

2003

Incremental Bar Admission: Lessons from the Medical Profession

Jayne W. Barnard

William & Mary Law School, jwbarn@wm.edu

Mark Greenspan

Repository Citation

Barnard, Jayne W. and Greenspan, Mark, "Incremental Bar Admission: Lessons from the Medical Profession" (2003). *Faculty Publications*. 333.

<https://scholarship.law.wm.edu/facpubs/333>

Incremental Bar Admission: Lessons from the Medical Profession

Jayne W. Barnard and Mark Greenspan

Consider two ambitious college students, Able and Caitlin. Able, a humanities major with a 3.6 undergraduate grade point average and a 162 LSAT score,¹ goes to law school. Caitlin, a biochemistry major with a 3.8 UGPA and a 36 MCAT score,² goes to medical school. For the first two years, the nature of their education is essentially identical: classroom instruction in the theoretical underpinnings of and principles governing the field; instruction in the skills required to perform specific professional tasks; simulations; perhaps some live-client (or -patient) experiences; written tests; oral presentations; and cocurricular activities.

But then their experiences will diverge. While Able moves through law school, accumulating course credits and anticipating the bar examination, Caitlin will very quickly begin to be assessed for purposes of licensure. That is, rather than taking a single exam after graduation like Able, Caitlin will take a series of examinations while she is still a student and again while a resident. Each of these examinations will test progressively more difficult material, beginning with a review of basic foundational material, followed by an assessment of clinical and communication skills, proceeding to a review of diagnoses and simple treatments, and concluding with a test of the applicant's judgment and skills in more complicated treatment settings. One of those tests will be a lengthy hands-on test involving the examination and treatment of human patients.

Jayne W. Barnard is the James Goold Cutler professor of law at the College of William and Mary.

Thanks to my research assistant, Ted Cundick, class of 2004, who provided valuable research support for this project. Also thanks to John Levy, Jim Moliterno, Don Tortorice, Taylor Reveley, John Tucker, and Alicia Scott Devine, each of whom provided detailed comments on earlier drafts of this article. Faculty colleagues at the College of William and Mary and the University of Hawaii also provided useful comments and criticisms. Thanks finally to Mark Greenspan, whose experiences and insights made this article possible.

Mark Greenspan is an associate professor of surgery at the Eastern Virginia Medical School. He is also a lawyer practicing in Norfolk, Virginia.

1. The Law School Admission Test is a half-day standardized test that measures acquired reading and verbal reasoning skills. It also requires a writing sample. A score of 162 would put Able in the 88th percentile of test takers.
2. The Medical College Admission Test is a daylong test that assesses competence in the biological sciences, physical sciences, and verbal reasoning, and also requires a writing sample. Each of the first three tests is graded on a score of 1 to 15. A score of 36 would put Caitlin in the 94th percentile of test takers. See AAMC: MCAT: Characteristics of Examinees and Summary Data, Table 1 <<http://www.aamc.org/students/mcat/examineedata/table0403.pdf>> (last visited Sept. 6, 2003).

Failure to pass any one of these examinations will render Caitlin ineligible to proceed toward licensure. And passage of all four of the exams will ensure only that she is ready to practice medicine under supervision, in the course of a highly structured, accredited postgraduate program.

Medical postgraduate programs were once divided into “internship” and “residency” components but today are combined into a single postgraduate program lasting three to seven years (and occasionally even longer).³ While in this program, Caitlin will not only be tested “at the bedside” on a daily basis by supervising physicians; she will also take annual “in-service” examinations geared to her particular branch of medicine. With each passing year both her bedside responsibilities and her annual exam will become more and more demanding.

Finally, at the end of her postgraduate program, Caitlin will be eligible to take an additional comprehensive examination in her field(s) of specialty and become board certified to practice in that speciality without supervision. Further, with her certification in hand, she will be able to pursue permanent licensure in any state in the United States.

This approach to licensure and certification—we will call it the “incremental” or “medical model”—offers several advantages over the bar examination model.

- It permits identification at an early stage of those candidates who are unlikely to achieve licensure, thus limiting their financial and emotional exposure.
- It provides a means of assessment over time, rather than just a single snapshot of a candidate’s accumulated learning.
- It provides a vehicle by which candidates may demonstrate in a meaningful way not only their paper-and-pencil knowledge but also their ability to manage that knowledge in a clinical setting.
- It provides a means of assessing both evolving technique and the development of judgment.
- It permits identification of that small subset of individuals whose cognitive skills may be excellent, but whose people skills are unsuited to the practice of medicine.
- Its results are accepted across all fifty states.

This article examines the use of incremental licensure for physicians and explores how a similar approach might improve the current bar admission process. In so doing, it follows the tradition of borrowing best practices from other professions.⁴ It also offers an improvement over the existing bar admission system that may be attractive to the practicing bar.

In part I we review the context in which and the process by which physicians attain licensure and certification to practice. In part II we review the context

3. What used to be known as the internship year is now (inelegantly) known as PGY-1. Subsequent years in the program are known as PGY-2, PGY-3, PGY-4, and so on.

4. See 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).

and process surrounding licensure of lawyers. In part III we raise some nagging questions about some of the recurring problems with the legal licensing regime. In parts IV and V we consider how the best of the medical licensure model might be applied to today's legal profession. Our purpose here is not to argue for complete replication of the medical model; we do not, for example, argue for structured postgraduate training at low pay with long hours. Rather, we show how incremental testing over a period of years beginning in law school, coupled with supervised practice in clinical or simulated settings while in law school, can improve the readiness of new lawyers to practice law. We also show how meaningful (though informal) postgraduate education might be achieved at a reasonable cost in the legal profession. We conclude by proposing a series of tests and experiences that would precede the permanent licensure of lawyers.

We offer these suggestions as an exercise in possibilities.

I. The Medical Licensure Process Today and Tomorrow

A. The Four-Part Medical Exam

The vehicle for assessment of entry-level physicians is the United States Medical Licensing Examination, known to all medical students as "boards." The USMLE is administered by the National Board of Medical Examiners, which provides the results to state licensing agencies. The NBME works in concert with the Federation of State Medical Boards to ensure that the procedures used and the tests employed are recognized equally in all fifty states.

1. USMLE Step 1

Step 1 of the USMLE typically occurs at the end of the second year of medical school and seeks to assess whether the applicant "can understand and apply important concepts of the sciences basic to the practice of medicine."⁵ This portion of the exam, which extends over eight hours, involves 350 multiple-choice questions covering such topics as anatomy, biochemistry, microbiology, pathology, pharmacology, and physiology, as well as interdisciplinary topics such as nutrition, genetics, and aging:

The test is designed to measure basic science knowledge. Some questions test the examinee's fund of information per se, but the majority of questions require the examinee to interpret graphic and tabular material, to identify gross and microscopic pathologic and normal specimens, and to solve problems through application of basic science principles.⁶

Step 1 is generally considered the most traumatic, though not the most complex, of the medical board examinations. Still, over 90 percent of first-

5. See USMLE—United States Medical Licensing Examinations <<http://www.usmle.org/>> (last visited May 13, 2003).

6. See USMLE—United States Medical Licensing Examinations <<http://www.usmle.org/step1/intro.htm>> (last visited May 13, 2003).

time test takers pass Step 1.⁷ Most medical schools require passage of Step 1 as a prerequisite to proceeding with the third year of medical school. But most schools permit multiple opportunities to pass Step 1 before dismissing the student.

2. USMLE Step 2

Step 2 of the USMLE typically occurs early in the fourth year of medical school, after the student has spent at least a year in a rotation through various clinical specialties. During that year the student has developed the ability to take a history, perform a good physical examination, formulate a preliminary diagnosis, and begin “working up” a patient to rule in or out specific conditions. In addition, the student has perfected some basic procedural skills such as blood drawing, suturing, and assisting in the operating and delivery rooms, and the ability to serve as a member of a patient-care team. Step 2 then seeks to assess whether the applicant “can apply medical knowledge and understanding of clinical science essential for the provision of patient care under supervision.”⁸ This portion of the examination, which contains 400 multiple-choice questions and extends over nine hours, involves a series of hypothetical scenarios.

Most Step 2 test items describe clinical situations and require that [the candidate] provide one or more of the following:

- a diagnosis
- a prognosis
- an indication of underlying mechanisms of disease
- the next step in medical care, including preventive measures.⁹

Frequently Step 2 questions require interpretation of tables and laboratory data, imaging studies, photographs of gross and microscopic pathologic specimens, and results of other diagnostic studies.

Most medical schools require passage of Step 2 as a prerequisite to graduation and award of the M.D. degree. In addition, many teaching hospitals require a certain percentile score on the Step 2 exam as a prerequisite to consideration for placement in their postgraduate programs. The current pass rate for the Step 2 exam is 95 percent for first-time test takers.¹⁰

7. In 1998, 1999, and 2000, the pass rates for first-time takers from U.S. and Canadian allopathic medical schools were 95, 94, and 93 percent, respectively. USMLE—United States Medical Licensing Examinations <<http://www.usmle.org/news/medlic.htm>> (last visited May 13, 2003). Pass rates were lower for students educated at osteopathic medical schools. They were lower still for foreign medical graduates.
8. USMLE—United States Medical Licensing Examinations <<http://www.usmle.org/>> (last visited May 13, 2003).
9. USMLE—United States Medical Licensing Examinations <<http://www.usmle.org/bulletin/2002/examinationcontent.htm>> (last visited May 13, 2003).
10. USMLE—United States Medical Licensing Examinations <<http://www.usmle.org/news/medlic.htm>> (last visited May 13, 2003).

3. USMLE Step 3

Step 3 of the USMLE occurs either just after graduation from medical school or (more frequently) after completion of a year of postgraduate medical training. The Step 3 exam seeks to assess whether the candidate “can apply medical knowledge and understanding of biomedical and clinical science essential for the unsupervised practice of medicine.”¹¹ In many respects Step 3 serves the same purposes as the bar examination, and it is organized accordingly. Like the bar exam, it includes multiple-choice questions—500 of them. It also includes nine case simulations in the form of a virtual dialog with a computer-simulated patient who initially presents with certain symptoms. The candidate selects from a menu the necessary tests or other courses of action. A simulated clock advances the time in the scenario, allowing for “followup visits” and counseling based on the “test results.” A case simulation may thus cover weeks or months in the simulated patient’s life, while taking only fifteen to twenty-five minutes in real time. “Encounters” with patients may occur in clinics, offices, nursing homes, hospitals, or emergency departments, or on the telephone. Once a decision is made and entered into the computer, the candidate—as in real life—is not permitted to go back in time and correct her errors, but she can change the patient’s orders to compensate for her mistake or to reflect an updated management plan.

Step 3 of the USMLE takes a full two days, with multiple-choice questions taking up one and a half days and case simulations taking up half a day.

The inclusion of Step 3 in the USMLE sequence of licensing examinations ensures that attention is devoted to the importance of assessing the knowledge and skills of physicians who are assuming independent responsibility for providing general medical care to patients.

Step 3 emphasizes selected physician tasks, namely, evaluating severity of patient problems and managing therapy. Assessment of clinical judgment will be prominent.

Clinical problems involve mainstream, high impact diseases. Provision is made for less common but important clinical problems as well.¹²

The current pass rate for first-time Step 3 test takers is 95 percent.¹³

Passage of Step 3 of the USMLE permits the candidate to be licensed. In most states the license is only provisional, though it can be renewed annually upon certification by the director of the candidate’s postgraduate program that the candidate continues to be in good standing in the program. Then, but only after satisfactory completion of the candidate’s postgraduate program, a permanent license is issued.

11. USMLE—United States Medical Licensing Examinations <<http://www.usmle.org/>> (last visited May 13, 2003).

12. USMLE—United States Medical Licensing Examinations <<http://www.usmle.org/step3/purpose.htm>> (last visited May 13, 2003).

13. USMLE—United States Medical Licensing Examinations <<http://www.usmle.org/news/medlic.htm>> (last visited May 13, 2003).

4. USMLE “Step 1.5”—The Test of Clinical Skills

Recently the National Board of Medical Examiners, together with the Federation of State Medical Boards, announced the creation of an additional test to be added to the current USMLE, designed to be taken late in the third year or sometime in the fourth year of medical school. Final pilot studies are now underway, and the test is expected to be in place by the fall of 2004.¹⁴

This portion of the USMLE is designed to test the candidate’s ability to gather information from patients and communicate medical findings to them. Interestingly, it will be strictly hands-on. Each candidate will conduct ten to twelve medical examinations of “standardized patients” over the course of a day.¹⁵ In each exam the candidate will spend about fifteen minutes gathering a history, conducting a physical examination, and providing feedback and counseling to the patient. After each encounter the candidate will have ten minutes to record findings before moving on to the next patient.¹⁶ The candidate’s performance will be evaluated both by the patients (using standardized checklists) and by a physician who reviews the paper record. To pass the test, the candidate must demonstrate both satisfactory clinical skills and satisfactory communication skills.¹⁷ Because the administration of the test will involve the use of standardized patients at a centralized testing site (both costly investments), the cost to the candidate to take this test is projected at \$950.¹⁸ The projected pass rate for this portion of the USMLE is 93 to 95 percent for first-time test takers. It is estimated that repeat test takers will achieve a 98 or 99 percent pass rate.¹⁹

B. Postlicensure Specialty Certification

Licensure upon passage of Step 3 of the USMLE is just the beginning of the professional credentialing process for doctors. All medical students today go on to a postgraduate program of one type or another. This involves selecting a specialty—or subspecialty—and undergoing the training that specialty re-

14. USMLE—United States Medical Licensing Examinations <<http://www.usmle.org/news/newscse.htm>> (last visited May 13, 2003).

15. A standardized patient’s examination uses actors and others trained to portray patients with a specific medical condition in a realistic, consistent manner. Use of standardized patients is the key to fairness and objectivity in the testing process. Standardized patients go through extensive training to minimize any biases that could interfere with the examination process. See Grosberg, *supra* note 4, at 214–15.

16. USMLE—United States Medical Licensing Examinations <<http://www.usmle.org/news/newscse.htm>> (last visited May 13, 2003).

17. See USMLE—United States Medical Licensing Examinations <www.usmle.org/news/newscse.htm> (last visited May 13, 2003): “Candidates [will be] graded on their ability to gather an appropriate history, perform the required physical examination, reach appropriate diagnostic conclusions, communicate with patients, and record their findings and impressions clearly.”

18. USMLE—United States Medical Licensing Examinations <<http://www.usmle.org/news/faqsce.htm>> (last visited May 13, 2003).

19. Jay Greene, Skills Test Moving Forward; Pilot Studies Prove Effective, *American Medical News*, Oct. 8, 2001 <http://www.ama-assn.org/sci-pubs/amnews/pick_01/prsc1008.htm> (last visited May 13, 2003).

quires.²⁰ Depending on the specialty, the program takes three to seven years. (A few subspecialties may take even longer.)

During the first postgraduate year, PGY-1, the candidate begins to practice more independently than was possible as a medical school student, though always under the supervision of more senior physicians. The first-year postgraduate student sees patients, writes orders, makes rounds,²¹ and is the first call for problems that arise or need clarification for the nurses responsible for the patient's bedside care. During subsequent postgraduate years the candidate continues to attend classes and take paper-and-pencil in-service examinations. Her primary task, however, is to deliver patient care under the close supervision of a more senior resident, who gradually allows increasing responsibility, depending upon the candidate's abilities. During the final year of this program—called the chief resident year—the candidate assumes essentially independent responsibility for patient care under the general supervision of a faculty member.

Upon completion of postgraduate training, the candidate will seek certification through a national medical specialty board.²² There are twenty-four such boards, each with its own specific testing format. Generally, though, certification requires satisfactory completion of an approved postgraduate training program and then passage of an examination designed “to assess the knowledge, skills and experience necessary to provide quality patient care in that specialty.”²³

Typically the exam for certification is organized in two parts: a daylong multiple-choice examination and (only if the candidate passes the first exam) an oral examination conducted by a panel of board-certified physicians.²⁴ These exams are known respectively as the qualifying exam and the certifying exam.²⁵ Passage of both exams will entitle the candidate to receive an Ameri-

20. The Accreditation Council for Graduate Medical Education oversees the fundamental requirements for medical postgraduate programs generally. Each specialty board, though, through its Residency Review Committee, sets national norms for postgraduate study in that specialty. These committees also periodically evaluate and accredit individual postgraduate programs. See Accreditation Council for Graduate Medical Education <<http://www.acgme.org>> (last visited May 13, 2003).

21. Rounds are conducted in two ways. Bedside rounds involve visiting patients at their bedside and conducting bedside examinations to document clinical progress or deterioration. Usually this includes a review of the chart and pertinent recent laboratory work. Informal rounds involve sitting around a conference table with charts and other available data and reviewing the patients without bedside contact.

22. Approximately 89 percent of all American physicians are certified by one or more medical specialty boards. American Board of Medical Specialties <<http://www.abms.org/faq.asp#DLP>> (last visited May 13, 2003). For younger physicians, the figure is nearly 100 percent.

23. American Board of Medical Specialties <<http://www.abms.org/faq.asp#DBC>> (last visited May 13, 2003).

24. These physicians, each of whom is actively engaged in teaching and also has a clinical practice, are selected by the specialty boards from a variety of medical schools.

25. See Examinations Offered by the [American] Board [of Surgery] <<http://www.absurgery.org/examoffered.html>> (last visited May 13, 2003). During the certifying exam in surgery, a candidate might be asked how he would handle a gunshot wound to the abdomen with the patient in shock. After successfully answering that part of the question, the candidate would then be asked about other intra-abdominal injuries. Each surgical certifying exam lasts 30 minutes, leaving considerable time for exploration of a variety of subjects. There are usually three examiners present, so a candidate's knowledge is thoroughly tested.

can board certification, which (at last) entitles her to practice in her specialty without supervision. Most hospitals insist upon board certification before conferring admitting privileges.²⁶ And many HMOs will not credential a physician who is a new graduate unless he gains board certification in one of the recognized specialties.

To ensure that board certification maintains its meaning, moreover, all medical specialty boards now require recertification every six to ten years.²⁷ Typically recertification involves a significant number of CME hours, further written tests, and a random audit of the physician's files. Regular recertification ensures that doctors maintain their currency in medicine, and assists hospitals and HMOs in their efforts to maintain quality of care.

C. License Portability

A newly board-certified physician may be licensed anywhere in the U.S. That is, even though, as in the legal profession, some states have reputations tougher than others when it comes to licensure,²⁸ licensure is likely to be expedited in any state where the candidate can meet the following qualifications:

1. Full and unrestricted licensure (in all jurisdictions where a medical license is held);
2. Free of disciplinary history, license restrictions, or pending investigations (in all jurisdictions where a medical license is or has been held);

26. Jayne W. Barnard, *Renewable Bar Admission: A Template for Making "Professionalism" Real*, 25 J. Legal Prof. 1, 22 (2001). Sometimes candidates apply for hospital privileges before they have completed the certification process. These candidates are granted privileges with the proviso that they be certified within a clearly defined number of years of completing their postgraduate program.

27. Recertification is now technically known as Maintenance of Certification. See American Board of Medical Specialties <<http://www.abms.org/faq.asp#CVC>> (last visited May 13, 2003). Each of the 24 medical specialty boards has its own requirements for Maintenance of Certification. See, e.g., American Board of Dermatology: Maintenance of Certification/Recertification <<http://www.abderm.org/recert.html>> (last visited May 13, 2003). The theory behind recertification is that the half-life of medical knowledge is now only four years. That is, four years after a candidate achieves specialty certification, half of the information on which he was tested has already become obsolete.

28. The differences in reputation are likely to be based on a number of factors:

- the period of time in which a candidate must successfully complete Steps 1, 2, and 3 of the USMLE (Most states require passage of Step 3 within 7 years of completion of Step 1; some states limit the allowable time to 6 years; others permit 10 years; and others impose no time limit.)
- whether a state permits candidates to take Step 3 of the USMLE during the fourth year of medical school or requires completion of one year or more of postgraduate study before a candidate may take Step 3
- whether a state permits permanent licensure at the completion of a single year of postgraduate study or withholds permanent licensure until completion of the postgraduate program
- how receptive the state is to receiving a physician from another state following initial licensure (Some states will only permit such a transfer within a few months of initial licensure in another state; other states will permit such a transfer up to 10 years after initial licensure in another state; some states impose no deadline.)

See generally *State Medical Licensure Requirements and Statistics 2000–2001* (Chicago, 2000).

3. Graduation from an approved medical school . . . ;
4. Passage of [the USMLE];
5. Completion of three (3) years of progressive postgraduate training in an accredited program; and/or
6. Current certification from a medical specialty board recognized by the American Board of Medical Specialties. . . .²⁹

In practice, this means that a board-certified ob-gyn who recently completed a postgraduate program at, say, the University of Virginia, and who throughout her postgraduate training held a provisional Virginia medical license, may now seek permanent licensure in any of the fifty states. If necessary, she may seek licensure in more than one state simultaneously.³⁰ This process is subject to verification of her credentials, often a personal interview, and, in some states, a criminal background check. The transferee state is also likely to consult the National Practitioner Data Bank. The Federation of State Medical Boards is in the process of developing a standardized license application for use by all state medical boards.³¹

Portability becomes more difficult as the doctor progresses through her career. For example, some states limit a candidate's right to licensure by endorsement (the term used to describe a transfer of license from state to state) to a defined number of years after initial licensure. After that period, an additional written qualifying exam, known as the Special Purpose Examination or SPEX, may be required.³²

II. The Bar Licensure Process

Bar licensure proceeds quite differently from medical licensure and is, quite frankly, a more superficial process. For a handful of students, preparation for the bar examination begins in the first year of law school. Many state bars have a detailed character and fitness form which may be filed in the second semester of the student's first year. Many students defer that process until the third year, however, even though there is a substantial discount if the form is filed before the second year of law school begins.

More typically, law students begin to focus on the bar exam and the process of licensure at the beginning of their third year. In August of that year students are eligible to take the first of the three required segments of the bar examination, the Multistate Professional Responsibility Examination. In most states, the other segments of the bar exam—the multistate section and the state section—may be taken only after successful completion of law school.

29. See Federation of State Medical Boards, Report of the Special Committee on License Portability <www.fsmb.org/policy.htm> [hereinafter FSMB Report] (last visited May 13, 2003).

30. This commonly occurs when a doctor practices near a state line and has an active clinical practice in two hospitals located in different states.

31. FSMB Report, *supra* note 29.

32. SPEX is a one-day, computer-administered examination with approximately 420 multiple-choice questions designed to assess knowledge needed by all physicians, regardless of specialty. See Policies of State Medical Boards About the Special Purpose Examination (SPEX), in *State Medical Licensure Requirements and Statistics 2000–2001*, at 15.

Bar admission is also contingent on establishing character and fitness, a process that often involves personal interviews and always involves extensive checking of references.

A. *The Multistate Professional Responsibility Examination*

Forty-seven states and the District of Columbia require the MPRE.³³ It is a fifty-question two-hour multiple-choice exam, designed to test the candidate's knowledge of the standards governing a lawyer's professional conduct. Necessarily superficial, the MPRE has been criticized for "trivializing" the subject of professional responsibility,³⁴ and also for being "seriously deficient as a measure of anything other than a superficial mastery of the Model Rules."³⁵ According to one critic, law students view the MPRE "with a mixture of amusement and contempt."³⁶ That being said, the MPRE requires law students to focus on ethical issues, at least for one day, to the exclusion of all other materials.

B. *Multistate Testing of General Principles and Practice Skills*

1. The Multistate Bar Examination

The MBE is a six-hour test consisting of 200 multiple-choice questions that cover the six basic subjects typically encountered in the first three semesters of law school: torts, real property, constitutional law, criminal law and criminal procedure, contracts (including sales), and evidence. Forty-eight states plus the District of Columbia employ the MBE.³⁷ Like the MPRE, the MBE has been criticized, largely for the problems inherent in multiple-choice questions,³⁸ its failure to examine on higher-order concepts,³⁹ and its emphasis on memorization.⁴⁰ The MBE has credibility, however, because the scoring is consistent across all test takers, it is possible to compare candidates' performance longitudinally by tracking performance on repeat questions (known as "equators") from year to year,⁴¹ and the test itself is constructed by testing professionals and is validated by means of psychometric techniques.⁴²

33. Comprehensive Guide to Bar Admission Requirements 2002 (ABA and NCBE) at 21 Chart VI [hereinafter Comprehensive Guide].

34. Leslie C. Levin, The MPRE Reconsidered, 86 Ky. L.J. 395, 396 (1997).

35. Elizabeth Chambliss, Professional Responsibility: Lawyers, A Case Study, 69 Fordham L. Rev. 817, 851 (2000).

36. Levin, *supra* note 34, at 405.

37. Only the states of Washington and Louisiana and the territory of Puerto Rico do not employ the MBE. Comprehensive Guide, *supra* note 33, at 17 Chart V.

38. See Greg Sergienko, New Modes of Assessment, 38 San Diego L. Rev. 463, 486 (2001).

39. See Deborah J. Merritt et al., Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam, 69 U. Cin. L. Rev. 929, 940 (2001).

40. See Daniel R. Hansen, Note, Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives, 45 Case W. Res. L. Rev. 1191, 1210 (1995).

41. See Merritt et al., *supra* note 39, at 932-33.

42. For a description of the validation procedures used by the NCBE, see Randall T. Shepard, Building Indiana's Legal Profession, 34 Ind. L. Rev. 529, 532 (2001).

2. The Multistate Essay Examination

Beginning in 2003, thirteen states and the District of Columbia will use the Multistate Essay Examination, which covers agency and partnership, commercial paper, conflict of laws, corporations, decedents' estates, family law, federal civil procedure, sales, secured transactions, and trusts and future interests.⁴³ The questions in the MEE are designed to function just like the essay questions in the state section of the bar exam, but have the benefit of the professional test construction expertise of the National Conference of Bar Examiners.

3. The Multistate Performance Test

Twenty-six states plus the District of Columbia now use the Multistate Performance Test, in which a candidate is given a "file" of documents and a "library" of reference materials, much as if she were a new associate receiving an assignment. The MPT packet includes statutes, cases, court documents, excerpts from interviews with the "client" and other witnesses, and a specific assignment (or "lawyering task"), which must be completed within ninety minutes.⁴⁴ The purpose of the performance test is to "evaluate [the candidate's] ability to handle a select number of legal authorities in the context of a factual problem involving a client."⁴⁵ The skills to be tested are "problem solving, identifying and formulating legal issues, analyzing facts, communicating effectively in writing, managing time efficiently to complete a legal task, and recognizing and resolving ethical issues." The grading is based on the candidate's "responsiveness to instructions regarding the task you are to complete . . . and on the content, thoroughness, and organization of your response."⁴⁶

Response by the bar to the MPT has been enthusiastic. The Conference of Chief Justices has endorsed its use.⁴⁷ Practitioners seem to appreciate the notion that "lawyering skills are just as critical to an applicant's competence [as a lawyer] as is memorization of substantive information."⁴⁸ The MPT's emphasis on organizing materials, formulating a strategy, and delivering a written product in a defined period of time seems to replicate more of the type of work that new lawyers are actually called upon to perform than multiple-choice or even essay questions could possibly do. So if there is any

43. See The Multistate Essay Examination <<http://www.ncbex.org/tests/mee/mee.htm>> (last visited May 13, 2003).

44. See February 2001 MPTs and Point Sheets (2001) (on file with the authors). The kinds of tasks that may be assigned include drafting an objective memorandum, a persuasive brief, a client letter, a closing argument, or provisions of a will. Suzanne Darrow-Kleinhaus, *Incorporating Bar Pass Strategies into Routine Teaching Practices*, 37 *Gonz. L. Rev.* 17, 19 (2001/2002).

45. See February 2001 MPTs and Point Sheets, *supra* note 44, Instructions at iii.

46. National Conference of Bar Examiners, *The Multistate Performance Test: 2001 Information Booklet* 2-3 (2000).

47. See Conference of Chief Justices, *A National Action Plan on Lawyer Conduct and Professionalism* (1999) <<http://www.ncsc.dni.us/ccj/natlplan.htm>> (last visited May 13, 2003).

48. Hulett H. Askew, *Why Georgia Adopted Performance Testing*, *B. Examiner*, Feb. 1998, at 1, 31.

mechanism that captures “minimum competence” to do entry-level work, the MPT comes as close as anything the legal profession has yet found.

C. State-Specific Testing on Substance and Procedure

In addition to whatever multistate tests they may employ, every state’s board of bar examiners devises a series of essay questions designed to test the candidate’s ability to analyze a legal scenario and write a logically organized answer based upon applicable state law (this is commonly known as the state section of the bar exam). Some states administer as many as twelve state law essay questions over a three-day period. Other states—especially those relying on all three portions of the multistate exam—may ask only three or four of their own essay questions.

Most bar examiners try hard to make the questions reasonable,⁴⁹ to score them consistently, and to select a cut score that reasonably distinguishes those who should pass the exam from those who should not. In recent years, however, concerns have been raised about the legitimacy of certain essay questions (or types of questions),⁵⁰ the number of subjects for which a student must prepare,⁵¹ the number of issues raised in each question,⁵² the consistency of the volunteer bar exam graders’ grading practices,⁵³ and the legitimacy of the cut scores used to select candidates out.⁵⁴

49. The Code of Recommended Standards for Bar Examiners (a joint project of the NCBE and the ABA) includes the admonition that bar exam questions should not be designed “primarily to test for information, memory, or experience.” In addition, “[q]uestions should not be based on unusual or unique local case or statutory law, except in subjects with respect to which local variations are highly significant” Code of Recommended Standards for Bar Examiners <<http://www.abanet.org/legaled/publications/compguide2003/code.pdf>> (last visited May 13, 2003).

50. See Merritt et al., *supra* note 39, at 940:

The content of most bar examinations has changed little in the last twenty years. In particular, the exam entirely omits most of the ways in which law practice has become more complex. Most bar exams do not test knowledge of civil rights statutes, environmental regulations, ERISA, or other modern statutory schemes. Nor do they touch upon international trade agreements, alternative methods of dispute resolution, or other forces that have revolutionized law practice during the last quarter century.

See also Joan Howarth, Teaching in the Shadow of the Bar, 31 U.S.F. L. Rev. 927, 937–38 (1997):

Why is the [bar] exam entirely written? Why are the subjects so tired and dusty? Why do we test on Trusts, but not on Title VII? Why trespass to chattels, but not sexual or racial harassment? Why is the exam closed-book? Why do the bar examinations continue to pretend that every lawyer is a generalist, or even that there is a canon of basic law? . . . Why not test critique of doctrine, surely as crucial for client advocacy as memorization?

51. See Dale Whitman, The President’s Message: Thinking About Bar Admissions, AALS Newsl., Aug. 2002 <<http://www.aals.org/pmaug02.html>> (last visited May 17, 2003).

52. *Id.* (noting that some questions raise 20 to 25 issues, though they are designed to be answered in 30 to 50 minutes).

53. See Maureen Straub Kordesh, Reinterpreting ABA Standard 302(f) in Light of the Multistate Performance Test, 30 U. Mem. L. Rev. 299, 319 (2000).

54. See Deborah Jones Merritt, Raising the Bar: Limiting Entry to the Legal Profession, B. Examiner, Nov. 2001, at 4, 9.

Inevitably, there has been litigation about the use of the bar examination and details of the grading process.⁵⁵ And, although an increasing number of states have embraced the use of multistate bar examinations of one type or another, and may even be contemplating some limited forms of cross-border bar admission,⁵⁶ there is virtually no likelihood that the state sections of bar exams—or the highly idiosyncratic state-by-state regulation of bar admission—will disappear anytime soon.⁵⁷

D. Postlicensure Specialty Certification

In the legal profession, as in the medical profession, it is possible to become certified as a specialist. Twenty-one states recognize at least some form of lawyer specialization.⁵⁸ The American Bar Association has identified twenty-four specialties and has promulgated model standards for each of those specialty areas.

Typically a lawyer seeking certification as a specialist must have practiced in the field for several years, devoted a significant portion of her time to the particular specialty, received the endorsement of one or more specialists and judges, attended a certain number of CLE courses, and taken a written examination. Certainly lawyer certification is meaningful—and competitively desirable in some areas of practice⁵⁹—but there is little about lawyer certification that resembles the process of specialty certification for physicians. That is, the vast majority of lawyers do not seek it, it is not a requisite for a specialty practice, it does not depend on completion of any formal postgraduate training, and in many specialties it does not include any mechanism for recertification.

In lieu of certification, some voluntary bar associations have established categories of membership that distinguish lawyers based on their years of experience and attendance at CLE programs.

55. See, e.g., *Arnovick v. Utah State Bar*, 2002 Utah LEXIS 97 (Utah July 26, 2002); *Walsh v. Mass. Bd. of Bar Exam'rs*, 2002 U.S. Dist LEXIS 6507 (D. Mass. Apr. 9, 2002); *Bester v. La. Supreme Court Comm. on Bar Admissions*, 779 So. 2d 715 (La. Feb. 21, 2001).

56. See Peter R. Jarvis, *Small World After All or Ball of Confusion? Some Thoughts on National Multijurisdictional Practice*, 34 Vand. J. Transnat'l L. 1169, 1170–71 (2001) (noting that Oregon, Washington, and Idaho have just adopted a three-state compact allowing lawyers in good standing who are admitted to practice in one state to be “more or less automatically admitted” to practice in one or both of the other states). A similar compact is being contemplated in New England. See Scott Brede, *New England Bar Considers Compact*, Conn. Law. Trib., Nov. 6, 2000.

57. See Carol A. Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law*, 45 Kan. L. Rev. 453, 501 (1997).

58. Judith Kilpatrick, *Specialist Certification for Lawyers: What Is Going On?* 51 U. Miami L. Rev. 273, 289 (1997).

59. More than 25,000 lawyers now hold specialty certificates of one type or another. The most popular specialty is civil trial advocacy, with 26 percent of the total certificates issued to date. Criminal law comes in second with 10 percent of the total, and family law comes in third with 9 percent. Alec M. Schwartz, *Board Certification Rises 41% in Half-Decade*, LexisONE, Nov. 2000 <www.lexisone.com/professionaldevelopment/pdlibrary/pd000g.html> (last visited May 13, 2003).

E. License Portability

Unlike the medical profession where, upon completion of an accredited postgraduate program and receipt of board certification in a given specialty, licensure is available nationwide, the legal profession offers bar admission strictly on a state-by-state basis with little uniformity. Although at least one jurisdiction accepts the results of out-of-state bar examinations in lieu of taking a local exam,⁶⁰ most states insist upon administering their own exams, at least for a day. This means that a person who passed the New York bar exam in February and wishes to be admitted to practice in Delaware in July will (not surprisingly) be required to take the state section of the Delaware bar exam. She will also, however, have to *retake* the MBE, regardless of how well she performed on that test just six months earlier.⁶¹ It may also mean that a candidate who wishes to practice near a state line will have to take two bar exams, which may or may not be coordinated so that taking the two within the same cycle is convenient or even feasible.⁶²

After initial licensure the problem gets worse. It may be that a state has a reciprocal relationship with the bars of other states, but reciprocity typically requires that the candidate have practiced for at least five years in the exporting state before he is admitted in the importing state. Further, eighteen states do not offer reciprocity,⁶³ which means that a lawyer who wishes to practice in one of those states will have to take the complete local bar exam, regardless of how long (or how competently) she has been practicing law. This will include answering torts and con law questions on the MBE, or criminal procedure and corporate law questions on the state section, even though the lawyer is exclusively a trusts and estates—or federal tax—lawyer. Stated another way, unlike the medical profession, where portability is encouraged by the national policymakers at least at the beginning of a doctor's career, the legal profession has gone to some lengths to discourage license portability, both at the entry point and in the early years of a lawyer's practice, and also in the later years. Recent action by the ABA House of Delegates does little to alter this conclusion.⁶⁴

60. See D.C. Bar Rules and Requirements for Admissions <http://www.dcbar.org/for_lawyers/membership/prospective_members/rule46.cfm#46c3> (last visited May 13, 2003) (indicating that the D.C. bar will admit anyone—subject to a character and fitness review—who has passed a local bar exam and scored 133 or more on the MBE and 75 or more on the MPRE).

61. See Delaware Board of Bar Examiners <<http://courts.state.de.us/bbc/mbe.htm>> (last updated Jan. 22, 2002). Twenty states, including Delaware, refuse to accept an MBE score from a test taken in another state. Comprehensive Guide, *supra* note 33, at 17 Chart V.

62. Some states—for example, New York and New Jersey—work to accommodate the needs of multiple-test takers, by scheduling their exams back to back with the exam in the neighboring state. Other states make no effort to schedule their exams for the convenience of multiple-test takers.

63. See Basic Reciprocity Information by Jurisdiction <<http://www.crossingthebar.com/Reciprocity-Chart.htm>> (last visited Feb. 25, 2003). The nonreciprocity states are Alabama, Arizona, Arkansas, California, Delaware, Florida, Hawaii, Kansas, Louisiana, Maine, Maryland, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Rhode Island, South Carolina, and South Dakota.

64. In August 2002 the House of Delegates adopted changes to Model Rule 5.5 to permit lawyers to practice temporarily and occasionally in a host jurisdiction if they are licensed and in good standing in their home jurisdiction, under certain limited circumstances. It also adopted a Model Rule on Admission by Motion [reciprocity]. Report of the Commission on

III. A Brief Critique of the Current Legal Licensure Regime

This paper is designed to provoke thinking about an alternative to the present legal credentialing regime. Those who think the current system is perfect or nearly so may see no need for any alternative. But even the most complacent observer might consider three preliminary questions about the way the current system operates in practice, especially when compared to the medical licensing regime. Without exhaustively treating any of these questions, we think it is useful to sketch them out here.

A. *Does Passage of the Bar Exam Really Indicate Readiness to Practice Law Independently?*

Licensure for lawyers suggests—to the public, at least—that the newly credentialed lawyer is fit to open an office and begin practicing law. Indeed, thousands of new lawyers do so every year.⁶⁵ Unfortunately, it is these same lawyers (solos and those in firms of two to five lawyers) who have the worst record for malpractice complaints and disciplinary complaints of any segment of the legal profession.⁶⁶ Often, because these lawyers failed to receive adequate mentoring, or were never taught how to practice efficiently in a competitive environment, and were probably at or near the bottom of their law school class to begin with, they perform poorly—sometimes abysmally. That is, even though they've graduated from an accredited law school, and even though they may have taken as many clinical courses as were available, and even though they may have dutifully attended bridge-the-gap and other CLE courses, they still lack basic skills, they lack the wisdom of experience, they may not know when to take a case and when to pass on it, and they often have no one reliable to turn to for advice. Can anyone really believe today that most students just out of law school—even if they did well in law school and passed the bar exam with a high score—are ready to practice law without supervision?

One might argue that such a lawyer can read books,⁶⁷ join support groups,⁶⁸ or seek out a mentor. But the fact is that many new lawyers find books and

Multijurisdictional Practice <<http://www.abanet.org/leadership/recommendations02/201.pdf>> (last visited May 15, 2003).

65. According to the National Association for Law Placement, 2.6 percent of the graduates of the class of 2001 who responded to their schools' surveys entered solo practice and 27.3 percent joined firms with 2 to 10 lawyers. Class of 2001 National Summary Report (on file with the authors).
66. See ABA Standing Committee on Lawyers' Professional Liability, Profile of Legal Malpractice Claims, 1996–1999 (2001) (noting that 73.2 percent of recent malpractice claims were filed against attorneys practicing in law firms of 1–5 attorneys; 85 percent of claims were filed against attorneys practicing with fewer than 9 others. Table 2A at 7. Barnard, *supra* note 26, at 19 n.104 (noting that over two-thirds of disciplinary complaints are filed against sole practitioners and an additional one-quarter of the complaints are filed against lawyers in firms with two to five lawyers).
67. See, e.g., Hal Davis, *How to Start a Solo Law Practice: The Nuts and Bolts of Starting and Running a Law Office* (Plano, 2003); Jeffrey R. Simmons, ed., *Flying Solo: A Survival Guide for the Solo Lawyer*, 3d ed. (ABA Section on Law Practice Management 2001); Harry F. Weyher, *Hanging Out a Shingle: An Insider's Guide to Starting Your Own Law Firm* (Lincoln, 2000).
68. The ABA offers a Section on General Practice, Solo and Small Firms. Many state bar associations offer similar sections and services.

support groups of limited value and find it extremely awkward to enlist useful mentors. Lawyers are busy and mentoring takes time. In the meantime, these new lawyers are representing clients—or trying to find clients. They may not be getting the opportunity to test out their skills, or to discover where their strengths and weaknesses as lawyers really reside.

Consider this: physicians only receive their licenses to practice without supervision after two years of postcollege course work in basic science and two more years of intense, supervised clinical placements in the highly structured environment of an accredited medical school. Then even more is required: three or more additional years of progressively responsible patient care under close supervision in a postgraduate program. By the time they are licensed, physicians have experienced thousands of hours of hands-on contact with patients, most of which involved direct oversight, immediate feedback, systematic periodic evaluation, and rigorous comparison with their peers. They have also taken comprehensive in-service examinations each year to ensure they were ready to go forward to the next stage of their education.

By contrast, lawyers who may never have spent a day in a law office—or met a client, or drafted a contract—can receive a license that qualifies them to do any of those things for the first time *without supervision*. Isn't there something wrong with this picture?

B. Does the Current System Encourage Mediocrity in the Early Years of Practice?

For many law students—and especially students at the most elite law schools—the understanding for years was that law school and licensure were only the first steps on the road to professional competence. Just as new physicians would become “real doctors” only after they completed their internship and residency programs, law students would become real lawyers only when they completed an intensive training regime at their law firms. This was the model devised by Paul D. Cravath in 1899,⁶⁹ and it has been assumed to be the model for the best students ever since.

Of course we know that, today, many new lawyers never get this type of training even in the most elite firms, and that elite lawyers are no longer getting the kinds of training they received even fifteen years ago. Certainly the model in which senior partners line-edited their associates' memos and the associates accompanied their partners to court for years before being given a case of their own to handle has become but a dim memory.

As for the less-than-the-best students, they rarely ever received the kind of training envisioned by the Cravath model, and today, even in well-intentioned firms, they often have very little oversight or meaningful training. They may miss out on the chance to explore areas of the law in which they might excel, and they may even miss out on the chance to develop mature practice skills. Instead, they are likely to be pigeonholed prematurely into a narrow specialty,

69. See Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 23–24 (New York, 1976).

rewarded for doing repetitive work efficiently, or turned over to clients to exercise judgment that they have not yet developed.⁷⁰

Contrast this scenario to that facing medical students. They get to try on various practice specialties before they graduate from medical school. By rotating through clinical specialties for a month or more at a time, they get a sense of which ones attract them, which ones are suited to their physical and emotional strengths and weaknesses, and which ones will permit them a lifestyle that meets their needs and the needs of their families. With this background, they then select a specialty area that is suited to their talents and temperaments. They then pursue postgraduate training to further refine their skills and their judgment in that specialty area. Before commencing independent practice, they are able to achieve a level of expertise and autonomy that new lawyers can scarcely imagine.

More important, even those physicians who do not get into the best residency programs, or are not able to pursue the specialty of their choice, can still learn to practice good medicine at a high level. In the legal model, only the top graduates receive much intensive postgraduate training. The rest have to learn through trial and error—sometimes egregious error, often at clients' expense. Shouldn't the legal profession demand more?

C. Why Is Admission to Practice in More Than One State So Difficult?

Many lawyers today—and an increasing number each year—find themselves practicing across state boundaries, and indeed often across national boundaries. So it often falls to new lawyers to take not one, but two or even three separate bar exams after graduation. Sometimes this includes retaking the Multistate Bar Examination. It often requires taking multiple bar exams, under different state laws, within a few days of each other. A few graduates finesse the issue by taking a bar examination in one state and then “waiving in” to the bar of another. Regardless, the process of multiple tests and character and fitness reviews costs money and time and adds greatly to candidates' stress.

Some states have considered creating regional bar exams so as to minimize the burdens on lawyers practicing in concentrated areas.⁷¹ At least one critic of the current state-by-state scheme has proposed a national bar exam which would combine the MBE and MEE and the results of which would be accepted by all the states.⁷² But the state bars and the state supreme courts take pride in

70. See *In re Yacavino*, 100 N.J. 50, 494 A.2d 801, 803–04 (1985) (disciplining a lawyer who had been left “virtually alone” in his firm’s suburban office):

The office was lacking in the essential tools of legal practice. Partners rarely attended the office; no member of the firm inquired as to the status of the office matters. . . . Had this young attorney received the collegial support and guidance expected of supervising attorneys, this incident might never have occurred.

71. See note 56 *supra*.

72. Michael J. Thomas, *The American Lawyer's Next Hurdle: The State Based Bar Examination System*, 24 J. Legal Prof. 235, 250–52 (2000). Under Thomas's model, states wishing to do so could also require a state-specific exam or a mandatory postadmission seminar for new admittees.

the autonomy and care with which they approach the determination of who is fit to practice within their borders. For many (including all those states which have so far rejected the use of the MEE), it is unthinkable that they would cede even one more inch of their present autonomy to some form of national examining board.

This means that, for the foreseeable future, hundreds and perhaps thousands of lawyers will have to take multiple bar exams in order to engage in a sophisticated multistate practice. In turn, this means that the cost of providing legal services to multistate clients will remain unnecessarily high. Relocation for law firms and lawyers will remain difficult too, and will impose unnecessary stresses on mobile, two-career families.

Physicians face few such problems. Absent character and fitness issues, a licensed and board-certified physician should have little difficulty achieving licensure in any state (or multiple states) at the beginning of her career. And later migration is usually easier for most doctors than it is for most lawyers.

We recognize that there are some local aspects to the practice of law that may not apply to the practice of medicine. But isn't it possible that a bar admission process that seeks to facilitate multistate practice, rather than to confound it, is an idea whose time has come?

IV. How Might the Medical Model Be Adapted to the Legal Profession?

So far, we have taken a quick look at both the medical model and the legal model of licensure. They are dramatically different.

One might deduce from the differences between these models that lawyers are lagging way behind their medical colleagues when it comes to the issues of professional training and licensure. Extrapolating from there, one might conclude that lawyers should be trained and tested in the same way doctors are trained and tested. They would have two years of traditional course work followed by intense, supervised clinical experiences over a period of several years. They would have hundreds of hands-on encounters with real and simulated clients. They would receive daily feedback on the quality of their work. And they would be licensed only when they could meaningfully demonstrate that they were truly ready to practice without supervision.

This will never happen, and we are not arguing that it should happen. First, such a dramatic change in legal training would raise the already high cost of a legal education and also the cost of legal services for clients. Second, it would tend to force the practice of law to become even more technical, and even more impenetrable, than it already seems to most clients and the public. Third, even if one were to agree this was a good idea, it would take forever to accomplish. The legal profession—and certainly the law school community—is slow to respond to even the most obvious need for change.⁷³

73. Five quick examples should suffice to make this point. First, the ABA abandoned its prohibition against lawyer advertising only when the U.S. Supreme Court ruled such prohibitions unconstitutional. Second, the ABA steadfastly endorsed mandatory fee schedules until they, too, were found to be unconstitutional. Third, many state bars maintained their resident-only requirements until they also were found unconstitutional. Fourth, few law schools bothered to teach professional ethics until the Watergate scandals forced a change in the law school

Fourth, the simple fact is that the legal profession, unlike the medical profession, has been quite indifferent to the possibilities of formal postgraduate work. Though there has been a remarkable growth in postgraduate law programs over the past decade, most of this growth has been designed to generate revenue for the law schools and not to ensure that lawyers are any more ready to practice independently than they were when they graduated with a J.D. Except in tax, where a postgraduate degree seems to be becoming the norm, firms today do not demand postgraduate study as a condition of hiring or professional advancement. We do not anticipate that this is likely to change.

So we do not recommend that widespread formal postgraduate study be seen as the solution to the readiness problems we've described. What we imagine, instead, is an adaptation of the medical model to the realities of the legal practice as it now exists. This means that our proposal will assume

- a three-year legal education more or less identical to what is now offered
- few additional resources to increase the availability of clinical or externship programs during the course of law school
- practical limits on the ability of most law firms to provide extensive or structured postgraduate training or supervision

We will also, however, assume the following:

- a willingness on the part of law schools to adapt to some new procedures
- a commitment by the organized bar to collectively improve the learning experience for lawyers during their early years of practice, regardless of the type of firm in which they practice
- a willingness on the part of state bar examiners to entertain the idea of incremental testing, rather than relying on what we have called the snapshot method
- flexibility on the part of state bar regulators when it comes to reciprocity and multistate admission at the time of initial admission to the bar

Any one—or all—of these assumptions may be optimistic.

V. Our Proposal

A. Reconfiguring the Assessment Process

In this section we propose a restructuring of the current process of lawyer credentialing, taking what we can from the medical model and adapting it, albeit incompletely, to the existing legal model. Our goals are threefold: to produce better-trained lawyers who enter the profession with a higher degree of readiness to practice than today's new lawyers have; to stress the need for continued education and assessment of lawyers during the first three (high-

accreditation requirements. Fifth, the process of law school accreditation and reaccreditation was changed only when it became apparent that the existing procedures were likely to be found in violation of the federal antitrust laws.

risk) years of their practice; and to increase the public's confidence in our profession.

1. Step 1—An Early Test of Legal Fundamentals

First, the Multistate Professional Responsibility Exam and the Multistate Bar Exam would be combined and taken at the end of the second year of law school. (We'll call this Step 1.) Both are multiple-choice exams, so they should easily fit together in terms of their format, administration, and security concerns. Such exams also permit immediate scoring and feedback.

Passage of the combined examinations would be a prerequisite for continuing with the third year of law school, although some schools might choose to allow students to continue provisionally, with the understanding that they must retake and pass the exam before enrolling for their sixth semester.

Step 1, as we see it, would provide an early-stage mechanism to identify that small number of law students who just don't get it—who cannot focus enough to pass even a straightforward multiple-choice exam, who really don't like law school at all and can't motivate themselves to master the material, or who, for cognitive reasons, are unlikely to ever become good lawyers. The rest would proceed with their legal education, absorbing practical experience during their second summer, if possible, and be ready to pursue more challenging intellectual tasks—including clinical assignments and capstone courses—during their third year.

We anticipate that the Step 1 exam would consist of some 240 multiple-choice questions and would take a full day to administer.

2. Step 2—A Test of Professional and Interpersonal Skills

The most radical aspect of our proposal involves a legal counterpart to the soon-to-become-effective medical test of clinical skills. It would test interpersonal skills, organizational skills, and basic writing skills, and students would take it before or during their fifth semester of law school. It would include an assessment of such specific skills as

- interviewing a new client
- fact gathering from diverse sources
- researching a discrete issue of law then orally summarizing the client's legal situation in terms suitable for that client
- dealing with different types of clients (angry, confused, unduly passive, or frightened of lawyers)
- outlining the terms of engagement with a client and preparing an intelligible engagement letter
- discussing and devising a strategy with a client for an anticipated negotiation or settlement conference
- organizing a file and creating a timeline of key events
- writing a simple research memo from a limited universe of, say, three preselected judicial opinions
- negotiating the terms of a simple contract

- drafting a simple contract
- drafting interrogatories appropriate for a simple complaint
- outlining a deposition
- drafting a simple advocacy document (a minibrief) that makes a coherent argument based on given facts and law
- drafting a simple motion
- making an opening statement
- making a brief oral argument before a simulated magistrate or judge

Some of these skills would involve the use of standardized clients.⁷⁴ Others might involve the use of interactive technology. Like the test of clinical skills given to medical students, this test would be given at selected regional sites around the country and would take a full day. There would be, perhaps, four simulation exercises in the morning and four in the afternoon, each taking thirty to sixty minutes. The purpose would be to test rudimentary lawyering skills, leaving the testing of more complex skill sets until the essay exam and performance test (Step 3) that follow graduation from law school.

3. Step 3—The New-and-Improved Comprehensive Bar Examination

After graduation from law school there would be a capstone exam—this one involving one or more essay questions as well as several questions in the performance-testing format. We'll call this Step 3 of the exam. Because so much testing will have gone before, Step 3 should require less time (and thus carry a lower price) than the existing bar exam. We think that a reasonable Step 3 exam should take no longer than one day.

The types of questions asked in Step 3 would look similar to those now asked in the essay and performance-testing segments of the bar examination. But the questions would focus on integrating various bodies of law rather than zeroing in on the minutiae of specific areas of law. For example, a question might force the candidate to assess the possible causes of action—tort? contract? breach of fiduciary duty? violation of a statutory provision?—arising out of a fact pattern. The questions would also require consideration of procedural issues and remedial options. They would also often include embedded ethical issues. They would, in short, replicate the kinds of intuitive assembly of factual information and law, and the kinds of preliminary “diagnoses” that most lawyers must make when encountering a new client or a new file.

In some respects, this new-and-improved bar exam would function in quite a different way from that of the existing exam. Rather than asking the candidates to capture the essence of certain legal doctrines (which were, after all, the subject of the Step 1 exam), the Step 3 exam would require candidates to juggle multiple considerations. And questions requiring a detailed regurgitation of specific bodies of law—that is, the kinds of questions that force candidates to memorize large amounts of detailed information which they

74. Standardized clients would be modeled on standardized patients. See Grosberg, *supra* note 4, at 214–15.

quickly forget (and could easily look up)—would be eliminated in favor of questions that require analysis, synthesis, and prioritization.

The Step 3 exam would be administered nationally, much as the MPRE and MBE are administered today. This would permit maximum flexibility for law school graduates, who would still have to undergo character-and-fitness scrutiny on a state-by-state basis. Though this is not part of our proposal, some states might also insist on supplementing Step 3 with some limited state-specific testing.

4. Step 4—Postgraduate Education in the Context of Today's Legal Practice

Upon successful completion of the Step 3 exam, and satisfaction of the character-and-fitness review, the candidate would receive a provisional license to practice law in the state or states of her choice. Her license would be renewable annually (and with relative ease) for up to three years. During this period she would have to demonstrate that she was attending the state's required number of CLE courses; attending specific CLE courses for beginning lawyers; and receiving meaningful supervision of, and regular feedback on, her work as a lawyer. Compliance with these requirements would involve a self-certification, accompanied by a brief confirmation by the lawyer's mentor(s).

The idea behind Step 4 is that, during the first three years of their practice, new lawyers should insist on some meaningful supervision of and regular feedback on their work, regardless of the type of law firm in which they work. Under our proposal, the burden would be on the new lawyer, not his firm, to ensure that meaningful supervision and regular feedback occur, presumably on a declining scale as the lawyer gathers experience and expertise. This might mean cobbling together a tag team of available supervisors and feedback providers. Or it might mean latching on to a single committed mentor.

Note that we are not asking for anything approaching the sort of apprenticeships employed in Canada or the United Kingdom.⁷⁵ Nor are we suggesting that every new lawyer be enrolled in a systematic in-service training program, though of course that might be ideal.⁷⁶ Rather, we are suggesting only that new lawyers must take some initiative to find and communicate with more experienced lawyers who can help them identify their own strengths and weaknesses, who can talk to them about the problems they are facing in their work, who can help them recognize problems they might not have discovered on their own, and who can encourage them when they show progress or excel. And these new lawyers must document that they have done so.

75. See, e.g., Hansen, *supra* note 40, at 1223.

76. Delaware offers a model for such a program in its mandatory preadmission clerkship program. In addition to passing the bar exam and undergoing a character-and-fitness screening, candidates seeking admission in Delaware must demonstrate that they have observed or participated in 30 specified activities (conducting a title search, attending a trial, preparing incorporation papers, observing a jury selection, attending a sheriff's sale, etc.) within a five-month period. See Law Clerk Schedule, at <<http://courts.state.de.us/bbe/cc.htm>> (last visited May 15, 2003).

As for the senior lawyers, the profession should make clear that experienced lawyers are expected to provide meaningful supervision and regular feedback to newer lawyers as a matter of professional obligation. This should be more than the traditional bar leaders' rhetoric. It should be included in the Rules of Professional Conduct.

We've used the terms "meaningful supervision" and "regular feedback" with caution. Meaningful supervision, in our view, need not require a close reading of all written work product or observation of the new lawyer's court appearances. Regular feedback, in our view, need not involve daily or even weekly interactions with the new lawyer.

Meaningful supervision might, in fact, mean that a new lawyer meets with a senior lawyer every few weeks to review the matters she has been working on, what problems have challenged her, what she feels she has done well, and what specific skills she thinks she ought to be learning next. Regular feedback might mean that the new lawyer periodically shares documents with her mentor, or asks the mentor to help her prepare for a negotiation or a court appearance or sit in on a client meeting. Meaningful supervision and regular feedback might come from within the firm through some systematic program, but it might also come from a relative or a member of a bar association to which the new lawyer belongs. It might also come from retired lawyers serving as unpaid consultants for the board of bar examiners.

The key is that new lawyers must understand that it is their professional obligation to secure the advice and counsel of a more experienced lawyer, at least in novel situations. At the same time, the paperwork must be kept to a minimum so as not to discourage those senior lawyers who are willing to provide supervision and feedback from doing so.

Even a sole practitioner should be able to practice under this regime—so long as she could show that she had sought out and received meaningful supervision and regular feedback. States might also require that the lawyer secure malpractice insurance during this period and participate in risk-management programs sponsored by her malpractice carrier.

5. Step 5—A Second and Final Bar Exam to Test for Expertise in the Lawyer's Field(s) of Practice

After a defined period, not less than three years, the candidate would be required to take a second written bar examination on one to three legal subjects of her choosing. Presumably, by this time she would have selected out of many fields of practice, and these would not be tested. Rather, the focus of this exam would be on the areas of law with which the candidate is most familiar, in which she has acquired some experience, and upon which she could be meaningfully assessed, both for her skills and her judgment. This exam would be organized like Step 3 and include both essay questions and some MPT questions. At least one of the questions on the exam would also include some embedded ethical issues. At this stage of the process, though not before, it would seem entirely appropriate to focus on sophisticated, state-specific material.

Passage of Step 5 would be required for permanent licensure as a lawyer. The license would not be limited to the practice areas that were tested, although the lawyer would have to give disclosure to clients when practicing in areas in which she was *not* tested. The lawyer, of course, could also provide information about CLE courses she had taken or other credentials—including specialty certification—that she had acquired after licensure.

A lawyer who is permanently licensed after passage of Step 5 should benefit from a presumption of fitness to practice in her specialty in other states. Whether this is achieved through reciprocity, or by the granting of limited-term, limited-purpose licenses, or otherwise, is outside the scope of this paper, but we do recommend that all the states give some form of meaningful credit to lawyers who have successfully completed Step 5 in their home state.

B. The Advantages and Disadvantages of Our Proposal

1. Disadvantages

There are obvious disadvantages to this proposal, the foremost among them being increased stress throughout the law school experience and significantly increased cost, especially for the test of lawyering skills. One might also be concerned about the discriminatory impact of this proposal, especially as regards the test of lawyering skills. Obviously this test, unlike all the other portions of the testing process, permits identification of the candidate's race and gender and (to some degree) national origin. Some candidates might feel this puts them at a disadvantage; we know, for example, that 10 percent of Canadian candidates, but 20 percent of foreign candidates, fail to pass the Canadian version of the medical test of clinical skills when they first take it.⁷⁷ Significant attention will therefore have to be given to training the evaluators—both those portraying the simulated clients and those lawyers reviewing the candidates' performance.

Another downside of the test of lawyering skills is a logistical one. At present medical students can take the test of clinical skills at only one testing site, Philadelphia. When the test is fully up and running, it will be offered regionally, but that still presents problems of cost and lost time. (The student section of the American Medical Association is now advocating that students should not have to travel more than 450 miles to take the exam.⁷⁸)

There are other possible downsides to this proposal, especially from the law schools' perspective. Conducting the Step 1 test in May or June following the second year might significantly invade the time available for summer clerkships. Since many students finance much of their third year of law school with their second-summer earnings, this is not an unimportant consideration.⁷⁹

77. USMLE Clinical Skills Examination: A Fact Sheet, available at <<http://www.doctrine.ca/csafacts.htm>> (last visited Aug. 11, 2003).

78. Greene, *supra* note 19.

79. We do think that students should not require nearly as much preparation time for Step 1 of the exam as they now spend preparing for the bar exam. First, the number of subjects to be tested—seven—is far less than the number on the bar exam. Second, the time lapse between taking the subjects and being tested on them would be halved under our proposal. Third, preparing for the Step 1 exam should feel like the continuation of an ongoing process, and not—as the bar exam frequently does—like starting over on a formidable new task.

Further, if Step 1 is not taken until June following the second year, and the test of lawyering skills is offered beginning in August, some students might spend the entire summer preparing for and taking these tests, without finding work—paid or otherwise—that would enhance their understanding of the profession.⁸⁰

And even if, as will be possible with the medical test of clinical skills, law students are allowed to self-schedule their test of lawyering skills at any time during their fifth semester of law school, this is likely to cause at least as much disruption to class preparation and cocurricular activities as now occurs when some students disappear in November or February to take the MPRE. One solution to this problem would be to schedule fifth-semester classes so as to block out a week to accommodate preparation and taking of the test, but this is admittedly an imperfect (and logistically difficult) solution.⁸¹

2. Advantages

Notwithstanding the problems inherent in an ambitious proposal such as this one, we believe the benefits of our proposal outweigh the disadvantages.

First, this proposal should reduce the number of lawyers who lack the necessary people skills to attract and retain clients. (In the medical profession, the number of such people—that is, those who are likely to fail the communication portion of the test of clinical skills—is quite small, estimated to be in the range of one to two percent of medical students.)⁸² It should also help to eliminate the unhappy phenomenon of lawyers who repeatedly take and fail the bar exam after investing three years and a lot of money in a legal education.⁸³ The process of incremental examination that we propose would give both these categories of students a meaningful heads-up much sooner

80. Several readers of earlier drafts of the article suggested that one solution to this problem of second-summer compression would be to offer Step 1 of the exam at the end of the first year, covering only traditional first-year subjects. (This is what is done in California's "baby bar examination" for students at unaccredited law schools.) We rejected this suggestion for three reasons:

We believe the end of the first year is too early to be offering a licensure exam. Some students who are likely to be fine lawyers but are late bloomers are simply not ready to take a licensure exam at this stage of their professional development.

We think the integration of the professional responsibility materials with the so-called substantive materials is an important part of our scheme. It would be lost if the substantive materials were tested at the end of the first year, before much in the way of professional responsibility has been taught at most law schools.

Testing at the end of the first year would simply add too much to the stress and trauma already present in the first year.

81. Another solution (less desirable from our point of view) would be to combine the test of lawyering skills with the Step 3 exam, following the candidate's graduation from law school.

82. See note 19 *supra*.

83. The financial consequences for these candidates can be devastating. Half of all law students enter law school with significant educational debt. Fully 80 percent of all law students borrow additional sums in order to finance their legal education. See Joseph D. Harbaugh, Legal Education Economics 101: A Primer for Bar Examiners, B. Examiner, Nov. 2001, at 21, nn.2,3.

than now occurs, and give them the opportunity to think about alternative careers.

There are also advantages for those students who have the necessary people skills, and for those—the majority—who would likely pass the bar exam regardless of when or how it is offered. For example, the early portions of the exam—Steps 1, 2, and 3—would be administered on a nationwide basis rather than state by state. All scores for all states would therefore be comparable,⁸⁴ and this is significant. Employing a nationwide testing process for all law students at this critical stage of their legal education—the stage at which most employers decide which law students to hire for permanent employment—would establish a consistent baseline, applicable across all law schools, that could be reported to prospective employers. Students at less prestigious schools (or high-prestige schools with low grading curves) would be able to point to a reliable mechanism by which their skill level and readiness to practice could be compared to students at other law schools. This device alone could be a great leveler and creator of opportunity.

Second, testing for ethics at the end of the second year of law school rather than during the third would reinforce the centrality of professional conduct in the legal profession. As it is now, students cram for the MPRE during their third year and get it over with as quickly as possible so that they can move on to preparing for the “real” bar exam. Combining the MPRE with the Multistate Bar Exam and moving it to a point much earlier in the candidate’s education will both elevate the treatment of ethics in the law school curriculum and force students to recognize the essential interrelationship between substantive law and the law governing lawyers’ behavior. In our proposed Step 1 exam, for example, the six substantive topics and the law governing lawyers would each receive equal attention—approximately thirty to forty questions on each topic. No subject would be subordinate to other subjects, and all subjects would receive the candidates’ full (and respectful) attention.

Third, introduction of a test of lawyering skills at the beginning of the third year would force the law schools to more thoughtfully address the teaching of those skills during the first two years. Though skills training at many schools is already a priority, at others it is not. And it should be possible to focus on skills training in a way that prepares students for the test of lawyering skills, without having to spend a fortune. Certainly, making sure that every law student before taking this exam has an opportunity to practice (and receive feedback on) each of the skills that may be included in the test should be within the resources of most law schools, and would surely benefit the students. It would be equally helpful to encourage employers to make sure that their clerks receive an opportunity to observe these kinds of activities—and perhaps to engage in role-playing—as part of their assigned tasks during a summer or part-time clerkship.

84. As it is now, each state decides its own cut score to determine who has passed the MPRE and/or the MBE in that state; of course, that might continue under our system. That is, State M might insist that only those persons who scored 144 or above would be eligible to take the Step 3 exam in that state. State N might select a higher or lower eligibility score.

There are, of course, other, more ambitious, ways in which law schools might respond to the addition of a lawyering skills test prior to the traditional words-on-paper bar exam (Step 3). What is significant in our proposal, we think, is that the test of lawyering skills will be an essential prerequisite for taking that exam. This will reinforce the idea that a successful lawyer depends at least as much on human interactions and the simple acts of oral and written communication as she does on her ability to manipulate substantive legal doctrine.

The fourth and fifth advantages of our proposal over the status quo have to do with what will happen to students *after* they graduate from law school. We believe that our emphasis on supervision and feedback during the first three years of practice would advance the cause, first articulated in the MacCrate Report,⁸⁵ of ensuring that new lawyers recognize the need for continued study throughout their careers. Similarly, our emphasis on the need for some form of testing at the end of the first three years of practice would reinforce the notion that continued study is essential.

Sixth, our proposal would build on learning theory, which recognizes a hierarchy of competencies.⁸⁶ Our proposal builds incrementally from lower-order tasks (answering multiple-choice questions based largely on memorization) in Step 1 to higher-order tasks (a demonstration of skills in a live-client setting) in Step 2 to still higher-order tasks (selection of necessary information, organization of thoughts, analysis of a complex problem, and synthesis of diverse materials) in Step 3. The final postlicensure examination (Step 5) will look much like Step 3, but will require a demonstration of *mastery* of discrete subject areas. That is, the kinds of skills required to pass Step 5 will be qualitatively different, and the performance standard much higher, than in Step 3. This kind of incremental testing mirrors the way in which lawyers (and all professionals) learn and progress throughout their careers.⁸⁷

Finally, our proposal has the potential to transform the third-year experience. As it is now, "students complain about the vapidness of the final year of law school,"⁸⁸ they resent the fact that their time is "underutilized,"⁸⁹ and they are often described as "disengaged." In many schools third-year students are

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

86. In ascending order, these competencies include knowledge, comprehension, application, analysis, synthesis, and evaluation. See Taxonomy of Educational Objectives: The Classification of Educational Goals, Handbook I: Cognitive Domain, ed. Benjamin S. Bloom, 7, 18 (New York, 1956).

87. One of us has suggested that, following completion of Step 5, lawyers should be required to seek relicensure every 10 to 15 years, not through the use of a written test, but through the application of a 360-degree peer review program. See Barnard, *supra* note 26. Certainly the medical profession has recognized that recertification throughout a physician's career is essential for patient well-being.

88. Mitu Gulati et al., The Happy Charade: An Empirical Examination of the Third Year of Law School, 51 J. Legal Educ. 235, 236 (2001).

89. Hansen, *supra* note 40, at 1232.

frequently missing from their classes, preferring instead to work for pay, pursue romance, or go to the gym.⁹⁰

We will not recite here the many possibilities for enriching the third year of law school. Others have done so ably.⁹¹ We can predict, however, that students who have successfully completed both Step 1 and Step 2 of an incremental licensure process will be entitled to and will in fact demand challenging work in their third year that is qualitatively different from the work they performed during their first and second years. They will also (legitimately) demand increased responsibility in their clinical and externship placements, opportunities to develop and refine their existing skills, and (for many) opportunities to perform socially useful tasks using the knowledge and skills they have mastered. All of these demands can only improve legal education.

* * * * *

Years ago, the chief justice of the United States observed: "The law always lags behind the most advanced thinking in every area. It must wait until the theologians and the moral leaders and events have created some common ground, some consensus."⁹² Like the law, lawyers themselves often lag behind what's known by the most advanced thinkers in their own and in other disciplines.

It is the thesis of this article that lawyers have much yet to learn on the subject of professional licensure and the assurance of competence over a lawyer's career. We can certainly benefit from what other professions have already learned about these issues and implemented within their own communities.

We think there is much specifically to be learned from the medical profession. We need not follow the medical model slavishly—indeed, striving to do so would be foolish. But we can change in ways that the medical profession has identified. Specifically, we should embrace a greater professionwide commitment to meaningful postgraduate education for new lawyers. Among other things, this means we will need some form of postgraduate testing of skills and professional judgment. We should also experiment with incremental testing throughout the rest of the educational continuum. This should include the testing of people skills as well as cognitive testing.

We would, of course, be stunned to discover that a state had adopted our proposal intact. There are many constituencies who would surely protest—law school deans, law school students, bar examiners, summer employers, and bar review entrepreneurs, to name a few. But we believe that moving in the direction that our proposal advocates—for example, by experimenting with an accelerated MBE or by conducting a demonstration project using standardized clients—would move the profession in a positive direction.

90. The data underlying these claims are, frankly, stunning. For example, over two-thirds of third-year students study less than 20 hours per week; over half of them come unprepared for a majority of their classes; and over half of them never or seldom contribute to classroom discussion, even in small self-selected classes. Gulati et al., *supra* note 88, at 244–45.

91. *Id.* at 260 n.41 (citing numerous articles).

92. Warren E. Burger, *The Law and Medical Advances*, 67 *Ann. Int. Med., Supp.*, 15, 17 (1967).