

11-1-2005

The Professionalism Crisis: How Bar Examiners Can Make a Difference

Clark D. Cunningham

Georgia State University College of Law, cdcunningham@gsu.edu

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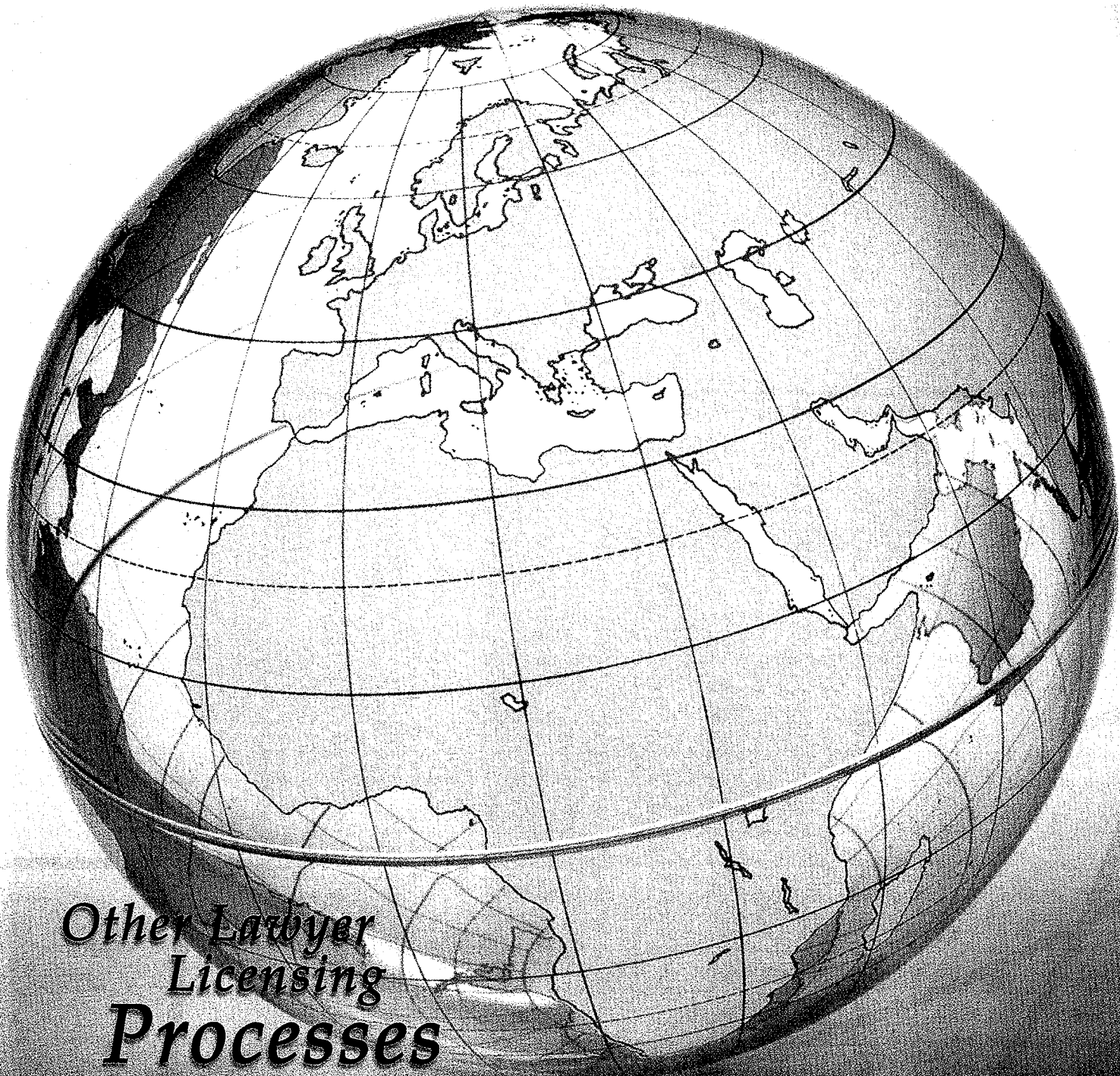
Recommended Citation

Clark D. Cunningham, The Professionalism Crisis: How Bar Examiners Can Make a Difference, *B. Examiner*, Nov. 2005, at 6.

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THE BAR EXAMINER

Volume 74, Number 4, November 2005



*Other Lawyer
Licensing
Processes
and Alternatives
to the Bar Examination*

ESSAYS ON OTHER LAWYER LICENSING PROCESSES AND ALTERNATIVES TO THE BAR EXAMINATION

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

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

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

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

THE PROFESSIONALISM CRISIS: HOW BAR EXAMINERS CAN MAKE A DIFFERENCE

by Clark D. Cunningham

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

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

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

The chief justices issued an urgent challenge to law schools:

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

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

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

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



CLARK D. CUNNINGHAM is W. Lee Burge Professor of Law and Ethics at Georgia State University College of Law. He is the Director of the National Institute for Teaching Ethics and Professionalism, Chair of the Selection Committee for the National Award for Innovation and Excellence in Teaching Professionalism (sponsored by the Conference of Chief Justices and the ABA Standing Committee on Profes-

sionalism), and Director of the Effective Lawyer-Client Communication Project. He can be reached at cdcunningham@gsu.edu, and his home page can be found at <http://law.gsu.edu/ccunningham/>.

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

The United States is virtually the only major country in world that gives an unlimited license to practice law to persons whose only preparation has been to sit in classrooms, take blue book exams, and write a few research papers. The essays in this issue by Paul Maharg⁸ and Nigel Duncan⁹ describe the bar admission systems in Scotland and England, which are good examples of what is required elsewhere in the world, systems in which law school graduates must complete a two- to three-year program that combines intensive simulation-based education with supervised on-the-job training.¹⁰ The New Hampshire pilot program in many ways will resemble the Scottish and English systems.

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

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

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

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

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

ENDNOTES

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

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

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

TRANSACTIONAL LEARNING ENVIRONMENTS AND PROFESSIONAL LEGAL EDUCATION IN SCOTLAND

by Paul Maharg

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

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



PAUL MAHARG is co-director of Legal Practice Courses in the Glasgow Graduate School of Law (www.ggsllstrath.ac.uk), and director of the innovative Learning Technologies Development Unit in the GGSL. He is in charge of all curriculum design and implementations on the Diploma in Legal Practice and Professional Competence Course, which includes developments in information and communi-

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

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