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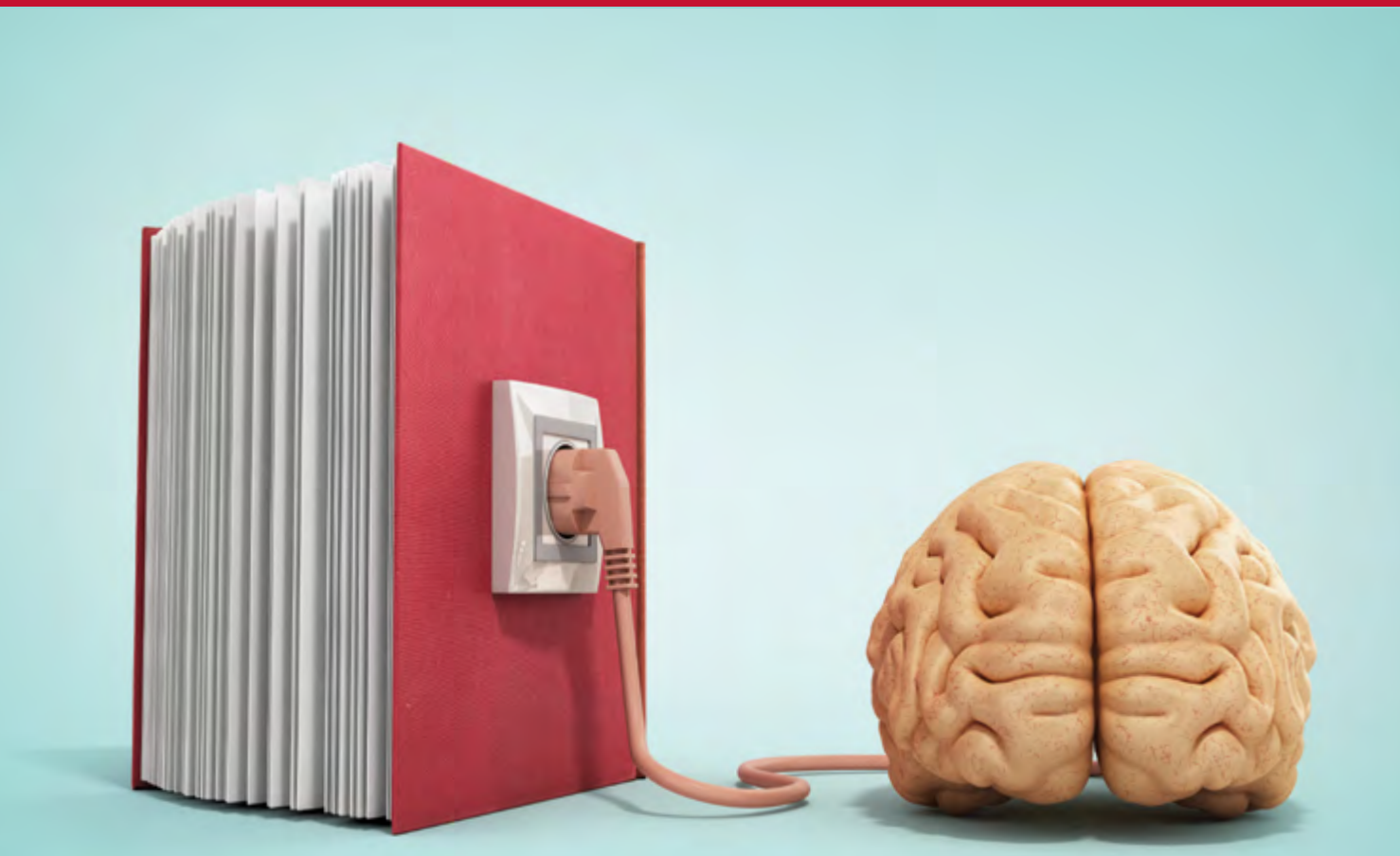

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Wednesday, September 26th | Albany
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Wednesday, October 3rd | Buffalo
Wednesday, October 3rd | Syracuse
Wednesday, October 3rd | Westchester
Wednesday, October 10th | Rochester

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Wednesday, October 3rd | Long Island
Thursday, October 4th | NYC

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Friday, October 5th | Buffalo
Friday, October 5th | Long Island
Thursday, October 11th | NYC
Tuesday, October 16th | Rochester
Friday, October 19th | Westchester
Wednesday, October 31st | Albany
Friday, November 2nd | Syracuse

Henry Miller - The Trial 2018
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Wednesday, October 10th | Westchester
Wednesday, October 17th | Long Island
Wednesday, November 14th | NYC

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7.0 MCLE Credits: 6.0 Skills, 1.0 Ethics
Thursday, October 11th | Rochester
Tuesday, October 16th | Albany
Tuesday, October 16th | Westchester
Thursday, October 18th | NYC
Friday, October 19th | Long Island

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Monday, October 15th | Buffalo
Tuesday, October 16th | Binghamton
Friday, October 19th | Albany
Friday, November 2nd | NYC

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PUBLISHER
Pamela McDevitt
Executive Director

MANAGING EDITOR
Dan Weiller
Email: dweiller@nysba.org

PRODUCTION EDITOR
Kate Mostaccio

DESIGN
Lori Herzing
Erin Corcoran
Christine Ekstrom

COPY EDITORS
Alex Dickson
Reyna Eisenstark
Howard Healy

EDITORIAL OFFICES
One Elk Street, Albany, NY 12207
(518) 463-3200 • FAX (518) 463-8844
www.nysba.org

EUGENE C. GERHART
(1912–2007)
Editor-in-Chief, 1961–1998

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by Deirdre L. Hay

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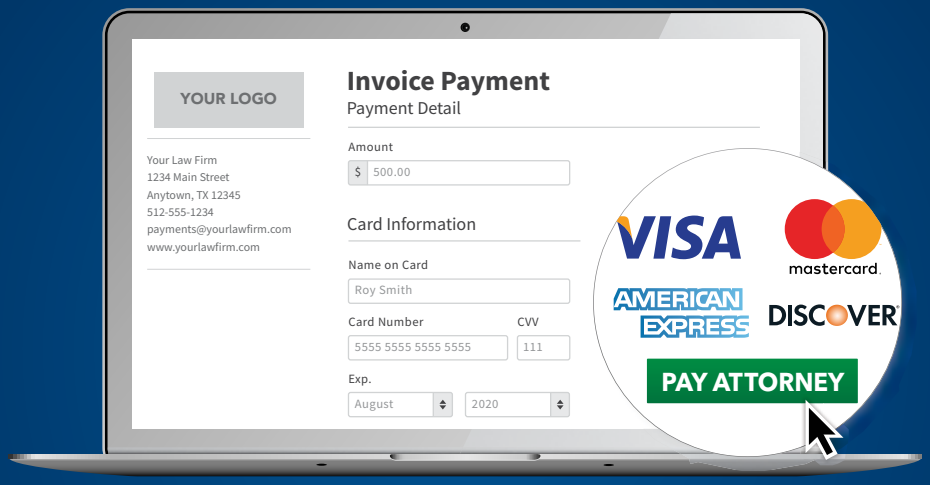

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Enemy of the People?

The United States of America has always been more than a location or place on a map. It has been a set of ideals founded upon a belief in and adherence to the rule of law. In order for that foundation to remain strong and vibrant, it is important that there is public confidence in the institutions of government – Congress, the Executive Branch and above all, the Judiciary – as well as what is commonly referred to as the fourth estate, the press.

Our nation today faces challenges, obstacles and threats that a short time ago would have seemed unthinkable. We lawyers are the guardians of our democracy and we have an obligation and duty to stand on the front lines in a battle to defend and protect the precious civil liberties that are enunciated in our Constitution and Bill of Rights. From the earliest days of our republic, our democracy and system of government have been built upon these fundamental principles.

The first 10 amendments to the U.S. Constitution were adopted in 1792, three years after adoption of the Constitution itself, and are commonly referred to as the Bill of Rights. That phrase – the Bill of Rights – speaks volumes. It sends a message: Not a Bill of Hopes, or a Bill of Aspirations, but a Bill of *Rights.*

The first of those amendments, arguably the most important of them all, provides the essential support for the most fundamental of all rights, the right of free expression of ideas. It provides for the essential maintenance of a free and democratic system of government and a society where one is free to worship as desired, to say whatever one wants to say without recklessly harming or endangering others, to assemble and seek redress of grievances from the government, and, within reasonable limits of truthfulness and veracity, to express ideas and positions. Religious freedom, freedom of speech, freedom of assembly and freedom of the press are the four great cornerstones of a free society. They are the essence of our majestic democratic system of government.

These very rights are now under siege in a way that we haven't seen at least since the McCarthy era in the 1950s, when individuals' lives were destroyed because of their beliefs. In today's digital age, an avalanche of baseless claims and insults can be circulated from a smartphone in the palm of one's hand. Through social media campaigns, there have been serious attacks on the essential institutions of our government, and polls show that real damage has been done to the public's confidence in these institutions.

There have been attacks on the judiciary's integrity and "so-called judges" when public officials and their supporters have been unhappy with decisions. There have been attacks on Congress when they have been unhappy with actions or inaction. There have been attacks on the integrity of academics who have disagreed with the administration's economic policies. There have been attacks on law enforcement agencies and anyone who have taken issue with administration policies. And, perhaps most dangerously, in attempts to stifle investigative efforts and criticism, there have been profound attacks on the news media.

Throughout history, when political leaders in authoritarian societies have been unhappy with perceived criticism from the news media and others, tyrants have often referred to those critics as the "enemy of the people." During Roman times, during the worst of the French Revolution, in Nazi Germany, during the Russian Revolution, and during the Cultural Revolution in China, the term "enemy of the people" was used by tyrants in attempts to diminish, stifle or eliminate criticism. As Scott Simon of National Public Radio recently noted, "'Enemy of the people' is an incendiary phrase. It's been uttered by some of history's most vicious thugs – Robespierre, Goebbels, Lenin, Stalin, Mao – to vilify their opponents . . . who were often murdered."

It is frightening that public officials are regularly using language from the tyrants' lexicon. Lawful investigations are described as witch hunts. Carefully sourced journalism is described as fake news from the enemies of the people. Immigrants are called vermin. African-American individuals

and others are referred to as dogs. This profoundly dangerous rhetoric is precisely the kind of language that was used in Nazi Germany and led to some of the darkest days in our history – World War II and the Nazis' systematic extermination of six million European Jews and millions more Roma, disabled persons, gay men and others.

Before the establishment of this nation, the 1776 Virginia Declaration of Rights, drafted by George Mason with contributions from James Madison and Patrick Henry, recognized that "[t]he freedom of the Press is one of the greatest bulwarks of liberty, and can never be restrained but by despotic Governments." That is as true today as when those words were first written 242 years ago.

Many of us know the children's rhyme, "Sticks and stones will break my bones but words will never hurt me." In fact, words can do terrible harm, especially the words "enemy of the people" when used in reference to the news media. Repeated over and over, these words can have a stifling effect on scrutiny and criticism. It is fair to take issue with a story in the media, just as it is fair to take issue with a judicial decision. But it is unfair and deeply dangerous to question without a modicum of evidence the integrity of the news media or members of the judiciary simply for disagreeing with or challenging political leaders.

President Ronald Reagan warned: "Freedom is never more than one generation away from extinction. We didn't pass it to our children in the bloodstream. It must be fought for, protected, and handed on for them to do the same." Democracy is fragile. We cannot and must not sit idly by on the sidelines as witnesses to the erosion of the public's confidence in the fundamental institutions of democracy and freedom.

We members of this great and noble profession must have the courage to challenge unsubstantiated claims. We must confront those who brand the news media the enemy of the people. The oath that each of us took to protect and defend the Constitution of the United States gives us a special obligation. Winston Churchill noted, "To each there comes in their lifetime a special moment when they are figuratively tapped on the shoulder and offered the chance to do a very special thing, unique to them and fitted to their talents." This is our special moment.

MICHAEL MILLER can be reached at mmiller@nysba.org

A Symposium on A Meeting of the

Editor: Deirdre L. Hay

Welcome to the State Bar *Journal* symposium on legal education, which includes interesting and thoughtful articles assembled by NYSBA's Committee on Legal Education and Admission to the Bar, led by Co-Chairs Patricia E. Salkin, provost of Touro College Graduate and Professional Divisions, and Prof. Larry H. Cunningham of St. John's University School of Law.

The symposium is timely because, as Nicholas Allard and Heidi Brown point out in their article about training legal communicators, the law cannot stagnate. Legal education needs to keep up with changing times, including many technological advances and new ways of doing business. The authors focus on problems such as the need to create powerful legal communicators even in the smartphone age, encourage diversity and address the low priority that law schools place on communication competencies.

In "JDInteractive: An Online Law Degree Program Designed to Expand Access to Justice," Nina A. Kohn examines how the availability of online study for a degree gives talented and often minority students – who may be busy during the day working in the industry, being the family breadwinner or taking care of children – the chance to study law. Online study also helps increase access to justice by keeping legal talent in rural areas, and gives clients who want attorneys with relevant non-legal experience a better chance to hire them. A range of different innovative solutions are in use and under consideration, including Syracuse University's JDinteractive, Brooklyn Law School's Smart LAB™ and the virtual courtroom simulation.

Yet getting a degree is only half the problem. A graduate with law school debt may find that law is not the right fit. A law degree might not even lead to a job, given a difficult market where more lawyers graduate than there are jobs. Pre-law advisors Professor Michael Fox and Joel Strauss set out some excellent advice to undergraduates. They explain that with skyrocketing billable rates, many clients simply will not pay for more senior attorneys to help new associates learn the clients' industry or business. The authors examine how the increasing use of artificial intelligence in discovery impacts the job market, and the advisability of studying accounting, finance, computers, and STEM or pursuing a joint MBA. They look at other possible paths prior to law school, such as working as a paralegal. And they compare the LSAT and the GRE as well as LSAT preparation strategies.

Our committee has spent much time studying New York's transition to the Uniform Bar Exam (UBE). Joan Howarth, in her article "New York Leads from the Middle: Crowdsourcing the Bar Exam Cut Score," explains that the "uniform" bar exam is *not* uniform. Passing scores vary dramatically between states, even though *all* states try to predict the minimum competence to practice law. She wisely suggests that a middle ground score of 133, used by New York and five other states, should be used by all states in order to best support diversity and access to justice while also protecting the public from incompetence.

In "How to Build a Better Bar Exam," Andrea Curcio, Carol Chomsky and Eileen Kaufman refer to a 2008 study sponsored by the Law School Admission Council which showed that many students lacked fundamental case analytical skills. The authors urge using a bar exam format which shifts the focus from memorization to discerning and comprehending legal rules, and consider an option based on California's case file "Performance Test" and the *open-book* multiple choice exam that tests the use of doctrinal knowledge in the context of law practice. They warn of placing too much emphasis on testing "speededness."

In "Rethinking Law Licensing," Judith Welch Wegner urges us to discuss not just the bar examination but law licensing more broadly, as New York State has done by adding pro bono requirements and creating a Pro Bono Scholars Program. She considers New Hampshire's Daniel Webster Scholar Program, a residency-like preparation course over the last four semesters of law school, to be more effective than the bar exam. She contemplates a post-1L pre-bar exam to test critical thinking abilities and legal writing and research skills, followed by an option of two more years of law school or courses plus a residency. Wegner also analyzes limited licensure in designated practice areas.

From a personal standpoint, as an Australian lawyer who did articles of clerkship as an alternative to a year of postgraduate practical studies, both of which were in lieu of a bar exam, and having spent most of my career working for

Legal Education: Minds

Deirdre L. Hay (S.J.D.), Esq. is Director of LL.M. & International Career Services at Cornell Law School, an antitrust attorney, President-Elect of the Women's Bar Association of the State of New York, co-founder of Finger Lakes Women's Bar Association and former Managing Editor of the ABA's *Antitrust Law Journal*. She is the author of *Unilateral Effects From Mergers of Firms Offering Differentiated Products: Australia and the United States Compared* (Vandeplas Publishing, 2008).

U.S. firms, I do not understand why more lawyers do not use the option in Section 520.4 of the Rules of the Court of Appeals describing eligibility to sit the bar through one year at law school and study of law in a law office. With a caring, experienced principal, work in a firm can train attorneys wonderfully, provided they are not used as cheap, dispensable labor or mainly for discovery. This could be an excellent option to increase access to justice in more suburban and rural areas, and in more specialized areas where there is a need for more practitioners.

In New York State, I worry that, following the move to the UBE, the decrease in emphasis in law schools on New York distinctions and learning how to find and apply New York State law might lead to clients not being served effectively. Will lawyers advising New York residents rather than multinational corporations be as well trained in New York State law as they ought to be?

I am also concerned that the push to make graduates more "practice ready," and the time law schools need to conduct practical training that used to be done by experienced practitioners on the job, might come at the expense of developing analytical skills. Core law courses taught in the Socratic style are so important for honing analytical skills and legal minds.

I also think that the burgeoning student debt burden problem could be addressed by offering an undergraduate law degree option. Some students know they want to practice law, or want to practice in a narrow area, and for them a degree before law school is costly.

But that's just my opinion. The more important question is: what is your opinion? I hope you will find much food for thought in this symposium and find much to consider in the issues raised by our authors.

Training Powerful
What Does The Future Hold?

By Nicholas W. Allard and Heidi K. Brown

Twenty years ago, lawyers communicated through lengthy client opinion letters or settlement demand letters transmitted via fax or FedEx, briefs filed with the court (often hand-delivered by couriers), and perhaps the occasional press release carefully crafted for high-profile cases. Today, in our fast-paced, media-saturated, and tech-driven world, we see lawyers like Michael Avenatti advocating for his clients through Twitter soundbites. Pleadings and briefs – once buried in dusty court filing cabinets – are electronically accessible for the world's review and "Monday-morning quarterback" scrutiny. Attorneys conduct negotiations, conferences, and depositions with their national or even international counterparts over Skype, GoToMeeting, or Zoom. Lawyers establish permanent digital footprints through LinkedIn, Facebook, and Instagram. Legal communication is rapidly changing because of technological advances, disruptive business models, and globalism – forces that are transforming the 21st century world of law.[1] The legal profession and legal educators – famously slow and often resistant to adaptation – must evolve with the times. Standing still, clinging to the "business as usual" status quo is not a luxury we can afford.

In 1816, late in his life, America's third president and renowned lawyer, Thomas Jefferson, wrote:

> [L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.

Over 200 years later, societal change happens faster and will continue to do so at accelerating speed. This is the "new normal" to which the legal profession must adjust.

A widely held, if not universal, view of anyone actively engaged in legal practice – employers, judges, clients, recent graduates, and senior supervisors – is that effective communication, including legal writing and oral expression, is among the most important skills that any lawyer must possess to succeed. The Institute for the Advancement of the American Legal System (IAALS) is a "national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system."[2] Educating Tomorrow's Lawyers is an IAALS initiative focused on aligning legal education with the needs of the legal profession.[3] In July 2016, IAALS and Educating Tomorrow's Lawyers issued a report summarizing a national, multi-year project called Foundations for Practice. The report noted:

> The current dichotomous debate that places "law school as trade school" up against "law school as intellectual endeavor" is missing the sweet spot and the vision of what legal education could be and what type of lawyers it should be producing. New lawyers need some legal skills and require intelligence, but they are successful when they come to the job with a much broader blend of legal skills, professional competencies, and characteristics that comprise the whole lawyer.[4]

The findings gathered from a survey of over 24,000 attorneys indicate that "[b]y and large, foundations in the Communications category were considered necessary in the short term by a majority of respondents."[5]

Paradoxically, law schools historically placed a lower priority on teaching fundamental communication competencies (like legal writing) than other core subjects. This trend is reflected in fewer credits traditionally allocated to writing courses in the 1L year of law school, in addition to less job security, much lower salaries, and limited or no faculty voting rights for many legal writing professors. While many schools have made great strides toward achieving professional equity for professors who teach these courses, the academy as a whole still has much work to do in that regard. The tectonic shifts shaking the foundations of law offer an opportunity for law schools and post-graduate training programs to innovatively teach essential communication skills in ways that can transform the profession, and honor this critical component of legal education and practice.

Baby Boomers and Generation Xers often criticize Millennials and members of Generation Z – who comprise

Legal Communicators

the current cohort of law students in this country – as overprotected or entitled, yet most of today's law students are digital natives who, in many cases, are more comfortable with technology and adaptable to change than many of their teachers, mentors, and critics. Forcing a new generation of law students to learn law the way we did – decades ago – is a shortsighted and risky endeavor. Renowned choreographer, dancer, and author Twyla Tharp said, "If you only do what you know and do it very, very well, chances are that you won't fail. You'll just stagnate, and your work will get less and less interesting, and that's failure by erosion." Medical teaching obviously has evolved with scientific advances; business education has adapted to the needs of emerging online markets and the growth of the tech industry. Architecture and engineering schools are using remarkable new tools – from 3D printing, to virtual reality powered by artifi-

Nicholas W. Allard is Professor of Law at Brooklyn Law School. He served as Dean of the Law School from 2012 to 2018 and as President from 2014 to 2018. He also is Senior Counsel in the Public Policy and Regulation practice at Dentons, a global law firm with presence in more than 50 countries. A prolific writer and speaker, Allard has received numerous awards and distinctions including most recently the service award presented jointly by the Brooklyn Bar Association, the Brooklyn Women's Bar Association and the Brooklyn Criminal Lawyers Association. Website: www.brooklaw.edu/nick-allard.

Heidi K. Brown is an associate professor of law and director of legal writing at Brooklyn Law School. Professor Brown was a lawyer in the construction industry for two decades. She is the author of *The Introverted Lawyer: A Seven-Step Journey Toward Authentically Empowered Advocacy* (ABA 2017). Website: www.theintrovertedlawyer.com. Instagram: @introvertedlawyer. Twitter: @introvertlawyer.

cial intelligence, to gamification – to reimagine effective ways to teach skills increasingly in demand in forward-progressing markets. For a learned profession like ours to refrain from adapting to new technology and classroom dynamics is analogous to teaching 21st century photography students only how to develop film negatives in a darkroom. Legal education must move beyond "the way we've always done things." Instead, we should meet our next generation of lawyers where they are, strive to speak a common language, and help our students outgrow us. This can be achieved through institutional support for: (1) innovating legal communication curricula; (2) advancing the role of technology in legal education; and (3) honoring diversity and inclusion in our classrooms and the language of law.

INNOVATING LEGAL COMMUNICATION CURRICULA

Legal writing programs around the country already are teaching legal communication methodologies in innovative and exciting ways. Professors invest time in crafting ripped-from-the-headlines research and writing assignments, and in teaching students how to engage with sources of law affecting our daily lives across an ever-changing, constantly updating societal landscape. Students learn how to draft memoranda and briefs, which, while reflective of traditional pedagogy, are still important vehicles through which students learn fundamental methods of predictive and persuasive legal analysis. Many professors also incorporate practical legal communication devices such as professionally presented emails to partners, clients, and opposing counsel, and "quickhitter" written reports of answers to discrete legal questions posed under a more pressing timeline in a case. Often these shorter assignments are designed to be read on a supervisor's Smartphone instead of a lengthy printed document. Our students need to learn how to balance a lawyer's non-negotiable need to take the necessary time to think, research, reflect, and communicate carefully and thoroughly, against the 24/7 demands and expectations of clients for instantaneous answers to tough questions.

Given the volatility of today's political climate, and the civics lessons currently engaging American citizens on a daily basis, lawyers can and should play a key role in educating the general public about our system of government and the rule of law. In addition, many students come to law school with a passion for activism and an eagerness to be involved immediately rather than waiting until after graduation to contribute to shaping the policy issues of our day. In that regard, professors are developing new genres of legal research and writing assignments, such as blogs and op-eds, to teach students how to communicate with the general public and explain complex laws and legal concepts in terms non-lawyers can understand. Through these assignments, we can blend the foundations of our legal rules (legislative history, development of case law, etc.) with events happening in real time, to bring the law to life. We can point students to the vibrant role of legal communications on the national stage, as when Idaho Senator James Risch specifically referenced the role of legal writing in a hearing before the Senate Intelligence Committee on June 8, 2017. He complimented former FBI Director James Comey on the quality of the written memorandum he submitted prior to his testimony, stating, "I find it clear. I find it concise, uh, and having been a prosecutor for a number of years and handling hundreds, maybe thousands of cases and read police reports, investigative reports, this is as good as it gets."

ADVANCING THE ROLE OF TECHNOLOGY IN LEGAL EDUCATION

The legal writing academy also has embraced technological innovations in legal education. Professors are supplementing the doctrine of legal writing by using technology to identify students' individual areas of needed improvement in legal research, grammar, and legal citation. Available tools include electronic legal research assessments, grammar diagnostics (such as *Core Grammar for Lawyers*,[6] an "online, self-directed learning tool"), and online introductory legal citation primers (such as the LexisNexis® Interactive Citation Workstation). Legal publisher Wolters Kluwer just launched LawClassFeedback, providing electronic formative assessments for legal research and writing courses, and other subjects. Well-renowned legal writing expert, Ross Guberman, developed a legal writing app called BriefCatch that he proposes "will improve any legal document by generating instant feedback and suggestions."[7] Lawyer and author Gary Kinder launched an editing tool called WordRake that helps writers "tighten, tone, and clarify."[8] Lest some legal educators suggest or worry that technology should or will supplant teachers, new technological platforms in the legal arena increase rather than decrease the need for, and power of, excellent "hands on" teaching by humans. Students always will need the requisite context for how to take the information gleaned from the diagnostics and incorporate and apply such learnings in the actual writing process.

Going forward, legal educators also can use technology to afford law students much-needed opportunities to engage in lawyering scenarios that offer decision-making circumstances in which they likely will make mistakes, and that require problem-solving to handle and remedy mistakes. Professors and students can use technology-driven simulations to foster dialogue about professional judgment and mistake-making related to the complex doctrines, rules, and procedures that permeate our professional lives. For example, Brooklyn Law School

and the Center for Urban Business Entrepreneurship (CUBE) have convened a consortium of faculty, external technology partners, and public and private legal entities to launch the Brooklyn Law Smart LAB™, a collection of virtual reality tools that will enhance legal education by allowing students to practice a diverse array of legal skills, and experience real-life circumstances in a virtual-reality setting. The consortium's initial concept is a Virtual Courtroom Simulator, which places the student in the role of a defense attorney at trial, encountering scenarios requiring tactical judgment and affording decision-making and mistake-making opportunities in a low-stakes learning environment. This technology easily can be adapted to teach mediation, arbitration, negotiation, client intake, job interviewing, and a wide variety of other lawyering competencies.

HONORING DIVERSITY AND INCLUSION IN OUR CLASSROOMS AND THE LANGUAGE OF LAW

Additionally, the legal academy and the profession must acknowledge that current events in our country are prompting aspiring lawyers from a wide variety of (and likely new) demographics, backgrounds, and constituencies to apply to law school. This positive development requires us to adjust the way we teach and train new lawyers. As one example, foiling the stereotype of the gregarious extroverted advocate with substantial debate experience in high school or college, or a passion for argument since childhood, some new law students are going to be more apprehensive than others toward performance-oriented lawyering activities – such as negotiations, depositions, and oral arguments. This does not mean that these individuals are not cut out for our profession, or that they should be funneled into a certain area of legal practice requiring less public speaking or interpersonal interaction. Instead, they just might need a more thoughtful approach to learning how to step into these scenarios authentically. If we discourage these individuals from particular types of law practice, or the profession as a whole, we will miss out on a pivotal cadre of voices, thinkers, and problem-solvers. Rather, law schools and law practice mentors can, and should, cultivate training environments in which individuals who initially may struggle with performance-oriented lawyering scenarios receive practical guidance in amplifying their advocacy voices in an authentic manner. One suggestion is to provide workshops focusing less on performance style, and more on mental, physical, tactical, and even emotional preparation for these categories of pressure-filled events.[9] Instead of telling law students and junior attorneys to "just do it" or "fake it till you make it," thoughtful and innovative educators can help these future advocates first understand why certain lawyering activities spark anxiety in them, and then navigate those scenarios with greater self-awareness and substantive and procedural action plans.

Further, acknowledging the global, interconnected, all-encompassing nature of law, the legal communications classroom also offers a forum to foster inclusiveness in the way lawyers speak, write, and otherwise exchange ideas. A recent movement toward "inclusive writing" in various countries advocates for the adoption of gender-neutral pronouns and replacing outdated gender-biased language in statutes and contracts with inclusive language. This could entail, for example, using the word "spouse" instead of "husband" and "wife," and adopting "their" as a gender-neutral singular pronoun (which remains the subject of grammar debates). While this inclusive writing movement has encountered resistance in some esteemed language circles such as the Académie Française, the American legal communications classroom presents a prime opportunity for legal educators to effect positive change, or at least spark dialogue with our new generation of lawyers about the importance of language in the law. Acknowledging the global nature of our legal arena, we must be open to, and inclusive of, cultural, ethnic, gender, sexual identity, racial, socio-economic and all other types of diversity in its broadest sense, in our classrooms and our professional interactions. Accordingly, we must cultivate classroom conversations in which all students can experiment with their lawyer voices and gain fluency in an inclusive legal language.

CONCLUSION

We can inspire our law students to regard legal communication as a powerful tool that is immediately at their disposal: not when they graduate, not when they pass the bar, not when they land their first job, but right now. Classrooms that focus on competencies in legal communication inevitably empower students to experiment with their authentic voices, develop confidence in the *logos*, *ethos*, and *pathos* of their messages, and address the legal issues facing our country – which also can have benefits in students' mental health and wellness. In 2016, the American Bar Association Commission on Lawyer Assistance Programs (CoLAP) – in conjunction with several other entities – established a National Task Force on Lawyer Well-Being. In August 2017, the Task Force issued a report[10] reflecting a call to action for members of the profession to commit to "reducing the level of toxicity in our profession."[11] We can start this initiative in the first year of law school by offering courses devoted to enhancing legal communication skills – in an inclusive manner. We can teach all of our students how to communicate in the language of law and help them adjust to unfamiliar terminology and concepts. In doing so, we also will offer a healthy outlet for stressed-out law students, presenting opportunities to channel their mental energy and potential internal conflict over the issues fac-

ing our country in a productive and professional manner. They will learn to fully research facts, law, and policy, and use their writing skills to communicate concepts to colleagues and the public in a civil, clear, thoughtful, well-reasoned manner.

Our profession faces many challenging pedagogical, professional, and ethical issues. These include the different communication preferences and technical prowess of Millennial and Generation Z digital natives. These issues further encompass the tension between, on one hand, the expectations of efficiency and immediate response to legal questions in a 24/7 interactive world, and, on the other hand, the fundamentals of professionalism.[12] We must carve out space in our legal curricula to inspire students to take the requisite time to research, reflect, and think, and feel empowered to seek advice from more experienced mentors before responding to an assignment or client request. Through this holistic, forward-thinking approach to legal education and professional training, we can reinvigorate our profession and increase the power of law to meet the challenging, rapidly changing needs of society in the 21st century.

1. Previously referenced in Nicholas W. Allard, Presentation, "The Inevitability of Digital Advances in Legal Education," Seventh Annual St. Petersburg International Legal Forum, Program 6.3 (May 16, 2018), and "The Future of Legal Education," Opening Plenary Session on the Future of the Profession, Seventh Annual St. Petersburg International Legal Forum (May 16, 2018).

2. http://iaals.du.edu/sites/default/files/reports/foundations_for_practice_whole_lawyer_character_quotient.pdf.

3. *Id.* "Working with a Consortium of law schools and a network of leaders from both law schools and the legal profession, Educating Tomorrow's Lawyers develops solutions to support effective models of legal education."

4. *Id.* at 2.

5. *Id.* at 8.

6. https://coregrammarforlawyers.com/.

7. https://briefcatch.com/.

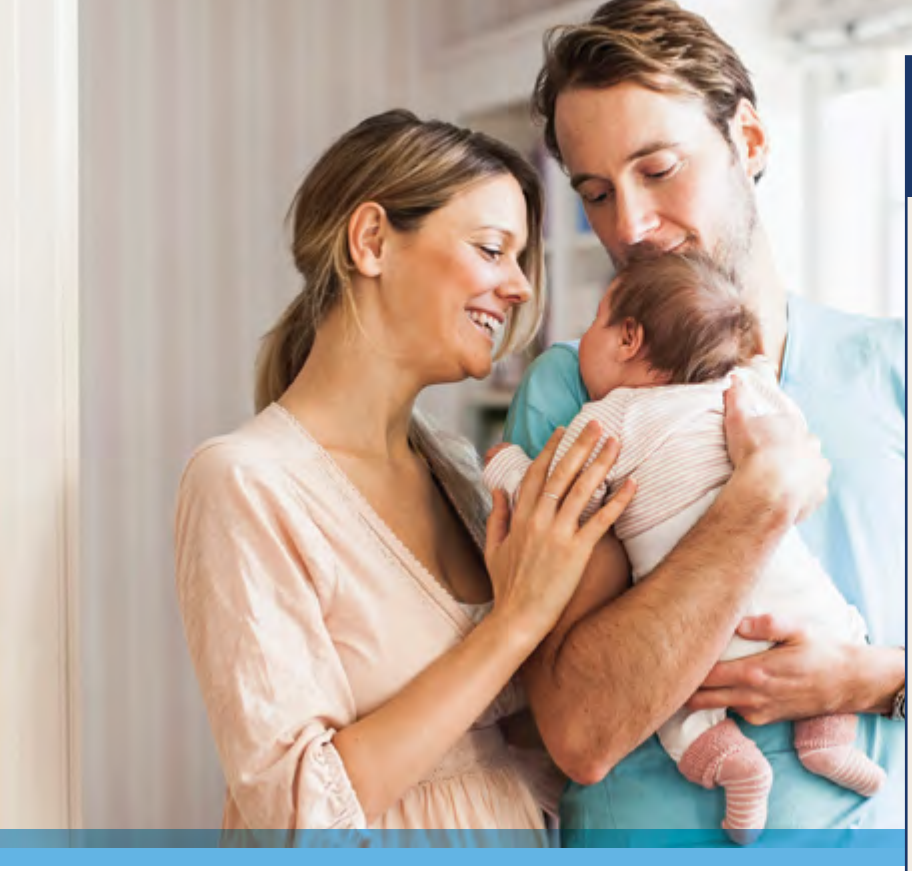
8. https://www.wordrake.com/.

9. *See* Heidi K. Brown, *The Introverted Lawyer: A Seven-Step Journey Toward Authentically Empowered Advocacy* (ABA 2017).

10. National Task Force on Lawyer Well-Being, "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change," Aug. 14, 2017.

11. *Id.* at 10.

12. Also previously referenced in Allard presentation, Opening Plenary Session on the Future of the Profession, Seventh Annual St. Petersburg International Legal Forum (May 16, 2018), *supra* note 1.



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Considering Law

Undergraduates Should Contemplate This Advice

By Prof. Michael L. Fox and Joel B. Strauss

Attorneys are of vital importance to the survival of our republic and, together with judges, have been the stewards of our democratic ideals and the rule of law for centuries – from the founding of the nation. The bench and bar further exist not to advance the interests of only the powerful or the majority, but to protect the rights and privileges of all – including the minority and those with unpopular views. The U.S. Constitution itself was designed to protect both the majority and the minority – for those interested in originalist readings of the founding documents. Look no further than at how the Founders, in their wisdom, constructed a representative legislature that ensured representation of the populous states (in the House) and equal representation of the small and large states (in the Senate), together with a checks-and-balances system among the Three Branches.

Michael L. Fox is Assistant Professor of Business Law and Pre-Law Advisor at Mount Saint Mary College in Orange County, New York. He received his Bachelor of Arts (B.A.) in Economics from Bucknell University (*summa cum laude* and Phi Beta Kappa); and his Doctor of Law (J.D.) from Columbia University School of Law (Harlan Fiske Stone Scholar). He was rated AV by Martindale-Hubbell when he was in private practice. He is a Past Chair of the Young Lawyers Section, and currently serves as Vice President for the Ninth Judicial District of the New York State Bar Association, and as a Member of the NYSBA Executive Committee and House of Delegates. He can be reached at Michael.Fox@msmc.edu. The opinions and thoughts expressed herein are those of the author alone.

Joel B. Strauss is a Partner in the law firm of Kaplan Fox & Kilsheimer LLP, where his practice focuses primarily on securities, consumer protection and data privacy litigation and class actions. He received his B.S. in Accounting from Yeshiva University (1986) and his J.D. from the Benjamin N. Cardozo School of Law (1992). He is also a licensed Certified Public Accountant in the State of New York and worked as a Senior Auditor at Coopers & Lybrand (n/k/a PwC) prior to law school. Mr. Strauss also serves as an Adjunct Instructor in the Political Science Department of Yeshiva University where he also assists with Pre-Law advising and, as a volunteer, chairs the Career Guidance and Placement Committee of the Yeshiva University Undergraduate Alumni Council. Since 2014, Mr. Strauss has served as a member of the NYSBA Committee on Legal Education and Admission to the Bar. He can be reached at Jstrauss@kaplanfox.com. The opinions and thoughts expressed herein are those of the author alone.

Those who are considering a career in law must recognize this proud history and ongoing commitment – and that as a result, law does not lend itself to a 9-5 schedule. Nor is law just a job. It is a profession and vocation.

That said, we are all familiar with the recent issues and the numbers. During the Great Recession, the number of applicants to law schools plummeted by 11 percent from fall 2012 to fall 2013, and 24 percent over the period from 2010-2013.[1] In fact, in the fall of 2013, the nationwide entering class was 39,675, the lowest level since the 1970s, as reported by the *Boston Globe*.[2] Interestingly, it took time for the Great Recession to impact the legal profession in a negative way. First, there was a seemingly positive bump – in October 2009, for example, the number of Law School Admission Test (LSAT) takers rose by 20 percent from October 2008, to a then all-time high number of 60,746.[3] According to *The New York Times* (quoting the director of communications for the Law School Admission Council), there is lag time between worry over the economy and increases in the numbers of those considering graduate degrees.[4] However, there was a countervailing force during the Great Recession – the availability of jobs requiring a *juris doctor* degree contracted. The class of 2015 from the nation's law schools did have an 86.7 percent employment rate, but that was 5 percent lower than the class of 2007 (pre-Great Recession).[5] To put this in perspective:

> About two-thirds of 2015 graduates landed jobs that actually required passing a bar exam, down sharply from more than three-fourths in 2007.
>
> And compared to just one year earlier, the number of jobs that 2015 graduates found was down by more than 3,000, compared with a year earlier. Since the number of graduates was also down – 39,984 in 2015 vs. 43,832 in 2014 – the employment rate remained basically unchanged.[6]

Additionally, according to the American Bar Association, for the classes of 2016 and 2017, 26,923 and 26,293, respectively, had long-term, full-time jobs requiring doctorates in law or in what are called "JD-advantage" positions, 10 months after graduation.[7] That was a drop of 630 available jobs, and the decrease was across the board – from law firms, to academia, to clerkships, to business, to government employment.[8] However, the

School?

From Pre-Law Advisors

data is not always clear, and different numbers can and should be examined for more information. For example, if one looks at the *percentage* of those in the class of 2017 obtaining full-time jobs requiring doctorates in law or in "JD-advantage" positions, there was an increase from 72.6 percent to 75.3 percent, but only because of a 6 percent drop in the number of graduates from 2016 to 2017.[9] Further, with regard to the number of long-term, full-time, J.D.-requiring positions for the class of 2017, there was an increase of 1.2 percent over 2016.[10] "A total of 24,008 members of the class of 2017, or 68.7 percent, had jobs that require bar passage, including jobs that are not long-term or full-time. . . . Comparatively, out of the class of 2016, a total of 23,928 members, or 64.5 percent, had jobs that required law degrees."[11] What about the category of "JD-advantage" jobs? There was a decrease in 2017 graduates obtaining those, from 14.1 percent to 11.8 percent, and the actual number of all entry-level positions in that category declined 21.7 percent (1,100 jobs) from just 2016 to 2017.[12]

However, even in light of that news, let's take the analysis one step further. Per the United States Department of Labor, Bureau of Labor Statistics: "Employment of lawyers is projected to grow 8 percent from 2016 to 2026, about as fast as the average for all occupations. Nevertheless, *competition* for jobs over the next 10 years is expected to be strong because more students graduate from law school each year than there are jobs available."[13] Great competition for jobs in the legal profession is also expected because firms may be restructuring how they staff cases and assignments,[14] and law jobs might be lost due to technological advances such as the growing use of artificial intelligence in the area of litigation discovery. Another factor is the rising cost for obtaining a doctor of law degree: "[t]he average tuition and fees at private law schools in the 2017-2018 academic year – $47,112 – was around $6,800 higher than the average *out-of-state* tuition and fees at public law schools. The difference between average tuition and fees at private schools and average *in-state* tuition and fees at public schools was enormous: around $20,000."[15] Thus, private law school tuition is, on average, more expensive than tuition at a public law school – even compared to students who attend a public school without the benefit of in-state tuition. The difference is larger for those who are residents and qualify for in-state tuition at a public law school as compared to out-of-state public or private school tuition rates. But, that is just the average cost. The tuition and fees for some law schools exceed $60,000 per year as of 2018.[16]

As mentioned by the ABA's article, despite any so-called "Trump Bump"[17] in the market for attorneys, there are those in the field who state that the

> job market for entry-level lawyers is 25 percent smaller than it was 10 years ago, and we are in the midst of a very strong economy. There is no reason to believe that the number of entry-level law jobs will increase any faster than the economy grows, which is roughly 2 percent a year. . . . Anybody who tells you that the job market for entry-level lawyers is good or is getting much better is wrong.[18]

The difficult job market for entry-level lawyers provided the impetus for this article; we aim to provide guidance for those thinking about law school, or for those advising potential law students. The following sections will provide thoughts concisely on a number of matters that should be considered before one embarks on the path toward law school, and beyond.

MAJORING OR MINORING IN ACCOUNTING, FINANCE, COMPUTERS OR STEM

Unlike, for example, medical school, which requires applicants to have completed certain course prerequisites, there are generally no prerequisite courses (or majors) students need to complete in order to apply to law school. That said, students considering law school have often gravitated toward majors in subjects such as Political Science, History, English, Philosophy or Economics. The common refrain of such students being that"math and science are not my strong suits, so I'll avoid those subjects and go to law school." This type of thinking is, for lack of a better term, old school.

Today, more than ever before, successful lawyers need to be able to understand and be at least minimally conversant in the language of business and technology. In *today's* world, many clients will refuse to pay hundreds of dollars an hour for a junior associate to learn the difference between an income statement and balance sheet while working on their deal. Today, law firm partners and, more important, their clients, expect and demand that the attorneys working for them can immediately grasp the financial, accounting and/or technological issues at the heart of the litigation or transaction with which they are being asked to assist. Like it or not, successful attorneys today, whether they be litigators or transactional lawyers, must also be comfortable dealing with technology issues that will be the subject of matters for which they are retained to assist. That is no doubt why a majority number of states have implemented ethics rules requiring attorneys "to become and remain familiar with technologies that affect their practices."[19] To be clear, we are not saying that if you want to go to law school and be a lawyer don't major in humanities subjects such as Political Science, History or English. However, if you do, we strongly recommend that you consider double- or co-majoring in, or at least minoring in, accounting, finance, computers or a STEM subject. Not only will this likely enhance your law school application, but, perhaps more important, it will likely give you a leg up in the increasingly competitive legal job market. And, if you ultimately decide not to go to law school, you should be comforted to know that according to at least one recent study, STEM college majors tend to earn more than non-STEM college majors.[20]

STRONGLY CONSIDER JOINT OR DUAL DEGREE PROGRAMS SUCH AS A J.D./MBA OR MANY OTHER J.D./MASTER'S PROGRAMS

As noted above, the legal job market today is extraordinarily competitive. And, just as undergraduate studies in subjects such as accounting, finance and STEM may give you an extra edge in landing that law job, joint or dual J.D./Master's degree programs will certainly help open many doors and opportunities, as well as increase your network of friends, business connections and colleagues with interests similar to yours. Traditionally, the most common joint J.D. program considered by law students has been the J.D./MBA. The most obvious benefit of adding an MBA is that the student will gain a solid grounding in business and finance applicable to many areas of legal practice, especially in the corporate and transactional arena. It can also open doors to many career paths outside of law, including in various aspects of business administration, the not-for-profit world and "Wall Street." Moreover, there has always been the added benefit that most J.D./MBA programs can be completed in four years, rather than the five years the degrees would take to complete separately, thus saving students a year of time and tuition.

Further, although not widely known, a growing number of universities are now offering a three-year J.D./MBA option. But beware, many of these J.D./MBA programs require attending school at least one summer; thus one would lose the opportunity to work at an internship that summer. Students considering applying to a joint J.D./MBA program should also be aware that most programs require students to apply separately to both the law school and business school, and be accepted to each. The application process should get a little easier, though, as a growing number of law schools (as discussed below) are accepting the GRE (which is typically accepted by business schools) in lieu of the LSAT. Those considering joint J.D./MBA programs should also keep in mind that most MBA programs will expect, if not require, that applicants have a minimum of one or more years of some type of work experience.

In addition to the J.D./MBA, numerous universities are offering a plethora of joint or dual degree programs where students can pursue a specialized area of study

through a master's program while in law school. So, if you are interested in public health, consider a J.D./MPH program. If international affairs is where your ultimate career ambitions lie, consider a J.D./M.A. in International Relations. From Biotech to Human Resources, Data Privacy to Government Affairs, chances are there is a master's program in a particular area that excites you. In a world where "specialization" is more and more common, completion of one of these joint or dual degree programs will also certainly give you a leg up careerwise. As with the J.D./MBA, some schools will allow for completion of these joint programs in just three years instead of the traditional four. And, unlike most MBA programs, there is usually not a "work experience" requirement to apply.

WORKING FOR A YEAR, OBTAINING ANOTHER DEGREE, INTERNING, WORKING AS A PARALEGAL – TAKING A "GAP YEAR"

There is no "usual" path to law school. Some may think that going straight through from undergraduate school to law school is the correct way. Others believe that working for a year or two, or taking a year to travel and determine career goals, is best. The truth is, both may be fine – because it depends on the applicant and the person. Some applicants know they want a career in law. They have a goal, a desire, or an area of practice they wish to pursue. Perhaps they have family members already engaged in the legal profession, or they have had an experience early in life that inspired them toward a career in law or to assist those in need of legal services. Whatever their reason, there are applicants to law school who are successful applying directly from their senior year of college.

There are also those undergraduate schools that have articulation agreements with law schools, where students apply at some point during their college careers and are accepted into law programs before their senior year – assuming they meet established grade point average (GPA) and LSAT scores. If enrolled in such a program at a participating institution, the student may spend either three or four years in a college program before advancing directly to a doctor of law program. This is ideal for the candidate who knows that he or she wishes to pursue an advanced degree in law and who knows that the law schools linked with his or her college are the ones for him or her.

There are also students who are not sure about a career in law but have it on their radar. As the numbers and career prospects discussed earlier in this article make clear, gone are the days when those who wished to have a doctorate useful for many career options, but unsure of what to pursue, obtained a law degree because they did not want a degree in medicine, dentistry, education or philosophy. So what advice do we have for these students? Well, frankly, speaking directly to them the advice is: "do not apply to law school until you are sure that is the path for you." And, in response to the question: "how will I know?" "Take a year, or two, off between undergraduate school and law school." Obtain a master's degree in a field of interest to you – but, as with a law degree, make sure the master's is in a field that will contribute to professional achievement and growth, one that you believe will complement or further your future goals. Additionally, do not assume that your GPA in the master's program will assist in raising your GPA profile on a law school application if your undergraduate GPA was lackluster, because it may not.[21]

Want another option? Work in a field related to the area of law you think you might be interested in. Work in another field altogether, and make yourself a well-rounded person. Travel. Whatever you do, be sure you are analyzing how and whether what you are doing will assist in determining if applying to law school will help to further your career goals and will make you a happy person and a productive citizen.

Some may tell prospective law school applicants that working as a paralegal is the best course. That is not, however, necessarily the case. Commentators and experts warn that if one does not work as a paralegal for a firm or attorney in an area of practice of interest to the prospective law student, the experience may simply not be enough to help achieve career goals.[22] We will say this: working as a paralegal is not a terrible idea, but much like anything else in life, do not just do it to do it. Or because you think it will "check off a box." Work as a paralegal because you want to, because you believe it will enhance your experience in an area of interest and will help to confirm your desire to be an attorney. Otherwise, explore different options, such as working for Teach for America or the Peace Corps, look for an internship in the chambers of a state or federal judge or for a court staff position, work for a political campaign or elected official, obtain an internship at a business related to the area of law in which you think you may be interested.[23] Indeed, according to *U.S. News*, "[i]n some years, more than 90 percent of [Northwestern University Law's – to name one] entering J.D. class has had work experience."[24] The maturity you gain, and the insight you obtain, may be just as important, or more important, than what you actually do. This is the ultimate goal – to make you an informed "consumer," a qualified law school applicant, and an educated aspiring law student.

SITTING-IN ON OR AUDITING FIRST-YEAR CLASSES

Speaking of informed consumers, how many people would buy a car without having taken it for at least a short test drive? Given that law school might be one of the costliest investments you'll ever make in terms of time and money, why wouldn't you sit in on some first-year law school classes before making the commitment to attend? Maybe you'll love it. Maybe you'll hate it. We suggest that you visit and sit in on classes at several of the law schools

you are seriously considering attending, and to which you believe you have a strong chance of getting accepted. Most law schools are open to allowing prospective students to sit in on classes; some even have formal programs for prospective students to visit their campus, visit classes and meet with current students. Not only will doing this give you a better grasp of what you might be getting yourself into, but it might also help your application for admission. Indeed, several law school admissions counselors we spoke with confirmed that some schools actually keep track of which prospective students visited their school. Moreover, referencing aspects of your visit to a specific school in your application to that school will likely only enhance your chances of acceptance.

THE LSAT AND THE GRE

Once you have decided that law school is the correct next move for you, you must consider the application process itself. Not just visiting schools and deciding which may be the right fit, but the actual mechanics of applying. The Law School Admission Council maintains the Credential Assembly Service (CAS) – the online database where your application, transcript, letters of recommendation, LSAT (or GRE) scores, and other materials for application are collected for electronic application to your chosen law schools. Most law schools now make use of the CAS.[25]

We have mentioned the LSAT and GRE above. The American Bar Association and the Council and Accreditation Committee of its Section of Legal Education and Admissions to the Bar are recognized by the U.S. Department of Education as the national accrediting agency for all J.D. law programs.[26] As part of the ABA's standards, law schools must use a "valid and reliable" test for admission of candidates – and the LSAT is the only such test recognized by the ABA.[27] Thus, until recently, only the LSAT was used for admissions by most law schools in the United States. That is now changing. So far, at the time of the writing of this article, 21 law schools have publicly announced they will accept Graduate Record Examinations (GRE) scores (administered by the Educational Testing Service (ETS)) in lieu of the LSAC's LSAT scores as part of the application process, with the three most recent being Columbia University School of Law, Wake Forest University School of Law, and Washington University School of Law, stating they will begin accepting GRE scores in the fall of 2018.[28]

In addition, both Cornell and University of Pennsylvania are accepting the GMAT or GRE in lieu of the LSAT – and Cornell's program is a pilot program, involving no more than 20 students/applicants.[29] On May 11, 2018, the Council of the Section of Legal Education and Admissions to the Bar proposed that the ABA eliminate the LSAT requirement from Standard 503 (although schools would likely still have to use a valid and reliable test of some kind).[30] However, the proposal was withdrawn prior to a debate or vote in the ABA House of Delegates at its Annual Meeting in Chicago on August 6-7, 2018. Instead, the House of Delegates considered and passed resolutions overhauling the law school accreditation process, and accreditation standards.[31] Thus, at this time, law schools that allow applicants to utilize the LSAT or GRE (or GMAT), must "perform validity studies to prove that the test is a good predictor of law school grades. And it falls on the ABA to police use of alternative tests."[32] No doubt, additional law schools may continue to accept the GRE in lieu of the LSAT – especially if those that have already acted find, and can prove, that the GRE is a "valid and reliable" test, accurately predicting first-year success. Indeed, it has been reported that 25 percent of law schools have plans to accept the LSAT or GRE, and that report was prior to the most recent events in the ABA House (although the same article mentioned that 73 percent of applicants may still take the LSAT, believing it will provide an advantage to them on their application).[33]

Therefore, law school applicants must decide *which* entrance examination to take. If they are interested in only pursuing a J.D. degree, then taking the LSAT may be the better option, providing them with a greater range of law schools to which they may apply. If, however, the student is considering another graduate degree at some point (or, as discussed above, concurrent with the J.D. degree), then they may wish to examine whether their law schools of interest accept a GRE score. Should they be applying to only those schools, if their GPAs and high GRE test score suggests they are likely to get admitted to law school too, or the student's primary focus is business and the MBA, they might not feel the need to take the LSAT as well.

One final thought: do not sit for one administration of the LSAT as a "practice run." Because the LSAT Score Report will include not only the most recent score, but also up to 12 previous scores going back up to six years,[34] some schools will look at prior scores received on the LSAT as part of the application process – i.e., you will not be able to choose your best score to include with an application. Because your GPA and LSAT (GRE) score will usually be the two highest metrics in an admission decision[35] (followed by extracurriculars, letters of recommendation, graduate work, any work or internship experience, and other factors[36]), you will want to present the best possible score. Thus, make use of self-administered practice examinations, or test preparation services, to gauge your score results *before* taking the LSAT for an official attempt. This, of course, is a best practice, and if your score (on the scale of 120-180) is too low for you to be competitive at the schools you desire to attend, then taking the examination a second, or third, time may be unavoidable.

CONCLUSION

We have attempted in this relatively short space to provide what we believe is some important advice to consider in your pursuit of an education in the law. It is not nearly all of the information or advice available. As always, circumstances matter, and some or all of the advice above may not be pertinent or applicable to your situation. We do hope, though, that we have provided food for thought and some guidance for evaluating career decisions. Whatever you decide, we wish you much success.

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LSAT or GRE?
The Admissions Test Debate
More Law Schools Accept GRE Scores in Lieu of the LSAT

By Christian Nolan

The Law School Admission Test (LSAT) is tried and true – the only exam accepted by every law school and a proven indicator for potential success in a legal career.

But the LSAT has some unlikely competition now in the form of the Graduate Record Examination (GRE), which has long been the required admission test for graduate schools in America.

As the number of applicants dwindled in recent years, law schools became faced with a growing dilemma of whether to accept GRE scores in lieu of the LSAT as a way to increase and diversify their applicant pool.

In 2016, toward the end of that nationwide law school application drought, the University of Arizona's James E. Rogers College of Law announced that it was willing to accept applicants' GRE scores instead of LSAT scores. Since then, more than 20 other law schools across the country including top programs like Harvard, Columbia, and Georgetown have done the same. In New York alone, seven of the state's 15 law schools have joined in on the trend.

Additionally, Cornell and the University of Pennsylvania will not only begin to accept the GRE, they will also accept the Graduate Management Admission Test (GMAT), which has long been the admissions test used by business schools.

"By experimenting with greater flexibility in our application process, we hope to make a world-class legal education accessible to an even wider variety of students," Eduardo Peñalver, Allan R. Tessler Dean and Professor of Cornell Law School, said in a statement. "Our hope is that accepting the GRE and GMAT will allow us to reach a diverse group of prospective students from different academic backgrounds, such as engineering or technology."

Cornell so far has only committed to this as a pilot program limited to no more than 20 students in order to encourage applicants with a broad range of backgrounds to apply. In June 2018, a day after Cornell made its announcement, New York University School of Law announced it would also accept the GRE for the incoming class in 2019.

The GRE trend began gaining so much traction that many thought the American Bar Association would pass a measure at its Annual Meeting in August eliminating the requirement for an admission exam as part of the law school admissions process.

In May, the council of the ABA Section of Legal Education and Admissions to the Bar passed such a measure by a slim 9-8 vote. However, in August, the same council withdrew its proposal to the ABA House of Delegates. There was substantial concern about the proposed changes from the ABA's Minority Caucus, Young Lawyers Division, Law Student Division and various state caucuses. The proposal will go back to the ABA council for further consideration.

"GOOD EQUALIZER"

According to a Kaplan Test Prep survey, 58 percent of aspiring lawyers say the ABA should keep the standardized testing requirement in place, 36 percent want it lifted, and 6 percent are unsure.

One student who favored keeping the requirement said: "The LSAT puts all students on a level playing field. GPAs vary tremendously based on school and major so the LSAT is a good way to score all students."

Said another student: "The LSAT is an important indicator of how students perform under pressure and timed. It also is a good equalizer."

An opponent of the requirement said: "I don't think standardized tests are really measuring a student's ability to excel at a law school. It's just measuring how good you are at taking standardized tests."

"Considering the potential significance this rule change would have had on the law school admissions landscape, it's understandable why this decision has been postponed," said Jeff Thomas, executive director of pre-law programs at Kaplan Test Prep. "It's important to note that it only passed by one vote in committee this past May. A close vote doesn't equal consensus and that may have given many ABA members some pause about making such a drastic change. The postponement also allows schools that are considering using the GRE and GMAT more time to conduct validity studies, a requirement for offering alternatives to the LSAT."

Thomas said they would be watching this issue closely over the coming weeks and months as they conduct an annual admissions officer survey about which test scores law schools plan to allow applicants to submit.

"In our 2017 survey, 25 percent of schools said they were considering allowing their applicants to submit GRE scores in lieu of LSAT scores," said Thomas. "A lot has changed since that time, so that percentage may increase, as the call for change among law schools remains strong."

Kellye Testy, president and CEO of the Law School Admission Council, the non-profit organization that administers the LSAT, said the LSAT is still the best choice for law school admissions despite the recent GRE trend. She said 99.8 percent of law school applicants in 2017-2018 still relied on the LSAT.

"Using the LSAT protects applicants by providing a good indication of their chances of graduating and passing the bar," said Testy. "The LSAT is the only test that allows candidates to see how they compare to other students being admitted to a given school, so they can focus on the schools that are right for them."

Testy was also pleased the ABA did not yet act on the matter.

"LSAC supports the goal of flexibility for law schools to design their admission processes, while ensuring clarity and fairness for applicants," said Testy. "The ABA Council's decision to reconsider the proposal is in the best interest of law schools and applicants because it allows more time for exploring admission practices that will continue to promote the access and equity in law school admission that the LSAT has long facilitated."

RELIABILITY

While alternative tests may be used by law schools in their admissions process, the schools must be able to demonstrate that the other tests are reliable. The criteria to prove such reliability is unclear. Schools must submit validity studies to the ABA.

According to the ABA *Journal*, Georgetown University Law Center looked at first-year Georgetown Law students between 2005 and 2016 and it found that the GRE was a slightly better predictor of how they performed than the LSAT.

While there is overall less data with regard to GRE exam results as a predictor of law school performance, Educational Testing Service, a non-profit that administers the GRE, has created a new GRE Comparison Tool for Law Schools.[1]

Score users can now use the comparison tool to predict a test taker's LSAT score using the test taker's GRE Verbal Reasoning and Quantitative Reasoning scores from the GRE General Test.

"This comparison tool helps the growing number of law schools accepting GRE scores to understand and appropriately interpret those scores in the context of LSAT scores to better inform their admissions decisions," said David Payne, ETS vice president and COO of Global Education. "The GRE test can help institutions achieve their admissions goals because it is taken by over half a million test takers annually from a broad range of backgrounds – including science and technology fields – that are relevant to the changing needs of the law profession."

Cary Cluck, Assistant Dean for Admissions at Arizona Law, the first law school to begin accepting the GRE scores in lieu of the LSAT, is on board.

"We already know that GRE scores are a valid predictor of law school success for us, and we've seen other law schools perform similar evaluations and reach similar conclusions," said Cluck.

Scores from the GRE Analytical Writing portion of the exam are not used in the comparison tool because the LSAT Writing Sample is unscored and does not contribute to the cumulative LSAT score.

Nolan is NYSBA's Senior Writer.

1. Access the GRE Comparison Tool for Law Schools online at https://www.ets.org/gre/institutions/about/law/comparison_tool/.

Rethinking Law L

By Judith Welch Wegner

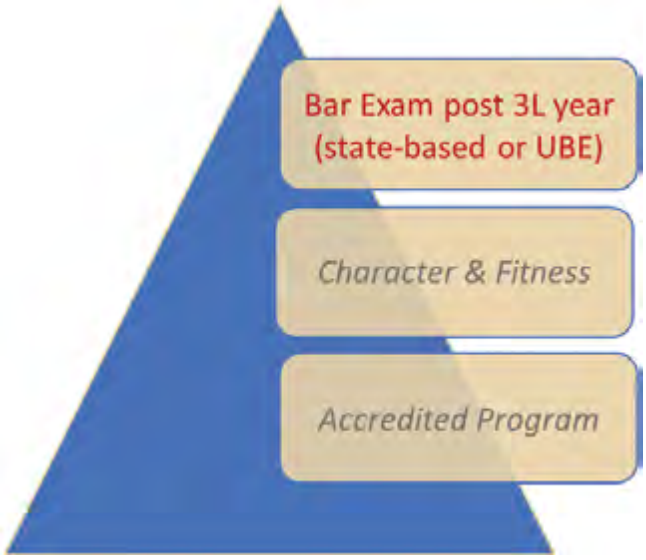
This is an important time for lawyers, legal educators, law licensing authorities, and state supreme courts. Over the last decade, a variety of significant forces have emerged that have driven change in the legal profession and legal education. In the aftermath of the 2008 recession, legal service providers have faced enormous stressors relating to their organizational structures, billing practices, outsourcing, and more. Legal education has also changed significantly in the face of employer expectations, reform proposals, and economic realities. The National Conference of Bar Examiners has launched its Uniform Bar Examination (UBE), incorporating multiple choice, essay, and performance testing. A majority of states have adopted that initiative so as to improve the quality of testing strategies and foster enhanced portability of bar examination scores. State supreme courts have also taken important initiatives – for example, by requiring that those seeking licensure document hours of pro bono or skills education that exceed American Bar Association accreditation requirements.

These diverse developments have resulted in a robust conversation about additional changes to law licensing systems. This article seeks to invite readers into this conversation by explaining why it is crucial to *focus on discussion of law licensing systems* (not just reform of existing bar exams) and suggesting *four areas* in which such conversations might be concentrated.[1]

LAW LICENSING SYSTEMS, NOT JUST BAR EXAMS

The bar examination is a perennial subject of debate. It is a central focus for the National Conference of Bar Examiners, who have been urging states to adopt the UBE as a way to improve drafting of bar questions and developing better bar examinations in general.[2] State licensing boards have in turn focused on whether to adopt the UBE and to adopt passing scores appropriate for their jurisdictions.[3] Law schools have faced increasing pressures from the American Bar Association (ABA) as the accrediting authority to assure a high level of performance on bar examinations by graduating students.[4] California licensing authorities and its state Supreme Court have engaged in highly publicized debates regarding the legitimacy of passing scores given disparate impacts on admission of minority applicants.[5]

This singular focus on bar examinations misses important points. Bar examiners already universally recognize a second area of inquiry: character and fitness.[6] Most state supreme courts and bar examiners also expect bar applicants to demonstrate that they have graduated from an ABA-accredited law school or a law school accredited within their particular jurisdiction. A number also require documented pro bono experience. The following diagram depicts the existing law licensing system as commonly perceived:



If the proposition is correct that multidimensional law licensing systems are already embedded in the existing American legal licensing system, the next question becomes: What should such multifaceted licensing systems look like?

MULTIFACETED LICENSING SYSTEMS: WHAT COMPONENTS ARE IDEAL?

A multifaceted licensing system should reflect best practices in professional licensing and should foster incentives for practitioners to achieve the highest possible level of competence in the public interest. Based on that focus, the following components might be adopted: (1) an initial post-1L test on foundational skills involving critical thinking, legal writing and research; (2) a "residency" requirement that facilitates training and assessment of students' performance in practice-based settings such as clinics, externships and jobs; (3) a possible limited license

Judith Welch Wegner has recently retired after completing more than 35 years as a faculty member and former dean at the University of North Carolina School of Law. She served as President of the Association of American Law Schools in 1995 and was a co-author of Educating Lawyers (study of legal education by the Carnegie Foundation for the Advancement of Education published in 2007). In retirement, Wegner is continuing her work in legal education reform and state and local government law.

system that allows qualified students to gain skills in specific practice areas and be credentialed based on performance in those areas before returning to seek a general license; and (4) an advanced bar examination system that allows applicants who have passed the initial post-1L year exam to demonstrate more in-depth expertise in substantive areas and additional skills. Here is a basic diagram that depicts the relationship among these more nuanced components:

POST FIRST-YEAR, PRE-BAR EXAMINATION ON CRITICAL THINKING, LEGAL ANALYSIS AND BASELINE SKILLS

Readers are likely aware that medicine employs "staged" licensure exams. The initial phase of such exams focuses on "book learning" and fundamentals of reasoning and knowledge within the field, while the later stages focus on clinical competence. Such systems rely on an initial appraisal of "basic competence," which is not an easy standard to explain or define.

Within the context of legal education, it is likely feasible to set a standard for "basic competence" with an eye to critical thinking abilities in core common law subjects following the first year of law school. Critical thinking includes key abilities to know, comprehend, apply, analyze, synthesize, and evaluate.[7] In addition, competence after the first year likely reflects basic legal writing and research. Debates about additional subject areas and levels of "competence" are more fraught.

Creating a new test of critical thinking in selected first-year subjects, with an associated performance test that focuses on legal writing and research, makes great sense as an educational proposition. Such a test might be structured as a voluntary assessment tool that law schools could require their students to take after the first or second year of law school, or students could voluntarily take such a test to determine their command of critical thinking, content basics, and performance before taking on more debt and enrolling in subsequent years of study. Such a test would also give students and their law schools a means for assessing student progress in the first year. It could serve as a wake-up call for law students who are struggling but might not appreciate their deficiencies. It could also help law schools become more accountable for working with students who are at risk of failure and could help schools demonstrate their compliance with ABA accreditation standards.[8]

"RESIDENCY" REQUIREMENTS AND ASSESSMENT STRATEGIES

Law schools were historically reluctant to incorporate "skills" training as an integrated part of their curricula.[9] In the last decade, following increased pressure from accreditors and a declining legal job market, schools have become more committed to embracing a mission that includes "experiential learning," and produces "practice-ready" graduates. There remain disagreements about how best to frame the purposes and formats used to develop law students' basic competence in non-doctrinal skills. Typical educational strategies include clinical programs (supervised by law school faculty), internships (supervised by lawyers at an external placement site), simulations involving specific skills (such as trial advocacy or negotiation), and carefully designed practicums that may situate practice-related activities in substantive contexts. While each of these strategies can prove sound educationally, clinical programs involving students in representation of clients and externships in which students assist lawyers in professional roles will be described here as forms of "residencies" similar to those incorporated in medicine, dentistry, architecture, and education (each of which uses distinctive terminology to describe requirements).

Notably, New York has been a leader in implementing a more comprehensive approach to bar admissions that incorporates a multifaceted "residency" approach in addition to the more traditional bar exam. Three aspects of New York's approach are especially notable for present

purposes.[10] First, as of January 1, 2015, applicants for admission are required to complete and document 50 hours of supervised pro bono service.[11] Second, New York has implemented a "Pro Bono Scholars" program administered by the Chief Administrator of the Courts that allows students in their final semester of law school to participate in a 12-week concentrated pro bono placement supervised by a qualified attorney and faculty member. The program requires students to participate in an academic component and to receive credit for at least 12 academic units toward the school's minimum units required for graduation.[12] Students participating in this voluntary program must also sit for the bar examination during their final semester.[13] Finally, New York imposes an expanded "practical skills" requirement for bar applicants, requiring them to complete at least 15 credit units of experiential coursework in which they demonstrate competence in professional skills and values.[14]

New York's leadership is important for several reasons. Its decisions show that the legal licensing system must indeed be the focus of reform, not simply the bar exam itself. New York's history also demonstrates the important role of the bench and bar, not only bar examiners, in structuring pathways into the profession. New York has also demonstrated a commendable commitment to recognizing the flexibility with which "residency"-like requirements can be structured, including requiring expanded "skills" preparation (that may be attained through clinics, externships, or other more innovative formats), requiring pre-bar-admission pro bono service that is well-supervised and adequately documented, and providing an intensive pro bono residency option that allows graduates expedited admission to the bar.

New Hampshire's Daniel Webster Scholar Program reflects a similar impulse to recognize the importance of residency-like preparation as an important part of the law licensing system but goes farther. New Hampshire's one law school has partnered with the bench and bar to develop a unique, nationally lauded program that incorporates residency-like preparation across the final four semesters of law school.[15] The program selects approximately 24 applicants a year from the University of New Hampshire's first-year class toward the end of their initial year, based on a comprehensive application framework. That framework is designed to consider many attributes (not just LSATs, UGPAs, or first-year law school grades, but instead professional relationships, professional development, personal responsibility, and academic competency).[16]

Perhaps the most notable aspect of the Daniel Webster Scholar Program is the commitment made by the law school, bench and bar, that graduating scholars need not take the New Hampshire bar examination, provided they engage in well-structured and carefully assessed work

each semester, and that a member of the state board of bar examiners reviews work product, video artifacts, and reflective essays compiled in portfolios. Although it is unlikely that this exact system could be replicated in other jurisdictions with many more law schools and much larger lawyer populations,[17] the Daniel Webster Scholar Program offers a proof of concept that indicates how structured learning opportunities related to legal practice and related skills, and carefully framed assessment practices, could provide a residency-based alternative to the traditional bar exam.

LIMITED LICENSURE FOR INTERESTED STUDENTS WITH OPTION TO RETURN FOR J.D.

Existing systems of bar licensure generally assume that students should complete three years of law school and then take a bar examination that allows them to qualify for general licensure. Many states build on this basic system by establishing systems of specialization that allow

lawyers with significant experience to gain certification as specialists in designated areas after they have gained basic licensure and accrued some years of specialized experience. While this approach makes a good deal of sense, other frameworks may be worth considering.

Consider, for example, whether talented law students might develop specialized expertise before broadening their range of knowledge as needed to secure a general license. Under such a different system, a law student who has passed an initial exam on critical thinking and basic performance skills (post-1L/pre-bar exam) might be afforded an important choice. The student might continue for two more years in law school and sit for the general licensing test at the end of that course or study. Alternatively, such students could in their second year enroll in an integrated set of courses and a supervised "residency" program that would prepare them to serve clients in certain contexts in which the state has determined that a significant "access to justice" gap exists.[18] Such areas might include family law, immigration law, landlord-tenant practice, debtor-creditor practice, veterans' disability practice or similar areas. In order to encourage (and not penalize those prepared to engaged in "limited license" practice in order to address access to justice needs), it would be important to subsidize their student loan debt through a loan forgiveness program while they served in a high-need context with a limited license. It would also be important to assure that those practicing on a limited license could return to their home law school (or another, as a visitor, transferring credits back "home") to complete a full, three-year J.D. and sit for a general licensing exam.

This proposal would build upon developments in Washington and a small number of other states, which have adopted or are considering "limited licensing" frameworks in targeted areas of high need where there are documented gaps in access to justice. Washington and others have initially focused on developing licensing systems for "super-paralegals" who could practice following intensive education, supervised practice and examination, but without going to law school. Fundamentally, the Washington system ("limited license legal technicians" or LLLT) allows applicants to enroll in a targeted program focused on family law and involving two years of instruction (based on the assumption that those applying have no previous legal education).[19] Candidates must then engage in a residency-like experience and subsequently pass a specialized licensing exam. Once licensed, LLLTs can perform a range of functions.

The current proposal differs from the Washington State system since it would not call for a new system of education for those without legal training to seek limited licensure. Instead, it would provide a means for those who have completed two years of law school (including a second year with a targeted focus and the equivalent of a semester's supervised practice) to assist those with pressing needs while on a limited practice-based posting before returning to law school. It should also be emphasized that creating a two-year scheme of limited licensure would not create a two-step hierarchy in which beginning lawyers eager to provide those in high need areas would be foreclosed from seeking a full three-year J.D. and a comprehensive general bar license. Significantly, under this approach, students who opt for a limited license after their second year would continue to be able to complete a third year of law school, secure a J.D., and gain a full license after passing the jurisdiction's bar exam.

Now is the time to explore such solutions as part of significant reforms to law licensure writ large, since such innovations can help address the crisis in access to justice, reduce student debt, and provide opportunities for those inclined to engage in specialized high-need practice early in their careers.

ADVANCED BAR EXAM WITH BETTER ASSESSMENT STRATEGIES

There is much that could be said about how to improve current bar exam assessment strategies, even if this proposal did not go farther and suggest that a separate post-1L year exam on critical thinking and performance skills relating to writing and research should be adopted in its own right. Additional attention should be devoted to bar exam formats in general, however, and this section introduces questions to help that process move ahead.

What validation is needed? Many have called for a better system for validating what is tested on bar examinations against the actual work required of minimally competent beginning lawyers.[20] That assumption should be a given. Unfortunately, too much time has been spent doing study after study of possible lawyering tasks, notwithstanding relatively widespread agreement on the knowledge and skills beginning lawyers need to possess or develop shortly after entering practice.[21] It is time to quit stalling by searching again and again for answers to "wicked problems"[22] that cannot be objectively answered in a singular fashion. Instead, we need to look ahead and begin to act on what we know. The questions that follow are intended reflect available possibilities. They are raised in the form of questions to provoke thought, rather than to give definitive answers.[23]

What subjects should be tested? The MBE portion of the Uniform Bar Exam has been expanded to seven subjects, with the addition of civil procedure. All told, the UBE covers 12 subjects, while some states such as Florida and California test many more. Does minimum competence really require that students prepare for all these subjects, during the compressed two months of preparation following graduation and before the post-3L bar?

Should students be given the opportunity to take a post-3L year exam that includes options for in-depth assessment in particular professional areas in which they might wish to practice? England and Wales have begun to move in that direction, allowing more in-depth evaluation once core competence in a broader array of subjects has been assessed.[24]

Should a post-3L exam more closely resemble actual work conditions that good lawyers navigate? For example, should open book strategies be employed, whereby those being examined are given a closed set of materials they can consult in answering questions). Such a strategy would move the exam away from focusing on memorization and move it into closer alignment with realistic legal tasks. Ontario, Canada has been exploring such options.[25]

Could additional types of performance questions be integrated into a post-3L bar exam? England and Wales have recently moved to assessment-center based simulations in which candidates are required to engage in certain basic tasks such as client counseling or negotiation.[26] Even if actual candidate performance were not required as part of a post-3L exam, applicants could be asked to evaluate lawyers' conduct in filmed vignettes of similar tasks and assess and explain where those depicted did a good or bad job.

Could more flexibility be introduced into the post-3L exam process? For example, could law examinees be given the opportunity to retake parts of the exam they did not pass (assuming the current structure of multiple choice, essay and performance test components)? Other professions use such a system.[27]

Could a wider variety or more closely focused objective questions be developed, in contrast to the multiple-choice prototypes currently employed by the National Conference of Bar Examiners? Others have begun to explore these issues in another article in this issue.[28]

How should cut scores reflecting minimum competence be set? Currently, as Dean Joan Howarth has demonstrated in this issue,[29] jurisdictions around the country employ a wide range of cut scores that in each locale, supposedly, reflects the minimum competence required to practice at a beginning level. How can that be? Instead, this range may reflect preferences about potential competition for business.

How should assessment of skills be integrated or augmented? The preceding discussion has suggested that the post-3L bar exam could and should include new strategies for assessing basic lawyering skills. Another approach might be to assess those skills apart from a cumulative bar exam, perhaps using a system similar to the intensive short-course in practical skills being considered in Ontario, Canada.[30]

How should state-specific law be assessed? Many states that have adopted the Uniform Bar Exam have developed distinctive methods for assuring that candidates for admission master basic state law in their respective jurisdictions.[31] How effective are these strategies?

How can integrity and reliability of high-stakes tests be assured? The National Conference of Bar Examiners has developed multiple strategies for calibrating existing tests to assure their reliability between one administration and the next, and across extended periods of time.[32] Should the strategies for assuring reliability change if a more multi-faceted assessment system were used, with different elements and different sorts of questions?

These questions are more easily asked than answered. But they must be pursued if a more valid and reliable system of law licensure is to be developed and implemented.

CONCLUSION

This article has sought to achieve two objectives. First, it has contended that our collective focus should be on

the law licensing system, not simply on updating the bar exam. Second, it has offered a four-part approach to improving that system. It argues for development of a post-1L voluntary exam that focuses on critical analysis and basic performance skills in writing and research, within the context of first year subject matter. It suggests that all jurisdictions require the equivalent of a semester's residency in the form of clinical or externship experiences. It recommends that states adopt a system of limited licensure for specialized practice in high-need areas for students who have performed well on the initial post 1L-exam, and in coursework and residency, focused on developing expertise in areas of high need (while also allowing those who undertake such licensure subsequently to complete a third year of law school and sit for an exam that will yield a general license). Finally, it poses a range of questions that should be addressed in improving the advanced bar exam (that is current or future bar exams to be administered following three years of law school and graduation).

This more nuanced approach would foster improved professional competence among beginning lawyers and greater protection for their clients in the public interest. It would also help structure legal education and students' understandings of the skills and values they need to develop to become effective lawyers. It's time to stop kicking the can down the road. We know what needs to be done and how to do it. Let's get going.

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1. For a companion, expanded essay offering more detailed rationales and explanations about related issues and possible changes, *see* Joan Howarth & Judith Wegner, *Ringing Changes: How Systems Thinking About Law Licensure Should Replace the Antiquated Notion of a Single Bar Exam*, FIU L. Rev. (forthcoming 2019) (publishing articles stemming from the Florida International University's 2018 law school symposium, *"Summit on the Future of Legal Education and Entry into the Legal Profession"*).

2. *See* Dennis R. Honabach, *To UBE or Not to UBE: Reconsidering the Uniform Bar Exam,* 22 Prof. Law. 43 (2014)

3. *See* Joan Howarth, *New York Leads From the Middle*, page 42, this issue.

4. In the version of Standard 316 adopted in 2014, the ABA Council for the Section on Legal Education imposed a requirement that, to gain or retain accreditation, law schools must demonstrate that 75 percent of graduates of a given school pass a bar exam within a five-year period, with two caveats that gave leeway for lower pass rates in some circumstances. *See* https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABAStandardsforApprovalofLawSchools/2017_2018_standards_chapter3.authcheckdam.pdf. In March 2016, the Section published for notice and comment a proposal that would have revised the 2014 version of standard 316 to require a 75 percent bar exam pass rate for law graduates of an institution within two years of graduation (removing the cushioning caveats), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20160325_notice_and_comment_memo.authcheckdam.pdf.

This proposal was not agreed to by the House of Delegates and the Section's Council. Since 2014, bar passage rates have fallen to below 75 percent in many states. *See* 2016 Statistics, The Bar Examiner, Vol. 38, No. 1, at 12-13, http://www.ncbex.org/dmsdocument/205.

5. For a version of report submitted by the California state bar to the California Supreme Court, *see* http://stephen-diamond.com/wp-content/uploads/2017/09/agendaitem1000001998.pdf. Ultimately the California Supreme Court declined to intervene to modify cut scores on the summer 2017 California bar exam. Supreme Court issues letter relating to In re California Bar Exam, California Courts News Release, Oct. 18, 2017, https://newsroom.courts.ca.gov/news/supreme-court-issues-letter-relating-to-in-re-california-bar-exam.

6. *See* Leslie C. Levin, *Rethinking the Character and Fitness Inquiry,* 22 Prof. Law. 19 (2014).

7. *See* Benjamin Bloom, Max Engelhart, Edward Furst, Walter Hill, & David Krathwohl, Taxonomy of Educational Objectives: The Classification of Educational Goals. Handbook I: Cognitive Domain (1956). For a discussion in the legal context, *see* Ruth Jones, *Assessment and Legal Education: What Is Assessment and What the # Does It Have to Do with the Challenges Facing Legal Education?,* 45 McGeorge L. Rev. 85, 98 (2013).

8. *See* Judith Wegner, *Law School Assessment in the Context of Accreditation: What We Know, What We Don't Know, and What We Should Do Next,* 67 J. Legal Ed. (2018) (forthcoming) (discussing standards relating to attritition rates).

9. *See* William Sullivan, Ann Colby, Judith Wegner, Lloyd Bond, Lee Shulman, Educating Lawyers: Preparation for the Profession of Law (Jossey-Bass, 2007), at 91-125.

10. *See* Part 520, Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law, *available at* http://www.nycourts.gov/ctapps/520rules10.htm#B18 (relating to competency); http://www.nycourts.gov/ctapps/520rules10.htm#B17 (relating to pro bono scholars program).

11. *Id.* at § 520.16 (a).

12. *See id*. at § 520.17. Pro bono scholars are deemed to have satisfied the "practical skills" requirement discussed below. *Id.* at § 520.17 (a)(7).

13. *Id.* at § 520.17 (f).

14. *Id.* at §520.18. *Id*. at § 520.18(a)(2)(i). Such coursework need not comply with narrower ABA definitions and may not include first-year legal writing or moot court courses. *Id.* at §520.18(a)(2)(ii-iii). Up to six hours can be attributed to supervised summer employment for which academic credit is not awarded, assuming that an award of one credit requires 50 hours of work, and that all work is adequately documented. *Id.* at § 520.18(a)(2)(iv).

15. For the school's discussion of the program, see https://law.unh.edu/academics/experiential-education/daniel-webster-scholar-program-dws (last visited July 18, 2018). For an independent evaluation of the program, *see* Alli Gerkman & Elana Harman, Ahead of the Curve: Turning Law Students into Lawyers, http://iaals.du.edu/sites/default/files/documents/publications/ahead_of_the_curve_turning_law_students_into_lawyers.pdf (Institute for the Advancement of the American Legal System (IAALS), 2015) (hereinafter *Ahead of the Curve*).

16. *Ahead of the Curve*, *id.* at 6.

17. *Id*. at 22-25.

18. The proposed approach is in some ways similar, but it other ways different, from New York State's unusual system of allowing bar admission based on a combination of academic and supervised law office study. *See* https://www.nybarexam.org/Eligible/Eligibility.htm. The New York system requires students to have completed one year of academic study, then to have spent up to four years learning in an office setting, after which documentation of work performed is assessed and the prospective lawyer certified to sit for the bar exam. The current proposal would call for an initial assessment based on a post-1L bar exam, followed by a second year composed of specialized coursework and supervised practice in a particular high-need area, before the student could be awarded a "limited" law license rather than a general law license (unless the student completed an additional years' worth of course work at a later date and sat for the bar).

19. *See* https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians.

20. *See, e.g.,* Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 Colum. L. Rev. 1696 (2002); Andrea Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change,* 81 Neb. L. Rev. 363 (2002).

21. *See, e.g.,* The "MacCrate Report," 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), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report).authcheckdam.pdf.

22. For a discussion of "wicked problems," *see* Judith Wegner, *A Legal Education Prospectus: Law Schools and Emerging Frontiers: Reframing Legal Education's "Wicked Problems,"* 61 Rutgers L. Rev. 867, 871 (2009).

23. For expanded discussion of these and other issues, see Ringing Changes, *supra* note 1.

24. *See* https://www.sra.org.uk/sra/consultations/new-regulations.page (last visited July 18, 2018).

25. *See* Curcio, Chomsky, Kaufman, *How to Build a Better Bar Exam*, page 37.

26. For discussion of emerging practices for registration of solicitors in England and Wales, see https://www.sra.org.uk/sra/policy/sqe/research-reports.page (draft assessment specification).

27. *See, e.g.,* Washington State's practices with licensing realtors. http://www.dol.wa.gov/business/realestate/brokersexam.html.

28. *See also* practices involving accountants and associated segmented examinations, https://www.aicpa.org/content/dam/aicpa/becomeacpa/cpaexam/downloadabledocuments/next-cpa-exam-structure-white-paper.pdf.

29. Joan Howarth, *The Case for a Uniform Cut Score*, 42 J. Legal Prof. 69 (2017). *See also* Joan Howarth, *New York Leads From the Middle*, page 42.

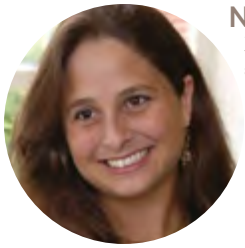
30. *See* studies underway by the Law Society of Upper Canada, available at https://lso-dialogue.ca/materials/ (last visited June 2, 2018). Information on Option 4 is particularly pertinent. *See* http://www.slaw.ca/2018/05/28/the-future-of-lawyer-licensing-in-ontario-consultation-on-four-options/ (last visited July 18, 2018).

31. *See UBE Jurisdiction-Specific Components: Seven Unique Approaches,* The Bar Examiner, Vol. 85, No. 3, 37 (September 2016).

32. *See* Susan Case, *The Testing Column: What Everyone Needs to Know about Testing, Whether They Like It or Not,* The Bar Examiner, Vol. 81, No. 2, 29 (June 2012).

JDinteractive:

An Online Law Degree Program Designed



Nina A. Kohn is Associate Dean for Online Education and the David M. Levy Professor of Law at Syracuse University College of Law. As Associate Dean, she has led the development of Syracuse's fully-interactive online JD program (http://jdinteractive.syr.edu). Kohn earned her A.B. *summa cum laude* from Princeton University, amd J.D. *magna cum laude* from Harvard Law School.

In February 2018, the American Bar Association granted a variance to Syracuse University that will allow the College of Law to launch the nation's first fully interactive online J.D. program. This program – called JDinteractive (JDi) – will combine live online class sessions, self-paced online class sessions, in-person residential courses, and applied learning experiences.

This article describes the program and its implications for the legal profession and those the profession serves. Specifically, it discusses the potential of this rigorous, yet flexible, approach to legal education to reach talented students who cannot reasonably attend a residential law school. It then explores how the approach may help increase diversity within the legal profession, produce lawyers with client-relevant experience, and expand access to justice in underserved communities.

OVERVIEW OF JDINTERACTIVE

When JDi launches in January 2019, it will be the nation's first online J.D. program to combine live class sessions in equal part with interactive self-paced class sessions. The program will include three types of courses: (1) online courses, in which at least 50 percent of each course is conducted in real time; (2) residential courses conducted on campus or at satellite locations; and (3) externships, which consist of an externship placement in a legal practice setting and an accompanying online seminar.[1] The 10-semester, year-round program will allow students to complete their J.D. in three-and-a-third years.

The central feature of each online course will be live class sessions. In every online class, at least 50 percent of the course will be conducted in real time, allowing faculty and students to dynamically and spontaneously engage with one another as they would in a residential classroom. These live sessions will be paired with self-paced instruction that will provide each student with the opportunity to fully engage with the material. This model represents a potential improvement over current practice in which generally only one student at a time is able to answer a faculty member's question; in an asynchronous session, all students can readily answer the question.

The JDi curriculum parallels that of the College of Law's residential program, and the two programs will use the same academic standards. Under the curricular framework developed and approved by the College of Law faculty, JDi students will be required to take all courses required of students in the residential program.[2] Students will likewise be required to meet the college's writing requirement. In addition, as in the residential program, students identified as at-risk based on prior grades will be required to take the doctrinal courses of the "structured curriculum," which is a series of courses designed to provide students with a strong foundation in subjects the faculty have judged to be foundational to the practice of law.

This general structure reflects a pedagogy-first approach to program design. In designing the program, the faculty's focus was not simply on how to bring the J.D. program online, but also how to do it in a way that could be a model for 21st century legal education. For example, it was critical to the faculty to preserve the traditional strengths of the residential J.D. program, including high levels of real-time engagement between faculty and students. Hence, the faculty developed a model in which the majority of students' in-class time will be live, giving students the chance to interact in real time with faculty as they do in the residential program. At the same time, faculty members see the program as creating possibilities to improve upon traditional instruction. Many are intrigued by the potential to use the learning management system to track student performance and to use exercises embedded in asynchronous class sessions to increase the amount of formative assessment students receive.

IMPLICATIONS FOR PROSPECTIVE STUDENTS AND ACCESS TO LEGAL EDUCATION

While discussions of online legal education typically focus on issues surrounding the quality of education students receive, it is not just JDi's potential to deliver excellent legal education online that is exciting. At least equally compelling is the program's potential to increase access to high-quality legal education for tal-

By Nina A. Kohn

to Expand Access to Justice

ented students throughout the country, increase diversity within the legal profession, and expand the pool of well-informed lawyers for prospective clients.

By allowing students to access law school regardless of their physical location, and on a flexible schedule, the program can make a high-quality legal education available to talented students with jobs that preclude them from simultaneously attending a residential law program, and to students with family situations or dependent care challenges that make attending a residential program unrealistic.

For such students, the cost of attending law school is often far higher than the cost of tuition. The real cost of law school for such students includes costs associated with forgoing employment, uprooting a family, or moving away from critical support networks to pursue a residential degree. For some, these opportunity and personal costs make a legal education prohibitively expensive. By contrast, the JDi program brings law school within reach for these students by giving them the flexibility to pursue their J.D. in a location and at a time of day that works around their existing obligations.

Making a legal education accessible to those whose work or whose family responsibilities preclude attending a residential law program may play a part in increasing racial diversity in the legal profession. Experience at Syracuse University shows that online degree programs can impact diversity: by taking their MBA and Masters of Science in Communications degree programs online, the Whitman School of Management and S.I. Newhouse School of Public Communications were able to significantly increase their African American enrollment.[3] This enrollment pattern appears to be attributable to program designs that make it feasible for students to earn their degrees while serving as the family breadwinner or par-

enting young children, which may be especially important for minority populations.

One demographic group that is especially likely to benefit from an online law degree program's combination of schedule and geographic flexibility is military service members seeking a legal education, either to further a military-connected career or to transition to civilian life. For many members of the military and their families, a successful transition to civilian life includes planning for post-service professional careers. Their geographic mobility, however, can be a substantial barrier to pursuing the education they need to make this transition. Members of the military on active duty and their families typically move every two to three years, and their assignments often require tours overseas. This aspect of military life makes the commitment to a residential J.D. degree program beyond the reach of most members of the military and their families.

By contrast, the portability of the JDi program can accommodate these students' transient base and living arrangements such that a service-based relocation will not disrupt their law school education.[4] The part-time format combined with online course delivery can enable members of the military to earn their J.D. while still fulfilling their service requirements. The residential components of the program, while not insignificant, are designed to be manageable during short periods of leave from work, family, or military service.[5]

IMPLICATIONS FOR PROSPECTIVE CLIENTS AND ACCESS TO JUSTICE

Making legal education more accessible to students with already established careers is also consistent with graduating students who are better prepared to serve client needs. A common critique of law schools is that they produce lawyers who do not have the skills or experience needed to represent their clients. While some of this problem is pedagogical in nature, some is structural.

Current Gap Between Law Graduates and Client Needs

One structural problem is that attorneys often lack relevant non-legal work experience. Law schools typically attract young students with limited, if any, work experience in the industries to which they will later be called upon to provide counsel. However, many business clients would benefit from lawyers who understand their sector – its terminology, practice, and norms – not merely the legal rules that apply to it. This is perhaps particularly true of corporate clients. A 2016 Report from the Association of Corporate Counsel identifies a growing trend of "mission creep" for in-house legal departments.[6] General counsel and chief legal officers are increasingly relied upon not just to provide specialized legal advice but also to offer input on business decisions.[7] In such an environment, limited experience in the sector is a disadvantage both for counsel and for clients.

Another structural mismatch is between where lawyers live and where lawyers are needed. Much has been written about the "rural lawyer gap."[8] A few headlines and news highlights illustrate the scope of this systemic problem: "Six counties in Georgia have no lawyers. Another 56 counties have 15 or fewer members of the bar" (Law.com);[9] "Just 2 percent of small law practices are in rural areas, where nearly a fifth of the country lives" (*The New York Times*);[10] and "Lawyer Shortage in Some Rural Areas Reaches Epic Proportions" (National Public Radio).[11] Indeed, the need is so pressing that some states and state bar associations are putting substantial amounts of money toward subsidizing programs designed to encourage law students to move to rural areas.[12]

Online Education's Potential to Bridge the Gap

By making high-quality law school education available online, JDi can help address both of these structural mismatches.

First, by making law school accessible to those with established careers in a wide range of geographic locations, the JDi program makes it possible for students to earn their law degree while remaining embedded in the sector and community in which they plan to practice. By having one foot in the law and one in another field, such students are in a better position to provide clients in that field with legal representation that is informed by and sensitive to the field's dynamics and concerns.

By contrast, residential law programs are often a poor fit structurally for students with the experience that would lead to such understanding. For younger law students, attending law school typically requires them to forgo substantial other employment that would provide that experience. Conversely, older students returning to a residential program can face a number of obstacles to success, including preexisting family and community commitments, inflexible scheduling, and career services offices geared toward placing graduates without substantial work experience. Thus, it is not surprising that law school students skew young, with approximately 50 percent of law school applicants 24 years of age or younger, and 80 percent under the age of 30.[13]

Similarly, "night programs," which have long been touted as a way to make legal education available to working and non-traditional students, are generally only accessible to students living in a limited number of major metropolitan areas. By contrast, JDi is accessible to students regardless of whether they live in close geographic proximity to an established law school.

Second, by making law school accessible to students regardless of their location, the JDi program makes high-quality legal education available to students already embedded in communities underserved by lawyers. This geographic flexibility will be especially valuable to students with careers and families who live in rural areas where a law school is not within commuting distance. Indeed, research indicates that those living in rural areas are disproportionately likely to enroll in an online graduate program.[14]

By contrast, residential law programs are not well-suited to addressing this structural, geographical issue. Residential law programs are typically located in major metropolitan areas and communities in which – if only because of the law school's presence – there are an abundance of lawyers. To be sure, students can always move to, or return to, underserved communities when they graduate law school. However, even if students from marginalized communities are able to uproot themselves – and potentially their families – to earn a J.D. at a residential program, they may never return to that underserved community.[15] Returning typically means graduates must uproot themselves again, leave behind connections to new people and places, and forgo cosmopolitan experiences and amenities to which they have grown accustomed.[16]

CONCLUSION

Syracuse University College of Law is not the first law school to enter the online space, and it will certainly not be the last. Our contribution, we hope, will be to set the standard for excellent, interactive online legal education. By doing so, we hope not only to provide a first-rate legal education, but to do so in a way that will produce lawyers with the skills to meet client needs where clients need them.

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1. For more program information, see the program's website: Syracuse University: JDinteractive, http://jdinteractive.syr.edu.

2. These courses currently are the following: Civil Procedure, Contracts, Criminal Law, Property, Torts, Professional Responsibility, two courses in constitutional law, three legal writing courses, a professional skills course, and an administrative law course or a course that covers statutory interpretation or the fundamentals of administrative law.

3. *See* U.S. News, Syracuse University (Whitman) Online Program, *available at* https://www.usnews.com/education/online-education/syracuse-university-OBUS0608/mba. (reporting 37 percent of Syracuse University Online MBA students are minorities).

4. This is consistent with patterns seen in other graduate programs. U.S. Department of Education data indicates that members of the military constitute a disproportionately large percentage of students in online graduate degree programs. *See* U.S. Department of Education, *After the Post-9/11 GI Bill: A Profile of Military Service Members and Veterans Enrolled in Undergraduate and Graduate Education* 1, 17 (2016), *available at* https://nces.ed.gov/pubs2016/2016435.pdf (noting that 37 percent of military graduate students had participated in entirely online graduate degree programs, compared to 17 percent of nonmilitary graduate students).

5. The program includes in-person intensive residential courses in which students will come together in a more traditional classroom setting. The first four, which place particular focus on skills-based learning, will be held on Syracuse University campus. The last two, which focus on specialized areas of law, will be held either on campus or at the University's facilities in other cities. As these are short courses (a week or less), students will typically stay in local hotels during these courses.

6. *See* Association of Corporate Counsel, *ACC Law Department Management Report*, Executive Summary 1, 17 (2016), *available at* http://www.acc.com/vl/public/Surveys/loader.cfm?csModule=security/getfile&pageid=1444823&page=/legalresources/resource.cfm&recorded=1.

7. *See id. Accord* Anne Smith and Alexa Baltodano, *Is an in-house counsel job right for you? A guide for law grads*, ABA Section on Intellectual Property Before the Bar Blog (Dec. 18, 2017), *available at* https://abaforlawstudents.com/2017/12/18/is-an-in-house-job-right-for-you-guide/ ("To meet these growing expectations, it is more important than ever that in-house attorneys develop skills to be able to translate law into corporate action.").

8. *See, e.g., Special Report: Access to Justice: The Rural Lawyer Gap*, Law.com, Jan. 15, 2015, *available at* https://www.law.com/dailyreportonline/almID/1202714351222.

9. *See id.*

10. *See* Ethan Bronner, *No Lawyer for Miles, So One Rural State Offers Pay*, N.Y. Times, April 8, 2013 at A1 (discussing the predicament faced by rural South Dakota residents).

11. *See* Grant Gerlock, *Lawyer Shortage in Some Rural Areas Reaches Epic Proportions*, Morning Edition, National Public Radio (radio broadcast Dec. 26, 2016) (focusing on the situation in Nebraska).

12. *See* Noel K. Gallager, *Maine School Moves to Reverse Shortage of Rural Lawyers*, Portland Press Herald, Oct. 22, 2017, *available at* https://www.pressherald.com/2017/10/22/maine-school-moves-to-reverse-shortage-of-rural-lawyers/ (discussing Maine's program and similar programs in other states). *See also* Kathryn Hayes Tucker, *Bar Board Approves Rural Assistance Plan—But Not Without a Fight*, Daily Report, Jan. 11, 2015, *available at* https://www.law.com/dailyreportonline/almID/1202714351222 (discussing Georgia's efforts); Gerlock, *supra* note 11 (reporting on Nebraska's efforts); Bronner *supra* note 10 (reporting on South Dakota's efforts).

13. *See* Kim Dustman & Ann Gallager, *Analysis of ABA Law School Applicants by Age Group 2011-2015,* Law School Admission Council (2017).

14. *See* David L. Clinefelter and Carol B. Aslanian, *2014 Online College Students: Comprehensive Data on Demands and Preferences* 1, 29 (June 2014), *available at* https://www.learninghouse.com/wp-content/uploads/2017/09/2014-Online-College-Students-Final.pdf.

15. Lisa Pruitt et al, *Justice in the Hinterlands: Arkansas as a Case Study of the Rural Lawyer Shortage and Evidence-Based Solutions to Alleviate It*, 37 U. Ark. L. Rev. 573 (2015).

16. *Cf id.* at 575 (finding that law students' perceptions of rural areas as lacking cultural and other amenities was a significant barrier to them choosing to practice in such areas).

Essential Questions: What to Ask About the

By Patricia D. White

In these parlous times for our legal system and the rule of law, it is essential that our educational institutions, our licensing system, and our many means of delivering legal services and access to justice are all working together, rowing in the same direction as it were.

Last year, as President of the ABA, Hilarie Bass created a small Commission on the Future of Legal Education and asked it to explore areas where misalignment between our institutions, licensing practices, and the practical realities of the delivery of legal services in the 21st century might be causing us to be less effective than we ought to be at achieving the fundamental goals we all share as stewards of our legal system and the rule of law.

In this first year of its work, the Commission met with representatives and leaders of many different stakeholders who share our common commitment. It has found that the same market, social, technological, and global forces that are driving change in the way we deliver legal services are also driving change and innovation in many law schools. Providers of legal services and law schools need to continue to accelerate their anticipation of changing conditions if they are to thrive going forward. At the same time, the Commission has also found that our system of licensing has been far less attuned to the needs of a changing profession.

In the next year, the Commission, along with others, is launching a number of empirical studies designed to help bar examiners and licensing bodies think through how an optimal licensing system should function and be structured if it is to best serve the fundamental goals of our system of justice in the contemporary landscape and in the future. We must all ensure that the bar exam of the future correlates with the work it is licensing and with the entry-level skills required to do that work. Presented below are essential questions, many of them hard and doubtless uncomfortable to some, which need to be addressed if we are to succeed.

OBJECTIVES

- Are the bar exams in use today still consciously designed, administered, and scored as pass/fail assessments of entry-level minimum competence? Have some of our exams evolved into tests which, in some respects, more resemble aptitude tests?
- Does the bar examining community sufficiently understand the psychometric design and scoring implications of these varied objectives? To put it simply, in theory everyone in a given administration could pass a test of minimum competence if everyone were capable and well-prepared (think about a driver's license for example). By contrast, a test designed to array the examinees along a spectrum will necessarily have a low end of the spectrum and need to ensure that not everyone (no matter how competent and well-prepared) does equally well.

VALIDITY

- Do our existing bar exams reflect the extensive recent empirical work being done to articulate what knowledge, skills, judgment, and values are critical to the modern, and constantly evolving, practice of law? How can this be done in a systematic way?

COMPARABILITY

- Although greater uniformity and transferability across states are clearly good developments, why do we not test our candidates nationally under the same conditions? Do we have any reasonable justification for the significant variations that do exist? These include the total number of subjects tested

Bar Exam

Patricia D. White is Dean and Professor of Law, University of Miami. Dean White is serving as Chair of the ABA Commission on the Future of Legal Education.

in the two-day period ranging from 12 to nearly 30 even with national grading and scoring of the MBE portion, and cut scores ranging from 129 to 145.

METHODOLOGY

- Could we use different methods of examination to more adequately assess entry-level competence? Might that include open-reference testing? Could we use one of the modern forms of progressive testing?
- If some UBE states think it reasonable to test state-specific topics through an online education and certification process, why not consider those methods for other portions of the bar exam?

ALTERNATIVES

- Under what circumstances is it appropriate to consider alternative paths to licensure including a diploma privilege, phased testing, articling or apprenticeship, limited licensing, specialized licensing, etc.?

PREPARATION

- Why do almost all candidates require an expensive three-month post-graduation commercial bar prep course (which not everyone can afford) to have a chance at passing the bar?
- Why are a large portion of law schools now offering – and sometimes requiring and other times highly recommending that their students take – bar prep courses as part of their law school coursework? In many cases this work replaces four credits or more of doctrinal or experiential courses.
- Is there any evidence that the months after graduation spent preparing for the bar exam improve the candidates' competence? Is there any evidence that the additional six months that an unsuccessful candidate must wait until eligible to retake the exam makes the candidate more competent, even if he or she passes the bar the second time?

CONSISTENCY

- What are the implications, if any, of various changes made in recent years to the MBE exam? These include a shift to full pretesting, the virtual elimination of subjunctive questions, the elimination of multiple questions on a single fact pattern, the elimination of multiple answers (e.g., A and B, B and C, all of the above), the addition of civil procedure, the addition of doctrinal depth over the decades across all topics, and the shift from 190 to 175 graded questions?

WELLNESS

- As the legal profession has increasingly come to appreciate the mental wellness challenges of legal education and practice, why are we not talking about the wellness costs associated with our system of licensing? Do we believe that the process required to prepare for and take the bar exam achieves its purpose without imposing an undue level of stress?
- Currently, 9 out of 10 candidates will eventually pass the bar exam. Is the additional time, cost, and stress for those who take the exam multiple times appropriate?

There are other essential questions which need to be asked, but thinking hard, open-mindedly, and honestly about these should help us begin to work together as a profession to play our essential role.

A VIEW FROM THE BENCH

Judicial Education as Paramount to Achieving Excellence

By Hon. Lawrence K. Marks

The importance of education and training in the justice system cannot be overstated. It is essential that those who work in the court system – particularly judges – receive regular training on issues and challenges they confront in carrying out their important responsibilities. Judges must have in-depth knowledge of the law and they must be effective in managing what goes on in their courtrooms. Judicial education is critical to achieving these goals.

The Unified Court System has long provided comprehensive education and training opportunities for judges. With the establishment of the Judicial Institute in White Plains some 15 years ago, New York's judges have benefited from access to one of the leading judicial education centers in the world. And with the appointment in 2016 of Chief Judge Janet DiFiore, promoting judicial excellence through judicial education has received the highest priority. Indeed, the Chief Judge has regularly emphasized that the goals of the Excellence Initiative[1] can best be achieved if high-quality educational programming and resources are readily available to New York's judges.

Consistent with that direction, the Judicial Institute, under the capable leadership of Judge Juanita Bing Newton, has refocused and reenergized its efforts to provide the highest level of judicial education and training. Discrete programming is provided on a broad range of substantive and procedural legal issues, ethics, case management skills and cutting-edge topics in disciplines such as science and medicine. The Judicial Institute website is a superb resource for judges to explore myriad legal issues, refine their case management skills, ponder ethical questions and improve their opinion writing.

In addition to the programs available year-round, for the first time in nearly a decade we reinstituted the Summer Judicial Seminars last year and continued them this past summer for the second year in a row. The Summer sessions enable Unified Court System judges from across the state to come together – face-to-face – to discuss legal issues, share experiences and best practices, and develop professional relationships and friendships. They are an integral component of the Excellence Initiative, with strong emphasis on topics such as case management and calendar control, conferencing and settlement skills, managing trials and alternative dispute resolution. They also allow for more intensive focus on hot-button issues. For example, this year included concentrated presentations on the new Raise the Age legislation, which takes effect on October 1 and will have a significant impact on Family Court and the criminal courts. The overarching goal of the Summer Seminars is that judges return to their courtrooms not only with a greater breadth of knowledge and understanding of the legal issues they face, but also with new ideas and enhanced skills to manage their formidable caseloads.

Although all judges benefit from regular education and training, it is especially valuable to new judges. In recognition of that, for many years the court system has provided an intensive program to orient new judges to the justice system. Offered every year in early January, this is a four-day instructive and interactive "boot camp" that prepares judges to hit the ground running as they take the bench. The curriculum addresses a range of relevant legal issues, along with important topics such as courtroom etiquette, implicit bias, handling self-represented litigants, understanding courthouse operations and efficient case management. The pedagogical benefits of these programs, which include presentations from veteran judges and legal and other experts, have proved to be invaluable.

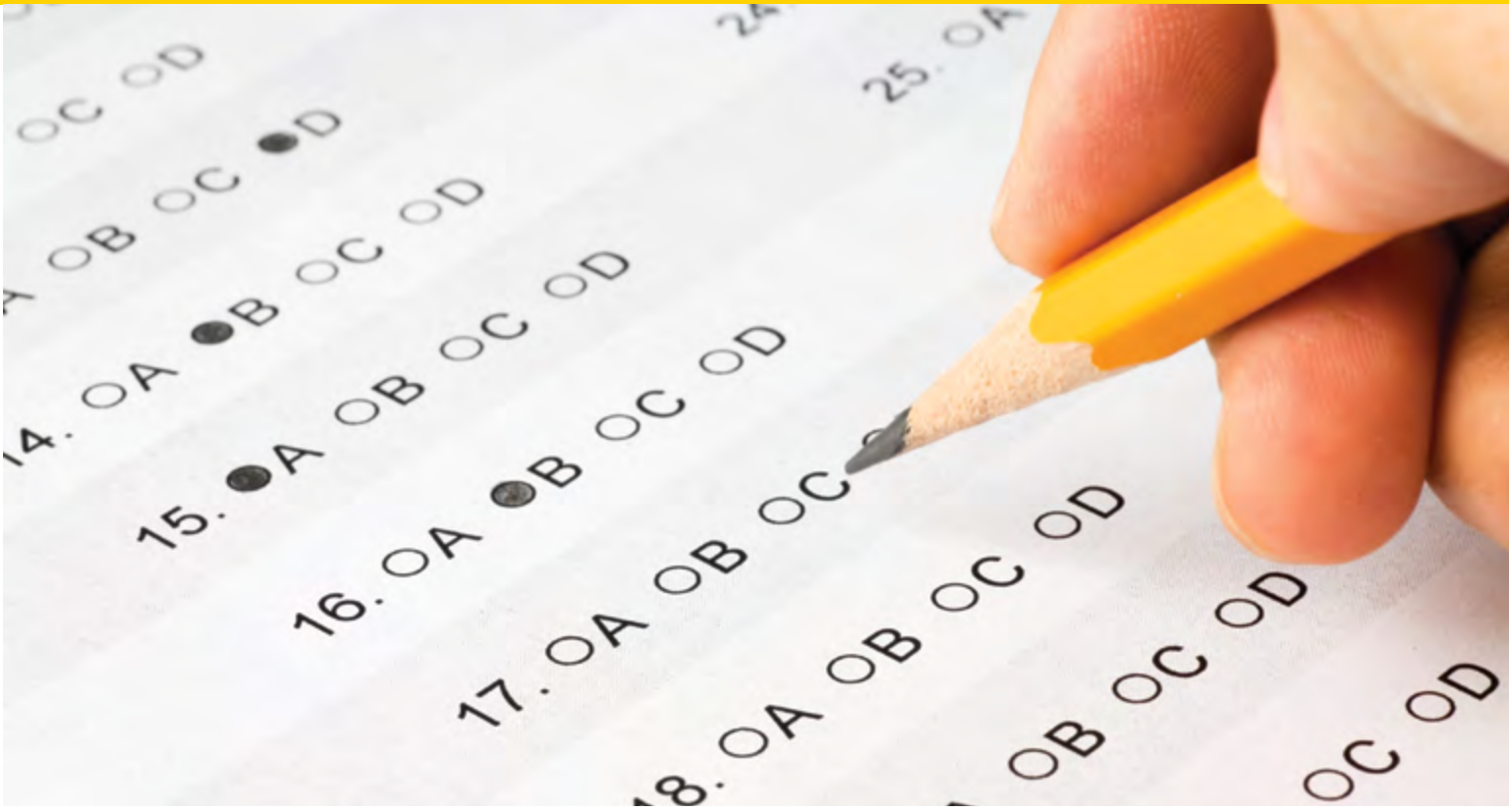
As those responsible for leadership of the judiciary, we believe it is our obligation to provide judges with the tools and resources they need to carry out the effective administration of justice and ensure the public's confidence and trust. Comprehensive, quality judicial education and training is a critical component of that effort and is indispensable to ensuring judicial excellence.

1. The Excellence Initiative involves a detailed and comprehensive evaluation of current court processes and procedures to determine what is working well and what needs to be improved. For more information on the initiative, access the 2017 and 2018 reports at www.nycourts.gov/excellence-initiative/.

Hon. Lawrence K. Marks is Chief Administrative Judge of the New York State Unified Court System.

How to Build a Better Bar Exam

By Andrea A. Curcio, Carol L. Chomsky and Eileen Kaufman



New York recently joined the growing number of jurisdictions that have adopted the Uniform Bar Exam (UBE).[1] The UBE consists of 200 multiple-choice questions; six 30-minute essay questions covering a wide range of doctrinal areas,[2] and two "performance" test questions in which examinees have 90 minutes to read a case file and write a client letter, memorandum, brief or other document. Applicants must also successfully complete an online course on "important and unique principles of New York law" in 12 subject areas and pass the New York Law Exam (NYLE), an online 50-question exam. Except for the materials provided for the performance test, the UBE exam is entirely closed book. The NYLE is open book, but electronic searching of the course materials is forbidden.

Andrea A. Curcio is Professor of Law at Georgia State University College of Law.

Carol L. Chomsky is Professor of Law at the University of Minnesota Law School.

Eileen Kaufman is Professor of Law at Touro College Jacob D. Fuchsberg Law Center.

The authors have long been engaged in critiquing the bar exam in their writing and in activities on behalf of the Society of American Law Teachers.

As a licensing exam, the purpose of the bar exam (both the UBE and the NYLE) is consumer protection – ensuring that new lawyers have the competencies required to practice law effectively. But critics in New York and elsewhere have long argued that the bar exam is not a valid measure of new lawyers' competence because it fails to test the wide array of skills lawyers need; the multiple-choice questions assess legal knowledge and analysis in an artificial and unrealistic context, and the closed-book format rewards the ability to memorize thousands of legal rules, a skill unrelated to law practice.[3]

A frequent response to these critiques is that, while the existing exam may not be perfect, it is the best we can do because we need an exam that is both psychometrically reliable and relatively inexpensive to administer to thousands of examinees.[4] But we *can* do better. We describe two licensing exams that demonstrate how bar examiners could utilize an open-book format (already being used in the NYLE) and develop multiple-choice questions that assess a candidate's ability to engage in legal reasoning and analysis without demanding unproductive memorization of so many detailed rules of law.

The first example, the case file approach, is taken from a 1983 California "Performance Test" in which test-takers received a case file and a series of multiple-choice questions testing the candidates' ability to read, understand, and use cases to support their legal positions. The second example discusses the current law licensing exam administered by the Law Society of Upper Canada (LSUC), an open-book multiple-choice exam that tests the use of doctrinal knowledge in the context of law practice.

These two licensing approaches demonstrate how multiple-choice questions can be used in a licensing exam to measure legal analysis and reasoning skills as lawyers use those skills, and they demonstrate that we *can* do a better job of testing minimum competence, even with a multiple-choice exam.

A CASE FILE APPROACH TO MULTIPLE-CHOICE TESTING

What Is a Case File Approach?

Long before the National Conference of Bar Examiners (NCBE) began administering a performance test, California developed its own performance exam, consisting of factual material and appellate opinions that provided the basis for both multiple-choice and essay questions. For example, a 1983 exam packet[5] focused on landowners' liability for injuries occurring on their property. The case file contained a memo from a supervising partner laying out some basic facts, notes from interviews with two witnesses, a memo from defendant company headquarters, a "slapped-together" complaint, a brief motion to dismiss for failure to "state a claim on which relief can be granted," and a case library of six short appellate opinions.

In other words, examinees had information lawyers might see when working on a client's case.

The case file served as the basis for both multiple-choice questions and a memo-writing assessment. We examine only the multiple-choice portion of the case file (though it is worth noting that the essay question asked not only for analysis of legal theories but also identification of "factual or proof problems" that the plaintiff might face and further facts that might be sought, skills that are also connected to the work that lawyers do for clients).

Sample Questions From the 1983 Case File Exam

The notable aspect of the multiple-choice questions is that they focus directly on an important analytical skill we expect lawyers to have: the ability to read and understand appellate cases and use those cases to support a party's legal contentions and theories. For example, several questions asked test-takers to choose which one or more of the opinions best supported particular stated rules of law (e.g., "if one enters uninvited onto the land of another, he cannot recover in negligence for injuries caused by the failure of the landowner to maintain the land in a safe condition"). The answer choices listed different combinations of cases from the case library.

Other multiple-choice questions tested the examinee's ability to understand a court's reasoning. For example, test-takers were asked to select which of the following five statements of law best describes the basis for the court's decision in one of the opinions in the case library:

(A) Plaintiff had no reason to foresee the risk that occurred when plaintiff entered upon defendant's property.

(B) Defendant impliedly consented to plaintiff's use of defendant's property.

(C) Defendant had no reason to foresee the kind of injury that plaintiff suffered while on defendant's property.

(D) A possessor of land must use reasonable care to avoid injury to others as a result of conditions on the land.

(E) A possessor of land must use reasonable care to avoid injury to others who are using an adjacent public way.

Examinees also answered questions about which cases were most supportive of plaintiff's position and which of three identified facts in each of the cases should be emphasized in preparing plaintiff's case. Finally, one question asked test-takers to identify the rule emerging from a synthesis of all the cases in the packet:

The cases establish that a landowner maintains a nuisance when conditions on his contiguous land are dangerous to users of a public way,

(A) so that the injured user is required, in seeking relief, to assert a wrong to the public generally.

(B) so that the injured user, despite the presence or absence of a wrong to the public generally, is required to show special damage to himself.

(C) so that it is possible to reason from them to absolute liability when a condition dangerous to users of the public way is present; that is, it is not necessary in such a case to prove negligence or the absence of contributory negligence.

(D) only as a way of expressing a duty to use due care with respect to users of the public way.

Answering these questions was not a simple matter of identifying case holdings but, instead, demanded close reading of the cases and understanding subtle differences in holdings and rationales.

How Does the Case File Approach Differ From the Status Quo?

According to the National Conference of Bar Examiners, the Multistate Bar Exam (MBE) multiple-choice questions test examinees' ability to "apply fundamental legal principles and legal reasoning to analyze given fact patterns."[6] Examinees, relying on their memory of thousands of legal rules, answer 200 questions based upon a large number of discrete fact patterns.[7]

The case file method shifts the testing lens from the ability to *recall* rules to the ability to *discern* and *comprehend* legal rules in typical legal materials. It tests legal analysis and reasoning the way lawyers do such analysis, understanding and using appellate opinions to support claims and defenses. Under the case file approach, examinees still must apply fundamental legal principles and legal reasoning to analyze fact patterns, but they do so utilizing analytic skills the way that lawyers actually function when assessing client problems.

Expanding Upon the California Case File Approach

The multiple-choice section of the 1983 California test consisted of 15 questions primarily focused on the plaintiff's case. It asked only one question about the defendant's case ("On which of the following cases would you expect the defendant . . . to place the most reliance?"). It easily could have asked additional questions about the defendant's legal theories and defenses, with or without supplementing the library of cases provided. The case file could have included additional facts that would allow questions asking examinees to identify additional legal theories that might be applicable upon further research, thus providing a way to test issue-spotting and foundational knowledge of a wide range of doctrinal areas. Statutes and regulations could be added to test examinees' ability to read and understand those materials. Questions could assess whether examinees are able to identify key missing factual information and the best way to develop those facts. In other words, the multiple-choice component of a case file exam could be developed to test a broader array of analytic and problem-solving competencies.

As was true in the 1983 California test, the case file could also serve as the basis for essay questions requiring the applicant to draft memoranda further analyzing the possible legal theories, identifying procedural and evidentiary or proof issues in presenting the case, and advocating on behalf of a client, thus combining essay and performance test questions with the multiple-choice portion to create an entire licensing exam that replicates how lawyers use and analyze facts and cases to solve a client's problem.

Can the Case File Approach Be Psychometrically Validated?

While we do not know if California engaged in a psychometric validation of its 1983 test, a study sponsored by the Law School Admission Council (LSAC) developed and validated a similar assessment method in a 2008 study, *Developing an Assessment of First-Year Law Students' Critical Case Reading and Reasoning Ability*.[8] The study provided first-, second-, and third-year law students with multiple appellate opinions, then tested their ability to read the cases and identify accurately issues, holdings, reasoning, rules, and policy. They also assessed students' ability to identify and work with indeterminacies in legal doctrine ("all the rhetorical ways that statements offered by courts may be open to interpretation, such that there may be no way to tell precisely what a court means or precisely how it is reaching its conclusion").[9] In other words, it tested the ability of the students to engage in higher-level legal analysis, not just to identify holdings and rationales in single cases.

The LSAC study demonstrates it is possible to develop a valid examination of legal reasoning ability using precisely the type of questions included on the 1983 California exam. It is worth noting that the LSAC study showed that many of the students lacked fundamental case analytical skills and, more disturbing, that their ability to accurately analyze appellate opinions and apply them to client problems did not improve between the first and third years of law school. If the bar exam tested appellate opinion analysis and application, it seems likely there would be increased efforts to ensure students, and therefore law graduates, would learn this fundamental legal skill more effectively.

LAW SOCIETY OF UPPER CANADA EXAM[10]

Another example of an alternative multiple-choice methodology worth exploring is the approach taken by the Law Society of Upper Canada (LSUC). The LSUC governs the law licensing process for the province of Ontario, administering a psychometrically validated licensing exam to thousands of applicants each year. It uses a seven-hour multiple-choice test consisting of 220 to 240 multiple-choice questions to test a wide range of lawyering competencies including ethical and professional understanding, knowledge of the law, establishing and maintaining client relationships, practice management issues, and (for barristers) problem/issue identification, analysis, and assessment.[11]

An Open Book Exam Approach to Law Licensing

A notable feature of the LSUC exam is that it is open book. The LSUC provides examinees with online access to the necessary materials to study before the exam. To help them navigate the materials, the LSUC encourages test-takers to organize the material via color coding, short summaries, and index cards, or to use the resources to create study aids that best suit the examinee's learning style. Candidates may print and bring the materials to the exam. Examinees' ability to answer a question does not rest on whether they remember (or forget) a key element. Rather, examinees have access to the relevant legal rules, and just like practicing attorneys, when they cannot recall a rule or key element, they have the ability to look it up. Unlike closed-book exams like the UBE, an open-book exam tests a key lawyering competency – the ability to find appropriate and relevant legal information.[12] The NYLE operates in a similar fashion, providing course materials that an applicant may access during the exam. In contrast, preparation for the UBE involves a few months of memorizing thousands of rules, quickly forgotten after the exam is over. The focus is on short-term memory rather than long-term understanding and the crucial ability to find or identify the relevant legal rule and then apply it. Neuroscience research attests to the ineffectiveness of that kind of preparation for knowledge retention and long-term learning,[13] confirmed by lawyers' memories of their own experience taking the bar.[14]

Testing Knowledge in the Context of Law Practice

The LSUC exam, like U.S. bar exams, tests legal knowledge and analytical skills, but it often does so in a practice-oriented context, focusing on how knowledge of the law informs the proper representation of clients. For example, LSUC exam questions ask what information a client needs to make an informed decision, how a lawyer would respond to particular questions from a tribunal, and what research should be done on the law or facts to inform the lawyer's next steps. This approach to multiple-choice questions tests legal knowledge and analysis, but it does so with a focus on how lawyers use legal doctrine in practice.

Sample Questions From LSUC Exam

Below are samples of LSUC questions provided by the Law Society of Upper Canada. They test the applicant's understanding of the information a lawyer needs from the client or other sources, strategic and effective use of trial process, ethical responsibilities, and knowledge of the real property registration system, all in the service of proper representation of a client. These and other questions (and the answers) are available on the LSUC website.[15]

1. Gertrude has come to Roberta, a lawyer, to draw up a power of attorney for personal care. Gertrude will be undergoing major surgery and wants to ensure that her wishes are fulfilled should anything go wrong. Gertrude's husband is quite elderly and not in good health, so she may want her two adult daughters to be the attorneys. The religion of one of her daughters requires adherents to protect human life at all costs. Gertrude's other daughter is struggling financially. What further information should Roberta obtain from Gertrude?

    (a) The state of her daughters' marriages.

    (b) The state of Gertrude's marriage.

    (c) Gertrude's personal care wishes.

    (d) Gertrude's health status.

2. Tracy was charged with Assault Causing Bodily Harm. She has instructed her lawyer, Kurt, to get her the fastest jury trial date possible. The Crown has not requested a preliminary inquiry. Kurt does not believe that a preliminary inquiry is necessary because of the quality of the disclosure. How can Kurt get Tracy the fastest trial date?

    (a) Waive Tracy's right to a preliminary inquiry and set the trial date.

    (b) Bring an 11(b) Application to force a quick jury trial date.

    (c) Conduct the preliminary inquiry quickly and set down the jury trial.

    (d) Elect on Tracy's behalf trial by a Provincial Court Judge.

3. Peyton, a real estate lawyer, is acting for a married couple, Lara and Chris, on the purchase of their first home. Lara's mother will be lending the couple some money and would like to register a mortgage on title. Lara and Chris have asked Peyton to prepare and register the mortgage documentation. They are agreeable to Peyton acting for the three of them. Chris' brother is also lending them money but Lara

and Chris have asked Peyton not to tell Lara's mother this fact. Should Peyton act?

(a) Yes, because the parties consented.

(b) No, because there is a conflict of interest.

(c) Yes, because the parties are related.

(d) No, because she should not act on both the purchase and the mortgage.

4. Prior to the real estate closing, in which jurisdiction should the purchaser's lawyer search executions?

(a) Where the seller previously resided.

(b) Where the seller's real property is located.

(c) Where the seller's personal property is located.

(d) Where the seller is moving.

CONCLUSION

As illustrated above, both the case file approach and the LSUC exam demonstrate that it is possible to design multiple-choice questions that test a wider range of lawyering competencies, including the all-important ability to read, analyze and effectively utilize cases. Both alternative approaches are open book, meaning they are much less dependent on memorization and more dependent on assessing knowledge in the context of how lawyers actually practice.

Neither exam addresses all of the flaws of existing U.S. bar exams. For example, both methods appear to require examinees to read rapidly, with little time for reflection. While lawyers must do their work efficiently and sometimes under time pressure, "speededness" in test-taking is a different skill. In updating or redesigning the bar exam, examiners should consider how to avoid making the wrong kind of speededness a significant variable in applicant performance.[16]

Additionally, none of the multiple-choice exams adequately address experiential skills such as client interviewing and negotiation, and alternative models of testing should be explored to assess those experiential learning skills. Recognizing this gap, the LSUC also requires applicants to "article" (a kind of apprenticeship with a law firm) or participate in the Law Practice Program (a four-month training course and a four-month work placement). That form of assessment has its own set of issues[17] and would be challenging to implement in the larger U.S. market. One alternative model that has been proposed is the "standardized client," modeled after the standardized patient exam given to medical school graduates.[18] Other options could include using a closely supervised law school clinical or externship experience to ensure appropriate skills development.

While the historical California performance test and the LSUC exam do not address all problems identified with the current U.S. bar exam, these licensing exams demonstrate that it is possible to develop psychometrically reliable multiple-choice questions that better test actual lawyering skills. Given the rising chorus of voices agreeing that our current bar exam fails to measure the wide array of lawyering skills required in the practice of law, there is every reason to explore these alternate approaches, at least as a starting point for a discussion about how to improve the existing bar exam to better protect the public.

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1. At the time this article was written, 31 states, the District of Columbia, and the Virgin Islands had adopted the UBE. *See Uniform Bar Examination: Jurisdictions That Have Adopted the UBE*, Nat'l Conf. B. Examiners, http://www.ncbex.org/exams/ube/.

2. For a list of the subjects tested, and the topics within each doctrinal area, see Nat'l Conference of Bar Exam'rs, 2018 MEE Subject Matter Outline (2017), http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F183.

3. *See, e.g.*, Don J. DeBenedictis, *Bar Winners and Losers: N.Y. Committee Suggests Lawyer Exams Test Wrong Skills, Unfair to Minorities*, ABA J., May 1992, at 26 (discussing draft report from the New York City Bar); Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 Pace L. Rev. 343, 375-81 (2003); *Society of American Law Teachers Statement on the Bar Exam*, 52 J. Legal Educ. 446, 446-49 (2002).

4. *See, e.g.*, Suzanne Darrow-Kleinhaus, *A Response to the Society of American Law Teachers Statement on the Bar Exam*, 54 J. Legal Educ. 442 (2004).

5. The 1983 California Performance Test is on file with the authors.

6. *Multistate Bar Examination: Jurisdictions Administering the MBE*, Nat'l Conf. B. Examiners, http://www.ncbex.org/exams/mbe/.

7. Examples of MBE questions (and answers) are available on the NCBE website. *See* Nat'l Conference of Bar Exam'rs, MBE Sample Test Questions (2016), http://www.ncbex.org/pdfviewer/?file=http%3A%2F%2Fwww.ncbex.org%2Fdmsdocument%2F17.

8. *See* Dorothy H. Evensen et al., *Developing an Assessment of First-Year Law Students' Critical Case Reading and Reasoning Ability: Phase 2* (LSAC Grants Report 08-02, Mar. 2008), https://www.lsac.org/docs/default-source/research-(lsac-resources)/gr-08-02.pdf.

9. *Id.* at 3.

10. For further discussion of the LSUC exam, see Eileen Kaufman, Andi Curcio & Carol Chomsky, *A Better Bar Exam—Look to Upper Canada?*, Law Sch. Café, July 25, 2017, https://www.lawschoolcafe.org/2017/07/25/a-better-bar-exam-look-to-upper-canada/.

11. For more information about the LSUC licensing process, including the list of competencies assessed, see *Guide to the Barrister and Solicitor Licensing Examinations*, Law Soc'y Ont., https://www.lsuc.on.ca/LawyerExaminationGuide/.

12. *See* Andrea A. Curcio, Carol L. Chomsky & Eileen Kaufman, *Testing, Diversity, and Merit: A Reply to Dan Subotnik and Others*, 9 UMass L. Rev. 206, 233-34 (2014).

13. *See, e.g.*, Hillary Burgess, *Deepening the Discourse Using the Legal Mind's Eye: Lessons from Neuroscience and Psychology That Optimize Law School Learning*, 29 Quinnipiac L. Rev. 1, 40-41 (2011) (discussing that bombarding a law student's working memory with too much information may result in cognitive overload and forgetting information crucial to understanding and overall learning); Larry O. Natt Gantt, II, *The Pedagogy of Problem Solving: Applying Cognitive Science to Teaching Legal Problem Solving*, 45 Creighton L. Rev. 699, 730-35 (2012) (discussing the importance of connecting domain knowledge and problem-solving).

14. A New York City Bar Task Force noted, presumably based upon the task force members' own experience, that the bar exam tests memory of "information that will be quickly forgotten after the exam." N.Y.C. Bar Ass'n Task Force on New Lawyers in a Changing Profession, N.Y.C. Bar Ass'n, Developing Legal Careers And Delivering Justice in the 21st Century 78 (2013), https://www2.nycbar.org/pdf/developing-legal-careers-and-delivering-justice-in-the-21st-century.pdf.

15. *See Sample Licensing Examination Items*, Law Soc'y Ont., http://www.lsuc.on.ca/LawyerExaminationGuide/#Sample_Licensing_Examination_Items.

16. *See* William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 Tex. L. Rev. 975, 1034-38 (2004) (arguing that "time-pressured" tests, such as the LSAT or traditional law school exams, do not measure the kind of efficiency or "quickness" that is valuable in legal practice). *See also* Polina Harik et al., *A Comparison of Experimental and Observational Approaches to Assessing the Effects of Time Constraints in a Medical Licensing Examination*, 55 J. of Educ. Measurement 308 (demonstrating that speededness significantly affects examinee test-taking strategy and suggesting that providing more time would especially impact lower-performing test-takers).

17. *See, e.g.*, Malcolm Mercer, *The Never-Ending Debate: What Should Be Required in Order to Become a Lawyer?*, Slaw, May 7, 2018, http://www.slaw.ca/2018/05/07/the-never-ending-debate-what-should-be-required-in-order-to-become-a-lawyer/ (discussing proposals to change the articling and Lawyer Practice Program portions of the LSUC exam).

18. Lawrence M. Grosberg, *Medical Education Again Provides a Model for Law Schools: The Standardized Patient Becomes the Standardized Client,* 51 J. Legal Educ. 212 (2001).

New York Leads Crowdsourcing the Bar

By Joan W. Howarth

Most lawyers prefer to forget about bar exams as soon as they have cleared the hurdle, but attorney licensing deserves our attention. New York recently adopted the Uniform Bar Exam (UBE), now approved by 34 jurisdictions. The time is ripe to consider the fact that even UBE bar exams are much harder to pass in some jurisdictions and easier to pass in others. Despite its name, the Uniform Bar Exam does not address this longstanding bar exam incongruity. Oddly, the main reason that bar exams are harder or easier from state to state is that states choose different passing scores on the one part of the test that is identical across the country, the multiple choice questions, also known as the Multistate Bar Exam (MBE). Candidates across the country are answering the same MBE multiple-choice questions to establish the same proposition – minimal competence to practice law – but are measured by different passing scores on that single test. Differences in difficulty based on different numbers of subjects tested or intricacies of local law could be easier to justify.

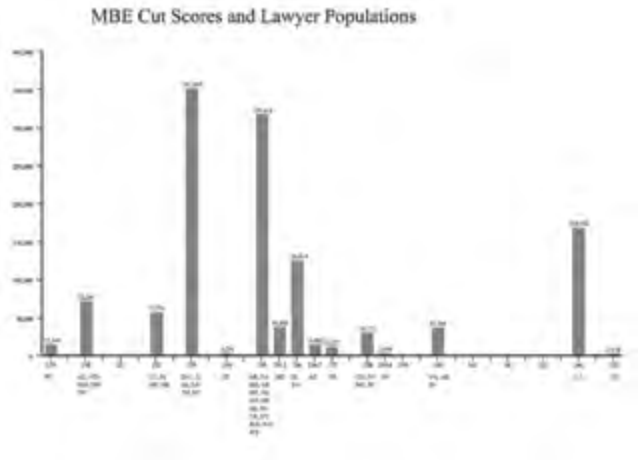
The range of MBE passing scores is dramatic. Cut scores extend from 129 in Wisconsin to 145 in Delaware.[1] The states with the most licensed attorneys, New York and California, use MBE cut scores of 133 and 144 respectively. Not even Californians pretend that these disparities are justified on the grounds that practicing law as a new lawyer is more difficult in California than in New York. It isn't. Our wide state-to-state spread in MBE cut scores is an artifact of an earlier era of jurisdictional isolation and less reliable bar exams.

Defensible attorney licensing today requires moving to a uniform cut score for multiple reasons. First, our current MBE cut score disparities constitute bad logic because every state is attempting to predict exactly the same thing: minimum competence to practice law, by using the same test but with different passing scores. Second, the cut score disparities are bad science because precision in setting a cut score is critical in assuring the validity of the use of the exam. Third, MBE cut score disparities are also bad policy, which explains why other professions have moved to uniform cut scores. Law, too, needs to arrive at a consensus, a uniform cut score. But, how?

Crowdsourcing follows the wisdom of the multitudes. We now routinely use the crowd to determine our driving routes and to support charitable causes. Following the crowd also offers the best way to eliminate bar exam cut score disparities. Based on attorney population, the leading MBE cut score is 133, now used by New York, New Jersey, Illinois, Kansas, Iowa, and the District of Columbia.[2] Attorney licensing will be more valid across the country when other jurisdictions follow the crowd of licensed attorneys now figuratively gathered at an MBE cut score of 133.

To truly appreciate the problem and embrace this solution, lawyers need to set aside their natural reluctance to think back to bar exams, and, probably for the first time, learn how bar exams are scored.

FIGURE 1



Joan W. Howarth is a Distinguished Visiting Professor at Boyd School of Law, University of Nevada, Las Vegas, and Dean Emerita, Michigan State University College of Law. This article is based on Joan W. Howarth, *The Case for a Uniform Cut Score,* 42 J. of Leg. Prof. 69 (2017).

from the Middle: Exam Cut Score

PSYCHOMETRIC BASICS FOR LAWYERS

Many of us distrust multiple-choice tests, but multiple-choice tests like the MBE are ubiquitous throughout professional licensing because of the science of testing. Two touchstones for standardized tests are validity and reliability. Validity means that the test measures what it purports to measure, here minimal competence to practice law. Reliability is the extent to which a score on the test means the same thing even when the test is given at different times.[3] Every profession uses multiple-choice tests in licensing to enhance reliability, such that a score from February means the same thing as a score from July, for example. Essay questions are too memorable to be used more than once, but multiple choice questions can be repeated. High-stakes multiple-choice tests typically include some repeat questions, whose degree of difficulty is already known. Psychometricians compare how test takers do on the repeat and the new questions, using the scores on the repeat questions to determine the degree of difficulty of the new questions, and then of the entire test. These complex statistical processes convert *raw* multiple-choice scores to *equated* scores that can be compared from February to July and from year to year. This equating process is the first of two big psychometric steps focused on reliability.

The second big step, scaling, makes the MBE multiple-choice scores crucial for determining how many candidates pass the *entire* bar exam, including the essays. Scaling essentially anchors the essay and performance test scores to the multiple-choice scores. Essay grades are notoriously unreliable because the questions change and grading is more subjective. Scaling uses the greater reliability of the equated multiple-choice score to improve the reliability of scores from less objective parts of the test, such as essays and performance tests. The subjectivity in essay grading is less problematic in law school, because law professors generally grade essays by comparing each student's essay to his or her classmates.'

Reliability on a licensing test, by contrast, means that the score would be the same no matter who else is taking the test. To counter the potential inconsistencies and subjectivities in essay scores, psychometricians use statistical scaling processes to match, in a way, the raw essay scores to the equated multiple-choice scores.[4]

In other words, the MBE scores anchor the scores for all components of the exam. Scaling means that the number of candidates who pass the MBE may also determine how many pass the essays. Scaling makes the MBE cut score a crucial decision concerning the degree of difficulty of the *entire* exam, a much bigger impact than what one would expect.

Other professions use the same equating and scaling practices for the same reasons. Multiple-choice test scores anchor state-specific test components, such as essays or performance tests, for doctors, engineers, nurses, and others. Nurses and engineers first adopted uniform cut scores for their multiple-choice licensing tests in the 1980s. Today, doctors, nurses, dentists, veterinarians, physical therapists, engineers, surveyors, architects, certified public accountants, mortgage loan originators, psychologists, emergency medical technicians, social workers, and real estate appraisers include a national multiple-choice test *with a uniform cut score* as a requirement for state licensure.

FIGURE 2

Longstanding habits of state control are not easily set aside, but architects, social workers, dentists, and other professions have overcome these impediments. We should too.

MBE CUT SCORE DISPARITIES ARE BAD LOGIC, BAD SCIENCE, AND BAD POLICY

Other professions moved to a uniform cut score in part because of the flawed logic of attempting to use the same pass-fail test to measure minimum competence between jurisdictions but setting the passing score at different levels. Nurses, doctors, and social workers do not gain or lose minimum competence by crossing state lines any more than lawyers. The difference is that the nurses, doctors, social workers, engineers, veterinarians, dentists, accountants, and other professions have given up the illogical pretense that minimal competence – *as measured by the same multiple-choice test* – changes from state to state.

The science of testing, psychometrics, supports finding a uniform cut score. The cut score is aimed at the dividing line that separates test takers with minimal competence from test takers who are *barely* below minimal competence. Therefore, not surprisingly, psychometric standards for any high stakes pass-fail test require great care related to the passing score. By adopting uniform cut scores, other professions have taken seriously these fundamental psychometric principles meant to ensure validity of the pass-fail test, meaning that the test actually does what it purports to do.

A uniform cut score is also better policy. The current practice of each state setting its own MBE cut score prevails only because most states do not approach the task in the way that testing standards require. Bar examiners in many states (other than New York) have no idea how their state's MBE cut score was established. This longstanding mystery is directly contrary to professional norms for transparency in licensing tests. Transparency is crucial to counter potential, perceived, or actual conflicts of interest, or anti-competitive behavior, when a profession is setting the bar for new entrants to the profession.

State licensing decision makers in other professions relegate standard-setting to national entities because the process is burdensome and too difficult for states to do well. For example, cut scores of licensing tests must be reviewed periodically. Nurses review their multiple-choice cut score every three years; engineers and physical therapists every five years. With all the other fiscal and operational pressures on state courts and bar examiners, routinely reevaluating cut scores is not a priority.

THE PATH FORWARD

The MBE cut score disparity problem will be addressed by moving to a consensus middle ground. Protection of the public is the touchstone: errors in either direction hurt the public. Setting the bar too low risks licensing attorneys who lack minimal competence. Setting the bar too high risks depriving the public of competent attorneys. Access to justice is implicated if competent attorneys are prevented from practicing, in part because fewer attorneys may mean increased costs for legal services. Setting the bar too high also has a disproportionate impact on competent attorneys of diverse racial and ethnic backgrounds.[5]

Licensing cut scores usually are difficult to evaluate in part because the professional performance of candidates with scores below the cut score – who do not receive the license – cannot be assessed. But our current MBE cut score variation creates a massive natural experiment. Do states with lower cut scores suffer from less competent attorneys? No evidence supports that conclusion. In the absence of data identifying harms to the public in jurisdictions with lower cut scores,[6] states should follow the crowd. Arriving at a middle-ground consensus will require states with very low cut scores to move up, and states with very high cut scores to move down. New York's cut score, 133, is a prime candidate for consensus because it is the score currently being used by jurisdictions with the largest total attorney population.

States should cherish their authority over attorney licensing, including their opportunity to provide meaningful public protection in innovative ways. Attorney licensing is, indeed, ripe for innovation.[7] States should be asking, what is minimum competence to practice law? How do we best protect the public? New York recently added pro bono and experiential experience requirements. But resting the case for state autonomy on setting a different cut score on the common, national portion of the exam is illogical, unfair, unambitious, and harmful. The public deserves valid licensing tests; eliminating MBE cut score disparities would be an important step in that direction. Crowdsourcing suggests that New York has set its cut score in the right place. New Jersey, Illinois, Iowa, Kansas, and the District of Columbia are already on board. Attorney licensing across the country will be more rational when others states follow.

1. Nat'l Conf. of B. Examiners, Comprehensive Guide to Bar Admissions 2018, at 33-34, Chart 9, available at http://www.ncbex.org/pubs/bar-admissions-guide/2018/mobile/index.html .

2. Figure 1 is derived from ABA National Lawyer Population Survey 2017, https://www.americanbar.org/content/dam/aba/administrative/market_research/National%20Lawyer%20Population%20by%20State%202017.authcheckdam.pdf.

3. Susan M. Case, *Back to Basic Principles: Validity and Reliability*, B. Examiner 23, Aug. 2006 at 23.

4. *See* Susan M. Case, *Frequently Asked Questions About Scaling Written Scores to the MBE*, B. Examiner 41 (Nov. 2006); *see also* Susan M. Case, *Demystifying Scaling to the MBE: How'd You Do That?*, B. Examiner (May 2005, at 45-46).

5. *See* Stephen P. Klein & Roger Bolus, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, 6 B. Examiner 8, 8 (Nov. 1997); Deborah Jones Merritt, *Validity, Competence, and the Bar Exam*, AALS News, Spring 2017, http://www.aals.org/about/publications/newsletters/aals-news-spring-2017/faculty-perspectives/; Tracy A. Montez, *Observations of the Standard Setting Study for the California Bar Examination* 10 (Calif. Dept. of Consumer Affairs, July 2017), http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Tracy-Montez-ReviewBarExamstudy.pdf. Recent California modeling shows that the higher the studied cut score, the larger the racial disparities in pass rates. *Final Report on the 2017 California Bar Exam Standard Setting Study* (State Bar of Cal. Sept. 12, 2017) [hereinafter *Calif. Report*] at Appendix I, *available* at https://www.calbar.ca.gov/Portals/0/documents/communications/CA-State-Bar-Bar-Exam09122017.pdf.

6. "There is no empirical evidence that indicates that California lawyers are more competent than those in other states [with lower cut scores]." *Calif. Report*, *supra* note 5, at 17-18.

7. *See, e.g.*, Eileen Kaufman, Andi Curcio, & Carol Chomsky, *A Better Bar Exam – Look to Upper Canada?*, Law School Café (July 25, 2017), https://www.lawschoolcafe.org/2017/07/25/a-better-bar-exam-look-to-upper-canada/.

NEW YORK STATE BAR ASSOCIATION
State Bar News

ABA Approves Resolution to Assist Puerto Rico Recovery Efforts

State & City Bar Collaborate to Gain Support for the Measure

By Christian Nolan

The American Bar Association (ABA) House of Delegates has unanimously approved a resolution calling on the U.S. Congress to assist Puerto Rico in recovering from Hurricane Maria, reflecting a measure already approved by the New York State Bar Association (NYSBA) and the New York City Bar Association (NYCBA).

NYSBA President Michael Miller and NYCBA President Roger Juan Maldonado worked in close collaboration to build support for the resolution, which asks Congress to exempt Puerto Rico from the Merchant Marine Act of 1920, better known as the Jones Act. The law causes Puerto Rico to pay higher shipping costs from the U.S. mainland for food, fuel and other basic goods, which has hampered recovery from Hurricane Maria last September.

NYSBA President Michael Miller and NYCBA President Roger Juan Maldonado at the ABA meeting.

"We are grateful for the ABA House of Delegates' support for this vitally important measure to address the ongoing humanitarian crisis facing our fellow Americans in Puerto Rico," said Miller. "The collaboration between the State Bar and the New York City Bar to advance this important measure is unprecedented, and I want to express special thanks to Roger Juan Maldonado for his partnership with us and his leadership on this issue."

"We are pleased that the ABA's House of Delegates has voted to support a Jones Act exemption for Puerto Rico," said Maldonado. "The New York City Bar Association and its Task Force on Puerto Rico, which was created in October 2016 in response to the island's fiscal crisis, has urged Congress to pass legislation granting this exemption, and we look forward to continuing our work with all of our partners toward that end."

The Jones Act requires that cargo shipped between two ports within the United States be transported on vessels that meet certain registration requirements. The application of the Jones Act to shipments to Puerto Rico results in substantially increased costs to the people of Puerto Rico for their imports and causes Puerto Rico to import most goods from foreign countries, often at much greater distances, rather than from the United States.

The Jones Act does not apply to foreign shipments. Exemptions already exist for other U.S. territories, including the Virgin Islands, American Samoa and the Northern Mariana Islands. The law was originally enacted to ensure that domestic ships would be available to support the U.S. military during war.

"Relief from the Jones Act is more important than ever following the devastation of Hurricane Maria," Maldonado said. "Thousands died from the storm, and many thousands more are struggling to put their lives and homes back together."

"Much of the island's power grid was destroyed, and some areas were without electricity for months," added Miller. "Puerto Rico's already reeling economy was decimated. And recovery has been hampered by an anachronistic and burdensome federal regulation that has made it difficult to get vitally needed food, supplies and materials to the island."

The ABA's House of Delegates unanimously approved the resolution in early August at their Annual Meeting in Chicago. The measure stems from the report and recommendations of the NYCBA, which NYSBA's House of Delegates adopted in June.

NYSBA President Welcomes New Lawyers to the Profession

Michael Miller delivered the lead address to roughly 730 newly admitted attorneys of the New York State Bar

By Christian Nolan

Comedians love to tell lawyer jokes.

But New York State Bar Association President Michael Miller has the perfect response for lawyers.

"When people are facing crises or find themselves in a difficult situation, they won't be calling comedians – they will be calling you."

"In essence, you are problem-solvers," Miller continued. "You are the individuals that people, businesses, organizations and communities will turn to when they need a solution, need guidance on charting their course of action to deal with a crisis, untangle a difficult problem or prevent trouble."

Miller's remarks were made to the approximately 730 newly admitted attorneys of the New York State Bar at a ceremony June 27 at the Empire State Plaza Convention Center in Albany.

Miller delivered the lead address at the ceremony. The members of the Court presiding at the ceremony included Associate Justices Eugene P. Devine, Christine M. Clark, Robert C. Mulvey, Sharon A.M. Aarons and Stan L. Pritzker.

All of the newly admitted lawyers either passed the New York State Bar examination or satisfied the motion admission requirements and were also approved for admission by the Third Department's Committees on Character and Fitness.

The new lawyers present, along with their families and friends, were not just from New York. Also represented were new members of the New York bar from at least 38 other states, the District of Columbia, Puerto Rico, the United States Virgin Islands and 43 foreign countries.

NYSBA President Michael Miller congratulates two newly admitted attorneys.

Miller explained that even though many of the newly admitted lawyers would live and practice outside New York, a New York State Bar Association membership was still an important asset.

"One-quarter of the State Bar Association's members are from outside of New York State or outside the U.S., and we have local chapters across the country and around the world," Miller said. "We offer top-quality continuing legal education. We are a valued resource for law practice management. We offer meaningful discounts on goods and services that lawyers need every day.

"We advocate for state and federal legislation, and we are a clearinghouse for pro-bono referrals.

"And … we offer the first year of membership after admission at no cost."

'Noble' profession

"Our profession is called "noble" for a reason," Miller told the audience. "There is no profession that does more to help people and to help our communities in more ways than do lawyers. And no profession gives back more than ours does.

"In fact, our spirit of generosity is so deeply engrained in the very DNA of our profession that we have a term for that special distinguishing characteristic that has come down through the ages: pro bono publico – for the public good," continued Miller. "This great profession of ours gives each of us the opportunity to try to make our community and our world a little bit better. And that is truly noble."

In closing, Miller recalled how excited he was on July 9, 1984 – the day he was admitted to practice law in New York.

"This will be a day you will never forget," said Miller. "Your future has limitless possibilities and opportunities. Make the most of them…and do good!"

7 questions and a closing argument

Member Spotlight with Eileen D. Millett

Millett is a partner at Phillips Nizer in New York City. She lives in Metuchen, NJ.

What do you find most unexpected about being an attorney?

As a petite woman of color, it is not uncommon for people to act genuinely surprised when I tell them I am an attorney, particularly if they are unaccustomed to encountering female attorneys. But whether gender or race, it can also be off putting, given that we are in the 21st century.

What do you find most challenging?

Balancing home and family – especially when a client cannot take no for an answer and wishes to have an answer instantaneously, even when you have explained that you are about to get on a plane or that you are at an airport going through security.

Who is your hero or heroine in the legal world?

Justice Betty Weinberg Ellerin, former Associate Justice of the First Department, Appellate Division is my living hero, and is a giant in spite of her stature. Her insightfulness, easy grasp of the big picture and vision for the future endear her to me.

Who inspired you to become a lawyer?

John Sydney de Bourg, my great grandfather, is a man I never met, but with whom I always felt a deep kinship. I think the connection flowed from my mother's deep and abiding admiration for him and his equally for her. Shortly after immigrating to the U.S., he was accused of practicing medicine without a license because of his invention "de Bourg's Rheumatic," a cure-all he had patented. He defended himself and won. I grew up thinking he was a lawyer, but he wasn't. He was a schoolmaster, and he was the leader of the Universal Negro Improvement Association (UNIA) for South and Central America and the provinces of the West Indies. His presence loomed large in my growing up, and I admired the unqualified confidence he displayed throughout his life, reinventing himself in his adopted country.

If you hadn't become an attorney, what career path would you have pursued and why?

Likely medicine. My dad, a Trinidadian immigrant, was an inspiration. He left his adopted country, the U.S., for his second adopted country, France, to study medicine at the Sorbonne and achieved the highest marks of any foreign student. If you are the oldest you are expected to set the example, making it difficult to go against the expectations that parents drill into you. So, having a doctor for a dad made considering anything other than medicine sacrilegious. My father didn't succeed with me or my siblings, but did with his grandchildren.

If you could dine with any lawyer—real or fictional—from any time in history, with whom would it be and what would you discuss?

I would wish to dine with Atticus Finch, as his choice to defend what at that time and in that place was almost indefensible, has to have lessons for our times. Finch is a shining example of doing the right thing against all odds, and I'd have to ask him, "Why did you simply not go through the motions, why did you treat Tom Robinson's defense as a serious matter, despite the prejudices?"

What is your favorite book?

History holds so many lessons, and these days, I return to *No Ordinary Time* by Doris Kearns Goodwin. The title is prescient for our times. We see Eleanor and Franklin Roosevelt making missteps, but taking big actions nonetheless. They were bold and undeterred and had the right dose of humanity. Kerns Goodwin's book is a window into the complexity and nuance of their relationship. Toyota's new mantra, "Start your impossible," is a fitting one for their relationship and for today.

Closing argument: Why should lawyers join the New York State Bar Association?

Lawyers are the bulwarks against chaos and tyranny, and stand for upholding the rule of law. In uncertain times, it is vital that we find a path to benefit the whole and not simply those who share our point of view. That path is easier if you have connected with lawyers from different parts of the state who have divergent practices. If you've swapped stories about your children, shared cocktails and dinner, and unexpectedly had your hand held in trying times, you will understand why NYSBA is critical.

Lawyers Resource Directory

Legal Office Space - Lawsuites

* 305 Broadway (All Courts)

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TECH TIPS

Ensuring Your Sensitive Emails Don't Go to the Wrong Place

By Workshare and Kraft Kennedy

After employees of the Australian Commonwealth Bank repeatedly sent confidential information to "cba.com" addresses instead of "cba.com.au," the bank bought the ".com" domain in 2018 to staunch the data leakage. It was too late – 651 internal emails had been sent to the wrong domain, releasing the privileged data of 10,000 customers.

Following a similar mishap, Goldman Sachs sought an order from the New York State Supreme Court to force Google to delete a confidential email sent by a contractor to a "gmail.com" address instead of "gs.com."

In April, the British Information Commissioner fined the Royal Borough of Kensington and Chelsea for breaching the Data Protection Act after its council inadvertently sent a spreadsheet to journalists identifying the owners of 943 vacant property lots.

In all three cases, email combined with human error to result in disastrous, embarrassing, and dangerous data loss.

EMAIL: THE LEADING CAUSE OF DATA LEAKS

Email is the number one source of data loss for businesses, according to statistics collated by the Information Commissioner's Office. Usually it happens as in the cases illustrated above, through unintentional sharing of information by employees, rather than malicious intervention by hackers. The cases above were made public, but many more stay under the radar to preserve reputations.

Such high-profile cases of data loss, along with new regulations, more stringent client audits, and increasingly crafty hackers have put legal teams under more pressure than ever to protect their clients' sensitive data.

MAKESHIFT SOLUTIONS

Firms are going to great lengths to make sure data loss does not happen to them. At some firms, IT and security administrators are manually investigating all email

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New AD Practice Rules Effective Sept. 17

By Joan Fucillo

The Office of Court Administration (OCA) has announced new Practice Rules of the Appellate Division, codified at 22 N.Y.C.R.R. Part 1250. The old, separate rules of practice for each department are repealed effective at the close of business Sept. 16, 2018, and the new joint rules go into effect Monday, Sept. 17. The new rules bring greater uniformity to the rules of the four departments in the Appellate Division and significant benefits to the courts and practicing attorneys. Each department has supplemented the joint rules with a few local rules that reflect the variations in practice particular to their respective parts of the state. The local rules are also effective Sept. 17.

Acting Supreme Court Justice Denise Hartman, who was an appellate lawyer in New York's Solicitor General's Office for nearly three decades, welcomed the announcement: "The new rules have merged a lot of different practices, which is good for the courts and especially for appellate attorneys who work among the departments."

James Pelzer, retired Clerk of the Appellate Division, Second Department, added that "adoption of joint rules that apply to all four appellate departments means attorneys will no longer have to learn court practices applicable in different parts of the state."

The sometimes subtle differences among the departments' rules can stymie practitioners who only rarely appear in appellate courts, and even occasionally confound attorneys who practice regularly in the four departments.

The groundwork for the new rules was laid by the New York State Bar Association's Committee on Courts of Appellate Jurisdiction (CCAJ). In 2011, then-committee co-chairs Hartman and Cynthia Feathers determined that one of their priorities would be to study the appellate rules to see which could easily be harmonized, which could be aligned with some effort and which would not easily be reconciled, and to report on their results.

"The goal was to minimize traps for the unwary by eliminating, to the extent possible, the nuanced differences that, for example, can cause an attorney to inadvertently miss a deadline, which means the court would have to address a motion to correct the error," said Judge Hartman.

The key was to work in consultation with each department, whose local rules often reflected deeply embedded procedures, culture and history. Co-Chairs Hartman and Feathers arranged a series of meetings with the presiding justice and the clerk of each department to ask for their input on and cooperation with the project.

The CCAJ then formed a Subcommittee on Appellate Division Rules, chaired by Judge Hartman. Subcommittee members included Mr. Pelzer, appellate practitioners, a sitting appellate judge, and a former appellate judge. Each member had years of experience in appellate practice and deep personal knowledge of how confusion over the rules could cause a case to go awry.

For nearly a year and a half, the subcommittee methodically reviewed the rules, topic by topic, meeting in two-hour monthly conference calls that featured presentations on rule topics, followed by an open discussion. Representatives from each of the four departments – the clerks themselves or a deputy clerk – participated in each call, providing their perspective on the current rules.

The subcommittee's final report included a chart with a side-by-side comparison of the rules along with recommendations for unified practice rules. The *Report on Appellate Division Rules* was approved by NYSBA's Executive Committee in April 2014. It was then submitted to the chief judge and the presiding justices of the four departments.

"It was fortuitous when Chief Judge Janet DiFiore joined the Court of Appeals in 2016," said Judge Hartman. When the chief judge announced her "Excellence Initiative," a detailed and comprehensive evaluation of current court processes and procedures to determine what is working well and what needs to be improved, she referred to the subcommittee's report and recommendations in a review of the Appellate Division rules. The report was cited in the proposed rules, which OCA posted in May 2017.

During the comment period, the subcommittee thoroughly reviewed the draft rules and submitted a marked-up copy to the OCA, noting that the amount of leeway granted to the departments to establish their own local rules might dilute the utility of the new rules. The OCA considered these comments and reduced the instances in which local rules were authorized. In December 2017, the presiding justices of the four departments issued a joint order adopting the new Practice Rules, which were revised and codified in Part 1250 in June 2018.

JJudge Hartman is pleased that the subcommittee's work helped bring about the adoption of a unified set of rules of practice for the Appellate Division. "It gave the courts a good base and solid recommendations, packaged in a format that allowed the rules to easily be compared," she said.

She also marveled at how it all came together: "The subcommittee members and the court personnel had an impressive spirit of cooperation and were willing to invest the time and energy it took to put forth this report. We were very lucky to have this group of people on board at that time and place. The timing also corresponded with the phase-in of appellate electronic filing rules. These circumstances combined with the advent of the Chief Judge's Excellence Initiative – it was serendipity."

The new Practice Rules of the Appellate Division are available at 22 N.Y.C.R.R. Part 1250, and the new Local Rules, which are now keyed into the new Part 1250 rules, are available at 22 N.Y.C.R.R. Part 600 (First Department), Part 670 (Second Department), Part 850 (Third Department), and Part 1000 (Fourth Department).

The new Practice Rules and the new Local Rules are also posted on the NYSBA website at http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=85241.

The Report on Appellate Division Rules is available at www.nysba.org/appellatedivisionrules.

Fucillo is NYSBA's senior messaging and communications specialist.

Ensuring Your Sensitive Emails Don't Go to the Wrong Place

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attachments sent to non-corporate domains. Many fruitless hours are then spent checking personal photos and recipes.

Adopting a different strategy, some security administrators are relying on the tags applied to a document when it is filed into their document management system (DMS) to flag an issue for review. But this tactic relies on attorneys filing documents before sending them. In fact, according to data collected by Workshare, only one out of three email attachments are ever tagged, which means around two-thirds of attachments move out of a firm's email system unmonitored.

PROACTIVE PROTECTION

While there is certainly a space in the legal IT marketplace for an effective method to stop people from emailing confidential data, not many vendors have created dependable solutions. Kraft Kennedy has tested various formal solutions for our clients. Workshare Secure is one that can clean attachments of sensitive metadata that may be hidden within a file and cause embarrassing data loss. This might include stripping track changes, authorship information, embedded objects, or white text.

Administrators can also use the tool to apply specific security policies at a mail server level, which can check recipients against blacklists and whitelists. These policies can either deliver warnings or automatically block attachments from being sent. These two simple checks and measures can help ensure that confidential data is never inadvertently (or deliberately) sent to the wrong people or unauthorized domains, including Gmail, Yahoo, and Hotmail addresses.

Workshare Secure also provides risk analytics, which track the emails leaving a firm to build a picture of what's "normal" email activity for the users in that firm and what's not "acceptable." Risk analytics can be configured specifically to predict which users and sharing behaviors may be putting a law firm at risk.

Our goal is to help security teams detect risk in three minutes or less using a suite of reports. The intelligent algorithms in Workshare Secure have been developed in conjunction with an advisory group of leaders in the legal industry and include dozens of factors to assess threats, such as whether users are sending files to personal email addresses and whether users are attaching files from multiple matters and different clients to a single email. With these reports, it's possible to drill down to identify specific behaviors demonstrated by high-risk users. For example, it's possible to see how many attachments a high-risk user has touched over a week. If it's a higher than usual number, then they are a threat worth investigating. And, in any report, it's possible to follow the trail right down to an individual email to quickly understand what's happened.

SHORING UP DEFENSES

Data loss can result in both hefty fines and serious embarrassment, making it crucial to both detect where risk lies and to protect the firm against the most obvious areas of risk and weakness. Which attachments can and can't legitimately be shared over email, however, can be a thorny issue for legal teams that deal frequently in confidential data. Before any technology is implemented, firms should discuss policy first.

Kraft Kennedy often works with law firms to help them draft appropriate policies and solidify them with the proper technology. With goals and guidelines in mind, the right security tools can help firms clean files, prevent sensitive metadata from being emailed to the wrong parties, and track the sending of data to comply with regulations and client audits.

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 email 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.

TO THE FORUM:

I recently started supervising students in a law school clinic that assists indigent individuals. We provide a number of services including evening programs where people can seek quick legal advice, and they are often referred to other specialized not-for-profit groups that can further assist them. For certain individuals, however, we expect to represent them in court and in other administrative proceedings. I was so enthusiastic about this new position that I reached out to a few of my colleagues at law firms and other not-for-profit organizations that I thought could help educate my law students and provide competent pro bono advice to our clients. They were excited to help.

But when I started to arrange our engagement letters, I realized that this was not going to be as easy as I anticipated. Do I need to run conflict checks with my colleague's law firms? Do I need to run conflict checks with the not-for-profit groups with which we are working? Are the conflict checks limited to the clients involved in the matters where we are acting as co-counsel, or do we have to run conflicts checks against all of our respective clients? The law school has a few different clinics that focus on different areas of law and clients. Do we have to run conflicts checks against all of the clients in each of the clinics? If we meet with someone in a drop-in session for a short period of time, is there a conflict if we later end up representing someone adverse? If there is a conflict, would it be imputed to any of the other firms or not-for-profits? Are there any other issues I should be concerned about?

Sincerely,
Ed U. Katz

DEAR ED U. KATZ:

Your desire to supervise the law school clinic is truly noble. All lawyers should admire your commitment to public service and your efforts to mentor law students as they begin their careers. The New York Rules of Professional Conduct (RPC) strongly encourage lawyers to engage in pro bono service. *See* NYSBA Comm. on Prof'l Ethics, Op. 1141 (2017). RPC 6.1 states that lawyers should aspire to provide at least 50 hours of pro bono legal services each year to poor individuals. *See* RPC 6.1(a)(1). Your efforts will hopefully instill a lifelong commitment by these law students to public service. As you aptly point out, however, your law school clinic program implicates numerous RPC that should be considered when establishing your conflicts of interest protocol.

As a general matter, the RPC treat law clinics as law firms. *See* NYSBA Comm. on Prof'l Ethics, Op. 794 (2006). The RPC defines a "firm" or "law firm" to include "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization." RPC 1.0(h). A "qualified legal assistance organization" is defined as "an office or organization of one of the four types listed in Rule 7.2(b)(1)–(4) that meets all of the requirements thereof." RPC 1.0(p). A legal aid office "operated or sponsored by a duly accredited law school," such as the clinic you describe in your inquiry, is included within RPC 7.2(b)(1)(i). *See* RPC 7.2(b)(1)(i). Therefore, unless the RPC state otherwise, the same Rules that govern law firms also apply to legal aid offices operated by an accredited law school. *See* NYSBA Comm. on Prof'l Ethics, Op. 1141 (2017); NYSBA Comm. on Prof'l Ethics, Op. 794 (2006).

CONFLICTS OF INTEREST PROCEDURES FOR LIMITED LEGAL SERVICES PROGRAMS

The clinic that you are describing would offer different types of services, including quick legal advice programs and more involved representations. A lawyer's obligations with regard to conflict checks differ based upon the scope of services performed. First, we will address the appropriate conflict checking procedure for when a law school clinic is providing "quick legal advice" at an event or evening program.

RPC 6.5 is intended to relax the conflict of interest Rules when lawyers participate in short-term limited legal services programs. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1630 (2016 ed.). "Short-term limited legal services" are defined as "services providing legal advice or representation free of charge . . . with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance." RPC 6.5(c). RPC 6.5 applies to a lawyer who provides short-term limited legal services as part of a legal service organization, court-sponsored program, government agency, bar association or various non-profit organizations. *See* RPC 6.5 Comment [1].

In the type of pro bono legal services covered by RPC 6.5, a client-lawyer relationship is established, but there is no expectation that the lawyer will continue with the representation beyond the limited consultation provided. *See id.* In these types of programs, it is not usually feasible to conduct a traditional conflict check prior to performing the legal services. *See id.* Accordingly, for these short-term limited legal services, RPC 6.5 only requires compliance with RPC 1.7, 1.8 and 1.9 (the primary Rules governing conflicts of interest with current and former clients) if the attorney knows that the representation of the client poses a conflict under the RPC for the lawyer providing the advice. *See* RPC 6.5 Comment [3]; *see also* Simon, *Simon's New York Rules of Professional Conduct Annotated,* at 1633. Said simply, the usual conflict of interest Rules do not apply unless the lawyer has "actual knowledge" that the representation of the client involves a conflict of interest for that lawyer or an associated lawyer. *See* NYSBA Comm. on Prof'l Ethics, Op. 1012 (2014). Without actual knowledge of a conflict, the lawyer need not perform any further conflicts analysis. *See id.* If the representation expands to provide ongoing legal services to the client after commencing the short-term limited representation under RPC 6.5, however, the lawyer must then comply with RPC 1.7, 1.9(a) and 1.10 and conduct a full conflict check. *See* RPC 6.5 Comment [5].

RPC 6.5 also limits the application of the conflict imputation provisions of RPC 1.10 in pro bono legal service programs. *See* RPC 6.5(a)(2). RPC 1.10(a) states, "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9 . . . ." RPC 1.10(a). The New York State Bar Association (NYSBA) Committee on Professional Ethics has opined that applying this "rigid imputation" Rule in the RPC 6.5 context could unduly burden a law firm or lawyer and deter them from participating in these limited services legal programs. *See* NYSBA Comm. on Prof'l

Ethics, Op. 1012 (2014). Therefore, if a new client seeks to retain a clinic volunteer lawyer's firm in a matter that is the "same or substantially related" to a matter on which the volunteer lawyer represented a clinic client, and there is a known conflict between the interests of the new client and the clinic client, RPC 1.10(a) will not preclude any *other member* of the volunteer lawyer's firm from representing the new client. *See id.* RPC 1.9(a), however, will preclude the volunteer lawyer from representing the new client directly absent a proper waiver from the clinic client for whom the volunteer lawyer already provided legal services and shared a lawyer-client relationship. *See id.*

A lawyer who provides legal services under RPC 6.5 must also be sure to obtain the client's informed consent concerning the limited scope of the representation. *See* RPC 6.5 Comment [2]. If a short-term representation relationship is not reasonable under the circumstances, the lawyer is permitted to offer advice, but must also advise as to the client's need for further assistance of counsel. *See id.*

CONFLICTS OF INTEREST PROCEDURES FOR EXPANDED REPRESENTATION

The conflict of interest rules for expanded representation matters differ from those for limited representation under RPC 6.5. When the nature of the representation is expanded, RPC 6.5 is no longer applicable and lawyers are required to follow more traditional conflicts of interest principles.

In order to encourage participation in leadership positions in not-for-profit organizations, RPC 6.3 allows lawyers to serve as "directors, officers or members" of these organizations without creating conflicts of interests that could disqualify them or their law firms from other matters. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated,* at 1611. RPC 6.3 permits a lawyer to serve "as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests that differ from those of a client of the lawyer or the lawyer's firm." RPC 6.3.

The law school clinic is a not-for-profit organization as contemplated by RPC 6.3; however, this Rule only applies to lawyers serving as a "director, officer, or member" and does not apply to other lawyers only representing clients through the organization. *See* NYSBA Comm. on Prof'l Ethics, Op. 794 (2006); *see also* Simon, *Simon's New York Rules of Professional Conduct Annotated,* at 1612. RPC 6.3(a) makes a clear distinction between lawyers who administer the organization, make policy, or teach and the lawyers who actually provide legal services. *See* RPC 6.3(a). RPC 6.3 is logical because the lawyers maintaining leadership positions in these organizations are not establishing client-lawyer relationships with those individuals served by the organization. RPC 6.3 Comment [1]. If a director, officer or member of a not-for-profit organization were to also establish a client-lawyer relationship as part of their work with the organization, however, it is likely that RPC 6.3 would not be applicable in that instance. *See* RPC 6.3. RPC 1.10 therefore remains in full force and effect for those lawyers actually providing legal services through a not-for-profit legal services organization. *See id.; see also* Simon, *Simon's New York Rules of Professional Conduct Annotated,* at 1614. Accordingly, we will turn to conflict issues for attorneys in expanded pro bono representations who are not solely acting in the capacity of a director, officer, or member of the not-for-profit legal services organization.

As discussed above, RPC 1.10 imputes conflicts to lawyers associated in the same law firm. The RPC do not define the word "associated." *See* NYSBA Comm. on Prof'l Ethics, Op. 1141 (2017). The NYSBA Committee on Professional Ethics has opined that "to be 'associated in a firm' means to be a member of, employed by, 'of counsel' to, or 'affiliated' with the law firm, in each instance reflecting a close and continuing relationship with the firm to warrant imputation of the conflicts of any one lawyer in the firm to the other lawyers there." *See id.* (citations omitted). The term "co-counsel" means "attorneys or firms jointly representing a client or clients with respect to a particular litigation or transaction. The relationship is episodic rather than enduring. Exchange of confidential information between co-counsel is a necessary incident to serving the interests of their mutual client(s)." *See id.* The primary concern when considering whether there should be imputation for conflicts purposes between co-counsel is the protection of confidential information under RPC 1.6. *See id.* When considering whether to "merge" two entities for the purposes of all conflicts, such as the clinic or any not-for-profit organization with which the clinic elects to work, it must be considered whether these entities will share any personnel, finances, office space, access to client files, and whether there is a substantial overlap of clients. *See id.*

In a 2006 NYSBA Committee on Professional Ethics opinion, the Committee addressed an inquiry concerning a law school legal clinic and imputation of conflicts of interest for different clinic programs and the lawyers that assisted the clinic. *See* NYSBA Comm. on Prof'l Ethics, Op. 794 (2006). The clinic had recently established a new project called the "Consumer Project" that would engage the law school clinic in representing clients harmed by improper commercial practices. *See id.* The two New York lawyers hired to assist the Consumer

Project were also employed at private law firms. *See id.* The Committee found that the measures taken by the clinic to prevent cross-imputation of conflicts between the clinic's non-Consumer Project matters to the law firms and the law firms' representations of other matters in the clinic were insufficient primarily because of the shared work spaces utilized and the storing of all client files in a common area. *See id.* The Committee reasoned that two or more lawyers carrying out conflicting assignments in close proximity and sharing common space could affect the lawyer's exercise of independent judgment, and this proximity required that the legal clinic (including the Consumer Project) be treated as a single law firm for conflict purposes. *See id.* The Committee also noted that that there was a palpable danger that client confidences and secrets would be divulged through the use of common staff and/or files. *See id.*, citing ABA Inf. 1474 (1982). If client confidences are at risk, the Committee opined, it is appropriate to treat the "association" of entities as a law firm for purposes of RPC 1.10 or to find that clients with adverse interests can't be represented. *See* NYSBA Comm. on Prof'l Ethics, Op. 794 (2006), citing *Commonwealth v. Alison,* 434 Mass. 670, 691 (2001). The Committee also stated that as long as the legal clinic students worked in the same space and had access to shared physical files, the entire clinic's staff, including the lawyers who supervised the students, are a law firm within the meaning of the RPC and therefore the conflicts of all the personnel are imputed to all the lawyers at the clinic, and vice versa. *See* NYSBA Comm. on Prof'l Ethics, Op. 794 (2006).

From the facts that you have given us, it does not appear that any of the relevant factors that would require imputation of conflicts between the law school clinic and the not-for-profit organizations with which you intend to work are present. Serving as "co-counsel" does not mean that a law firm is "associated in" the same firm as a legal services organization for purposes of imputation under RPC 1.10. When your clinic works with a legal service organization or law firm as "co-counsel" in a particular matter, the RPC require only that the clinic and legal services organization (or law firm) clear conflicts, individually and separately, only for the matters where they serve together as co-counsel (as long as none of the factors implicating association noted above – such as shared files and close working proximity – apply). *See* NYSBA Comm. on Prof'l Ethics, Op. 1141 (2017). For example, law firms often retain local counsel when litigating in foreign jurisdictions without having each other's conflicts imputed. *See id.*, citing ALI, Restatement of the Law Governing Lawyers (Third), §123, Cmt. c(iii).

Accordingly, after reading the various opinions cited above, we suggest that you institute proper measures to maintain client confidences between clinic clients and those of the not-for-profit organization by keeping the office spaces of the clinic and any other organization who serves as co-counsel separate and by maintaining files (electronic or otherwise) separate from any organization with whom you work as co-counsel.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(Syracuse@thsh.com)
Carl F. Regelmann, Esq.
(Regelmann@thsh.com)
Alexandra Kamenetsky Shea, Esq.
(Shea@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

My adversary in a case is representing himself pro se, but his briefs are very sophisticated and appear to have been ghostwritten by an attorney. I asked him whether an attorney helped him with it and he just changed the subject. I am frustrated because I feel like the judge is sympathetic to him because he is pro se, but I suspect that his legal arguments are actually being crafted by an attorney. I think that this puts me at a big disadvantage. Since he is not a lawyer, I know that he is not bound by the Rules of Professional Conduct. If he is getting help from a lawyer, are there rules that are being violated and is there anything that I can do?

This issue got me thinking about the ease in which anyone can just "cut and paste" briefs, opinions, and articles into their own submissions without attribution. For all I know, maybe my pro se adversary isn't really working with an attorney and just found good briefs by other attorneys that were publicly available. In the "old days," firms had banks of old briefs to work from, but with public e-filing access to literally thousands of briefs from the comfort of home, anyone can access briefs on any subject matter easily. Are there any limitations on where to draw the line on plagiarizing briefs? I admit, I am guilty of occasionally taking good citations and arguments from briefs I find online, but I always check the citations and craft the arguments around my client's specific cases. But should I be concerned I am lifting from briefs too liberally? I recently had an insurance carrier tell me it wouldn't pay for my research time unless I used its legal research firm, which includes a bank of briefs. I am fine using the briefs from this service, but should I be concerned that I am signing my name to a brief that was largely written by someone I don't know?

Sincerely,
Jacob Marley

How Reddit Helped Me Excel on the LSAT and Get Into Law School

Editor's note: *This column is a forum for law students to discuss and reflect on their experiences as they pursue their law degree – the ups and downs of getting into law school, the demanding curriculum, the pressures on their lives outside of class, their internships, and more. Students in all accredited law schools, both within New York State and beyond, are invited to contribute articles by contacting Kate Mostaccio at kmostaccio@nysba.org.*

In today's world, it's not hard to find examples of how the internet and related technologies have proven to be formidable forces to drive us apart and spread hatred and misinformation. But the internet also offers extraordinary promise and the power to bring people together in ways that were unimaginable even a few years ago. I can attest to this myself: I used Reddit – a social media site where millions of people join online communities, known as subreddits, organized around common interests – to identify the valuable resources and peer support that helped me excel on the LSAT and get into law school.

I am a first-generation immigrant and the first in my family to pursue a graduate degree. The first time I took the LSAT, I had no idea what I was doing. I signed up for the free Kaplan video prep a couple of times, borrowed a Kaplan book from my university Collegiate Science and Technology Entry Program (CSTEP) office, and attempted to read it page by page, front to back. That was my game plan.

I would read a chapter, and then answer the corresponding questions. Just when I thought I was really getting it, I would get answers wrong and could not really understand why. And I couldn't ask a book follow-up questions. I was learning a whole new set of specific skills without anyone with those skills showing me how to use them. My college academic advisors recommended that I take a prep course.

LSAT courses cost around $1,000. While that $1,000 course could get me a 170+ score and thus possibly a full ride to law school and maybe even a living stipend, I first needed to have that $1,000 to spend. As the intelligent and cynical protagonist Earn, of the Emmy-winning television series *Atlanta,* explains, "I'm poor . . . and poor people don't have time for investments because poor people are too busy trying not to be poor. I need to eat today. Not in September." I simply did not have the money, so I could not make that investment.

As an undergrad, I was lucky enough to be a Law School Admissions Council (LSAC) Discover Law scholar at Rutgers Law–Camden. The LSAC program and the efforts of Dean Jill Friedman and Dean Angela Baker were instrumental in my understanding of what going to law school and being a lawyer entailed, but not necessarily how to get there. The program also allowed me to take the LSAT twice, at no cost.

When I first took the LSAT, my score was under 150. By the time I took the second, I had become more attuned with how social media was being used to connect people with opportunities and resources. I had known through friends in high school that Reddit was a resource people used to ask any and every question. It occurred to me that maybe someone there knew a thing or two about the LSAT.

Dubbed "the front page of the internet," Reddit is home to thousands of passionate communities dedicated to a spectrum of interests stretching as far as the imagination can reach – from the basics /r/movies, /r/news, /r/books, to the very political /r/The_Donald, the very specific /r/childrenfallingover, and the help-driven /r/buildapc, and /r/skincareaddiction. There is something for everyone, and that's Reddit's strength and its weakness. It is a place to live your truth, a place where random strangers online will dedicate time and energy to help others just to make their knowledge available to those who may need it, but also a dangerous echo chamber to brew toxic culture.

For me, finding /r/LSAT, a Reddit community dedicated to helping LSAT test takers prepare and ace the test, was one of the best things that could have happened to me during this process.

Some of the advice was harsh and often reeked of privilege, like users discouraging others from pursuing law at all unless they were going to a Top 14 school. Anyone with less than

Nayram S. Gasu is a first-generation Ghanaian immigrant with a B.A. in Political Science, and English, and a minor in Communications from the University at Albany, SUNY. Following graduation in 2016, she worked in the New York State Senate as a Policy Research Associate for the Senate Democratic Policy Group. Nayram will be a 1L at Temple University Beasley School of Law this fall. She can be found on Twitter at @Tuesnay or can be reached at Nasygasu@gmail.com.

a 165 on the LSAT was often told to retake the test. Some called it tough love, others were just plain rude, and some genuinely thought people should think things through before making a massive financial debt commitment that had the potential to be financially crippling, even with the prestigious degree.

I felt a shift in my own ambition, as I was now part of this digital community of people shooting for the 170s and above, whereas in my actual life every other pre-law student I knew was content with just getting enough to get into a law school. I was now aiming for higher-ranked schools. I was aiming not only to get into law school but get a minimum of a 50 percent scholarship.

Before /r/LSAT, a lot of the advice I got was to settle for good enough because I was already beating some odds by being the first in my family to pursue anything higher than a bachelor's degree. Students like me aren't often encouraged to go the extra mile because there is no one in our lives to show us what that extra mile looks like. In well-intentioned attempts to make sure we continue to succeed, those who are supposed to help us sometimes sell us short.

On the sidebar of the subreddit, a section generally used to display community rules and guidelines, there was also a list of LSAT resources curated by past and present users. Many I had never come across before, including LSATMax, which provides a free course to anyone who was granted an LSAC waiver. Just like that I had a free full online course. I was also introduced to 7sage and its extremely helpful videos on YouTube. Those videos showed how to work just about every single Logic Games question that has ever been written. I would do it my way, then see how they did it and correct myself. Soon I learned the patterns, and I went from getting only a handful right to getting the whole section correct. I was dumbfounded and elated.

I studied for several months with a new vigor and intensity I never had for this test before, and in the end I went from a sub 150 score to scoring high enough to earn a full ride offer, acceptances at elite top tier schools, and I was even waitlisted at a couple of T-14s, which to some is nothing to boast about, but to me is symbolic of the long way I have come and how I can really make things happen when I find the right tools.

As I reflect, I am aware that though I did not have the privilege of wealth or legacy, I had the privilege of good fortune. I was fortunate enough to have been accepted to the LSAC program as a freshman, fortunate to have time and space to study, even fortunate to have good internet access that a lot of rural students still lack.

I was also fortunate to have a work supervisor, Lauren Popper-Ellis, who was immensely kind and supportive of my endeavor, lent advice when she could and helped me balance my busy full-time job as a researcher with studying.

Once past the LSAT, many on /r/LSAT migrated to /r/lawschooladmissions, a subreddit for general law school admissions questions, sharing tactics, essay exchanges, and opinions about whether they were being too ambitious or not ambitious enough with where they were applying. This was also the first place I had ever heard of negotiating a scholarship. Once everyone sent out their applications, the subreddit largely became a place we expressed our grievances about the process. The long waits. The exorbitant price of paying for rejection. How much power the *U.S. News* ranking has. Choosing between Harvard, Yale or Columbia at sticker price or a full ride at a tier one but lower-ranked school.

There was a post one day asking how much each person had spent on the admission process. I was fortunate that being a part of the LSAC Discover Law program not only afforded me two free LSATs, but also four processing waivers and a free CAS report. The process cost me just under $400, a tiny amount compared to others who admitted to spending more than $3,000 on the application process, prep course included. In a more recent similar post, a user contemplated, "It seems like just applying to law school is expensive. Do you think the cost of applying is a barrier for applicants?" to which another replied "Absolutely. [. . .] It's a shame to think of how many talented potential attorneys will never enter the field simply because of the financial cost."

Being part of the communities of /r/LSAT and /r/lawschooladmissions gave me the resources I had spent four years of college looking for. I know I am not alone in this because a quick look at the subreddits after every cycle shows many joyous students proud of the school they chose and how Reddit helped them reach beyond their obstacles and previous ambitions. I was lucky I found all this out when I had the space to give it a second try. Many can only afford to give the LSAT one shot. This is why I am particularly elated by the introduction of free LSAT prep by Khan Academy.

I believe the internet can be used to truly be the great equalizer in the face of inequality, and hopefully change the face of not just top law firms but also our judicial system. When the profession is overflowing with people of the same copy-and-paste background, it is difficult to see things through different lenses.

When you have not been poor, it can be difficult to think about how the poor interact with the law. When your days are mostly surrounded by people with prestigious degrees, it can be easy to forget the law is not written in easy common language. When different people look at the same problem, there is potential for different answers, and where there are different answers, there is an increased probability in finding the right answer.

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kbaxter@nysba.org

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pwood@nysba.org

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mwilson@nysba.org

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dweiller@nysba.org

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arossi@nysba.org

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jfucillo@nysba.org

Christian Nolan, Senior Writer
cnolan@nysba.org

Brendan Kennedy, Marketing and Communications Content Producer
bkennedy@nysba.org

Design Services

Web Site
Brandon Vogel, Social Media and Web Content Manager
bvogel@nysba.org

MIS & Content Management

Jason Nagel, Managing Director of IT Services
jnagel@nysba.org

Jeffrey Ordon, IT Operations Manager
jordon@nysba.org

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jknickerbocker@nysba.org

Publications
Daniel J. McMahon, Director
dmcmahon@nysba.org

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kcalista@nysba.org

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Katherine Suchocki, Senior Director of CLE & Law Practice Management
ksuchocki@nysba.org

CLE Programs
Patrick Boland, CLE Program Manager
pboland@nysba.org

Sally Bratten, CLE Program Attorney
sbratten@nysba.org

Jessica Patterson, CLE Program Manager
jpatterson@nysba.org

Thomas Richards, CLE Program Attorney
trichards@nysba.org

Cindy O'Brien, CLE Event Manager
cobrien@nysba.org

Section and Meeting Services
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pstockli@nysba.org

Lisa J. Bataille, Chief Section Liaison
lbataille@nysba.org

Finance

Kristin M. O'Brien, Senior Director
kobrien@nysba.org

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arizvanovic@nysba.org

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swhiteley@nysba.org

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How to Succeed in Legal Writing by Really Trying

Legal writing is perfected over a career. No matter how good you are today, you'll get better with effort, practice and an open mind. Anyone admitted to the bar is smart enough to be a competent legal writer. Some require more study than others. Some must be edited more than others. But any law student and lawyer who thinks logically can be a competent legal writer. The issues are how to teach someone to be competent if they aren't already and how to teach someone to be excellent if they're already competent.

Are some people born with talent to write like a lawyer? Or is good writing something a good lawyer develops? Will those we nurture ever be good enough to keep up with their naturally talented peers?

Great legal writers turn complicated legal issues into something simple and understandable. They bring their audience to a logical conclusion, one that suits their clients. Sometimes a first-year law student is a natural at legal writing. We've all met the lucky few who ace writing courses from the get-go. But even those who aren't naturals at legal writing can learn how to be competent legal writers.

THE NATURE-NURTURE DEBATE

Nature and nurture combine to produce skillful people. The nature-nurture debate asks whether people's genetics or environment make people who they are. The scientific community agrees, more or less, that it's both:[1] Natural ability and education enable proficiency. Talent alone doesn't produce excellence. Athletes, artists, and musicians work hard to be better and stay the best. Excellent writing, like any skill, results from work and dedication to the craft.

With enough effort, anyone smart can become a good writer. Fiction writer Stephen King thinks that writing skills are innate and that one can improve only slightly with hard work.[2] He thinks that competent writers can be good writers but that they can never be great writers, and that bad writers can never be competent no matter how much they practice.[3] The Legal Writer respectfully disagrees.

Gerald Lebovits (GLebovits@aol.com), New York State Supreme Court Acting Justice in Manhattan, is an adjunct at Columbia, Fordham, and NYU law schools. He thanks intern Andrea Castano (New York Law School) for her research.

King says that good writers are sometimes born with a well-tuned ear, just as some musicians are born with perfect pitch.[4] But perfect pitch, the ability to reproduce a musical note by ear, isn't innate.[5] Japanese psychologist Ayako Sakakibara taught children to have perfect pitch.[6] She proved that anyone can learn it. If anyone can learn perfect pitch, anyone can learn legal writing.

Success in legal writing is about hard work. The issue is that students who aren't good writers — the students who need to work hardest in their writing courses — think they're good writers. This is the Dunning-Kruger effect.

THE DUNNING-KRUGER EFFECT

Some law students suffer from the Dunning-Kruger effect. That's a cognitive bias that prevents people from learning. Social psychologists Dunning and Kruger's 1999 study, *Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments*, found that unskilled people don't recognize their lack of skill.[7] The more incompetent someone is, the stronger the bias.[8] Many law students and young lawyers suffer from this effect.[9]

Law students who think they're talented writers don't think they need to study writing. They resent their writing professors for suggesting otherwise. Students suffering from the Dunning-Kruger effect can't recognize good writing when they see it. By the time students realize they aren't talented legal writers, there might not be time enough for them to improve their grades. Students should acknowledge that they might suffer from a cognitive bias and accept their writing professor's suggestions from the start.

Along similar lines, most law students suffer from the Better-Than-Average effect. The Better-Than-Average effect is the cognitive bias that most people think they're above-average at some skills.[10] Most drivers think they're above-average drivers. Most law students think they're above-average legal writers.

But there's a silver lining. The way to overcome cognitive biases is through legal-writing instruction. Dunning and Kruger found that the unskilled people can assess their abilities better after learning a skill.[11] Well-taught and motivated writing students can conquer their cognitive

biases and become better writers. Writing professors and their students must both struggle to make that happen.

HOW TO TEACH[12]

If students can't learn legal writing, why do we bother teaching it in law school and during CLEs? Why do we bother reading and writing articles like this one? Because we can teach and learn legal writing.

A legal-writing professor must motivate students to develop writing skills. Students' exposure to critical thinking during the first year of law school improves their legal writing.[13] By the end of their 1L year, all students develop basic legal-writing skills.[14] Writing professors teach law students how to be lawyers. Legal-writing courses are the most important skills courses. They take the law and policy students learn in their substantive courses and put them to work.

"Students start law school confident in their own abilities as writers. A writing professor is the first to crush their confidence."

Students will get a return for the time they invest in legal writing. It frustrates students that writing courses are worth fewer credits and require more work than substantive courses.[15] The time students spend on legal-writing assignments will help them in substantive courses.

Legal-writing skills are necessary for exams. Legal-writing assignments are an opportunity to practice analysis and get direct feedback from a professor. On exams, students must identify issues, know the rule, apply the facts to the rule, and address counterarguments. Students learn how to do this in legal writing. They also learn how to persuade, research, cite, and organize. These skills are critical to success in law school and success as a lawyer.

Legal-writing courses show what good legal writing looks like. In law school, students read judicial opinions that aren't good models of legal writing. Judicial opinions in substantive classes teach students the law. But they lead students to believe that this is how a lawyer should write.[16] Many opinions are filled with legalese and lengthy discourses on how the court arrived at the law instead of stating what the law is and defending their positions. Students need exposure to well-written models to know what to do and what not to do.

As long as students are logical thinkers, they can be competent legal writers. Logical thinkers can learn to write for the reader. The reader is the only one who counts. Know the reader to know the right tone (persuasive or objective) for the assignment. When writers write in plain English and keep subjects next to predicates, the reader understands what the writer is trying to communicate. When writers write in the active voice and prefer verbs to nouns, the reader is engaged. Sentences should go from old to new, simple to complex, short to long, and end with power.

CRITICIZING CONSTRUCTIVELY

The fundamental issue with teaching legal writing is that students resist the process.[17] Their egos are wrapped up in their writing. Students start law school confident in their own abilities as writers.[18] A writing professor is the first to crush their confidence.[19] Bad grades and a damaged pride make some students do the minimum or give up.

Students shouldn't see criticism as failure. Confident writers seek advice from fresh eyes.[20] Feedback improves the writing and the writer. Through feedback, students can evaluate the strengths and weaknesses in their writing. Students shouldn't be wedded to their work.

Badly given feedback is debilitating. Writing professors should instruct students on how they grade, whether it's on a grading rubric, line-by-line on the assignment, or comments at the end. In giving feedback, writing professors should address the students' biggest issues. If there are problems in their analysis, structure, or case law, students must learn how to prioritize their edits. When the professor marks every mistake, students focus on small edits while ignoring major issues.[21]

Positive comments help students accept criticism. Professors' edits should highlight something good about the student's work. Writing professors discourage students when feedback is too harsh or vague.[22] Feedback that ends on a good note encourages students to revisit the assignment and reach out to their writing professor for help. Some writing professors criticize the way a boss would.[23] This strategy hurts students' growth as writers, and they'll resent the writing professor.[24]

HOW TO LEARN

When entering law school, students should expect to struggle at legal writing.[25] Legal writing is a new skill. A good writer isn't always a good legal writer, although only a good legal writer can be a good lawyer. Law students who majored in English or history might believe they're good writers until they start law school.

Writing in college differs from writing in law school. A lawyer's audience differs from an undergraduate's audience. Undergraduates write essays for professors who're

experts on the topic. Lawyers are the experts of their case. Their audience isn't as familiar with the facts or law.

Undergraduates are wordy writers. They overcomplicate issues and don't edit for concision and clarity. They've a word count to reach.[26] College courses give students word minimums; law-school courses give students word maximums. In law school, every word counts. Time spent on one argument is time not spent on another. If the student's writing is clear and concise, they can say more in less space.

A lawyer's words are more powerful than an undergraduate's. Lawyers write to persuade someone to do something: to make a decision. That decision has real consequences for clients. A clear and concise brief can be the difference between a decision in your client's favor or a decision in your adversary's favor.

THINK OF LEGAL WRITING AS A PRACTICAL SKILL

The fundamentals of legal writing teach students how to write like lawyers. Teachers teach, chefs cook, and lawyers write. Learning the fundamentals of legal writing helps students address complex issues clearly.[27] Good legal writers outline discussion and argument sections into the IRAC, CRARC, CREAC, etc., structure; state their conclusion up front; and begin each paragraph with topic sentences. Students think adhering to a strict structure stifles their writing. Law students must master the fundamentals before they can break the rules.[28]

IT'S ALL IN THE REWRITE

Students procrastinate writing their first drafts. Sometimes it's because they can't stop researching and want to know everything before they write anything. If you wait until you're "ready" to write, you'll never have enough time to rewrite and edit. Writing the first draft shows the gaps in research and the weaknesses in the argument. The first draft needn't be perfect. Only the final must be right.

Edits, rewrites, and constructive criticism are part of the process of being a good writer. No matter their ability, all writers write a first draft. This is the last step for bad writers. This is also when those with a natural talent shine. A good writer understands that a first draft is only one step in a long process. Before the first draft there is research, outlining, researching again, and outlining again. After the first draft is editing, revisiting research, revisiting the outline, rewriting, and editing.

Law students learn when they realize that legal writing can be learned. Poor writers who start law school can become competent writers. Good legal writers became good because they worked hard. Students develop when they're eager to learn, study the fundamentals of legal writing, and accept constructive criticism from their legal-writing professors.

Legal-writing development doesn't end with the first year of law school. Students should take more legal-writing courses in their second and third years. A good legal writer can become a great legal writer if they continue to develop their writing skills throughout their career. Summer internships, clinics, pro bono hours, and post-graduate employment are opportunities to further enhance legal-writing skills. Always push yourself to be a better writer. It'll make you a better lawyer.

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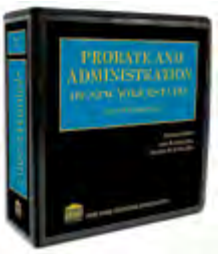

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