Article

Client-Centered Legal Education and Licensing

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INTRODUCTION

Clients are central to law practice. Indeed, the line that separates "law practice" from other law-related activities depends on the presence of a client. As the American Bar Association declared in 2003, "each state's and territory's definition [of law practice] should include the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of *another person or entity*."[1] Without a client, in other words, one does not practice law. Writing about the law, critiquing the law, and proposing changes in the law are worthy activities, but they do not constitute the "practice of law." Nor do these activities require a law license. Individuals need to secure a license only if they plan to serve clients.[2]

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1. Task Force on the Model Definition of the Pract. of L., Standing Comm. on Client Prot. & Wash. State Bar Ass'n, *Report to the House of Delegates: Recommendation*, A.B.A. (emphasis added), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-def_migrated/|recomm.pdf [https://perma.cc/JNA2-7W95].

2. "Clients" may include individuals, organizations, corporations, governmental units, other entities, or even the public. Whatever form the client takes,

Despite the centrality of clients to law practice, clients play a limited role in both legal education and licensing. Law professors allude to clients, incorporating them into classroom hypotheticals and exam questions. The bar exam, similarly, references hundreds of imaginary clients. But these are two-dimensional clients with carefully delineated legal issues and little background or personality. On the bar exam these clients even lack names.[3] Law students don't meet real clients—with rich backgrounds and complex problems—unless they participate in clinics, externships, or paid work. Even then, their exposure is limited. More worrisome, they often receive little instruction or feedback on how to interact with clients, elicit their needs, and counsel them. Law school and the bar exam sometimes seem determined to isolate aspiring lawyers from clients, rather than prepare them to serve those clients.[4]

In this Article, I discuss the need to incorporate clients—real, three-dimensional clients—more directly into legal education and licensing. Part I discusses empirical data on the importance of clients in entry-level law practice, on the challenges new lawyers face when trying to serve those clients, and on the difficulties supervising attorneys face when attempting to teach client-related skills to new lawyers. Part II outlines innovative approaches to licensing that would move clients to the center of both legal education and licensing. Part III explains that, if properly constructed, these innovative approaches protect both

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the relationship between an attorney and client remains "a fundamental requirement of the legal process." Irene Oritseweyinmi Joe, *The Prosecutor's Client Problem*, 98 B.U. L. REV. 885, 888–89 (2018) (discussing alternative visions of the prosecutor's client).

3. *See* Susan M. Case & Beth E. Donahue, *Developing High-Quality Multiple-Choice Questions for Assessment in Legal Education*, 58 J. LEGAL EDUC. 372, 378, 383–84 (2008) (recommending that exam questions use descriptions of roles rather than names for the actors).

4. A few law schools have consciously resisted this dominant paradigm and have integrated clients directly in their requirements. The CUNY School of Law, for example, requires all students to complete both client-centered simulations and ten to sixteen credits of closely supervised live client representation. *Curriculum and Course Descriptions*, CUNY SCH. OF L., https://www.law.cuny.edu/academics/courses [https://perma.cc/34PY-TC8M]. Other law schools have adopted similar requirements or offer rich elective opportunities for client contact. *See infra* notes 49–51 and accompanying text; *see also infra* Part II.A (discussing an experiential licensing program at University of New Hampshire's Franklin Pierce School of Law). These efforts, however, remain a minority trend in legal education.

candidates and the public as effectively—or more effectively—than a written bar exam. If legal education and licensing aim to protect the public, as educators and regulators claim,[5] then those institutions must focus more steadfastly on preparing new lawyers to serve clients.

I. CLIENTS IN ENTRY-LEVEL LAW PRACTICE

Empirical studies show that new lawyers encounter clients early in their careers, and that those lawyers feel woefully unprepared to interact effectively with clients. These studies also suggest that the supervisors of new lawyers lack the time and pedagogic skills to help new lawyers develop client-centered skills. This section explores that empirical work, documenting the need for more client-focused education and assessment of new lawyers.

A. NEW LAWYERS INTERACT FREQUENTLY WITH CLIENTS

Some senior lawyers remember a time when new lawyers languished in libraries and document warehouses, waiting years before they would meet a client. That image captures the experience of some new lawyers working in large law firms during the late twentieth century, but it never represented the experience of most new lawyers. Legal aid offices, public defenders, and other nonprofits or government agencies have always needed their new lawyers to interact directly with clients. Small law firms also move quickly to introduce new lawyers to clients, while graduates who establish solo practices necessarily work directly with clients. The image of a "clientless" new lawyer reflects the pervasive influence of Big Law and appellate clerkships on legal education.

Today it is undisputed that client relationships play an important role in entry-level law practice. The National Conference of Bar Examiners (NCBE) documented this fact in two different national studies. In the first study, conducted in 2011–12, NCBE

5. *See* JOAN W. HOWARTH, SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING 3 (2023) ("Many professions wrap themselves in the rhetoric of public protection . . . ."); Kellie R. Early, Joanne Kane, Mark Raymond & Danielle M. Moreau, *2019 Practice Analysis*, NAT'L CONF. OF BAR EXAM'RS (Mar. 2020), https://nextgenbarexam.ncbex.org/wp-content/uploads/TestingTaskForce_Phase_2_Report_031020.pdf [https://perma.cc/QQ5M-6HWJ] (stating that NCBE's mission is to "promote[] fairness, integrity, and best practices in admission to the legal profession for the benefit and protection of the public").

surveyed new lawyers about the types of work they did, the knowledge they applied in that work, and the skills they used.[6] Three-quarters of the respondents indicated that their work included establishment of the attorney-client relationship,[7] while almost ninety percent communicated at least sometimes with clients.[8] Communicating with clients received one of the highest "importance" ratings in the survey (3.48),[9] exceeded only by the importance of communicating with a supervising attorney (3.49).[10] Respondents rated the importance of client communications as even more critical to their work than analyzing the law (3.46),[11] and well above knowledge of any area of substantive law.[12]

NCBE's second survey, conducted in 2019, produced similar results. This survey gathered input from both newly licensed lawyers and supervisors of those lawyers. Eighty-eight percent of the newly licensed lawyers indicated that they responded to client inquiries; supervisors pegged that percentage even higher, at ninety-four percent.[13] Similar percentages of new lawyers identified the goals and objectives in a client matter, informed clients about the status of their matters, and interviewed clients or witnesses.[14] New lawyers and their supervisors rated these tasks as more important than knowledge of most doctrinal areas.[15] NCBE's practice analyses, conducted to identify competencies to be tested on the bar exam, overwhelmingly demonstrate the importance of client relationships in entry-level law practice.

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6. STEVE S. NETTLES & JAMES HELLRUNG, A STUDY OF THE NEWLY LICENSED LAWYER 3 (2012). A majority of the "new lawyers" responding to the survey had one to three years of experience, with a smaller number reporting less than one year of practice. A very small number had more than three years of experience. *Id.* at 13.

7. *Id.* at 273 (75.50%).

8. *Id.* (87.65%).

9. *Id.*

10. *Id.*

11. *Id.* at 303.

12. The knowledge area rated most highly by respondents was the rules of civil procedure (3.08), followed by knowledge of other statutory and court rules of procedure (3.06), rules of evidence (3.01), and professionalism (2.95). *Id.* at 313–14.

13. Early et al., *supra* note 5, at 42.

14. *Id.*

15. The mean "criticality" of the client-related tasks, as rated by both newly

The *Building a Better Bar* study, a national research effort that I co-directed, confirms that finding and adds new detail.[16] To complement the survey responses obtained by NCBE, our study analyzed transcripts of fifty focus groups in which both new lawyers and supervisors discussed the knowledge and skills needed for entry-level law practice.[17] Our research team convened those groups in eighteen different locations around the country, assembling views from a highly diverse group of lawyers in a wide range of practice areas.[18] The focus groups allowed us to obtain more detail about the work of new lawyers than is possible in surveys.

A substantial majority of the new lawyers in those focus groups described significant client contact during their first year of practice. Even after excluding solo practitioners from the analysis, almost three-fifths of the new lawyers described working directly with clients during their first year.[19] A qualitative study cannot provide a reliable estimate of numbers, but the degree of client contact was marked—especially since our focus group script did not ask directly about that contact.[20] Instead, lawyers volunteered this information while responding to more general questions about their work as newly licensed lawyers.

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licensed lawyers and more senior supervisors, ranged from 2.5 through 2.7 on a three-point scale. *Id.* The mean importance of most knowledge areas fell well below 2.5 on an analogous three-point scale. *Id.* at 56–57. The only knowledge areas that earned a mean importance of 2.5 or higher were the rules of professional responsibility and ethical obligations (2.7), civil procedure (2.6), contract law (2.6), rules of evidence (2.5), and legal research methodology (2.5). *Id.* at 57.

16. Deborah Jones Merritt & Logan Cornett, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf [https://perma.cc/4J8Q-F9XU].

17. *Id.* at 3 ("[W]e conducted 50 focus groups using a protocol we developed to gather data about the knowledge and skills new lawyers need to practice competently. Of those focus groups, 41 were conducted with new lawyers, while the remaining nine were conducted with those who supervise new lawyers.").

18. *See id.* at 13–20 (describing the location, job status, demographic information, and other details about participants).

19. *Id.* at 87 n.104.

20. *See id.* ("We did not ask directly about client contact, so the number of participants who described that contact during their first year probably underestimates the total number who had some of that contact.").

New lawyers were surprised by their degree of client contact. Adanna, a litigation associate in a firm of two to ten lawyers, remarked:

> My firm is so small that the first day, [my supervisor was] putting a lot of things on me. So, I really needed to know how to interact with clients because I do a lot of on the phone with clients, managing expectations. I had no idea how to do any of that when I first came in.[21]

Similar stories emerged even from lawyers working at large firms. Reese, a transactional associate at a firm employing more than 500 lawyers, noted: "As a first year associate I was a major point of contact for most of my clients, which surprised me . . . . Being able to talk to the CFO of a big company was not something I expected but I had to develop that skill really quickly."[22]

Supervisors agreed that first-year lawyers needed to know how to interact with clients. Representative comments included:

- "[W]e're a big believer in getting people contact with clients as soon as possible. That's a big help to us."[23]
- "[T]hey need to know how to speak to clients."[24]
- "Even our new attorneys do have a fair amount of client contact."[25]
- "They have to put their hands on the case, talk to a client."[26]

Each of our focus group discussions underscored the fact that, in today's workplace, legal employers frequently rely upon new lawyers to interact with clients.

Despite that reliance, new lawyers in our focus groups expressed their lack of preparation for interacting with clients. Alice, a new lawyer working for a nonprofit that assists low-income workers, recounted that her supervisor simply "dropped" her into client intake with the words: "Okay. We have intakes today.

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21. *Id.* at 25 & 87 n.105. The name "Adanna," like other names cited from the *Building a Better Bar* report, is a code name used to protect the confidentiality of focus group participants. *See id.* at 21. The discussion in the remainder of this section draws heavily from relevant sections of the report.

22. *Id.* at 25 & 87 n.106.

23. *Id.* at 25 & 87 n.107 (S.Mylah). The prefix "S" in code names signifies that the speaker was a supervisor, rather than a new lawyer. *Id.* at 22.

24. *Id.* (S.Jill).

25. *Id.* (S.Carter).

26. *Id.* (S.Vivian).

I can't do them. They can't do it. You got to do it."[27] Alice responded, "I don't know what I'm looking for," but the nonprofit's lean staffing forced her to proceed.[28] A bankruptcy lawyer, similarly, recalled:

> Someone can know the black-letter law inside and out, and then their first day on the job they are sitting in front of somebody who is incredibly worried, incredibly anxious. [There] hasn't really been any formal training on what do you do when this person's on the brink of tears and you have to take him in front of the judge.[29]

The new lawyers in our focus groups criticized both law schools and the licensing system for failing to prepare them for client interactions. "Law school teaches you to do the research, law school teaches you how to write, oral advocacy," one new business lawyer reflected.[30] "It does not teach you how a client thinks, it does not teach you how clients' business people think."[31] "It's so shocking," another new lawyer declared, "considering how much of a lawyer's job is client management that there's nothing about it in law school. It's amazing!"[32] "It all comes back to a client," a third lawyer concluded.[33] "We have a client and the bar doesn't address that at all. It's like it doesn't exist."[34]

Focus group participants, sadly, described times when their inexperience with client interaction harmed or inconvenienced clients. One new lawyer failed to prepare her client for a judge's ruling and the client screamed uncontrollably in the courtroom.[35] Another neglected to ask a client about citizenship status and had to redraft an estate plan after discovering that the client's partner was not a United States citizen.[36] Yet another lost a hearing because he had not obtained sufficient information

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27. *Id.* at 26 & 87 n.115.

28. *Id.*

29. *Id.* at 43 & 91 n.238 (Owen).

30. *Id.* at 42 & 91 n.224 (Rob).

31. *Id.*

32. *Id.* at 44 & 92 n.258 (Owen).

33. *Id.* at 44 & 92 n.259 (Khepri).

34. *Id.*

35. *Id.* at 43 & 91 n.242 (Cadence). A supervisor noted that this failing was common among new lawyers. New lawyers "unnecessarily create crises," he commented, "by, for example, not properly preparing the client for what may happen, the range of possibilities that may happen at a negotiation or a status conference. That's where we see things gone south." *Id.* at 91 n.242 (S.Tabor).

36. *Id.* at 43 & 91 n.241 (Carson).

from his client.[37] Several new lawyers sent emails that clients found abrasive.[38] Learning to interact effectively with clients, new lawyers agreed, was "trial by fire"—in which clients sometimes were burned.[39]

B. WORKPLACE TRAINING

Legal educators have long maintained that lawyers should learn skills like client counseling in the workplace rather than the classroom.[40] They reason that practitioners, rather than educators, better understand the nuances of client interaction. The practicing lawyers in the *Building a Better Bar* study, however, emphatically rejected this reasoning. New lawyers in our focus groups reported that, although they interacted frequently with clients, they received little workplace training for that task. Instead, they learned through "trial by fire" or "trial and error."[41] Supervisors somewhat apologetically agreed with that assessment, giving two reasons for their inability to educate new lawyers on client interaction skills.

First, supervisors cited their lack of time to educate new lawyers effectively. "And while I'm sitting here," a partner at a large firm reflected, "I'm realizing that sometimes I don't have that type of patience with like, the young associates in my firm. Because it's just like, we're too busy."[42] A supervisor at a smaller firm agreed: "I take full blame that sometimes I've got to slow down long enough to teach it to [the new attorneys] so that they can give me back what I want from them."[43] The pressures of

37. *Id.* at 91 n.241 (O.Sebastian). The prefix "O" in code names signifies that the speaker was a solo practitioner. *Id.* at 22.

38. *Id.* at 43 & 91 n.245 (*e.g.*, Cole).

39. *Id.* at 43.

40. *See, e.g.*, Robert J. Condlin, *"Practice Ready Graduates": A Millennialist Fantasy*, 31 TOURO L. REV. 75, 79 (2014) ("Legal education's principal purposes should be (and always have been) to develop an intellectual understanding of law and legal institutions and the way they work, as well as the critical thinking skills that underlie law practice tasks generally."); Robert Steinbuch, *The Problem with Focusing on "Practice-Ready" Graduates*, NAT'L JURIST (July 2, 2015), http://nationaljurist.com/national-jurist-magazine/problem-focusing-practice-ready-graduates [https://perma.cc/M53J-448N] ("The goal of producing practice-ready graduates from law school is another attempt by legal education to throw jelly at the wall to see what sticks. It's not good for law students nor the legal enterprise.").

41. Merritt & Cornett, *supra* note 16, at 43.

42. *Id.* at 27 & 88 n.127 (S.Adam).

43. *Id.* at 27 & 88 n.128 (S.Caroline).

practice, however, often prevented her from slowing down to educate the new lawyers.[44]

Second, and equally important, several supervisors noted that they lack effective teaching and feedback skills. "I'm working on trying to find that balance," a government lawyer observed, "between more directly conveying there's a concern, and not crushing the new young spirit."[45] Teaching new lawyers, one large-firm lawyer explained, is "one of the things that we did not learn in law school, and it has to be taught."[46] Another supervisor declared: "And talk about skills that they don't have, that lawyers don't have, and this is from the first year to the 50th year. There's no management training in law school—like zero. . . . They don't know what positive feedback is versus negative feedback."[47]

Teaching professional skills effectively *is* a skill—one in which clinical professors and some other legal educators have developed considerable expertise. Interacting with clients, moreover, is a sophisticated cognitive activity.[48] Workplace supervisors are understandably frustrated that law schools, with all of their teaching expertise, don't do more to teach client-centered skills.

Senior lawyers, in sum, lack the time and expertise to educate new lawyers effectively about client interaction. Legal educators have the expertise, but many law schools are unwilling to devote sufficient resources to this core lawyering skill. Nor has

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44. This supervisor further reflected, "I've got to invest the hours of my own time in order for them to give back to me, which they normally want to. But if I don't do that, that's on me." *Id.*

45. *Id.* at 27 & 88 n.129 (S.Jasmine).

46. *Id.* at 27 & 88 n.130 (S.Justin).

47. *Id.* (S.Archie).

48. *See, e.g.*, Marcus T. Boccaccini, Jennifer L. Boothby & Stanley L. Brodsky, *Client-Relations Skills in Effective Lawyering: Attitudes of Criminal Defense Attorneys and Experienced Clients*, 26 LAW & PSYCH. REV. 97, 110 (2002) (identifying seven different components of good client-relations skills for criminal defense lawyers); Lynette M. Parker, *Increasing Law Students' Effectiveness When Representing Traumatized Clients: A Case Study of the Katharine & George Alexander Community Law Center*, 21 GEO. IMMIGR. L.J. 163 (2007) (discussing the need for specialized training of lawyers who represent trauma victims and outlining methods for providing that training); Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219 (2002) (explaining the complexities of multicultural awareness and the need for lawyers to develop that awareness to competently interact with clients).

the bar exam focused sufficiently on client-related skills. New lawyers and their clients suffer the consequences.

II. NEW INITIATIVES

Law schools today teach more client-centered skills than they did in the past. Almost one-quarter of law schools now require their students to participate in a clinic or externship before graduation.[49] Another half report that a supermajority (seventy-one to ninety-nine percent) of their students enroll in one of those experiences.[50] Simulations and other experiential courses have also expanded, providing additional opportunities to interact with real or simulated clients.[51]

Critics, however, question the depth of law schools' commitment to these opportunities. Clinical professors occupy second-class status at many law schools, and adjunct faculty teach many simulations.[52] Some schools stretch the definition of "experiential" coursework to comply with ABA requirements.[53] Overall,

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49. Robert P. Kuehn, Margaret Reuter & David A. Santacroce, *2019–20 Survey of Applied Legal Education*, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC. 12 (2020), https://uploads-ssl.webflow.com/5d8cde48c96867b8ea8c6720/628457f6d9c25cc6c1457af4_Report%20on%202019-20%20CSALE%20Survey.Rev.5.2022.pdf [https://perma.cc/337T-77AQ] ("Twenty-three percent of schools now require J.D. students to participate in a clinic *or* field placement course as a condition of graduation.").

50. *Id.* at 15.

51. *See* Allison Korn & Laila L. Hlass*, Assessing the Experiential (R)evolution,* 65 VILL. L. REV. 713, 727 (2020) (recounting that, in response to a 2018 survey, "a vast majority of [law school] respondents reported expanding [their] upper level experiential curriculum, and a notable nineteen schools reported expanding first-year experiential curriculum").

52. Robert Kuehn, *The Disparate Treatment of Clinical Law Faculty*, CLINICAL LEGAL EDUC. ASS'N NEWSL., Winter 2020–21, at 8, https://www.cleaweb.org/resources/Documents/CLEA%20Newsletter%20Winter%2020-21%20FINAL.pdf [https://perma.cc/2KGH-5YYW] ("[T]he percentage of clinical faculty in tenure/tenure track positions, even when including lesser status clinical/programmatic tenure positions, has declined to just 29%, and decreased by more than 30% over just the last 12 years.").

53. *See* Robert Kuehn, *If 6 Turned Out to Be 9, I Don't Mind (But 3? or 2!): The Uneven Implementation of Mandatory Experiential Credits*, CLINICAL LEGAL EDUC. ASS'N NEWSL., Winter 2018–19, at 7, 8, https://www.cleaweb.org/resources/Documents/CLEA%20Newsletter%20Winter%2018-19%20(final).pdf [https://perma.cc/EH6A-9P4Q] ("There is evidence, unfortunately, that a few schools have taken their required first-year spring semester . . . legal writing course . . . and simply recharacterized it as a three- or four-credit 'experiential course.'").

client-centered coursework retains an "uneasy" relationship with legal education.[54]

The key to increasing client-centered education lies in the licensing system. If state courts require aspiring lawyers to demonstrate their competence at client-centered skills, then candidates will learn those skills. Students will demand more client-focused education from law schools, and, if schools don't respond, students will seek that education elsewhere—just as they have turned to bar review companies to prepare them for the demands of the bar exam. If our profession is serious about protecting clients, then we need to build clients into our licensing system.[55]

The NCBE, which creates exam materials for most jurisdictions, has already taken important steps in this direction. The "NextGen" bar exam, due to premier in July 2026, will test client counseling, management of the client relationship, negotiation,

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54. *Cf.* Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools,* 122 DICK. L. REV. 551, 552 (2018) (coining the phrase "uneasy history" as applied to experimental education in law schools and discussing that history). For an eloquent vision of a client-centered law school, see generally Claudia Angelos, Mary Lu Bilek & Joan W. Howarth, *The Deborah Jones Merritt Center for the Advancement of Justice*, 82 OHIO ST. L.J. 911 (2021) (describing the founding principles, structure, admissions process, learning model, faculty, and research—among other topics—of the imaginary Merritt Center for the Advancement of Justice). Although the authors of that article honored me in their title, their vision goes far beyond my work or imagination. But I join their invitation that all readers "improve [their] vision and look for ways to move the project beyond the imaginary." *Id.* at 929.

55. Psychometricians and other assessment experts have started to recognize the impact of high-stakes assessment on education. To improve professional education, they argue, "any system of assessment should model the realities of practice as closely as possible." Kevin W. Eva, Georges Bordage, Craig Campbell, Robert Galbraith, Shiphra Ginsburg, Eric Holmboe & Glenn Regehr, *Towards a Program of Assessment for Health Professionals: From Training into Practice*, 21 ADVANCES HEALTH SCIS. EDUC. 897, 905 (2016). The necessary "authenticity is achieved when assessment protocols accurately reflect the domain of practice such that 'studying to the test' or learning to 'game the system' equates with learning to practice well." *Id.*; *see also* Liesbeth K.J. Baartman, Theo J. Bastiaens, Paul A. Kirschner & Cees P.M. van der Vleuten, *The Wheel of Competency Assessment: Presenting Quality Criteria for Competency Assessment Programs*, 32 STUD. EDUC. EVALUATION 153, 154 (2006) ("The development of adequate assessment methods is of utmost importance because of the strong relationship that exists between learning and assessment."); Cees P.M. van der Vleuten & Lambert W.T. Schuwirth, *Assessing Professional Competence: From Methods to Programmes*, 39 MED. EDUC. 309, 314 (2005) ("[T]he notion of the impact of assessment on learning is gaining more and more general acceptance.").

and fact investigation—all skills that are essential for working directly on client matters.[56] Law schools must soon respond to these changes, adapting curricula to better prepare students for the new exam.[57]

The bar exam, however, can test these skills only in written format. Several states have developed—or are considering—more dramatic changes that would assess client-centered competencies more fully. One approach, which I discuss in the first subsection below, develops and assesses these skills through experiential education programs completed in law school. Another approach, explored in the second subsection, assesses lawyering competence during a period of supervised practice after graduation.

A. LICENSING THROUGH EXPERIENTIAL EDUCATION

In 2005, the University of New Hampshire's Franklin Pierce School of Law inaugurated a new method of licensing lawyers.[58] Each year, the school chooses about two dozen students to participate in its Daniel Webster Scholar Honors Program.[59] Those students, selected at the end of their first year, complete a rigorous upper-level curriculum of doctrinal courses, simulations, and clinics or externships.[60] Each semester, a bar examiner reviews work product accumulated from these experiences to determine whether the student is demonstrating minimum competence to

56. Cynthia L. Martin, Hulett H. (Bucky) Askew, Diane F. Bosse, David R. Boyd, Judith A. Gundersen, Anthony R. Simon & Timothy Y. Wong, *Overview of Recommendations for the Next Generation of the Bar Examination*, NAT'L CONF. OF BAR EXAM'RS 1, 4 (2021), https://nextgenbarexam.ncbex.org/overview-of-recommendations [https://perma.cc/XP5Y-HRD9].

57. *See* Melissa Bezanson Shultz, *Professor, Please Help Me Pass the Bar Exam: #NEXTGENBAR2026*, 71 J. LEGAL EDUC. (forthcoming) (manuscript at 1), http://dx.doi.org/10.2139/ssrn.3930165 ("[L]aw schools must . . . understand the changes adopted by the National Conference of Bar Examiners in January of 2021 and begin to meaningfully adjust their curricular and assessment practices to ensure students graduating in 2026 (when the NextGen exam will first be administered) have the skills necessary [for] the NextGen bar exam.").

58. Alli Gerkman & Elena Harman, *Ahead of the Curve: Turning Law Students into Lawyers*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 5 (Jan. 2015), https://iaals.du.edu/sites/default/files/documents/publications/ahead_of_the_curve_turning_law_students_into_lawyers.pdf [https://perma.cc/4QMD-RMU2].

59. *Id.*

60. *Id.* at 6–10.

practice law.[61] Students who successfully complete the program are licensed to practice law the day before they graduate.[62]

An independent assessment of the Daniel Webster program concluded that its graduates were "ahead of the curve" compared to new lawyers who passed the bar exam.[63] Focus groups of New Hampshire attorneys suggested that the Daniel Webster graduates were "able to hit the ground running, working with clients and taking a lead role on cases immediately."[64] Peers who completed a traditional law school program and passed the bar exam, in contrast, "spen[t] their first few years learning to practice."[65] Some focus group participants estimated that Daniel Webster graduates were "up to two years ahead" of their peers in practice.[66] Judges also commended the Daniel Webster graduates, noting that they were able to "'argue ably' and research and write at a level superior to other new lawyers."[67]

A simulation exercise provided quantitative support for these impressions. New Hampshire lawyers who had passed the bar exam and practiced for less than two years completed the same standardized client interview that Daniel Webster Scholars conducted. The Scholars performed significantly better than the practicing lawyers on this exercise: They obtained significantly more relevant information from the simulated client and received significantly higher overall scores from independent raters.[68] Although the practicing lawyers had all passed the bar exam, only sixteen percent of them elicited all of the relevant

61. *Id.* at 10–11.

62. *Daniel Webster Scholar Honors Program*, UNIV. OF N.H. FRANKLIN PIERCE SCH. OF L., https://law.unh.edu/academics/daniel-webster-scholar-honors-program [https://perma.cc/Z86F-49JH].

63. Gerkman & Harman, *supra* note 58, at 25.

64. *Id.* at 13.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 17–20 ("DWS scholars significantly outperform non-DWS lawyers on both the overall assessment and the percentage of relevant information learned . . . DWS scholars' overall performance was rated an average of 3.76 out of 5, compared to non-DWS lawyers whose overall performance was rated an average of 3.11.").

information from the client.[69] More than half of the Daniel Webster Scholars, in contrast, obtained that information.[70] The superior performance of the Daniel Webster Scholars, moreover, persisted even after controlling for the LSAT scores and class rank of the simulation participants.[71]

New Hampshire's experience suggests that a licensing system tied directly to legal education can produce more competent lawyers than one that rests on a written bar exam. Features contributing to the program's success include its client-centered courses, simulations, clinics, and externships; continuous feedback from faculty and practicing lawyers; and bar examiner review focused on evidence of effective lawyering.[72] Participants also cite the program's promotion of both collaboration and personal reflection as keys to developing competent professionals.[73]

Despite the success of New Hampshire's program, no other state has yet adopted a similar approach.[74] Oregon's Supreme

69. *Id.* at 20 ("Fifty-one percent of DWS scholars learned all relevant information points compared to only 16% of non-DWS lawyers.").

70. *Id.*

71. *Id.* at 20–22 ("Neither LSAT score nor class rank is significantly predictive of overall assessment and the percentage of relevant information learned. Rather, the only significant predictor of standardized client interview performance is whether or not the interviewer participated in the DWS program.").

72. *Id.* at 14–15 (describing such experiences as part of "formative assessment" and "practice context," which "[f]ocus group participants identify [as] two factors driving the accelerated competence of DWS scholars").

73. *Id.* at 14–16 (describing personal reflection as part of the formative assessment and collaboration as part of the practice context).

74. Wisconsin has long admitted graduates of its two in-state schools through diploma privilege, but that mechanism does not require the experiential education that is central to the Daniel Webster Program. Nor does Wisconsin require outside examiners to review any of the work product produced by the in-state students. *See* HOWARTH, *supra* note 5, at 121 (discussing Wisconsin's diploma privilege); Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645, 645 (writing about firsthand experience as a faculty member with Wisconsin's diploma privilege). During the pandemic, a few other jurisdictions admitted candidates through forms of diploma privilege, but those programs were temporary accommodations that, again, lacked the distinctive features of New Hampshire's Daniel Webster program. *See* Marsha Griggs, *An Epic Fail*, 64 HOW. L.J. 1, 29–31 (2020) (describing temporary diploma privilege in Oregon and Washington); Leslie C. Levin, *The Politics of Bar Admission: Lessons from the Pandemic*, 50 HOFSTRA L. REV. 81, 97–101, 118–29 (2021) (outlining different state approaches to licensure during the early stages of the COVID-19 pandemic, including diploma privilege).

Court, however, has "approved in concept" a licensing path that resembles the Daniel Webster program.[75] A task force appointed by the court developed the broad outlines of this program,[76] and a follow-up committee began working in May 2022 to develop a more detailed blueprint for the "Oregon Experiential Pathway."[77] As currently envisioned, the pathway would be just one of three options that candidates could pursue to demonstrate their minimum competence. Candidates could also choose to take a written bar exam or to complete a "Supervised Practice Pathway" that has also won preliminary approval from the Oregon Supreme Court.[78]

The Minnesota State Board of Law Examiners has also expressed preliminary interest in adopting a program like the Daniel Webster one. In June 2021, the Board announced a two-year study of licensing options, including "alternative options for determining competency" such as "supervised practice/limited

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75. Karen Sloan, *Oregon Moves Closer to a Bar Exam Alternative*, REUTERS (Jan. 12, 2022), https://www.reuters.com/legal/litigation/oregon-moves-closer-bar-exam-alternative-2022-01-12 [https://perma.cc/9WZG-7EKY].

76. Joanna Perini-Abbott, *Recommendation of the Alternatives to the Bar Exam Task Force*, OR. ST. BD. OF BAR EXAM'RS, ALTS. TO THE EXAMINATION TASK FORCE 1–2 (June 18, 2021) [hereinafter *Oregon Task Force Recommendation*], https://taskforces.osbar.org/files/Bar-Exam-Alternatives-TFReport.pdf [https://perma.cc/P23F-K4UV]; Joanna Perini-Abbott, *Supplement to the Alternatives to the Bar Exam Task Force Report*, OR. ST. BD. OF BAR EXAM'RS, ALTS. TO THE EXAMINATION TASK FORCE (Nov. 29, 2021) [hereinafter *Oregon Supplemental Report*], https://taskforces.osbar.org/files/2021-11-29SupplementalReporttoJune182021ATEReport.pdf [https://perma.cc/3BDA-8DJW].

77. *See Meeting Agendas and Minutes*, OR. ST. BAR LICENSURE PATHWAY DEV. COMM. [hereinafter *Agendas and Minutes*], https://lpdc.osbar.org/meeting-agendas-and-minutes [https://perma.cc/R544-2DPH]; *Licensure Pathway Development Committee*, OR. ST. BAR LICENSURE PATHWAY DEV. COMM. [hereinafter *LPDC*], https://lpdc.osbar.org [https://perma.cc/QY38-N3A7]. As a part of its work, the committee renamed this pathway the "Oregon Experiential Portfolio Examination." *Meeting Minutes*, OR. ST. BAR LICENSURE PATHWAY DEV. COMM. (Jan. 25, 2023) [hereinafter *Meeting Minutes Jan. 25, 2023*], https://lpdc.osbar.org/files/LPDCMinutes230125.pdf [https://perma.cc/KZ64-YGB5].

78. See *infra* notes 98–102 and accompanying text; *see also* Sloan, *supra* note 75; *Agendas and Minutes*, *supra* note 77. The Committee has renamed this pathway. *See infra* note 102 and accompanying text.

practice models" and "legal education" pathways.[79] More recently, the Board lauded the Daniel Webster program as "an impressive and highly competitive program," and announced its support for "develop[ing] a similar program in Minnesota."[80] To explore that possibility, the Board invited collaboration from the state's law schools, set two meetings for public comment, and invited written submissions from members of the legal profession and the public.[81] As in New Hampshire and Oregon, the Minnesota program would offer an alternative to the written bar exam rather than replacing that exam.[82]

Other states are also exploring the possibility of assessing minimum competence through work created in a law school curriculum centered on experiential learning.[83] If adopted, these pathways would offer several benefits to candidates, employers, and clients. Educational licensing paths are the most efficient, inexpensive way for candidates to demonstrate their minimum competence because the candidates complete all work while enrolled in law school.[84] Graduates who obtain their licenses at or shortly after graduation can also provide more immediate value to employers and clients. And, as studies of New Hampshire's program suggest, these graduates may possess better lawyering skills than peers who opt to take a written bar exam.[85]

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79. Emily John Eschweiler, *Public Notice*, MINN. ST. BD. OF L. EXAM'RS (June 21, 2021), https://www.ble.mn.gov/wp-content/uploads/2021/06/Public-Notice-June-21-2021.pdf [https://perma.cc/TY7Z-AM2N].

80. *Public Notice*, MINN. ST. BD. OF L. EXAM'RS (Nov. 14, 2022), https://www.ble.mn.gov/wp-content/uploads/2022/11/Public-Notice-November-2022.pdf [https://perma.cc/ENZ7-UF4C].

81. *Id.*

82. *Id.*

83. *See* Stephanie Francis Ward, *Examining the Bar: Should Law Grads Need to Pass the Bar to Practice? Some Say There Is a Better Way*, A.B.A. J. Feb.–Mar. 2022, at 57, 60–61, https://www.abajournal.com/magazine/article/examining-the-bar [https://perma.cc/PR82-WZ2Y] (discussing potential experiential learning alternatives to the bar exam).

84. Even if examiners or law schools charged extra fees to cover program expenses, those fees would be unlikely to exceed the costs of preparing for and taking the bar exam. *See How Much Does the Bar Exam Cost?*, JD ADVISING, https://jdadvising.com/much-bar-exam-cost [https://perma.cc/L7Q6-J248] (breaking down various costs associated with the bar exam).

85. *See* Gerkman & Harman, *supra* note 58, at 25; *see also supra* notes 63–71 and accompanying text (documenting the superior skills of new lawyers who participated in the New Hampshire program).

On the other hand, experiential education pathways pose some risks for candidates, employers, and clients. At least to start, these pathways are unlikely to offer the portability that the Uniform Bar Exam affords.[86] Portability allows newly licensed lawyers to relocate between states; it also benefits employers who serve clients in multiple jurisdictions. Employers and clients may also question the validity and reliability of this novel pathway. As the final section of this Article explains, those concerns are misplaced. At least some employers and clients, however, may need time to adjust to new licensing methods.

B. LICENSING THROUGH SUPERVISED PRACTICE

In March 2020, as the threat of the COVID-19 pandemic became clear, I was part of a research team that proposed safe ways to continue lawyer licensing during the public health emergency.[87] One of the options we recommended was licensing lawyers after a period of supervised practice. We noted that supervised practice "would offer a particularly rigorous assessment of graduates' competence because it would require demonstration of a wide range of knowledge and skills required for practice."[88] Assessment through supervised practice, we added, could test "many skills that are difficult to assess (or are not currently tested) on a written bar exam."[89]

Two jurisdictions, Utah and the District of Columbia, adopted this recommendation to license pandemic-era graduates

86. If these pathways become more common, states may recognize licenses gained through this process in other states—much as jurisdictions created portability for licenses gained under multiple conditions during the pandemic. *See, e.g.*, *July 2020 Bar Exam Jurisdiction Information*, NAT'L CONF. OF BAR EXAM'RS (Sept. 24, 2020), https://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information [https://perma.cc/JD3J-JBE4] (mentioning portability and reciprocity agreements between jurisdictions).

87. Claudia Angelos, Sara J. Berman, Mary Lu Bilek, Carol L. Chomsky, Andrea A. Curcio, Marsha Griggs, Joan W. Howarth, Eileen R. Kaufman, Deborah Jones Merritt, Patricia E. Salkin & Judith Welch Wegner, *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action* (Ohio State Univ. Moritz Coll. of L. & Ctr. for Interdisc. L. & Pol'y Stud., Working Paper No. 537, 2020), http://dx.doi.org/10.2139/ssrn.3559060. Given the urgency of the situation, we posted this white paper on SSRN rather than attempt to publish in a different forum. We also created a website to track licensing developments during the pandemic. *Coming Together to Fight a Pandemic*, THE COLLABORATORY, https://barcovid19.org [https://perma.cc/SRA2-HBVU].

88. Angelos et al., *supra* note 87, at 6.

89. *Id.*

through forms of supervised practice. Utah permitted some recent graduates to demonstrate their competence by completing 360 hours of supervised practice.[90] After documenting that work and satisfying other admission requirements, those graduates obtained Utah licenses without taking the bar exam. The District of Columbia pursued a somewhat different approach. It granted licenses to specified graduates that allowed the graduates to practice under supervision for three years.[91] After that time elapsed, the graduates' licenses would mature into unrestricted ones.[92]

California also adopted a supervised practice licensing pathway during the pandemic, although that pathway responded to a change in California's bar passing score. In July 2020, addressing longstanding criticism of the state's unusually high passing score, the Supreme Court of California lowered that score from 1440 to 1390.[93] This shift generated requests to apply the new score retroactively to candidates who had scored between 1390 and 1439 in recent years. California refused to apply the new score retroactively,[94] but it allowed candidates who had scored at least 1390 during the five years preceding the score reduction

90. Order for Temporary Amendments to Bar Admission Procedures During COVID-19 Outbreak at 2–4, 8, *In re* Matter of Emergency Modifications to Utah Supreme Court Rules of Professional Practice, Rules Governing Admission to the Utah State Bar (Utah Apr. 21, 2020), https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F240 [https://perma.cc/9473-QH3G]. The court limited eligibility for this pathway to recent graduates of ABA-accredited law schools that recorded a 2019 first-time bar exam pass rate of eighty-six percent or higher. *Id.* at 1. The court's detailed order spelled out other conditions for participating in this pathway. *Id.*; *see also* Griggs, *supra* note 74, at 23–24 (describing Utah's approach).

91. Order No. M269-20, at 6 (D.C. Sept. 24, 2020), https://www.dccourts.gov/sites/default/files/2020-09/M-269-20%20Order%20denying%209_28_20_3.pdf [https://perma.cc/Q2D9-EYAA].

92. *Id.*

93. *See* Letter from Jorge E. Navarrete, Clerk and Exec. Officer, Sup. Ct. of California, to Alan K. Steinbrecher, Chair, California State Bar Bd. of Trs. (July 16, 2020), https://newsroom.courts.ca.gov/sites/default/files/newsroom/document/SB_BOT_7162020_FINAL.pdf [https://perma.cc/B96C-76QE] (discussing the change).

94. Sam Skolnik, *California Will Not Make Lower Bar Passage Threshold Retroactive*, BLOOMBERG L. (Aug. 10, 2020), https://news.bloomberglaw.com/us-law-week/california-will-not-make-lower-bar-passage-threshold-retroactive [https://perma.cc/D7ES-JLQR].

to demonstrate their competence by completing 300 hours of supervised practice.[95] Candidates who completed those hours and obtained a statement from their supervisor attesting that they "possess[ed] the minimum competence expected of an entry level attorney," could be licensed without retaking the bar exam.[96]

These pathways addressed special circumstances but, when combined with ongoing criticism of the bar exam, they prompted courts and bar examiners in several jurisdictions to consider adoption of more permanent forms of assessing minimum competence through supervised practice.[97] Oregon was the first state to offer a detailed proposal for a licensing pathway that would rely upon supervised practice rather than a written bar exam. A task force proposed a "Supervised Practice Pathway" along with the Oregon Experiential Education Pathway described in the previous section.[98] The proposed pathway is more rigorous than the temporary paths adopted by Utah, the District of Columbia, and California. Among other features, Oregon's proposed pathway would require candidates to submit work product from their supervised practice to the Board of Bar Examiners for review.[99]

The Oregon Supreme Court approved this pathway, along with the experiential education one, "in concept" in January 2022.[100] Following the court's direction, a committee is developing details for this pathway along with the blueprint for its experiential education companion.[101] To emphasize the pathway's

95. Order Re Request for Approval of Proposed Amendments to the California Rules of Court at 3, Administrative Order 2021-01-20 (Cal. Jan. 20, 2021), https://newsroom.courts.ca.gov/sites/default/files/newsroom/2021-01/20210128062716391.pdf [https://perma.cc/EF49-SVVU].

96. *Id.* at 5.

97. Scholars had been noting the bar exam's flaws for decades, but criticism from others accelerated greatly during the pandemic. 2020 graduates, distressed by the callous manner in which some jurisdictions treated them, organized anti-exam campaigns in several states. Carol L. Chomsky, Andrea A. Curcio & Eileen Kaufman, *A Merritt-orious Path for Lawyer Licensing*, 82 OHIO ST. L.J. 883, 896 (2021); Griggs, *supra* note 74, at 18–19. At the same time, the murder of George Floyd focused attention on deeply ingrained racial biases and racist structures—leading many to question validity of a bar exam that regularly generates higher scores for white takers than examinees of color. *See infra* note 126 and accompanying text.

98. *See supra* notes 75–78 and accompanying text.

99. *See Oregon Task Force Recommendation*, *supra* note 76, at 23–24.

100. Sloan, *supra* note 75.

101. *See Agendas and Minutes*, *supra* note 77 (documenting the committee's work thus far).

focus on work product reviewed by the Board of Bar Examiners, the committee has renamed the pathway the "Supervised Practice Portfolio Examination."[102]

Oregon's work on the Supervised Practice Portfolio Examination received an unexpected boost in May 2022. The state's February 2022 bar exam had imposed an unusual hardship on candidates taking that exam: The heating system at the exam site failed, "resulting in extremely cold temperatures" over both days of the exam.[103] As remedial measures, the Oregon Supreme Court lowered the passing score for that exam and ordered creation of a "Provisional License Program" (PLP) that would allow candidates who failed the exam to demonstrate their competence through supervised practice.[104] The court's order established a framework for the program, including a direction that candidates should submit work product to the Board of Bar Examiners for review on a quarterly basis.[105]

I had the honor of consulting pro bono with Troy Wood, Regulatory Counsel for the Oregon State Bar, and members of Oregon's Board of Bar Examiners to help draft more detailed rules for the PLP. The Oregon Supreme Court approved those rules in July 2022,[106] and eight provisional licensees have started the program.[107] The number of candidates who failed Oregon's February 2022 bar exam was small,[108] so the PLP is unlikely to grow

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102. *Meeting Minutes Jan. 25, 2023*, *supra* note 77.

103. Order Adopting Remedial Measures for the February 2022 Oregon Uniform Bar Examination Cohort at 1, *In re* the February 2022 Oregon Uniform Bar Examination Cohort, No. 22-019 (Or. May 12, 2022), https://cdm17027.contentdm.oclc.org/digital/collection/p17027coll10/id/2959/rec/58 [https://perma.cc/J92F-S4R3].

104. *Id.* at 3–6. The court also allowed failing candidates to register for another administration of the exam without paying an additional fee. *Id.* at 3.

105. *Id.* at 4.

106. Order Adopting Rules for the Oregon Provisional License Program for the February 2022 Oregon Bar Examination Cohort, *In re* Approval of the Oregon Provisional License Program Rules, No. 22-031 (Or. July 26, 2022) [hereinafter Or. PLP Rules], https://www.osbar.org/_docs/resources/SCO22-031ProvisionalLicensingProgram-Rules-Feb2022Cohort7-19-22.pdf [https://perma.cc/J2FT-RNST].

107. *See Provisional License Program Licensees*, OR. ST. BAR, https://hello.osbar.org/admission/provisionallicenseprogram [https://perma.cc/4VSH-8C7H].

108. *See Exam Results - February 2022*, OR. ST. BAR, https://www.osbar.org/admissions/examresults_feb2022.htm [https://perma.cc/ZB53-JKWT] (showing forty-two people failed Oregon's February 2022 bar exam).

beyond a dozen participants. The program, however, is allowing the state to explore supervised practice and portfolio review as a means of assessing minimum competence. The committee designing a more permanent supervised practice pathway has adopted some of the approaches used in the PLP.[109]

Oregon's PLP allows candidates to practice under the same constraints that apply to students participating in Oregon's Student Appearance Program.[110] The latter rules allow provisional licensees to engage in a wide variety of practice activities while under the general supervision of a more experienced attorney. While engaged in this supervised practice, the provisional licensees submit eight pieces of written work product to the Board of Bar Examiners, as well as assessments of two client encounters and two negotiations.[111] Rubrics guide assessment of the client encounters and negotiations, as well as the examiners' review.[112] Provisional licensees who receive "qualified" ratings on work submitted to the examiners may be admitted to the bar without taking a written bar exam.[113]

Oregon's PLP is open to qualifying candidates working for any legal employer, but more focused programs are possible. Professor Eileen Kaufman has proposed a particularly appealing supervised practice pathway that would focus on graduates working for organizations that serve underrepresented individuals and communities.[114] This pathway, titled a "Lawyers Justice Corps," would address the pressing need for additional lawyers serving disadvantaged clients.[115] Law school graduates would be able to begin assisting those clients shortly after graduation, ra-

109. *LPDC*, *supra* note 77.

110. *See* Or. PLP Rules, *supra* note 106, at 8 r. 5.1(C) (incorporating rules of Student Appearance Program); OR. R. FOR ADMISSION OF ATT'YS rr. 13.05–13.20 (2023) (supervision rules for Student Appearance Program).

111. Or. PLP Rules, *supra* note 106, at 11–14 rr. 6.5–6.7.

112. *See Provisional License Program: Rubrics and Templates*, OR. ST. BAR (Sept. 23, 2022), https://www.osbar.org/_docs/admissions/plp/PLPRubricsandTemplates.09.23.22.pdf [https://perma.cc/V7EW-QC33].

113. Or. PLP Rules, *supra* note 106, at 20 r. 9.4.

114. *See* Chomsky et al., *supra* note 97, at 907–09 (explaining the proposed pathway known as the "Lawyers Justice Corps"); Eileen Kaufman, *The Lawyers Justice Corps: A Licensing Pathway to Enhance Access to Justice*, 18 U. ST. THOMAS L.J. 159, 160 (2022) (outlining and analyzing the Lawyers Justice Corps idea).

115. *See* sources cited *supra* note 114.

ther than devoting several months to bar study. The organizations and clients relying upon these graduates could also count on their ongoing service, rather than losing some who discover in late autumn that they have failed the bar exam. No state has yet adopted a Lawyers Justice Corps, but the concept holds exceptional promise for both licensing and improving access to justice.[116]

As with the experiential education path described above, several other states are considering adoption of supervised practice pathways to licensure.[117] These pathways, like the experiential education ones, offer both benefits and risks to stakeholders. A major benefit for candidates is the ability to work and earn a salary while demonstrating their competence, rather than bearing the expense of the current bar exam. Employers and clients, likewise, can benefit from the candidate's work during the supervision period. The supervision and feedback provided during the licensing process, finally, may produce more competent lawyers than does study for the bar exam.

On the other hand, licenses based on completion of a supervised practice period are unlikely to be portable—at least in the foreseeable future. Stakeholders may also wonder whether supervised practice periods will be sufficiently valid and reliable to protect the public from incompetent lawyers. Some may also wonder about the fairness of new pathways to candidates: will licensing systems rooted in supervised practice offer sufficiently fair, objective measures of competence? The final section of this

116. Two California programs provide a possible foundation for a Lawyers Justice Corps. Lawyers for America, a program that originated at the University of California College of Law, San Francisco, places third-year law students in nonprofits or governmental organizations. The students serve clients through those organizations, earning clinical credits for their work. After taking time off to study for the bar exam, the graduates return to the organizations for another paid year of work. *About Us*, LAWS. FOR AM., https://lawyersforamerica.org [https://perma.cc/AFR7-NJGS]. The Legal Services Funders Network, another California organization, created the Public Interest Law Bar Fellowship during the pandemic to support public interest work by graduates waiting to take the bar exam. *LSFN Public Interest Law Bar Fellowship*, LEGAL SERVS. FUNDERS NETWORK, https://www.legalservicesfundersnetwork.org/fellows [https://perma.cc/Y9ZY-BWJP]. Neither of these programs, however, has been able to offer a pathway to licensing. Instead, participants must interrupt their client service to study for and take the bar exam.

117. *See* Ward, *supra* note 83, at 57–58 (listing states considering alternatives to the bar, including supervised practice pathways).

article turns to those concerns with respect to both supervised practice and experiential education pathways.

III. PROTECTING CANDIDATES AND THE PUBLIC

Licensing systems are designed to protect the public from incompetent or unscrupulous practitioners.[118] At the same time, these systems must treat candidates fairly by giving them equitable opportunities to gain a license.[119] Regulators attempt to achieve these dual goals by following the psychometric principles of validity, reliability, and fairness.[120] *Valid* measures rest on evidence that the measurement outcome relates to the purpose for which the assessment is used. A yardstick, for example, offers a valid measure of the length, width, and height of a box. A *reliable* assessment is one that produces consistent results. Yardsticks are highly reliable; they provide constant measurements under a wide variety of conditions. And yardsticks are fair: they do not provide more accurate measurements of blue boxes than red ones.[121]

Validity, reliability, and fairness are harder to attain with measures of human qualities such as competence to practice law. These principles, however, still provide important guides for choosing an assessment system. In this section, I explore the application of these guidelines to licensing systems based on experiential education or supervised practice.[122]

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118. AM. EDUC. RSCH. ASS'N, AM. PSYCH. ASS'N & NAT'L COUNCIL ON MEASUREMENT IN EDUC., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 174–75 (2014) [hereinafter STANDARDS FOR TESTING]. The STANDARDS FOR TESTING, produced by three leading organizations, offers guidelines for a wide variety of testing programs. *See also* Michael T. Kane & Joanne Kane, *Standard Setting 101: Background and Basics for the Bar Admissions Community*, BAR EXAM'R, Fall 2018, at 9, https://thebarexaminer.ncbex.org/article/fall-2018/standard-setting-101-background-and-basics-for-the-bar-admissions-community [https://perma.cc/W76E-7GNF] (stressing the need for the bar exam and other licensing tests to protect the public).

119. STANDARDS FOR TESTING, *supra* note 118.

120. *Id.* at 11–72.

121. A traditional yardstick may not provide a valid or fair measure of a very small box, a very large one, or one that is irregularly shaped. Few, if any, assessments are universal. Most are valid, reliable, and fair within certain defined limits.

122. The medical profession offers numerous examples of assessments conducted during students' clinical rotations (a form of experiential education) and during post-graduate residencies (a form of supervised practice). An extensive

First, though, it is important to recognize that few assessments of human competence can maximize all three of these goals.[123] The Uniform Bar Exam achieves a high degree of reliability, largely through extensive use of multiple-choice questions, but its validity and fairness have both been questioned. The exam tests only a subset of the knowledge and skills identified as essential by NCBE's own practice analyses.[124] The power of jurisdictions to set their own passing scores, often without any standard-setting process, further compromises the exam's validity.[125] And the exam's strikingly disproportionate racial impact,[126] the financial burdens it imposes on candidates,[127] and

literature discusses the validity, reliability, and fairness of these assessments—providing important insights for developing these assessments in the legal profession. For an overview of the medical literature, see Jennifer M. Weller, Ties Coomber, Yan Chen & Damian J. Castanelli, *Key Dimensions of Innovations in Workplace-Based Assessment for Postgraduate Medical Education: A Scoping Review*, 127 BRIT. J. ANAESTHESIA 689 (2021).

123. *See* Eva et al., *supra* note 55, at 899 ("[C]ompromise is necessary across these factors."); van der Vleuten & Schuwirth, *supra* note 55, at 310 ("[C]hoosing an assessment method inevitably entails compromises . . . .").

124. *See* HOWARTH, *supra* note 5, at 57 (quoting a "nationally prominent bar examiner" who said there is probably not "a high correlation" between the bar exam and actual practice); Chomsky et al., *supra* note 97, at 888 ("Finally, the exams test only a small portion of the skills lawyers need, an issue identified by many scholars and confirmed by the National Conference of Bar Examiners' own studies.") (citations omitted); *see also Oregon Supplemental Report*, *supra* note 76, at 13 (noting that the bar exam does not test all of the competencies identified as essential by Oregon).

125. HOWARTH, *supra* note 5, at 6–7; Joan W. Howarth, *The Case for a Uniform Cut Score*, 42 J. LEGAL PRO. 69, 69–70 (2017) ("The MBE cut score is typically more an aspect of a state bar's culture and history than a purposeful decision.").

126. The most recent ABA data from 2021 show that, among first-time exam takers from ABA-accredited law schools, 85% of white candidates pass, compared to 61% of Black candidates, 72% of Hispanic candidates, 79% of Asian candidates, 70% of Native American candidates, and 47% of Hawaiian candidates. *Summary Bar Pass Data: Race, Ethnicity, and Gender*, A.B.A., https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2022/2022-bpq-national-summary-data-race-ethnicity-gender-fin.pdf [https://perma.cc/LAH2-YUSP]; *see also* HOWARTH, *supra* note 5, at 18, 26–27, 30 (describing recurrent racism in attorney licensing); Chomsky et al., *supra* note 97, at 888–91 (same).

127. *Analyzing First-Time Bar Exam Passage on the UBE in New York State*, N.Y. ST. BD. OF L. EXAM'RS & ACCESSLEX INST. 5–6 (May 19, 2021), https://www.accesslex.org/sites/default/files/2021-05/NYBOLE_2021_050521_0.pdf [https://perma.cc/6WDQ-YAGK] (discussing those financial burdens).

the challenges it poses to candidates with disabilities[128] all raise questions about its fairness. Licensing systems based on experiential education or supervised practice also have shortcomings, but, overall, they are at least as valid, reliable, and fair as a written exam.

A. VALIDITY

Assessments conducted in clinics, simulations, or the workplace carry a high degree of face validity. That is, their authentic context suggests that they are good measures of a candidate's competence. As one group of highly regarded psychometricians wrote: "The time-honored way to find out whether a person can perform a task is to have the person try to perform the task."[129] Regulators, however, cannot assume that any experiential education or supervised practice pathway will produce valid assessments of a candidate's minimum competence to practice law. Instead, at least three foundations are necessary to assure valid assessments.

First, the requirements of the licensing path must track an evidence-based definition of minimum competence.[130] Experiential courses and entry-level law practice require many tasks and generate many types of work product. Which tasks and work product should be assessed to determine minimum competence? Regulators must address that question when designing any licensing system.

Several recent studies offer jurisdictions sound evidence of the knowledge, skills, and abilities that comprise minimum competence. NCBE's practice analyses, discussed above, offer one guide.[131] California's Attorney Practice Analysis, conducted the

128. HOWARTH, *supra* note 5, at 7 (detailing the challenges candidates with disabilities face, including being required to test in person during the pandemic).

129. Michael Kane, Terence Crooks & Allan Cohen, *Validating Measures of Performance*, 1999 EDUC. MEASUREMENT: ISSUES & PRAC. 5, 5.

130. *See* C.P.M. van der Vleuten, L.W.T. Schuwirth, E.W. Driessen, M.J.B. Govaerts & S. Heeneman, *Twelve Tips for Programmatic Assessment*, 37 MED. TCHR. 641, 641 (2015) (asserting that when developing an assessment system based on a compilation of work product and observations, it is "[e]ssential" to choose "an overarching structure usually in the form of a competency framework").

131. *See supra* notes 6–15 and accompanying text.

same year as NCBE's most recent analysis, provides another reference.[132] The *Building a Better Bar* study offers a different perspective, defining minimum competence through a set of twelve interlocking "building blocks."[133] Jurisdictions may rely upon one of more of these studies—or collect their own evidence of minimum competence—when designing a licensing path based on experiential education or supervised practice.

Developers of the Daniel Webster Program carefully adhered to this requirement, first identifying the competencies needed for entry-level law practice and then designing the program's curriculum around those competencies.[134] Oregon's Regulatory Counsel and I adopted a similar approach when designing that state's Provisional License Program. Oregon's Rules for Admission of Attorneys specify a list of "Essential Eligibility Requirements" that constitute the state's definition of minimum competence to practice law.[135] The Oregon Supreme Court's Alternatives to the Bar Exam Task Force had also pointed favorably to the twelve building blocks of minimum competence documented by the *Building a Better Bar* study.[136] In shaping the requirements of the PLP, therefore, we followed the dictates of those two complementary sources.[137]

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132. *The Practice of Law in California: Findings from the California Attorney Practice Analysis and Implications for the California Bar Exam*, ST. BAR OF CAL. (May 11, 2020), https://www.calbar.ca.gov/Portals/0/documents/reports/2020/California-Attorney-Practice-Analysis-Working-Group-Report.pdf [https://perma.cc/SAS2-28GV].

133. Merritt & Cornett, *supra* note 16.

134. The Daniel Webster developers drew their definition of competence from the lawyering skills and values identified by a 1992 ABA Report popularly known as the "MacCrate Report." Gerkman & Harman, *supra* note 58, at 4; *see also* AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM (1992) (the "MacCrate Report").

135. OR. R. FOR ADMISSION OF ATT'YS r. 1.25 (2023).

136. *Oregon Task Force Recommendation*, *supra* note 76, at 4–5, 8, 13, 15, 22; *Oregon Supplemental Report*, *supra* note 76, at 7–10.

137. When we submitted the draft rules and program description to Oregon's Board of Bar Examiners and Supreme Court, we included tables showing how the proposed program aligned with both the "essential eligibility requirements" of Oregon's Rules for Admission and the twelve building blocks described in the *Building a Better Bar* report. Executive Summary of Draft Provisional Licensing Program 7–11 (June 27, 2022) (on file with author) (tables detailing alignment).

A second step in establishing the validity of a licensing path is to show that the path assesses competence broadly enough to support the scope of the license. A law license allows attorneys to practice in any field, so any licensing path must support a claim that successful candidates are minimally competent in all fields. Many workplaces and law school clinics specialize in a particular field of law, so some regulators have questioned whether success in those contexts is sufficient to demonstrate competence to practice law more broadly.[138] If a student or graduate demonstrates their competence to practice immigration law, intellectual property, or international tax law through an experiential education or supervised practice pathway, is that showing sufficient to establish their competence to practice in other areas?

Both scholarly research and real-world experience demonstrate that the answer to this question is "yes." Minimum competence to practice law rests upon knowledge and skills that transcend particular practice areas, rather than on the specialized knowledge that lawyers develop in particular fields. The *Building a Better Bar* study, like several previous studies, found that lawyers do not rely upon memorized legal rules to practice law.[139] Instead, they master threshold concepts—foundational principles that support expert insights—across a wide range of subject areas taught in law school.[140] That knowledge, combined with the ability to conduct legal research, interpret legal materials, and apply legal principles to new fact patterns, allows lawyers to master new fields of law and practice them effectively.

The lawyers who participated in the *Building a Better Bar* focus groups vividly illustrated this fact. Several new lawyers described practicing successfully in areas that they had never studied.[141] Supervisors, similarly, indicated their willingness to

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138. Merritt & Cornett, *supra* note 16, at 46 (describing concerns regarding broad understandings versus detailed knowledge of a single area).

139. *Id.* at 24–25.

140. *Id.* at 37–38. For further discussion of the threshold concepts that inform practice across fields, see Chomsky et al., *supra* note 97, at 898–901.

141. *See* Merritt & Cornett, *supra* note 16, at 27 (providing several examples, including one new lawyer who stated, "I've handled a couple of family law matters as pro bono, and that's brand new. Had no idea any of that prior, during, after law school.") (footnote omitted); *id.* at 61–62 (describing techniques new lawyers adopted to learn new practice areas).

hire recent graduates with no previous knowledge of the organization's practice area.[142] As long as the graduates possessed knowledge and skills like the ones identified by the *Building a Better Bar* study, supervisors were confident that the new hires would learn the doctrinal rules of the practice area.[143]

The Model Rules of Professional Conduct recognize this feature of law practice. The Rules command lawyers to "provide competent representation to a client," but recognize that "[a] lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar."[144] Instead, a lawyer may provide competent representation by harnessing "skill[s] that necessarily transcend[] any particular specialized knowledge," engaging in "necessary study," or "association of a lawyer of established competence in the field in question."[145]

Assessing the skills and knowledge that span practice areas, therefore, is sufficient to support a general license to practice law. Experiential education courses or supervised practice may occur in any specialty, as long as they allow candidates to demonstrate their competence in the foundational skills and knowledge required by law practice. Displaying knowledge of legal principles in specific practice areas, no matter how common those areas are, is not necessary.[146]

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142. S.Tabor, who supervised the family law division at a legal aid organization, commented: "[I]f somebody comes in without any family law classes or prior experience, I would have no problem with that." In fact, given the importance of interacting with clients in the practice, he concluded: "So, people who have like a social work background, I'm all over that. I could, that to me, if they have that background and they didn't have any family law classes, I'd be completely fine with that." Another supervisor, S.Caroline, expressed a similar sentiment: "For instance, we do some workers' comp in the office and I've noticed that if you come to the table with, you're quick on your feet, you have a general understanding of torts. Someone can teach you workers' comp in two days." Focus Group Study for Merritt & Cornett, *supra* note 16 (original transcripts on file with the author).

143. *Id.* (summarizing supervisors' satisfaction with fundamental skill sets).

144. MODEL RULES OF PRO. CONDUCT r. 1.1 & cmt. 2 (AM. BAR ASS'N 1983).

145. *Id.* at r. 1.1 cmt. 2. The comment refers to three skills as examples of ones that undergird all practice areas: "the analysis of precedent, the evaluation of evidence and legal drafting, . . . [and] determining what kind of legal problems a situation may involve." *Id.*

146. If this were not true, then the bar exam would fail to protect many clients from incompetence. Although the exam assesses knowledge in some of the

The final prerequisite for assuring the validity of a non-exam pathway is creating an assessment process that candidates, practitioners, and the public will trust. The individuals who judge a candidate's competence must be independent and credible. For most pathways, this means that bar examiners—rather than professors or direct supervisors—will determine a candidate's competence.[147] Professors and supervisors should provide extensive formative feedback to candidates participating in an experiential education or supervised practice pathway, but they should not make the summative assessment of competence.[148] Mixing formative and summative feedback creates conflicting roles for the mentors who work directly with candidates; those mentors may become advocates for their candidates, rather than providing constructive feedback.[149]

New Hampshire's Daniel Webster Program and Oregon's Provisional License Path both adhere to this principle.[150] Professors or supervisors provide formative feedback in those licensing pathways, but bar examiners determine whether a candidate has demonstrated minimum competence to practice law. In both systems, the examiners review portfolios of work product compiled by the candidates. In New Hampshire, the portfolios include written work and video or audio recordings of some lawyering tasks.[151] In Oregon, the portfolios contain eight pieces of written work and assessments related to two client encounters and two negotiations.[152]

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most common practice areas, it necessarily omits more practice areas than it includes. *See* Early et al., *supra* note 5, at 57–58 (noting many knowledge areas rated by survey respondents).

147. *See* van der Vleuten et al., *supra* note 130 (stressing the importance of having an independent group of examiners make decisions).

148. *Id.* at 643 ("[T]he mentor should not be responsible for final pass-fail decisions.").

149. *Id.* ("It is important that the mentor is able to create a safe and entrusted relationship.").

150. *See Daniel Webster Scholar Honors Program, supra* note 62; OR. ST. BAR, *supra* note 107.

151. *Daniel Webster Scholar Honors Program*, *supra* note 62.

152. *See* Or. PLP Rules, *supra* note 106, at 16–18 § 7 (regulating content and grading of quarterly portfolios). Examiners cannot review client encounters and negotiations directly in Oregon, because those interactions involve real client matters rather than simulated ones. By reviewing a supervisor's assessment and a reflection from the candidate, however, examiners are able to make a credible determination of the candidate's competence at those lawyering tasks. *See id.* at 16–17 r. 7.4.

The New Hampshire and Oregon programs both incorporate another feature that enhances the credibility of examiner judgments: The examiners provide feedback to candidates during the licensing pathway. In New Hampshire, the examiner assigned to a student's portfolio reviews that portfolio each semester and meets with the student at least once a year.[153] The student receives feedback from both the examiner and program director about their progress, allowing for course corrections before graduation.[154] In Oregon, examiners review portfolios anonymously, and more than one examiner may review a candidate's portfolio over time.[155] Candidates, however, receive feedback each quarter on whether their submitted work demonstrates minimum competence.[156] If it does not, the candidate may submit supplemental information about the work or replace it with another work sample.[157]

Research suggests that interim feedback like this helps avoid the "failure to fail" syndrome in which examiners hesitate to fail a candidate who has become known to them.[158] Examiners are more comfortable assigning failing grades to work product when they know that a candidate can try again.[159] By providing these opportunities, the New Hampshire and Oregon systems produce more credible ratings from examiners.[160] That credibility strengthens the validity of the system's claim to separate competent candidates from incompetent ones.

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153. Gerkman & Harman, *supra* note 58, at 10–11.

154. *Id.* at 10.

155. Or. PLP Rules, *supra* note 106, at 16–18 r. 7.

156. *Id.* at 16–17 rr. 7.1, 7.4.

157. *Id.* at 17–18 rr. 7.7–7.8.

158. *See, e.g.*, Nancy L. Dudek, Meredith B. Marks & Glenn Regehr, *Failure to Fail: The Perspectives of Clinical Supervisors*, 80 ACAD. MED. S84, S86 (2005) ("[M]any participants felt that they could not fail a trainee if remediation was not available to them."); Lynda J. Hughes, Marion L. Mitchell & Amy N.B. Johnston, *Moving Forward: Barriers and Enablers to Failure to Fail—A Mixed Methods Meta-Integration*, 98 NURSE EDUC. TODAY 1, 3 (2021) ("Assessors in this study felt empowered [to fail students] when there was flexibility in the programme to allow for students who needed more time to meet fitness for practice standards.").

159. *See* Hughes et al., *supra* note 158.

160. These systems also recognize that minimum competence is a level of proficiency that students and recent graduates achieve over time. Initial struggles should not prevent a candidate from receiving a license if they demonstrate minimum competence by the end of a licensing pathway. *See, e.g.*, Gerkman &

B. RELIABILITY

A licensing system should produce consistent results across candidates and over time. The Uniform Bar Exam, like many other standardized tests, relies heavily upon multiple-choice questions to create that consistency.[161] Multiple-choice questions provide standardized exercises with objective answers.[162] They also support statistical techniques like scaling and equating, which allow test-makers to standardize scores over time.[163] For example, a candidate who received a scaled score of 135 on the July 2022 Uniform Bar Exam demonstrates the same level of competence as one who received that score on the February 2022 exam—or, according to NCBE, on any other administration stretching back to the 1970s.[164]

At first blush, assessments based on work product drawn from experiential courses or supervised practice seem much less reliable. Client matters are not standardized; one clinic student

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Harman, *supra* note 58, at 16 ("Because the same bar examiner repeatedly assesses students, improvement is commended and positive feedback is perceived as more credible because students have previously received criticism from the same source.").

161. *Preparing for the MBE*, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/exams/mbe/preparing [https://perma.cc/Y8FY-87R8].

162. *Creating Multiple Choice Questions*, UNIV. OF MAN., https://umanitoba.ca/centre-advancement-teaching-learning/support/multiple-choice-questions [https://perma.cc/WGE6-GTZP] ("[T]he objective scoring associated with multiple choice test items frees them from problems with scorer inconsistency . . . .").

163. *See* Mark A. Albanese, *The Testing Column: Equating the MBE*, BAR EXAM'R, Sept. 2015, at 29, https://thebarexaminer.ncbex.org/article/september-2015/the-testing-column-equating-the-mbe [https://perma.cc/STH4-B88Q]; Susan M. Case, *Demystifying Scaling to the MBE: How'd You Do That?*, BAR EXAM'R, May 2005, at 45, 45, https://thebarexaminer.ncbex.org/wp-content/uploads/PDFs/740205-testing.pdf [https://perma.cc/YRY8-GXKU].

164. *See* Albanese, *supra* note 163. Some psychometricians question whether it is possible to equate scores over such a long period of time. *See, e.g.*, Robert L. Brennan, *Tests in Transition: Discussion and Synthesis*, *in* LINKING AND ALIGNING SCORES AND SCALES 161, 173 (Neil J. Dorans, Mary Pommerich & Paul W. Holland eds., 2007) ("[O]ver an extended period of time, even small year-to-year changes could add up to substantial differences between old and new [test] forms."); *id.* at 174 ("[E]ven relatively small changes in test specifications might influence a 20-year trend line."). In addition, NCBE's equating may not account properly for changes in the exam over time, particularly the addition of subject matter to the multiple-choice section of the exam. *See* Deborah J. Merritt, *Equating, Scaling, and Civil Procedure*, LAW SCH. CAFE (Apr. 16, 2015), https://www.lawschoolcafe.org/2015/04/16/equating-scaling-and-civil-procedure [https://perma.cc/TJ9S-54YE].

may defend a client against a thorny criminal prosecution while another drafts a straightforward contract. Nor do professors and supervisors share the same standards for producing or evaluating work product. One litigator may raise multiple issues in an appellate brief while another prefers to focus on the most promising issues. One negotiator may defend positions aggressively while another takes a more conciliatory approach.

Despite these challenges, the psychometric literature makes it clear that it is possible to develop reliable assessments rooted in experiential courses or the supervised practice.[165] There are four keys to establishing reliability in these contexts: multiple assessments, multiple assessors, well designed rubrics, and effective training.[166]

Multiple points of assessment are essential for reliability in all contexts, including multiple-choice exams.[167] An exam that posed a single question, or even a dozen questions, would not generate reliable results. Success on that type of exam would depend on the fortuity of the candidate's knowledge matching the questions asked. A candidate might know answers to the questions asked in February but not in July.

For similar reasons, a licensing path based on experiential education or supervised practice should include multiple assessment opportunities.[168] Judging a candidate's minimum competence based on a single memo or client interview would not offer

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165. *See, e.g.*, Baartman et al., *supra* note 55, at 156 ("[T]he idea of reliability is important for [competency assessment programs], but it needs to be defined and estimated in a different way than is done for classical tests.").

166. *See, e.g.*, van der Vleuten & Schuwirth, *supra* note 55, at 311 (discussing "the recent insight that reliability is not conditional on objectivity and standardization" and noting that "reliability can also be achieved with less standardized assessment situations and more subjective evaluations, provided the sampling is appropriate"); *id.* at 312 ("[T]here is no direct connection between reliability and the level of structuring or standardization.").

167. *See, e.g.*, Cees P.M. van der Vleuten, *Revisiting 'Assessing Professional Competence: From Methods to Programmes*,*'* 50 MED. EDUC. 885, 885 (2016) ("Any assessment, old or new, objective or subjective, standardised or unstandardised, requires at least 3–4 hours of testing time to achieve minimal reliability.").

168. *See, e.g.*, Kane et al., *supra* note 129, at 9–10; J.M.W. Moonen-van Loon, K. Overeem, H.H.L.M. Donkers, C.P.M. van der Vleuten & E.W. Driessen, *Composite Reliability of a Workplace-Based Assessment Toolbox for Postgraduate Medical Education*, 18 ADVANCES HEALTH SCIS. EDUC. 1087, 1095–97 (2013) (discussing the value of a variety of assessment opportunities in the medical school context).

a reliable result; that single performance might not represent the candidate's performance on other occasions. Gathering multiple samples of lawyering work over time offers a more reliable picture of the candidate's competence.

New Hampshire's Daniel Webster Program and Oregon's Provisional License Program both follow this dictate. Students enrolled in Daniel Webster's experiential courses gather many samples of lawyering work in their portfolios.[169] The graduates participating in Oregon's Provisional License Program, similarly, present eight pieces of written work, evaluations of two client encounters, and reviews of two negotiations to bar examiners.[170] These multiple samples allow examiners to make a reliable determination of the candidate's overall competence.[171]

Using multiple judges to review a candidate's work product further enhances reliability.[172] When assessing professional work, judges sometimes have genuine differences of opinion. Psychometricians suggest that it is not necessary to erase these differences. Instead, using multiple raters allows professionals to exercise their expertise while assuring consistent results overall.[173] In a licensing system based on professional work product,

169. *See supra* notes 72–73 and accompanying text.

170. *See supra* notes 110–13 and accompanying text.

171. Some scholars have suggested that in the context of portfolio review, "reliability" is similar to the concept of "saturation" in qualitative research. Saturation in that type of research occurs when a researcher concludes that additional information would not "add important information beyond the information already collected." David A. Cook, Ryan Brydges, Shiphra Ginsburg & Rose Hatala, *A Contemporary Approach to Validity Arguments: A Practical Guide to Kane's Framework*, 49 MED. EDUC. 560, 567 (2015). Similarly, portfolio reviews "continue[] to accumulate information until saturation is reached and a decision becomes trustworthy and defensible." van der Vleuten & Schuwirth, *supra* note 55, at 315.

172. *See, e.g.*, Shiphra Ginsburg, Kevin Eva & Glenn Regehr, *Do In-Training Evaluation Reports Deserve Their Bad Reputations? A Study of the Reliability and Predictive Ability of ITER Scores and Narrative Comments*, 88 ACAD. MED. 1539, 1543 (2013) ("[T]he evidence seems to suggest that as long as there are multiple raters, either within or across rotations, there can be acceptable reliability."); Moonen-van Loon et al., *supra* note 168 (discussing the value of multiple assessors); van der Vleuten et al., *supra* note 130, at 642 ("[M]any subjective judgements provide a stable generalisation from the aggregated data.") (citation omitted).

173. *See* Cook et al., *supra* note 171 ("Whereas we treat inter-rater variability as error for most numeric scores, in qualitative assessments we view observer variability as representing potentially valuable insights into performance.").

it is not essential for judges to agree closely with one another. Instead, the question is whether a series of judgments from a series of raters will yield a consistent result—one that is close to a result based on a different series of judges.[174] Neither New Hampshire's Daniel Webster Program nor Oregon's Provisional License Program explicitly embrace this rule, but it is one that designers of future programs should attempt to incorporate.

Well-designed rubrics offer a third safeguard promoting reliability.[175] Rubrics help maintain consistency among graders and over time.[176] They also focus judges on the essentials of minimum competence, pushing aside disagreements over more nuanced points.[177] Even the process of creating rubrics enhances reliability because examiners must discuss and agree upon descriptions of minimum competence.[178]

Lawyers produce many kinds of documents and engage in many lawyering tasks, but it is not necessary to design unique rubrics for every type of document or task. Most documents, for example, share a few key elements. A rubric that Oregon's Board of Bar Examiners approved for their PLP, for example, identifies just nine criteria that distinguish a competent legal document from an incompetent one.[179] Four of those criteria reflect the IRAC paradigm that lawyers learn in the first year of law school: issues, rules, application, and conclusion. The other five assess the document's focus, audience, organization, reliance upon sources, and format. A copy of that rubric, which can be used to assess a wide range of documents, appears as Appendix A.[180]

Training offers a final aid to reliability. Graders for the Uniform Bar Exam attend training workshops and participate in

174. *Id.* at 570 (discussing generalization in a table and noting that among different interpreters relatively consistent judgements are formed).

175. *See* Kane et al., *supra* note 129, at 9.

176. *Id.*

177. *Id.*

178. *Id.* at 12.

179. OR. ST. BAR, *supra* note 112, at 19.

180. *See id.* The rubric in Appendix A applies to both formal documents like motions and briefs and less formal ones like emails or memos to the file. The rubric also encompasses both persuasive and objective writing. A slightly different rubric, attached as Appendix B, applies to contracts, leases, and other documents with the force of law.

calibration sessions to improve the consistency of their grading.[181] Training workshops, similarly, can be used to introduce bar examiners to the nuances of grading authentic workplace documents. To complement that initial training, examiners should hold calibration sessions using sample portfolio materials. Those sessions would allow examiners to compare, discuss, and align their ratings.

Training of candidates, professors, and supervisors can further enhance reliability by helping candidates and their mentors optimize the work product they submit to examiners. Training related to implicit bias and cultural differences can help all program participants recognize and overcome those obstacles.[182] A solid training program, combined with the other safeguards outlined in this section, can generate acceptable levels of reliability for licensing systems based on experiential education or supervised practice.

C. FAIRNESS

Fairness in testing requires that all test-takers have "the opportunity . . . to demonstrate their standing on the construct(s) the test is intended to measure," without the interference of irrelevant conditions or characteristics.[183] Judges should not favor one group of test-takers over another. Nor should tests impose barriers, like the ability to type quickly or manipulate a computer mouse, that are irrelevant to the knowledge or skill measured by the test.

Licensing paths that rest upon experiential coursework or supervised practice raise important questions about fairness. It

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181. *See* Sonja Olson, *13 Best Practices for Grading Essays and Performance Tests*, BAR EXAM'R, Winter 2019–2020, at 8, https://thebarexaminer.ncbex.org/article/winter-2019-2020/13-best-practices-for-grading-essays-and-performance-tests [https://perma.cc/L6N3-J2AJ].

182. Naike Bochatay, Nadia M. Bajwa, Mindy Ju, Nital P. Applebaum & Sandrijn M. van Schaik, *Towards Equitable Learning Environments for Medical Education: Bias and the Intersection of Social Identities*, 56 MED. EDUC. 82, 86 (2022) (recommending "learning activities addressing social identity and intersectionality," that focus on "strategies to generate awareness of social identities," "build[ing] skills to navigate in-group versus out-group differences," and "sensiti[zing] [participants] to their implicit biases and beliefs").

183. STANDARDS FOR TESTING, *supra* note 118, at 51; *see also* Baartman et al., *supra* note 55, at 158 ("Fairness specifies that [an assessment process] should not show bias to certain groups of learners and [should] reflect the knowledge, skills and attitudes of the competency at stake, excluding irrelevant variance.") (citations omitted).

is difficult to standardize tasks in these pathways, especially when candidates serve clients in clinics or post-graduate practice. One candidate may interview a cooperative client with a simple problem, while another faces a hostile client with a complex legal issue. The professors and supervisors who judge this work, moreover, know the identity of their students and junior lawyers. These interpersonal interactions raise the specter of favoritism and bias. Supervisors, finally, may lack adequate standards for evaluating the work of new lawyers; if they lack the expertise to provide feedback, as the *Building a Better Bar* study suggests, they may be even less prepared to assess work product.[184]

Despite these challenges, it is possible to construct experiential education and supervised practice licensing paths that give candidates fair opportunities to demonstrate their competence.[185] The four practices that promote reliability (multiple tasks, multiple assessors, well designed rubrics, and training) also enhance fairness. The use of multiple tasks can ease the unevenness of candidate experiences. When asked to perform a dozen different tasks, each candidate will face some easy tasks and some difficult ones. Multiple graders, similarly, can help overcome favoritism or bias; no candidate will receive all of their assessments from a single judge.[186] Rubrics further reduce bias by focusing judges on objective criteria—and the rubrics can be

184. Merritt & Cornett, *supra* note 16, at 27 (noting the lack of effective feedback skills among some supervisors).

185. *See generally* Nyoli Valentine, Steven Durning, Ernst Michael Shanahan & Lambert Schuwirth, *Fairness in Human Judgment in Assessment: A Hermeneutic Literature Review and Conceptual Framework*, 26 ADVANCES HEALTH SCIS. EDUC. 713 (2021) (providing a thorough review of practices that increase fairness in these types of assessments).

186. *Id.* at 726 ("System procedures such as having multiple sources of evidence in a variety of clinical settings (triangulation), continuous collection of evidence and tripartite meetings (peer debriefing and member checks) is also seen to improve the perception of fairness of evidence."); *id*. at 729 ("Several authors suggest that a fair and defensible assessment program utilising human judgement should be comprehensive, multimodal, incorporate factual knowledge, sufficiently large samples of direct observation, multisource feedback, and a portfolio to monitor progress and to develop learning plans and self-reflection.").

honed to eliminate criteria that might evoke bias.[187] Training, finally, can both concentrate judges' attention on objectively defined elements of minimum competence and educate those judges about unconscious forms of bias that might taint their decisions.[188]

In addition to these protections, more than half a dozen other guardrails can increase fairness in licensing systems based on experiential education or supervised practice. First, candidates should have the opportunity to choose the work product that they submit to examiners for review. If a candidate writes a memorandum that falls short in analyzing a complex issue, the candidate should be able to choose a simpler assignment to submit for review. If a candidate feels that their supervisor was too harsh in assessing a client interview, the candidate should be able to ask a different attorney to evaluate another client encounter. During the two years of an experiential education pathway—or the four to six months of a supervised practice one—candidates will be able to choose among a large number of writings and other work to submit for review. That opportunity compensates for the possibility that some assignments may be unduly hard and that some assessors may harbor biases against the candidate.[189]

Second, candidates and supervisors should be able to supplement a candidate's work product with notes that explain the context of the work. A candidate, for example, may have refused to compromise during a negotiation because the client adamantly opposed any compromise. A motion to suppress evidence

187. A rubric for scoring client interviews, for example, should not ask whether the candidate "listened" to the client. Although listening is undoubtedly important in client interviews, personal characteristics (including race, gender, and nationality) can affect the way in which lawyers manifest "listening." A fairer rubric would ask whether the candidate responded to the client's questions. Responding to questions is a more objective measure of a behavior that depends upon listening. *See, e.g.*, Merritt & Cornett, *supra* note 16, at 55 (noting that communication skills should focus on providing information to clients).

188. *See* Valentine et al., *supra* note 185, at 732 ("Almost all individual and system components of fairness in human judgment require time and training for assessors, especially for novice assessors.").

189. Oregon's PLP adopted this approach. Candidates choose just eight pieces of writing, two client encounters, and two negotiations to submit for review. Or. PLP Rules, *supra* note 106, at 11–14 rr. 6.5–6.7. In addition, as noted above, candidates have the opportunity to replace work product that an examiner finds deficient. *See supra* note 157 and accompanying text.

may have avoided a plausible argument because the candidate knew that the presiding judge disfavored that argument. Assessments can account for the idiosyncrasies that arise in practice as long as the candidate or supervisor is able to explain the context for their work.[190]

Third, the interim feedback described above can improve the fairness of a licensing system.[191] Regular feedback reduces the anxiety that a multi-month (or multi-year) assessment process can generate. It also assures that all candidates understand the expectations of examiners and are able to adjust their work before a final pass-fail decision is made. Interim reviews also allow candidates to identify potential sources of bias that they can raise with an ombudsperson (discussed below), their supervisor, or their professor.[192]

Fourth, examiners should review as many submissions as possible anonymously. Anonymity is relatively easy to achieve with written work; candidates can identify themselves with code numbers and redact the writing to omit references to client matters. For client interviews, negotiations, and other tasks, complete anonymity may not be possible. The supervisor, professor, or colleague who observes the lawyering task usually will know the candidate's identity. That first-line assessment, however, should be submitted anonymously to the examiner—along with any accompanying notes from the anonymized candidate. The

190. *See, e.g.*, Eva et al., *supra* note 55, at 907 ("Given that context influences performance there might be value in establishing opportunities for examiners to explore the reasoning underlying candidates' behaviour.") (citation omitted); van der Vleuten, et al., *supra* note 130, at 643 (recommending "provision of mentor and learner input" to portfolios submitted for assessment; "the mentor may write a [letter of] recommendation . . . that may be annotated by the learner").

191. *See supra* notes 153–60 and accompanying text; *see also* Valentine et al., *supra* note 185, at 724 ("High quality, appropriate judgements about a performance which provide feedback build the credibility, transparency and thus fairness of a judgement decision.") (citation omitted); van der Vleuten et al., *supra* note 130, at 643–44 ("High-stakes decisions at the end of the course, year, or programme should never be a surprise to the learner. Therefore, provision of intermediate assessments informing the learner [is an essential feature of assessments based on performance over time.]").

192. *See* Valentine et al., *supra* note 185, at 724 ("Transparency brings out into the open the values and biases of the judgement process and provides an opportunity for debate about the influences . . . .").

examiner who makes the final decision then may judge all elements of the portfolio anonymously.[193]

Fifth, even though examiners review submissions anonymously, a conflict-checking system should be used to prevent even the appearance of bias.[194] Oregon's PLP requires examiners to review a list of all candidates and "identify any . . . who are family members, former students, current or former Employees of their organization, or who are known to the Examiner in some other way that might bias the Examiner's assessment of the Provisional Licensee's work."[195] Candidates do the same with a list of any examiners who might review their work.[196] If any conflicts are identified, examiners are shielded from the conflicted candidate's work.[197]

Sixth, the licensing system should embrace transparency.[198] Candidates should have advance access to the examiners' grading rubrics so that they understand the criteria that will be used

193. Oregon's PLP uses this approach. Or. PLP Rules, *supra* note 106, at 17 r. 7.5. New Hampshire's bar examiners do not review candidate portfolios anonymously; on the contrary, examiners meet with their candidates and provide feedback. Many even become mentors for their candidates. The lack of anonymity allows these positive relationships to flourish and there have been no reports of unfairness in the Daniel Webster program. *See* Gerkman & Harman, *supra* note 58, at 16 (discussing the program's selection process). Anonymity, however, remains an important way to guard against unfairness of different types.

In Oregon's system, the examiner assesses client encounters and negotiations by applying an "entrustment" standard to the reports from the supervisor and candidate. Examiners are asked: "Based on your review of the Supervising Attorney's rubric and the Provisional Licensee's reflection, would you allow the Provisional Licensee to conduct an unsupervised negotiation [or client interview] in their practice area?" OR. ST. BAR, *supra* note 112, at 33. This approach has been successful in medicine, where supervisors are asked to indicate how much autonomy they would give a candidate to perform a task after observing the candidate perform that task. *See, e.g.*, J.M. Weller, M. Misur, S. Nicolson, J. Morris, S. Ure, J. Crossley & B. Jolly, *Can I Leave the Theatre? A Key to More Reliable Workplace-Based Assessment*, 112 BRIT. J. ANAESTHESIA 1083 (2014).

194. van der Vleuten et al., *supra* note 130, at 643 (urging "[p]revention of conflicts of interest").

195. Or. PLP Rules, *supra* note 106, at 22–23 r. 11.1(A).

196. *Id.* at 23 r. 11.1(B).

197. *Id.* r. 11.1(C). The Oregon rules also require conflict-checking related to work product submitted by candidates. *Id.* r. 11.3. A confidential system determines whether a proposed examiner has a conflict of interest with respect to any client involved in the submitted matter. *Id.* rr. 11.2—11.5.

198. *See generally* Valentine et al., *supra* note 185, at 724 (describing aspects of transparency required for fair assessment).

for scoring. Once scoring is complete, examiners should share their completed rubrics with the candidates so that candidates understand how to improve their performance—or can challenge assessments that they believe are unfair.

Appointment of an ombudsperson offers a seventh protection against unfairness. An ombudsperson can help participants in the licensing system address both individual and systemic problems with the program, including issues of bias. Oregon's PLP provides for two ombudspersons, in case one is conflicted from discussing the matter.[199] The ombudspersons are not allowed to assist program participants with legal issues related to client matters, offer advice on whether portfolio elements are minimally competent, or participate in any license termination proceeding against a candidate,[200] but they may counsel participants on any other issue related to the program.[201] A well trained ombudsperson can help participants overcome fairness challenges.

Experiential education and supervised practice pathways, finally, can increase fairness by embracing flexibility in their requirements. The bar exam has a rigid structure, requiring candidates to demonstrate their competence on a closed-book exam that is crammed into twelve closely timed hours and offered just twice a year. Candidates who are adept at research rather than memorization, who need time to reflect and write, who have care-taking responsibilities, or who have disabilities all struggle with this rigid structure. For candidates of color, the structure itself may generate stereotype threat—a well-documented phenomenon that reduces scores and produces an invalid measure of competence.[202]

Experiential education and supervised practice pathways are inherently more flexible than the bar exam. These pathways, like law practice itself, can confirm competence in a wide variety

199. Or. PLP Rules, *supra* note 106, at 26 r. 15.1.

200. *Id.* at 26–27 r. 15.4. The latter restriction is essential to encourage candid discussions between the candidates and the ombudsperson, even on sensitive matters that might lead to license termination.

201. *Id.* at 26 r. 15.2.

202. *See generally* CLAUDE M. STEELE, WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO (2011) (offering an overview of research into stereotype threat by the founder of that research); Arusha Gordon, *Don't Remind Me: Stereotype Threat in High-Stakes Testing*, 48 U. BALT. L. REV. 387 (2019) (discussing stereotype threat in the context of high-stakes testing).

of contexts. Candidates have multiple opportunities to demonstrate their competence and may choose the work product that they submit to examiners. Production of work product must match the pace of practice, but not the artificial time constraints of a written exam. Candidates may also rely upon accommodations appropriate for their educational setting or workplace, rather than petitioning for accommodations that often prove inadequate in the artificial setting of a closed-book, timed exam.[203]

The designers of experiential education and supervised practice pathways can expand this flexibility by allowing candidates to pursue those pathways part-time, by avoiding unnecessary deadlines or time limits, by adopting other principles of universal design, and by publicizing this flexibility to candidates. The Oregon committee that is drafting the rules for a supervised practice licensing path has adopted all of those approaches, attempting to make the pathway as inclusive as possible.[204]

Through this combination of safeguards, jurisdictions can design experiential education and supervised practice licensing paths that are fair to all candidates. Perhaps most important, these pathways avoid the financial burdens, stereotype threat, and other barriers that tilt the current bar exam in favor of white candidates with economic resources, few caretaking responsibilities, and a lack of disabilities.[205] Fairness is a challenge for any licensing system, but the non-exam pathways described in this

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203. Testing accommodations themselves are often rigid, "one size fits all" attempts to address candidate needs. *See* Alison Esposito Pritchard, Taylor Koriakin, Lisa Carey, Alison Bellows, Lisa Jacobson & E. Mark Mahone, *Academic Testing Accommodations for ADHD: Do They Help?*, 21 LEARNING DISABILITIES 67, 76 (2016) (finding that five common test accommodations provided little help in assisting students with ADHD); Lawrence J. Lewandowski, Benjamin J. Lovett & Cynthia L. Rogers, *Extending Time as a Testing Accommodation for Students with Reading Disabilities*, 26 J. PSYCHOEDUCATIONAL ASSESSMENT 315, 321 (2008) ("However, even with extended time, their performance did not rise to the level of the nondisabled group's performance at standard time, although it did allow them to attempt the same number of items.").

204. *See The Oregon Supervised Practice Portfolio Examination*, OR. ST. BAR LICENSURE PATHWAY DEV. COMM., https://lpdc.osbar.org/files/SPPEDraftRules-SupervisedPracticePortfolioExamination.pdf [https://perma.cc/HBB7-A4DZ] (draft rules released for public comment); *Notes and Explanations on Proposed Rules for the Supervised Practice Portfolio Examination (SPPE) Licensing Pathway*, OR. ST. BAR LICENSURE PATHWAY DEV. COMM., https://lpdc.osbar.org/files/SPPEDraftRules-ExplanatoryNotes.pdf [https://perma.cc/77G7-7WVW] (discussing rules that increase inclusiveness).

205. *See supra* notes 126–28 and accompanying text.

article are likely to achieve as much—or more—fairness than the current bar exam.

CONCLUSION

Work product derived from experiential coursework or supervised practice offers a rich opportunity to evaluate the minimum competence of aspiring lawyers. With appropriate safeguards, those assessments will offer a valid, reliable, and fair measure of that competence. These innovative approaches, in fact, will better protect the public by measuring client-centered competencies that are essential to law practice.

The new systems will take effort to design, and some may prove more expensive than the administration of written exams. The current exam, however, is horribly expensive for candidates.[206] It may be time for the profession to absorb more of the cost of assessing new entrants, especially if we want the legal profession to embody its promises of inclusion. Any added expense, moreover, will promote more client-centered education and licensing. If increased cost produces better public protection, then the profession should not shy away from the expense.[207]

Assessments based on authentic practice are novel in the legal profession, but they draw upon models in other professions. Regulators in several fields have started turning away from standardized written exams as the only—or best—method of evaluating knowledge and skills.[208] As these programs emerge,

206. *See* Deborah J. Merritt, *Reflections of a Bar Exam Skeptic*, LAW SCH. CAFE (May 26, 2017), https://www.lawschoolcafe.org/2017/05/26/reflections-of-a-bar-exam-skeptic [https://perma.cc/FXP8-RT9A] (conservatively estimating that, in 2017, the bar exam cost each test taker $15,000 in direct costs and foregone income). Almost 65,000 individuals took a bar exam in 2021—generating an estimated total cost of almost a billion dollars. *2021 Statistics*, BAR EXAM'R, Spring 2022, https://thebarexaminer.ncbex.org/article/spring-2022/2021-statistics [https://perma.cc/798K-ZQE8].

207. *Cf.* C.P.M. van der Vleuten, *The Assessment of Professional Competence: Developments, Research and Practical Implications*, 1 ADVANCES HEALTH SCIS. EDUC. 41, 61 (1996) ("[I]nvesting in assessment is investing in teaching and learning.").

208. *See, e.g.*, Eva, et al., *supra* note 55, at 908 ("Conceptions of best practice in health professional assessment are evolving away from simply focusing on 'knows how and shows how' processes towards processes that catalyze quality improvement and patient safety."); Trevor J.G. Robinson, Natalie Wagner, Adam Szulewski, Nancy Dudek, Warren J. Cheung & Andrew K. Hall, *Explor-*

they will need careful evaluation and refinement.[209] Today, however, we have the knowledge and tools to begin building a more client-centered system of legal education and licensing.

ing the Use of Rating Scales with Entrustment Anchors in Workplace-Based Assessment, 55 MED. EDUC. 1047, 1048 (2021) ("In the global shift towards competency-based medical education (CBME), workplace-based assessment (WBA) tools, informed by direct and indirect observation, have become the cornerstone of assessment."); van der Vleuten & Schuwirth, *supra* note 55, at 312 ("[W]e are likely to witness the continued progress of the authenticity movement towards assessment in the setting of day-to-day practice.").

209. *See* van der Vleuten, et al., *supra* note 130, at 644 ("Monitor, evaluate, and adapt the assessment programme systematically.").

APPENDIX A

Examiner Rubric for Emails, Memos, Motions, Etc.

	Working Towards Minimum Competence	**Achieves Minimum Competence**	**Exceeds Minimum Competence**	**NA**
Identifying Issues	The document fails to identify a critical issue—or omits 2 or more less critical issues	The document identifies all critical issues but misses a lesser issue	The document identifies all appropriate issues	
Stating Legal Principles	The document misstates one or more legal principles	The document accurately states all legal principles, although there is room for minor improvement on detail	The document accurately states all legal principles	
Applying Legal Principles to Facts	The document fails to apply more than 2 principles adequately to specific facts	The document applies most legal principles to specific facts, but application of 1–2 principles could be improved	The document adequately applies all legal principles to specific facts	
Focus	Includes many irrelevant issues, legal principles, and/or facts	Includes some irrelevant issues, legal principles, and/or facts	Focuses tightly on key issues, legal principles, and facts	
Citing Sources of Law (if appropriate)	The document fails to cite sources of law or cites inappropriate sources	The document cites appropriate sources in most places, but could improve in 1–2 respects	The document cites appropriate sources in all places, giving them appropriate weight	

	Working Towards Minimum Competence	**Achieves Minimum Competence**	**Exceeds Minimum Competence**	**NA**
Organization	The document is poorly organized, making it difficult for the reader to follow	The document is well organized, although organization could improve in 1–2 places	The document is very well organized, making it easy for the reader to follow	
Audience	The document is poorly addressed to the audience	The document properly addresses the audience, but falls short in 1–2 minor ways	The document is fully appropriate for the audience	
Format, Grammar & Spelling	The document is poorly formatted and/or contains many spelling or grammatical errors	The document is well formatted and is mostly free of spelling and grammatical errors	The document is properly formatted and has very few spelling or grammatical errors	
Conclusion (at Beginning or End)	There is no conclusion, it is unclear, or it lacks important caveats	There is a conclusion, but it lacks some clarity or caveats	The document offers a clear conclusion, with appropriate caveats	

APPENDIX B

Examiner Rubric for Contracts, Leases, and Other Documents with the Force of Law

	Working Towards Minimum Competence	**Has Achieved Minimum Competence**	**Exceeds Minimum Competence**	**NA**
Issue Identification	The document fails to address a critical issue or omits 2 or more other issues	The document addresses all critical issues but misses one lesser issue	The document addresses all issues appropriate for the client	
Knowledge	The document reflects insufficient knowledge of the legal principles affecting the client	The document reflects knowledge of most legal principles relevant to the client, but suggests need for improved knowledge on 1–2 principles	The document reflects knowledge of all legal principles relevant to the client	
Use of Model or Template (if appropriate)	The document fails to draw from an appropriate model or template	The document rests on an appropriate model or template, but a somewhat better model/template could have been chosen	The document rests on a well chosen model or template	

	Working Towards Minimum Competence	**Has Achieved Minimum Competence**	**Exceeds Minimum Competence**	**NA**
Customization	The document fails to reflect the client's distinctive concerns in several respects	The document appropriately reflects the client's distinctive concerns, but there is room for improvement on 1–2 points	The document fully reflects the client's distinctive concerns	
Organization	The document is poorly organized, making it difficult to find provisions	The document is well organized, although organization could improve in 1–2 places	The document is very well organized, making it easy to find provisions	
Word Choice and Definitions	The document uses a number of words that are inappropriate for the context and/or fails to define more than 2 key terms	The document generally uses appropriate words for the context and defines most key terms, but there is room for improvement in some places	The document uses appropriate words for the context and defines all key terms	
Format, Grammar, and Spelling	The document is poorly formatted and/or contains many spelling or grammatical errors	The document is well formatted and is mostly free of spelling and grammatical errors	The document is properly formatted and has very few spelling or grammatical errors	