

Attorney Licensing Principles & Pathways

Joan W. Howarth
Distinguished Visiting Professor, William S. Boyd School of Law, UNLV
Dean Emerita, Michigan State University College of Law

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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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Principles, Pathways, Better Exams

Presentation to California Blue Ribbon Commission on the Future of the Bar Exam (Sept. 1, 2021)

drawing on JOAN W. HOWARTH, SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING (forthcoming 2022, Stanford University Press)

see also Howarth, *Attorney Licensing Principles & Pathways* (handout prepared for this meeting in your materials)

Joan W. Howarth
Distinguished Visiting Professor, Boyd School of Law, UNLV
Dean Emerita, Michigan State University College of Law
joan.howarth@unlv.edu

California State Bar Commission to Study the Bar Examination Process (1975)

Purpose: investigate bias and determine “if the bar exam [is] related to the practice of law.”

Result: regarding relationship of bar exam to the practice of law:

“[I]t was practically impossible to arrive at an acceptable measure of one's effectiveness as an attorney.”

(from the *Final Report to the Board of Governors of the State Bar of California from the Commission to Study the Bar Examination Process* (Aug. 1975), as described by testing expert Dr. Richard S. Barrett, Director, Laboratory of Psychological Studies, Stevens Institute of Technology, in 1976 UCLA BLACK LAW JOURNAL Symposium.)

California State Bar Commission to Study the Bar Examination Process (1975)

Commission Member Robinson explained why the Commission “did not attempt to determine whether the bar [exam] is job related.”

“We just didn't know how to do it.”

He added,

“Hopefully one of these days somebody will come up with the answer to that.”

(David K. Robinson (L.A. Bar Assn.), remarks at UCLA BLACK LAW JOURNAL Symposium 1976).

Twelve Principles for Licensing

(from Chap. 12, SHAPING THE BAR)

1. Base every licensing requirement on evidence about understanding, ensuring, and assessing minimal competence to practice law.
2. Eliminate unnecessary racial, ethnic, and gender disparities as if required by law.
3. License no one who has not successfully practiced law under supervision, preferably in an academic clinical residency.
4. Align bar exams more closely with minimum competence to practice law.
5. Establish competence-based educational or training requirements.
6. Reduce the expense of becoming a lawyer.
7. Make licenses portable from state to state.
8. Use uniform cut scores to protect the public—including by eliminating unnecessary racial disparities.
9. Provide multiple forms of law licenses.
10. Reassess competency following licensure.
11. Design licensing requirements to change with the changing profession.
12. Responsibility for better attorney licensing rests with the states.

Six Pathways to Better Licensing

- **License lawyers through clinical residencies, not written exams.**
- **License lawyers through postgraduate supervised practice.**
- **Create a Lawyers' Justice Corps.**
- **Ask More of Law Schools.**
- **Establish competence-based diploma licensure.**
- **Reform written bar exams.**

License lawyers through clinical residencies, not written exams.

Use student practice rules for formal licensing stage.

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.

- **Clinical residency** should be **15 academic credits, 6 in a clinic** with direct client representation. Single semester or extended over more time.
- Purpose is to **instill the habits of professionalism and competence** that transcend specialization.
- Residency includes: (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.**

License lawyers through clinical residencies, not written exams.

Assessment:

- **Rubrics, supervisor training & supervisor affidavit** certifying that the candidate has demonstrated minimum competence to practice law by means of successful completion of specified lawyering tasks;
- **portfolios** of work product (redacted to preserve client confidentiality), reviewed by bar examiners to assess minimal competence; random spot checks for scale in California.

Examples:

- Oregon Proposal
- NH Webster program

License lawyers through **postgraduate supervised practice**.

Identify competent lawyers as well—or better than—a paper exam.

Examples: Utah in 2020; Oregon proposal

Not as good as clinical residency in law school:

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

But postgraduate supervised practice protects the public better than the status quo.

Create a **Lawyers' Justice Corps.**

Better licensing with access to justice benefits.

Jurisdiction identifies legal service organizations focused on underserved communities for program;

Legal services orgs hire new attorneys who start practice under supervision immediately;

Licensure after six months of successful supervised practice, followed by at least six months more at same agency

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

Ask More of Law Schools.

Clinical residencies

Other coursework:

- law office and practice management—would lend itself to short courses within the JD program or training programs with certificates.
- Client relations.
- Negotiation.
- professional formation course, preferably 1L (*cf.* ABA accreditation proposal).

Another Educational Model: post-graduate education/training instead of a bar exam

Cf. PREP.

Alberta, Manitoba, Nova Scotia, and Saskatchewan now require, 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 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.”



Establish competence-based diploma licensure.

California should consider expanding its attorney licensing system to include the option of competence-based diploma licensure without a bar exam.

- *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.
- *Diploma Licensure with Structured Curriculum & Portfolios.*

Compared to current licensing systems, competence-based diploma licensure:

- offers greater assurance of minimum competence to practice law
- easier for jurisdictions to administer,
- less expensive for candidates,
- avoids the discriminatory impact of bar exams.


Reform written bar exams.

For historical reasons, we have over-emphasized knowledge of common law rules, ignoring statutes, the rise of the regulatory state, and the specialization of the profession.

Bar exams should be primarily tests of legal methods, not doctrinal knowledge. Bar exams should require expert use of doctrinal rules, not memorization of those rules.

See, e.g.,

Joan W. Howarth, *What Law Must Lawyers Know?*, 19 CONN. PUB. INT. L.J. 1 (2019).



Reform written bar exams.

NCBE's NextGen = better, but
issues/problems include:

test design:

- memorization
- speededness
- standard-setting
- flexibility to change with the profession?

NCBE vs. California.

Performance Tests = best.



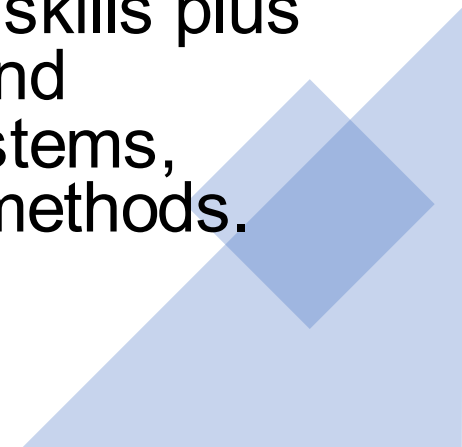



Build a California Bar Exam using only performance tests.

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.

Performance tests can be used to test a variety of lawyering skills plus fundamental knowledge and understanding of legal systems, legal authority, and legal methods.






Build a California Bar Exam using only performance tests.

Performance tests could be administered during a single post-graduation bar exam or offered throughout a candidate's legal education.

California, 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.

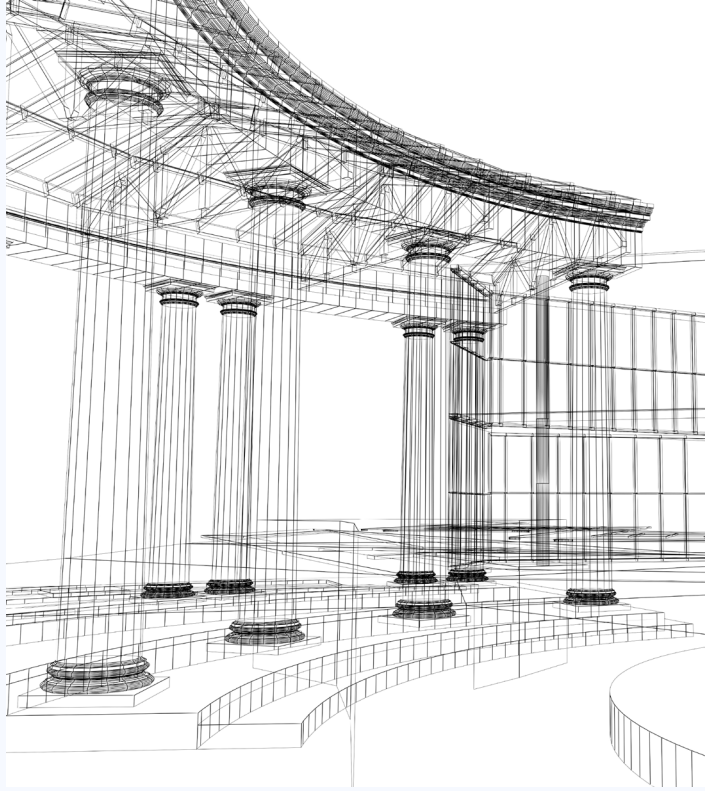
These performance tests could be offered three times a year.

Students could start taking them in their 3rd semester of law school.





Questions for Joan Howarth or Deborah Merritt?



Protecting the Public: What Is Minimum Competence?

Deborah Jones Merritt

Distinguished University Professor
The Ohio State University
Moritz College of Law

Merritt & Cornett, *Building a Better Bar* (2020)



- 50 focus groups in 18 locations (eight in California)
- New lawyers and supervisors
- Well defined script
- Diverse demographically, as well as by job setting and practice area
- More than 1,200 pages of transcribed discussion

Six Facts About New Lawyers

- They use state/local law more often than federal law
- Many engage directly with clients
- Many take primary responsibility for client matters
- They struggle to learn skills in the workplace
- They do not rely upon memorized rules
- Care and preparation matter more than speed

New Lawyers Engage Directly with Clients

- “I did my first client intake on my own and I just, I didn't even know what to ask. I was fumbling all over the place.”
 - New lawyer at a small estate-planning firm
- “Getting those facts [from the client] . . . is really the more difficult part and knowing what facts you need to get.”
 - Supervisor of new lawyers at a nonprofit

New Lawyers Take Primary Responsibility

- “I had 60 cases. I’m still fairly new at practicing law, and I didn’t know how to keep up with everything.”
 - New lawyer at a small personal injury firm
- “I feel very conflicted about [my pro bono work]. . . . Sometimes I feel like we're sending bad lawyers to people who are in desperate need of help.”
 - New lawyer at a 51-100 lawyer firm

New Lawyers Struggle to Learn Skills

- “So, one new skill is negotiating. My boss would just say, ‘Get on the phone and do it.’ So, most of the things I've learned is trial and error. ” – New lawyer
- “Factual knowledge or substantive knowledge . . . is easier to pick up down the road than the skills, whether that's about research, self-awareness, communication, [or] client counseling.” – New lawyer

New Lawyers Do Not Rely Upon Memorized Rules

- Rules vary from state to state
- Rules change over time
- Memory is fallible
- Legal rules are complex

“Memorization never. That's just a bad way to practice law, to do it off the top of your head.”

“If you do anything memory-based in the practice of law, you’ll get sued.”

“There’s just no point [in relying on memory]. I need to cite a specific statute. I need to cite a specific rule of law.”

“Dangerous”

“Malpractice”

Familiarity with Basic Principles

- “For me, it's not so much what I remember, but what I'm able to find. That trigger that says, ‘Oh, I know something about this doesn't feel right. I'm going to go look for this.’”
 - New lawyer at 101-500 lawyer firm
- Basic principles are “the index for me that allowed me to kind of hone in as to where I needed to go and start my research.”
 - New solo practitioner

Federal courts have diversity jurisdiction when the plaintiff and defendant are citizens of different states and the amount in controversy is more than \$75,000. If there are multiple plaintiffs and defendants, no plaintiff can be a citizen of the same state as any defendant. Courts determine “citizenship” by looking to

Courts have limits on the types of lawsuits they will hear. This is known as “subject matter jurisdiction.” Statutes and court rules define each court’s jurisdiction. Before filing a lawsuit (or when responding to a complaint), it is essential to check the court’s subject matter jurisdiction.

Care and Preparation Matter More Than Speed

"Some of them, they rush through things and that's where the mistakes are made. I've had to tell new attorneys a lot, 'Slow down. I'd rather have the quality work, not the quantity.'" – Supervisor, Small Law Firm

"It's not about who's the fastest, but who's typically the most thorough in practice. . . . When we get in practice, I'm going to chew you up and spit you out [because I'm more prepared]." – New Solo Practitioner

- Act professionally
- Understand legal processes and sources of law
- Understand basic concepts of legal doctrine
- Interpret legal materials
- Interact effectively with clients
- Identify legal issues

- Conduct research
- Communicate as a lawyer
- See the “big picture” of client matters
- Manage a law-related workload
- Cope with the stresses of legal practice
- Pursue self-directed learning

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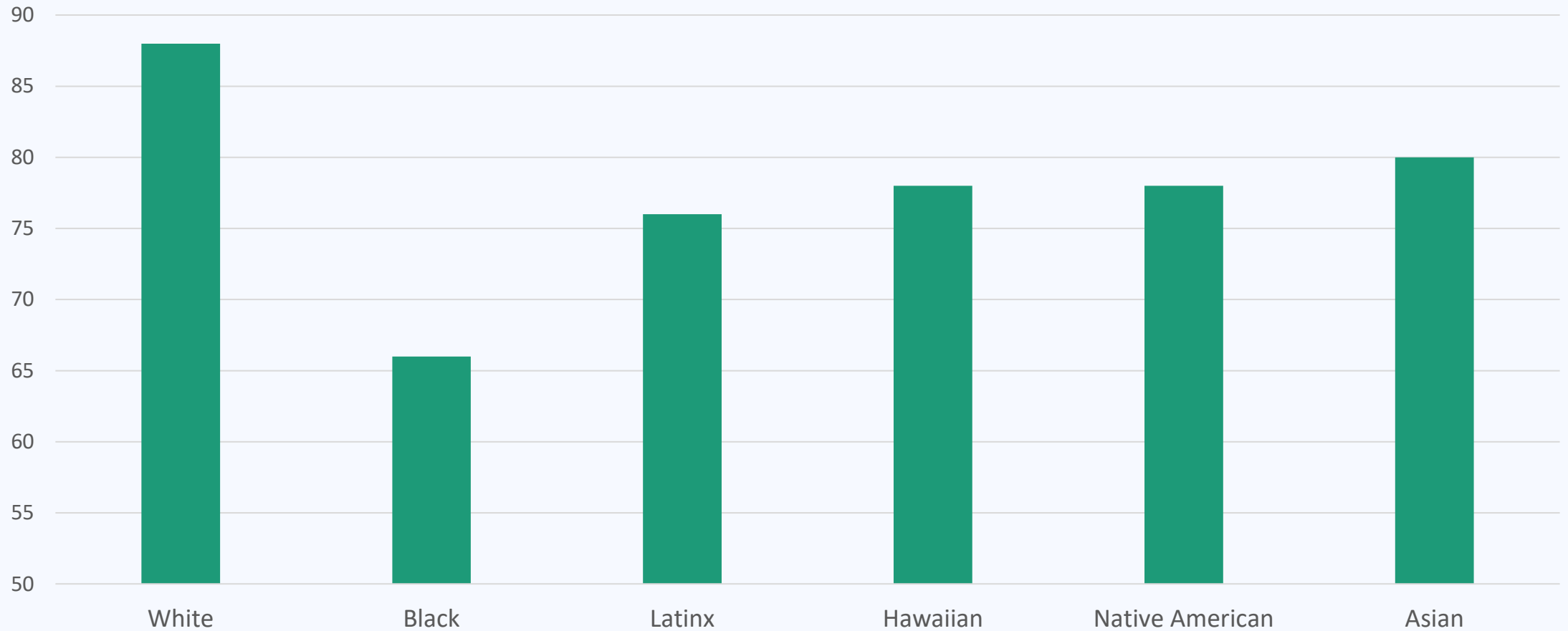
- Act professionally
- Understand legal processes and sources of law
- Understand basic concepts of legal doctrine
- Interpret legal materials
- Interact effectively with clients
- Identify legal issues

- Conduct research
- Communicate as a lawyer
- Memorize detailed rules
- Answer rapidly
- See the big picture
- Manage a law-related workload
- Pursue self-directed learning

- Steven Foster, *Does the Multistate Bar Exam Measure Minimum Competence?* 82 Ohio St. L.J. Online (2021).
 - 16 licensed lawyers took a simulated MBE without prep
 - None passed
 - Best score = 52% correct

First-Time Bar Passage Percentages (ABA Data)

JD Graduates of ABA-Accredited Law Schools



The Exam Has Become a Test of Resources

- The exam requires two months of intensive preparation—usually without paid employment
- Candidates purchase expensive commercial courses for memory drills and exam-taking techniques

AccessLex Institute, *Analyzing First-Time Bar Exam Passage on the UBE in New York State (May 2021).*

- Almost 5,500 respondents (40% response rate)
- Grads who had greater financial resources were significantly more likely to pass
- Grads who purchased commercial bar courses were also significantly more likely to pass
- Grads who worked for pay were significantly less likely to pass

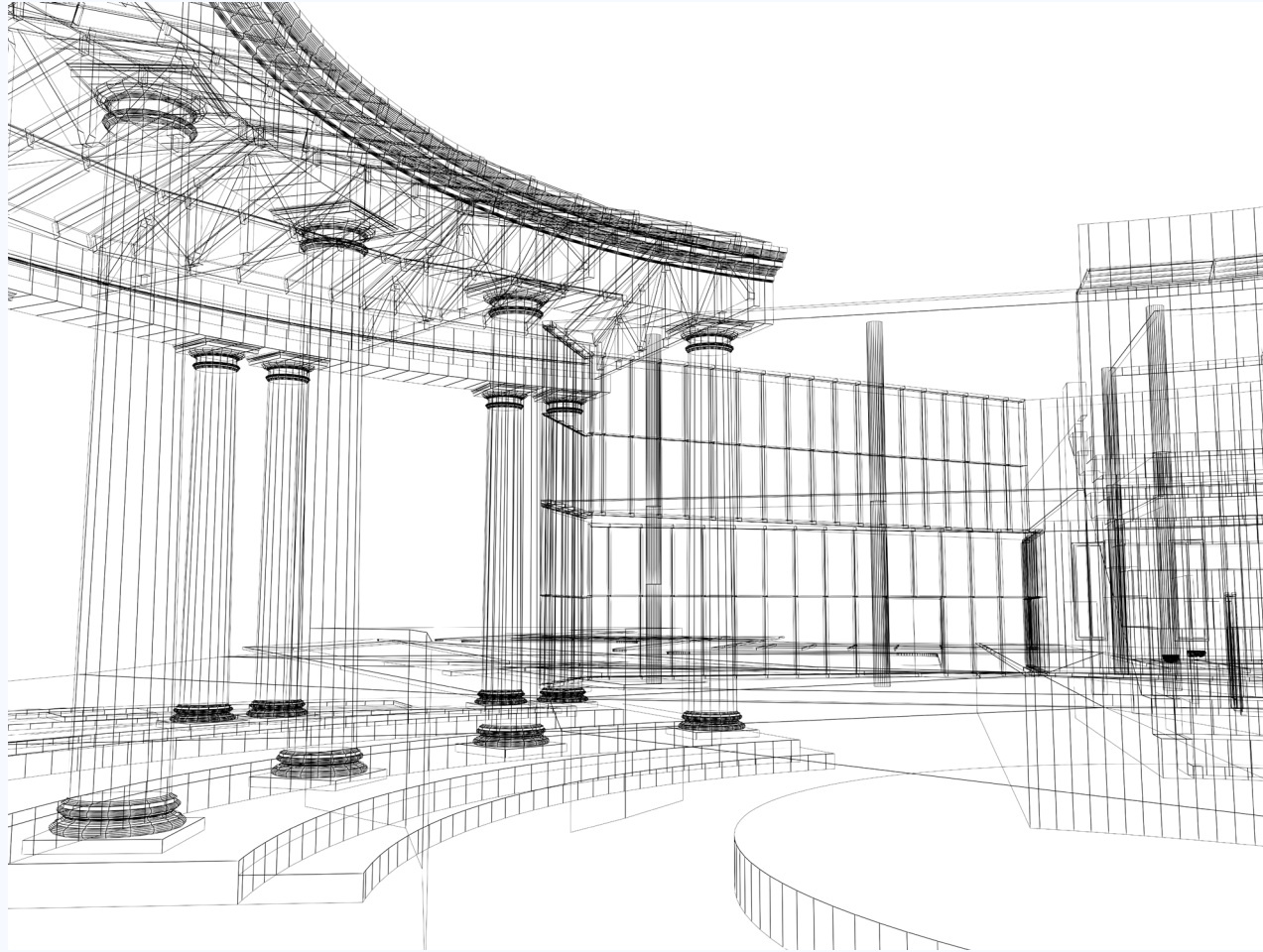
After
controlling
for LSAT,
etc.

The Bar Exam Elicits Stereotype Threat

- Context affects competence and performance
- If we identify with a group that is stereotyped as performing poorly on a particular exam, that produces anxiety
- Battling this anxiety lowers performance
- The effect is highest among high-achieving people

Stereotype Threat Can Affect Anyone

- White men with high math aptitude took a challenging math exam
- Neutral environment: 53% correct
- Environment invoking stereotype: 36% correct



Can We Design
a Better
System?