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RETHINKING THE LICENSING OF NEW ATTORNEYS—AN EXPLORATION OF ALTERNATIVES TO THE BAR EXAM:
INTRODUCTION

Clark D. Cunningham

INTRODUCTION

On January 29, 2004, the Georgia State University Law Review held its annual Symposium on the subject: “Rethinking the Licensing of New Attorneys—An Exploration of Alternatives to the Bar Exam.” The choice of this topic was inspired in large part by the work of Georgia State University (“GSU”) College of Law Professor Andrea Curcio, who was the primary author of a report issued by the Society of American Law Teachers (“SALT”) in July 2002 urging states to consider alternatives to the conventional bar examination.1 The Law Review invited speakers from three states that are currently considering alternatives to the bar examination: (1) from New York, Dean Kristin Booth Glen and Professor Lawrence Grosberg; (2) from Arizona, Dean Toni Massaro and Sally Simpson; and (3) from New Hampshire, Professor Sophie Sparrow. Additionally, the Law Review commissioned articles that would put these proposals in comparative and cross-disciplinary perspectives. Those attending the Symposium thus learned about the training and licensing of lawyers in England from Nigel Duncan, in Scotland from Paul Maharg, and in South Africa from Peggy Maisel and Thuli Mhlungu. Information about the medical profession in the United States was provided by Dr. David Stern. Articles written for this Symposium by these speakers (and subsequently revised) form the core of this Symposium Issue.

The Law Review also invited a number of influential leaders in both the legal profession and legal education to serve as commentators at the

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Symposium: Hulett H. Askew, Director of the Office of Bar Admissions at the Supreme Court of Georgia, who is a member of the Council of the American Bar Association Section of Legal Education and Admission to the Bar; John T. Berry, Executive Director of the State Bar of Michigan, who is the Chair of the American Bar Association Standing Committee on Professionalism; Professor Joan Howarth from the University of Nevada-Las Vegas School of Law, who is a consultant on the bar examination to the Nevada Supreme Court; Dean Mary Kay Kane from the University of California-Hastings College of the Law, who serves as the Chair of the Joint Committee on the Bar Examination of the Association of American Law Schools and the American Bar Association; Professor Eileen Kaufman from Touro Law School, who currently serves as the Chair of the Committee on the Bar Examination, Society of American Law Teachers; Erica Moeser, President of the National Conference of Bar Examiners; and Professor Judith Wegner from The University of North Carolina School of Law, who is directing a major study of legal education for the Carnegie Foundation for the Advancement of Teaching. The commentators were asked in particular to consider three questions in light of the various principal presentations: (1) Should a bar alternative proposal include a training component, and if so, what should be the focus and method of the training? (2) Should some form of service to the community also be a goal, and if so, whom should be served and how should service be delivered? and (3) How should competence to be licensed as a lawyer be assessed? Glen, Moeser, and Kaufman have contributed commentaries to this Issue, and comments from all the commentators, as well as presentations by the principal speakers, can be found in the transcribed Symposium proceedings, which are available on the Web site of the

3. Wegner is the former Dean of The School of Law at The University of North Carolina and a former President of the Association of American Law Schools ("AALS"). Mary Kay Kane is also a former AALS President.
GSU College of Law. This Introduction will summarize the articles and commentaries published in this Symposium Issue as well as some of the presentations and comments that appear in the transcribed proceedings.

I. PROPOSALS FOR ALTERNATIVES TO THE BAR EXAMINATION

A. New York

In a 2002 Columbia Law Review article, Dean Kristin Booth Glen summarized a program that she had been proposing for New York for several years: a two to three year pilot program, which she has titled a “Public Service Alternative to the Bar Examination” (“PSABE”). This proposal is based upon her critique of the current bar examination, set forth in the first part of the article, and in particular her concerns that the bar examination (1) does not adequately test for the skills that the legal profession has actually identified as necessary for competent practice and (2) has a disparate impact, unrelated to competence, on non-

5. See W. Lee Burge Chair of Law and Ethics, Georgia State University College of Law, at http://law.gsu.edu/ecn Cunningham/Professionalism/Index.htm (last visited June 23, 2004); see also Georgia State University Law Review, available at http://law.gsu.edu/lawreview/ (last visited June 23, 2004) (featuring the full text of articles and commentaries found in this Issue).

6. Glen has been Dean of the City University of New York School of Law since 1995.

7. Kristin Booth Glen, When and Where We Enter: Rethinking Admission to the Legal Profession, 102 COLUM. L. REV. 1696, 1723 n.103 (2002) [hereinafter When and Where We Enter]; see also Kristen Booth Glen, Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession, 23 PAC. L. REV. 343 (2003); Kristen Booth Glen, In Defense of the PSABE, and Other “Alternative” Thoughts, 20 GA. ST. U. L. REV. 1029, 1029 (2004) [hereinafter In Defense of the PSABE]. Glen began discussing this proposal in various forums, including several academic conferences, as early as 2000. When and Where We Enter, supra, at 1696 n.*., 1703. According to Glen, the idea for such a program originally came from Justice Alfred Lerner, when he was the Presiding Justice of the Appellate Division of the Supreme Court of New York, First Department. Id. at 1723 n.103. New York has a long history of skepticism about the bar examination. Id. at 2018 n.86 (citing a 1988 report by the New York State Bar Association concluding that “neither the multiple choice nor the essay examinations can ensure that students have adequate lawyering skills to enable them to engage in the practice of law”); see also Lawrence M. Grosberg, Standardized Clients: A Possible Improvement for the Bar Exam, 20 GA. ST. U. L. REV. 841, 843 n.8 (2004) (citing a 1992 report by the Committee on Legal Education and Admission to the Bar of the Association of the Bar of the City of New York that critiqued the bar examination).

8. Glen takes as her primary authority for the definition of necessary skills the TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, A.B.A. SEC. LEG(172,571),(904,711)(172,711),(904,759)(172,759),(904,807)(172,807),(904,856)(172,856),(904,905)(172,905),(904,954)(172,954),(904,1003)
majority applicants. The PSABE program would use unpaid placements in trial courts to provide what Glen called a “test in a real practice setting”: participants would observe proceedings in courtrooms, assist judges in research and drafting court decisions, provide assistance to unrepresented litigants, and perhaps even serve as court-appointed arbitrators or mediators. She proposed using trial courts because they would offer accessible placement sites throughout the state, because they have an enormous need for assistance, and because they would be viewed as credible institutions for assessing competence to practice law. The work of the participants would be evaluated by judges and other court personnel. Upon successful completion, participants would be fully admitted to the New York bar without taking any examination.

The program would operate full-time for ten weeks during the summer following law school graduation—a period designed to correspond with the time taken by most graduates to study for the bar examination in a commercial bar review course. Each year, 100 to 200 participants would be chosen by lottery from applicants enrolled at the various law schools in New York. Lawyers licensed through the PSABE program would be required to provide 150 pro bono hours to be

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9. *When and Where We Enter*, supra note 7, at 1709.
10. Participants would begin with a three to five day orientation course. *Id.* at 1726.
11. *Id.* at 1724-26.
12. Glen’s assumption that placement in a trial court would provide opportunities to demonstrate lawyering skills, as well as competency as a judicial clerk, seems to be based in part on her personal experience as a trial judge in New York City, where the courts, according to her, more closely resemble a hospital emergency room than the traditional image of a courtroom. *Id.* at 1724-25. The city courts in New York affirmatively provide services to the thousands of poor, unrepresented litigants that appear before them through the Self-Representation Office and various mediation programs. *Id.*
13. *Id.* at 1728-29; see also *In Defense of the PSABE*, supra note 7, at 1031.
14. *See When and Where We Enter*, supra note 7, at 1735-38 (summarizing the wide-ranging benefits Glen claims would result from the PSABE).
15. *Id.* at 1734. Not having to spend the time and fees required for a commercial bar review course, Glen hopes, would at least partially offset any loss of income for participants during their ten weeks of volunteer service to the courts. *Id.* at 1734-35.
16. *Id.* at 1729. Glen also indicates that applicants should be required to take during law school a course on New York practice as well as some experiential courses such as clinics, externships, or simulation-based classes. *Id.* at 1722 n.97, 1729 n.126.
served within the state court system for each of the first three years following admission to the bar.\textsuperscript{17}

Even as Glen’s article was being prepared for publication, a joint report of both Committees on Legal Education and Admission of the Association of the Bar of the City of New York ("ABCNY") and of the New York State Bar Association ("NYSBA"), entitled \textit{Joint Committee Report: Public Service Alternative Bar Exam} ("Joint Proposal"), was issued in June 2002 recommending implementation of most of the provisions of Glen’s PSABE pilot project proposal.\textsuperscript{18} Professor Lawrence Grosberg\textsuperscript{19} was Chair of the ABCNY Committee during the time the Joint Proposal was written and issued. According to Grosberg, the main differences between the Joint Proposal and Glen’s PSABE proposal are that under the Joint Report: (1) only 50 applicants would be chosen for the first year,\textsuperscript{20} (2) the program period would be 12 weeks instead of 10, (3) participants would be assessed by outside evaluators (such as law school clinical teachers) as well as by court personnel, and (4) participants would also be required to pass the Multistate Professional Responsibility Examination ("MPRE") and a written performance test.\textsuperscript{21}

\begin{footnotes}
\textsuperscript{17} \textit{Id.} at 1723. This requirement would further support New York’s overburdened trial courts by providing volunteer attorneys already trained in the areas where the courts require assistance, as well as reinforce the public service ethos the program is designed to instill. \textit{When and Where We Enter}, supra note 7, at 1737.

\textsuperscript{18} Grosberg, \textit{supra} note 7, at 841; see also Association of the Bar of the City of New York, Reports/Publications, \textit{at} http://www.abcny.org (last visited June 23, 2004) (providing the full text of the report under Committee Reports); W. Lee Burge Chair of Law and Ethics, Georgia State University College of Law, \textit{at} http://law.gsu.edu/ecunningham/Professionalism/Index.htm (last visited June 23, 2004).

\textsuperscript{19} Grosberg is a Professor of Law at New York Law School and a nationally recognized expert in clinical education.

\textsuperscript{20} The number would increase to 150 by the second year. Grosberg, \textit{supra} note 7, at 848 n.25.

\textsuperscript{21} Id. at 847-49. The written performance test would resemble in some respects the Multistate Performance Test ("MPT") currently administered as part of the bar examination in a number of states. See Hulett H. Askew, \textit{Remarks} at the Georgia State University Law Review Symposium (Jan. 29, 2004) (afternoon transcript available \textit{at} http://law.gsu.edu/ecunningham/Professionalism/Index.htm, at 31-32) (describing the history of the MPT and its use in Georgia.); see also Hulett H. Askew, \textit{Why Georgia Adopted Performance Testing}, \textit{B. EXAMINER}, Feb. 1998, at 33. Glen’s major disagreements with the Joint Proposal are with its proposed requirements of the MPRE and the written performance test. Grosberg, \textit{supra} note 7, at 848 n.28; \textit{When and Where We Enter}, supra note 7, at 1726 n.117; \textit{In Defense of the PSABE}, supra note 7, at 1031-33.
\end{footnotes}
The Joint Proposal was submitted to the New York State Board of Law Examiners, as well as to the New York State Chief Administrative Judge and the Chief Judge of the New York Court of Appeals. According to Grosberg, there has been very little official response; he reports that in informal meetings between members of the two bar committees and members of the Board of Bar Examiners, the bar examiners present were skeptical of the PSABE proposal as impractical.

B. Arizona

In 2002, a group of law students at the University of Arizona, led by Sally Simpson, formed an organization called the Community Legal Access Society ("CLAS"). This group developed a proposal for a Community Legal Access Bar Alternative ("CLABA"), which has been approved on a pilot basis by the Board of Governors of the Arizona Bar contingent upon obtaining preliminary funding commitments. The CLABA proposal calls for a one-year, post-J.D. apprenticeship where law graduates would be employed by a non-profit organization specifically designed both to train these graduates and to provide reduced-fee legal services to persons of modest means whose incomes are nonetheless above the eligibility limits for conventional legal aid and public defender programs. Apprentices would rotate through six

22. Grosberg, supra note 7, at 845 n.15.
23. Id. Grosberg also reports that within several months of receiving the Joint Proposal, the Board of Bar Examiners issued an extensive report recommending a substantial increase in the minimum passing score and that widespread opposition to this recommendation diverted attention from the PSABE proposal. Id.
24. Simpson graduated from the University of Arizona Law School in 2004. She was one of a group of students who participated in a discussion of the bar examination with Dean Massaro during a review session in December 2001 for a first year class taught by Massaro; that discussion prompted formation of CLAS. Sally Simpson & Toni Massaro, Students with "CLAS": An Alternative to Traditional Bar Examinations, 20 Ga. St. U. L. Rev. 813, 813-16 (2004).
25. Id. at 814; see also Community Legal Access Society, at www.law.arizona.edu/depts/CLABA/ (last visited June 23, 2004).
26. Electronic Mail Communication from Toni Massaro, Dean and Professor of Law, University of Arizona College of Law, to Tony Ventry (June 24, 2004) (on file with Author).
27. Projected salaries for apprentices are in the range of $19,000 to $24,000 for the year. Simpson & Massaro, supra note 24, at 818 n.6.
28. Id. at 818.
practice areas, spending eight weeks in each rotation. Applicants to the program would be required to graduate from an ABA-accredited law school with a minimum GPA of 2.75, complete specified core courses, pass the MPRE, and be approved by the usual character and fitness review process. During the apprenticeship, the graduates would be evaluated by their supervising attorneys both in terms of their day-to-day practice and through competency-based performance evaluations. Upon satisfactory completion of the one-year program, the graduates would become fully-licensed attorneys. During the pilot period, there would be 18 apprentices each year supervised by 6 full-time attorneys.

C. New Hampshire

In New Hampshire a Bar Practicum Committee has been exploring alternatives to the bar examination. The committee is chaired by Supreme Court Justice Linda Dalianis and includes members representing the Board of Bar Examiners, the New Hampshire Bar Association, the state supreme court, practicing lawyers, and the Franklin Pierce Law Center, the state’s only law school. The Committee is considering a kind of modified diploma privilege that would be called the Daniel Webster Scholar Program (“Program”), to be

29. The projected practice areas would be misdemeanor criminal defense, government regulation, personal injury, business planning, personal finance, and family law. Id. at 817 n.4.
30. Id. at 818.
31. Id. at 818, 828. The CLABA proposal does not provide detail about the evaluation methodology to be used nor does it call for any evaluation of the apprentices by attorneys or academics from outside the CLABA program, in contrast to the New York proposal discussed supra notes 6 through 23 and accompanying text.
32. Simpson & Massaro, supra note 24, at 829.
33. The work of this committee follows from an initiative several years earlier, when members of the bench, bar, and law schools in Maine, New Hampshire, and Vermont explored the idea of administering a single tri-state bar examination. Sophie Sparrow, Presentation Materials Distributed at the Georgia State University Law Review Symposium (Jan. 29, 2004), at 1 (available at http://law.gsu.edu/oscunningham/Professionalism/Index.htm) [hereinafter Sparrow Presentation Materials]; see also Sophie Sparrow, Presentation at the Georgia State University Law Review Symposium (Jan. 29, 2004) (morning transcript available at http://law.gsu.edu/oscunningham/Professionalism/Index.htm, at 56-67) [hereinafter Sparrow Remarks].
34. The phrase “diploma privilege” refers to a bar admission system where graduates of one or more specified law schools in a state are automatically admitted to the bar without requirement of a bar examination. Curcio, supra note 1, at 410-11. Currently, the only state with a diploma privilege is Wisconsin, but in the past, Montana and West Virginia also had a diploma privilege. Id. at 417 n.256.
established as an honors program at Franklin Pierce. Students who successfully complete the Program would not be required to take the MPRE or the state bar examination in order to be admitted to the bar in New Hampshire.

The Program would begin as a three-year pilot project, supervised and evaluated by a Webster Scholar Program Committee that would include at least one representative from the New Hampshire Supreme Court, the Board of Bar Examiners, the State Bar Association, and Franklin Pierce. Enrollment in the Program would be limited to students at Franklin Pierce, who could apply after completion of the first full-time semester. No more than 25 students would be accepted each year. During the pilot program, participation would be limited to students who are in the top half of their class both at the time they apply and throughout the balance of their legal education.

According to Professor Sophie Sparrow, the focus of the Program will be on outcomes achieved by the students: what the student knows and can do, not simply what he or she has been taught. It appears that these outcomes will be primarily produced (1) by taking existing upper-level elective courses, such as clinic, externship, law office management, advanced writing, and alternative dispute resolution, and (2) through participation in at least four new courses called “practice courses.” These courses, taught by adjunct professors, would focus on practice in particular subject matter areas (for example, criminal law, family law, real estate). Enrollment in each course would be limited to 12 students. The course would incorporate ethics, professionalism, and writing into the specifics of practice in that field; involve students in simulations; and provide opportunities for student reflection. Students would be required to produce one “product” (for example, a complex real estate document) and one “process assignment” (for example, a list

35. Sparrow is a Professor of Law and the Director of Legal Skills at the Franklin Pierce Law Center. She is also a member of the New Hampshire Bar Practicum Committee.

36. Students could propose an alternative to clinics or practice courses, based on a showing that they would receive a more rigorous and valuable experience under the alternative, such as mentoring with an experienced attorney through an externship. Sparrow Presentation Materials, supra note 33, at 6.
of resources, a source of forms, and an outline of how to solve a problem in this specific practice area).

The products and process assignments generated by the practice courses, apparently combined with work produced in clinics, independent studies, and externships, would comprise a portfolio that would be the primary basis for determining whether the student should be licensed without having to take the bar examination. This portfolio would be evaluated by the Board of Bar Examiners, perhaps with participation of the Webster Scholar Program Committee.37

II. HOW LAWYERS ARE LICENSED IN THREE OTHER COUNTRIES

The Law Review commissioned articles about England, Scotland, and South Africa because: (1) England is the origin country that established the basic paradigm for the practice of law in common law jurisdictions; (2) Scotland is engaged in a comprehensive reform of its system for training and licensing lawyers that has resulted in an impressive attempt to integrate academic education with apprenticeships; and (3) South Africa has for the past ten years offered a community service alternative to traditional bar admission that compares in interesting ways to the proposals now pending in New York and Arizona.

A. England

The legal profession in England38 consists of two branches: (1) solicitors, who are the first contact for any client and who take full responsibility for most matters apart from litigation, and (2) barristers,

37. According to Sparrow, the criteria used to assess the portfolio would be whether the student has demonstrated competence in the ten fundamental lawyering skills and for fundamental values described in the MacCrate Report. Id. at 2.

38. The United Kingdom consists of three separate legal jurisdictions, each of which has its own system for training and licensing lawyers: (1) Scotland, (2) Northern Ireland, and (3) England and Wales. For convenience “England” will be used to refer to both England and Wales. Nigel Duncan, Gatekeepers Training Hurdlers: The Training and Accreditation of Lawyers in England and Wales, 20 Ga. St. U. L. Rev. 911, 911 (2004) [hereinafter Gatekeepers Training Hurdlers]. Nigel Duncan is presently Principal Lecturer at the Inns of Court School of Law, City University, London. He is also the Editor of The Law Teacher and a past Chair of the Association of Law Teachers.
who have special expertise in trial advocacy and who only represent clients on referral from solicitors. Barristers may appear in any court while solicitors have more limited rights of appearance.\footnote{39} Separate professional bodies control each branch: the Law Society regulates solicitors and the General Council of the Bar regulates barristers.\footnote{40} (In England “the bar” refers only to barristers, not to lawyers generally.) To become a solicitor, one must complete a university degree in law,\footnote{41} a one-year post-graduate Legal Practice Course, and then a two-year apprenticeship called the “Training Contract.” Barristers take a one-year Bar Vocational Course after completing their university degree and then complete a one-year apprenticeship called “pupillage.”\footnote{42} The only examinations that must be passed to become a lawyer are the internal examinations of the university degree program, the Legal Practice Course, and the Bar Vocational Course. However, both the content and the assessment methods of the Legal Practice Course and the Bar Vocational Course are much more closely regulated by the Law Society and Bar Council, respectively, than are the curricular programs of U.S. law schools. Both courses include extensive instruction and assessment of practice skills such as interviewing and advising clients, negotiation, courtroom advocacy, and document drafting.\footnote{43} Assessment of these skills is not based simply on written answers to examination questions. For example, in the first-established Bar Vocational Course, provided by the City University of London Law School, to pass the course on client interviewing and counseling, students must conduct a simulated

\footnote{39. \textit{Id.}}

\footnote{40. Unlike the United States, the courts in England do not play a significant role in setting standards for legal education, licensing lawyers, establishing rules of professional conduct, or disciplining lawyers in practice. Interview with Nigel Duncan, Principal Lecturer, Inns of Court School of Law, City University, London (Aug. 22, 2003) (on file with Author) [hereinafter Duncan Interview].}

\footnote{41. Persons who obtained their university degree in a non-law subject may still enter a Legal Practice Course if they complete a one-year post-graduate course in legal studies, thereby obtaining a Diploma in Law. This Diploma is also accepted for admission to the Bar Vocational Course for would-be barristers. \textit{Gatekeepers Training Hurdlers, supra} note 38, at 913-14.}

\footnote{42. \textit{Id.} at 918-21. It is increasingly common for lawyers to qualify first as solicitors and then, after a period of practice, go through the Bar Vocational Course and pupillage to become barristers. Duncan Interview, \textit{supra} note 40.}

\footnote{43. \textit{Gatekeepers Training Hurdlers, supra} note 38, at 918-21. Because transactional work is the specialty of solicitors, the Legal Practice Course also requires competency in such skills as conveying real estate, probate planning and administration, and tax work. \textit{Id.}}
first client meeting with a trained actor; the videotape of that meeting is evaluated by two assessors, neither of whom can be the teacher of the course.  

B. Scotland

Scotland, although it is a part of the United Kingdom, has its own legal system which differs in many respects from the system in England. The specialized training and licensing of advocates (who are comparable to English barristers) is available only after completion of all the education and training steps for becoming a solicitor. After completion of a university degree in law, aspiring solicitors must complete a 27 week post-graduate Diploma in Legal Practice (“Diploma”). Then, as in England, there follows a two year traineeship, with one significant difference: mid-way through the training period, trainees are required to take an additional course called

44. Id. at 941; Nigel Duncan, Presentation at the Georgia State University Law Review Symposium (Jan. 29, 2004) (morning transcript available at http://law.gsu.edu/ccunningham/Professionalism/Index.htm, at 92-94).

45. Paul Maharg, Professional Legal Education in Scotland, 20 GA. ST. U. L. REV. 947, 947 (2004). Professor Paul Maharg is Co-Director of Professional Practice Courses at the Glasgow Graduate School of Law. He is also Director of the Learning Technologies, Development Unit and Chair of the British & Irish Law, Education and Technology Association and a member of a number of committees within the Law Society of Scotland (Diploma Co-ordinating Committee: Professional Competence Committee; Test of Professional Competence Committee, and Education & Training Committee).

46. Id. at 949. After a minimum of 21 months as a trainee in a solicitor’s office, an aspiring advocate spends an additional 9 months of training supervised by the governing body of the advocate’s profession, the Faculty of Advocates, which integrates apprenticeship to an experienced advocate with intensive simulation-based courses taught by the Faculty. Candidates must then pass a series of examinations, some of which are performance-based, after which they are admitted as advocates. Id. at 954; Interview with Kenneth Campbell, Director of Training, Faculty of Advocates (Aug. 19, 2003) (on file with Author); Interview with John Sturrock, former Director of Training, Faculty of Advocates (Aug. 19, 2003) (on file with Author).

47. Maharg, supra note 45, at 950. Unlike the English Legal Practice Course, the content and teaching methodology of the Scottish Diploma is much less regulated by the Law Society and varies considerably among the five law schools that currently provide the Diploma. Id. Maharg is co-director of the largest Diploma program in Scotland, offered by the Glasgow Graduate School of Law; this program has gained international recognition for its innovative use of learning technology to integrate the teaching of substantive law and legal skills in the setting of “virtual” law firms, clients, cases and even a “virtual” town where all are located. See id. at 962-63 (describing the “virtual community” created for the Diploma at the Glasgow Graduate School of Law.) There is an alternative route, now rarely used, in which a person can become a solicitor without either a university law degree or the Diploma by instead completing a three-year apprenticeship and passing a series of examinations administered by the Law Society. Id. at 952.
the Professional Competence Course ("PCC"). The PCC lasts about two weeks and, unlike the Diploma, contains a significant elective component tailored to the trainee's anticipated area of specialization. The trainee then returns to the firm to complete the two-year apprenticeship; upon satisfactory completion, the trainee becomes a licensed solicitor.

C. South Africa

To be admitted as an attorney in the Republic of South Africa, a person must obtain a law degree from a university, graduate from a five-week course at a Practical Legal Training School ("PLTS"), and complete two years of apprenticeship (called "articles of clerkship"). In addition to successful completion of the clerkship, in order to be licensed the candidate must pass a four-part examination that covers legal ethics, court procedure, accounting, and the administration of estates. These parts can be taken at different times, including before and during the clerkship.

48. Id. at 953. England does require a much less substantial 72 hour course during the training contract for solicitor candidates. Gatekeepers Training Hurdlers, supra note 38, at 925.

49. The Professional Competence Course ("PCC") also differs from the Diploma in that there is no assessment to be passed and in that it is offered not only by law schools but also by some larger firms as an "in-house" course for their own trainees. Maharg, supra note 45, at 953. The fees for the PCC are generally paid by the firm providing the clerkship rather than by the trainee. Id.

50. As part of an extensive restructuring of the legal training program for solicitors, the Law Society of Scotland proposed several years ago that a Test of Professional Competence ("TPC") be required at the end of training before licensing. However, despite several pilot projects to develop such a test, the TPC has not yet been implemented. Id. at 952-53 n.32.; Interview with Liz Campbell, Director of Training, Law Society of Scotland (Aug. 21, 2003) (on file with Author).


52. Id. at 1026. During the clerkship, the candidate attorney is also required to keep a diary which is available for inspection at any time by the Law Society. Id. at 1012. This South African "bar exam" differs in a number of ways from the American bar exam: the exam tests only four topics, all intended to relate directly to practice; it can be taken during the apprenticeship period while candidates are hopefully learning in a real-life context what will be tested; and because it can be taken in parts at various times, a candidate is more likely to persevere and re-take a failed part, as in fact Mhlungu reports she did. Id. at 1026; Peggy Maisel, An Alternative Model to United States Bar Examinations: The South African Community Service Experience in Licensing Attorneys, 20 Ga. St. U. L. REV. 977, 983 n.17 (2004). Nonetheless, this examination is criticized by Mhlungu and many others, and indeed the licensing system for attorneys is currently under review by the Law Society of South Africa, which has appointed a task force to study in particular the issue of assessment. Mhlungu, supra note 51, at 1026.
The South African Attorneys Act was amended in 1993 to create an alternative route for licensing. The usual two-year clerkship period can be reduced to one year if the person completes a five-month full-time course at a PLTS and then performs 12 months of community service with a public interest legal organization.\(^{53}\) This amendment coincided with the end of the apartheid régime, which led to the election of Nelson Mandela. The amendment was intended to address two problems created by apartheid: (1) black law school graduates were being denied access to the profession because of the difficulty in obtaining clerkships with law firms, which were largely dominated by whites, and (2) there was a huge unmet need for indigent representation, especially in criminal cases.\(^{54}\)

Community service sites are accredited by provincial law societies and include university based law clinics and “Justice Centres” run by the Legal Aid Board.\(^{55}\) These community service sites provide training for a large number of candidate attorneys. The Legal Aid Board funds 58 Justice Centres which employed 288 candidate attorneys as of March 2003, a number that was expected to rise to 602 by March 2004.\(^{56}\) One of the two Symposium articles about South Africa was written by Thuli Mhlungu, who is Deputy Director of the University of Natal Campus Law Center, which operates an approved community service site.\(^{57}\) The University of Natal Law Clinic is currently training nine candidate attorneys (eight of whom are from previously disadvantaged backgrounds) under the supervision of three attorneys, one of whom is Mhlungu.\(^{58}\) All legal advice given to clients and all documents prepared by the candidates are reviewed in advance by the supervising attorneys. When the candidate attorneys go to court, the candidate and the

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53. Mhlungu, supra note 51, at 1009 n.149.
54. Maisel, supra note 52, at 977-78.
55. Mhlungu, supra note 51, at 1022.
56. Id. at 1025-26.
57. Mhlungu is also the Vice President of the Association of University Legal Aid Institutions. The other article on South Africa, Maisel, supra note 52, is written by Peggy Maisel, currently an Associate Professor and the Director of Clinical Programs at the Florida International University College of Law, who was first a visiting Fulbright Professor at the University of Natal from 1996-97 and then a member of the University of Natal Faculty from 1997-2002.
58. Mhlungu, supra note 51, at 1023.
supervisor act as co-counsel.\textsuperscript{59} This clinic also teaches fourth-year law students, and the candidate attorneys participate in the clinical education program, sometimes acting as student supervisors.\textsuperscript{60}

Mhlungu’s article differs from the other contributions to the Symposium in that she includes a description of the apprenticeship program from the perspective of a candidate attorney by providing a highly critical report of her own personal experience, as a black woman who obtained her university law degree in 1996 and then completed her articles of clerkship by working in two very different settings: (1) a small, general practice firm where all the lawyers were black and (2) a large, top-echelon law firm where she was only one of two black professional employees.\textsuperscript{61} Law firms are under no obligation to train candidates for clerkship; many firms do not accept clerks, viewing them as more of a financial liability than an asset.\textsuperscript{62} According to Mhlungu, many candidate attorneys receive poor training and are financially exploited.\textsuperscript{63} Small firms in particular thrust untrained clerks into interviewing clients, making court appearances and assuming administrative burdens so as to free up time for the principal attorneys in the firm to concentrate on procuring more clients.\textsuperscript{64} Mhlungu’s experience as a clerk in her small firm was that the clerks typically had to take the clients’ initial instructions, counsel them on their options, and independently decide on the legal strategy to be followed. The clerks’ primary interaction with their supervising attorneys consisted mainly of the supervising attorney giving instruction via brief notes placed on files without proper guidance. Although they were provided with some opportunities to accompany the supervising attorneys to court, this did not offer much of a learning experience because the

\begin{itemize}
\item \textsuperscript{59} Id. at 1023-24.
\item \textsuperscript{60} Id.
\item \textsuperscript{61} Id. at 1014. Although most of her report focuses on her two clerkships, Mhlungu also found her five-week PLTS course to be deficient. Although the PLTS course is intended to focus on practical skills, organizing students into firms that "litigate" against each other, Mhlungu’s experience was that her PLTS course consisted of too much lecturing and substantive law. Id. at 1011-12.
\item \textsuperscript{62} Id. at 1013.
\item \textsuperscript{63} Mhlungu, supra note 51, at 1013-14.
\item \textsuperscript{64} Id. at 1015.
\end{itemize}
clerks were never part of the planning and preparation of the case.\textsuperscript{65} During her entire apprenticeship period with this small firm, Mhlungu never saw a case from start to finish and never had the opportunity to prepare or litigate a case of her own. She only appeared in court by herself to postpone or adjourn cases for one of the supervising attorneys.\textsuperscript{66} Her experience as a clerk in a large firm was quite different but had its own distinct deficiencies. In contrast to the small firm, her work was closely supervised, but the method of training used by her supervisor was very directive.\textsuperscript{67} She was not permitted to speak or correspond with clients without his instruction or approval. He carefully reviewed her draft correspondence and made extensive corrections in an effort to conform her style of drafting to his own personal style.\textsuperscript{68}

Mhlungu’s experience illustrates a conundrum about the apprenticeship approach to training prospective lawyers: if a trainee attorney receives real responsibility, there is often inadequate supervision, whereas if good supervision is provided, there is often little direct responsibility and too much emphasis on imitation of the supervisor.\textsuperscript{69} Although the community service alternative was created in South Africa primarily to open up entry to the profession for non-white law graduates and to provide legal services to indigent clients, this option may also improve the quality of training even though the length of the clerkship period is reduced from two years to one—at least in university-based clinical programs such as the one Mhlungu describes

\textsuperscript{65} Id. at 1017.
\textsuperscript{66} Id. at 1017.
\textsuperscript{67} Id. at 1019.
\textsuperscript{68} Id. Several factors in addition to the difference in size appeared to have contributed to Mhlungu’s experience in her second clerkship. Her supervisors in the first firm were, like her, black. In the second firm, Mhlungu felt like a token black, which may be one reason that she was not given significant responsibilities. Mhlungu, supra note 51, at 1021 (quoting her supervisor as telling her that he was holding back in giving her more responsibility “because Black people tended to leave white firms as soon as they were qualified”). Gender bias also apparently played a role. Id. (noting that a male clerk in her department, who played golf with the partners, was given more responsibility). Finally, although her first clerkship involved substantial litigation, her second clerkship focused entirely on real estate conveyancing, which meant that her supervisor was not absent in court as was the case frequently in her first clerkship and thus more available to provide close supervision. Id.

\textsuperscript{69} Maisel, supra note 52, at 1017, 1019. Duncan reports similar problems with the apprenticeship programs for both solicitors and barristers in England. Gatekeepers Training Hurdlers, supra note 38, at 923-25.
where close supervision and real case responsibility appear to be well-coordinated. However, because a major purpose of the community service alternative is to meet the enormous need for representation of indigent clients, Mhlungu acknowledges that even in her university-based clinic there is a daily tension between providing adequate training for the candidate attorneys and representing as many clients as possible.\textsuperscript{70} The risk that candidate attorneys will receive more responsibility than supervision is even greater for the majority of sites, which are legal services offices not integrated into a law school clinical education program.\textsuperscript{71}

III. THE TRAINING AND LICENSING OF PHYSICIANS
IN THE UNITED STATES

The training and licensing of physicians, in its extensive integration of academic and practical education, offers a model towards which the legal profession could well aspire. To be licensed as a medical doctor in the United States, one must graduate from an accredited medical school, pass a national examination, and complete a minimum of one year of supervised medical training after medical school ("the residency").\textsuperscript{72}

Although the traditional model for medical school education was the "2+2" curriculum—two years of basic science followed by two years of clinical education—most schools now introduce students to actual patient care beginning in the first year. Students first learn how to interview patients at health fairs and similar activities and then move on to more complete interviews and physical examinations that are either observed by a faculty member or assessed through review of the written record produced by the student. Most schools also use simulated clinical

\textsuperscript{70} Mhlungu, supra note 51, at 1023 n.45.

\textsuperscript{71} Legal Aid Board offices represent over 220,000 indigent criminal defendants per year as well as handling civil cases. Id. at 1025 n.52; see Maisel, supra note 52, at 990 n.48 (noting that although there is not yet much written about the training of candidate attorneys, it seems certain that the South African system still suffers from wide variation in the quality of training provided to candidate attorneys).

\textsuperscript{72} David Stern, Outside the Classroom: Teaching and Evaluating Future Physicians, 20 GA. ST. U. L. REV. 877, 877 (2004). David Stern is an Associate Professor of Medicine and Medical Education and the Director of the Global REACH Program at the University of Michigan Medical School. He also serves on the Advisory Board on Professionalism of the Accreditation Council for Graduate Medical Education.
examination of "standardized patients" for both teaching and evaluation during this period.

By the beginning of the third year of medical school, students make the transition to full-time clinical care under faculty supervision, typically moving through a series of "rotations" in different fields for one to three months at a time. The student has no authority to order hospital procedures or write prescriptions but does present a proposed diagnosis and treatment plan—based on the student’s own interview and examination of the patient—and these plans are frequently implemented over the signature of a supervising physician. In these rotation settings, the students typically spend more time with each patient than any other member of the healthcare team.

The national medical examination is given in three parts. Part I is typically given after the second year of medical school and focuses on the basic science foundational to the practice of medicine. Part II is designed to evaluate the student’s ability to manage patients under supervision and is usually taken during the fourth year of medical school.

Effective June 2004, a Part II(CS) has been added that requires all medical students to pass a clinical skills examination in which the student interviews and examines a series of standardized patients and prepares a diagnosis and treatment plan.

Part III is administered during the first year residency and is designed to determine if the resident physician can manage a wide array of medical conditions independent of supervision. Although many physicians still in practice only completed one or two years of residency after medical school, in the past 20 years almost all medical school graduates have proceedings to further training in one of about 50 different specialties. After completion of this training, physicians are "board-eligible"—if they subsequently pass a series of specialty examinations administered by the board that governs the specialty they become

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73. See below for a more detailed discussion of standardized patients and the potential application of this approach to the assessment of lawyering competency. See infra notes 97-101 and accompanying text.
74. Id. at 887.
"board-certified." Board certification is often required in order to obtain privileges to practice with a hospital and to be included as a preferred provider for managed health care organizations.

CONCLUSION

The Law Review intended that this Symposium not simply rehearse the mounting criticisms found elsewhere that both legal education and the bar examination fail to assure that newly-licensed lawyers are in fact competent to practice law without supervision, which is the purported standard for bar admission. Rather, the Symposium could be described as asking the following question (in the style of a law school hypothetical): even if one assumes that the current bar examination does an adequate job of identifying those persons who should be licensed, is it possible that there are other approaches which would be equally effective in identifying who should be licensed but would offer additional benefits not provided under the current American system? The Symposium proceedings reveal a unanimous consensus that the

75. Id. at 890.
76. See, e.g., Curcio, supra note 1; Why and Where We Enter, supra note 7, and sources cited therein. As mentioned below, infra note 78, there was, however, a strong sense among many if not most of the participants that the current American system for training and licensing lawyers was in serious need of improvement. For example, one of the most prominent bar leaders at the symposium, John Berry, said he brought to the symposium a message to "dramatically make change as quickly as possible." Remarks at the Georgia State University Law Review Symposium (Jan. 29, 2004) (morning transcript available at http://law.gsu.edu/ccunningham/Professionalism/index.htm, at 76-77).
three bar alternatives each offer significant benefits as compared to the current bar exam system of licensing; most of the reservations expressed focused on the question of whether various alternatives could be as effective as the bar examination in excluding unqualified candidates and on issues of costs. 79

The Arizona proposal would seem to offer the most significant and substantial benefits. The year-long community service program most closely resembles the medical approach to licensing, as a kind of combination of the clinical rotations at the end of medical school and the first year of residency. Like the medical model, this approach is designed to combine significant professional responsibility with close supervision, while at the same time providing a much-needed service to lower-income persons. 80 In comparison, the New York proposal does not purport to offer a comparable degree of training or public service; this is not only because the period of service is 3 months instead of 12, but also because, as the program was conceived by Dean Glen, training and service were only secondary goals. 81 Glen insists that the primary benefit of the PSABE is that it would be a better way of testing competence and that other major benefits would be an indirect impact on the law school curriculum and promotion of a pro bono ethos. The New Hampshire proposal of course has a direct effect on law school curriculum: not only with the new practice courses to be created but presumably students eager to participate in the Webster Scholars Program will create a demand for more law school clinics and externships. 82

An interesting, recurring theme emerged from the Symposium discussion that revealed a benefit common to all three alternatives. This theme was introduced by Peggy Maisel, who reported on her very recent

80. Stern, supra note 72, at 898-99 (noting role of medical rotations and residencies in indigent health care and in care provided to veterans).
81. In Defense of the PSABE, supra note 7, at 1031.
82. Sparrow acknowledged that the New Hampshire program lacks a strong public service element in comparison to the New York and Arizona programs. Sparrow Remarks, supra note 33.
experience in taking the Florida bar examination as a result of becoming the director of clinical education at a Florida law school. As she looked around at her fellow exam takers—most of whom, of course, just graduated from law school—she concluded that the process of preparing for the examination induced widespread cynicism about the practice of law, as well as numbing any excitement about entering the profession.\(^{83}\) (Interestingly enough, several other speakers had also taken bar examinations well into their professional lives,\(^{84}\) including Dean Massaro, who referred to the bar preparation experience as “misery” for the students at the University of Arizona, even though 96% of their graduates passed on their first attempt during the most recent administration of the examination.\(^{85}\) Maisel contrasted this depressing “capstone” experience to American legal education with her observations of South African law graduates participating in the community service program, which increased their excitement about and commitment to practicing law.\(^{86}\) This theme of substituting excitement and idealism for cynicism was elaborated eloquently by Joan Howarth, who said that the training component of any bar alternative should aspire to promote not merely “skills” narrowly conceived but “habits of justice, candor and courage.”\(^{87}\)

\(^{83}\) Peggy Maisel, Presentation at the Georgia State University Law Review Symposium (Jan. 29, 2004) (transcript available at http://law.gsu.edu/ccunningham/Professionalism/1ndex.htm, at 122) [hereinafter Maisel Presentation].

\(^{84}\) See, e.g., Berry Commentary, supra note 78, at 24 (nothing that 85% of the exam was memorization); Toni Massaro, Remarks at the Georgia State University Law Review Symposium (Jan. 29, 2004) (morning transcript available at http://law.gsu.edu/ccunningham/Professionalism/index.htm, at 41) (“I don’t remember anything from [taking the Arizona bar four years ago].”) [hereinafter Massaro Remarks]. I have taken three bar examinations myself (Michigan in 1981, Missouri in 1989, and Georgia in 2002). My own overwhelming thought upon completing the Georgia Bar Examination two years ago was that, although I felt like I had passed, I also felt as if 75% of what I wrote in the examination was based entirely on what I had studied in the prior 20 days by reading commercial bar review outlines, even though, as a clinical teacher, I had been actively engaged in both civil and criminal practice for over 20 years.

\(^{85}\) Massaro Remarks, supra note 84, at 41; see also Simpson & Massaro, supra note 24, at 814 (students studying for the bar lose faith in their legal education because it has not taught them the “correct” answers that are the focus of commercial bar review courses).

\(^{86}\) Maisel Presentation, supra note 83, at 122-23.

The most critical issue to emerge from the Symposium was thus the question of assessment. How would the candidates for bar admission be assessed to determine their competence in the absence of the traditional paper-and-pencil examination? As was frequently noted during the Symposium, assessment tools must be both reliable and valid. As David Stern explains in his article:

Reliability . . . refers to the degree to which scientists can duplicate one measurement of knowledge exactly upon the next measure of knowledge. Validity refers to the degree to which the assessment actually measures the domain of interest. One can easily imagine a highly reliable measure ("what is the sum of 3 plus 3?") that is an invalid indicator of one’s ability to solve a problem in geometry.

There was widespread agreement at the Symposium that the traditional bar examination is highly reliable: the same candidate is likely to receive very similar scores if taking the examination on different occasions, even if the examination has different graders and the question content varies. (The validity of the bar examination—whether it actually measures what it purports to measure, that is, competency to practice unsupervised—was, however, very much contested during the Symposium.) In contrast, for example, the assessments to be used in the Arizona proposal, although clearly valid (measuring competence to practice by directly observing actual practice), would seem to be of more questionable reliability, given the likely variability in the real-life situations presented to trainees and the risk of subjective bias in the supervisor doing the assessment. I suspect that there was an underlying concern with many people that supervising

transcript available at http://law.gsu.edu/ocunningham/Professionalism/Index.htm, 59) (making analogy to impact on law students of taking a clinic).


90. Stern, supra note 72, at 900; see also Grosberg, supra note 7, at 849-50
attorneys would be very inclined to “pass” everyone, including those of questionable readiness for licensure.\textsuperscript{91} This risk might be analogized to what Stern called the ceiling effect in medical training—a tendency of attending physicians to give much higher ratings when asked to evaluate professionalism than when asked to evaluate extent of knowledge.\textsuperscript{92}

The medical analogy, however, also offers some promising solutions. Stern reported that the key to assessing competence to practice medicine was in the use of multiple assessment tools and of multiple evaluators over time.\textsuperscript{93} Here, the New Hampshire proposal offers a useful comparison. In that proposal, assessment draws from work in a variety of settings (clinics, externships, practice courses) over the span of about two years (the second and third years of law school), and different assessors evaluate the same work: not only must the student satisfy the original course instructor but also the team of examiners who review his or her completed portfolio at the end of the program. During her presentation, Sophie Sparrow indicated that even these two assessments might be further supplemented by various types of oral presentations and even perhaps simulated exercises.\textsuperscript{94}

In my view, the fact that these proposals seem to require development of new assessment methods\textsuperscript{95} is one of their most appealing features—not a drawback. It is a truism in educational theory that not only do we test what we value—we value what we test. Speaking from years of experience in handling complaints about lawyers as an administrator of bar discipline programs, John Berry stated at the Symposium that:

\textsuperscript{91} See also Moeser, supra note 829, at 1052 (questioning whether an isolated mentor can make decisions that are ultimately consistent across an applicant population). The CLABA proposal does include some evaluation components in addition to supervisor observations; see Massaro & Simpson, supra note 24, at 835-36.

\textsuperscript{92} Stern, supra note 72, at 902.

\textsuperscript{93} David Stern, Presentation at the Georgia State University Law Review Symposium (Jan. 29, 2004) (morning transcript available at http://law.gsu.edu/ccunningham/Professionalism/index.htm, at 10-13) [hereinafter Stern Presentation]; see also Stern, supra note 72, at 903 (“By using multiple evaluations in various settings, with a diverse array of measurement instruments, educators have a great deal of confidence in students’ competence.”).

\textsuperscript{94} Sparrow Remarks, supra note 33, at 56-80.

\textsuperscript{95} See Judith Wegner, Comments at the Georgia State University Law Review Symposium (Jan. 29, 2004) (afternoon transcript available at http://law.gsu.edu/ccunningham/Professionalism/index.htm, at 34) (noting that it is very hard to validate what you have not yet done).
“Communication with clients, the ability to actually be able to talk to our clients, is the number one discipline complaint in the country. It is the number one complaint also that leads eventually to malpractice actions.”

The ability to communicate with clients is not tested at all in the current bar examination. David Stern reported that it was particularly the public members of the medical licensing authorities (that is, the non-physicians) who pushed for the new requirement that all medical students pass a multiple-station examination using standardized patients because of concerns about the number of doctors who were poor communicators. Lawrence Grosberg proposed in his Symposium article that the legal profession adapt this assessment tool from medicine and develop the use of “standardized clients,” lay persons who are carefully trained not only to present the same previously-scripted case scenario to a series of interviewers but also to fill out a rating sheet after the interview that reliably measures both the interviewer’s basic interviewing skills and the application of specific legal knowledge to the scenario. The day before the Symposium began, Lawrence Grosberg, Paul Maharg, Nigel Duncan, and I visited the Atlanta Clinical Skills Assessment Center, one of the five centers around the country where the standardized patient examination is administered to medical students. That experience, combined with discussion at and around the Symposium, has prompted Maharg’s Diploma program at the Glasgow Graduate School of Law to explore potential collaboration with the

96. Berry Commentary, supra note 78, at 2.
97. The ability to communicate with clients in both written and in oral form is tested in both the English and the Scottish systems through required components of the postgraduate skills courses, such as graded exercises in drafting letters to clients and interviewing clients. Interview with Paul Maharg, Co-Director of Professional Practice Courses, Glasgow Graduate School of Law (Aug. 22, 2003) (on file with Author); Duncan Interview, supra note 40.
98. Stern Presentation, supra note 93, at 23 (“[T]he state medical boards got fed up with dealing up with unprofessional doctors, poor communicating doctors—real problems—and they were pushed by the public members . . .”).
100. The Atlanta center has already been in operation for several years testing foreign medical graduates, who have been required to pass a standardized patient examination for a number of years. See Clinical Skills Assessment in the U.S. Medical Licensing Examination, NBME EXAMINER, Fall/Winter 2002, at 1-3, available at http://www.nbme.org/examiner/FallWinter2002/news.htm.
Effective Lawyer-Client Communication Project, which is based at the GSU College of Law,\textsuperscript{101} to run a pilot program in Scotland using standardized clients to assess solicitor candidates. Adoption of the Arizona, New York, or New Hampshire proposals might in turn create a demand to expand that pilot project to the United States.

\textsuperscript{101} See Effective Lawyer-Client Communication Project, at http://law.gsu.edu/Communication/ (last visited June 25, 2004).