

Attorney Licensing Principles & Pathways

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State supreme courts and bar examiners try to protect the public by ensuring that newly licensed attorneys are at least minimally competent to practice law. The challenges of that task are enormous. Practicing law is complex and undertaken in a wide array of disparate settings. Minimal competence is hard to define and even harder to assess. In this handout, I offer:

- Twelve principles that can guide states facing those challenges;
- Six concrete ways to improve the licensing of new lawyers;
- A brief comment on NCBE's NextGen exam; and
- A list of sources for further reading on licensing. Parentheticals in the text refer to those sources.

Twelve Principles for Licensing

1. Base every licensing requirement on evidence about understanding, ensuring, and assessing minimal competence to practice law.

Licensing for attorneys requires evolution as the profession evolves, with almost constant efforts to adapt to the changing profession. Ensuring minimal competence requires careful consideration and alignment of what a candidate should have learned in school, what lawyering experience a candidate should have had, and what kind of licensing tests may be appropriate. Until very recently, courts and bar examiners did not have solid research about minimal competence to practice law. Now we do. Next, we must use it.

2. Eliminate unnecessary racial, ethnic, and gender disparities as if required by law.

Courts and bar examiners are immune from Title VII scrutiny of the undisputed racial, ethnic, and gender disparities in bar exam pass rates. Nonetheless, our values and principles require us to commit unrelentingly to understanding disparate results and reducing them. As the President of the NAACP Legal Defense and Education Fund, Sherrilyn Ifill, told the ABA upon accepting a Spirit of Excellence Award in 2021, "I challenge you to stop talking about diversity and inclusion and make it happen." Our history is humbling.

Public protection requires both an unyielding focus on minimal competence and an uncompromising commitment to a diverse and inclusive profession. Medical outcomes are better studied than legal outcomes, so we should learn from the dismal truth that African American babies with African American doctors have a much higher survival rate than African American babies with white doctors (Greenwood). Similarly, a diverse legal profession will serve the entire public better (Markovic & Plickert; Pratt). To best protect the diverse public, licensing authorities should audit every policy decision as to whether the decision exacerbates or reduces our long-standing racial disparities in licensing. The enduring problems with high-stakes tests suggests that our dual goals of competence and inclusivity require us to seriously consider paths to licensure based on competence proven through supervised practice (Howarth).

3. License no one who has not successfully practiced law under supervision, preferably in an academic clinical residency.

Law is exceptional among professions in not requiring substantial clinical experience prior to licensure. Jurisdictions should require every candidate to have successfully completed a residency prior to licensure, using student practice rules to impose professional standards on both student lawyer and supervisor. This is a single, simple step that jurisdictions can take to dramatically improve public protection.

The required residencies may vary widely as to areas of practice, but each residency should feature: (1) client representation; (2) with supervision by an excellent attorney; (3) in the context of an academic program that includes (a) key learning goals, (b) habits of reflective practice, and (c) assessment of competencies expected to be learned. The public deserves assurance that a newly licensed lawyer has practiced with a copilot before flying solo.

4. Align bar exams more closely with minimum competence to practice law.

Attorney licensing exams are overdue for a major overhaul. Changes in the profession demand new tests and changes in technology, computer assisted grading, and psychometric scoring advances make them possible. If attorney licensing tests persist, the bar exams of the future must be reworked to become more valid assessments of minimum competence to practice law.

Current exams focus too much on memorization of volumes of legal rules at a picky level of detail, rules which may not even be the correct law of the jurisdiction administering the exam. Memorization should be reduced or eliminated and replaced by a new emphasis on assessing fundamental methods of lawyering. The ungodly speededness and the required memorization of too many rules, neither of which tracks to law practice, make current tests too hard for competent future lawyers who are not rapid-fire memorization superstars. On the other hand, the questions are also too simple, using cardboard scenarios with falsely stable rules and artificially firm facts. Lawyering is about handling ambiguity. Current technology invites more dynamic question sets that can move beyond doctrine to strategy, organization, case management, and other higher order legal thinking.

5. Establish competence-based educational or training requirements.

Jurisdictions typically rely on graduation from an accredited law school as the educational requirement for licensure, without scrutiny of the courses taken. This simplicity is welcome to candidates, law school administrators, and bar examiners. But public protection through meaningful mechanisms to ensure minimal competence is not served by mere graduation in a time of largely elective law school curricula. Administrative ease and public protection can both be achieved through requirement of coursework or training (which might be completed outside of law school, through CLE's or online courses) in certain crucial aspects of minimal competence. Using minimal competence and public protection as the touchstones, some educational requirements within the degree make sense.

6. Reduce the expense of becoming a lawyer.

Protecting the public requires eliminating barriers to the profession based on anything other than potential for and then demonstration of competence as a lawyer. Three years of post-graduate education should be enough time to produce and assess minimal competence to practice law.

Multiple pathways achieve the goal of licensing upon law school graduation, including Arizona's [early testing](#), Wisconsin's [diploma privilege](#), New Hampshire's [Daniel Webster Scholars Program](#), and new ideas such as combining a clinical residency with multiple, staged performance tests that can be taken during law school. Law graduates who take care of children or work in non-law jobs have a harder time passing bar exams (Taylor, Scott & Johnson; AccessLex Institute). The public is hurt when licensing mechanisms exclude competent candidates who do not have the resources to succeed in our expensive gatekeeping system.

7. Make licenses portable from state to state.

Whether or not states use identical licensing tests or requirements, a mobile and dynamic profession requires portability of licensure. Limits on reciprocity are artifacts of protectionism. Jurisdictions should approach reciprocity with the premise that the public benefits from the availability of competent attorneys. Attorneys licensed in one state should be presumed competent to practice law in other states. Concern about state-specific rules and law can be addressed through required state-specific training and tutorials.

8. Use uniform cut scores to protect the public—including by eliminating unnecessary racial disparities.

Current bar exam cut score practices are [indefensible](#). The scores rely upon flawed standard-setting processes or no process at all. States choose different passing scores on the same test to establish the same thing, minimum competence to practice law. But minimum competence does not magically appear or disappear when someone crosses the state line, especially because the underlying exam tests general law, not the law specific to any state.

Every bar examiner and state supreme court justice should understand that artificially high bar passage standards can have a disproportionate impact on minority applicants to the bar. Five states (Alabama, Minnesota, Missouri, New Mexico, and North Dakota) currently use a cut score

of 130 to signal minimum competence. These five states cover different regions of the country and include a variety of practice areas. No evidence suggests that the public suffers from lawyers in these states being less competent than in the forty-five states that choose higher MBE cut scores. Indeed, recent research suggests that higher cut scores bear no relationship to attorney competence as measured in disciplinary rates (Winick et al.).

Some states, including California, have attempted to set cut scores with objective processes. These processes, however, have been inadequate. The first part of any standard-setting process should be to have the standard setters (or other competent lawyers) take the test. That exercise would reveal the artificiality of the exam—especially the unrealistic time limits and the prohibition on research. We all know that competent lawyers would fail today's bar exams miserably (Foster). That fact should inform standard setting, if not wholesale revision of the exam.

9. Provide multiple forms of law licenses.

Low income and middle-class individuals handle legal problems without lawyers in complicated systems created by lawyers for lawyers. Eighty percent of the legal needs of the poor are unmet, as are about roughly half of the legal needs of middle-income people (Rhode). The current regime of a single general license for any kind of legal practice contributes significantly to this access to justice emergency.

The licensing reform most likely to address the crisis in access to justice is increasing the types of licenses to deliver legal services (Sandefur). Some jurisdictions are trying new categories of legal service providers, including limited license legal technicians, court navigators, self-represented litigant coordinators, and certified legal document preparers and other categories.

Law students are another pool of potential providers of legal services in areas of unmet need. Jurisdictions should consider granting limited licenses to practice law in specified areas of severe unmet need—for example landlord-tenant, elder law, or debtor-creditor—to students who have completed two years in an accredited J.D. program. The jurisdiction could impose special educational requirements to be admitted under this program, and the admittees could practice fulltime with their limited licenses. These specialized-practice lawyers could return to school in the future to obtain a J.D. and seek a general license to practice law in any field (Howarth & Wegner).

This new category of licensure could engage students' passion for public service and social justice, improve access to justice, reduce student debt by providing a fulltime earning opportunity after two years, and potentially lead to more focused and meaningful third year for students who return to school after this practice experience. New ways to provide legal services—including new types of licenses—are necessary next steps to begin to address the access to justice crisis that is a seemingly intractable feature of our current licensing structures.

10. Reassess competency following licensure.

The absence of any evaluation after initial licensure smacks of a licensing system that protects lawyers more than it protects the public. The public needs protection from experienced lawyers as much as from new ones. Practicing attorneys would be horrified to have to periodically retake today's bar exams, and rightly so. The utter unsuitability of today's bar exams to be repurposed

for subsequent checks of competency is a good sign that they do not measure minimal competency. Two current licensing mechanisms could provide more palatable and meaningful periodic re-evaluation of competence:

- *Performance tests.* Every competent attorney should be able to pass a performance test that provides adequate time to produce a typical attorney work product based on a self-contained file and library provided to the test-taker. Jurisdictions could design these tests to include changed aspects of practice.
- *Structured self-assessment.* Evaluation need not take the form of a test. A more modest assessment system would require licensed attorneys to engage in self-assessment followed by execution of a learning plan. Such systems are in place in Alberta, Canada and England and Wales in lieu of mandatory continuing legal education (Furlong). New Zealand requires each lawyer to develop and maintain an annual continuing professional development plan that includes that attorney's assessment of their learning needs for the coming year, an action plan, activities record, and reflection on how the activities undertaken will improve practice (CDP Requirements).

11. Design licensing requirements to change with the changing profession.

Professional standards for licensing tests require examiners to keep tests current by regularly reviewing changes in the profession (AERA). The legal profession has changed profoundly over the last several decades, but the structure and coverage of bar exams have not kept up with these breathtaking changes. High-stakes testers, like lawyers, have a responsibility to adjust to change.

12. Responsibility for better attorney licensing rests with the states.

Licensing authority is firmly situated with the states, usually the state supreme courts. Efficiency, technical and psychometric expertise, and greater social mobility have made the last five decades a time of national standardization of attorney licensing led by the NCBE. This standardization has brought important advances in test quality, reliability, and portability for candidates. It has also centralized the challenging work of exam development that was otherwise a significant burden on each jurisdiction's bar examiners, sometimes volunteers.

But better public protection in attorney licensing requires greater jurisdictional leadership, not less. NCBE has been slow to update its exams or respond to criticisms. Its corporate culture can be defensive and opaque. Most importantly, the NCBE has not addressed structural inequities in bar exams or shown sufficient leadership in urging jurisdictions to address them.

The states are our laboratories for licensing for a client-centered, inclusive legal profession. Practicing law—even at a level of minimum competence—is neither simple nor easy. But today we know enough about the components of minimal competence to be able to license attorneys well. That requires thinking about requirements beyond tests.

States should use their authority to seriously consider what minimal competence means, and design licensing systems to align education, experience, and exams toward that competence. Important research on minimal competence has been done by the NCBE, the California Bar, and independent researchers (Merritt & Cornett). We also have important new research—from the

California Bar and researchers funded by AccessLex—about bar exam disparate impact and fairness concerns (AccessLex Institute; Winick et al.). These studies support a range of approaches that every jurisdiction should consider as it aims its licensing system more directly at minimum competence and protection of the public.

Six Pathways to Better Licensing

The twelve licensing principles could support several types of licensing systems. In this section, I offer six specific changes for jurisdictions to consider. These suggestions offer pragmatic ways to improve current licensing systems.

1. License lawyers through clinical residencies, not written exams.

New lawyers should not be unleashed on the public unless they have successfully practiced law under the watchful eye—and license—of an experienced attorney (Howarth & Wegner). Conversely, this type of practice can establish—far better than any exam—that a new lawyer is minimally competent to practice law. Jurisdictions can use student practice rules to establish this route to licensure. Those rules, notably, require both the student lawyer and the supervising lawyer to conform to formal rules of professional responsibility for the protection of the clients.

Why call this a clinical residency instead of an apprenticeship? Apprenticeships as a path to becoming a lawyer in U.S. history have been loose, unstructured, and based largely on personal relationships and connections. By contrast, medical residencies are a formal educational stage during which new doctors practice medicine under supervision before they are fully licensed (Cooke et al.). Borrowing “residency” from medicine situates supervised practice as an established, crucial stage in the educational progression of a new lawyer and drives home the need for formal structures, requirements, and assessment.

In medicine, residencies occur after a prospective doctor graduates from medical school. In law, however, we can incorporate these residencies within the three years of legal education. Our law schools devote more time to classroom instruction than medical or other professional schools; there is ample room to replace some classroom time with hands-on practice.

The residency required for a law license should be the equivalent of fifteen academic credits, of which at least six consist of clinics that include direct client representation. Schools could concentrate residencies in a single semester or extend them over more time.

The purpose of the residency is to instill the habits of professionalism and competence that transcend specialization, so a candidate can earn a license through a residency in any substantive area of legal practice. To instill those habits effectively each residency should feature: (1) client representation; (2) with supervision by an excellent attorney; (3) in the context of an academic program that includes (a) key learning goals, (b) habits of reflective practice, and (c) assessment of the competencies expected to be learned. This is more than simply learning from experience; it is learning how best to learn from experience.

- *Client Representation.* Oddly and indefensibly, in most U.S. jurisdictions new attorneys can be licensed without ever having seen a client, let alone represented one. The residency required for licensure should feature supervised, first-chair client representation in clinics and externships, whether oriented to public policy, transactions, or litigation. Optimal public protection requires this learning to begin in the context of professional education, not after licensure.
- *Attorney Supervision.* The key distinction between client representation under a student practice rule in a residency compared to licensure as an attorney is that the student lawyer is actively supervised by an attorney. The attorney supervisor ensures that the representation provided by the law student meets or exceeds the level of professional competency owed to the client. The student lawyer and the supervising attorney both sign court documents, and both are present when the student attorney appears in court. But under the first-chair model, the student takes the lead in communicating with the client, identifying issues, strategizing solutions, negotiating with opposing counsel, and making formal appearances. The supervising attorney offers feedback at each of these stages and stands ready to intervene if necessary. Standards and pedagogies for such supervision are well developed (Bryant et al.).
- *Learning Outcomes, Reflective Practice, Self-Regulation, and Assessment.* Learning from experience is central to the residency. But undertaking initial client representation in the context of a structured, purposeful academic setting expands the professional learning far beyond simply having the experience. Three features of the residency's academic context are especially important: (1) identified learning goals; (2) purposeful inculcation of habits of reflective practice and self-regulation; and (3) assessment of competencies learned.

Learning goals can be established for clinical residencies based on recent research on minimum competence to practice law and experience with learning goals now required by the ABA accreditation process for clinical and externship courses. Instilling habits of reflection is a long-standing goal of clinical and externship pedagogy and a hallmark of professional identity formation more generally. Assessment should be part of the residency's formal structure and continuous throughout the residency, creating context and support for the ultimate judgment of successful (or unsuccessful) completion of the entire residency. Professors teaching clinics and other skills course have experience creating and applying detailed rubrics for assessment.

Residencies can complement written exams; all candidates should complete a residency before bar admission. But residencies can also be used in lieu of a licensing test. In the latter case, the supervisor should submit an affidavit certifying that the candidate has demonstrated minimum competence to practice law by means of successful completion of specified lawyering tasks. Candidates should also submit portfolios of their work (redacted when necessary to preserve client confidentiality), which bar examiners can review to confirm minimal competence. This process has been used successfully for many years in New Hampshire's [Daniel Webster Program](#) and has been [proposed in Oregon](#).

In a large jurisdiction, examiners could choose to audit randomly selected portfolios rather than reviewing each file. Reviewing portfolios, however, may not take examiners longer than the grading, calibrating, and tabulating they already perform on written exams—especially since determinations of minimal competence are more straightforward when reviewing genuine work products.

2. License lawyers through postgraduate supervised practice.

During the pandemic, Utah licensed graduates who successfully completed a period of [supervised practice](#). That approach can identify competent lawyers as well—or better than—a paper exam. It can also take the place of residencies when law schools are not willing to provide sufficient resources for that pathway.

States considering this approach, however, should be aware of serious problems of quality, expense, and equity that can plague this type of program:

- Excellent supervision of student lawyers requires expertise and time, not just good will. Some practitioners are inspired teachers and mentors, but most may not be well-positioned to undertake this kind of time-consuming teaching and mentoring as part of their workday.
- Delaying supervised practice until after graduation from law school, rather than using residencies, unnecessarily increases the cost of becoming a lawyer.
- Post-graduation supervised practice can create serious inequities because access to supervisors is based on pre-existing connections and relationships, problems that have infected supervised practice or articling systems around the world.

Academic residencies within legal education are therefore far preferable. But especially in a period of transition before residency opportunities are prevalent, jurisdictions adopting a residency requirement could permit the alternative of post-graduation supervised practice. The Oregon Board of Bar Examiners took this approach in its [recent proposal](#), unanimously recommending two pathways to licensure that would not require a bar exam: one based on a structured experiential law school curriculum, and another based on 1000-1500 hours of supervised practice following graduation. Under either route, bar examiners will evaluate portfolios of work product.

Any jurisdiction considering a supervised practice pathway to licensure can elevate the quality of supervision with formal training of supervisors; agreements about the supervision to be undertaken; and standardized rubrics, certifications, and affidavits for assessment.

3. Create a Lawyers' Justice Corps.

A proposal by Professor Eileen Kaufman for a Lawyers Justice Corps is a particularly intriguing model of post-graduation supervised practice as pathway to licensure (Kaufman). Under this proposal, a jurisdiction's highest court would designate public service organizations serving underrepresented individuals and communities to participate in the program. Qualifying organizations would use ordinary hiring processes to hire law graduates for job openings. The Justice Corps lawyers would begin working for their organizations shortly after law school graduation rather than deferring work to prepare for the bar exam. Once a new lawyer completed

6 months of successful fulltime supervised practice, documented through assessment rubrics, the organization would certify that lawyer as having completed the equivalent of a bar exam. After completing other requirements for admission, such as character and fitness review, the candidate would be admitted to practice.

Lawyers admitted under this route would commit to continue working for the organization for at least an additional six months. The pathway thus would increase access to justice, both by allowing law graduates to begin serving clients immediately after graduation, and by assuring continued work from candidates for a full year. The public, meanwhile, would be assured of these lawyers' competence: they would be supervised and assessed through six months of real-client work.

4. Ask More of Law Schools.

Most states require candidates to graduate from an ABA accredited law school before sitting for the bar exam. This requirement assures that new lawyers have completed coursework in the few subjects mandated by accreditation standards, as well as the subjects that form the first-year curriculum at most law schools. But as noted above, these bare requirements may not sufficiently protect the public. Instead, states should consider requiring J.D. coursework or training certificates in certain crucial aspects of minimal competence. The alternative of training certificates would allow candidates to obtain the necessary coursework outside of their law schools.

In rethinking educational requirements, jurisdictions should reverse engineer from the problems that generate malpractice awards and attorney discipline. These are often failures related to law office management, substance abuse, health crises, and the like. Memorizing the rules of professional responsibility—as required to pass the MPRE—is not the same as managing the responsibilities of practice well.

Some of this—law office and practice management, for example—would lend itself to short courses within the JD program or training programs with certificates. But short courses or training certificates are not enough to prepare new lawyers to handle the responsibilities of the profession when facing the added stress of personal challenges. Therefore, jurisdictions should consider pushing law schools to emphasize what the landmark Carnegie Report called the apprenticeship of professional identity (Sullivan et al.). States should require candidates for licensure to have completed a foundational professional formation course, preferably in the first year. This course should highlight the lawyer's role as “a public citizen having special responsibility for the quality of justice,” an aspect of competence so important that another recent study recommends required coursework to ensure it (Merritt & Cornett).

Jurisdictions should also consider requiring coursework in client relations and negotiation because both are critical to competence and not easily assessed on exams (Merritt & Cornett). Jurisdictions, finally, might require state-specific training or tests on the jurisdiction's procedure and unique rules that are not necessarily covered in a national bar exam or in the curriculum of many law schools.

Four Canadian provinces (Alberta, Manitoba, Nova Scotia, and Saskatchewan) recently adopted programs that provide a model for this type of licensing supplement. Each of those provinces now

requires, instead of a traditional bar exam, a nine-month, part-time [Practice Readiness Education Program \(“PREP”\)](#) undertaken during the law graduates’ period of articling. PREP is a hybrid of in-person workshops and online modules that focus on “practical legal knowledge” and “competencies in lawyer skills, practice management, professional ethics, as well as the personal attributes needed to successfully practice law in Canada.”

A consortium of U.S. jurisdictions or law schools could offer a similar program to law students or recent law graduates. Three years of law school should provide enough time for this education for practice, which would be less expensive than tacking on a post-graduation program. But the public would be protected better if new lawyers could use the months following graduation to prepare for practice instead of cramming for bar exams.

5. Establish competence-based diploma licensure.

A traditional diploma privilege, such as that previously used by as many as fifteen states and currently used in Wisconsin, makes graduation from (certain) law schools a substitute for passing a bar exam. A revival of diploma privilege could serve access goals related to the outsized cost of legal education and of the rapacious commercial bar prep industry. A diploma privilege also eliminates the disparate racial and ethnic impact that plagues bar exams. The privilege can also be justified because bar exams replicate the academic project of law school. Bar exams test aspects of how good a law student you were, not how competent an attorney you would be. If bar exams do not add much, why not make licensing much less expensive with a diploma privilege?

On balance, however, legal education has not earned a general diploma privilege for its graduates because law schools do not do a good enough job of producing minimally competent new lawyers. A diploma-based licensing system that demands specific competencies from graduates (and their law schools), however, would both protect the public and align legal education more closely to law practice.

Every jurisdiction should thus consider expanding its attorney licensing system to include the option of competence-based diploma licensure without a bar exam. There are at least two ways to do this:

- *Diploma Licensure with Clinical Residency.* The quickest, cheapest, and easiest way for a state to add an option for licensure without a bar exam is to condition licensure on passing either a bar exam or a clinical residency. Fifteen credits of a structured, assessed, clinical residency would create a foundation in the range of lawyering abilities that are critical to competent practice, including proper handling of the weight of client responsibility.
- *Diploma Licensure with Structured Curriculum & Portfolios.* Portfolios can provide evidence of actual competent performance instead of using an exam as a proxy for such competence. Licensing authorities in dentistry, architecture, engineering, teaching, and other fields have begun to use portfolios of actual work products completed by candidates to assess candidates’ minimal competence and eligibility to practice (Ranney & Hambleton; Keane). Advances in technology make licensing portfolios newly feasible and scalable. California already uses a [portfolio](#) system for

new teachers to prior to certification. Bar examiners could assess portfolios of work product from law school, rather than bar exams.

Models for this type of licensing already exist. New Hampshire has adopted a competence-based diploma pathway known as the [Daniel Webster Scholars Program](#), and Oregon is considering a [similar program](#) that would serve a larger number of students.

Compared to current licensing systems, competence-based diploma licensure offers greater assurance of minimum competence to practice law, is easier for jurisdictions to administer, is less expensive for candidates, and avoids the discriminatory impact of bar exams. Under current bar exam systems, White candidates have a strong likelihood of eventually passing, assuming they have the resources to continue cramming for bar exam success (AccessLex Institute; Winick et al.). The only losers from widespread adoption of competence-based diploma licensing would be the bar prep industry, which would need to pivot to other, perhaps more useful, training products.

6. Reform written bar exams.

Better public protection requires bar examiners and testing experts to develop and implement tests that are closely aligned with legal practice, looking forward to candidates' competence to function as lawyers, not backwards to their abilities as law students or the way law used to be practiced. To assess whether new practitioners are at least minimally competent, licensing tests need laser focus on the knowledge, skills, and abilities required for competence in practice.

From the beginning, bar exams have correctly focused on legal analysis, a core lawyering skill. But we do not yet test enough other lawyering competencies and our tests overemphasize memorized knowledge. And, although the demand for knowledge recall has dominated bar exams, we have not understood why or how to test knowledge, or even [what knowledge](#) to test.

Today we know much more about what competent lawyers must be able to *do* and what they must *know*. Numerous reports and studies over decades present a consistent message about what skills or abilities are necessary for competence in practicing law, and serious empirical research now elevates our understanding of what new lawyers actually do, and how they do it.

The foundational abilities of every competent lawyer include legal reading, legal research, legal analysis, and legal writing. We also know that new lawyers need *foundational knowledge*, not recall of detailed rules. Legal analysis includes the ability to use this foundational knowledge to recognize the category of law presented by a new set of facts, identify the type of rule implicated, know or find the relevant rules, and then apply the applicable legal rules to the facts.

Residencies are a much better way to test minimum competence than written exams, but for jurisdictions that retain written exams, there are key ways to improve them:

- **Rely primarily on performance tests.** The best way to protect the public through a written exam is to move performance tests from the periphery to the center. Performance tests are a feasible, flexible, relatively inexpensive, and even elegant licensing test of minimum competence to practice law. These tests could be administered during a single post-graduation bar exam or offered throughout a candidate's legal education. A jurisdiction, for example, could require successful passage of five performance tests, one of which could be at the 1L level, at least two

at the 2L level, and at least two at the 3L level. These performance tests could be offered three times a year.

Performance tests assess a broad range of foundational knowledge, along with the skills new lawyers need to apply that knowledge. They can test a variety of lawyering tasks, avoid the current bar's focus on memorization, increase testing of statutes and regulations, and avoid the law of nowhere. These tests also eliminate the cost of months of bar review cramming and can be routinely adjusted to change with the profession.

Psychometricians will need to work with the NCBE and jurisdictions to develop scoring protocols to ensure reliable grading of performance tests. This is a different approach to reliability than the current MBE-centric systems in place. Multiple graders, careful rubrics, calibration training for graders, and providing multiple opportunities to pass the requisite number of performance tests would add to the reliability and fairness of this assessment mechanism. These reliability challenges of untethering from the MBE are more than justified because performance tests are so much better assessments of minimum competence to practice law, the core validity concern of any bar exam.

I speak only for myself, but my experience as a Nevada bar examiner gives me confidence that performance tests work: I have written and graded performance tests for recent bar exam administrations. When I score a candidate's performance test as not minimally competent, I am disappointed but confident in the assessment. A candidate who cannot glean the issues from the file and use the library to answer the problem presented does not have the skills of critical reading, legal writing, and legal analysis required of every minimally competent lawyer.

MBE scores, by contrast, are tainted by the irrelevancy of super-fast mechanical application of memorized rules. Essay scores of a single candidate can range from excellent to terrible, depending on the happenstance of the match of the question asked with the candidate's interests or memorized knowledge. Licensing should not depend on that kind of luck. A performance test gives a candidate a clean shot to demonstrate the requisite skills and fundamental knowledge to solve a legal problem with nowhere to hide. If given reasonable time, candidates who cannot accomplish the task are not ready to practice law without supervision.

- **Develop rigorous and sensible procedures for setting cut scores.** The hodgepodge of cut scores currently used by states sows doubts about the validity of any of them, and about the legal profession's competence regarding standard setting. Some recent attempts to set these scores have been well meaning but lacked important safeguards. Any standard setting process should consider all parts of the exam (including any multiple-choice questions) and should have well-regarded lawyers and judges take the test before deliberating on the cut score.
- **Stop using speededness as a proxy for competence.** For the tasks to be performed on bar exams to align with lawyering competence, the amount of time allotted must reflect the actual challenges of practice, not artificial time pressures. Competent lawyers need time to think. Our focus on speed in licensing exams is especially wrong

because novices in any field, including legal practice, take longer to perform any task when it is new. That is one reason that new attorneys bill at a lower rate than more established attorneys. Thoughtfulness is more important to competent law practice than speed.

We need research to establish the correct amount of time to give for multiple choice, essay, or performance test answers (Margolis & Feinberg). NCBE test experts justify their time limits with claims that most candidates are able to finish with little diminution of accuracy at the end. They seem not to understand that law schools and bar prep companies drill law graduates to spend 18 minutes on each set of ten multiple choice questions, undercutting the premise of the methodology on which the NCBE rely. NCBE experts and other bar examiners need to confront the damage that hunches about speed are doing to the fairness and validity of their bar exam products.

- **Be transparent about sources of law being tested.** NCBE and some states publish outlines of the subjects tested on the bar exam. These outlines, however, often fail to specify which rules will be tested within a particular subject. Is it the majority rule or the restatement rule? If the latter, which restatement? For the criminal law section of its exams, NCBE tells candidates that questions may test either common-law rules or those of the Model Penal Code. Which is it? And why is the exam testing rules that few states have adopted in their original form?

In addition to specifying the sources of law covered on an exam, bar examiners should go further. If some rules are so important that candidates should recall them from memory, examiners should publish those rules in advance. There is no point in hiding the ball for an exam testing minimum competence.

- **Implement routine periodical review.** Professional standards for licensing tests require examiners to keep tests current by regularly reviewing changes in the profession (AERA). The California Supreme Court's recent Court Rule requiring reexamination of its bar exam every seven years is impressive because states rarely adopt any such schedule, yet a seven-year cycle may barely meet the standard for periodic review required by testing standards. As the California Supreme Court has learned, doing a good job of assessing minimum competence to practice law is difficult work that never ends.

NCBE's NextGen Bar Exam

The NCBE is currently designing what it calls the next generation bar exam, or NextGen, expected to replace the NCBE's current exam products in July 2025. Preliminary reports from NCBE suggest that the new exam will incorporate some of the reforms listed above. The exam, for example, will test fewer subjects in less detail. It will also test an impressive list of legal skills, including legal research, legal writing, issue spotting and analysis, investigation and evaluation, client counseling and advising, negotiating and dispute resolution, and client relationship and management. These features will make NextGen a much better exam than NCBE's current offerings.

There are, however, several weaknesses in the NextGen blueprints that NCBE has shared to date. The exam may continue to test more memorized rules than competent law practice requires. Performance tests will make up more of the exam, but multiple-choice questions will retain a place. It is not clear that the NextGen exam will reduce the current exam's speededness. Nor has NCBE indicated how it will develop or describe the range of cut scores it expects to offer jurisdictions.

The NextGen test fails to incorporate any aspect of staged testing, remaining an all-or-nothing, one-shot exam following graduation. The new exam may also suffer from an inability to adapt to changing realities of law practice. Having taken eight years to develop its NextGen bar exam, NCBE will need to stick with it. Finally, the integrated design of the new test could push jurisdictions to adopt the entire test, or none of it. This could close the door on meaningful innovations by state bar examiners and make any weaknesses of the NCBE even more problematic.

Instead of abdicating the responsibility for better bar exams to the NCBE, states should press NCBE for better choices or develop their own tests. Whatever tests a jurisdiction offers, it should consider creating alternative pathways to licensure (such as residencies) that candidates could choose. Alternatives based on successful supervised practice offer more valid tests of competence than any written exam and can preserve innovation in licensing. Of particular importance, licensure based on successful supervised practice may also reduce some of the racial disparities that high-stakes, written exams are known to produce.

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BUILDING A BETTER BAR

THE TWELVE BUILDING
BLOCKS OF MINIMUM
COMPETENCE

Key Points for Licensing Reform

Prepared by Deborah Jones Merritt
August 2021





The Building a Better Bar Study

Deborah Merritt, a Distinguished University Professor at The Ohio State University Moritz College of Law, co-directed the *Building a Better Bar* study with Logan Cornett, Director of Research at IAALS (the Institute for the Advancement of the American Legal System). Merritt and Cornett designed the study to explore the knowledge and skills that new lawyers need to serve clients competently. Previous studies relied primarily upon surveys to gather this information. Seeking to deepen that research, Merritt and Cornett convened 50 focus groups of new lawyers or their supervisors to discuss the work of new lawyers in greater detail.

Groups spanned 18 locations across the country, from rural counties to major cities. Participants were demographically diverse and represented a wide variety of practice areas and settings: solo practice, law firms of all sizes, government agencies, corporate departments, and nonprofits.

This summary of the research focuses on four topics:

- Five key facts about entry-level practice, which should inform any definition of minimum competence.
- The skills and knowledge that constitute minimum competence to practice law. Those skills and knowledge form 12 interlocking building blocks.
- The ways in which our current licensing system falls short, failing to protect the public.
- Approaches to creating a better licensing system.

The discussions include representative quotes from focus group members.

The opinions or views expressed in this handout are those of Deborah Merritt and do not necessarily reflect those of IAALS (the Institute for the Advancement of the American Legal System), the AccessLex Institute, or The Ohio State University.

For the full, comprehensive report, please see: <https://iaals.du.edu/publications/building-better-bar>

Focus Group Sites:

Los Angeles CA
Silicon Valley CA
Denver CO
Orlando FL
Atlanta GA
Chicago IL
Portland ME
Rural ME
Minneapolis MN
Las Vegas NV
Manhattan NY
Queens NY
Rural NY
Raleigh NC
Rural NC
Columbus OH
Rural OH
Houston TX



Five Key Facts About Entry-Level Law Practice

1. Many new lawyers engage directly with clients.

This is particularly true in solo practices, small firms, government agencies, and nonprofit organizations—but it occurs surprisingly often in large firms as well.

"I really needed to know how to interact with clients because I do a lot on the phone with clients, managing expectations. I had no idea how to do any of that when I came in." - Litigation associate, 2-10 lawyer firm

"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." - Transaction associate, firm of 501+ lawyers

2. Many new lawyers also take primary responsibility for client matters.

Again, this is most common outside of large firms, but it occurs in all settings. Even when new lawyers receive supervision for paying matters, they often handle pro bono matters on their own.

"I walked in on my first day, . . . and they handed me 40 cases and said 'go.' There was no instruction." - Litigation associate, 11-50 lawyer firm

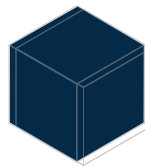
"I've handled a couple of family law matters as pro bono, and that's brand new. Had no idea of any of that prior, during, after law school." - Litigation associate, firm of 501+ lawyers

3. New lawyers do not rely upon memorized rules.

Instead, they recall general principles to identify issues—and then look up the applicable rule. After working in the same field for a while, new lawyers begin to rely upon memory. But starting with memory is dangerous because rules vary significantly among jurisdictions, rules change over time, and memory is unreliable. Instead, new lawyers are quite adept at checking rules online, on their phones, in rule books or codes, and in desk references.

Relying on memory is "a bad way to practice law." It's malpractice." Always "read the rule before you give an answer." - Numerous new lawyers

"I am often reminding new lawyers that there's a rule book that they should be looking at." - Supervisor



Five Key Facts About Entry-Level Law Practice

This finding about the unimportance of memorization is consistent with previous research on minimum competence. One of the first studies of lawyer competence surveyed 1,200 California lawyers to rate the importance of 15 different skills and knowledge areas. Only 4.0% of these respondents believed that "memorizing legal concepts" was essential to their practice. Memorization of legal concepts, in fact, received more "not useful" ratings than any other item on the survey.¹

More recent studies have not asked about the necessity of memorization; they inquire about "knowledge" without distinguishing recall of general principles from memorization of specific rules. These studies, however, uniformly find that new lawyers devote a significant amount of their time to "research." In the CAPA report on *The Practice of Law in California* (2020), for example, "research and investigation" ranked second in frequency/criticality among the tasks that new lawyers perform. Similarly, NCBE's *2019 Practice Analysis* identified three types of research among the top 10 tasks that new lawyers perform. Much of this "research" reflects the checks that new lawyers frequently perform to assure that they are using the appropriate legal rules for their jurisdiction.

4. New lawyers readily learn new doctrine, but they struggle to acquire skills.

New lawyers frequently master new doctrine in the workplace. Indeed, some practice in areas that are not tested on the bar exam—and that they never studied in law school. New lawyers handle this challenge easily: law school taught them how to learn new doctrine. Supervisors, similarly, feel comfortable teaching new doctrine to junior lawyers. If "you have a general understanding of torts," one explained, "someone can teach you workers' comp in two days."

The same, however, is not true of lawyering skills like client counseling, negotiation, or fact gathering. New lawyers who lack a foundation in those skills struggle to acquire them while serving clients. Supervisors, meanwhile, acknowledge that they lack both the time and pedagogic expertise to teach those skills effectively. One supervisor, who leads the family practice unit in a legal aid office summed up the relative difficulty of teaching doctrine and skills this way: "If somebody comes in without any family law classes or prior experience, I would have no problem with that." Instead, he sought new lawyers who already know how to interview clients with a "trauma-informed perspective."

1. Robert A.D. Schwartz, *The Relative Importance of Skills Used by Attorneys*, 3 *Golden Gate U.L. Rev.* 321 (1973).



Five Key Facts About Entry-Level Law Practice

5. For new lawyers, carefulness and preparation matter more than speed.

New lawyers and supervisors agree that new lawyers should not offer "off the cuff" advice to clients. Instead, new lawyers should take the necessary time to work carefully and prepare thoroughly.

"Some of them, they rush through things and that's where the mistakes are made. I've had to tell new attorneys and interns and clerks a lot, 'Slow down. I'd rather have the quality work, not the quantity.'" - Supervisor, 2-10 lawyer firm

*"Slow down. Don't worry about the budget as much because if you screw it up, budget doesn't matter. So that's the guiding principle that I think I've learned."
- New lawyer, general practice*

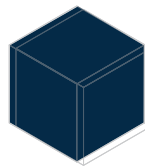
New solo practitioners were even more emphatic about taking time to address client problems. They stressed that they handled relatively few matters during their early practice months prepared carefully for each one.

"I don't have three hours to write 10 pages. I got three weeks or three days. And that levels the playing field in practice. . . . Because now it's not about who's the fastest, but who's typically the most thorough in practice. . . . I'm going to chew you up and spit you out [because I'm more prepared]." - New solo practitioner (business transactions)

"I very rarely charge by the hour. So if I need to stay up all night or do whatever it is to be a product I'm proud of, I can. I can put in all those extra hours that I want to feel good about it." - New solo practitioner (estate planning and elder law)

All lawyers acknowledged that client matters sometimes require quick action. Even here, however, care matters more than speed. New lawyers explained that they coped with time pressures by anticipating issues (such as courtroom objections) in advance, preparing carefully for client meetings, performing quick research on phones or laptops, and explaining the need for delay when necessary.

"I've noticed from just observing other attorneys there, that there are still some things that they'll say I'll get back to you. . . . And that's something that I had to learn. It's like you don't have to answer just because somebody asks you a question right then and there. It's okay to say 'I'll have to get back to you,' and get back to them." - New lawyer, 51-100 lawyer firm



Twelve Building Blocks of Minimum Competence

After analyzing the comments of more than 200 new lawyers and their supervisors, the *Building a Better Bar* team concluded that minimum competence to practice law consists of twelve interlocking competencies. We call these competencies "building blocks." The twelve building blocks are:

- The ability to act professionally and in accordance with the rules of professional conduct
- An understanding of legal processes and sources of law
- An understanding of threshold concepts in many subjects
- The ability to interpret legal materials
- The ability to interact effectively with clients
- The ability to identify legal issues
- The ability to conduct research
- The ability to communicate as a lawyer
- The ability to see the "big picture" of client matters
- The ability to manage a law-related workload responsibly
- The ability to cope with the stresses of legal practice
- The ability to pursue self-directed learning

The full *Building a Better Bar* report discusses each of these building blocks in detail. The key point, when designing a licensing system, is that minimum competence is much more nuanced than recall of black-letter legal rules. Memorization is relatively unimportant in entry-level law practice. Instead, new lawyers must be familiar with basic concepts (which we call "threshold concepts") in a large number of subjects. These concepts allow lawyers to identify legal issues and, combined with good research skills, to find the rules related to a client matter.

At the same time, new lawyers need foundational experience in a range of key lawyering skills: acting professionally (rather than simply knowing the Rules of Professional Conduct), interacting effectively with clients, communicating as a lawyer, seeing the big picture of client matters, managing a law-related workload responsibly, coping with the stresses of legal practice, and pursuing self-directed learning.



Problems with the Current Bar Exam

Neither the Uniform Bar Exam nor current state-based exams adequately protect the public. These exams fail to assess the competencies that new lawyers need when starting practice today. In particular:

- Current exams require extensive memorization of black-letter rules of law, but new lawyers do not rely upon memory when serving clients. Indeed, this memorization is harmful if the jurisdiction's rules vary from the memorized rule, if the rule has changed since the lawyer took the bar exam, or if the lawyer mis-remembers the rule.
- Current exams do not test many of the skills that new lawyers need to serve clients with minimum competence. These skills include client counseling, fact gathering, legal research, negotiation, seeing the big picture in client matters, and managing a law-related workload.
- Current exams impose unrealistic time constraints on test-takers. On the Multistate Bar Exam, candidates must absorb 200 complicated fact patterns and answer a complex question related to each fact pattern in six hours. That allows just 1.8 minutes per question, with candidates constantly switching among practice areas. Performance tests, which include more complex fact patterns and a library of associated materials, give candidates just 90 minutes to absorb the materials, analyze them, and prepare a specified written product.

The exam's focus on memorization and speed requires candidates to prepare intensively for the exam, forgoing two months' of income and purchasing expensive prep courses. A recent report by the AccessLex Institute demonstrates that candidates are more likely to pass the Uniform Bar Exam if they:

- Study 40 or more hours per week for the two months before the exam;
- Have a higher household income;
- Received financial support from families during law school; and/or
- Purchase commercial bar prep courses.²

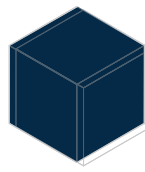
Candidates who lack these advantages, who work while studying for the bar exam, or who live in larger households are less likely to pass the exam.

The current bar exam, in other words, has become a test of resources rather than of competence. This fact likely helps explain the exam's strikingly disproportionate racial impact. According to figures released by the American Bar Association, 88% of White test-takers passed the bar exam on the first try during 2020. The first-time pass rate for Black candidates that year was 66%. For Latinx candidates, it was 76%; for both Hawaiian and Native American candidates, 78%; and for Asian candidates, 80%.³

The exam's racially exclusionary effect harms both the public and the profession. It's time to rework an exam that fails to track minimum competence while excluding a disproportionate number of BIPOC candidates.

2. AccessLex Institute, Analyzing First-Time Bar Exam Passage on the UBE in New York State (May 2021), <https://www.accesslex.org/NYBOLE>.

3. https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/20210621-bpq-national-summary-data-race-ethnicity-gender.pdf.



Solutions: Paths to Better Licensing

"Why would you ever operate on someone for the first time as a doctor? Please do it observing and a thousand times before I'm put under. It's the same thing with a lawyer, right? . . . You need hands on experience."

- New lawyer, firm of 2-10 lawyers

"I find that the lawyers, not just the associates that are in our firm, but the lawyers that are most successful seem to be the ones . . . that have actually had hands on experience."

- Supervisor, firm of 2-10 lawyers

A gold-standard licensing system would measure minimum competence by assessing new lawyers as they interact with clients and perform real-world lawyering tasks. New Hampshire has created that type of system through its Daniel Webster Scholars Program. Students in that program complete a rigorous law school curriculum that includes doctrinal classes, skills classes, and supervised clinical work. As they pursue the program, they compile portfolios that practicing lawyers evaluate. Students who complete the program successfully are sworn into the New Hampshire bar without taking the standard bar exam—although they complete other requirements such as character and fitness review.

An earlier study by IAALS evaluated the Daniel Webster program and found that, when tested on a realistic client exercise, its graduates outperformed lawyers admitted through the traditional bar exam. Members of the local bar, similarly, indicated that Daniel Webster graduates were "a step ahead" of lawyers who completed a traditional law school curriculum and bar exam.⁴ This program has real promise for protecting the public. It also eliminates the factors that may drive the current exam's racially disproportionate impact.

Some observers have assumed that programs like the Daniel Webster one could succeed only in small states with a single law school. They have doubted that the program is "scalable." Larger states, however, don't just have more applicants for the bar: They also have more law schools and larger bar associations to support programs like the Daniel Webster one. It is quite possible for any state to create a program like the Daniel Webster one, especially since New Hampshire has created a template for doing so.

These are some of the resources that a state could tap to create a Daniel Webster-like program:

- Financial and personnel resources currently devoted to creating, securing, administering, and grading paper exams. These tasks absorb more resources than many states realize; they have become part of the unseen status quo.
- Members of the bar, who would be eager to review student portfolios and provide feedback to aspiring lawyers. New Hampshire lawyers draw significant satisfaction from this work.
- Law schools, which have enhanced their experiential and clinical education in recent years. Schools may be eager to partner with the state on an experientially based path to licensure. Law schools also devote significant resources to preparing students to take the bar exam; those resources could be redirected to more constructive education and preparation of portfolios.

4. Alli Gerkman & Elena Harman, *Ahead of the Curve: Turning Law Students Into Lawyers* (IAALS 2015), <https://iaals.du.edu/publications/ahead-curve-turning-law-students-lawyers>.



- Candidates pay significant fees to take the bar exam and shell out even more money for bar prep courses. Candidates may be willing to pay reasonable amounts to support licensing through a Daniel Webster-like program, and states could offer financial support to those unable to pay.
- Establish a system of supervised practice that allows candidates to gain practical experience while studying for the bar exam. This system could be modeled on the Daniel Webster program, which allows candidates to work for a law firm or public service organization while studying for the bar exam. Candidates would receive credit for their work and could receive financial support from the state or their employer.
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For states that are unable—or not ready—to adopt this gold-method approach, there are other solutions:

- Create a pilot system modeled on the Daniel Webster program, working with a limited number of candidates or a small number of law schools. Candidates could choose whether to pursue the experiential education track or the exam track.
- License some lawyers through a "Lawyers' Justice Corps" program. In this program, a state licenses lawyers who successfully complete 6 months of supervised practice with public service organizations designated by the state. The organizations must promise supervision, necessary training, and assessment. This program builds on the supervision and training structures that many public service organizations already have in place. Successful completion of this service would substitute only for passing the bar exam; candidates would still satisfy other prerequisites for admission.⁵
- Create a written bar exam that focuses on performance tests and research tasks, rather than multiple-choice questions and memorization of legal rules. Provide realistic time constraints for candidates taking this new exam. Note that this type of exam may be less expensive to produce, administer, and grade than the Uniform Bar Exam or Multistate Bar Exam. Security need not be as tight because questions are not re-used, and graders can more readily recognize minimum competence in realistic performance tests than in artificial essays.

5. See Eileen R. Kaufman, *The Lawyers Justice Corps: A Licensing Pathway to Enhance Access to Justice*, U. St. Thomas L.J. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3852313.

Read the full *Building a Better Bar* report: <https://iaals.du.edu/publications/building-better-bar>

