ensure the New York portion is focused only on skills and knowledge that new attorneys *must* possess.

Conclusion

More than two decades of detailed and expert assessments of the bar exam have consistently recommended reform. Multiple committees have issued reports setting forth the same concerns: the existing bar exam fails to assess the wide range of competencies needed to effectively practice law and produces a disparate impact on racial minorities which undermines the diversity of the profession. Groups of diverse stakeholders have presented options to address these failures. Legal education is dramatically changing; law schools are increasingly adapting their curricula to produce more profession-ready graduates. This shift within law schools makes it particularly timely for the NYSBA to address meaningful bar exam reform now. ■

1. American Bar Association Section of Legal Education and Admission to the Bar, *Legal Education and Professional Development – An Educational Continuum* (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) (1992) (MacCrate Report).

2. Committee on Legal Education and Admission to the Bar, *Report on Admission to the Bar in New York in the Twenty First Century–A Blueprint for Reform*, 47 Record Ass'n B. City N.Y. 464, 467–70 (1992) (Davis Report).

3. The Committee on Legal Education and Admission to the Bar was formed on June 1, 1952, and is tasked with "studying the various aspects of and developments in legal education and admission to the bar, in the maintenance of adequate standards of legal education and in the prevention of admission to the bar of unworthy candidates." N.Y. State Bar Ass'n, Committee on Legal Education and Admission to the Bar, Committees, http://www.

nysba.org/AM/Template.cfm?Section=Committee_on_Legal_Education_and_Admission_to_the_Bar_Home (last visited June 11, 2013) (summarizing the Committee's work over the past 21 years).

4. *See* N.Y. State Bar Ass'n, Report of the Special Committee to Study the Bar Examination and Other Means of Measuring Lawyer Competence, 16–17 (Sept. 13, 2010) (Kenney Report); *see also* N.Y. State Bar Ass'n Comm. on Legal Education and Admission to the Bar, *Recommendations for Implementation of the MacCrate Report* 15 (1995).

5. This report was named after the lead evaluator Professor Jason Millman of Cornell. Jason Millman et al., *An Evaluation of the New York State Bar Examination* ES-1, ES-3, ES-4, 10–15 (May 1993) (Millman Report); *see also* Kenney Report, *supra* note 4, at 19.

6. Millman Report at 10–15; *see also* Kenney Report, *supra* note 4, at 19.

7. Kenney Report, *supra* note 4, at 20.

8. *Id.* at 21.

9. *Id.* at 7, 9.

10. Committee on Legal Education and Admission to the Bar of the Association of the Bar of the City of New York & Comm. on Legal Education and Admission to the Bar of the N.Y. State Bar Ass'n, *Joint Committee Report: Public Service Alternative Bar Examination* (June 14, 2002) (Joint Report). John Holt-Harris, the former Chair of the New York Bar Examiners, believed that "*the PSABE will enable law graduates to provide meaningful service to both the courts and litigants. We envision evaluating PSABE participants using a variety of assessment methods, on a broad range of the MacCrate lawyering competencies. . . .*" John A. Holt-Harris, Jr., *Examining Ourselves: Observations of a Bar Examiner*, 65 B. Examiner 4, 6 (1996).

11. Joint Report at 4.

12. *Id*.

13. Kenney Report, *supra* note 4, at 22–23.

14. *Id.* at 22–27.

15. Susan Saulny, *Case for Tougher Bar Exam Prompts a Forceful Rebuttal*, N.Y. Times (Apr. 13, 2003), http://www.nytimes.com/2003/04/13/nyregion/case-for-tougher-bar-exam-prompts-a-forceful-rebuttal.html.

16. *See* Michael Kane, et al., *Impact of the Increase in the Passing Score on the New York Bar Examination*, Report Prepared for the New York Board of Law Examiners (Oct. 4, 2006); Letter from Mark H. Alcott, President of The New York State Bar Association, to Honorable Judith S. Kaye (Nov. 29, 2006).

17. Kenney Report, *supra* note 4, at 1–3.

18. *Id*. at 4.

19. *Id*. at 32.

20. *Id.* at 33 (quoting Robert MacCrate, *Yesterday, Today and Tomorrow: Building the Continuum of Legal Education and Professional Development*, 10 Clinical L. Rev. 805, 831 (2004)).

21. Roy Stuckey et al., Best Practices for Legal Education: A Vision and a Road Map, vii (2007) (Stuckey).

22. William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law (Carnegie Foundation for the Advancement of Teaching 2007).

23. Carnegie Foundation for the Advancement of Teaching, *Carnegie Examines the Education of Lawyers and Calls for Change*, Press Releases (Jan. 2007), http://www.carnegiefoundation.org/press-releases/carnegie-examines-education-lawyers-and-calls-change.

24. N.Y. State Bar Ass'n, *Report of the Task Force on the Future of the Legal Profession* (Apr. 2, 2011).

25. William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 Tex. L. Rev. 975 (2004).

26. *See* Stuckey *supra* note 21 at 181; *see also* The N.Y. State Bar Ass'n Comm. on Legal Education and Admission to the Bar, *Recommendations for Implementation of the Report of the Special Committee to Study the Bar Examination and Other Means of Measuring Lawyer Competence* 12 (Feb. 2012).

NAM is pleased to announce that

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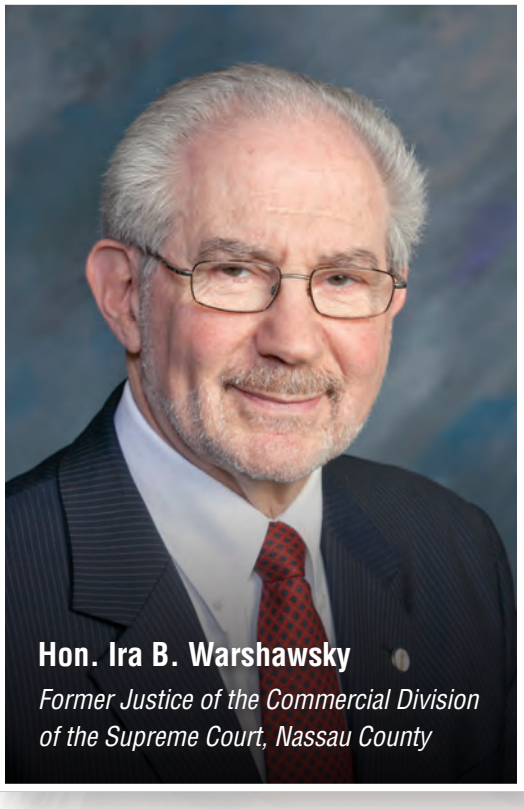

Hon. Ira B. Warshawsky
Former Justice of the Commercial Division of the Supreme Court, Nassau County

Judge Warshawsky has been a distinguished member of the New York judiciary for the past 25 years. He was a New York Supreme Court Justice in Nassau County's Commercial Division from 2002 until his retirement in 2011. He presided over all manners of business claims and disputes, including business valuation proceedings, corporate and partnership disputes, class actions and complex commercial cases. Immediately prior to this appointment, Judge Warshawsky handled general litigation, including products liability, from 1998 to 2002. Prior to that, he sat in the Nassau County District Court for ten years, from 1987 to 1997, presiding over a wide variety of matters.

According to the 2009/2010 New York Judge Reviews, Judge Warshawsky has been praised for keeping a "calm" demeanor, even during highly charged, high-profile cases. Lawyers interviewed described him as "one of the hardest working, intelligent, even-handed judges, who has a very good sense of justice." He has been described as a "top-notch judge" who is known for encouraging settlement negotiations without being overly aggressive. One attorney stated, "Judge Warshawsky is one of the best judges I have ever appeared before in the nation."

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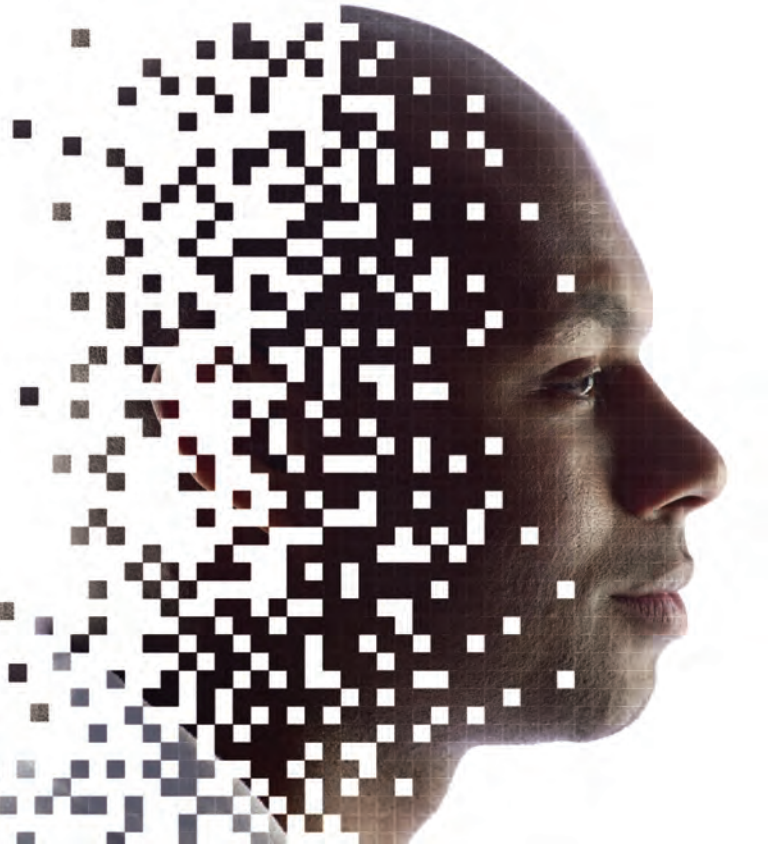

Edna Wells Handy is Commissioner, New York City Citywide Administrative Services and a noted expert on the Bar Exam. She has written extensively on the subject, including authoring the book, *You Can Pass Any Bar Exam* (PLI, 1997). The views expressed hereim are hers and not necessarily those of the City.

Blacks, the Bar Exam and Lean Six Sigma

By Edna Wells Handy

Introduction

"How could this be?" is a question I've been asking myself a lot lately. How could it be that after 30-plus years in the profession, I am still one of the few minorities and almost always the only African-American female at the so-called "power breakfasts," executive briefings, bar association committees, or some such other professional or alumni gathering? After all, I have spent much of those 30 years trying to increase minority participation within the legal profession and elsewhere. Have those efforts failed to take root? Or, are there other leaks in the pipeline to these gatherings that account for the paucity of minorities in attendance?

As a young lawyer, I was intimately involved in both the institutional review of the topic as well as individual preparation for the exam. Indeed, I had already written articles on the subject.[1] As a more mature lawyer and the Executive Director of the New York State Judicial Commission on Minorities, I took part in the Commission's analysis and its identification of minority bar exam pass rates as a substantial leak in the pipeline leading to decreased minority entry and participation in the legal profession.

Now, after years away from these undertakings, I thought it was a good time to see whether the leak persists – and whether that accounts for my loneliness at these meetings. In so doing, I have drawn the inescapable conclusion that we need to redouble our efforts as a profession and as individual bar candidates to reach the goal of the Commission and countless others before us, namely, the narrowing, if not elimination, of the "Black-White Bar Exam Passage Gap."

Discussion: The "Black-White Bar Exam Passage Gap"

In his May 2013 president's message, Seymour James, the third black president of the New York State Bar Association in its 137-year history, stated:

> Achieving diversity and inclusion is an ongoing and multi-faceted goal for the State Bar and our profession. In our increasingly diverse society, a legal profession representative of our society at large is necessary to maintain the legitimacy of our legal system and respect for the rule of law. A diverse legal profession allows us to better represent our clients and helps to ensure the fair administration of justice.[2]

Yet, threatening that diversity and, by extension, trust in our justice system is the real or perceived endurance of the Black-White Bar Exam Passage Gap.

What is that "gap"? In relation to the bar exam, the gap can manifest itself in three ways. There is first-time taker pass rate for persons who have taken the exam only once and passed it, generally right after graduating law school. Next, there is the "eventual pass rate" for those who failed the first time, but who pass on a subsequent try. Finally, there is the "persistence gap" for those who have stopped trying to pass. With respect to each gap,

whites have the highest passing rates, while blacks have the lowest. Other minority groups are sandwiched between the two.[3] The plotting of bar exam pass rates and the subsequent gap is remarkably similar to the score gaps for other tests.

> African Americans currently score lower than European Americans on vocabulary, reading, and mathematics tests, as well as on tests that claim to measure scholastic aptitude and intelligence. This gap appears before children enter kindergarten and it persists into adulthood.[4]
>
> Social scientists have been trying to understand the black-white test score gap since World War I, when test scores collected from the U.S. Army's wartime recruits first demonstrated its existence. But empirical research on the subject has proceeded in fits and starts.[5]

The authors of this much-cited collection of studies could very well have been discussing research on bar exam pass rates. Up until the 1990 report of the New York State Judicial Commission on Minorities, there had been no empirical study of statewide pass rates for the New York bar exam. The Commission's report referred to a New York Court of Appeals case brought in an attempt to bring official scrutiny to a little studied, but widely perceived, black-white bar exam passage gap.[6]

In 1974, a group of black law school graduates petitioned the Court to appoint a commission to determine whether the bar exam was an appropriate method to grant licenses to practice law. They relied on a six-year study of candidates in the Fourth Department that found a pass rate of 18% for blacks compared with a 72% rate for whites.[7] The petitioners asserted the bar exam violated the equal protection clause of the Fourteenth Amendment because of its disparate impact on black candidates and the absence of a showing of job-relatedness. In response, the Court held a number of meetings and appointed an expert – who could not give an opinion on the exam's validity given the paucity of the data. Notwithstanding the absence of an expert opinion, the Court denied the petitioners' initial request for a commission, as well as their subsequent demand to abolish the bar exam as not being job-related.[8]

The New York State Judicial Commission on Minorities

In 1989, the Court of Appeals finally did establish a commission, charging it, among other things, to look at the bar exam as a barrier to admission to practice by minorities. In that groundbreaking, 2,000-page report on the representation, status and treatment of minorities within the courts and legal profession, the Commission published one of if not the first empirical statewide studies on minority pass-rates on the New York bar exam. Identifying law schools as the only repository of both race and bar passage information for individual applicants, the Commission established minority pass rates for graduates of New York law schools for the July bar exams administered between 1985 and 1988. It found the following pass rates:

Whites	73.1%
Asian Americans	62.9%
Hispanics	40.9%
Native Americans	33.3%
Blacks	31.0%

"It was a saying of [Aristotle's] that education was an ornament in prosperity and a refuge in adversity."
– Diogenes Laërtius

While the Commission did not call for abolition of the bar exam, it did recommend a review of the exam for job-relatedness as well as cultural/economic bias. Moreover, the Commission recommended that "[t]he New York State Board of Law Examiners should begin maintaining race data to determine minority pass rates, especially now that it is a participant in a national study on bar passage being conducted by the Law School Admissions Council."[9]

The Law School Admission Council's (LSAC) National Longitudinal Bar Passage Study

We may never know whether New York participated in the LSAC's study as all data, communications or agreements were destroyed by researchers as a condition of participation by the states. What we do know is that the Law School Admission Council's "National Longitudinal Bar Passage Study" became the first empirical study on national pass rates.[10] In undertaking the study, the LSAC noted: "The information was vital to legal education regardless of the outcome. If the dismal failure rates being reported in whispers were accurate, legal education would need to rethink both its admission and educational

policy and practice. If they were false, they needed to be replaced with accurate information." While its reasons for the study were straightforward, its task was not.

To provide a national picture, the LSAC study needed bar passage data from all 50 states. Thirty-six states did actively participate by providing data. The 14 that did not participate asserted any number of reasons from the belief that they could not disclose the information to their distrust of the use of the data. Some were just not interested. Consequently, the researchers had to reconstruct data from two key sources – participating law schools (also the source of the Council's data) and public lists of passing candidates. The LSAC's pass rate findings for students over a five-year period, starting in 1991, were the following:

Whites	92%
Asian Americans	81%
Mexican Americans	76%
Hispanics	75%
Puerto Ricans	70%
American Indians	66%
Blacks	61%

Interestingly, the LSAC's study took the analysis one step further. It quantified the two other gaps mentioned earlier. As to the "eventual bar passage gap," the study found:

Whites	96.7%
Asian Americans	91.9%
Hispanics	89.0%
Mexican Americans	88.4%
American Indians	82.2%
Puerto Ricans	79.7%
Blacks	77.6%

And as to the "persistence gap," researchers noted: "These numbers also tell us that approximately 8–22 percent of the law students of color who entered law school in fall 1991 . . . did not enter the profession." They also noted, "Although overall, the number of first-time failures who did not make a second attempt is small, they represent a substantial proportion of black and Hispanic law school graduates."[11] An unpublished report interpreted the LSAC's eventual pass rate findings to mean: "The overall failure rate of blacks remains relatively high: 22 percent or 1-5 black applicants never pass the bar examination in comparison to 3 percent of, 1-30, white applicants."[12] Thus, the LSAC study adds a third source of empirical data on the black-white bar exam passage gap.

National Conference of Bar Examiners Evaluation of New York Bar Results From 2005–2006

A fourth source of information comes from the New York State Board of Law Examiners (NYSBLE) itself. To address the controversy attending an increase in the overall passing grade for the New York bar exam (from 660 to 665), the Board asked the National Conference of Bar Examiners (NCBE) to evaluate the impact of the 665 passing score on the July 2005 exam, and subsequently on the February and July 2006 exams. Its 2007 report, titled "Impact of the Increase in the Passing Score on the New York Bar Examination," gave the legal community its first official statistics on minority performance on the New York bar exam:

July 2005 Exam Passing Rates for First-Time Takers

Caucasian/White	86.8%
Asian/Pacific Islander	80.1%
Hispanic/Latino	69.6%
Black/African American	54.0%

February 2006 Exam Passing Rates for First-Time Takers

Caucasian/White	78.3%
Asian/Pacific Islander	71.6%
Hispanic/Latino	64.0%
Black/African American	52.6%

Treating the July 2005 bar candidates as a cohort, the study captured successive attempts at passing the bar exam by those who had failed it the first time. This information gives us the first official findings on the two other "black-white bar exam passage gaps" mentioned earlier – the eventual pass rate gap and the persistence gap. In releasing this information the Board noted: "Of the 7,156 who took the New York bar exam for the first time in July, 91.1% passed a New York bar exam administered within a year later."[13] The eventual pass rates for those who took and passed an exam by February 2006 were:

Caucasian/White	92.1%
Asian/Pacific Islander	87.2%
Hispanic/Latino	82.0%
Black/African American	72.3%

And the eventual pass rates for those who took an exam by July 2006 were:

Caucasian/White	93.4%
Asian/Pacific Islander	89.8%
Hispanic/Latino	84.8%
Black/African American	75.1%[14]

A Call to Action

Assuming, for the sake of argument, the validity of the studies described above, we seem to have a good news story here. The black-white bar exam passage gaps (and those of the other ethnic groups in between) appear to be closing – from the 18% passing rate cited in the 1974 *Boddie* Petition, to the 31% finding of the 1991 New York State Judicial Commission on Minorities, followed by the 61% finding of the Law School Admission Council's National Longitudinal Study in 1998, to this 2007 study of the New York State Board of Law Examiners/National Conference of Bar Examiners and its finding of 52%–54%. The same seems to be true of the eventual pass rate; the LSAC

and NCBE studies establish a passing rate of between 75% and 77%. Clearly, the time and resources devoted to this issue by law schools, bar associations, the Board of Law Examiners and the individual bar exam candidates themselves have paid off and must be applauded.

Yet (and you knew there would be a "yet"), the "gaps" persist, especially for first-time takers. And despite efforts to downplay the significance of first time passing, the need for employment, loan repayments, school accreditations and prestige continue to support the urgency of first-time passing. Moreover, despite the good work mentioned above, the "persistence gap" persists, and "racial/ethnic minority group members (especially Blacks) [are] not as likely to eventually pass as their [white] classmates."[15] What, therefore, do we do in the face of the still large and stubborn bar exam passage gaps? We take up the charge of the authors of the much-heralded book *Black-White Test Score Gap* and *focus on the gap*.

> The black-white test score gap does not appear to be an inevitable fact of nature. . . . In a country as racially polarized as the United States, no single change taken in isolation could possibly eliminate the entire legacy of slavery and Jim Crow or usher in an era of full racial equality [and, I would add, "participation"]. But if racial equality is America's goal, reducing the black-white test score gap would probably do more to promote this goal than any other strategy that commands broad political support. Reducing the test score gap is probably both necessary and sufficient for substantially reducing racial inequality in educational attainment and earnings.[16]

How, then, do we focus on the black-white bar exam score gaps? We can perhaps call for more study of the matter to determine the validity of the studies already done. Or, we can establish another commission. But that commission would need to conduct even more studies to come up with recommendations probably not too dissimilar to those already made. In any event, both would have to compete for the scarce, discretionary government resources at hand and, given the state of race-conscious activity, neither would probably be able to command the "broad political support" needed. Alternatively, I would argue that we need an entirely new approach, one with potentially immediate return and minimal cost. That approach is the process improvement methodology known as "Six Sigma," "Lean Six Sigma" and "Lean."

Six Sigma grew out of the manufacturing sector to address the need for processes resulting in fewer defective products. Its goal, therefore, was to create business processes that produce no more than 3.4 problems/defects-per-million opportunities, tantamount to error-free. Using a number of Six Sigma tools, persons involved in a troubled process, from the production line worker to the manager, would come together to map out the present state, determine areas of dysfunction and make changes needed to improve that targeted process and to reduce the defects. A Six Sigma tool of particular note is the "Kaizen Group."

> Kaizen is Japanese for "improvement" or "change for the better." A typical Kaizen Group consists of the process [that the] owners will meet over five business days to analyze a business operation with the intent to improve it. Using another tool, value stream mapping, the group maps the operation by developing a value stream to gain an understanding of the current state. Upon completion of the value stream map, the team identifies areas for improvement in the process and develops a future state.[17]

The goals and tools of Six Sigma have been gaining popularity and not just in sectors that produce widgets. Six Sigma is gaining traction in the service delivery sectors under the headers "Lean" and "Lean Six Sigma" (LSS). Thus we find Lean/Lean Six Sigma initiatives in health care. The New York City Health & Hospitals Corporation is renowned for "Breakthrough," its version of "Lean."[18] Corporate HR departments are adapting the methodology to call center operations. Law firms even are looking to LSS to improve legal processes.[19] LSS's goals and tools can be applied anywhere there is a desire to improve a process to obtain a better outcome.

Surely, we have a desire to improve bar exam pass rates for minorities by closing the gaps. We have a process that begins officially in law school and continues through licensure. Law schools, Boards, Courts, minority and majority bar associations, first time and repeater bar candidates, even the bar review courses – we can all be considered the "process owners." What if we were to come together for a few days to map out the process to determine the future state for success? We might come

Lean Six Sigma

Lean Six Sigma is a powerful, proven method of improving business efficiency and effectiveness. In a nutshell, here are the key principles of Lean Six Sigma to bear in mind:[1]

- Focus on the customer.
- Identify and understand how the work gets done (the value stream).
- Manage, improve and smooth the process flow.
- Remove Non-Value-Added steps and waste.
- Manage by fact and reduce variation.
- Involve and equip the people in the process.
- Undertake improvement activity in a systematic way.

1. http://www.dummies.com/how-to/content/lean-six-sigma-for-dummies-cheat-sheet.html.

up with the design of coaching initiatives that studies have found to be effective in closing the gaps. An idea might surface similar to the "repeaters boot camp" model that a number of minority bar associations have designed. The result of a bar exam Kaizen Group may be something we've not seen before, something only the energy, attitude and creativity of renewed commitment and concern could envision. We may never know until we try.

Conclusion

After 30-plus years working to close the gap, I'm certainly willing to try. While I thoroughly agree with President James, the New York State Judicial Commission on Minorities and countless others that diversity and inclusion are indispensable attributes of a fair and impartial justice system, I also want to try so that more lawyers of color gain access to those power breakfasts, executive briefings and professional gatherings from which they are now so noticeably absent. Won't you join me? ■

1. *See* Edna Wells Handy, et al., Executive Summary and Final Report of the New York State Judicial Commission on Minorities, Vols. I–V, April, 1991 (Final Report); Edna Wells Handy, Blacks, the Bell Curve and the Bar Exam, book review, NYLJ (Apr. 1996); Edna Wells Handy, You Can Pass Any Bar Exam (PLI 1993); Edna Wells Handy, *The Bar Exam: Why Students Fail*, Nat'l B. Ass'n Mag., Vol. 11, No. 1 (Nov./Dec. 1997).

2. *President's Message*, N.Y. St. B.J. (May 2013), p. 5.

3. I highlight the rates for blacks and whites for the same reasons noted by Christopher Jencks and Meredith Phillips: "Although this book concentrates on the black-white gap, similar issues arise when we compare Hispanics or Native Americans to whites or Asians. We have concentrated on the black-white gap because far more is known about test performance among blacks and whites than among other groups." Christopher Jencks, Meredith Phillips, eds., The Black-White Test Score Gap 1–2 (Brookings Inst. 1998).

4. *Id.* (footnote omitted).

5. *Id.* at vii.

6. *In re Boddie, et al.*, memorandum of Boddie Petitioners in Support of Their Application 14 (N.Y. Ct. App. Nov. 20, 1975), *cited in* Final Report, Vol. IV, p. 5.

7. *Id.*

8. *Id.* at p. 6.

9. *Id.* at p. 19.

10. Scholars Stephen Klein, Ph.D., and Roger Bolus, Ph.D., had blazed the trail in their studies on the California bar exam.

11. LSC National Longitudinal Bar Passage Study, Linda F. Wightman, Law School Admission Council (1998) at p. 80.

12. Jane E. Cross, *The Bar Examination in Black and White: The Black-White Passage Gap and the Implications for Minority Admissions to the Legal Profession*, Nat'l Black L.J. (Dec. 12, 2003), SSRN:http://ssrn.com/abstract=1313860.

13. New York State Board of Law Examiners, "Impact of the Increase in the Passing Score on the New York Bar Examination," National Conference of Bar Examiners, July 2007, www.nybarexam.org/press/summary2.pdf.

14. Stephen Klein & Roger Bolus, "Eventual Passing Rates Among July 1997-2000 First Timers," June 22, 2003, http://www.seaphe.org/pdf/past-bar-research/Eventual_Passing_Rates_Among_July_1997-2000_First_Timers.pdf. The analysis went even further to determine eventual pass rates with what the study termed "non-persisters." Without this group, the study stated, the rates would have been even higher. For example, Black/African American rates would have increased from 75% to 82.6%. *Id.* at p. 6.

15. *Id.*, at p. 1. This statement, while made in regard to the California Bar results, could equally apply to that of New York. *See supra* note 13.

16. *See supra* note 3 at 1–2.

17. *See* Thomas Pyzdek & Paul A. Keller, The Six Sigma Handbook (2001), http://www.sixsigmaonline.org/lean-six-sigma/. For an example of kaizen in action, see Mona El-Naggar, *Toyota Donates Its Efficiency Model to Help a City Food Bank*, N.Y. Times, Jul. 27, 2013, p. A17.

18. *See* N.Y. City Health & Hospitals Corp., *2010 Year in Review: Report to the HHC Board of Directors*, pp. 5–6, http:// www.yearinreview10.nychhc.org/page5.html.

19. *Going Lean & Legal Process Optimization: Understanding current trends in legal service delivery, and the operational framework that enables law firms to deliver more . . . for less*, Ark Group, a Wilmington Co., Webinar, Sept. 12, 2013, http://www.usa.ark-group.com/events-details.aspx?eid=135.

Align Preparation and Assessment With Practice

A New Direction for the Bar Examination

By William M. Sullivan

Big changes in legal practice are reverberating throughout the legal academy. Graduating practice-ready attorneys has become the phrase of the hour. The new emphasis is upon aligning legal education more intentionally with the demands of the larger profession. There have been similar appeals for a long time, often originated by the judiciary, and most notably by the ABA's MacCrate Report of 1994. But, as they say, this time it may be different.

Lawyers feel themselves under increased economic and social pressures. There is now wide recognition that today's more competitive economic environment often prevents even large law firms from providing the resident training they once did. Such firms now need recruits better able from the start to engage with significant legal work; for the far more numerous smaller firms it has always been so. Solo practice has always required a range of skills rarely taught formally in law school. The current situation helps explain why the content and quality of what students learn in law school is becoming subject to more intense scrutiny. Two issues must be addressed: how to move students more effectively across the arc of professional development from novice to competent beginning practitioner, and how to assess the readiness of such developing lawyers.

In what follows, I want to argue that these two aims – more efficient and effective education plus ways to assess and ensure professional competence at an appropriate level – can each be better achieved if they are conceived together. They are two facets of a single educational challenge: the formation of competent and committed legal professionals.

The approach I offer for examination is the Daniel Webster Scholar Honors (DWS) Program at the law school of the University of New Hampshire. In this program, legal learning is focused on achieving competence in legal reasoning, reflection, and action in context; legal learning is guided by the aim of forming in law students a fiduciary disposition toward clients and their needs as well as the values of the legal system as a whole; and assessment of competence to practice is "embedded" in the process of learning, in stages appropriate to achieving the goals of competence and professionalism.

Understanding the Problem With the Dominant Model of Legal Education

Shortly before the Great Recession put cost and sustainability high on the agenda of legal education, two reports appeared that laid out complementary analyses

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of the current state of law schools. *Best Practices in Legal Education* offered a strong critique of the pedagogical shortcomings of the dominant model for teaching students to "think like a lawyer" while it also provided valuable alternatives that were already being developed in the clinical-legal educational field.[1] *Educating Lawyers*, the 2007 report on legal education by the Carnegie Foundation for the Advancement of Teaching, uses the metaphor of apprenticeship to call attention to the needed breadth of preparation.[2] In that study, we proposed that the first apprenticeship consists of the intellectual training needed to "think like a lawyer," that is, mastering the academic knowledge base important to legal thinking and practice. The second apprenticeship involves learning actually to practice law in the various professional contexts. The third apprenticeship initiates students into the social roles, ethical standards, and responsibilities entailed by the fundamental purposes of the profession of law.

In *Educating Lawyers*, we criticized the current structure of legal education for providing an unbalanced curriculum that did too little to prepare graduates for most forms of legal practice. The report characterized the dominant law school model as placing most of its emphasis on inducting students into learning legal reasoning through what we called the cognitive or academic apprenticeship. By contrast, few schools paid much attention to preparation for practice through courses on lawyering and simulations, or live client experiences, which the report called the second apprenticeship of practice. We found that schools typically gave the least thought to what we called the third apprenticeship, that of professional identity and purpose, even though this is an area that a number of earlier reports have pointed out as most critical for the long-term health of the legal profession. In response, we proposed a rethinking of law school and its educational practices, including assessment, to focus on the formation of identity and purpose as the overarching aim that should integrate all areas of legal education.

The report drew upon contemporary learning theory discoveries about how expertise is acquired in a variety of domains. The major finding of this research has been the importance of conceiving learning experiences as forming an arc reaching from beginner toward greater degrees of competence. For law, this includes not only mastery of reasoning but also the ability to comprehend the legal salience and human significance of situations so attorneys respond with strategies that solve clients' problems and uphold the rule of law. Effective practice in all professions depends upon developing a bi-focal stance: both the ability to distance oneself critically and analytically from clients' problems and a capacity to engage situations reflectively from within, through participation. As currently structured, and especially as compared to other fields such as medicine, law school still does less than it could to develop the latter aspects of expertise. The result has been new lawyers who too often are far from practice-ready. The report went on to propose a number of principles for reform, chief among these the need to integrate the three apprenticeships with assessment in preparation for practice.

"If my future were determined just by my performance on a standardized test, I wouldn't be here. I guarantee you that."

– Michelle Obama

Law School and Assessment Rethought in the Perspective of the Carnegie Report

Based at the Institute for the Advancement of the American Legal System at the University of Denver, Educating Tomorrow's Lawyers (ETL) is a project that has attempted to carry forward the spirit of reform endorsed by the Carnegie Report. ETL provides a web-supported platform for a consortium of 25 law schools, hosts an annual invitational conference for these schools on topics such as educating for professional identity formation and connecting the legal academy and the profession, and supports an online Law Jobs Calculator which enables prospective students to determine for themselves the kind of professional future likely to follow graduation from any particular law school

At the same time, ETL has surveyed all American and Anglophone Canadian law schools about the nature and extent of changes they have initiated since the publication of the Carnegie Report.[3] While tracking these developments, ETL has also begun a project on assessment. One of the chief findings of *Educating Lawyers* was that assessment practice in law schools lagged the advances made in assessment practice in a number of other professional fields. The potentials of well-designed assessments for enhancing learning were not much recognized, and a number of capacities key to competent practice went unassessed by either law schools or the typical bar examination. More recently, Judith Wegner, one of the report's co-authors, has pointed out the significance of these issues for the bar examination as the gatekeeper of access to the practice of law.[4]

To remedy this, an ETL study team has gone in search of models of legal education that intentionally relate

teaching and learning to professional competence and use reliable methods of assessment to both aid learning and to measure adequacy of preparation for practice. The search has found a plausible "existence proof" of the possibility of such an integrated model in the Daniel Webster Scholar Honors Program of the University of New Hampshire Law School. This selective program for 2Ls and 3Ls has since 2005 been both teaching a wider range of capacities than typical of the legal curriculum and assessing the students' progress throughout the program. But its most eye-catching feature concerns bar preparation itself. New Hampshire bar examiners are embedded in the program; they review the students' work, discuss it with them, and assess their progress toward competence three times over the program's four semesters.

The Daniel Webster Scholar Honors Program as an "Existence Proof"

The genesis of the DWS Program is instructive. It began as a response by the supreme courts of three northern New England states to the MacCrate Report's call for greater emphasis upon the skills of thinking, writing, and communicating that the practice of law demands. Prior to becoming New Hampshire Chief Justice, Judge Linda S. Dalianis was an early advocate for creating a program to train attorneys to the standards MacCrate was calling for. The program finally crystallized at what was then the Franklin Pierce Law Center. Under the leadership of John Garvey, this ambitious idea became a working program, with two cohorts of 24 students, each in their last two years of law school, selected after their first year at the University of New Hampshire Law School. The program has proceeded with the full cooperation and participation of the New Hampshire bar examiners. From its inception, the program's mission statement has declared its intention of "Making Law Students Client-Ready."

Today, more than 50 graduates of the program are in practice, both in New Hampshire and around the United States. The program has been extensively documented and its outcomes scrutinized. In addition, as part of its study, the ETL team spent several days talking with supervisors and peers of the DWS Program graduates. As measured by the performance of its graduates, the results seem to be extraordinarily positive. Chief Justice Linda Dalianis sums it up: "They are up to it, not just in skills, but in confidence and their competence as professionals." John Broderick, the current dean at UNH Law, was a skeptic when he served on the New Hampshire Supreme Court but has since become a major proponent of the program. As he put it: "Given the changes going on in legal practice today, it's hard to believe that the existing paradigm can endure outside of a few special places." He urges that the DWS Program be used as a source of innovation for more general adaptation.

The DWS Program is a tightly integrated sequence of educational experiences. There is continuity in faculty and approach across the program. It moves progressively from a complex simulation experience in pre-trial advocacy that lasts an entire semester, to trial advocacy, including negotiation and mediation, in a subsequent semester. In their final year, the students take courses in the law school to enhance their depth of understanding of a number of areas of the law, as well as their required live-client courses – i.e., residency (externship) and clinical types. As part of the goal of producing law graduates who are practice-ready, students are also assessed on their ability to demonstrate competence in interaction with standardized clients, another unusual feature of the program.

Instead of sitting for two days of a written bar examination at the end of their study, Webster Scholars are assessed by New Hampshire bar examiners three times during the two-year program. With the bar exam thus "embedded" in the program, students must meet a variety of performance criteria in each DWS course, based upon the competencies and values enumerated in the MacCrate Report. These include substantive legal knowledge and the ability to apply legal knowledge in specific contexts, along with demonstrating competence in research, critical writing, oral argument, project management, and team performance. There is a great deal of emphasis on providing feedback to students. Over the two-year period, each student's work and performance are assessed by their professors and their assigned bar examiner, in a manner that is in-depth and progressive.

In conclusion, preliminary investigation of the DWS Program suggests that the certification function of the bar examination can be enhanced – and the competence level of beginning lawyers raised – by linking it more directly with learning in law school. When both the educational program and the bar exam focus on the demonstration and mastery of performance capacities – from legal reasoning of the sort typically associated with doctrinal courses to interactional lawyering skills – students can develop professional expertise more effectively. When the certification function of the bar exam is embedded in the educational process itself, it can provide a point of leverage for courts and the profession to assist legal education's movement toward more intentional development of legal expertise and professional identity. ■

1. Roy Stuckey et al., *Best Practices for Legal Education* (Clinical Legal Education Ass'n 2007), www.cleaweb.org/Resources/Documents/best_practices-full.pdf.

2. William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, Educating Lawyers: Preparation for the Profession of Law (Jossey-Bass/Wiley Publishers, 2007).

3. Stephen Daniels, William M. Sullivan & Martin Katz, *Analyzing Carnegie's Reach: The Contingent Nature of Innovation*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209278.

4. Judith Welch Wegner, *The Carnegie Foundation's Educating Lawyers: Four Questions for Bar Examiners*, B. Examiner, June 2011, pp. 11–24.

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"Making Law Students Client-Ready"

The Daniel Webster Scholar Honors Program: A Performance-Based Variant of the Bar Exam

By John Burwell Garvey

In 2005, after years of committee work and consideration, New Hampshire launched a pilot program intended to be a "variant of the New Hampshire bar examination"[1] – the Daniel Webster Scholar Honors Program, named after one of New Hampshire's most distinguished lawyers. The program completed its three-year pilot phase in 2009. Upon thorough review, the New Hampshire Supreme Court unanimously approved the continuation of the program, and in May 2013, the sixth class of Webster Scholars was admitted to the New Hampshire Bar through this alternative licensing program. This article briefly reviews the history of the program, discusses the program requirements and evolution of the program's assessment tools, and describes the information that is being collected about Webster Scholar graduates.

What Is the Purpose of the Daniel Webster Scholar Honors Program?

The stated mission of the Daniel Webster Scholar Honors (DWS) Program is "Making Law Students Client-Ready." Although the program does not presume to graduate new lawyers who are ready to take on all levels of complexity, and recognizes that legal education is a continuing process, it does seek to provide a practice-based, client-oriented education, which prepares law students for the tremendous responsibility of representing others.[2]

A stated goal of the program is to "significantly increase practical experience, supplementing learning in law school to reflect the reality of today's practice."[3] Upon completion of the program, Webster Scholars are expected to know how to advise clients and use existing resources, to be well versed in the substantive law and to have the insights and judgment that usually develop after being in practice for some years.[4] The program was designed to add value to education and bridge the gap between education and practice by focusing on the ten fundamental skills and four fundamental values described in the 1992 American Bar Association report "Legal Education and Professional Development: An Educational Continuum," known as the MacCrate Report.[5] (See chart for a summary of the MacCrate skills and values.)

The 10 MacCrate Skills and 4 MacCrate Values

Fundamental Lawyering Skills

1. Problem solving
2. Legal analysis and reasoning
3. Legal research
4. Factual investigation
5. Communication
6. Counseling
7. Negotiation
8. Litigation and alternative dispute resolution
9. Organization and management of legal work
10. Recognition and resolution of ethical dilemmas

Fundamental Values of the Profession

1. Providing competent representation
2. Striving to promote justice, fairness, and morality
3. Striving to improve the profession
4. Engaging in professional self-development

Source: American Bar Association Section of Legal Education and Admissions to the Bar, "Legal Education and Professional Development: An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap" (ABA 1992).

How Was the Program Created?

The DWS Program is the brainchild of Chief Justice Linda S. Dalianis of the New Hampshire Supreme Court. Through her observations as a trial judge for more than 20 years and as a state Supreme Court justice for several more, then-Senior Associate Justice Dalianis believed that "there must be a better way to prepare students to practice law"[6] and determined to lead an effort to improve legal education. She coordinated with the New Hampshire Supreme Court (the state's only appellate court), the New Hampshire Board of Bar Examiners, and the dean and other faculty from the state's only law school, the University of New Hampshire School of Law (UNH Law),[7] to create the Webster Scholar Committee to consider an alternative bar licensing program. The committee spent two years researching and brainstorming ways to implement such a program.[8] In addition to seeking to create an alternative to the bar exam that would actually improve the quality of new lawyers, the committee was dedicated to "incorporat[ing] the MacCrate factors at every step along the way."[9]

The committee began by examining which courses UNH Law offered, which courses it did not yet offer, and which courses might be necessary to qualify a student to pass the bar.[10] Ultimately, the committee determined that it could accomplish its goals "by requiring certain courses that are already offered but have not previously been required, and by adding practice courses such as Advanced Civil Procedure/Civil Litigation Practice; Contracts and Commercial Transactions Practice (Articles 3 and 9); Criminal Law Practice; Family Law Practice; Real Estate Practice; and Wills, Trusts, and Estate Practice."[11] Additionally, the committee decided that these practice courses should be small, emphasize the MacCrate skills and values, and be taught in the context of real life.[12]

Because the program was intended to be an alternative to the bar exam, methods of assessment were a primary consideration. The committee determined that each Webster Scholar would "maintain a 'portfolio' that would contain all of the practice exercises as well as other materials, such as a video of the Scholar doing an opening statement, [leading] direct and cross examinations, conducting a mediation, or interviewing a client."[13] The portfolio would be reviewed by members of the Board of Bar Examiners.

The committee decided to implement the program initially as a three-year pilot program.[14] In May 2005, I was named the program's first director.[15] As recommended by the MacCrate Report, the program is a collaborative effort, which involves the New Hampshire Supreme Court, the New Hampshire Board of Bar Examiners, the New Hampshire Bar Association, and UNH Law. The program opened to students in January 2006 and graduated its first class of 13 students in May 2008.[16]

What Are the Program Requirements?

Webster Scholars participate in the DWS Program during their last two years of law school; they must meet all of the law school's requirements for graduation in addition to requirements that are specific to the DWS Program.[17] During each semester, in addition to electives, Webster Scholars must take specifically designed DWS courses, which generally involve substantial simulation – including Pretrial Advocacy, Trial Advocacy, Negotiations, and Business Transactions. Students also take a miniseries that exposes them to Client Counseling, Commercial Paper (Articles 3 and 9), Conflict of Laws, and Family Law, which includes eight hours of training to be qualified as pro bono domestic violence attorneys who then volunteer[18] in New Hampshire's Domestic Violence Emergency (DOVE) Project.[19]

The last semester of the program includes Advanced Problem Solving and Client Counseling, a capstone course that integrates and builds upon the skills students have already learned through the program. This course takes them to the next level, particularly emphasizing fact gathering (including witness interviewing), legal analysis, problem solving, and client counseling.

In addition to the six DWS courses, each student must take four additional courses that ordinarily would be elective: Business Associations; Evidence; Wills, Trusts, and Estates; and Personal Income Tax. Moreover, each must have at least six credit hours of clinical and/or externship experience, including related course work. The chart below shows the course requirements and sequencing for the program.

DANIEL WEBSTER SCHOLAR
HONORS PROGRAM
"Making Law Students Client-Ready"

DWS Requirements and Sequencing
(in addition to all other school requirements for graduation):

GPA: Must *graduate* with a cumulative GPA of at least 3.0

DWS Courses: No grade below a B- in any DWS designated course

Upper Level Courses:
Evidence
Personal Income Tax
Business Associations
Wills, Trusts, and Estates
Clinic/Externship

DWS Required Courses:
DWS Pretrial Practice
DWS Miniseries
DWS Negotiations
DWS Trial Advocacy
DWS Transactional Practice
DWS Capstone

Students must obtain at least a 2.67 (B-) in all DWS courses and at least a 3.0 (B) cumulative overall transcript grade point average on a 4.0 scale. Students create cumulative portfolios of their work, including performance videos. The portfolios are reviewed each semester by assigned bar examiners, and the students also meet with them once a year to go over the portfolios and answer any questions they may have. As discussed later, each Webster Scholar must also successfully complete a standardized client interview with a trained standardized client.

Finally, Webster Scholars must also pass the Multistate Professional Responsibility Exam (MPRE) and a character and fitness check. Students who successfully complete the two-year program are then certified by the Board of Bar Examiners as having passed the New Hampshire bar exam and are admitted to the New Hampshire Bar upon graduation.[20]

How Are Students Selected for the Program?

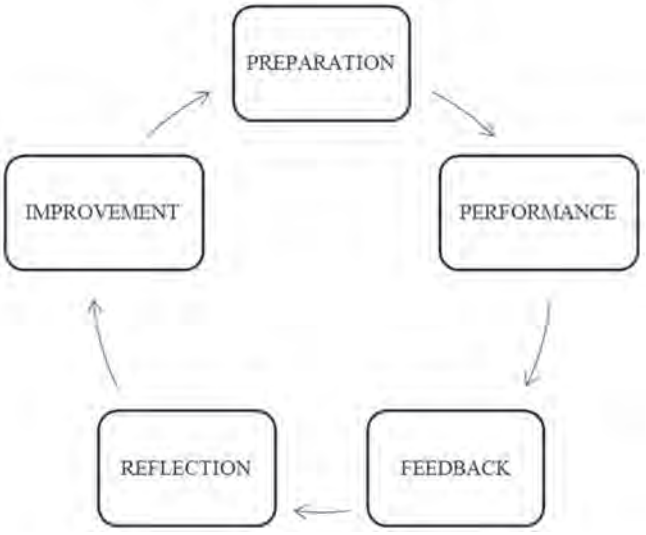
To keep the program sufficiently small and flexible during its developmental phase, it was initially limited to 15 students per graduating class. Based upon its early success, it was expanded three times and now has 24 students per class. The goal is to offer the program to all qualified applicants as soon as possible, but selection is currently competitive.[21]

Students apply to the program in March of their first year of law school and are selected in June, following their first year, by a committee composed of professors and graduated Webster Scholars. Selection is based upon a personal interview conducted by graduated Webster Scholars and a holistic assessment of each applicant, which includes evaluation of academic, professional, and interpersonal skills and the student's overall ability to succeed in the program. Because enrollment is limited, the committee identifies a balanced and diverse group from the pool of qualified applicants.[22]

How Were Methods of Assessment Developed?

When the inaugural class of Webster Scholars began the program in the fall of 2006, it was a first-time experience for everyone. From the beginning, the learning cycle for all participants has been preparation, performance, feedback, reflection, and improvement. This has been true not only for the Webster Scholars, but also for those involved in program design, implementation, and oversight. The assessment methods recommended by the Webster Scholar Committee were implemented, but all persons involved in program oversight realized that the assessment methods would need to evolve and be refined.

The program has a Supreme Court Oversight Committee which is chaired by Chief Justice Dalianis. The



committee has met regularly since the program's inception and has made improvements and adjustments based upon the experience of each cycle. As a result, assessment methods have been subject to some evolution, and this is expected to continue as a natural and healthy part of the program's development.

What Assessment Methods Are Used in the Program?

Since its inception, assessment has been an integral part of the DWS Program, both as a critical aspect of the learning environment and as a means of measuring outcomes.

Since the program has the dual purpose of educating students to be client-ready *and* testing their competency for actual bar admission, there is substantial formative, reflective, and summative assessment (see chart for an explanation of these different types of assessments). Unlike most legal education experiences and other bar examinations, the DWS Program immerses students in a loop of nearly continuous feedback. They study the basic law and then practice the skill. They receive feedback from numerous sources and reflect upon their own performance. They internalize the feedback and then perform the skill again, receiving additional feedback. The DWS courses are sequenced to be increasingly complex and to incorporate and build upon skills from the previous courses.

"The Law: It has honoured us, may we honour it."
– Daniel Webster

Portfolios

Much of each student's performance is documented in writing and/or by video. This becomes part of the student's portfolio, which is provided to the bar examiners for review each semester. In addition to the semester portfolio review, assigned bar examiners meet yearly with each student to review and discuss the student's portfolio and to evaluate his or her progress. Currently, each bar examiner is assigned to no more than five Webster Scholars.

Implicated MacCrate Skills

Webster Scholars are introduced to the concept of assessment from the very beginning. As soon as they are admitted to the program, they are required to read the MacCrate Report and to become familiar with the skills and values they will need to demonstrate by the end of the program. Beginning with an all-day orientation workshop, new Webster Scholars are informed of the goals of assessment, and the various assessment methods are explained. Pretrial Advocacy is the first DWS course, and students are provided at orientation with a form titled Pretrial Advocacy: Implicated MacCrate Skills, (the first page of this form is shown on page 48).

The Implicated MacCrate Skills form shows the new students the various tasks they will be performing in the course, how those tasks relate to the MacCrate Skills, and examples of performances that indicate the student is client-ready. In addition to the MacCrate Skills, the form also uses information from a study conducted by Prof. Marjorie M. Shultz and Prof. Sheldon Zedeck, of the University of California at Berkeley, in which they identify 26 factors related to effective lawyering and the behaviors associated with each factor.[23] Along with an Implicated MacCrate Skills form for each course, there is also a summary for the overall program that identifies the MacCrate Skills and Values each course is intended to teach.

Assessment Types

Formative Assessment
Feedback during the course or the program, which the student can process in time to apply to another attempt at the particular task. For example, in the Pretrial Advocacy simulation, the "junior associate" receives feedback from the "senior partner" on the initial evaluative memo and rewrites the memo incorporating the feedback.

Reflective Assessment
Students reflect upon their formative feedback from others and evaluate their own performance, identifying areas of strength and areas in need of improvement. Students provide a plan for overcoming the areas in need of improvement. For example, at the end of each course (and before a summative evaluation), students write a reflective paper in which they identify what they learned from the course about themselves and about their performance, including a "plan of action" for addressing perceived weaknesses.

Summative Assessment
Final evaluation of the end product of any piece of the student's work by a professor or bar examiner.

"The doer alone learneth."
– Friedrich Nietzsche

MacCrate Benchmarks

In addition to the Implicated MacCrate Skills form, at the orientation Webster Scholars are also given the Pretrial Advocacy Benchmarks Ability-Based Outcomes form, a portion of which is shown on the next page. (As with the Implicated MacCrate Skills form, there are Benchmark forms for all DWS courses.) This form is intended to capture and assess in summative form those outcomes identified in the Implicated MacCrate Skills form. The student and/or professor checks off the description that best describes the quality of the work performed.

The Benchmark is completed by the professor and the student following each activity. Joint completion of the form provides feedback and reflection for the student as well as information for the bar examiner as part of the student's portfolio. Bar examiners have repeatedly reported

PRETRIAL ADVOCACY: IMPLICATED MACCRATE SKILLS

Assessing Performance of Webster Scholars According to MacCrate Skills

Fundamental Lawyering Skill (MacCrate)	Examples of Performances Showing that Student Is Client-Ready	Project(s) Demonstrating Skill
1. Problem Solving 1.1 Identifies and diagnoses legal problems 1.2 Generates alternative solutions and strategies 1.3 Develops a plan of action 1.4 Implements a plan of action 1.5 Keeps the planning process open to new information and ideas	**(Language primarily based upon other work performed on a grant to the principal investigators, Marjorie M. Shultz and Sheldon Zedeck, from the Law School Admission Council)** —Student demonstrates sufficient grounding in substantive law to enable him or her to recognize legal issues and potential courses of action —Student is able to identify potential outcomes and consequences and develop contingency plans to handle various possibilities —Student listens well and tries to use the experience, knowledge, and insight of others in dealing with a problem	Week 1: Interview of potential client by plaintiff's firm attorneys; oral report to partner by defense firm attorneys Week 2: Evaluative memo to partner by plaintiff's firm attorneys; conference call with HR person by defense firm attorneys Week 3: Letter to client Week 4: Discovery plan Week 5: Discovery requests Week 6: Discovery responses Week 7: Further discovery plans Weeks 8 & 9: Depositions Weeks 10 & 11: Summary judgment motion drafted by defense firm attorneys Week 12: Opposition to summary judgment motion drafted by plaintiff's firm attorneys Week 13: Oral argument Week 14: Post-discovery memorandum to partner Week 15: Reflective paper Summative evaluation by professor

that they gain great insight into a student's development and ability by reading the student's own reflection on and evaluation of work that is in the portfolio and available to the bar examiner for independent review. Bar examiners have also reported that they can review the portfolios over the two-year period and identify growth and increased maturity that correlate directly with the MacCrate Skills and Values. Instead of grading a two-day bar exam, examiners are evaluating a two-year exam.[24]

Additional Assessments

As noted above, the assessment cycle is continual. Each semester, the students create written materials that are reviewed first by professors and then by bar examiners. Through simulations using trained actors, real judges, and court reporters, students also experience various events common to practice, such as taking a deposition and interviewing a client. They argue a motion for summary judgment before various judges in the judges'

PRETRIAL ADVOCACY BENCHMARKS: (ABILITY-BASED OUTCOMES)

Assessing Performance of Webster Scholars According to MacCrate Skills

Nature of Task and Performance Goal	EXCEEDS	MEETS	APPROACHES
Initial Memo to Partner FINAL **Review FINAL memo in conjunction with initial memo and comments** **Individual Work** **Goal—demonstration of adequate evaluative and writing skills for first-year associate** **MacCrate 1, 2, 3, 4, 5, 6, 9**	__ Memo includes facts and law and is well-organized, coherent, and concise. Supervising attorney would *be confident that writer understood and appropriately analyzed issues.* __ Incorporates feedback from initial memo and improves quality.	__ Memo includes facts and law and is *generally* well-organized, coherent, and concise. Supervising attorney would *require some additional clarification* or analysis. __ Incorporates feedback from initial memo and improves quality.	__ Memo *lacks clear organization, coherence, or conciseness.* Supervising attorney would require significant additional clarification or analysis. __ Fails to incorporate feedback from initial memo and improve quality.

courtrooms, and they negotiate with each other using various simulations.[25] They perform as lawyers in simulated civil and criminal trials. These events are recorded and become part of the portfolio for evaluation by the bar examiners. (The depositions are on video and in transcript.)

The students evaluate each semester with a reflective paper, which is part of the portfolio. In addition to the benchmarks and the written feedback on the student's work, the professors provide a written summary of each student's overall performance for the course, which is also included in the portfolio. Bar examiners meet three times with each student, go over the portfolio and discuss the student's progress.

Standardized Clients

In the summer of 2008, the program added a new assessment component by training standardized clients.[26] Standardized clients, similar to standardized patients used in medical schools, are actors trained to assess a student's skill in communicating with clients according to standardized criteria.[27] Each actor is given a persona, using a carefully prepared simulation. (The standardized clients are paid $18 per hour.) Although the roles are not scripted, the actors are trained to stay in character, based upon the detailed scenarios provided to them. Each actor is interviewed by a student and acts like an authentic client during the interview. Each interview is videotaped. Interviews vary depending upon how the students conduct them and what questions are asked.

Using written standardized criteria, which evaluate eight effectiveness categories on a scale of one to five, with five being the best, each client then evaluates the student's interviewing skills. The student must obtain at least 24 points (a "three" average on the scale of one to five) to pass this component of the exam. The students perform three interviews with three different standardized clients using three different fact patterns.

Standardized clients enable students to learn important client relationship skills, particularly those associated with client counseling, and allow the DWS Program to assess student performance in those skills. Professors Maharg, Barton, Cunningham, and Jones have already published their findings on the validity of this form of assessment as used at the Glasgow Graduate School of Law.[28] The DWS Program is carrying this work forward and expanding upon it.

What Are the Costs of the Program?

To date, the cost of the program has been modest. Because it is a joint effort of the Supreme Court, the New Hampshire Bar Examiners and UNH Law, the program has received strong volunteer support from the New Hampshire Bar, active judges, court reporters and others. As the program director, I co-teach Pretrial Advocacy and teach Negotiations/ADR and the Capstone Course; I also supervise the other DWS courses. The courses are taught in sections of not more than 24 students, which is typical of upper level courses. We currently use adjuncts to assist in Pretrial Advocacy and to teach two sections of Trial Advocacy.

The judges, clerks of court, lawyers, and court reporters have all been excited to participate as volunteers. The court reporters have donated eight "real time" depositions per year, at a value of many thousands of dollars, but we have more volunteers each year than we need. The judges use their own courtrooms, and court personnel seem to enjoy the experience. Lawyers consistently volunteer whenever they are available. We have six classes of graduates, and DWS Program alumni are volunteering in large numbers. As these young lawyers gain experience, they will also be available as adjuncts. Two have already returned to teach Family Law and to conduct DOVE training. One of the greatest benefits to the bar has been the strong working relationship that has developed with the volunteers and their sense of involvement with and responsibility for the development of young attorneys.

Implementation on a larger scale will be more expensive and will require more faculty effort, but we are working on economies of scale and increased efficiency, including electronic simulation software and secure, online portfolios.

Can the Program Be Replicated in Other States?

Each state has its own unique needs and challenges. I would not presume to answer for others the question of whether the DWS Program can be replicated in their states. But the DWS Program has been very successful in New Hampshire, and early indications suggest that it has been worth the effort.

In April 2010, Supreme Court justices, bar examiners, examination professionals, state bar leaders, and law school personnel from eight other states met for a day at Franklin Pierce Law School. They listened to a comprehensive program description from various DWS participants, including justices, judges, lawyers, bar examiners, professors, and students. One of the presenters (by video) was Lloyd Bond, a retired Senior Scholar at the Carnegie Foundation for the Advancement of Teaching, who was an author of the 2007 Carnegie Report *Educating Lawyers: Preparation for the Profession of Law*.[29] Professor Bond previously taught measurement and assessment at the University of North Carolina and the University of Pittsburgh. He had this to say about the DWS Program:

> As many of you are no doubt aware, the Carnegie Foundation, as part of its series on education in the professions, published *Educating Lawyers* in 2007. . . . In the book we called upon law schools to rethink the way they educate aspiring lawyers. . . . We called for nothing less than a sea change in the way lawyers are prepared. More realistically, what we hoped for was

to nudge legal education in the direction of preparing students to be competent lawyers rather than competent law students.

Quite independent of our book, Pierce Law has done just that, and much more. Never in our most optimistic moments did the Carnegie authors envision a school bringing real stenographers, real paralegals, real lawyers, and yes, real judges into the training program. We can only hope that other state Supreme Courts will seriously consider the Webster Scholar method as an alternative approach to training and licensing.

When I studied the program in depth three or so years ago, I said that it fused instruction, assessment, and practice in such an integrated way that the three became indistinguishable. The Daniel Webster Scholar Program at [UNH] Law exemplifies the sea change we had in mind. . . .[30]

New Hampshire is currently sharing information with other states that are interested in implementing similar programs and welcomes inquiries.[31] ■

1. N.H. Sup. Ct. R. 42(XI).

2. For a thorough discussion of the history of legal education and the development of the DWS Program, see John Burwell Garvey & Anne F. Zinkin, *Making Law Students Client-Ready: A New Model in Legal Education*, 1 Duke Forum for Law and Social Change 101 (2009), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1477391 (last visited June 7, 2013).

3. John D. Hutson, *Preparing Law Students to Become Better Lawyers, Quicker: Franklin Pierce's Webster Scholars Program*, 37 U. Tol. L. Rev. 103, 104–05 (Fall 2005).

4. *Id.*

5. American Bar Association Section of Legal Education and Admissions to the Bar, "Legal Education and Professional Development: An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap" 106 (ABA 1992) (MacCrate Report).

6. Katherine Mangan, *N.H. Allows Law Students to Demonstrate Court Skills in Lieu of Bar Exam*, The Chron. of Higher Educ., Jul. 4, 2008, at 8.

7. Hon. Linda S. Dalianis & Sophie M. Sparrow, *New Hampshire's Performance-Based Variant of the Bar Examination: The Daniel Webster Scholar Program*, The Bar Examiner, Nov. 2005, at 23, 26 n.2.

The University of New Hampshire School of Law is formerly Franklin Pierce Law Center. For ease of reference, this article will consistently refer to UNH Law.

8. *Id.* at 25.

9. Hutson, *supra* note 3, at 103.

10. *Id.* at 105.

11. *Id.* at 106.

12. *Id.*

13. *Id.*

14. Dalianis & Sparrow, *supra* note 7, at 26. The class of 2011 was the first class to participate totally outside of the pilot phase of the program.

15. Press Release, New Hampshire Supreme Court, Concord Lawyer John Garvey to Direct New Webster Scholars at Pierce Law Center (May 12, 2005), *at* http://www.courts.state.nh.us/press/2005/garvey.htm (last visited June 7, 2013).

16. Thirteen of the original 15 scholars finished the program.

17. For further detail regarding the program requirements and sequencing, see "Course requirements and sequencing," http://law.unh.edu/academics/jd-degree/daniel-webster-scholars/curriculum (last visited June 7, 2013).

18. Pro bono work not only provides an opportunity for early exposure to clients but can also "strongly influence a student's future involvement in public service and even become a highlight of the law school experience." William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, Educating Lawyers: Preparation for the Profession of Law 6, 138–39 (The Carnegie Foundation for the Advancement of Teaching/Jossey-Bass 2007).

19. The Domestic Violence Emergency (DOVE) Project is a program of the New Hampshire Bar Association's Pro Bono Referral Program that provides victims of domestic violence with emergency legal services. DOVE is operated in partnership with domestic violence services agencies throughout New Hampshire and relies on the donated services of specially trained attorneys. The DOVE Project provides free legal representation to qualifying clients at final Domestic Violence Restraining Order hearings under New Hampshire RSA 173-B, "Protection of Persons from Domestic Violence." For further information see http://www.nhbar.org/uploads/pdf/DOVEbrochureNHEnglish.pdf.

20. See N.H. Sup. Ct. R. 42(XI).

21. Despite the stringent requirements, over 40% of the 1-L class has applied each of the last two years.

22. For further detail regarding the selection process, see "Criteria for applicants," http://law.unh.edu/academics/jd-degree/daniel-webster-scholars/criteria (last visited June 7, 2013).

23. Marjorie M. Shultz & Sheldon Zedeck, Final Report: Identification, Development, and Validation of Predictors for Successful Lawyering (2008), http://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf (last visited June 7, 2013).

24. Bar examiners have stated that the total time they spend on their complete evaluation of five Webster Scholars each semester is comparable to the amount of time they spend on evaluating a single question for all exam takers of the traditional bar exam.

25. The DWS ADR course now uses a LexisNexis Skills & Values book called ADR, that I co-authored with Charles Craver, which was field tested using Webster Scholars.

26. The standardized clients used in the DWS Program were initially trained by Paul Maharg, now of Northumbria Law School, and Karen Barton of the Glasgow Graduate School of Law. I am working with Professors Maharg and Barton as well as with Professor Clark Cunningham of Georgia State University School of Law in connection with this aspect of the program, including conducting empirical research regarding a comparison of the client interview performance of Webster Scholars and other new bar admittees.

27. *See* Karen Barton, Clark D. Cunningham, Gregory Todd Jones & Paul Maharg, *Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence*, 13 Clinical L. Rev. 1, 3–5 (Fall 2006), *at* http://law.gsu.edu/ccunningham/PDF/ValuingWhatClientsThink.pdf (last visited June 7, 2013).

28. *Id.*

29. Sullivan et al., *supra* note 18 at 6.

30. Lloyd Bond, Consulting Scholar (retired), The Carnegie Foundation for the Advancement of Teaching, Prepared Remarks to the Conference on a Performance-Based Approach to Licensing Lawyers: The New Hampshire "Two-Year Bar Examination" (Apr. 23, 2010).

31. I can be reached at john.garvey@law.unh.edu.

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New York's 50-Hour Rule

The Value of Pro Bono Service by Law Students

By Hon. Victoria A. Graffeo

New York's courts were confronted with 2.3 million civil litigants last year who were unable to secure legal representation.[1] This is an astounding revelation, but statistics alone do not tell the entire story. Many of these pro se litigants presented legal problems related to the necessities of life – lawsuits involving evictions and mortgage foreclosures, spousal and child support issues, demands for health care services and claims for government benefits. The absence of counsel in these proceedings not only affected the efficiency of the courts, but raised serious concerns related to the court system's ability to provide equal access to justice to all New Yorkers. In addition to the social costs and fairness issues, the crisis caused by the lack of legal services is detrimental to our state's economy because an increased demand for government services and assistance strains available state and local resources.

To address the lack of availability of legal resources, N.Y. Court of Appeals Chief Judge Jonathan Lippman has embarked on a campaign to alleviate what he aptly terms "the gap in civil legal services" that has turned the courts into "the emergency rooms of our society."[2] Through negotiations with the other two branches of government, the Chief Judge was successful in securing increased state financial assistance in the 2013–2014 Judiciary budget for legal services providers and organizations providing assistance to the poor and low-income persons. But more was needed. In his Law Day address in May 2012, the Chief Judge encouraged the bar to renew its commitment to the provision of pro bono legal services. Recognizing that the demand for legal services far exceeds the current supply of voluntary pro bono services from the practicing bar, the Chief Judge further announced new initiatives aimed at easing the crisis in legal services. One of his innovative proposals was to use the vast pool of law students to work on appropriate pro bono projects as part of their training prior to entering the legal profession. Such hands-on experience undoubtedly would be the most effective means of instilling the core values of our profession – service to others, respect for the rule of law, equality and fairness, and civility – in the next generation of attorneys. In pursuit of this objective, Chief Judge Lippman announced that all applicants for bar admission in New York would be required to perform 50 hours of pro bono service.

This proposal was formalized with the adoption of Rule 520.16, which took effect January 1, 2013, and applies to applicants seeking bar admission in New York after January 1, 2015.[3] It is the first prerequisite for bar admission of its kind in the nation, and its implementation will be watched closely by other states that are contemplating the adoption of a similar rule.

Through the work of an Advisory Committee that solicited recommendations and comments from interested legal services providers, bar leaders, law school representatives, government counsels and law firms with

"There is no debt with so much prejudice put off as that of justice."
– Plutarch

established pro bono programs, the essential components of the rule were identified.[4] Two principles underlie the nature of qualifying pro bono service by law students.

1. The assignments must be law-related, meaning that the tasks performed must involve the use of legal skills or law-related activities suitable for performance by law students or bar applicants. General charitable activities, regardless of how worthwhile, do not suffice because the purpose of the requirement is to increase the resources available to persons who cannot otherwise access or afford legal representation.
2. The work undertaken by law students must be supervised by an attorney admitted to practice and in good standing; by a law school faculty member, adjunct professor or instructor; or by a judge or attorney employed by a court system. The supervision component assures that law students will be provided with adequate instruction and training, guidance as needed and constructive evaluation. Indigent civil litigants deserve appropriate legal assistance, and the supervision component supports the provision of adequate legal assistance.

New York is the proud home of 15 American Bar Association-accredited law schools, all of which produce outstanding lawyers. Admission to the New York bar is a highly valued international legal credential – more than 4,000 foreign-educated attorneys from more than 100 countries sat for the bar exam last year. New York also tests a large number of candidates who acquired their law degrees elsewhere in the United States, raising the total number of test-takers for the New York bar examination to over 15,000 in 2012.[5] Consequently, in developing the parameters of the pro bono rule, the fact that more than half of the applicants for admission are from other states or foreign countries necessitated that qualifying work be broadly construed in order to accommodate the large numbers of potential admittees seeking to comply with the requirement.

Although the impetus of the 50-hour admission rule was to assist the legal needs of those unrepresented in New York, because so many applicants for admission do not obtain their legal educations in New York, the rule allows for pro bono work to be performed in whatever state or country the applicant is able to engage in pro bono work. And in recognition that law school-sponsored clinics often provide the most comprehensive training, supervision and high-quality learning experiences, the award of academic credit for the successful completion of a clinical experience will not disqualify students' pro bono work from being counted toward the 50-hour requirement. Likewise, since law firm summer interns or new associates not yet admitted to practice may be assigned by their employers to work on pro bono cases, the receipt of stipends or salaries by students will not result in the disqualification of otherwise qualifying pro bono work, provided that the clients do not pay any fees.[6]

Externships served in federal, state or municipal legal offices or agencies will also be acceptable. In light of the burdensome debt obligations carried by many law school graduates, employment opportunities in public service are no longer viable career options for many graduates. To expose law students to the value of public service, supervised legal tasks with public sector entities that are consistent with the purposes of the rule will count toward the 50-hour requirement.[7]

In January 2015, applicants for bar admission will be filing their notarized form affidavits indicating compliance with the pro bono rule.[8] It is hoped that most of the applicants will have found their pro bono work to be the highlight of their legal education experience – that assisting those less fortunate with their problems offered an opportunity to acquire practical skills training while improving the lives of others. Such outcomes will fulfill the goals of the 50-hour rule: exposing law students and bar applicants to real-life legal problems, providing law students with a better understanding of the difficulties faced by the poor in our society, allowing students to gain practice-ready skills, fostering a deeper appreciation of the value of pro bono service and the satisfaction derived from helping others, and expanding access to justice in New York. Through fulfillment of the 50-hour requirement, young lawyers will set an example for the profession they now join, reminding all of us in the practicing bar that we can benefit equally by volunteering our time and talents to those in need of our services. ■

1. *See* Report to the Chief Judge of the State of New York, The Task Force to Expand Access to Civil Legal Services in New York 1 (Nov. 2012), http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT_Nov-2012.pdf.

2. Chief Judge Jonathan Lippman, Law Day Remarks 2 (May 1, 2012), http://www.nycourts. gov/whatsnew/Transcript-of-LawDay-Speech-May1-2012.pdf.

3. *See* 22 N.Y.C.R.R. § 520.16.

4. *See* Report to the Chief Judge of the State of New York and the Presiding Justices of the Four Appellate Division Departments, Advisory Committee on New York State Pro Bono Bar Admission Requirements (Sept. 2012), http://www.nycourts.gov/attorneys/probono/ProBonoBarAdmissionReport.pdf.

5. *See id.* at 4–5.

6. *See id.* at 6–7; *see also* New York State Bar Admission: Pro Bono Requirement – FAQs (Oct. 1, 2012), http://www.nycourts.gov/attorneys/probono/FAQsBaradmission.pdf.

7. *See id.*

8. *See* Application for Admission to Practice as an Attorney and Counselor-at-Law in the State of New York – Form Affidavit as to Applicant's Compliance with the Pro Bono Requirements, http://www.nycourts.gov/attorneys/probono/AppForAdmission_Pro-BonoReq_Fillable.pdf.

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Should Skills Training Be Required for Licensing?

By Adele Bernhard

The New York State Bar Association Committee on Legal Education and Admission to the Bar (CLEAB) is debating whether skills training should be required for admission to practice law in New York. In light of current dramatic changes to law practice that discourage law firms from investing in training and have encouraged record numbers of recent graduates to enter solo and small firm practice soon after graduation, CLEAB is considering whether a skills training requirement might positively impact the profession – by assisting law graduates to better make the transition from law student to practitioner, furthering the ethical and competent practice of law, and protecting clients.

CLEAB is not alone in considering this question. The Board of Trustees of the State Bar of California charged our sister committee, California's Task Force on Admissions Regulation Reform, with examining whether the State Bar of California should develop a regulatory requirement for a pre-admission practical skills training program.

The California Task Force held a series of hearings and elicited testimony from many practitioners, legal academics, judges, clients, and members of the public at large. The Task Force also reviewed the extensive literature on the topic of practical skills training for new lawyers. In the end, the California Task Force was convinced and unanimously proposed three new requirements for admission to the Bar. The proposals are outlined in a report titled "Task Force on Admissions Regulation Reform: Phase I Final Report."[1] The proposals include:

1. Pre-admission requirement:
   A practical skills training requirement that must be fulfilled prior to admission. The requirement could be met either in law school, where 15 units of course work following the first year of law school must be

dedicated to developing practical skills and serving clients, or, alternatively, it could be met through employment in a Bar-approved clerkship or apprenticeship program of at least six months in duration;

2. Pre-admission or post-admission requirement: 50 hours of pro-bono or low bono service; and,
3. Post-admission requirement: 10 additional hours of MCLE courses for new lawyers, over and above the required MCLE hours for all active members of the Bar, specifically focused on practical skills training. Alternatively, credit towards these hours would be available for participation in mentoring programs.[2]

The California Task Force Report discusses pro bono and "low-bono" service with reference to examples of law school incubator programs, considers what a new practical skills requirement should look like and how to implement it, and reflects on the impact that the new skills requirement might have on diversity of the Bar, costs to students and new lawyers, and possible impediments to national uniformity of admission standards. The Task Force suggests that the new requirements be introduced gradually over a three-year period.

The State Bar of California is not an association. It is a mandatory bar, and it serves as an adjunct of the California Supreme Court in regulating admission and discipline. The State Bar's Board of Trustees is taking public comments on the Report until September 5. If adopted, the Board's decision will go to the California Supreme Court in the form of a recommendation. Ultimately, the Court – which has plenary authority over admissions and discipline – will decide whether to implement it.

"Justice, sir, is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together."

– Daniel Webster

In reaching its decision, the California Task Force was persuaded by the "[c]hanges in the economics of the profession [which] are making it more and more difficult for new lawyers to find the training, hands-on guidance and mentoring that is necessary for a successful transition into practice."[3] The Task Force also found that "more than half of the recently admitted attorneys have not found jobs with big law firms or government agencies, and have instead worked in firms of five or less," which are less able to provide training and supervision.[4]

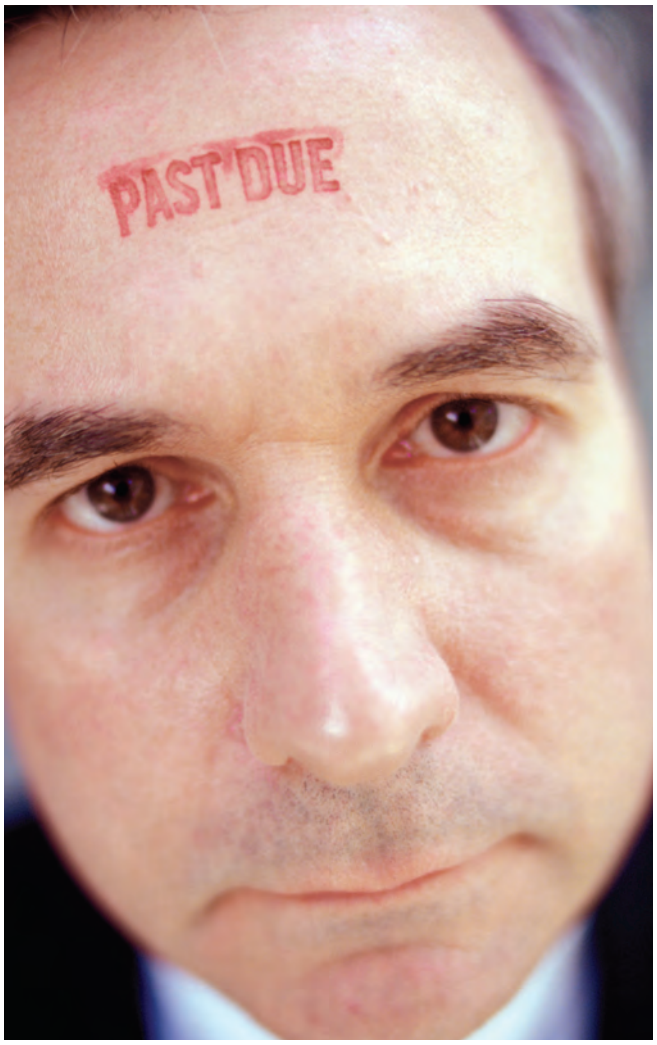
The Task Force determined that assisting graduates to grow into ethical and competent practitioners is not just the responsibility of the law schools but is a profession-wide responsibility that must be shared. "[C]losing the gap in practice-readiness must involve a collaborative effort in which the law school community, practicing lawyers, and the Bar each have a role – it must be a shared endeavor in which burdens are shared and responsibility is shared as well."[5]

The new skills requirement could be met through a postgraduate clerkship or apprenticeship alternative, which adds "flexibility in how Bar applicants may meet their preadmission training requirement, accommodates concerns on the part of law schools that we seek to force changes on them that are impractical and bound to increase costs, and most importantly, promotes a greater role by practitioners in pre-admission practical training."[6]

In reaching its determination, the California Task Force relied heavily on the New York State Bar Association's Report of the Task Force on the Future of the Legal Profession,[7] citing the NYSBA's willingness to examine assumptions about the efficacy of the bar exam, and NYSBA's emphasis on mentoring as an effective mechanism to help newly admitted lawyers develop professional skills and identity.

The New York State Bar Association Committee on Legal Education and Admission to the Bar will begin a serious study of the Report in fall 2014. All New York law schools have skills courses, and the majority of New York law school students enroll in skills courses while in law school. Whether requiring a certain number of credits or course hours in skills training would change choices students make or re-focus law schools on practical training remains to be seen. Certainly a pre-admission skills requirement will turn the attention of the legal profession to the lawyering skills needed to provide competent ethical service to clients, just as our highly respected pro bono requirement has re-energized the professional community's dedication to service. Stay tuned.

1. The report is available at http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000010717.pdf.
2. *Id* at 2. (Note that age numbers in published report may differ.)
3. *Id*. at 5.
4. *Id.*
5. *Id.*
6. *Id*. at 12.
7. Published April 2, 2011, the NYSBA report is available at http://www.nysba.org/AM/Template.cfm?Section=Task_Force_on_the_Future_of_the_Legal_Profession_Home&Template=/CM/ContentDisplay.cfm&ContentID=48108.



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Trouble in Paradox

Our Nation's Unmet Legal Needs and Unemployed Young Lawyers

By James R. Silkenat

This nation is facing an "access to justice" paradox.

On one hand, the legal needs of the poor, low- and moderate-income people are grossly unmet. In New York alone, court statistics show that 2.3 million people are unrepresented in civil proceedings annually.[1] Most of these people cannot afford legal representation, and this undermines the quality of justice that they receive. Data collected by the Legal Services Corp. (LSC) in the spring of 2009 shows that for every client who gets representation from an LSC-funded program, one person who seeks help is turned down because of insufficient resources.[2] Many people with serious legal problems do not even bother to seek legal help, realizing that it will be unavailable or unaffordable. State and national studies of the legal needs of poor and moderate-income people consistently show that only a small fraction (fewer than one in five) of the serious legal problems they experience are addressed with the assistance of a lawyer. Many low- and moderate-income people in America cannot find or afford a lawyer to defend their legal interests, no matter how urgent the issue.

On the other hand, the legal industry – for some time now – has not been able to fully absorb the number of young lawyers who are graduating from law school each year. The number of jobs at large firms is not what it used to be, though the allure of these jobs has sustained the enrollment at law schools (that is, until very recently). We have watched the number of law students increase, while the number of lucrative job opportunities shrinks. Only 55% of the nearly 44,000 law school graduates of the class of 2011 had a law-related job nine months after graduation.[3] One "desperate" attorney in California went so far as to plead for a job on Craigslist (the classified advertisement website many people use to search for apartments and to buy or sell used furniture), saying that he would do whatever it took to get a legal job in "any area of law."[4] And getting a job as a lawyer no longer guarantees a decent salary. In fact, while some large firms still offer associates starting salaries of $160,000 or more, last year a Boston law firm advertised annual salaries for new associates of just $10,000.[5] The firm had more than 50 applicants, despite the fact that the starting salary is below the 2013 federal poverty guidelines. To add insult to injury, many young lawyers are graduating law school saddled with staggering, six-figure debt from student loans.

How is it that we have people badly in need of a lawyer with no one to turn to and, at the same time, find

that thousands of young lawyers are unemployed and underemployed? The access to justice paradox seems to defy the most basic principles of supply and demand. There is almost universal agreement that the current system of providing access to justice to all Americans is broken. We, as lawyers and as leaders, must work together to find solutions to this growing problem. We must find a way to improve the fit between the needs of our society and the opportunities of our profession.

> *"The only person who is educated is the one who has learned how to learn and change."*
> – Carl Rogers

With 400,000 members from all over the world, the American Bar Association is uniquely poised to address the many facets of this problem. In early 2013, the American Bar Association began convening its members and staff, as well as experts with experience in legal education, pro bono legal assistance and legal job incubators, to discuss ways that the ABA could take a leadership role in addressing and making these important issues a priority area during the 2013–2014 ABA year and beyond. A Legal Access Job Corps Task Force officially began working on this issue at the ABA's Annual Meeting in San Francisco in August 2012. The Task Force is exploring the potential of the innovative programs that have been started by law schools and bar associations in response to today's challenges and figuring out what is working and what is not. The group will also look at funding models for such programs. Some reputable and successful programs are running into long-term sustainability issues. Others are untested but could supply promising partnerships.

The paradox of unmet legal needs and unemployed or underemployed lawyers has already yielded some innovative solutions as well as promising ideas. In South Dakota, where the state bar president calls the Main Street attorney an "endangered species," Gov. Dennis Daugaard signed a rural attorney recruitment bill into law on March 21, 2013.[6] This legislation made possible the creation of a pilot program that will give new lawyers an annual subsidy if they live and work outside the state's biggest cities, provided they make a five-year commitment to their rural practices.[7] This four-year pilot program, similar to programs designed to attract doctors, nurses and dentists to rural areas, will be administered through the South Dakota court system, with the state appropriating 50% of the cost, local governments paying 35% and the state bar or its foundation covering the remaining 15%. This lawyer recruitment program appears to be the first of its kind in the country, but it is replicable in any state with large rural areas, including New York.

Since the downturn of the national economy, law firm incubator and residency programs have emerged as models to help bridge the gaps, and the ABA Division for Legal Services has already surveyed a number of these programs.[8] A few notable programs include the following:

- City University of New York's "alpha" incubator has been operational since September 2007. Its mission is to provide training and technical assistance to public interest attorneys starting solo and small-firm practices and nonprofits. The program is operated under the auspices of a law school with participants operating their own independent law firms. It is funded through law school support, grants, donations and revenue from participants. The CUNY program provides opportunities for participants to take on pro bono and moderate-income clients. Participants pay a flat monthly license fee for the space and training while enrolled in the program (18 months to two years); they must also obtain their own malpractice insurance. Approximately eight or nine young lawyers participate in the program at any given time.
- The Chicago Bar Foundation's Justice Entrepreneurs Project (JEP) is significant because it is being started by a bar foundation with expectations that the program will become freestanding. Launched this past June, the Justice Entrepreneurs Project seeks to develop market-based solutions to serve the unmet legal needs of those with moderate incomes, and to do so at an affordable cost. The JEP will help entrepreneurial and public-interest-minded new attorneys develop law practices that use innovative methods to deliver cost-effective, quality legal services to clients of low and modest means. It will also bring together the Chicago legal community to support and collaborate in this effort. By using an incubator model, participants will not be considered part of a single-program law firm, but instead will operate their own independent law firms. While the Chicago Bar Foundation has provided the seed money, the program will be funded through a combination of bar association/foundation support, grants, donations, revenue from participants and law school support specifically tied to stipends for participants. There will be a participation fee during the last 12 months of the 18-month program. In addition, the program will purchase umbrella insurance that applies to the program itself and is seeking discounted rates for participants. The program will begin with 10 participants; it plans to add 10 more at each six-month interval to an

envisioned maximum of 30 participants at a time. The program will also include a 20-hour-per-week pro bono component to be performed during the first six months of the program.

- Arizona State University's program is a practical, hands-on residency, analogous to medical residencies. As of this writing, the program is slated to begin in the fall of 2013. The program will be self-sufficient after a brief startup phase supported by the Arizona State Law Alumni Association. The program will hire 10 associates a year (with a maximum of 30), who will be part of a single program law firm that will include five supervising attorneys and approximately 20 support staff. The two- to three-year program will have insurance that covers participants and will require that participants take on both pro bono and moderate-income clients.

In addition, public interest models are emerging, such as Lawyers for America. This is a 501(c)(3) nonprofit founded by the University of California-Hastings to create two-year fellowships that begin during law students' final year of law school and continue through their first year as new attorneys. The University of Miami's award-winning Miami Law Legal Corps is a postgraduate fellowship program that places recent law graduates in public sector organizations nationwide.

These new efforts complement the American Bar Association's longstanding commitment to help lawyers be prepared for the practice of law and to find work now and in the future. The ABA's Law Student Division and Young Lawyers Division are focused on helping law students and young lawyers nurture their entrepreneurial spirit and leadership potential – two key ways for young lawyers to set themselves apart from the competition in this difficult economy. The Young Lawyers Division Career Development Initiative and its New Lawyer Bootcamp, as well as its Next Steps Challenge Program, are a few examples of the ways in which the ABA has been tackling this issue.

The challenges of the new economy are now mixed in with the age-old challenge of providing access to justice for all. The collective responses from law schools, courts, and bar associations – and all the other stakeholders in the legal profession – create a laboratory setting that is worthy of our greatest attention. If we meet these challenges, the rewards will be high. We will provide legal services to those who have been denied them and at the same time address the needs of unemployed and underemployed young lawyers. If these new programs are not sustainable, we need to understand why and move forward from there. What we cannot do when confronted with the paradox of unmet legal needs and unemployed lawyers is to stand on the sidelines and do nothing. ■

1. Associated Press, "New York officials say the legal needs of the poor are still unmet," Sept. 27, 2012, http://www.syracuse.com/news/index.ssf/2012/09/new_york_officials_say_the_leg.html.

2. Legal Services Corp., "Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans (2009)," National Legal Aid & Defender Ass'n, http://legalaidresearch.org/2012/12/01/documenting-the-justice-gap-in-america-the-current-unmet-civil-legal-needs-of-low-income-americans/.

3. Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. Times, July 14, 2012, http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html?_r=0.

4. Abby Rogers, *"Desperate" Unemployed Lawyer Puts a Plea on Craigslist*, Jan. 30, 2013, http://jobs.aol.com/articles/2013/01/30/unemployed-lawyer-craigslist/.

5. Martha Neil, *"More Than 50 Would-Be Associates Have Now Applied for $10,000-a-Year Boston Law Firm Job." ABA J.* June 11, 2012, http://www.abajournal.com/news/article/more_tha_50_have_now_applied_for_10000-a-year_boston_law_firm_associate_job/.

6. Patrick G. Goetzinger, State Bar of South Dakota Project Rural Practice website, http://sdrurallawyer.com/prpsmission/.

7. NPR, "Luring Doctors and Lawyers to Rural America," May 1, 2013, http://www.npr.org/2013/05/01/180329738/efforts-to-reverse-rural-brain-drain.

8. The results can be found at http://www.ambar.org/incubators.

Harmonizing the Forces Buffeting the Legal Profession

By Michael M. Martin and Ian Weinstein

Change is often dislocating, particularly for the legal mind. We prize predictability and stability. But in our profession – and for journalists,[1] doctors,[2] architects[3] and teachers[4] – there is talk of crisis.[5] Undoubtedly, the profession is changing. The market for legal services is being reshaped, many young lawyers are struggling and law schools are being sharply criticized.[6] Some wonder about the future of lawyering as the ways we control and use information continue to shift.[7] What will be demanded of new lawyers and how will they find a place in our profession? Who will hire them? And will they regret all their law license has cost them?

With those questions come concerns about the justice gap in America. While some call attention to the oversupply of law graduates relative to the employment opportunities that support repayment of significant educational debt,[8] others highlight our nation's considerable unmet need for legal services.[9] Too many young lawyers have too much debt, and there are not enough lawyers or others with legal training to meet the legal needs of all Americans. We are called to meet a significant challenge. How can we remake the law schools that flourished from the 1970s to the start of the Great Recession so they can survive in the current marketplace and more effectively help close the justice gap?

While some propose dramatic reforms such as making law an undergraduate degree, as it is in Europe, or complete deregulation of both law practice and legal education, we imagine a simpler path to a better future. Within the legal education system itself, a number of smaller changes are already in progress, and we can imagine other reforms as well. Each may be relatively modest on

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its own, but together they offer a path to better situating young lawyers for contemporary practice and permitting more citizens to become active participants in our justice system.

To understand the future we imagine, it helps to know a bit about the complex web of forces that shape legal education, control admission to the bar, and regulate the delivery of legal services. Law schools are overseen by academic and professional regulators. The academic accreditation of law schools is the responsibility of the Council on Legal Education.[10] State courts indirectly regulate legal education through their authority over the bar exam and other licensure requirements.[11] State courts and legislatures also shape the delivery of legal services by defining the practice of law and the bounds of the services that may be offered by a lawyer outside the traditional attorney-client relationship or by a non-lawyer.[12]

In addition to meeting academic standards and professional preadmission standards, and responding to the broader regulation of the profession for which we are preparing our students, law schools must also respond to market forces. Here again, it's complicated. Because of financial aid, the cost of law school varies significantly from student to student. While a number of law schools enjoy significant private giving, many have long cross-subsidized other units of their universities that generate less revenue. In addition, public support of higher education, and particularly federal educational loan policies are crucial factors in the law school financial picture.

The six considerations we have identified – academic regulation, professional admission regulation, professional practice regulation, price, university-based support and federal loan policy – do not exhaust the list of the things we worry about as law school administrators. They do, however, offer a reasonable starting place for this overview.

We begin with market pressures and suggest that a correction is well under way. As is widely reported, there are significantly fewer law school applicants than there were three years ago, and law school enrollment has been falling for the past two years.[13] As in any market, lower demand is resulting in lower prices. While reducing tuition is one straightforward way to lower the price of education and become more competitive,[14] law schools are also offering higher discounts through merit- and need-based financial aid. The actual or discounted tuition has fallen at many schools, even as the retail price of tuition has not decreased. Students are receiving more aid and running up less debt. It will take several years for these trends to become evident as the classes work their way through the three years of law school, but we are on the way to seeing fewer graduates, with lower overall debt burdens, competing for the available jobs.

Of course, decreased enrollments and discounted tuition mean less revenue for law schools. Some of that decrease is being absorbed by lowering costs, and austerity and budget cuts are the order of the day at many schools. Here, too, it will take time to see the impact of these cuts, as the smaller classes of law students progress through their programs. But austerity is not the only way law schools will cope with lower revenues.

"It is not the strongest of the species that survives, nor the most intelligent that survives. It is the one that is the most adaptable to change."

– Charles Darwin

Many law schools have access to other resources. Some law schools that are part of universities are already renegotiating institutional cross-subsidies, the practice of supporting one division of a university with funds generated by another unit.[15] And while not every law school enjoys significant private giving, philanthropy remains an important and distinctively American piece of the higher education financing puzzle. While neither university support nor private giving is a panacea for the cost of legal education, each is a significant factor for some schools and helps explain why the sudden, cataclysmic collapse of legal education as we know it is unlikely.

Public support for higher education is the third force that influences the law school market. While direct public support in the form of state-funded schools and grants to support enrollment in private schools are an important part of the puzzle, the single largest source of public support for legal education is the federal loan program, which has undergone significant change in the past few years. Today, almost every entering law student is eligible for Income Based Repayment, a program that caps monthly payments based on income and forgives the remaining debt after 10 years for attorneys in qualifying public service work, or after 25 years for all others.[16] While making 25 years of loan payments and then getting a significant tax bill – the amount of debt forgiven is counted as income for tax purposes – means debtors are not being let off too easy and of course the long-term stability of the program may turn on our collective political will, forgiving the debt for those in public service is a significant change, and the program does offer additional options for borrowers.

Thus, while we do not see anything approaching a complete solution for all that ails law school budgets, we see a significant reduction in student enrollment and

have reason to think that smaller graduating classes of attorneys laden with less debt will have an easier time finding viable careers in the law.

While we will see a smaller number of new lawyers in coming years, those lawyers will be better able to meet the demands of contemporary practice. And we see an expanded role for law schools in educating others in the law. American legal education is a powerful education. Although fewer J.D. degrees will be awarded, that degree will remain at the core of legal education. If law schools are to survive and address the justice gap in America, they cannot restrict their educational programs to doctrinal-focused teaching. Here again, there are promising trends that we hope will gain momentum.

One long-term trend, over the past 40 years, is the American law school's deepening commitment to research and scholarship. We know that there is much criticism of legal scholarship and the academic orientation of law schools. But to reduce a legal education to the black letter lectures of an earlier era – an affordable model we grant – would greatly damage the profession. The emphasis on legal scholarship and research helps law students develop higher order analytic skills. They become conversant with a world of important ideas and are prepared for change. The academic Accreditation Standards play a key role in protecting the integrity of a legal education.

In our view, faculty-controlled law schools, most often functioning as units of research universities, are the best, surest way to protect and pass on the rich learning that has long distinguished our profession from other important pursuits. We believe calls for academic deregulation are misguided. We cannot meet the future with profit-making schools reliant on part-time contingent faculty teaching a minimal curriculum aimed at bar passage; we would only destroy one of our most distinctive professional strengths.

But our enthusiasm for the academic influences on legal education does not foreclose improvement. As schools have deepened legal education, they have also enhanced the development of professional expertise in law school clinics, in writing classes, in offerings stressing quantitative analysis and in a myriad of other ways. More recently, many schools have begun to focus on the transition to practice with incubator and mentoring programs.[17] An academic approach to law can and should take practice and the profession of law seriously.

In this area, we note the role of state-based requirements for admission to the bar. New York's pro bono requirement is an example of the important role the bar and the judiciary can play in setting and enforcing professional standards. Another example is the very serious discussion in California about requiring applicants to the bar to have had significant exposure to practical skills, whether in law school or in a post-graduate, supervised field experience. The profession continues to play a key role in fostering the connection between legal education and legal practice.

Last, we see the traditional division of the world into lawyers and non-lawyers being replaced with a continuum of legal service providers. Medicine offers a useful analogy. Just as highly trained doctors work with a range of medically trained people to provide health care, legal services will be provided by people with a spectrum of legal training. Law schools have the expertise and resources to offer legal education to a range of people. Some expansion of the role of non-lawyers in providing legal services is possible without regulatory change or reconsideration of our traditional conception of the attorney-client relationship. Some are already thinking about more significant change and the creation of new categories of regulated legal service providers.[18] Reexamination of the metes and bounds of the practice of law could lead to useful reforms.

Society has vital interests in the future of legal education, licensure of lawyers and the way legal services are delivered. We could have a more public-regarding bar that affirmatively values meeting America's legal needs or a more inward looking bar that values self-interest. If we emphasize education as an elite, expensive private good[19] and make young people bear the highest cost possible to gain admission to the bar, we tend toward a future dominated by self-interest. If we moderate costs, raise the portion of the cost borne by others and inculcate the value of serving all Americans, we will tend toward a bar that can better tend to others.

Fostering the profession's commitment to justice and society, not just to oneself, is not susceptible of a single solution or approach. We think it very unlikely that a single global solution would be optimal or that circumstances would give rise to the political will to impose such a scheme. But we see a path to the future in the set of changes to law school programs and financing, bar admissions requirements and the delivery of legal services. In these related but distinct areas, there are a number of mechanisms available to maximize the value of a legal career, reduce the costs of becoming a lawyer and move toward a future in which more Americans can find justice. ■

1. *See, e.g.*, Paul Gillin, Newspaper Death Watch, http://newspaperdeathwatch.com/ (last visited June 10, 2013).

2. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

3. Employment in architecture firms fell by 40% during the great recession. The Am. Inst. of Architects, *2012 AIA Firm Survey: Economic Downturn Cut Architecture Firm Revenue by 40 Percent, Employment by Almost a Third*, 19 AIArchitect (Aug. 24, 2012), *at* http://www.aia.org/practicing/AIAB095764.

4. Elementary and secondary education in America has been fundamentally reshaped by vigorous assessment of students and teachers alike. *See, e.g.*, Diane Ravitch, *The Death and Life of the Great American School System: How Testing and Choice Are Undermining Education* (2011); *see also* Diane Ravitch, Diane Ravitch's Blog, http://dianeravitch.net/ (last visited June 10, 2013).

5. *See, e.g.*, Steven J. Harper, The Lawyer Bubble: A Profession in Crisis (2013).

6. *See, e.g.*, Brian Z. Tamanaha, Failing Law Schools (2012); Ill. State Bar Ass'n, *Special Committee on the Impact of Law School Debt on the Delivery of Legal Services* (Mar. 8, 2013), *at* www.isba.org; N.Y. State Bar Ass'n, *Report of the Task Force on the Future of the Legal Profession* (Apr. 2, 2011), *at* www.nysba.org.

7. Richard Susskind, Tomorrow's Lawyers: An Introduction to Your Future (2013).

8. David Segal, *Is Law School a Losing Game?*, N.Y. Times (Jan. 8, 2011), *at* http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all&_r=0.

9. N.Y. State Unified Court Sys., *The Task Force to Expand Access to Civil Legal Services in New York: Report to the Chief Judge of the State of New York* (Nov. 2012), *at* http://www.nycourts.gov/ip/access-civil-legal-services/index.shtml (*Access to Civil Legal Services in N.Y.*).

10. The Council of the ABA Section on Legal Education and Admission is the federally recognized law school accreditor, pursuant to 20 U.S.C. § 1099b. Although nominally a part of the ABA Section on Legal Education and Admission to the Bar, the Council is required to be "separate and independent" by the statute. *See* 20 U.S.C. § 1099b(a)(3)(A).

11. *See, e.g.*, N.Y. Ct. R. 520.3; *see also* State Bar of C.A. Task Force on Admissions Regulation Reform, *Working Group Drafting Proposals for Discussion* (Mar. 2013), *at* http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000010279.pdf.

12. *Access to Civil Legal Services in N.Y.*, *supra* note 9, at 36.

13. Catherine Ho, *Law School Applications Continue to Slide*, Wash. Post (June 2, 2013), *at* http://articles.washingtonpost.com/2013-06-02/business/39697850_1_american-bar-association-accredited-law-school-legal-job-market (reporting 55,700 law school applicants as of May 17, 2013, a decrease of about 13% from the year before and also noting the continued nationwide drop in law school enrollment).

14. Karen Sloan, *Arizona Cuts Law School Tuition, Marking a First*, The Nat'l L. J. (Apr. 4, 2013), *at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202594883355&slreturn=20130506094216.

15. *See* Ronald G. Ehrenberg, *American Law Schools in a Time of Transition*, Presented at a Presidential Session of the AALS Annual Meeting (Jan. 2012), *at* http://www.ilr.cornell.edu/cheri/upload/cheri_wp145.pdf (suggesting that law school have not discounted tuition as aggressively as undergraduate programs and noting pressures for increased discounting and lowering law school subsidies to other university programs).

16. *See* Philip G. Schrag & Charles W. Pruett, *Coordinating Loan Repayment Assistance Programs With New Federal Legislation*, 60 J. Legal Educ. 583–612 (2011); *see also* Philip G. Schrag, *Failing Law Schools – Brian Tamanaha's Misguided Missile*, Geo. J. Legal Ethics (forthcoming), *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179625.

17. *See, e.g.*, Ethan Bronner, *To Place Graduates, Law Schools Are Opening Firms*, N.Y. Times (Mar. 7, 2013), *at* http://www.nytimes.com/2013/03/08/education/law-schools-look-to-medical-education-model.html?pagewanted=all&_r=0; Deborah L. Cohen, *Growing Justice: Law Schools Hop on the Incubator Trend*, A.B.A. J. (Oct. 1, 2012), *at* http://www.abajournal.com/magazine/article/growing_justice_law_schools_hop_on_the_incubator_trend/; Jonathan D. Glater, *Lawyers Learn How to Be Businesslike*, N.Y. Times (Jan. 9, 2008), *at* http://www.nytimes.com/2008/01/09/nyregion/09law.html.

18. *Access to Civil Legal Services in N.Y.*, *supra* note 9.

19. Steven L. Willborn, *Legal Education as a Private Good*, 41 J.L. & Pol'y 89 (2013).

BY DAVID PAUL HOROWITZ

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An Adjunct's Lament

Introduction

In the interest of full disclosure, I have taught as an adjunct at several area law schools for more than a decade[1] and have loved almost every minute of it. The work is challenging, the students engaging, and the opportunity to impact the development of future lawyers exhilarating. But, and you knew there was going to be a "but," there are aspects of the legal education milieu that trouble me, which hinder, rather than help, law students following graduation.

I offer my observations, comments, and suggestions[2] because I believe law schools can produce graduates better equipped to flourish in the marketplace. And it is graduates' success in the marketplace[3] that, rightly or wrongly, is the benchmark that matters most to them.[4] While my "research" is anecdotal, it is, nonetheless, empirical.[5]

I have chosen to work around the margins, avoiding major issues such as whether law school should be two years or three, how to make law school affordable, or what to do with the large pool of unemployed and underemployed recent graduates.[6] I assume that the current reluctance of many legal employers to train newly minted lawyers will continue, and probably accelerate. I also assume, at least in the short term, the continuation of the institutionalized (mis?)allocation between theory and practice in law school curricula.

Challenges Facing New Graduates

We can all agree that a great deal of the current tumult in legal education stems from the extraordinarily poor job market for lawyers since the impact of the "Great Recession" percolated to law school graduates.[7] However, when the legal market has recovered (and it will recover), most pundits agree it will be different in significant ways.[8]

Substantial legal work previously done by U.S. lawyers will be outsourced overseas (as opposed to being outsourced domestically, a practice which is most likely already in decline). Automation will continue to reduce the required lawyer body count, as will the furnishing of a greater range of legal services by non-lawyers. This is why it is so important to graduate lawyers who are better equipped to provide legal services immediately upon graduation, rather than after a period of post-graduate mentoring and training by employers. Most employers do not want this responsibility, and many are declining to fulfill it.

We Can Do Better

Law schools must do a better job of realistically orienting students to the opportunities and prospects available for new lawyers. There has always been a gap between perception and reality for incoming students. For example, when I attended law school, it seemed that approximately 50% of my class aspired to be entertainment lawyers (a field which, then and now, consisted of a handful of jobs nationwide), but students quickly learned that entertainment law job prospects were extremely slim, and refocused their aspirations. However, the legal profession was largely static, with the most dramatic development being the evolution of the "Rambo Litigator."

Today, there has been a tectonic shift in the legal landscape, and the gap between student expectations and market realities is far wider than at any time (and persists despite the length of the current downturn). Law schools may be as reluctant as students are to confront likely future career paths that include employment on an hourly basis performing document review, independent contractor status as the new norm when working for law firms, and the greatly diminished availability of government positions (all accompanied by retirement for none). Yet, modifications to current curricula can better equip new graduates to thrive, or at least survive, in this new environment.

I suggest we start with a change of focus in several areas of legal education.[9] What I propose does not represent a "dumbing down" of the curriculum or jeopardize the status of lawyers as professionals. The changes will, I believe, make law students better lawyers. And isn't that the point?

1. There Are No "National" Lawyers

While there are a select few members of the bar who practice throughout the country (and overseas), most of us practice in one state (with occasional forays into contiguous states either through formal admission to the bar or through *pro hac* admission). And while there are some true national law schools, attracting students from around the country (and overseas), and

dispersing their graduates throughout the country (and overseas), most graduates of most law schools practice law in the jurisdiction in which their law school is located.

Unfortunately, students fetishize attending a "national" law school, and many law schools are willing to cater to this craving. The result? Graduates well versed in the nuances of model codes and generic substantive bodies of law, best equipped to practice in non-existent jurisdictions. These skills are accompanied by a concomitant lack of familiarity with the rules, and nuances, of practice of the state in which they attend law school, the state that, often by default, is the state students are most likely to practice in following graduation.

I encounter this when I teach Professional Responsibility. Believing that most of my students will practice law in New York,[10] I utilize New York's Rules of Professional Responsibility and New York case law when teaching this subject, with occasional forays into other codes and rules where appropriate.[11]

I am inevitably confronted with pushback from students, from the first class of the semester[12] when reviewing my syllabus (available online weeks before the first class and explaining that it is New York's Code and cases that will predominate), through end-of-semester student evaluations, wherein students bemoan the fact that they are attending a "national" law school but learning New York law.

Given the importance law schools place on the teaching of Professional Responsibility (the only required law school class outside the first-year curriculum), isn't it more useful to educate students in the rules they will actually have to navigate after admission to the bar? Isn't it more relevant to a prospective employer if an applicant for a job in New York can discuss contacting witnesses in the employ of a represented adverse party in the context of *Niesig v. Team 1*[13] and *Muriel Siebert & Co., Inc. v. Intuit, Inc.*,[14] rather than by reference to a model rule or out-of-state decision? Isn't it more useful to a lawyer practicing in New York to have learned, through a 15-week, two or three credit law school course, New York's rules for reporting misconduct, dividing legal fees, or waiving privilege? And isn't it more valuable to the profession as a whole if students attending law school in New York are fully versed in the obligations and penalties contained in Rule 130-1.1?

Basing the curriculum in a New York law school Professional Responsibility class on New York's rules and cases, with reference, as desired, to conflicting Model Rules and out-of-state cases, in no way diminishes the subject. If the ultimate goal of teaching the course is producing law graduates equipped and prepared to practice law while adhering to required ethical standards, why not teach the required ethical standards?

Focusing on New York cases and rules in other substantive law courses, while discussing noteworthy material from other jurisdictions, enables students attending New York law schools to practice more knowledgeably and effectively in the jurisdiction in which most of them will practice.

2. Most of Us Will Not Be Appellate Lawyers

Legal writing in law school is primarily focused on writing appellate briefs. The art of legal advocacy in law school is primarily focused on advocacy at trial. Evidentiary issues in law school are most often framed in the context of trial objections.

Legal writing in the early stages of practice is primarily focused on discovery demands and responses, cogent file memoranda, and motions. Legal advocacy at that stage is primarily focused on conferencing cases and arguing motions. Evidentiary issues are most often confronted (when they are recognized at all) in the context of the admissibility of proof in support of, or opposition to, motions.

Don't get me wrong. Appellate brief writing, trial advocacy, and alacrity in making and responding to evidentiary objections are all marvelous skills to teach law students, and are critical skills in many areas of practice. It's just that most recent graduates will not be utilizing these specific skills.

When I teach evidence,[15] many evidentiary principles are discussed in the context of trial practice. I spend equal time, however, discussing evidentiary principles in the context of motion practice, highlighting throughout the semester the concept of "proof in admissible form." Many practicing lawyers are fuzzy on this critical principle, and a good many lawyers make and oppose motions believing that any piece of paper appended to a set of legal papers is evidence.

By focusing on motion practice and emphasizing the avoidance of evidentiary mistakes (and detecting the mistakes of adversaries) graduates will be better equipped to do the work that new lawyers are most often engaged in. The ability to present proof in admissible form is more readily, and meaningfully, acquired through the preparation of exhibits in support of motions, rather than through the static evidentiary issues contained in the record on appeal utilized by students in a legal writing or appellate advocacy courses.

Students are understandably proud of the writing samples they produce during the course of their law school years. If a goal in producing this work is to present prospective employers with writing samples that highlight the student's ability to practice law, which work is more likely to spark an employer's interest? A summary judgment motion, incorporating proof in admissible form, or an appellate brief (often in an imaginary jurisdiction) addressing an esoteric issue of law? I believe that most of the time the well-crafted motion wins, hands down. It is also far more likely to furnish "talking points" during an interview than the prototypical appellate brief.

3. We Need to Do Simple Things Well

In *To Kill a Mockingbird*, one of my favorite passages, in one of my favorite books, is where Miss Maudie rebuts Scout's assertion that Atticus "can't do anything." She rolls off a list of skills, all of which are seemingly straightfor-

ward, often simple, beginning with "He can make a will so tight . . . ." What Atticus does, he does well, including the simple things. (Readers uncertain of the virtues of doing simple things well would do well to review last issue's column, "Sweat the Small Stuff.")

Many students graduate law school without knowing what is required to draft an affidavit, client retention letter, or notice of motion. Many of these same graduates lack training in the skill of asking direct questions, objecting at a deposition, or cogently reciting the relevant facts and law supporting a position they are advancing on behalf of a client.

These skills are not sexy, and they don't lend themselves to scintillating course catalog descriptions. They are "the small stuff," more a product of care and precision than intellect and showmanship. Yet they are among the critical core skills most lawyers need to succeed in practice. We need to teach more of them, without apology.

Conclusion

I believe that law schools are motivated by the shared goal of producing graduates equipped to practice in today's challenging environment, an environment that appears to grow more challenging every day. Relatively modest tweaks to the existing curriculum, some of them outlined here, can have a meaningful impact on accomplishing this goal.

Perhaps inspiration can be found in the locavore movement, premised on the idea that ingredients locally sourced, and often quite simple, can be prepared to create food that is sublimely satisfying. By focusing more on law that is local, and skills that are basic, law schools can graduate lawyers who will be more skilled, marketable, and satisfied. ■

1. At the time of this writing (summer of 2013) I have not yet taught at Columbia Law School (and after this column, perhaps never will), and therefore none of my comments are based upon legal education there.

2. All of which are, of course, my own, and not reflective of, or attributable to, any particular institution.

3. And by marketplace, I am not talking only about the private sector, but include all positions in the legal field historically open to new graduates.

4. And their parents, significant others, and children.

5. "Empirical" being a term much beloved by authors of law review articles, notwithstanding their theoretical perches.

6. Though I have strong opinions about all of these issues.

7. It does take some time for the effects to be felt. I graduated law school in 1988, nearly a year after the 1987 market "crash," and my graduating class was not impacted in any way. It was the class of 1989 that bore the brunt of that crash.

8. When I attended law school, the advantages of a law degree for students who were not interested in practicing law were frequently extolled, something that is almost never mentioned today, probably for the best.

9. An obvious criticism of my suggestions is that they are geared most often to the litigation arena and, more often than not, to civil practice. Both true, but no reason to dismiss them.

10. And Professional Responsibility is an area where it does not matter whether students practice in state or federal court.

11. Students often argue, and I concede the point, that they will have to take (and pass) the MPREs before graduation. Nonetheless, I have never met a law student who did not take a commercial prep course prior to taking the exam, and many students take the MPREs before taking Professional Responsibility.

12. Students are, of course, free to transfer to another section.

13. 76 N.Y.2d 363 (1990).

14. 8 N.Y.3d 506 (2007).

15. I will set aside, for this column, the merits of teaching the Federal Rules of Evidence versus the Rules of Evidence in New York State Courts.

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I have been trying to develop an appellate practice and decided a few years ago to write a quarterly electronic newsletter discussing recent appellate decisions on issues that are of interest to my colleagues and potential clients. My thought was that the newsletter would give me an opportunity to demonstrate my writing and analytical abilities, and attract clients.

The newsletter (known as "The Able Law Firm Letter") targets attorneys and members of the business community who might refer business to my firm, and it includes my biographical and contact information. When I write about a case, I give the citation. I discuss the decision, its implications to the particular practice area and whether the decision is in my opinion correct. I never mention the names of the attorneys who handled the case. My plan is working and I have gotten several clients who tell me they decided to hire me because of the newsletter. Recently, I had a case in the Court of Appeals, which resulted in a major victory for me. I have decided to write about the case in my newsletter and plan on identifying the name of my client and highlighting the fact that I was the attorney who successfully handled the case.

A number of colleagues have suggested that my newsletter is attorney advertising, and that it is unprofessional for me to tout my victory by writing about it. Frankly, I do not think my colleagues are correct, but I am wondering whether it is possible that I am doing something wrong. I have also been told that even though my Court of Appeals decision is a reported case, I need the permission of my client to write about the case and identify its name.

Sincerely,

I.A.M. Able, Esq.

Dear I.A.M. Able, Esq.:

Your questions concerning The Able Law Firm Letter raise significant issues. First, are prior editions of The Able Law Firm Letter that merely discuss recent developments in the law "attorney advertising" pursuant to the Rules of Professional Conduct? Second, does the proposed forthcoming edition of The Able Law Firm Letter, in which you plan to tout your recent victory in the Court of Appeals, constitute attorney advertising? Finally, if that forthcoming edition is attorney advertising, are you required to obtain written consent from the client about whose case you intend to write?

Under Rule 1.0(a) of the Rules of Professional Conduct, a communication does not rise to the level of an "advertisement" unless it is "about that lawyer or law firm's services." As Professor Roy Simon, a leading commentator on New York ethics issues, wrote in his treatise (2013 ed.): If "a communication is not about either the lawyer making the communication or the services of the law firm making the communication, then it is not an advertisement" (at 22).

The principal advertising guidelines are in Rule 7.1. Comment 7 to Rule 7.1 states, in relevant part:

> Topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are generally not considered advertising. However, a newsletter, client alert, or blog that provides information or news primarily about the lawyer or law firm (for example, the lawyer or law firm's cases, personnel, clients or achievements) generally would be considered advertising.

Professor Simon seems to concur with this view (at 1350).

Merely adding a lawyer's biographical information or contact information to a topical newsletter does not make the newsletter "about the lawyer or law firm's services." N.Y. State Bar Op. 848 (2010). Therefore, it appears that the prior editions of The Able Law Firm Letter are not "advertising" within the meaning of Rule 1.0(a).

However, the forthcoming edition of The Able Law Firm Letter (in which you intend to discuss your recent victory in the Court of Appeals), likely qualifies as an "advertisement" under Rule 1.0(a) because it touts your victory, rather than merely discussing the result in the case.

Rule 7.1 therefore applies to this communication. Rule 7.1 is extensive, and you should pay close attention to it. In particular, you should note the following:

Rule 7.1(a)(1) states that a "lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that contains statements or claims that are false, deceptive or misleading."

Rule 7.1(b) sets forth some categories of information that an advertisement may contain, including qualifications, names of "regularly represented" clients (provided they have given prior written consent), bank references, and range of fees.

Rule 7.1(c) states various matters that a lawyer may *not* include.

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

Rule 7.1(d) sets forth information that a lawyer may include, but only if the communication complies with Rule 7.1(e).

Rule 7.1(f) requires advertising to be prominently labeled as "Attorney Advertising" on the first page of a hard copy communication, on the home page of a website, and on a self-mailing brochure or postcard. It also states that, for a communication that is sent by email, "the subject line shall contain the notation 'ATTORNEY ADVERTISING'" (capitalization in the original).

The third part of our answer to your question deals with whether you must obtain your client's consent to write about your victory on the client's behalf. The answer here is probably not.

There are two rules that require an attorney to obtain the client's prior written consent for a communication that constitutes "attorney advertising": Rule 7.1(b)(2), which allows an advertisement to mention the "names of clients regularly represented, provided the client has given prior written consent"; and Rules 7.1(d)(3) and (e)(4), which allow for "testimonials or endorsements of clients, and of former clients," provided that "the client gives informed consent confirmed in writing."

In our view, neither of these applies to your forthcoming newsletter. Both rules appear to apply to client *endorsements*, whether implicit (Rule 7.1(b)(2)) or explicit (Rule 7.1(d)(3)). Many law firms list the names of representative clients to convey an implicit endorsement. That is, if XYZ Bank, or ABC Insurance Company, regularly engages the law firm, those clients are happy with the law firm's performance. Other lawyers like to use an explicit endorsement (e.g., Clarence Client says: "I.A.M. Able is the most able lawyer in town"). Both rules require that such endorsements be cleared with the client in advance, and that the client give prior written consent.

Because the forthcoming newsletter is not offering the client's name as a *testimonial*, but only as part of the truthful reporting about a decision by the Court of Appeals that is a matter of public record, the obligation to obtain the client's written consent is far from clear. The better reading of the Rules is that obtaining the consent is not required. The safer course under the Rules and (perhaps more important) for client relations is to obtain the consent anyway.

Sincerely,
The Forum by
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Jamie B.W. Stecher, Esq., and
Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse
& Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I have always been curious about what conduct outside of legal practice could potentially affect my ability to practice law. Recently, for whatever reason, I have done a number of things that some people have told me are unbecoming. For example, last year my home suffered damage after Super Storm Sandy. My insurance claim listed not only items of direct loss, but also some items that needed repair even before the storm, but which "may" have been exacerbated by it. In addition, I currently own real estate for investment. Several of these properties display numerous building code violations and fines. Last, a month or so ago, I submitted an application for a bank loan, and I may have said on the application that I attended Yale Law School, rather than my true alma mater, "Yala" Law School.

My question for the Forum: Do any of these constitute violations of the Rules of Professional Conduct that could lead to disciplinary charges?

Sincerely,
Risk E. Behavior

Because of the value of legal writing, law schools should do more to improve their programs. All first-year students at ABA-accredited law schools must study legal writing.[8] But although many law schools like New York Law School happily offer so many writing electives that students can take at least one writing course every semester in their second and third year, no law school requires any student to take a writing elective. Students must satisfy a writing requirement in their second or third year, but their papers typically are academic, not practice-based, and are rarely line edited, as are the writing course's papers. Law schools like St. John's have writing centers at which students, taught by upper-level students,[9] can improve their legal writing. All schools should have them.

Legal writing puts into practice what other teachers teach.

Many schools use mostly adjuncts to teach their students legal writing, but students profit when the writing faculty is made up mostly or entirely of full-time teachers, who are more accessible to their students than adjuncts are and who form a professional cadre of specialists. The extra pay that law schools must give to full-time writing professors is worth it, despite today's economy.

Worth it as well is for law schools to treat their writing faculties in line with their doctrinal faculties. Doctrinal faculty has long been held above the skills faculty, and especially against the writing faculty. Different theories have been offered for that unfortunate fact, including gender-based discrimination against women,[10] who form a majority of writing teachers at many law schools. Increasingly, full-time writing professors are being given titles, benefits, and the right to participate in school governance similar to doctrinal professors.[11] Yet the writing faculty is still too often given short-term contracts and paid poorly.[12]

Law schools should offer writing courses that allot a fair number of credits and sufficient class hours for the work their writing students must do. Doctrinal classes, believed to be "more intellectually complex" than writing courses, continue to receive more credits and class time.[13] There should be enough academic credit and class time to teach more than objective memorandum and brief writing. The programs should also be broad enough to teach letter writing, legislative writing, how to email, as well as negotiating, interviewing, and counseling.

Law schools must continue to devote themselves to scholarship. Scholarship improves the profession and makes teaching better. At the same time, they must acknowledge that they are trade schools for a noble profession "that depends on flawless writing, logical reasoning, and persuasive argumentation."[14] To teach students their vocation, law schools must now, more than ever, augment their writing curriculum. Doing so will be expensive. Not doing so will be even more expensive.

The *Journal*'s next Legal Writer column will continue with its series on drafting civil-litigation documents. ■

Gerald Lebovits, a New York City Civil Court judge, has taught legal writing as an adjunct professor of law at Columbia Law School, Fordham University School of Law, New York Law School, New York University School of Law, and St. John's University School of Law. His email address is GLebovits@aol.com.

1. William M. Sullivan et al., Educating Lawyers for the Profession of Law 111 (2007) (Carnegie Foundation Report).

2. Am. Bar Ass'n, Section of Legal Educ. & Admissions to the Bar, Report and Recommendations of the Task Force on Lawyer Competency 15 (1979) (arguing that more students should "receive rigorous training and experience in legal writing").

3. Am. Bar Ass'n, Section of Legal Educ. & Admissions to the Bar, Legal Education and Professional Development — An Educational Continuum 138–40 (1992) (emphasizing skills training, although not legal writing itself).

4. Roy Stuckey et al., Best Practices for Legal Education 77 (2007).

5. Toni M. Fine, *Reflections on U.S. Law Curricular Reform*, 10 German L.J. 717 (2009).

6. For an excellent study articulating these concepts, see Sherri Lee Keene, *One Small Step for Legal Writing, One Giant Leap for Legal Education: Making the Case for More Writing Opportunities in the "Practice-Ready" Law School Curriculum*, 65 Mercer L. Rev. 1 (2013).

7. Carnegie Foundation Report, *supra* note 1, at 8–10.

8. Am. Bar Ass'n, Section of Legal Educ. & Admissions to the Bar, 2012–2013 ABA Standards and Rules of Procedure for Approval of Law Schools 19–20 (2012) (setting out standard 302, which requires "at least one rigorous writing experience in the first year") (cited in Keene, *supra* note 6, at 6).

9. It's smart to let students teach one another legal writing through collaborative learning, see Elizabeth L. Ingelhart, *From Collaborative Learning to Collaborative Writing in the Legal Writing Classroom*, Legal Writing: J. Legal Writing Inst. (2003), and peer conferences, see Sheila Rodriguez, *Letting Students Teach Each Other: Using Peer Conferences in Upper-Level Legal Writing*, 13 Fla. Coastal L. Rev. 101 (2012). The better (or richer) law schools also use law-student teaching assistants or teaching fellows.

10. Kirsten Anne Dauphinais, *Sea Change: The Seismic Shift in the Legal Profession and How Legal Writing Will Keep Legal Education Afloat in Its Wake*, 10 Seattle J. for Soc. Just. 49, 78–82 (2011).

11. Leslie Rose, *Norm-Referenced Grading in the Age of Carnegie: Why Criteria-Referenced Grading Is More Consistent With Current Trends in Legal Education and How Legal Writing Can Lead the Way*, 17 J. Legal Writing Inst. 123, 131–32 (2011).

12. *See, e.g.*, Philip N. Meyer, *Confessions of a Legal Writing Instructor*, 46 J. Legal Educ. 27 (1996). *See also, e.g.*, Catherine J. Wasson & Barbara J. Tyler, *How Metacognitive Deficiencies of Law Students Lead to Biased Ratings of Legal Writing Professors*, 28 Touro L. Rev. 1395 (2012) (discussing the at times difficult relationship between legal-writing teachers and their students, who misuse the teacher ratings and evaluation process because their own deficiencies prevent them from seeing their own poor performance); Mary Dunnewold, *Establishing and Maintaining Good Working Relationships With 1L Writing Students*, 8 Perspectives: Teaching & Legal Writing & Research (1999) (a good piece on working well with students); *and* Susan Liemer & Hollee Temple, *Did Your Legal Writing Professor Go to Harvard?: The Credentials of Legal Writing Faculty at Hiring Time*, 46 U. Louisville L. Rev. 383 (2008) (arguing that legal-writing teachers have the same stellar credentials as doctrinal teachers but do not receive the same recognition).

13. Andrew Jay McClurg et al., *"The Most Important Course in Law School": Five Experts Offer a Roadmap for Success in First-Year Legal Writing* (2010), *available at* http://ssrn.com/abstract=1635263.

14. James Etienne Viator, *Legal Education's Perfect Storm: Law Students' Poor Writing and Legal Analysis Collide With Dismal Employment Prospects, Creating the Urgent Need to Reconfigure the First-Year Curriculum*, 61 Catholic U. L. Rev. 735 (2012).

BY GERTRUDE BLOCK

An Education

The editor has asked me to conform to the theme of this issue by writing about my experience establishing and teaching the Writing Clinic at the University of Florida College of Law so that students deficient in writing ability could improve their performance in law school.

The typical student assigned to take my clinic would arrive at my office wearing an indignant expression and offering this observation: "I don't belong in your class. I did good in writing in college!"

His indignation was reasonable. Like all students who are accepted at this law college, he considered himself a member of the intellectual elite. Surely, of all the students who had received a college degree, he must be among the most capable of writing effectively.

But unfortunately, in the early 1980s this was not true. Former dean of Syracuse Law School Judith Younger had remarked that a great many law students were illiterate – and she did not put "illiterate" into quotation marks. Even the medical faculty at this university were concerned. They complained that some arriving medical students wrote so poorly that patient charts and treatment orders were garbled and useless. (At least bad legal writing is not fatal, but it can result in bad outcomes, judicial chastisement, and professional humiliation.)

In some courts, for want of a comma, cases were lost. In one court, the judge in a contract case opined that "elemental rules of sentence construction were totally ignored,"[1] although the contract at issue could easily have been stated clearly and concisely. Another judge scolded the state district attorney for ungrammatical language, saying that if the "rules of English grammar [were] a part of the positive law . . . , [the defendant's] burglary conviction [should] surely be reversed."[2]

Among law student writing, easiest to remedy is the picturesque and metaphor-laden prose style they bring with them – writing that had been praised in undergraduate disciplines like English literature, history, and creative writing. Creative writing can be a liability in a genre where precedent controls, and yesterday's answer is the right answer.

Harder to remedy is the "democratic" assumption that everyone's grammar is as good as everyone else's; therefore, standard grammar is unimportant. Sometimes the problem is that students write in their own vernacular because that is all they know, and they may never have been told it was not standard.

Such students use sentence fragments and run-on sentences with abandon. The comma is a mystery to them; they punctuate with dashes. Writing Clinic participants were selected on the basis of their ability to write a short essay in a proctored setting. Students who had entered under affirmative action, which admitted bright college graduates whose credentials were below admission standards, almost always needed remedial help in writing. (Remember, this was the early 1980s.)

Here is a part of an essay written by a student who had been placed in the Writing Clinic; the assigned subject was whether county high schools should be consolidated:

> Sometimes we are force to sacrifice for a greater gain. This community must vote in favor of one consolidated high school, the advantages far out weigh the disadvantages.
>
> All this community will be loosing is the local pride associate with present high school and the more proximity of the school.
>
> The second reason to consolidate the schools is to expand all of the kids by focusing on a wider area. They will make new friends in his/her whole community. Also, by expanding the sports program the students can travel to other schools. Thus learning about and meting others.

I am not familiar with today's law students' writing; it may be much improved. What surprised those of us who tutored Writing Clinic students was how quickly they learned to write acceptably. But that really was not surprising when you realize that these students had several advantages: they were bright and highly motivated, and their tutoring was intensive – two classes each week plus frequent one-on-one assistance.

After the students learned acceptable grammar, they became aware of the damage of dangling participles in statements like, "Being filthy and roach-infested, the plaintiff refused to rent the apartment." They noticed the ambiguity of "squinting modifiers" in sentences like: "The trial that was postponed twice apparently will occur next month." (What does the adverb "apparently" modify?) They learned to use the least language to convey exact meaning, and to prefer clarity over imagery.

Once the students had learned to write clearly, they were ready – and eager – to work on "legal" writing. They then practiced writing case syntheses and interoffice memoranda, which the other first-semester law students were also doing in their first-semester writing class. Writing Clinic students then took both writing classes, starting in the second semester.

The combination of hours spent in the remedial program, plus the commitment of both students and instructors, kept students in law school who otherwise probably would have failed. So when the Writing Clinic had been in progress for about three semesters, students who had been assigned to it

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GERTRUDE BLOCK (block@law.ufl.edu) is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association). Her most recent book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co.).

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had a change in attitude. Students were now eager to be given "the privilege" of attending the Clinic.

In fact, during that first week I often saw more new students in the Writing Clinic than the number listed on the class roll, so I had to weed out students who were ineligible to attend, but who recognized a good deal when they saw one. That fact was a testimonial of the effectiveness of the Clinic.

That effectiveness was due to the effort and determination of the teachers and the students. In addition was the fact that the students had the advantage of knowledge they had gained in their regular classes, so legal problems were easier to write about. Finally, the students could now distinguish between good writing and bad writing in the legal writing they were exposed to.

Now that I am retired, I miss those students and wish I could hear of their success. ■

1. *Cohen v. Erie Indem. Co.*, 28 Pa. Super. 446, 453 (Super. Ct., 1981).

2. *Henderson v. State*, 445 So. 2d 1364 (1984).

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BY GERALD LEBOVITS

Legal Writing in the Practice-Ready Law School

The Legal Writer interrupts its regularly scheduled program — our series on drafting civil-litigation documents. We join, instead, with the other authors of this special edition of the *Journal* to address legal education and, in particular, the most important course in law school: legal writing.

The three goals of legal education are analysis, practice competence, and professionalism. Only one law-school course teaches all three: the first-year course in legal writing.

The practice of law is experiencing seismic changes, largely for economic reasons. Law firms are downsizing. Some are going bust. Firms are hiring fewer law graduates, delaying their start times, and trimming their partnership ranks. Clients are saying no to funding associate training. Government and public-service opportunities are eroding. Law students are finding it difficult to get even unpaid internships.

Law schools, too, are suffering. Applications are falling. Enrollment is dropping. Faculty is being cut. Students are rightly frustrated with the high cost of legal education and the reduced prospects for employment. Things will get worse for most existing law schools if law students can earn a degree in two years instead of the current three: A third of the schools' tuition income will evaporate.

Legal employers are setting aside less of their dwindling resources to train law graduates. But because the quality of lawyering may not lessen — it must, rather, improve — employers expect new hires to be practice ready. Preparing their law students to be practice ready is a role that law schools must embrace. And quickly.

There's nothing new about training practice-ready law students by teaching them the skills necessary to practice law. The idea was urged in the groundbreaking 2007 Carnegie Foundation Report on legal education,[1] which emphasized skills training, specifically courses in legal writing, as well as in other major studies on legal education, including the 1979 Crampton Report,[2] the 1992 MacCrate Report,[3] and the 2007 Best Practices for Legal Education Report.[4] But as the practice of law is forever changing, skills-based training has received some serious attention lately.

Many law schools have made significant curricular fixes to prepare their students for practice.[5] None has gone far enough.

This column argues that the best way to make law students ready to practice law is for law schools to enhance their legal-writing courses, programs, and faculty. The legal-writing curriculum, more than any other, bridges the divide between practice and the legal-theory courses like contracts, property, and torts. Wonderful though they are, no internship, externship, clinical experience, or extra-curricular program like editing a law journal or competing in Moot Court can replace a foundation course in legal writing.

The reasons are many. A legal-writing class isn't simply an isolated class in training skills.[6] It ain't just grammar, neither. Legal writing teaches legal method, citing, organization, rhetoric, ethics, and professionalism. Legal writing teaches substantive law. Legal writing puts into practice what other teachers teach. Combining clarity with concision, the goal of legal writing is to produce something effective for the reader, not to regurgitate doctrine. Through in-class participation and feedback, writing students have a meaningful dialogue with their professors, a dialogue no doctrinal course can match. While doctrinal professors use writing — through one final examination — only to assess, legal-writing professors use writing to teach and to assess.

The three goals of legal education, according to the Carnegie Foundation Report, are analysis, practice competence, and professionalism.[7] Only one law-school course teaches all three: the first-year course in legal writing (or, as Columbia Law School calls it, the Legal Practice Workshop) or the integrated lawyering-skills course that NYU developed for first-year students.

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