

# ESSAYS ON OTHER LAWYERS LICENSING PROCESSES AND ALTERNATIVES TO THE BAR EXAMINATION

*The bar examination, as it is administered in the various U.S. jurisdictions, continues to evolve. Most jurisdictions have had, over their histories, a number of versions of the examination; for example, at different times, examinations have included oral questions, mathematics items, or performance tests.*

*In this issue, we have invited essays describing the lawyer licensing processes in a handful of foreign countries and essays on alternatives to or suggestions for improving the bar examination. While there are many criticisms of the bar examination as it is currently adminis-*

*tered, there are fewer proposals for other feasible assessment methods, and we are happy to present the views of a number of authors to our readers. The views expressed by each of the authors are not necessarily endorsed by the National Conference of Bar Examiners, as our intent was merely to provide a forum for the exchange of ideas.*

*The magazine welcomes reader reactions to the essays included in this group. The bar admission process will continue to evolve, as it has for many years, and ideas for ways to help shape its evolution are important for bar examiners to consider and discuss.*

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## THE PROFESSIONALISM CRISIS: HOW BAR EXAMINERS CAN MAKE A DIFFERENCE

*by Clark D. Cunningham*

New Hampshire's pilot project of a performance-based variant of the bar examination, described elsewhere in this issue by Justice Linda Dalianis and Professor Sophie Sparrow,<sup>1</sup> is a remarkable and exciting initiative by state officials responsible for regulating admission to the bar. In particular, it is a very promising response to what is widely known as "the professionalism crisis."

In August 1996, the Conference of Chief Justices (the CCJ) passed a resolution for a National Study and Action Plan regarding Lawyer Conduct and Professionalism. In that resolution, the CCJ noted a significant decline in professionalism in the bar, and a consequent drop in public confidence in the profession and in the justice system generally. The CCJ determined that a strong, coordinated effort by state supreme courts to enhance their oversight of the profession was needed.<sup>2</sup> In 1999, the CCJ adopted a National Action Plan on Lawyer Conduct and Professionalism. The CCJ concluded that "Successful efforts to improve lawyer conduct and enhance professionalism cannot be accomplished unilaterally.

The objective of such efforts is a change in the very culture of the legal profession. . . . Success requires a sustained commitment from all segments of the bench, the bar, and the academy.”<sup>3</sup>

The chief justices issued an urgent challenge to law schools:

Most lawyers get their first introduction to the basic concepts of legal ethics and professionalism during law school, but few students fully appreciate their importance or receive a sufficient grounding in practical legal skills for competent legal practice before being admitted to the profession. In addition to providing law students with substantive legal knowledge, law schools should ensure that students understand the importance of professionalism and have an adequate grasp of basic legal skills.<sup>4</sup>

The chief justices also expressed concern about the current format of the bar examination:

State bar examinations traditionally test bar applicants’ knowledge of substantive legal principles, but rarely require more than a superficial demonstration of the applicants’ understanding of legal ethics, professionalism, or basic practical skills. Thus, they fail to provide an effective measure of basic competence of new lawyers.<sup>5</sup>

The New Hampshire initiative, which allows selected law students (the “Webster Scholars”) to take an alternative route to bar admission, recognizes that bar examiners cannot contribute to solving the professionalism crisis simply by tinkering with the current bar admission system—not only because professionalism cannot be adequately assessed in a one-time paper-and-pencil test,<sup>6</sup> but more important-



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ly because the current path to the bar examination inadequately prepares applicants to become professionals. Bar examiners, and the state supreme courts that authorize them, however, do have unique power to alter the path that applicants walk before bar admission.<sup>7</sup>

The United States is virtually the only major country in world that gives an unlimited license to practice law to persons whose only preparation has been to sit in classrooms, take blue book exams, and write a few research papers. The essays in this issue by Paul Maharg<sup>8</sup> and Nigel Duncan<sup>9</sup> describe the bar admission systems in Scotland and England, which are good examples of what is required elsewhere in the world, systems in which law school graduates must complete a two- to three-year program that combines intensive simulation-based education with supervised on-the-job training.<sup>10</sup> The New Hampshire pilot program in many ways will resemble the Scottish and English systems.

Simply by offering an alternative to the traditional bar examination, New Hampshire has provided a powerful incentive to the only law school in its

state to enrich its three-year curriculum to combine existing classroom, clinic, and externship courses with new “practice courses” taught by practicing attorneys, which focus on integrating substantive knowledge, skills, and ethical judgment in the context of fields of practice.<sup>11</sup> The Webster Scholars will also be assessed repeatedly during their second and third years of law school, as well as upon graduation, by a committee that includes judges and bar examiners, not just law professors. This committee will review portfolios of written work and performance in situations simulating law practice; the committee will also conduct in-person reviews at which the students will be required to show comprehension of the many legal and ethical issues presented in the real and simulated legal practice situations and explain the decisions they made. These future lawyers will be expected to show that they know how to:

- listen
- creatively solve problems
- make informed judgments
- recognize and resolve ethical problems
- negotiate and
- counsel people effectively.<sup>12</sup>

The New Hampshire program has adopted two key features of the Scottish and English systems of bar admission, which are set out in the Duncan and Maharg essays. First, ethical issues and professional values are learned and reinforced in the recurring context of realistic—and real—situations of practice, rather than simply taught as a set of rules. Second, prospective lawyers are continually assessed over an extended period with detailed feedback on their professional performance,<sup>13</sup> so they are encouraged to internalize “habits of justice, candor and courage.”<sup>14</sup>

Can there be any doubt that such a program will do more to improve the professionalism of future lawyers than our current system of demanding only knowledge of black-letter law and demonstrable test-taking ability? ■

## ENDNOTES

1. See Hon. Linda S. Dalianis & Sophie M. Sparrow, p. 23.
2. IMPLEMENTATION PLAN FOR THE CONFERENCE OF CHIEF JUSTICES’ NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 1 (adopted August 2, 2001, by the Conference of Chief Justices).
3. A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 17 (adopted January 21, 1999, by the Conference of Chief Justices).
4. *Id.* at 31.
5. *Id.* at 32. This critique included the the Multistate Professional Responsibility Examination, which, though it “tests the bar applicant’s substantive knowledge of the rules of professional and judicial conduct . . . does not require applicants to demonstrate their commitment to professional values or even to engage in extended analysis of questions that are legally uncertain under the professional codes.” *Id.* at 32 n.7.
6. The addition of character and fitness screening does not really address the central problem of professionalism either. As pointed out in THE MACCRATE REPORT, this “process is not intended to ensure an applicant’s familiarity with or adherence to professional values, but simply to weed out the exceedingly small number of candidates whose past misconduct is viewed as a portent of future wrongdoing.” LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 283 (REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP), American Bar Association Section of Legal Education and Admissions to the Bar (July 1992) (“THE MACCRATE REPORT”).
7. Two other promising alternatives to the conventional bar examination are under consideration in Arizona and New York. See Sally Simpson & Toni M. Massaro, *Students with “CLAS”: An Alternative to Traditional Bar Examinations*, 20 GA. ST. L. REV. 813i (2004); Lawrence M. Grosberg, *Standardized Clients: A Possible Improvement for the Bar Exam*, 20 GA. ST. L. REV. 841 (2004); and Kristin Booth Glen, *In Defense of the PSABE, and Other Alternative Thoughts*, 20 GA. ST. L. REV. 1029 (2004). The Committee on the Standards of the Profession of the State Bar of Georgia, originally charged to consider possible imposition of an apprenticeship requirement, has developed a post-bar admission transition to practice program that includes an enhanced bridge-the-gap course and one year of mandatory mentoring. See *Transition Into Law Practice Program Moves Forward* at <http://www.gabar.org> and Sally Evans Winkler, C. Ronald Ellington & John T. Marshall,

*Learning to be a Lawyer: Transition into Practice Pilot Project*, 6 GA. B. J. 8 (2001).

8. See Paul Maharg, p. 9.
9. See Nigel Duncan, p. 16.
10. Paul Maharg and his colleagues at the Glasgow Graduate School of Law are currently collaborating with the Effective Lawyer-Client Communication Project to develop an even more sophisticated system of teaching and assessing professional competence, following models being used in medical education. See Karen Burton, Clark D. Cunningham, Gregory Todd Jones & Paul Maharg, *Do We Value What Clients Think About Their Lawyers? If So, Why Don't We Measure It?* at <http://law.gsu.edu/Communication/>.
11. The Franklin Pierce Law Center has gone so far as to hire a full-time director for this program using its funds.
12. Dalianis & Sparrow at 24.
13. "To be effective, the teaching of lawyering skills and professional values should [include the] . . . opportunity for students to perform lawyering tasks with appropriate feedback and self-evaluation; [and] reflective evaluation of the students' performance by a qualified assessor." MACCRATE REPORT at 331.
14. Thanks to Paul Maharg for this felicitous quote. See Clark Cunningham, *Rethinking the Licensing of New Attorneys—An Exploration of Alternatives to the Bar Exam*, 20 GA. ST. L. REV. vii, xxvi (2004).

## TRANSACTIONAL LEARNING ENVIRONMENTS AND PROFESSIONAL LEGAL EDUCATION IN SCOTLAND

by Paul Maharg

*Learners need instructional conditions that stress the interconnections between knowledge within cases as well as different perspectives of viewpoints on those cases. . . . Learners need flexible representations of the knowledge domains that they are studying, representations that reflect the uncertainties and inconsistencies of the real world.*<sup>1</sup>

Scotland is a small jurisdiction. With a legal profession of 10,000 solicitors and over 400 practising advocates (the equivalent of barristers in England) serving a population of under five million, it is in size smaller than the legal bar of many states in the U.S.



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cations technologies (video-based virtual learning environments, online simulations, etc.), and skills-based learning, teaching, and assessment. He is currently involved in a number of legal educational projects, including the Standardised Client Initiative and the Virtual Learning Environments Project (under the auspices of the UK Centre for Legal Education). His research areas lie largely in legal education. He is currently Chair of the British and Irish Law Education and Technology Association (BILETA—[www.bileta.ac.uk](http://www.bileta.ac.uk)).

The training of both advocates and solicitors takes nearly the same route at the initial stages. All lawyers in Scotland must qualify with an undergraduate law degree from an institution recognised by the Law Society of Scotland, or they must pass the Society's examinations following a period of self-study. (The great majority of students take the degree route into the profession.) Students who wish to enter the legal profession then begin the three-year course of professional training and education. They first enter a 28-week course called the Diploma in Legal Practice. Equivalent in many ways to the Legal Practice Course in England and Wales, the Diploma sets out to train law students in practice skills, knowledge, and values, and to equip them for the two-year traineeship that follows the Diploma. Currently there are five Diploma providers, all attached to university law departments or schools. The course is taught predominantly by tutor-practitioners working in specific areas of the law, and designed and administered by the university.

Either before or during their Diploma experience, students must arrange for a traineeship with a practising solicitor or a legal service employer in Scotland. On successful completion of the Diploma, they enter into a two-year contract of training with this employer. The traineeship is monitored by the Society: trainees are required to submit logs of work undertaken in the office, and review sheets are completed every quarter and submitted to the Society for monitoring. These documents form part of the ongoing assessment of the training program known as the Assessment of Professional Competence. Sometime between the 6th and 18th months of their traineeships, trainees are required to take another course called the Professional Competence Course. This course is designed to build upon the knowledge and skills developed in the Diploma, and relies upon the office experience that trainees will have gained in their traineeship to date. At the start of their second year of training, trainees obtain a restricted practising certificate which enables them to practise in the courts under certain conditions. At the end of their second year, if they have fulfilled all the conditions of the Society, and have obtained a discharge of their training contract and a signing-off statement from their employer, trainees can apply for a full practising certificate and entry to the profession.<sup>2</sup>

In this essay I shall briefly describe some elements of professional training we have designed using information and communications technology (ICT) in the Diploma taught at the Glasgow Graduate School of Law (GGSL), and suggest why the approach might be considered as a part of some U.S. bar examinations. The key concept is that of “transactional learning”—in effect, learning environments that simulate practice—where students practise legal transactions and are assessed upon their practice skills and knowledge.<sup>3</sup> Such transactional learning lies at the heart of attempts by educators

since John Dewey to address the relationship between learning and life.<sup>4</sup> There are five general principles to our approach:

**1. Transactional learning is active learning.**

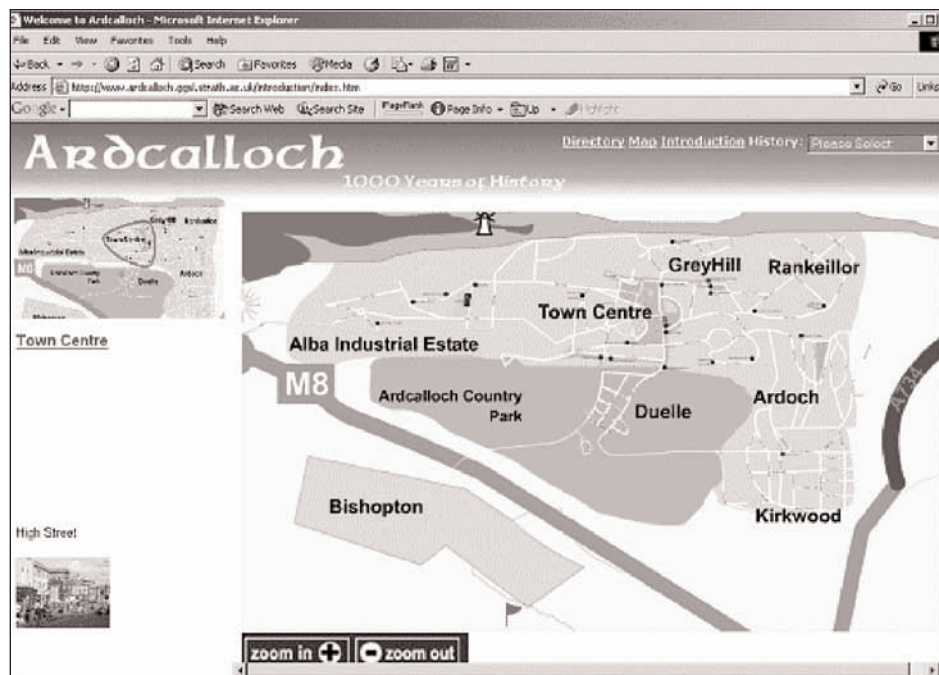
Our students are involved in activities within client cases, rather than standing back from the actions and learning about them. There is, of course, a place for learning about legal actions—indeed, transactional learning is rarely possible unless students first have a conceptual understanding of substantive and procedural law, which in the GGSL they gain from paper resources, video virtual learning environments, and face-to-face tutorials. However, transactional learning goes beyond learning *about* legal actions to learning *from being involved in* actual or simulated client cases. We would claim that there are some forms of learning that can only take place if students go through the process of some form of active learning.

To facilitate this process, we created a fictional town on the web called Ardcalloch; the town is represented on our website by a civic history, a map (see Figure 1, on the next page), and a directory. Within the town, we created several hundred fictional businesses, institutions, and citizens, and sixty-four passworded law firms to each of which were attached four students.

**2. Transactional learning is based on completing legal transactions.**

Within the firms, students act as newly qualified lawyers. In Conveyancing

Figure 1:  
Map of  
Ardcalloch



classes for example, students learn in tutorials about how property might be conveyed via purchase and sale, but their focus is on the two simulated transactions, which are also part-assessments of student competence in Conveyancing. Students thus learn in depth about the practical realities of this kind of transaction.

**3. Transactional learning involves reflection on learning.**

Transactional learning involves thinking about the transactions to be completed and includes consideration of action to be taken on ethical issues arising from those transactions. For our students, it means documenting their firms' transactions, logging individual activities, keeping a (confidential) personal log, and taking part in group reflection on these transactions with a tutor who is

the firm's Practice Management tutor/consultant. The tutor acts as a resource and also as a disciplinary figure should there be any doubt about the quality or quantity of individual student participation in the transactions.

**4. Transactional learning is based on collaborative learning.**

Students are valuable resources for each other, particularly if they have opportunities to engage in both cumulative talk (the accumulation and integration of ideas) and exploratory talk (constructive sharing of ideas around a task).<sup>5</sup> In the GGSL, collaborative learning is used to balance individual or cellular learning. There is of course a place for silent study, individual legal research, and so on, and we emphasize these methods as preparation for collaborative work. Thus, in a personal injury transaction, students

carry out fact gathering and analysis, legal research, and negotiation. They can gather information in real time. On average, a firm will generate around 20 to 30 letters in this process (see Figure 2, below), which ends with a negotiated settlement of the claim. Aspects of firm performance are tracked and presented in feedback sessions to students.

**5. Transactional learning requires holistic or process learning.**

In their traineeships, the students are asked to undertake tasks that demand a holistic understanding of legal process and legal procedure. In this sense, students need to arrive in their traineeships not only with a sufficient knowledge of the parts of a transaction—which letter is sent to whom, what content it should include, etc.—but also with a holistic

knowledge of the entire transaction. When they are given a file-in-progress in the office, for instance, they need to be able to move from part to whole, and vice versa, in order to identify what has been done and why, and what needs to be done next. It therefore makes sense to give them considerable practice in carrying out whole-to-part and part-to-whole thinking. Such thinking is effectively the basis of practical legal reasoning, and our students begin to learn this skill by working through simulations of office-based and court-based transactions.

Transactions are embedded within the teaching and learning of specific subjects. For example, in the Diploma curriculum, the “Private Client” unit deals with transactions such as the inheritance of property after death, the winding up of estates, and the making of wills. In the GGSL course there are no lectures and no examinations, per se. Instead, the tutorials

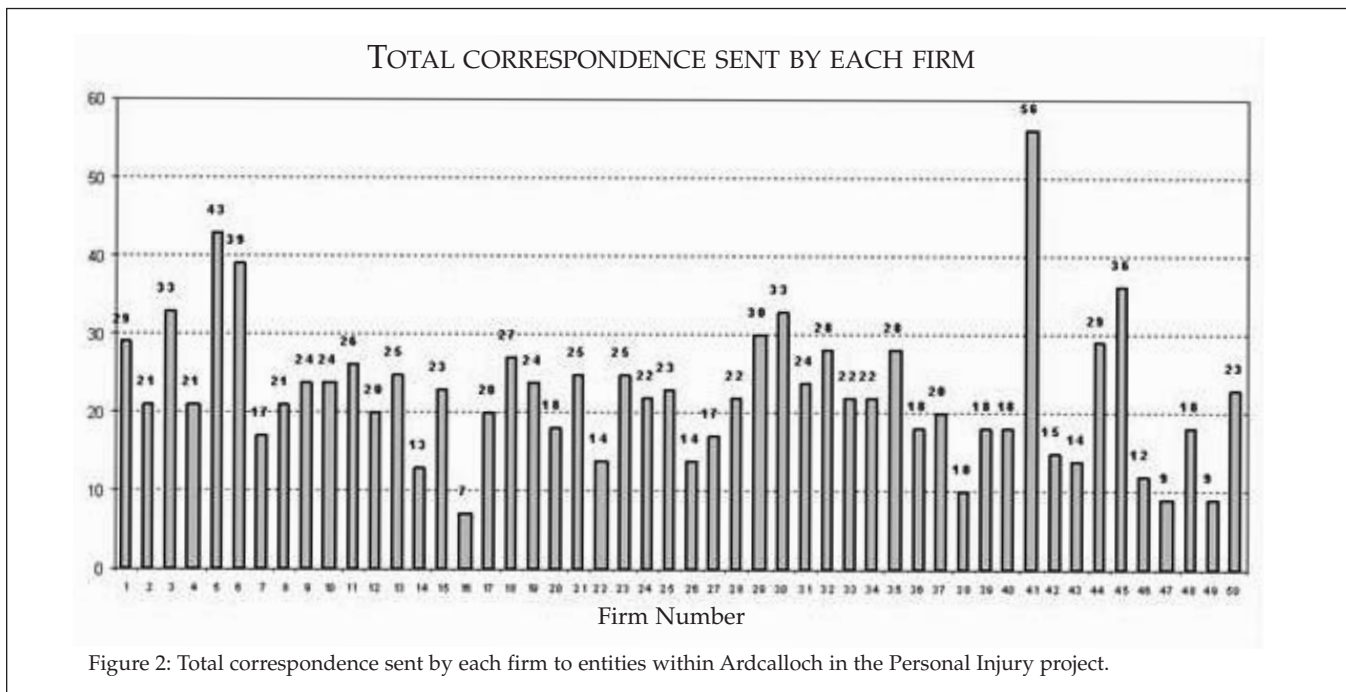



Figure 2: Total correspondence sent by each firm to entities within Ardcalloch in the Personal Injury project.

focus on the work of two transactions, namely winding up the estate of a deceased intestate client, and drafting a will for another client. We have four assessment points which involve students in drafting wills, court documentation, letters, and revenue tax forms. The virtual firms are given two opportunities to pass the assessments for each task, with feedback from tutors. The task assessment criteria are based upon acceptable practice performance—for example, if any of the court documentation would have been rejected by court administrators, the assessment is marked as “not yet competent” by the tutors. Each year the feedback from students demonstrates how useful they found the assessment.

Simulations are only beginning to be recognised as powerful learning environments and assessment tools—and none too soon.<sup>6</sup> There is a need for attractive learning environments and above all, assessment activities that draw students into tasks that are absorbing and that retain the complex, multi-layered sense of reality—what Jonassen in the quote that begins this essay called “the uncertainties and inconsistencies of the real world”—while at the same time enabling students to reflect on their simulated practice and obtain feedback upon that practice. Such an approach requires a fresh view of what constitutes professional learning.<sup>7</sup> Above all, transactional learning and assessment is highly flexible: it can be adapted to full-time or part-time courses. It could be developed as part of a professional competence assessment framework.<sup>8</sup> For practice-based assessments such as we need on the Diploma it is one answer (though by no means the only one) to the problem of creating imaginative learning and assessment applications that simulate what fee-earners and others do in everyday legal practice. 

## ENDNOTES

- 1 D.H. Jonassen, *Cognitive flexibility theory and its implications for designing CBI*, in INSTRUCTION MODELS IN COMPUTER-BASED LEARNING ENVIRONMENTS 385-403 (S. Dijkstra, et al., eds. 1992).
- 2 Further detail about the Scottish system is provided in P. Maharg, *Professional Legal Education in Scotland*, 20 GA. ST. U. L. REV. 947 (2004) (available online at: <http://law.gsu.edu/ccunningham/Professionalism/Index.htm> under “Rethinking the Licensing of New Attorneys—An Exploration of Alternatives to the Bar Exam”).
- 3 For further descriptions and analyses of this model, see P. Maharg, *Negotiating the Web: Legal Skills Learning in a Virtual Community*, 15 INTERNATIONAL REVIEW OF LAW COMPUTERS & TECHNOLOGY 3, special edition, WEB-BASED TEACHING, LEARNING & ASSESSMENT IN LAW 345-361 (P. Maharg ed., 2001); P. Maharg & A. Paliwala, *Negotiating the Learning Process with Electronic Resources*, in EFFECTIVE LEARNING AND TEACHING IN LAW 81-104, (R. Burrige, et al., eds., 2002); P. Maharg & A. Muntjewerff, *Through a Screen, Darkly: Electronic Legal Education in Europe*, 36 LAW TEACHER, LEGAL EDUCATION IN EUROPE 3, 307-332 (2003).
- 4 See J. Dewey, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION (1916). Note that Dewey was invited to teach at Columbia Law School by Dean Harlan F. Stone in the 1920s.
- 5 C. Van Boxtel, et al., *Collaborative Learning Tasks and the Elaboration of Conceptual Knowledge*, 10 LEARNING AND INSTRUCTION 311-330 (2000).
- 6 See, e.g., James Gee, WHAT VIDEO GAMES HAVE TO TEACH US ABOUT LEARNING AND LITERACY (2003). For a range of current simulation providers to industry, see reports available from Brandon Hall at [www.brandonhall.com](http://www.brandonhall.com).
- 7 In an experimental/control group experiment on the use of resource-based learning environments, Vermetten, et al., found evidence of improved performance in students only where the innovative approach was a prominent element of the curriculum. See Y. J. Vermetten, et al., *Powerful Learning Environments? How University Students Differ in Their Response to Instructional Measures*, 12 LEARNING AND INSTRUCTION 263-84 (2002); see also J.D. Vermunt & N. Verloop, *Congruence and Friction Between Learning and Teaching*, 9 LEARNING AND INSTRUCTION 257-280 (1999).
- 8 We are working with Dutch colleagues in the RechtenOnline Foundation to produce international simulation projects using their simulation environment, Sieberdam, as well as Ardcalloch.

# CANADIAN BAR ADMISSIONS

by John M. Law

## INTRODUCTION

Historically, Canadian legal education has consisted of two stages: an academic stage at a university law school followed by a vocational stage designed to “bridge the gap” between academic study and law practice. Central to the latter is a period “in articles,” a sort of apprenticeship of 10 to 12 months’ duration during which the law graduate works for and under the supervision of an experienced legal practitioner. However, to address concerns about the variable quality of the articling experience as a means of preparation for general law practice, Canada’s provincial law societies have established formal bar admission programs. These programs are designed to augment the applicants’ articling experiences and to provide a certain standard of preparation for practice. While at one time these programs focused on instruction in jurisdiction-specific substantive and procedural law in core practice areas, over the last 20 years there has been a greater emphasis on the development of practice skills and attitudes. Finally, the practical stage culminates in a bar examination, of varying content and structure, which has not, except for the members of some minority groups, proven to be a major obstacle to practice, as typically only one to two percent of students fail the test.

Over the last four years, law societies in the provinces of British Columbia, Ontario, and Alberta (the latter as part of a regional consortium with Saskatchewan and Manitoba) have conducted major reviews of the vocational stage of legal education. As a result, the structure and content of bar admission programs and examinations have been refined or reformed to better measure and assess the entry-level



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Legal Education Society of Alberta. Law has been an associate dean and has twice served as a member of the Board of Trustees of the Law School Admission Council. He has been also a member of several Law Society committees and was the executive director of the Canadian Institute for the Administration of Justice. Currently, he is a member of the University of Alberta’s Board of Governors.

competence of persons seeking admission to practice in these jurisdictions. The purpose of this essay is to briefly outline these developments.

## NEW DIRECTIONS

It must be stated at the outset that the reforms have not affected the general structure and nature of articling, which remains intact as a central element in each province’s integrated admissions or licensing process. These processes are designed to ensure that newly admitted lawyers are competent and fit to begin the practice of law as measured by the demonstrated possession of legal knowledge, lawyering and law practice skills, professional attitudes, experience in the practice of law, and good character. Despite its imperfections, articling continues to be seen as a sound means for the application of legal knowledge in a practice setting, the acquisition and enhancement of practice knowledge and skills, and the development of a sense of professionalism. To better ensure that articling meets these goals, the law societies have committed themselves to greater monitoring and regulation of the articling process and to

greater provision of educational support in the areas of practice skills development, examination preparation, professional and personal development, and instruction in the substantive and procedural law associated with core areas of general practice. While these educational supports will be delivered in a variety of ways, increasing use will be made of electronic formats.

Continuing a trend which began more than 20 years ago in British Columbia, with the advent of the Professional Legal Training Course (PLTC) directed towards the development of practice skills, the most significant changes have concerned the structure and content of formal bar admission programs in order to rationally and systematically address the issue of entry-level competence. Increasingly, traditional bar admission programs, which focused on instruction in jurisdiction-specific substantive and procedural law, were perceived to be inadequate in light of competency profiles developed by the various law societies, which defined competence in terms beyond simply the possession of legal knowledge to include practice skills, abilities, and professional attitudes and judgment. Moreover, the traditional programs seemed to be too parochial in a time of greater lawyer mobility under the National Protocol on Transfer and Mobility.

British Columbia has recently refined its ten-week program with greater emphasis on the development of lawyering skills such as legal research, problem solving, advocacy, writing, drafting, interviewing, and advising in the context of core practice areas. Using a small-group format, these skills will be developed through exercises and assignments which will be critically assessed by a small cadre of full-time instructors who are senior lawyers with practice and teaching experience. Significantly less attention

will be paid to instruction in substantive and procedural law, as it is expected that students will have learned these subjects during the course of their university education. The program will be offered three times a year.

Ontario decided to radically overhaul its formal bar admission program in 2003, with implementation set for 2006. The new program represents a significant shift in focus to a skills-based licensing and education program that is more in keeping with the responsibilities of the law society as a public interest regulator and the needs of the profession in the 21st century. After graduation from law school but before commencement of the ten-month articling period, students will be required to participate in a five-week skills development and professional responsibility program which will provide more than double the previous amount of skills instruction. The purpose of the program is to ensure that newly licensed lawyers possess problem-solving skills and are able to effectively and ethically function in terms of legal research and writing, client contact, management of transactions, court applications, and dispute settlement processes. Like that of British Columbia, the course is designed to allow students to learn, practice, and improve those skills that have been identified, after extensive consultation with experienced practitioners, as critical entry-level competencies.

The program will be delivered using a problem-based learning method in which approximately 1,400 students, divided up into small firms of no more than six members each, will handle a number of model files derived from client matters typically encountered in early general practice. Experienced practitioners will serve as facilitators and coaches to each of the "firms" and will provide critical feedback on assignments and formal assessments.

In Alberta, students will undertake the five-month course in conjunction with their articles. Like the other jurisdictions, the course content is based upon a competency profile which requires the newly admitted lawyer to demonstrate competency in four areas: lawyering skills, practice management, ethics and professionalism, and legal knowledge. Because the primary focus in the course is on the development of skills and attitudes, students will be expected to either possess the requisite legal knowledge in core areas of practice, or acquire it using the resource materials provided. The development and assessment of lawyering skills will take place in eight learning modules, seven of which are common across the consortium and one of which is jurisdiction specific. The major innovation concerns the delivery of the course—five of the modules will be interactive and delivered online. Students will become members of a virtual “law firm” and in that setting will deal with a variety of clients who will present common but increasingly complex problems. The remaining modules will address advocacy, negotiations, and interviewing and advising, and will be delivered using a face-to-face format. This new program is designed to offer students greater flexibility in meeting the program requirements and less time away from the offices where they will be articling.

In all of the jurisdictions, students will be formally evaluated on the basis of assessments of their skills conducted by program instructors. Students in British Columbia and Ontario are also required to successfully pass bar examinations. British Columbia will require students to pass two three-hour qualification examinations that test their knowledge of substantive and procedural law in eight core areas of legal practice. Ontario will also utilize two licensing examinations, each of seven hours’ duration and consisting of 250 multiple-choice questions. The

questions will be based on detailed competency profiles, in both litigation and non-litigation contexts, developed after extensive consultation with a diverse range of practice experts. Blueprints have been drawn up around these entry-level competencies to systematically guide the content, structure, context, and scoring of the examinations.

## CONCLUSION

With the changes described above, the vocational stage of Canadian legal education continues to move away from the traditional focus on the acquisition of legal knowledge to a skills-based model concerned with what the nascent lawyer can do with the acquired knowledge. The instructors will be charged with assessing the applicants’ abilities to apply their knowledge in a skilled, effective, and ethical manner to problems arising in a workplace setting. While it is too early to tell, surely this system will provide a better way to develop and assess the competence of new lawyers, a task which, arguably, lies at the heart of the profession’s overarching obligation to serve the public interest. ■

## TRAINING AND LICENSING LAWYERS IN ENGLAND AND WALES

*by Nigel Duncan*

This essay will present the current lawyer training and licensing regimes operating in England and Wales in order to explore the lessons which might be considered by those responsible for the same tasks in the U.S. It will focus on those aspects that are seen as crucial for the preparation of effective, ethical lawyers and explore the methods which have proven

to be most effective. Of particular interest may be the way in which ethical competence is assessed through the use of simulations and how validity and reliability are established in the assessment of skills (such as client counseling).

## TWO TRACKS OF PRACTICE

In England and Wales the legal profession is divided into two branches: solicitors, who are the first contact for clients and undertake most types of transactional work, and barristers, who are specialist advocates. Both branches of the profession retain responsibility for the training and accreditation of their lawyers, and the methods used share important common characteristics. In each branch there are academic, vocational, and real-experience stages.

## THREE STAGES OF PREPARATION

The academic stage for both branches constitutes an undergraduate law degree or, for a significant minority of students, a degree in another subject followed by an intensive one-year course covering “the foundations of legal knowledge.”<sup>1</sup> The vocational stage involves a one-year course—the Legal Practice Course (LPC) for solicitors and the Bar Vocational Course (BVC) for barristers—which focuses on the skills and knowledge required for that particular type of practice. The final stage—a training contract for solicitors and pupillage for barristers—is supervised work in a law firm or a barrister’s chambers.<sup>2</sup>

Although there are differences between the training provided for the two branches of the legal profession, the underlying principles are the same. In particular, what is regarded as crucial is largely common to both. For example, during the vocational stage, the LPC includes courses in a number of core practice areas, three electives, and the study of the skills of Advocacy, Interviewing and Advising,



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Writing and Drafting, and Practical Legal Research. The BVC focuses on Evidence, Procedure, and Remedies, two electives, and the skills of Case Analysis, Legal Research, Advocacy, Conference Skills, Negotiation, Opinion Writing, and Drafting. The integration of learning new areas of law with the skills of practising in those areas is common to both. This integration is accomplished by working with realistic exercises in a simulated clinical setting. Students get practice and receive feedback on their developing skills in analysing cases, researching the law, and applying their research conclusions to various tasks in the interests of their clients.

While the real-experience stage is informed by a common approach, there are some differences. On the barrister track, pupillage is one year, during the second half of which pupil barristers may take on their own cases. The training contract for solicitors lasts for two years and trainees typically have four six-month “seats” in which to gain diverse

experience within their employing law firm. These differences between the two branches flow from the different natures of the work and the organisational structures of the professions. However, the requirement to gain real experience under supervision is seen as essential for both branches.

### ASSESSMENT DURING THE STAGES

The academic stage is assessed like other undergraduate degrees, usually by a mixture of coursework and final closed-book examinations. Assessment on the vocational courses is often more varied and practice focused; I shall present some concrete examples of the assessment tools below. Assessment of the real-experience stage is done by the supervisor and generally constitutes a broad judgment of readiness for practice.

The essential elements of these programs include learning the substantive law, training in the skills required to apply that law, and gaining practice experience through supervised work on real cases. None of these elements would be regarded by those responsible for assessing practice readiness as dispensable. The BVC has been a required step for barristers since 1989; the LPC has been required since 1993. In 1998 the Bar published a volume called *GOOD PRACTICE IN PUPILLAGE* to set standards for the experience stage for barristers. A re-evaluation of the solicitor apprenticeship is currently underway to ensure that trainees undergo a thorough assessment of their readiness for practice at the end of the entire process.<sup>3</sup>

A number of developments designed to improve the quality of student learning are currently taking place in England and Wales. The emphasis is on developing a more reflective learning practice, both to improve the quality of learning and to encourage a more integrated approach, which will be a founda-

tion for continued professional development once in practice.<sup>4</sup> Clinical programs, including the increased use of live-client clinics, are becoming more common at the undergraduate stage, and are widely used at the vocational stage.<sup>5</sup> These programs are most commonly taken on by students as voluntary additional activities, although they are sometimes an assessed part of the course.<sup>6</sup>

Of crucial importance for protection of the public is the lawyer's ability to practise in an ethical manner. Legal educators in the U.S. already recognize this essential concern and require all J.D. students to undertake a course in professional responsibility. While many of these courses are widely criticised as mere formalistic instruction on the Codes,<sup>7</sup> there are significant exceptions, mostly using clinical techniques to explore the conflicts and grey areas left by the Codes. Although some undergraduate courses in the U.K. address legal ethics, U.K. legal education mainly deals with these issues at the vocational stage. The BVC uses simulated clinical situations to require students to respond to ethical dilemmas encountered in those situations. Students are encouraged to go beyond narrow readings of the Code contained in the manual with which they are provided<sup>8</sup> and learn and are assessed through writing and role-playing tasks into which ethical dilemmas have been embedded. The approach is described below in the context of client counseling, but similar methods are used in Advocacy, Negotiation, Drafting, and Opinion Writing.

Two elements of this technique are particularly significant. Students are required to act ethically, not merely to proclaim what they would do. Moreover, they encounter these kinds of dilemmas in a supportive context before facing the pressures of real legal practice.<sup>9</sup>

Assessment of any of the requirements of competent lawyering, to be effective, must be consonant with the program of learning, reliable, and valid. This necessity requires the design and implementation of assessment tools that reflect the activities students have been using to learn, that reliably produce the same grades for students performing at the same level, and that reflect what students will need to do once in practice.<sup>10</sup> I shall illustrate an attempt to achieve all three with the Conference Skills (client counseling) course in the BVC taught at my own institution.

### CLIENT COUNSELING ASSESSMENT

Students are provided with a theoretical base in the form of a course manual<sup>11</sup> and develop their skills through role-playing in a series of realistic exercises designed to address progressively the demands of effective client interaction. Those students playing clients are given instructions so as to require the students playing counsel to address, for example, ethical issues. The assessment of these role-playing exercises is done via videorecording, using actors to portray the clients. This method provides consonance with the learning process and a high degree of validity, as the situations are designed to achieve realism.

Reliability is more difficult to achieve. Our approach is to bring the assessment team together to observe recorded conferences and mark according to detailed criteria.<sup>12</sup> The team members all assess the student performance and then discuss the marks given under each criterion. The use of weighted criteria helps to achieve a degree of objectivity and the discussion both identifies the issues which arise and achieves a common approach to the standard to be applied. Once all student work has been graded, statistical moderation is carried out,<sup>13</sup> and grades are reviewed where significant deviations are identified.

All failed grades are double-marked and finally a sample of assessed student work is sent to an external examiner<sup>14</sup> for checking.

### BENEFITS OF THE ASSESSMENT PROCESS

This method produces a valid and reliable assessment of students' readiness to turn to the third stage of their training: working on real cases under supervision in a real law office where they encounter real clients. This progressive approach ensures that students learn their skills in a controlled environment once they have mastered substantive law, that they are assessed as competent before they encounter real clients, and that they gain real experience under supervision before they take responsibility for their own cases. Clients are protected from exposure to lawyers who have not undergone this developmental experience and been assessed as having some minimal mastery of practice.

Many of the characteristics of these programs are widely available in American law schools. The U.S. offerings of clinical courses in law school, for example, far exceed those in the U.K. However, as long as it remains impossible to guarantee that newly qualified lawyers have experienced (in simulation or in reality) communication with a client or advocacy within a courtroom, there must be doubt about their competence to practise and their readiness to meet the inevitable ethical demands of practice. The U.K. approach is not appropriate for transfer to the U.S. situation.<sup>15</sup> However, its key components—valid and reliable assessments of practice skills and supervised introduction to the realities of practice—should, in this author's view, be a required element of the accreditation of every lawyer. 📄

### ENDNOTES

1. Public Law, including Constitutional Law, Administrative

- Law, and Human Rights; Law of the European Union; Criminal Law; Obligations, including Contract, Restitution and Tort; Property Law; and Equity and the Law of Trusts. In addition students must be trained in legal research and achieve a number of general transferable skills.
2. A full description of these various stages and courses is provided in N. Duncan, *Gatekeepers Training Hurdles: the Training and Accreditation of Lawyers in England and Wales*, 20 GA. ST. U. L. REV. 911 (2004) (available online at: <http://law.gsu.edu/ccunningham/Professionalism/Index.htm>, under "Rethinking the Licensing of New Attorneys—An Exploration of Alternatives to the Bar Exam," (last visited October 6, 2005)).
  3. The Training Framework Review. A variety of documents explaining the development of these ideas may be seen at [http://www.lawsociety.org.uk/newsandevents/news/view\\_newsarticle.law?NEWSID=231708](http://www.lawsociety.org.uk/newsandevents/news/view_newsarticle.law?NEWSID=231708) (last visited October 6, 2005) by following the links displayed there.
  4. At my own institution, the Inns of Court School of Law, students keep a Professional Development File containing a structured reflective journal and evidence of their engagement with course and voluntary activities. This file is regularly reviewed by members of the faculty.
  5. Those available at my own institution can be seen at [http://www.city.ac.uk/icsl/current\\_students/pro\\_bono/index.html](http://www.city.ac.uk/icsl/current_students/pro_bono/index.html).
  6. Details of the first example of this may be seen in N. Duncan, *On Your Feet in the Industrial Tribunal: A Live Clinic Course for a Referral Profession*, 14 J. PROF. LEGAL EDUC. 169 (1996). For the most developed example in the UK go to <http://northumbria.ac.uk/sd/academic/law/slo/?view=Standard> (last visited October 6, 2005).
  7. See R. Granfield, *The Politics of Decontextualised Knowledge: Bringing Context into Ethics Instruction in Law School*, in ETHICAL CHALLENGES TO LEGAL EDUCATION AND CONDUCT (K. Economides ed., Hart, Oxford 1998).
  8. See N. Duncan, *The Letter and Spirit of the Code*, in PROFESSIONAL CONDUCT (Burgess, ed., Oxford University Press 2005).
  9. The pressures of the marketplace for legal services may be inimical to the highest standards of professional conduct. Students need to be introduced to working with the Codes before entering practice, and even before entering a learning environment controlled by practitioners. See Auerbach's comments on the effects of litigation on ethical behavior in JUSTICE WITHOUT LAW? vii (Oxford 1983). Although the students' learning experiences encourage a more sophisticated approach, the formal assessment (whether their responses to dilemmas are correct or not) is based on compliance with the Codes.
  10. Readers may wish to contrast this with the approach on the current U.S. bar examination, on which reliability may be high but, because the assessment is restricted to paper and pen tests, validity is harder to achieve.
  11. CONFERENCE SKILLS (Soanes ed., Oxford University Press 2005).
  12. These criteria are laid out in Duncan, *supra* note 2.
  13. Given the large number of candidates, each assessor grades a sufficiently large number of performances for a statistical analysis of his or her grades to have validity. We therefore examine when an individual assessor's grades depart radically from the bell curve of the overall student performance in that assessment. This picks up (in particular) those new to assessing who might be overgenerous or overcritical, or who are too reluctant to use the full range of marks available (a common problem throughout higher education). A team of senior faculty decides whether adjustments to marks are required.
  14. External examiners are experienced practitioners or academic lawyers with practice experience.
  15. Such a structural change, with an undergraduate law degree replacing the U.S. bachelor's degree plus J.D. structure, would not address the central problems with the current U.S. licensing system and if proposed would more likely act as an obstacle to more effective changes.

## LOOKING TOWARD FUTURE BAR EXAMINATIONS: THE STANDARDIZED CLIENT?

by Lawrence M. Grosberg

Nearly everyone who has anything to do with bar examinations acknowledges that our current typical exam does not test all of the skills and knowledge necessary to competent lawyering. It does not assess, for example, whether a future lawyer can counsel a client. It does not evaluate the ability to do legal research, particularly electronic legal research. It certainly does not assess how a fledgling lawyer might examine a witness either before or at a trial. There are many justifications that are offered for these examination shortcomings. The cost of innovative testing technologies is extremely high. Fairness and objectivity are demanding to meet in any licensing examination that is taken by thousands of applicants. Reliability (i.e., consistency of the assessments) and validity (i.e., accuracy in measuring the targeted skills or knowledge) are critical criteria to be satisfied by any standardized test, and those criteria require

empirical data not yet compiled with respect to many lawyering skills. The bar examiners assert that achieving acceptable levels of reliability and validity is difficult with tests that assess counseling skills or cross-examination skills, for example, and that therefore, the bar examination cannot now address these lawyering capacities. And, most importantly, the overall financial costs that would be incurred were we even to begin to consider such expanded testing, the bar examiners assert, are simply prohibitive.

Where does that leave the organized bar? Do we throw up our hands and simply live with these serious limitations in the bar examination? How do we explain to the public that our representations that those who pass the examination are competent to practice law may not be entirely true? Or should the bar examiners simply declare that it is the responsibility of the law schools, and not them, to address the examination's deficiencies? None of these expressions of futility seem appropriate to the legal profession. We are, after all, responsible for assisting our clients in problem solving. We should apply those same skills to the task of improving the bar examination.

The Joint Working Group's<sup>1</sup> conference in Chicago last fall suggests some basis for optimism. At the very least, the people who are dealing with bar examinations on a daily basis were present and actively discussing some of the limitations in the current exam. The attendees represented one of the most comprehensive groups of individuals ever gathered to consider some of these issues. There were numerous state chief justices (representing the judicial institutions that oversee bar admission and bar exams), bar examiners, academics, and leaders of bar associations. The subject matter covered a wide range of issues, from computerized exams to public service alternatives to the traditional bar examination. One



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began teaching, Grosberg was a litigator in a commercial law firm and a managing attorney in a legal services office. He recently completed three years as chair of the Committee on Legal Education and Admission to the Bar in the Association of the Bar of the City of New York. He has lectured on clinical education in Russia, Poland, Scotland, and Nicaragua.

concept I discussed at the conference was the use of "standardized clients,"<sup>2</sup> an assessment technique based on one developed in the medical profession. My reliance on the research and experience of our medical colleagues is worth elaborating on.

Indeed, our medical education and medical licensing colleagues have extensive experience with evaluation issues that are very similar to those facing the legal profession. We would be seriously remiss if we did not look to them for guidance as to how they have responded to these same challenges.<sup>3</sup> Like attorneys, physicians must meet with their patients and obtain enough information to be able to order appropriate tests and complete a diagnosis. The physician then must explain both the diagnosis and the recommended treatment to the patient in such a way that the patient can absorb the information and make a decision about what to do. Similarly, a lawyer needs information in order to counsel the client on available options. This is the core of the informed consent requirement, an obligation that is integral to both the medical and legal professions. For decades,

medical educators have assiduously constructed empirical studies examining different ways to teach and assess the kind of interpersonal skills that are essential to competent doctoring, just as they are for lawyering.<sup>4</sup>


A critical component in those medical studies is the “standardized patient” assessment. This test involves a layperson who first acts as a patient being interviewed and examined by the prospective physician, and later assesses on a written form how the interviewer performed in the session. Medical professors draft the checklist that the standardized patient fills out. The laypersons are trained to portray the patient and evaluate the student’s performance. This tool assesses the skill of obtaining specific facts as well as the abilities to listen, relate to the patient, and explain a diagnosis or a treatment protocol.

This is not the place to review the extensive empirical data demonstrating the reliability and validity of this assessment tool. It is enough here to point out that respected psychometricians have sufficiently attested to the appropriateness and effectiveness of these techniques.<sup>5</sup> The result is that standardized patient exams are not only used for formative testing in nearly all medical schools, but also, following the approval of the National Board of Medical Examiners, have become an integral part of the medical licensing examination series.<sup>6</sup>

Seeking to emulate the medical model, I developed a “standardized client” assessment tool for use at the New York Law School. Several colleagues and I have now been experimenting with it for several years. Last spring, for example, our first-year students conducted more than 1,400 standardized client exercises. Instead of a patient, the layperson portrays either a client or a witness. As with the medical

analogue, law professors draft the evaluation instrument that is used and then train the laypersons to play the roles and to evaluate the law students’ performances. The standardized client assesses the law student’s ability to gather facts and the skill with which she or he relates to the client. In a counseling session, the standardized client evaluates the student’s ability to convey legal opinions and options to the client. Last semester, for the first time, we gave students limited grade credit for their performances on the standardized client exercises.<sup>7</sup> We have only begun to generate the kind of data that supports the use of the standardized patient as an integral part of the medical licensing examination series. But it is a beginning.

Our medical colleagues’ continuous experimentation with new and innovative ways to teach and evaluate medical students is not limited to standardized patients. Most medical schools are now using computerized testing, both with multiple-choice exams and with sophisticated interactive testing. There is even significant innovative work being done with simulated human bodies—called “mannequins” or “simulators”<sup>8</sup>—that enable evaluation of surgical as well as other diagnostic techniques. Being open to new and better ways to teach and assess has meant that medical educators have achieved a much more sophisticated and nuanced way both to educate future physicians and to evaluate them for licensure. There seems to be no real reason why the legal profession cannot be similarly open and progressive, insofar as experimenting with new assessment techniques. The purpose is not just to implement new ideas, but to improve our ability to carry out our responsibilities, one of which is our licensing duty to assure the public that those whom we license to practice law are minimally competent to do so. Technological and empirical research aimed at

achieving that goal should be actively supported by the bar. The gap between what the medical profession does and what the legal profession is doing is enormous. While there may be practical or financial justifications or rationales for these differences, our inability to adequately satisfy those duties and responsibilities to the public constitutes a continuing shortcoming of the bar.<sup>9</sup> 

## ENDNOTES

1. The Joint Working Group on Legal Education and Bar Admissions was a panel of experts in these areas that was co-sponsored by the Association of American Law Schools, the ABA's Section of Legal Education and Admissions to the Bar, and the National Conference of Bar Examiners, with participation by the Conference of Chief Justices. The Joint Working Group put on an invitational seminar in September of 2004.
2. Lawrence Grosberg, *Standardized Clients: A Possible Improvement in the Bar Exam*, 20 GA. ST. U. L. REV. 841 (2004).
3. See, e.g., Jayne W. Barnard, *Assessment of Clinical Skills in Medicine and Law*, 18 BAR EXAMINER 3:18 (2004); Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 394-98 (2002).
4. See, e.g., M.H. Swartz, et al., *Global Ratings of Videotaped Performance Versus Global Ratings of Actions Recorded on Checklists: A Criterion for Performance Assessment with Standardized Patients*, 74 ACAD. MED. 1028 (1999).
5. *Id.*
6. See [www.usmle.org/Orientation/menu/htm](http://www.usmle.org/Orientation/menu/htm), describing the Step 2 Clinical Skills part of the medical licensing examination. (Visited June 1, 2005).
7. Ten percent of the student's grade in our first-year two-credit Lawyering course was based on the average of the two highest evaluations of the three standardized client assessments that each student received. The faculty videotaped a randomly selected sample of exercises and then reviewed the tapes for the purpose of assessing the quality of the standardized clients' role-playing performance and their evaluation of the students' skills.
8. Jerome Groopman, *A Model Patient*, THE NEW YORKER, May 2, 2005, at 48.
9. Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343, 375-8 (2003).

## NEW HAMPSHIRE'S PERFORMANCE-BASED VARIANT OF THE BAR EXAMINATION: THE DANIEL WEBSTER SCHOLAR PROGRAM

by Hon. Linda S. Dalianis and Sophie M. Sparrow

As of July 1, 2005, New Hampshire officially launched the Daniel Webster<sup>1</sup> Scholar Program, a variant form of the bar examination. Initiated by the New Hampshire Supreme Court, this practice-based teaching and licensing program is a collaborative effort of the New Hampshire Supreme Court, the New Hampshire Board of Bar Examiners, the New Hampshire Bar Association, and Franklin Pierce Law Center, New Hampshire's only law school.

### WHAT IS THE NEW HAMPSHIRE DANIEL WEBSTER SCHOLAR PROGRAM?

To successfully pass this variant of the New Hampshire bar examination, Webster Scholars must demonstrate that they are "practice ready." To do this, second- and third-year Pierce Law students enrolled in the Webster Scholar Program will complete a range of courses, demonstrate their developing professional skills and judgment, and compile a portfolio of work. Several times during their participation in the program, the Webster Scholars will be required to demonstrate their ability to practice law before a committee of judges, New Hampshire bar examiners, classmates, and faculty. By the end of their final law school semester, Webster Scholars must have shown competence in the MacCrate lawyering skills and values and knowledge of doctrinal foundations. And they must know what they don't know. In short, to pass this variant of the bar examination, students will need to do more than

pass a “paper and pencil” test; they must show that they know how to listen, creatively solve problems, make informed judgments, recognize and resolve ethical problems, negotiate with and counsel people effectively, and be committed to continuing their legal education and contributing to the profession.

To ensure quality in the program, during the first three years, enrollment will be limited to 25 students each year. Starting in the spring of 2006, first-year students will be eligible to apply to this two-year honors program. Second-year students who wish to enroll in the program will be required to have a minimum GPA; waivers for those with GPAs just below the minimum may be granted to students whose applications demonstrate a likelihood of success. To ensure rigor, students will be engaged in comprehensive assessments during their second and third years; those who do not successfully complete these assessments or whose GPAs fall below a given level will be required to leave the program.

Once admitted, the Webster Scholars will be required to enroll in a number of fundamental law school courses, a law school clinic or internship where they will receive live-client training, and several “practice courses.” The Webster Scholar Committee envisions that while Webster Scholars will still have room for electives, they will also have more required courses than other J.D. students, and will have “distribution requirements.” For example, a Webster Scholar could fulfill a family law distribution requirement by completing any of the following four courses: a traditional family law class, a family law clinic, a family practice course, or a family law externship.

Among the program’s curricular innovations are the practice courses, which will be designed by the Webster Scholar Program Director and taught by



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Dalianis served on the New Hampshire Supreme Court’s Education Committee for many years and is the court’s liaison justice to both the Board of Bar Examiners and the Professional Conduct Committee. She is a longtime member of the New Hampshire Bar Association Committee on Cooperation with the Courts.



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fessionalism, sponsored by the American Bar Association and the Conference of Chief Justices.

practicing lawyers. To ensure that students will acquire an increasingly complex and integrated range of skills and knowledge, the director will coordinate course goals and objectives. The aim is to integrate these courses so that students build upon and apply their learning from one course to the next. For example, rather than enroll in different stand-alone practice courses, Webster Scholars could be expected to draft and negotiate incorporation documents in a business practice course and then engage in more sophisticated negotiations in a criminal practice course.

Webster Scholars will have their practice skills assessed through a series of three cumulative interdisciplinary assessments conducted in their second and third years. In contrast to traditional law school examinations, where students are usually evaluated on their ability to understand and apply the law in only one area, such as family law, the Webster Scholars will have to know how to analyze and begin to resolve the many legal problems that accompany clients. For example, in working through a simulation with a family facing divorce, students would show how issues of child support, alimony, tax, property, pensions and retirement benefits, insurance, and inheritance could arise and be resolved. Students would then explain their decisions and recommendations to an evaluation committee.

Webster Scholar evaluation committees will be composed of representatives from the New Hampshire courts, the New Hampshire Board of Bar Examiners, the practicing bar, Pierce Law faculty, and Webster Scholar peers. These representatives from the bench, bar, and academy will evaluate students based upon their portfolios of written and multimedia work, their performances in situations simulating law practice, and their in-person interviews. In addition to assessing students' developing skills, professionalism, specialized knowledge, and values, the evaluation committee will also look at the students' ability to evaluate their own learning, and to reflect upon their development as future lawyers.

## HOW WAS THE NEW HAMPSHIRE WEBSTER SCHOLAR PROGRAM CREATED?

The genesis for the idea is not new. More than a decade ago, a number of lawyers and judges started discussing ways to improve the performance of newly admitted New Hampshire lawyers, many of whom began their legal careers as sole practitioners.

These lawyers had graduated from ABA-accredited law schools and passed the bar examination, but they often lacked the skills and knowledge necessary to practice law effectively. In an effort to remedy this problem, a committee was formed of New Hampshire lawyers and judges and Pierce Law faculty, which has been chaired by New Hampshire Supreme Court Justice Linda Dalianis since its inception; this committee spent the last two years working to design a "better bar exam," one that would "bridge the gap" between what students do in their three years in law school and what they will do as practicing lawyers. As Justice Dalianis, who served as a trial court judge for more than 20 years, has remarked in her presentations to the New Hampshire Bar Association Board of Governors and Pierce Law faculty, "our goal has always been to make lawyers better."

Achieving that goal, however, is not easy. Those of us on the Webster Scholar Committee spent two years researching and brainstorming ways to implement such a program. During our monthly committee meetings, we collectively tackled three major questions, "What is it that law students should be able to do to practice law?" "How would we assess them and know that these students were qualified?" "How will we fund and administer this kind of labor-intensive program?"


In working through these questions, the committee determined that it would be essential to have a program director—a practicing lawyer who could guide and supervise the attorneys teaching the practice courses, counsel and coach students, design the curriculum, engage practicing lawyers as mentors and evaluators, and serve as the spokesperson for the program. Pierce Law agreed to fund the program, and recently appointed attorney John B.

Garvey, a highly experienced New Hampshire lawyer and chair of his firm's trial department, as a professor of law and director of the Daniel Webster Scholar Program. Garvey is now charged with working with members of the Webster Scholar Committee and Pierce Law faculty to design and implement the program, including the practice courses and logistics of the comprehensive evaluations.

In addition to hiring a director, one other task has already been completed. After going through its required rulemaking process, the New Hampshire Supreme Court amended its rules to allow for bar applicants to be admitted to the practice of law after they have successfully completed the Webster Scholar Program. The Webster Scholar bar applicants will still be required to pass the MPRE and the New Hampshire character and fitness requirements. The court's rule amendment took effect on July 1, 2005.

Recognizing the difficulties of launching a project of this scope, the Webster Scholar Committee decided to implement the program as a three-year pilot program, with the hope that Pierce Law Center would fully fund and make the program available to many law students at the end of the three-year pilot period. During the pilot phase, the Webster Scholar Committee plans to continue meeting monthly with the director, providing guidance and feedback about the program's development.

There is an advantage of creating this variant to the bar examination in a state like New Hampshire, a state with relatively few attorneys and only one law school. Under these circumstances, it is much easier to regularly engage in conversations with judges, lawyers, and licensing officials. As David Leach, M.D., noted during his presentation at the October 2004 Joint Working Group Conference co-sponsored by the AALS, NCBE, and the ABA, the quality of

what we do "is directly related to the quality of the conversations in our lives." Here in New Hampshire, we have had monthly, documented conversations, enabling us to build upon and improve the quality of those conversations.<sup>2,3</sup> 

## ENDNOTES

1. The program is named after Daniel Webster, one of New Hampshire's most distinguished lawyers.
2. We also recognize that a number of other factors have enabled us to move from idea to implementation. Members of the committee know and respect each other; each is committed to make this program successful. Our chair, Justice Dalianis, has led the process, setting rigorous agendas and marshalling resources. Her colleague, Justice James E. Duggan, is a former law professor and acting dean at Pierce Law; he understands the issues involved in creating such a program from many angles. The chair of the New Hampshire Board of Bar Examiners, Frederick J. Coolbroth, is interested in other ways to examine lawyers. Former New Hampshire Bar Presidents Bruce W. Felmly and Martha Van Oot are leading attorneys in the state, and knowledgeable about legal education. Attorney Lawrence A. Vogelmann is a member of the New Hampshire Board of Bar Examiners and is a former clinical professor. Pierce Law Dean John D. Hutson is interested in trying and promoting new initiatives that make lawyers better. Professor Sophie M. Sparrow brings teaching and assessment experience.
3. More information about the Webster Scholar program can be found at <http://www.students.piercelaw.edu/webster.pdf>, <http://www.piercelaw.edu/news/mediainfo/clippings/websterschol.htm>, or by contacting Program Director John Garvey at [jgarvey@piercelaw.edu](mailto:jgarvey@piercelaw.edu), 603-228-1541, or either of the authors.

## LICENSURE IN MY IDEAL WORLD

*by Susan M. Case, Ph.D.*

The discussions about ways to improve licensure examinations are exciting discussions that we welcome within the testing unit at NCBE. While I have spent the past few years deeply entrenched in working with existing examinations, I appreciate being able to step back and think about my ideal

world of bar admissions. Of course, my ideal is affected by my training and experience in testing and measurement, and the concerns about fairness that necessarily follow. In my world, the examination would include the following attributes:

**Content relevant to newly licensed practitioners.** Every question would assess something that reasonable people agree a new lawyer should possess in terms of knowledge, skills, or judgments. This is not to say that every examinee would answer every question correctly, but that each question would be a reasonable one to include on the test. This attribute can be met by all examination formats, even multiple choice, if the questions are structured appropriately.

**Broad content sampling.** The content would be sampled broadly enough and be comparable enough across forms and test administrations that candidates would not be disadvantaged by receiving one form of the test as opposed to an alternate form of the test. Examinees should not feel that they were unlucky in the selection of content included on the test.

**Accurate and valid grading.** The scores would reflect the quality of the answers, and would not be affected by things that are not relevant (such as grader inconsistency).

**Equated scores to ensure fairness across time.** The scores would be equated over time so that the scores would maintain the same meaning regardless of the proficiency of the particular cohort of examinees and regardless of the relative difficulty of the exam form.



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world, computer-administered examinations, and written examinations. Her Ph.D. and M.S. degrees are in measurement and evaluation.

**Reliable scores to ensure fairness across exam forms.** The grades would be reliable enough that if a group of candidates were to be tested again, the rank-ordering of those candidates and their pass/fail outcomes would be very similar.

**Anonymity of examinees to avoid bias.** Answers would be graded without regard to the identity of the examinee. The grader would not be able to determine private information about the examinee such as name, law school, age, gender, or ethnicity.

**Reasonable costs.** The examination would be relatively inexpensive. By this, I don't mean that the exam should be cheap, but rather that a component that is more expensive than existing components would not be included without a rationale for incurring the additional expense. Research would have to indicate that the new, more expensive component added something to the measurement outcome that resulted in passing more people who should pass or failing more people who should fail.

## MEDICAL LICENSURE

Many people both inside and outside the licensing world are interested in the standardized patient examination that was recently added to the licensing examination process for physicians. This component should be considered within the overall United States Medical Licensing Examination (USMLE) program, which requires that each examinee pass several separate hurdles: Step 1, a full-day multiple-choice test that most U.S. students take after their second year of medical school; Step 2, a full-day multiple-choice test that most U.S. students take near the beginning of their senior year of medical school; Step 2 Clinical Skills, a full day of interactions with standardized patients,<sup>1</sup> and Step 3, a one-and-a-half-day exam including a full day of multiple-choice questions and a half day of computerized simulations of patient interactions. Each component is offered in sites around the world, except the clinical skills examination, which, because of its significant cost and complexity, is offered in only six sites, requiring significant amounts of examinee travel.

Please note that each step in the examination sequence includes hundreds of multiple-choice questions that are used to evaluate the ability of examinees to apply their knowledge across a broad range of clinical situations; these questions span the content that is covered by the medical license, even though most physicians ultimately restrict their practice to something less than what is covered by their medical license. Because of the large number of questions, scores on the multiple-choice components are highly reliable; they are also equated across time so that scores maintain the same meaning regardless of the particular cohort

(Continued on page 30)

There are several things that are not listed above because they are not high on my list of desirable attributes. My ideal examination would not have to be a replica of real practice experiences. In order to provide standardization across examinees and anonymity of candidates, I am willing to give up this attribute. Verisimilitude is typically reduced when standardization and anonymity are more heavily emphasized. Multiple-choice exams, for example, are often criticized as being unrealistic; however, they successfully fulfill far more of the above attributes than any other type of exam.

Every testing format has strengths and weaknesses. Some formats that are optimal for educational purposes are less optimal for high-stakes licensure purposes. Table 1 on the next page comments on the extent to which five sample assessment formats (apprenticeship, standardized client examination, written performance test, essay examination, and multiple-choice examination) possess each attribute described above. They are listed in order of verisimilitude—apprenticeship is closer to real practice than is a standardized client examination, etc. Multiple-choice exams are the least like real practice, although questions that are framed within the context of real cases (such as those used on the MBE) require decision-making skills that are far closer to real life than the skills tested by the multiple-choice tests we all remember from school, basically recall of isolated and often picky facts.

The sidebar on this page and p. 30 that discusses the testing sequence for medical licensure is included in this article because critics of the existing bar examination often endorse parts of the medical licensure examination program as being superior to the licensure components in law. It is important to note that the medical licensure system has several hurdles,

**TABLE 1**

	<b>Apprenticeship</b>	<b>Standardized Client</b>	<b>Written Performance Test</b>	<b>Essays</b>	<b>Multiple-Choice</b>
<b>Content Relevant to Entry Level Practice</b>	Can be structured to be relevant.	Can be structured to be relevant.	Can be structured to be relevant.	Can be structured to be relevant.	Can be structured to be relevant.
<b>Broad Content Sampling</b>	Can be broad, but could also be quite limited in scope.	Usually is limited because of significant testing time per case.	Usually is limited because of significant testing time per case.	Usually is limited because of significant testing time per question.	Yes. Can sample 50 cases per hour.
<b>Accurate and Valid Grading</b>	Because each experience is unique, this is difficult to assess. Grading can be done appropriately, but can be biased and unfairly harsh or lenient.	Yes. Interactions and scoring keys are highly structured, so grading can be accurate and valid.	Yes, can be done appropriately.	Yes, can be done appropriately.	Yes
<b>Equated Scores to Ensure Fairness Across Time</b>	No. Because by its very nature, the assessment is unique to each examinee, there is no way to assure consistency across examinees.	No, because cases cannot be repeated over time, but can be scaled to objective tests given at the same time.	No, because cases cannot be repeated over time, but can be scaled to objective tests given at the same time.	No, because cases cannot be repeated over time, but can be scaled to objective tests given at the same time.	Yes
<b>Reliable Scores to Ensure Fairness Across Exam Forms</b>	Cannot ensure fairness across possible alternative apprenticeships.	Can be done, but requires days of testing time.	Can be done, but requires days of testing time.	Can be done, but requires days of testing time.	Yes
<b>Anonymity of Applicant to Avoid Bias</b>	No	No	Yes	Yes	Yes
<b>Costs</b>	High	High	Moderate	Moderate	Low

of examinees and the relative difficulty of the questions sampled. In addition, examinees are required to have graduated from an accredited medical school prior to licensure; many skills that are not assessed by the licensing examination sequence are assessed instead within the medical school experience.

After graduation from medical school, almost all graduates enter a residency program. After several years of residency, the graduates take specialty board examinations in order to become “board certified.” While many medical specialties have oral examinations or other examination components, all have significant multiple-choice components to provide equated, reliable scores. It is also worth noting that the examinations are cumulative, in the sense that content from Step 1 may be covered again in Step 2, Step 3, and even in post-residency board examinations. For example, pharmacology is covered in Step 1 from a basic science perspective, and then is covered in increasingly sophisticated ways throughout the subsequent examination sequence.

Note: Keep in mind that for physicians, the test is national in scope, and entitles them to practice anywhere in the U.S., as opposed to lawyers who are admitted to one U.S. jurisdiction at a time.

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1 Standardized patients are people trained to portray real patients. After eliciting information from the patient and performing a focused physical examination, the examinee records findings in a medical record. The examination includes interactions with a dozen standardized patients and requires a full day of testing.

some of which have multiple components. Every one of those steps includes one day or more of multiple-choice items.

There are strengths and weaknesses associated with every format that might be used for licensure purposes. Testing for licensure is intended to provide evidence that an individual possesses sufficient knowledge and skills necessary for entry-level professional practice. The multiple-choice format is the most common format for licensure exams in the professions, although professions may use more than one format in their examination sequence.

Non-multiple-choice formats, such as performance tests and even apprenticeship assessments, have much to offer by assessing skills of interest, such as the ability to communicate in writing or orally and the ability to ask relevant questions to identify the significant information in a legal problem. However, because of their limitations, such as low reliability, lack of anonymity, and lack of standardization, these formats should not be used in isolation. Combining scores across formats, and scaling scores on non-standardized components to the MBE helps to ensure that the scores are determined without bias and are comparable across time and across testing sites, which are important attributes in ensuring a fair licensing exam. 