

THE CARNEGIE FOUNDATION'S *EDUCATING LAWYERS:* FOUR QUESTIONS FOR BAR EXAMINERS

by Judith Welch Wegner

Bar examiners look both forward and backward. They must look back and understand trends in legal education so that they can fairly examine law school graduates who seek admission to the practicing bar. At the same time, they must look forward to the nature and responsibilities of the practicing bar, which are evolving rapidly given the many vectors of change now operating, including globalization, economic pressure, technological change, and related changes in law practice.

The Carnegie Foundation for the Advancement of Teaching¹ has also in the past decade looked back upon work it undertook early in the 20th century regarding several fields of professional education,² while looking ahead to how professional education might be improved for the century to come. Under the leadership of President Lee Shulman (who served as president from 1997 to 2008), it focused a decade's worth of energy on researching teaching and learning in five different fields of professional education: clergy, law, engineering, nursing, and medicine.³ This round of studies, in contrast to those of a century ago, adopted a comparative perspective that endeavored to draw lessons that could be shared across different fields, and tapped into insights from the "learning sciences" that have

emerged in recent years. The studies were grounded in empirical work on a number of campuses for each discipline, and were undertaken by teams of investigators, including a study director knowledgeable about the specific field, working with longer-term Carnegie personnel with expertise in philosophy, psychology, and education.⁴

This article presents key insights from the Carnegie Foundation's study on legal education, *Educating Lawyers: Preparation for the Profession of Law*,⁵ commonly known as the Carnegie Report, published in 2007, while also incorporating information about related developments in law schools that have occurred in ensuing years. It focuses on four major themes that animate the study:

- the relationship between the characteristics of professionals and professional education
- the three "apprenticeships" implicit in legal education
- the importance of progression
- the role of assessment

In tracing these themes, the article raises related questions that implicitly arise in the context of bar examination policy, even though those large-scale questions are not readily perceived or addressed.

SUMMARY OF FINDINGS:
EDUCATING LAWYERS: PREPARATION FOR THE
PROFESSION OF LAW

Observations

1. Law School Provides Rapid Socialization into the Standards of Legal Thinking
2. Law Schools Rely Heavily on One Way of Teaching to Accomplish the Socialization Process
3. The Case-Dialogue Method of Teaching Has Valuable Strengths but Also Unintended Consequences
 - a. Most law schools give only casual attention to teaching students how to use legal thinking in the complexity of actual law practice
 - b. Law schools fail to complement the focus on skill in legal analyses with effective support for developing ethical and social skills
4. Assessment of Student Learning Remains Underdeveloped
5. Legal Education Approaches Improvement Incrementally, Not Comprehensively

Recommendations

1. Offer an Integrated Curriculum
2. Join “Lawyering,” Professionalism, and Legal Analysis from the Start
3. Make Better Use of the Second and Third Years of Law School
4. Support Faculty to Work Across the Curriculum
5. Design the Program so that Students—and Faculty—Weave Together Disparate Kinds of Knowledge and Skill
6. Recognize a Common Purpose
7. Work Together, Within, and Across Institutions

Source: WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 5 (Jossey-Bass 2007), available at http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf.

I. WHAT IS THE RELATIONSHIP BETWEEN THE CHARACTERISTICS OF PROFESSIONALS AND PROFESSIONAL EDUCATION GENERALLY, AND SHOULD IT MATTER TO BAR EXAMINERS?

One of the most important insights incorporated into the Carnegie Foundation’s studies of professional education arose from a set of “common-places” developed by President Lee Shulman in consultation with others at the Foundation.⁶ Based on his work with medical and teacher education, Shulman posited that there are six major dimensions along which professionals in the field must function (whatever their particular specialty). Professionals

- employ fundamental knowledge and skills derived from an academic base,
- make decisions under conditions of uncertainty,
- engage in complex practice,
- learn from experience,
- create and participate in responsible professional communities, and
- have the ability and willingness to provide public service.

The following sections assess how law schools and bar examiners have addressed and evaluated these six characteristics.

Employing Fundamental Knowledge and Skills Derived from an Academic Base

Law schools have long emphasized the fundamental knowledge and analytical skills that are the hallmark of legal education. Students are expected to take a required set of core subject-matter courses and are given options to explore other topics of their choice. Bar examiners have traditionally sought

to assess fundamental knowledge in a narrower range of subject matter where lawyers with general licenses to practice should have basic competence. Although there are important differences among the states in subject areas tested and assessed by bar examiners, such differences generally lie at the margins, and the National Conference of Bar Examiners has increasingly focused on developing examinations that assess law school graduates' understanding of core subjects from a national viewpoint. These long-standing practices have proved important to bar examiners' efforts to develop reliable and valid measures by which prospective entrants to the bar can be fairly assessed.

Making Decisions Under Conditions of Uncertainty

To a lesser extent, both legal educators and bar examiners address the dimension of uncertainty insofar as they focus on assessing students' abilities to "think like lawyers" in responding to novel scenarios rooted in varied fact patterns. As discussed more fully later in this article, law professors' use of the case-dialogue method provides a powerful means of stretching students' analytical thinking abilities, as they gradually move from wanting knowledge to seeking comprehension, and to analyzing, synthesizing, and applying legal principles. Depending on the courses they choose, students may also have to address more sophisticated problem solving in connection with their work on seminar paper topics or in clinical programs.

To a substantial degree, bar examiners require graduates to demonstrate a modest ability to deal with uncertainty through the presentation of sophisticated multiple-choice and essay questions that involve scenarios to be addressed. In those jurisdictions using performance-based testing strategies,

students may be asked to work with a novel file provided during the examination and to submit various types of written products after their review of the file. Because of the challenges of developing reliable and valid assessment instruments, it is likely that this approach is about all bar examiners can do.

Engaging in Complex Practice and Learning from Experience

Law schools have been less adept at introducing students to complex practice and learning from experience, and the same is true of bar examiners. As discussed later in this article, law schools have increasingly created opportunities for students to "cluster" their courses, or concentrate in certain specialty areas, and have expanded experiential learning opportunities through externship, clinical, pro bono, and other similar programs. State bars have established a variety of "specialist" designations that require interested lawyers to demonstrate substantial practice experience in complex areas, while also requiring extensive references and demanding examinations. Such state approaches are well advised, for they reflect the complexity of sophisticated practice and the need for substantial grounding in experience before lawyers can be designated as experts. On the other hand, as discussed in the subsequent section on progression, there are reasons to reconsider the approaches employed in subject-matter testing in light of the changing nature of law practice and law school curricula.

Creating and Participating in Responsible Professional Communities, and Having the Ability and Willingness to Provide Public Service

These other dimensions of professional practice and education (creating and participating in responsible professional communities and having the ability and

willingness to provide public service) are valued by law schools without doubt and are encouraged by support of varied extracurricular and pro bono programs. Nonetheless, such activities are not generally part of the curriculum (except to the extent that clinical and externship programs incorporate service to those of limited means). Law schools require their students to complete courses in professional responsibility or legal ethics, as mandated by the American Bar Association in post-Watergate years. Most such courses focus on the “law of lawyering” rather than on the nature and responsibilities of practitioner communities or the nature of service to those without resources. Understandably, bar examiners assess prospective lawyers’ knowledge of the “law of lawyering” and separately review their character and fitness for law practice. If these central dimensions of professionals’ responsibilities are to be given their due, however, more may need to be done, as discussed later in this article.

In summary, if the characteristics of professionals employed by Shulman and the Carnegie Report provide a meaningful template regarding the nature of professionals’ responsibilities, it would seem that legal educators should more conscientiously incorporate attention to each of these variables as part of legal education—in setting instructional goals, assessing responsibilities, and guiding and evaluating their students. Bar examiners might in turn ask themselves whether the predominant focus on subject-matter knowledge is sufficient in determining whether prospective entrants should be admitted to the bar.

II. IS AN UNDERSTANDING OF “APPRENTICESHIPS” STILL RELEVANT FOR LEGAL EDUCATORS AND BAR EXAMINERS?

The modern era of legal education began with Christopher Columbus Langdell’s development of

a university-based system of professional education for lawyers at Harvard Law School in 1871.⁷ The academic model eventually replaced the apprenticeship system that had preceded it, through which beginning lawyers learned their craft at a practitioner’s knee. Apprenticeship systems are still employed in some countries such as Canada and the United Kingdom as a supplement to university education (“articling” is required following academic preparation and before admission to the bar).⁸ In important respects, apprenticeships would seem to be old news rather than modern innovation. Notwithstanding this history, the Carnegie Report does resurrect discussion of apprenticeships, but in a metaphorical rather than literal sense.

The Three Types of Apprenticeships

Educating Lawyers suggests that there are three conceptual apprenticeships that professionals-in-development must traverse:

- the *cognitive apprenticeship*⁹ that relates to ways of thinking in the context of relevant subject matter
- the *apprenticeship of skills and practice* that relates to developing an ability to do or produce what professionals in a given field must do or produce, and to act in a way that those professionals must act
- an *apprenticeship of professional identity and values* that concerns an emerging professional’s capacity to navigate the relationship between his or her personal and professional values and ways of being in the world

Taken together, these three metaphorical apprenticeships constitute the process of professional formation through which emerging professionals are able to navigate newfound responsibilities to those they serve.

Cognitive Apprenticeship: The Use of the Case-Dialogue Method

Successful Results of the Case-Dialogue Method

The Carnegie Report gives legal educators' efforts to teach students to "think like lawyers" their due, recognizing that the use of the case-dialogue method (particularly in the first year) rapidly socializes most students by developing their legal literacy (careful reading and new vocabulary), enhancing their critical thinking skills, and expanding their appreciation of the legal landscape and its various denizens. At the same time, the case-dialogue method generally requires students to develop cognitive skills such as knowledge acquisition, comprehension, analysis, application, synthesis, and evaluation.¹⁰ Legal education's cognitive apprenticeship focuses on developing students' thinking skills in the specific context of legal materials and law-related content. Students must learn what kind of knowledge "counts" and how to construct knowledge for themselves within this particular field.

Not surprisingly, the Carnegie Report found that legal education handles the cognitive apprenticeship very well and, indeed, better than most other fields. Much of this success relates to the way the case-dialogue method functions as a distinctive *signature pedagogy*: a systematic, shared set of practices that is widely adopted by instructors and programs across a field of education, generally reflecting an alignment of theory and practice and possessing unusual power to shape understandings of the nature of knowledge and professional roles.

The power of the case-dialogue method (and other forms of signature pedagogy) lies in its pervasive repetition and routine, resulting in habits of mind that can be employed, almost automatically, when engaging in complex problem solving. Signature pedagogies generally require students to

perform in role, necessitating activity, interaction, and visibility within a public setting that fosters accountability. The dialectical approach, reminiscent of the question-answer rhythm found in courts and legislatures and using authentic legal artifacts (cases and statutes), requires students to grapple with uncertainty in order to develop professional judgment. Often the emotional stakes are high (coupling excitement with anxiety), resulting in experiences that shape students in profound ways, affecting their values and dispositions as members of a particular profession.

The case-dialogue method is wonderfully adept in allowing instructors to make student thinking visible and then to coach students to the next level, before fading away when students can stand on their own. It also conveys implicit values and assumptions (whether sound and desirable, or not): who is visible, who gets to speak, what counts as authority, and what form of conflict resolution (most often litigation) is the norm.

Shortcomings of the Case-Dialogue Method

For all the power of the case-dialogue method as an effective cognitive apprenticeship, it has important downsides. It is not particularly well suited to developing practice-oriented skills apart from legal analysis, to opening up issues of professional identity and values, or to fostering a critique based on social justice. Although its power raises the adrenaline level of students significantly during the first year, once students have mastered the technique, they can grow bored with repetition that extends beyond the first semester and on into the second and third years. Also, the case-dialogue method is well suited to engaging students in large classes but less so in smaller discussion settings, seminars, and clinics. Finally, it has no obvious means of building important progression in what and how students learn.

Considerations for Bar Examiners

Bar examiners need to be aware of the powerful role of and first-year emphasis on the cognitive apprenticeship in legal education, because success in “thinking like a lawyer” (the upshot of effective instruction grounded in the cognitive apprenticeship) is largely what bar examinations assess, whatever subject matter may be involved. Ideally, law schools would successfully enhance students’ analytical thinking capacities by emphasis on the cognitive apprenticeship dimension of their development in the first year, and bar examiners would provide a method for assessing that accomplishment in connection with subject-matter areas in which such thinking processes are initially developed.

There is often a gap, however, between when students are given an opportunity to develop competence in “thinking like a lawyer” (during the first year) and when they are assessed on that ability (two years later, on the bar examination they take following graduation). Following the American Bar Association’s change to its law school accreditation requirements in 2008 allowing law schools to offer bar exam preparation courses for credit,¹¹ a growing number of schools have begun offering such courses that endeavor to help students address deficiencies in the cognitive area most commonly identified in the third year, before the students sit for the bar examination. As I have argued at length elsewhere, however, an approach that bifurcates the bar examination and assesses students’ capacities in the cognitive arena at an earlier stage would prove highly beneficial and is worthy of consideration.¹²

Apprenticeship of Skills and Practice

Modest Developments in Applied Learning Opportunities

While commending legal education’s strength in addressing the cognitive apprenticeship dimension

of professional preparation, the Carnegie Report found that legal education’s entrancement with academic knowledge and the case-dialogue methodology has crowded out attention to the other two “apprenticeships” important in preparing beginning law professionals. The report highlighted the limited extent to which legal education endeavors to develop graduates’ professional skills (and ability to do what professionals need to do) and found that law schools have generally addressed this important dimension of professional preparation incrementally and somewhat modestly in most instances.

Although advocates for “lawyer schools” such as Jerome Frank¹³ had long urged attention to developing professional skills relating to “doing” and “acting” during law school, it took more than 30 years, until the late 1960s, for law schools to become more serious about such reforms, thanks in part to the Ford Foundation’s commitment of \$12 million to support clinical legal education and the establishment and advocacy of the Council on Legal Education for Professional Responsibility.¹⁴ The publication in 1992 of the American Bar Association’s report *Legal Education and Professional Development: An Educational Continuum*, commonly known as the MacCrate Report,¹⁵ reflected continuing concern by those in the legal profession and some legal educators that attention needed to be given to beginning lawyers’ abilities to “do,” not just “think.”¹⁶

In ensuing years, student demand for applied learning opportunities in law school has grown. The number of clinical programs has increased, and the programs have diversified.¹⁷ Schools have also increasingly employed externships to place students in off-campus settings with judges, prosecutors, public defenders, nonprofits, and other entities.¹⁸ Freestanding offerings on topics such as trial advo-

cacy and counseling/negotiation have also been developed.

More Recent Initiatives and Law School Student Preparedness

Despite the importance of the MacCrate Report, many law schools did not embrace curriculum reform in ensuing years. Instead, it took the 2007 publication of the Carnegie Report and the dramatic changes in the legal market beginning with the current economic downturn to get their attention. In the past several years, a growing number of schools have experimented with other sorts of instructional designs that provide applied learning experiences through seminars focused on applying legal principles to complex social problems or partnering with practitioners to develop skills in conjunction with doctrinal knowledge. There also appears to be a growing trend in many law schools to expand traditional instruction in legal writing and research to incorporate more instruction in interviewing, counseling, negotiation, and problem solving not only in the first year but in the second year as well. A number of law schools have also begun experimenting with intersession or short-course options to provide basic skill-related instruction or enhance student expertise by offering advanced courses in which substantive content and targeted skills are integrated. The sidebar on page 18 highlights some of the recent initiatives taking place in law schools.

Many law schools nationally have begun participating in the yearly Law School Survey of Student Engagement, a tool designed to assist them in evaluating student learning on cognitive, skills, and ethical dimensions. Key findings of the 2010 survey are summarized in the sidebar on page 19. It is worrisome that, despite increased applied learning opportunities in law school, more than 40 percent of

third-year students who responded to the survey felt unprepared for dealing with client needs and many other aspects of professional practice.

Considerations for Bar Examiners

Bar examiners in some jurisdictions have recognized the importance of assessing prospective lawyers' abilities to "act" and "do" as part of the bar examination. The Multistate Performance Test (MPT) reflects that commitment but focuses primarily on analytical exercises tied to case files, rather than on assessing various professional skills relating more directly to "acting" and "doing." Bar examiners are handicapped to some extent because they need to tie their assessments to what law schools actually teach. If law schools are not systematically teaching students to "act" as lawyers or "do" what lawyers need to do in particular contexts, it may be problematic to assess prospective lawyers' skills in that regard. I have not seen empirical studies that attempt to discern whether law schools in states that employ the MPT have altered their curricula or whether bar review providers attempt to build students' abilities to respond to questions posed on the MPT.

On the other hand, bar examiners very likely have more power than they may realize. I would venture that bar examiners could identify some essential "acting" and "doing" skills on which they might focus and could make that focus known to law schools around the country. For example, I recently explored whether bar examiners in at least some states assess prospective lawyers' writing skills as part of the bar examination and learned that in many instances they do not. I have also talked with many law librarians who recognize the importance of preparing law students to be effective legal researchers, but I am not aware that any bar examination attempts to assess skills of that sort. Perhaps effective listening

EXAMPLES OF CURRENT LAW SCHOOL INITIATIVES

Programs with In-Depth Introduction to Trial Advocacy, Transactional Law, and Dispute Resolution

- **Emory Law:** Emory has established a Center for Transactional Law and Practice that hosts periodic teaching conferences and collects instructional materials to facilitate enhanced instruction in this area.
<http://www.law.emory.edu/centers-clinics/center-for-transactional-law-practice.html>
- **Stetson Law:** Stetson is known for its advocacy programs as well as for its Center for Excellence in Advocacy, which hosts periodic conferences on teaching advocacy skills and provides free online resources for faculty and public sector attorneys seeking to learn or teach related skills.
<http://www.law.stetson.edu/ARC/>
- **University of Missouri School of Law–Columbia:** Missouri is well known for its pioneering work introducing dispute resolution throughout the curriculum, starting with the first year.
<http://law.missouri.edu/academics/curriculum.html#5095>

Innovations in Legal Writing, Research, Skills, and Professionalism

- **Case Western Reserve University School of Law:** Case Western's law school has adopted its CaseArc Integrated Lawyering Skills Program, a comprehensive approach to integrating instruction in legal research, writing, problem solving, negotiation, drafting, and client representation as part of the first- and second-year curriculum.
<http://law.case.edu/Academics/Curriculum/JDProgram/CaseArc/CaseArcCurriculum.aspx>
- **City University of New York School of Law:** CUNY integrates theory and practice throughout the three years of law school. First-year students must participate in a year-long lawyering seminar featuring simulation exercises. Second-year students are required to take an advanced semester-long seminar in a public-interest law area of their choice, while third-year students must enroll in a 12- to 16-unit field placement program or live-client clinic.
<http://www.law.cuny.edu/academics/AcademicPhilosophy.html>
- **Gonzaga University School of Law:** Gonzaga has developed "skills and professionalism" labs linked to fall 1L courses related to litigation (civil procedure and torts) and spring 1L courses related to transactions (contracts and property).
<http://www.law.gonzaga.edu/Academic-Program/curriculum/default.asp>
- **Maurer School of Law, Indiana University–Bloomington:** Maurer has introduced an innovative four-hour course, The Legal Profession, that addresses ethics, competencies, and the economics of the legal profession as part of its first-year curriculum.
<http://www.law.indiana.edu/degrees/jd/curriculum.shtml>
- **NYU Law:** NYU is well known for its 1L Lawyering Program that integrates intensive instruction in legal theory, practice-oriented skills, problem solving, ethics, and professionalism in a collaborative, reflective context.
<http://www.law.nyu.edu/academics/lawyeringprogram/mission/index.htm>
- **Southwestern Law School:** Southwestern gives 1Ls an overview of lawyering skills in the fall semester and then allows them to opt into one of three more focused tracks (appellate advocacy, negotiation, or trial practice) during the spring term.
<http://www.swlaw.edu/academics/courseinfo/firstyear>
- **University of New Mexico School of Law:** The UNM program requires all students to enroll in clinical offerings in order to graduate.
<http://lawschool.unm.edu/clinic/index.php>

Advanced Seminars/Applied Learning Partnering with Doctrine/Theory

- **University of Cincinnati College of Law:** Cincinnati has developed a range of "Practice One" courses that serve as companion offerings to traditional doctrinal courses in areas such as family law and tax law.
<http://www.law.uc.edu/current-students/register/spring2011regularclasses>
- **University of Maryland School of Law:** Maryland offers a range of clinical, practicum, workshop, and "legal theory and practice" offerings that link substantive and practice-oriented instruction.
<http://www.law.umaryland.edu/academics/practice/practicums.html>
- **Washington and Lee University School of Law:** Washington & Lee has pioneered a new approach to the third year of law school that incorporates intensive skills instruction at the outset of each semester, a professionalism program, and intensive clinic/externship/practicum programs each semester.
<http://law.wlu.edu/thirdyear/>

Intersessions and Short Courses

- **Drake University Law School:** Drake's Trial Practicum is a week-long intensive program that introduces 1Ls to issues of criminal law, evidence, ethics, and professionalism during a trial held on school premises.
<http://www.law.drake.edu/admissions/?pageID=trialPracticum>
- **Georgetown University Law:** Georgetown offers a one-week intersession integrating transnational legal issues with research, writing, and other skills.
<http://www.aals.org/documents/curriculum/documents/GeorgetownWeekOne.pdf>
- **Harvard Law School:** The Problem Solving Workshop offered at Harvard is an intensive winter session program for 1Ls designed to introduce them to real-world problem solving and collaboration strategies.
<http://www.law.harvard.edu/academics/registrar/winter-term/problem-solving-workshop.html>

Specialization

- **Northwestern Law:** Northwestern has approved concentrations in appellate law, business enterprise, civil litigation and dispute resolution, environmental law, international law, and law and social policy.
<http://www.law.northwestern.edu/concentrations/>
- **Stanford Law School:** Stanford has embraced an effort to allow students to earn dual J.D./Master's degrees in three years (in contrast to four years in many other law schools). Dual degrees of this sort represent an expanded approach to concentration in areas of student interest.
http://www.law.stanford.edu/program/degrees/joint/#joint_degrees
- **University of Dayton School of Law:** Dayton has developed three optional areas of concentration for students (advocacy and dispute resolution; personal and transactional law; and intellectual property, cyber law, and creativity).
http://community.udayton.edu/law/academics/degree_requirements.php
- **William Mitchell College of Law:** Some schools, such as William Mitchell, do not expect students to concentrate in particular fields but instead facilitate student exploration of possible pathways toward careers of interest.
<http://www.wmitchell.edu/pathways/>

FINDINGS OF THE 2010 LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT

The Law School Survey of Student Engagement (LSSSE, *available at* <http://lssse.iub.edu/>) is now a well-established tool used by many law schools to determine how deeply students engage with their law study and various aspects of the law school experience. The LSSSE format has been built upon related efforts to understand the dimensions of student learning in college, as determined by the National Survey of Student Engagement (NSSE, *available at* <http://www.nsse.iub.edu/>).

LSSSE questions ask students to assess characteristics of their law school experience (such as the characteristics of legal writing programs, their involvement in clinical instruction, their ethical and personal development, the hours they work, their career interests, and more). Responses are provided to participating schools and summarized on a national basis each year.

The 2010 LSSSE annual report (released in January 2011) includes information on experimental questions that sought to assess law students' development from their entry into law school through their third year in ways that related to their preparation as future lawyers. Key findings are as follows:

Third-Year Students Who Felt Prepared in Select Professional Aspects (those who responded "very much" or "quite a bit")

Understanding the needs of clients	57%
Working cooperatively with other attorneys as part of a legal team	50%
Managing your time effectively	66%
Coping with day-to-day stresses of law practice	45%
Dealing with ethical dilemmas that arise as part of law practice	57%
Serving the public good through your profession	55%
Understanding professional values that will serve you in your legal career	58%

Clinical and Pro Bono Work and Its Effect on Student Preparation

Students with experience in clinics or pro bono work were more likely than other students to report that their law schools provided adequate professional preparation. Specifically, clinical participation and pro bono work correlated with a higher degree of preparation in the following areas:

- Understanding the needs of future clients
- Working cooperatively with colleagues as part of a legal team
- Serving the public good through their profession
- Understanding professional values that will serve them in their legal careers

These findings suggest that exposure to practice-based and experiential settings provide valuable opportunities for students to cultivate professional ethics.

Source: Student Engagement in Law School: In Class and Beyond: 2010 Annual Survey Results (Law School Survey of Student Engagement 2010).

skills could be assessed in some way; in discussing interviewing/counseling/negotiation offerings with colleagues from around the country, I've learned that some instructors use video clips as a means of asking students to critique or analyze what steps should be taken to engage in effective representation.

While I do not believe that it is advisable for bar examiners to require prospective lawyers to have taken certain courses in order to sit for the bar examination in particular jurisdictions, I hope that bar examiners who read this article will consider whether there are ways in which their choices about assessment of professional skills could be reconsidered. I'm convinced that greater attention to the apprenticeship of skills and practice by bar examiners could help law schools move in productive ways that would benefit and protect the public.

Apprenticeship of Professional Identity and Values and Professional Formation

Professional Responsibility Courses Fall Short

The Carnegie Report's third "apprenticeship" concerns the development of students' appreciation for professional roles, the relationship of personal and professional values, and the importance of individual meaning derived by professionals from the work they do. This "apprenticeship" is the one that seems most absent and least well understood within the legal education universe of today.

As indicated earlier, law schools require students to take courses in professional responsibility. Unfortunately, such courses often focus only on the cognitive realm, addressing the "law of lawyering" and the least common denominator of ethical obligations. In most law schools, students must rely upon the hidden curriculum (optional speakers, orientation programs, extracurricular activities), pro bono initiatives, and clinical offerings to probe questions of professional identity and values. This narrow

approach is unfortunate, since it undercuts the potential inherent in the apprenticeship of professional identity and values to link all parts of legal education and to provide a meaningful opportunity to engage in professional formation—a formation that integrates the full range of “apprenticeships” in helping students appreciate their roles as professionals upon graduation.

Considerations for Bar Examiners

What might bar examiners do if they conclude that the apprenticeship of professional identity and values deserves greater attention in determining which candidates are admitted to the bar? One approach might be to consider how character and fitness reviews proceed. Candidates for admission to the bar might be asked whether they have engaged in pro bono activities, why or why not, and what other professional activities they might have pursued in law school that demonstrate understanding of their obligations to the public or to professional service. Even if bar examiners do not impose a particular requirement regarding pro bono service, discussions about professional contributions might encourage students to engage in related activity. In addition, bar examiners might consider assessing “professional portfolios”¹⁹ to augment their review of candidates for admission to the bar.

III. DO NOTIONS OF PROGRESSION HAVE A BEARING FOR LEGAL EDUCATION AND FOR THE BAR EXAMINATION?

Specialization: The Reality of Modern Law Practice

The Carnegie Report criticized law schools for giving insufficient attention to the progression of student development across the typical three-year program. Because of the dominance of the cognitive apprenticeship aspect of legal education, students gener-

ally concentrate their attention on substantive course selection throughout their three years. However, because of the increasingly specialized nature of law practice, with a split between lawyers for individuals and those who represent business interests (particularly in large cities and in specialized arenas),²⁰ many law schools now provide students with opportunities to gain certificates in particular content areas, or to specialize in particular fields beyond the first year. It is not surprising that students have an interest in taking such paths, since they believe (with some justification) that law practice is increasingly specialized and since many of those now in law school were advised to focus their undergraduate studies on double majors (reinforcing their tendency to specialize).

Most bar examiners, however, continue to emphasize coverage that relates to authorizing newly admitted lawyers to engage in general practice. This emphasis is understandable, given the obligation of bar examiners to assure that the public is protected by determining whether entry-level lawyers possess sufficient expertise to qualify for general licensure in which they may represent clients in a variety of matters, ranging from real estate closings to contract matters to criminal defense. Those who gain a general license are authorized to put up a shingle and engage in solo representation, or to affiliate with more specialized practices as they choose. The changing reality of modern law practice, however, needs to be considered by bar examiners.

Considerations for Bar Examiners

The potential power of bar examiners to frame and direct the development of beginning lawyers’ expertise and expectations is worthy of exploration. Consider, for example, a change in bar examinations that would allow candidates for bar admission to be examined on some number of substantive fields, still requiring them to demonstrate knowledge in a variety of fields, but also to declare themselves

as inclined to practice and opt to be assessed at a higher level of expectation in one or another more concentrated field of expertise (e.g., general practice, criminal law, family law, real estate law, business law, or other fields). Some candidates might opt to be examined in expertise across a full range of fields (from criminal law to estate planning), while others might opt for slightly less expansive general assessment plus more in-depth evaluation in one or more particular fields. The idea would not be to have students declare specializations or to certify entry-level lawyers as experts in particular areas, but instead to provide incentives for development of subject-area expertise and to assess those opting for this approach appropriately rather than penalizing them. Because the candidate will have taken a series of courses in his or her chosen field(s), he or she can be tested at a more intensive level, thereby providing the opportunity for more effective testing of analytical and problem-solving skills.

Bar examiners need to consider whether current practices employed in assessing entry-level candidates for admission to the bar advance or undercut the quality of legal services provided by beginning lawyers. At present, bar examinations create incentives for students to take courses in the broad range of subjects tested on bar examinations, rather than to develop more in-depth expertise in areas where they hope to practice. Does it make sense to have incentives in place for future lawyers likely to engage in criminal prosecution or defense to take courses in trusts and estates, real estate finance, business associations, or family law? Perhaps so. But bar examiners need to consider the tradeoffs that result from examinations that assess baseline knowledge across a full array of subject areas compared to more in-depth assessments that would give students incentive to develop progressive expertise and finely honed skills by focusing on areas where they hope to practice.

Bar examiners could also go one step further to address progression by allowing candidates to take the bar exam in two parts (a “bifurcated option”). Part I could be taken after the first year of law school (using multistate questions and covering first-year subjects) and could be retaken later. Part II, taken after graduation, would not have to cover this same material again but could instead embody focused examination in areas of concentration or more in-depth performance testing.

In summary, bar examiners might explore the following questions:

- Should the current emphasis on examination across the full array of general practice subject areas continue to drive the structure of bar examinations?
- Should bar examiners test candidates on a smaller number of core baseline subjects, while requiring candidates to opt for in-depth examination from a range of focused fields (e.g., general practice, criminal law, family law, and so forth)?
- Should bar examiners go a step further to bifurcate the bar examination?

However bar examiners might choose to answer each of these questions, it is at least clear that they have a powerful role in encouraging law schools to structure their curricular options in order to help students shape their professional trajectories.

IV. HOW DOES ASSESSMENT DRIVE LEARNING, AND HOW MIGHT RELATED PRINCIPLES INFLUENCE THINKING ABOUT BAR EXAMINATIONS?

The Importance of Formative Assessment

One of the most important insights offered by the Carnegie Report concerns the relationship between

learning and assessment. The basic proposition that assessment drives learning is one that is well known to any professor whose students ask, "Will it be on the test?" (implicitly suggesting that if not, the topic is not worth studying). Law schools should have learned this lesson even more powerfully in recent years as, similarly, *U.S. News & World Report* ratings (however flawed) have influenced them to change their policies regarding admissions, expenditures, and other determinations.

The Carnegie Report offers important lessons regarding the relationship between assessment and learning. For example, it discusses the importance of *formative assessment* (ongoing feedback that drives student learning) in contrast to *summative assessment* (end-stage determination of how well students or prospective candidates for bar admission have demonstrated their ultimate level of expertise).

The Carnegie study urges law faculty members to attend more seriously to formative assessment of students by providing them with formal or informal feedback that can spur their attention to shortcomings and potential gains in understanding. This dynamic is particularly salient within the context of legal education, since many students are highly motivated to achieve at the highest level possible, and faculty members have an opportunity to encourage this desire by providing meaningful feedback about the level of expertise students have achieved at a given time.²¹

Considerations for Bar Examiners

The stakes are higher for bar examiners, however. Their role, ultimately, is to engage in summative assessment that discerns whether candidates for admission to the bar have the requisite capabilities to be awarded licenses to represent members of the

general public. Bar examiners should accordingly give particular attention to the ultimate competencies they seek to assess, which, in turn, can have an impact on what students are expected to learn in law school.

Extensive efforts have been undertaken in recent years to map the competencies that reflect successful and effective lawyering, including, in one such study, identifying the specific characteristics of effective lawyers.²² If bar examiners could develop assessment strategies designed to assess whether candidates for admission to the bar possess characteristics linked to effective lawyering, they would undoubtedly drive law schools to consider such characteristics in law school admissions decisions and to develop curricular offerings to develop such capabilities for those enrolled in law school.

CONCLUSION

If bar examiners turned their attention to the important considerations raised by the findings of the Carnegie Report, they might well consider a number of possible innovations in bar examinations, as suggested throughout this article:

- Should a different balance be struck between assessment of content knowledge and the ability to "think like a lawyer" and assessment of other competencies relating to professional skills and professional identity and values?
- Should a different balance be struck regarding rudimentary understanding of a wide range of subject fields associated with general practice and more in-depth expertise related to particular fields of professional work?

- If bar examiners push the envelope and develop strategies for assessment of expertise in various practice-related contexts, how might they assess prospective lawyers' abilities, taking into account prospective lawyers' substantive expertise, capacity to "do" and "act" effectively in particular contexts, and professional identity and values?

The Carnegie Report, in raising awareness about such issues as characteristics of professionals in relation to professional education, the importance of "apprenticeships," progression and specialization during law school, and the relationship between assessment and learning, provides a platform for assessing legal education and exploring innovations in bar examinations. The positive reception given the Carnegie Report suggests that legal educators are willing to engage with core challenges in order to improve the professional preparation they provide their students.²³ The interest of the National Conference of Bar Examiners in this important subject suggests that bar examiners around the country may well do likewise. ■

NOTES

1. Further information on the history and initiatives of the Carnegie Foundation for the Advancement of Teaching may be found at <http://www.carnegiefoundation.org>.
2. The earlier Carnegie Foundation studies on legal education include JOSEF REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* (Bulletin Number Eight, The Carnegie Foundation for the Advancement of Teaching, 1914) and ALFRED Z. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* (Bulletin Number Fifteen, The Carnegie Foundation for the Advancement of Teaching, 1922). The best-known Carnegie Foundation study from this early period is the "Flexner Report," ALBERT FLEXNER, *MEDICAL EDUCATION IN EUROPE* (Bulletin Number Six, The Carnegie Foundation for the Advancement of Teaching, 1912).
3. The Carnegie Foundation's most recent set of studies on professional education include the following: CHARLES R. FOSTER, LISA DAHILL, LARRY GOLEMON & BARBARA WANG TOLENTINO, *EDUCATING CLERGY: TEACHING PRACTICES AND PASTORAL IMAGINATION* (Jossey-Bass 2005); WILLIAM M.

SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (Jossey-Bass 2007); SHERI D. SHEPPARD, KELLY MACATANGAY, ANNE COLBY & WILLIAM M. SULLIVAN, *EDUCATING ENGINEERS: DESIGNING FOR THE FUTURE OF THE FIELD* (Jossey-Bass 2008); PATRICIA BENNER, MOLLY SUTPHEN, VICTORIA LEONARD & LISA DAY, *EDUCATING NURSES: A CALL FOR RADICAL TRANSFORMATION* (Jossey-Bass 2009); and MOLLY COOKE, DAVID M. IRBY & BRIDGET C. O'BRIEN, *EDUCATING PHYSICIANS: A CALL FOR REFORM OF MEDICAL SCHOOL AND RESIDENCY* (Jossey-Bass 2010). The Carnegie Foundation also released a study on higher education: GEORGE WALKER, CHRIS M. GOLDE, LAURA JONES, ANDREA CONKLIN BUESCHEL & PAT HUTCHINGS, *THE FORMATION OF SCHOLARS: RETHINKING DOCTORAL EDUCATION FOR THE TWENTY-FIRST CENTURY* (Jossey-Bass 2008).

4. The author of this article was the director of the Carnegie Foundation's legal education study. Others involved in the study and its resulting report had backgrounds in psychology, philosophy, and education. Sixteen schools with varying missions, locations, and student characteristics were sites for fieldwork which in each case involved observation of classes, discussions with faculty (including those teaching in traditional, clinical, and legal writing contexts), discussions with deans and other administrators, and focus groups with first-year and advanced students. For more details about the study and other observations about important findings, see Judith Wegner, *Reframing Legal Education's "Wicked Problems,"* 61 RUTGERS L. REV. 867 (2009).
5. WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (Jossey-Bass 2007), available at http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf [hereinafter "the Carnegie Report"].
6. See Lee S. Shulman, *Theory, Practice, and the Education of Professionals*, 98 ELEMENTARY SCH. J. 511 (1998); see also Howard Gardner & Lee S. Shulman, *The Professions in America Today: Crucial But Fragile*, 134 DAEDALUS 13 (2005).
7. For a comprehensive study of Langdell's ideas and their impact, see BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826-1906* (University of North Carolina Press, 2009).
8. The Law Society of Upper Canada provides helpful information on articling at <http://rc.lsuc.on.ca/jsp/licensingprocesslawyer/articling.jsp> (last visited Jan. 30, 2011). A recent consultation report is available at <http://www.lsuc.on.ca/media/licensing.pdf>. In important ways, Canadian articling requirements have parallels in mandatory mentoring programs for entering lawyers established in Georgia, Ohio, and Oregon. Delaware also has a mandatory clerkship requirement; see Hon. Randy J. Holland, *The Delaware Clerkship Requirement: A Long-Standing Tradition*, THE BAR EXAMINER, Nov. 2009, at 28.
9. The term *cognitive apprenticeship* is attributed to the work of John Seely Brown and colleagues. See John Seely Brown, Allan Collins & Paul Duguid, *Situated Cognition and the Culture of Learning*, 18 EDUC. RESEARCHER 32 (1989). Brown's work in turn built on earlier studies of apprenticeships by Jean Lave and Etienne Wenger, who developed the notion of "situated learning" through which those learning a craft (such as tailoring or midwifery) initially observed from

the perimeter and gradually moved toward more central involvement. See JEAN LAVE & ETIENNE WENGER, *SITUATED LEARNING: LEGITIMATE PERIPHERAL PARTICIPATION* (Cambridge University Press 1991).

10. These cognitive skills are the six dimensions identified in educational theorist Benjamin Bloom's "taxonomy of educational objectives." See *TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS* (Benjamin S. Bloom ed., Susan Fauer Company, Inc., 1956).
11. In 2008, the ABA eliminated Interpretation 302-7, which had stated that bar examination preparation courses could not be counted for credit toward graduation. See <http://www.abajournal.com/files/112B.pdf>. In that same year, the ABA added new Interpretation 301-6, relating to law schools' obligations to demonstrate a strong level of success as to their students' performance on bar examinations. See http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/2010-2011_standards/2010-2011abastandards_pdf_files/chapter3.authcheckdam.pdf and http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/2010-2011_standards/2010-2011abastandards_pdf_files/appendix3.authcheckdam.pdf.
12. See Judith W. Wegner, *Response: More Complicated Than We Think*, 59 J. LEGAL EDUC. 623, 640-643 (2010), proposing bifurcation of the bar exam between part I, covering first-year subjects and offered as an option following the first year of law school, and part II, involving more in-depth testing and offered following graduation.
13. Jerome Frank was a graduate of the University of Chicago Law School who had a distinguished career in private practice before serving as a member and then chair of the U.S. Securities and Exchange Commission, and later as a judge on the U.S. Court of Appeals for the Second Circuit. Frank was also a noted legal philosopher and leader of the legal realist movement, serving as a research associate and visiting lecturer at Yale Law School for 25 years until just before his death in 1957. He is best known for his book *LAW AND THE MODERN MIND* (Brentano's 1930) and for a highly regarded article, *Why Not a Clinical Lawyer School*, 81 U. PA. L. REV. 907 (1933).
14. For a discussion of the history of the Council on Legal Education for Professional Responsibility, see Robert L. Bogomolny, *Prefatory Remarks*, 29 CLEV. ST. L. REV. 345 (1980); J.P. Ogilvy, *Celebrating CLEPR's 40th Anniversary: The Early Development of Clinical Legal Education and Legal Ethics Instruction in U.S. Law Schools*, 16 CLINICAL L. REV. 1 (2009).
15. American Bar Association Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development: An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (ABA 1992).
16. *Id.*
17. See Becky L. Jacobs, *A Lexical Examination and (Unscientific) Survey of Expanded Clinical Experiences in U.S. Law Schools*, 75 TENN. L. REV. 343 (2008).
18. For a symposium on the use of externships in legal education, see Harriet N. Katz & Alexander Scherr, *Toward a New World of Externships: Introduction to Papers from Externships 4 and 5*, 17 CLINICAL L. REV. 1 (2010); K. Terry, *Externships: A Signature Pedagogy for the Apprenticeship of Professional Identity and Purpose*, 59 J. LEGAL EDUC. 240 (2009).
19. Professional portfolios could include a selection of student work product, including writing samples, reflections on the meaning of professionalism, multimedia clips involving interviewing or negotiation, summaries of pro bono activities, and more. See, e.g., Deborah Jones Merritt, *Pedagogy, Progress and Portfolios*, 25 OHIO ST. J. ON DISP. RESOL. (2010).
20. For an exceptionally insightful analysis of forces affecting the evolution of law practice, see Harry W. Arthurs, *Will the Law Society of Alberta Celebrate Its Bicentenary?*, 45 ALBERTA LAW REVIEW 15 (2008).
21. Wegner, *supra* note 4, at 885.
22. The study referred to is one undertaken by Professors Marjorie M. Shultz and Sheldon Zedeck at the University of California at Berkeley, which sought to track characteristics of prospective lawyers (prior to admission to law school) in an effort to discern whether law school admission criteria might be framed to discern and admit students with characteristics common to effective or successful lawyers. The researchers' hope was that by identifying characteristics common in effective lawyers, admissions criteria could be shaped to admit students with related characteristics. The study identified 26 characteristics of effective lawyers and at the same time developed means of assessing competencies in these important areas, based on careful analysis of the experiences of judges, senior partners, clients, beginning lawyers, and academics. See MARJORIE M. SHULTZ & SHELDON ZEDECK, *IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING* (2008), <http://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf>.
23. Numerous conferences and presentations have addressed the implications of the Carnegie Report as well as those of *Best Practices for Legal Education: A Vision and Road Map* (Roy Stuckey and Others, Clinical Legal Education Association, 2007). For a collection of links to such conferences and presentations, see http://www.albanylaw.edu/sub.php?navigation_id=1721 (last visited Dec. 9, 2010).



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