THE RELATIONSHIP BETWEEN LAW SCHOOL AND THE BAR EXAM: A LOOK AT ASSESSMENT AND STUDENT SUCCESS

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Law schools have a moral and ethical obligation to society—and, to an even greater degree, to their students—to adequately prepare the students to succeed as professionals. Ultimate success for law students is measured by the ability to competently practice in the legal profession, which requires passing the bar exam. A recent downward trend in national bar passage rates highlights the need for law schools to address the factors negatively affecting bar passage rates. Based on research conducted at the University of Colorado School of Law, this article discusses methods to reform new attorney licensure and also highlights strategies to improve bar passage. It suggests ways to minimize the effects of the bar exam's negative factors and recommends ways to better prepare law students.

INTRODUCTION

Bar passage rates have been of increasing concern for law schools as the national bar passage rate has declined over the past decade. Undoubtedly, a school's bar passage rate figures prominently into the all-important *U.S. News and World Report* Law School rankings methodology.[1] However, as educational institutions, law schools should be at least equally concerned with falling bar passage rates to the extent that those rates reflect the quality and effectiveness of legal education—or

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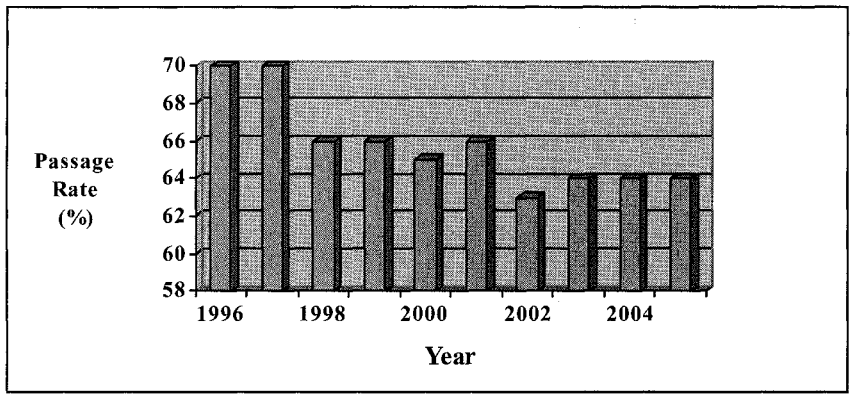
1. William D. Henderson & Andrew P. Morris, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 IND. L.J. 163, 165 (2006).

lack thereof. Specifically, law schools should be cognizant of bar passage rates and trends as a function of whether their students are being effectively educated and trained to practice law.

Figure 1: *National Bar Passage Rates*[2]



Additionally, a survey of messages from the American Bar Association's Law School Deans' listserv[3] confirms that bar passage rates are of deep concern to deans at law schools throughout the United States.[4] This survey indicates that deans are particularly interested in providing effective, high-quality academic services to aid their students in passing the bar exam.[5] While some schools are simply struggling to improve bar passage rates after their respective states raised the bar passage threshold,[6] others are trying to remedy unexpected and unexplained drops in their institutions' bar passage rates.[7]

Law schools have a moral and ethical obligation to society—and, to an even greater degree, to their students—to adequately prepare the students to succeed as professionals. Ultimate success for law students is measured by the ability to competently practice the legal profession. This necessarily requires licensure. Therefore, academics should teach

2. National Conference of Bar Examiners, Bar Passage Statistics, http://www.ncbex.org/stats.htm (last visited Dec 18, 2005).

3. The Dean's listserv is an electronic system of e-mail communication among the Deans of United States and Canada law schools. Each Dean may subscribe to the system.

4. *See, e.g.*, posting of Joseph Harbaugh, harbaugh@nova.edu, to deans@mail.abanet.org (Oct. 10, 2005); *see also* posting of Jeffrey Brand, brandj@usfca.edu, to deans@mail.abanet.org (Oct. 9, 2005) (copies on file with author).

5. *See* posting of Joseph Harbaugh, *supra* note 4; *see also* posting of Jeffrey Brand, *supra* note 4.

6. *See* posting of Jack Guttenberg, jguttenberg@law.capital.edu, to deans@mail.abanet.org (Oct. 10, 2005) (copy on file with author).

7. *See* posting of Jeffrey Brand, *supra* note 4.

and prepare their students for success by ensuring that they are adequately equipped to pass their state's bar examination.

Based on the research provided herein, the author believes that a bar exam is a necessary prerequisite to licensure in the legal profession. However, the time is ripe for the exam to evolve by incorporating multiple testing modalities and a more sophisticated application of technology in exam assessment. This article begins with a discussion of the national concern surrounding the bar exam, followed by an explanation of the methodology of the bar exam and a survey of common criticisms of the exam. Next, suggested alternatives to the current bar exam are evaluated and contrasted with the prevailing arguments supporting adherence to the current examination model. Based on the research, including the author's experience and implementation of strategies at the University of Colorado School of Law ("CU Law School"), the article details and discusses strategies for bar passage. Finally, an analysis of bar passage results at CU Law School is used to illustrate which factors may be negatively affecting bar passage rates. In connection with this analysis, the author also outlines suggestions for minimizing the effects of these factors.[8]

I. BAR PASSAGE: A NATIONAL CONCERN

A review of the ABAnet Dean's listserv provided by the American Bar Association reveals that law schools are using a variety of strategies to increase bar passage rates.[9] As noted previously, national bar passage rates have declined significantly over the past ten years.[10]

Correspondingly, the effectiveness of academic support services available for struggling students is a prevalent concern at law schools across the country. Comments on the Dean's listserv indicate that a number of schools are implementing, strengthening, and enhancing academic services in an attempt to combat falling passage rates.[11] Many of these law schools have implemented academic support programs to prepare incoming law students with specific, known weaknesses.[12] Various incarnations of tutorial programs aimed at assisting incoming students

8. Factors include LSAT scores, undergraduate GPA, class rank, bar review courses, and whether the student worked during bar preparation.

9. A cross-section of these approaches is analyzed in this article. *See* discussion *infra* Part V.

10. National Conference of Bar Examiners, *supra* note 2.

11. *See, e.g.*, posting of Jeffrey Brand, *supra* note 4.

12. For example, students with undergraduate grade point averages or LSAT scores that rank significantly below their peers' scores may be targeted for academic support in order to combat potentially low law schools grades—and correspondingly low bar exam scores.

during the course of the 1L academic year appear to be the most common ancillary services. Many schools have also begun to offer tutorial sessions and academic services to second- and third-year students whose grades, class rank, or other indicators signify that they may be at risk for failing the bar exam.[13] Not surprisingly, rather than aiming to improve grades or class rank, these tutorials are often specifically designed to assist in bar preparation. Although some schools' bar preparatory courses are voluntary and exclusive to students with the lowest grades, other schools have considered offering preparatory courses for credit pursuant to the limitations established by the ABA.[14] Other options for enhanced academic services include allowing commercial bar preparation companies to teach a course during the traditional academic year. Alternatively, some schools are considering offering scholarships to students who are otherwise unable to pay for bar preparation courses. However, concern that focus on bar passage will label them as "bar review" schools has caused a few schools to express trepidation about offering bar preparation courses as academic classes. This concern stems from a belief that academically rigorous schools do not need such preparation because the quality of legal instruction should be sufficient to ensure bar passage.

Classroom experiences may also have a significant effect on bar passage rates. Two considerations that have been identified as being relevant in this regard are (1) the use of "typical" law school timed-essay exams versus multiple-choice or take-home exams[15] and (2) the use of laptop computers in the classroom.[16] A discussion among colleagues has revealed that one factor contributing to bar passage rates may be whether professors give "traditional" exams or take-home exams.[17] Traditional exams, given under timed-limited conditions, more closely simulate the bar exam experience. As such, there appears to be a disparity in bar passage among students given predominantly take-home exams and those taking more traditional exams, with traditional exam takers passing the bar in greater numbers than those who are given take-home exams.[18]

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13. The University of San Francisco, University of Baltimore, and Capital University are examples of schools now offering second- and third-year students such academic and tutorial services. *See* posting of Jeffrey Brand, *supra* note 4; *see also* posting of Joseph Harbaugh, *supra* note 4.

14. American Bar Association, Interpretation 302-7 (2005–2006), http://www.abanet.org/legaled/standards/2005-2006standardsbook.pdf.

15. Christian C. Day, *Law Schools Can Solve the "Bar Pass Problem"—Do the Work*, 40 CAL. W. L. REV. 321, 343 (2004).

16. *See infra* notes 19–20.

17. E-mail from Lucy Marsh, Professor of Law, University of Denver, to Lorenzo Trujillo, Assistant Dean for Students and Professional Programs, University of Colorado (June 22, 2005, 16:53:58 EDT) (copy on file with author).

18. *DU Panel Probes Low Bar Pass Rate . . .*, LAW WEEK COLO., Jan. 3, 2006, at 1

The use of laptop computers for taking notes in class has also increased dramatically in recent years. However, after observation, professors and students alike have indicated that in some situations computers are simultaneously being used for e-mail, on-line shopping, instant messaging, and note taking.[19] This multi-tasking presents two major concerns. First, students are distracted by their computers and are thus inattentive in class. Obviously, surfing the internet does not support or enhance legal knowledge or skills and does not contribute to classroom interaction or discussion.[20] Second, it has been hypothesized that handwriting notes takes advantage of a different cognitive process than does taking notes on computers. Classroom experience suggests that students who take notes on their computers, accompanied by all of the distractions that inhere in such a machine, are at a disadvantage in terms of actual learning processes and knowledge retention. Interestingly, and perhaps not coincidentally, the introduction of laptops in the classroom coincides with the national decline in bar passage rates. That said, it will be interesting to track how this data changes with the next generation of law students who have grown up with computers and may have adapted to new cognitive modes and learning processes. In 1980, Seymour Papert hypothesized "about how computers may affect the way people think and learn."[21] Papert noted a distinction between the various ways computers might enhance thinking and change patterns of access to knowledge.[22] We are now experiencing the impact of computers on the youth of the 1980s as they enter law schools across the country. Without a doubt, this is an area that requires further study and empirical analysis to provide data to either support or disprove hypotheses about the impact of computers in education.

II. BAR EXAM METHODOLOGY

Any discussion of the bar exam's effectiveness should begin with the purpose of the bar exam. Licensure generally, and the bar exam specifically, is meant to provide the public with assurances that all practitio-

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(identifying too many take-home examinations as one of the reasons for the University of Denver's Law School's "disturbingly low bar passage rates." *Id.*)

19. E-mail from Lucy Marsh, *supra* note 17. This supposition is also supported by informal conversations with law faculty and colleagues who attended the National Conference of Bar Examiners (Sept. 26–28, 2005) (notes on file with the author).

20. *See* Kathy Matheson, *More Professors Ban Laptops in Class* (May 3, 2006), http://www.wjla.com/news/stories/0506/324463.html.

21. SEYMOUR PAPERT, MINDSTORMS: CHILDREN, COMPUTERS, AND POWERFUL IDEAS 3 (1980).

22. *Id.*

ners are at least minimally competent.[23] It is important to recognize that the licensure process and the bar exam are not intended to measure all of the skills necessary to competently practice law.[24] If, however, the exam is written in such a way that it measures too narrow a range of skills, the public will not be protected from incompetent lawyers, and the examinees will have fewer opportunities to demonstrate their competence.[25] Specific identified competencies necessary to effective legal practice influence fundamental principles in selecting test content. For example, test questions should measure minimum competence for entry-level lawyers in a wide range of areas.[26] The bar exam tests the abilities to analyze facts and identify issues, in addition to testing knowledge of the law in general.[27] As such, the modern licensure regime used in most states is comprised of the Multistate Professional Responsibility Exam ("MPRE"), the Multistate Bar Exam ("MBE"), the Multistate Essay Exam ("MEE"), and the Multistate Performance Test ("MPT").[28] The MBE measures an examinee's ability to apply broad knowledge, the MEE measures depth of knowledge on a specific topic and the ability to synthesize that knowledge, and the MPT measures practical skills.[29] While not every state uses all of these examination techniques, each remains widely used. For instance, the MBE is required in every jurisdiction except Washington and Louisiana.[30] In addition, over 80% of all bar applicants take the MPT or a similar state exam. Similarly, every jurisdiction except Wisconsin, Maryland, and Washington uses the MPRE.[31] On the other end of the spectrum, the MEE is required in only 18 jurisdictions.[32]

Exam drafters within each individual state have the burden of determining which subjects to test on the state bar exam. The *Code of Recommended Standards for Bar Examiners* suggests that "the emphasis

23. Mike Kane, Address at the Academic Support Conference—Sponsored by the National Conference of Bar Examiners (Sept. 27, 2005).

24. *Id.*

25. *Id.*

26. Diane Bosse, Address at the Academic Support Conference—Sponsored by the National Conference of Bar Examiners (Sept. 27, 2005).

27. *Id.*

28. Judy Gundersen, Susan Case, and John Kidwell, Address at the Academic Support Conference—Sponsored by the National Conference of Bar Examiners (Sept. 27, 2005).

29. *Id.*

30. *Id.*

31. *Id.*

32. AMERICAN BAR ASSOCIATION, NATIONAL CONFERENCE OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 21 (Margaret Fuller Corneille & Erica Moeser eds., 2005), *available at* http://www.abanet.org/legaled/publications/compguide2005/chart6.pdf.

should be upon the basic and fundamental subjects that are regularly taught in law schools."[33] Among the reasons for limiting the subjects tested on the bar exam is the recognition that while the bar exam tests for generalized knowledge, lawyers specialize in particular practice areas. New lawyers may not be well-versed in any subjects while practicing lawyers are expected to conscientiously avoid subjects in which they do not specialize. Therefore, an exam of limited length must be content-limited as well as time-limited.[34]

After determining which areas must be tested, the exam drafters must select specific questions to be asked. Drafters select what issues to test and then write a set of facts drawn to raise the desired issues.[35] In order to assure that questions are tailored to elicit the correct responses, the MBE drafters are divided into six subject matter committees: Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Real Property, and Torts.[36] A member of each committee writes a draft, the chair of each committee adds draft items, and the committee meets to edit the items.[37] The draft of the test is then sent out for review in each state by the MBE policy committee and at least one impartial outsider.[38]

The MBE is machine-scored. The machine has the ability to flag items that were marked incorrectly by a majority of test takers.[39] Incorrect responses by a majority of test takers are indicative of a substantial statistical variation which indicates a problem with the test item. These questions are then double-keyed, meaning that either the intended correct answer or the incorrect answer marked by a majority of examinees will be accepted as a valid answer.[40] In some instances, questions that were missed by a majority of examinees may be removed from the exam.[41] The MBE raw score, based on the number of questions answered correctly out of two hundred items, is converted into a scaled score so that every test indicates the same relative proficiencies.[42] This standardization performs the essential function of allowing the bar exam to be perceived as both "valid" and "reliable."[43] More particularly, in order to garner support, the exam must actually measure what it purports to

33. Bosse, *supra* note 26.
34. *Id.*
35. *Id.*
36. Gundersen et al., *supra* note 28.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. Susan Case, Mike Kane, and Doug Ripkey, Address at the Academic Support Conference—Sponsored by the National Conference of Bar Examiners (Sept. 27, 2005).

measure (validity), and an individual's score must remain the same after multiple assessments (reliability).[44]

Finally, the essay portion of the bar exam must be graded. State bar examiners use one of two methodologies for grading the essay portion of the exams: holistic or analytical.[45] Holistic grading consists of comparing the whole of each essay against a defined performance standard.[46] On the other hand, analytical grading deconstructs the analysis and assigns a point value to each issue and sub-issue.[47] Not all questions lend themselves to analytical grading, and any reliability gained from this process is unlikely to alter the overall reliability of the exam.[48] Bar examiners must also choose whether essays will be graded on an absolute or relative scale.[49] An absolute scale compares the examinee's performance against a predetermined standard while a relative scale compares how each examinee's performance compares to other examinees.[50] Data indicates that a relative grading method better accounts for differences in grading standards and is therefore more reliable.[51]

Clearly, an unreliable exam can never be valid.[52] Therefore, ensuring reliability in both testing and scoring procedure is paramount. Before an exam is drafted, the examiners must agree on the purpose of the exam and the types of skills that ought to be measured prior to licensure.[53] These decisions are reflected in both the examiners' choice of subjects to test and the proficiency required of the examinees to pass. Finally, the examiners must decide what skills and knowledge are best suited to essay questions versus multiple-choice questions.[54] If the examiners choose essay questions, they must decide if more questions with shorter responses or fewer questions with longer responses should be included.[55] That said, asking more questions is generally the preferred method, as it provides a better opportunity for a prepared candidate to demonstrate his or her competence.[56] The use of "optional questions," where the exami-

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44. *Id.*
45. Bosse, *supra* note 26.
46. *Id.*
47. *Id.*
48. Stephen Klein, *Option for Assigning Essay Scores*, B. EXAMINER, Feb. 1996, at 24, 25.
49. *Id.*
50. *Id.*
51. *Id.* at 26.
52. Julia Lenel, *The Essay Examination Part II: Construction of the Essay Examination*, B. EXAMINER, May 1990, at 40.
53. *Id.* at 41.
54. *Id.*
55. *Id.*
56. *Id.* at 42.

nee is able to choose one question from a selection of questions, reduces reliability because each examinee is, in essence, taking a different exam.[57] Ultimately, the quality of an essay question and the extent to which it lends itself to consistent grading procedures will affect the reliability of the exam.[58]

III. CRITICISM OF THE BAR EXAM

Critics of the bar exam rely on three principal arguments. First, critics contend that the bar exam does not verify minimum competence necessary for the practice of law because it does not evaluate proper skills, it relies to a large extent on memorization, it does not test the law itself, and it does not implicate current problems of incompetence.[59] Second, critics assert that the bar exam has a negative effect on law schools because the exam drives curriculum and admission decisions in such a way that actual student education and the educational environment suffer.[60] Third, the bar exam has a disparate impact on minorities and women, which tends to inhibit the goal of having a diverse bar and bench.[61]

Along the same lines, critics believe that the bar exam does not test the skills relevant to the successful practice of law. In 1992, a blue-ribbon commission of judges, professors, and attorneys authored the "MacCrate Report," detailing the ten skills lawyers use most often in their practices.[62] These essential skills include problem solving, legal analysis and reasoning, research, fact investigation, written and oral communication, counseling, negotiation, litigation and ADR procedures, organization, and recognizing and resolving ethical dilemmas.[63] Critics point out that the bar exam tests some of the skills mentioned in the report in cursory fashion while entirely ignoring others. The bar exam in its current form does not emphasize, or even test, such crucial topics as legal research, fact investigation, oral communication, counseling of clients, or negotiation.[64] Because the bar exam ignores nearly half of the skills essential to a career in law, critics assert that the bar exam does not

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57. *Id.*
58. *Id* at 43.
59. *Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 446 (2002) [hereinafter "SALT Statement"].
60. *Id.*
61. *Id.*
62. ABA SECTION OF LEGAL EDUC. & 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 (1992).
63. Kristen Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1699 n.2 (2002).
64. *See* SALT Statement, *supra* note 59, at 447.

and cannot ensure that applicants who pass the exam are minimally competent to practice law.

Bar exam critics have extended this argument to the debate over whether to raise the cut-score[65] of the bar exam. Nevertheless, because the exam does not test enough of the skills that effectively measure competence, raising the cut-score makes little practical sense.[66] According to critics, raising the cut-score in an effort to ensure competent attorneys cannot protect the public from inept lawyers because the bar exam does not accurately test an applicant's minimal competence to practice law. One critic has stated that raising the cut-score on the bar exam as a method of guaranteeing capable lawyers is "naive, at best, and deceptive, at worst."[67]

Critics also point to the fact that the bar exam does nothing to encourage or test the development of other qualities in applicants that may be beneficial to the profession as a whole. The bar exam does not make an effort to encourage or measure an applicant's empathy for clients, desire to do pro bono or public interest work, or the probability that the applicant will aid poor communities in her career as an attorney.[68]

The second argument made against the effectiveness of the bar exam is that it over-emphasizes memorization of legal doctrine in a profession that does not require—and in fact frowns upon—memorization. A bar examinee memorizes countless legal rules in order to answer the 200 multiple choice questions on the MBE and spot issues on the essay or performance portions of the exam. While the examinee may "know" the law in its black letter form, she may not "understand" the nuances required for practical legal reasoning.[69] Based on this reasoning, the proper test of a future lawyer would be something that does not involve memorization exclusively. A good lawyer does not rely solely on memory. Rather, she relies on legal research and may, in fact, be subject to sanctions or malpractice claims if she attempts to rely solely on faulty

65. The "cut-score" is the threshold score which determines whether a candidate passes the bar exam.

66. Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 369–72 (2002).

67. *Id.* at 372. Currently, New York is in the process of raising the cut-score.

68. SALT Statement, *supra* note 59, at 447. Some readers may question the relevance of promoting pro bono or public interest legal services to the poor. However, in Colorado, for instance, there is a clear value statement in the Colorado Rules of Professional Conduct Rule 6.1 that encourages members of the bar to provide pro bono or public service legal services to the poor. This rule is patterned after the American Bar Association Model Rules of Professional Conduct Rule 6.1. *See* MODEL RULES OF PROF'L CONDUCT R. 6.1 (2003), *available at* http://www.abanet.org/cpr/mrpc/rule_6_1.html.

69. SALT Statement, *supra* note 59, at 447.

memory.[70] Furthermore, if memorization does test the minimal legal knowledge necessary to practice law, then current lawyers and judges should be able to pass the bar exam readily at any point in their careers.[71] Obviously, memorized bar exam information quickly disappears from examinees' minds, and current lawyers and judges likely could not readily pass the bar exam. These facts illustrate why critics argue that the bar exam should not emphasize memorization to such a great degree.

Similarly, critics maintain that the bar exam is inherently flawed given that most law students take an intensive bar review course before taking the exam.[72] Commercial bar preparation courses, which may cost upwards of $3,000, teach the tricks of the bar exam and immerse students in black letter rules.[73] Critics argue that these tricks and concentration on black letter rules demonstrate that the bar exam ignores the nuanced understanding of the law and the synthesizing of rules—skills which are required to be an effective lawyer.[74]

Critics also argue that the bar exam is flawed because it uses artificial testing techniques that have little to do with the practice of law. The MBE multiple-choice portion of the exam is often offered as evidence establishing this point—a practicing lawyer never has to answer a novel multiple-choice question in 1.8 minutes.[75] A competent lawyer presented with a unique question will do the requisite legal research, ask questions, and clarify legal and factual issues before coming to any preliminary determination of a correct answer—if there is one.[76] Also, a practicing lawyer is never given a defined group of answers and forced to choose the "most correct" or "least wrong" answer of a set.[77]

Opponents of the bar exam also point to the time constraints on the exam as a flaw in testing proper legal skills. There are time limits on the multiple choice, essay, and performance portions of the bar exam. In practice, no competent lawyer relies on her first determination of a legal question written in the first draft of a brief. On the contrary, a good lawyer researches, analyzes, writes, and then *rewrites* the answer following a determination made in any given situation.[78] Similarly, the 1.8 minutes allotted to each multiple-choice question or the time constraints of analyzing a file in the performance test places substantial artificial limita-

70. *Id.*
71. Curcio, *supra* note 66, at 374.
72. SALT Statement, *supra* note 59, at 448.
73. *Id.*
74. *Id.*
75. *Id.*
76. Curcio, *supra* note 66, at 376.
77. *Id.*
78. *Id.* at 377.

tions on examinees.[79] In other words, a person who would be a diligent and competent researcher, analyzer, and writer might have all the skills necessary to be a competent lawyer but may have trouble with the onerous time constraints of the bar exam.

Opponents further argue that the bar exam does not test the proper law, even if one assumes the examinees know and understand the nuances of the law they have memorized. They argue that the bar exam tests general and sometimes obscure rules while ignoring specific rules in a segmented profession and local rules of the administering state.[80] While lawyers from different communities may never encounter the same situations, clients, or legal rules, they are all subjected to the same bar examination, the passage of which proclaims their minimum competence to practice law.[81] By ignoring the segmented nature of the legal profession, the bar exam ignores the complex market conditions in which lawyers practice.[82] Lawyers with expertise in one or two subjects are invaluable, while lawyers with a superficial understanding of a plethora of black letter rules cannot be successful advocates for their clients.[83]

The bar exam also fails to test competence because it does not test the local laws of the administering jurisdiction. "In all states, up to one-half of the examination is not based upon the . . . state's own laws; in some states the entire exam requires no knowledge of the particular . . . state's governing law."[84] Even if one assumes that testing general and obscure rules will lead to a proper evaluation of an examinee's competence, the bar exam still falls short because the MBE multiple choice and the MEE sections test majority/minority general rules, rather than the specific rules of the state.[85] A taker in a particular jurisdiction may memorize, know, and understand a black letter rule that she may never use in actual practice.[86] A state's bar exam cannot possibly measure a lawyer's minimal competence to understand and use legal rules of that state if that state's legal rules are not addressed on the test itself.

Critics also argue the bar exam's failure to test minimal competence can be seen in the fact that the bar exam does nothing to address current problems with incompetence in the legal profession. The leading causes of malpractice claims are problems with the transmission and submission

79. *Id.* at 376, 378.
80. Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343, 363 (2003).
81. *See id.* at 363–65.
82. SALT Statement, *supra* note 59, at 448.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*

of documents, filing actions in a timely fashion, and properly carrying out investigations.[87] Similarly, communication breakdowns and failures to work with diligence on current cases are the leading issues mentioned in disciplinary proceedings before the bar.[88] Judge William Lucero, Colorado Presiding Disciplinary Judge, reports that the majority of the cases that come before him fall into three areas: (1) neglect and abandonment (usually a communication issue), (2) misappropriation of firm funds and lack of honesty, and (3) misappropriation of client and third party funds, including negligence in handling COLTAF accounts.[89] Opponents assert that the bar exam does not attempt to measure the skills necessary to avoid these problems and thus falls short of its purported goal of protecting the public from incompetent attorneys.[90]

Another major criticism of the bar exam is that it drives curriculum and admissions decisions in law schools throughout the country. Opponents contend that law schools offer, and students choose to concentrate on, the so-called "bar courses" at the expense of clinical, more specialized, and smaller courses.[91] By ignoring clinical courses, students are exposed only to courses driven by black letter rules, and are not exposed to classes "designed to introduce . . . the skills required for the actual practice of law."[92] They also complain that in so-called "bar exam courses," law school professors fashion their exams around the bar exam instead of seeking out alternative and possibly better ways to evaluate student performance.[93] Additionally, by ignoring smaller, non-bar courses such as health law, poverty law, environmental law, and law and economics, students "fail to fully engage in a law school experience that

87. Curcio, *supra* note 66, at 383–84.

88. *Id.* at 384.

89. Interview with Judge William Lucero, Presiding Discipline Judge, Colo. Supreme Court, in Denver, Colo. (Dec. 19 2005). In Colorado, a lawyer may either keep client funds in his possession in an interest-bearing account for the client's benefit or in a COLTAF account. *See* COLTAF About Us, http://www.coltaf.org/about_us.htm (last visited Dec. 5, 2006). COLTAF is the Colorado Lawyer Trust Account Foundation, and COLTAF receives the interest from pooled client accounts where the funds are short-term or nominal. *Id.* The interest COLTAF receives is then used to further COLTAF's purposes, including improving the knowledge and awareness of law in the community, providing legal services to the disadvantaged, and improving legal services. *Id.*

90. SALT Statement, *supra* note 59, at 447.

91. *Id.* at 449.

92. *Id.*

93. This statement does not necessarily suggest take home exams or papers. Further, it does not argue against traditional law school exams. Rather, it proposes possible better ways to evaluate student performance which may include traditional exams that use a variety of modalities of language use, essay question types, or hypothetical simulations within the traditional timed exam experience.

will give them . . . the jurisprudential perspective that will make them better lawyers."[94]

Moreover, opponents suggest that the bar exam drives admission decisions. Not surprisingly, studies show that students who do well on the LSAT are more likely to do well on the bar exam.[95] If a law school admits "students who know how to take a test almost exactly like the bar exam, and know how to take it successfully, you don't have to do much with those students in law school in order to assure their success on the bar exam."[96] In other words, students who do well on a standardized test such as the LSAT are essentially preprogrammed to do well on the bar exam. As a result, law schools rely heavily on LSAT scores in order to boost their bar passage rate, and in turn, potentially boost their rankings in the oft-cited *U.S. News and World Report*. Unfortunately, law schools often partake in this practice at the expense of admitting students who could be good practicing attorneys, but who do not perform well on standardized tests such as the LSAT and bar exam.

A high ranking in the *U.S. News and World Report* has numerous beneficial effects for a law school. For example, it helps with alumni contributions, gives satisfaction to the faculty, gives students a feeling that they are attending a superior school, and allows the school to attract new students of higher caliber.[97] Therefore, law schools admit students who are likely to pass the bar exam by relying to a significant degree on LSAT scores. This reliance by admissions departments on LSAT scores may lead to the exclusion of students who could have become great lawyers but are not preprogrammed[98] to do well on standardized legal tests. "From the moment they enter law school through graduation, students realize that unless they pass the bar examination, their substantial financial commitment and their years of hard work will be wasted."[99]

The bar exam may also negatively affect how law schools evaluate student performance in law school. Like the bar exam, law school exams are a "one-time make-or-break examination that focuses on only a very few of the many skills that competent lawyers need."[100] If the bar exam

94. SALT Statement, *supra* note 59, at 449.

95. Glen, *supra* note 80, at 357 n.43 (citing LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY (1998)).

96. *Id.* at 357.

97. SALT Statement, *supra* note 59, at 449.

98. See Elizabeth Rindskopf Parker & Sarah E. Redfield, *The Educational Pipeline From Preschool to Professional School: Working to Increase Diversity in the Profession*, B. EXAMINER, May 2006, at 7, for a discussion of how the education pipeline has a history of preprogrammed academic failure of minorities.

99. SALT Statement, *supra* note 59, at 449.

100. *Id.*

tested more skills such as communication, research, and negotiation, law schools would respond in turn, initiating new evaluation techniques that reward mastery of all the skills needed to be a successful attorney rather than simply focusing on skills that can be measured by a paper and pencil test.[101]

Underlying the idea of the bar exam driving curriculum, admissions, and evaluation decisions, is the impression that the bar exam relieves law schools of their responsibilities to prepare competent future lawyers.[102] The bar exam relieves faculty of their responsibility to control the curriculum and evaluate students in the best manner possible at a particular law school, and it relieves the admissions committee of the responsibility to find and admit students who will make a law school the most effective learning environment. The bar exam takes these responsibilities away from law schools and may turn some schools into tuition-collecting institutions that can teach as little or as much as they want, knowing the bar exam will presumably weed out the students who are unfit to practice law.

Critics are also concerned with the disparate effect the bar exam has on minorities and women, thus providing a barrier to a diverse bar and bench. An increase in the number of minorities in the legal profession would lead to an improvement in public perception of the bar and the judicial system, legal services for underrepresented groups would increase, and the bar in general would become a more public-minded body.[103] The lack of diversity in the legal profession can be attributed to the bar exam because of its disparate impact on minorities and women that delay or completely hinder minority and female entrance into the legal profession. A five-year LSAC study found that the first-time bar passage rate was 91.9% for Caucasians, 80.7% for Asian-Americans, 75.8% for Mexican Americans, 74.8% for Hispanics, 66.36% for Native Americans, and 61.4% for African-Americans.[104] Furthermore, a recent study by the National Conference of Bar Examiners concluded:

> Our preliminary analysis showed that men outperform women on the MBE by about 5 points, which is about 1/3 of a standard deviation . . . . With such a large sample size, a difference of this size is

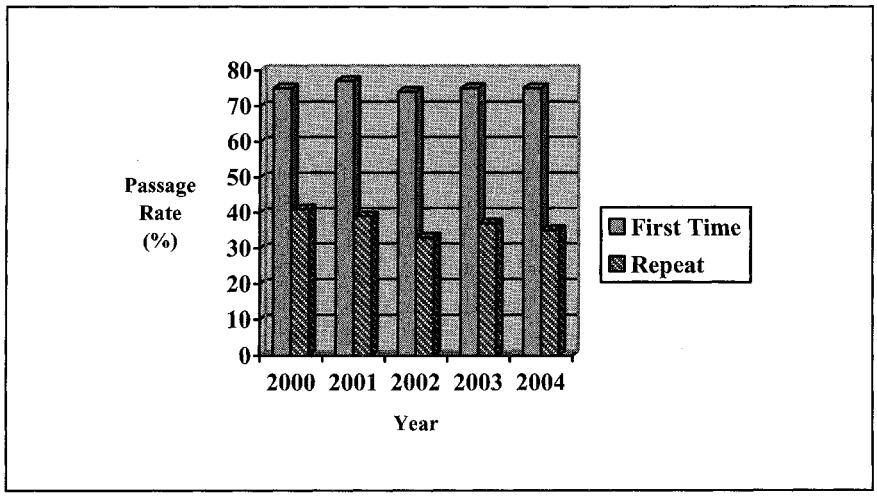
101. *Id.*
102. *See* Glen, *supra* note 80, at 355–56.
103. SALT Statement, *supra* note 59, at 450.
104. LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 27 (1998).

> statistically significant; it is also large enough for many people to believe that it is practically significant.[105]

The data provide a substantial argument that the bar exam needs to be carefully studied and revised to level the playing field and to make the assessment fair and equitable for everyone, including minorities and women who have survived the biases imbedded in the education system from kindergarten through twelfth grade, various standardized tests including the SAT, ACT, and LSAT, and undergraduate college level education.[106]

While it is true that applicants may retake the exam and pass, there is significant cost both financially and psychologically for not passing the bar exam on the first try.[107] Failure rates for second- and third-time test takers are often even higher than for first-time examinees.[108]

Figure 2: *Passage Rates for First and Repeat Examinees*[109]



105. Susan M. Case, *The Testing Column, Men and Women: Differences in Performance on the MBE*, B. EXAMINER, May 2006, at 44. For a more complete understanding of the implications of these data, read the complete article.

106. See Parker & Redfield, *supra* note 98, for a discussion of the pipeline.

107. SALT Statement, *supra* note 59, at 450.

108. *See 2005 Statistics*, B. EXAMINER, May 2006, at 23, 27, *available at* http://www.ncbex.org/bar-admissions/stats/.

109. National Conference of Bar Examiners, Bar Passage Statistics, *available at* http://www.ncbex.org/stats.htm (last visited Dec 18, 2005). The apparent discrepancy between Figure 1 and Figure 2 can be attributed to the fact that Figure 1 includes all examinees while Figure 2 separates first-time from repeat exam takers.

The data in Figure 2 from the National Conference of Bar Examiners show that repeat examinees pass the bar at less than half the rate of first-time examinees. Therefore, an examinee who fails the exam on his or her first try is more than likely to fail the exam on the second attempt. Clearly, this indicates that the reason for the failure on the first exam was replicated on the second exam. However, if the exam is flawed, then it fails as a fair and equitable assessment of skills and knowledge. The question then becomes whether an assessment that has such a negative impact on admitting minorities and women to the legal profession should be sustained. The answer is no with the bar exam in its current form. Although an assessment is appropriate, the exam must be revised. Validity and reliability must be re-established to create an evaluation system that is fair and equitable.

IV. PROPONENTS OF THE BAR EXAM

Proponents of the bar exam effectively counter each of the contentions leveled against the bar exam. First, they argue that the bar exam measures minimal competence because it tests the proper skills of a lawyer, does not rely on memorization, and properly tests general, rather than specific, areas of the law. Second, proponents assert that there is nothing wrong with the bar exam driving admission decisions, and that critics' curriculum concerns are misplaced. Third, they assert that a disparate impact on minority students exists well before the bar exam is administered. Bar exam proponents also suggest that the answer to the various criticisms of the bar does not lie in changing the exam, instead noting that "[l]earning to think like a lawyer is the key to passing the bar."[110]

Supporters of the bar exam argue that the exam tests the "most basic and essential analytical skills required for the practice of law" and thus, "serves a necessary function."[111] Those in favor of the bar exam agree that it does not test all of the so-called MacCrate skills, but argue that this is a strength of the bar exam rather than a deficiency. Bar examiners have identified the skills that can be accurately tested with a standardized test, and examine only those skills.[112] Thus, the bar exam tests reading comprehension, recognition of legal issues, organization, writing ability, and the ability to follow directions, all of which are "fundamental to the

110. Suzanne Darrow-Kleinhaus, *A Response to the Society of American Teachers Statement on the Bar Exam*, 54 J. LEGAL EDUC. 442, 452 (2004).
111. *Id.* at 442.
112. *Id.*

competent practice of law."[113] To do well on an essay question or performance test question, an applicant must effectively read and follow directions, recognize the legal issues involved, and organize and effectively write an answer in the language of the law.[114] Furthermore, greater weight is given to analysis than to "knowing" a particular rule because "credit is given . . . for well-reasoned analyses of the issues and legal principles involved even though the final conclusion may be incorrect."[115] Similarly, a multiple-choice question requires an applicant to read a question effectively and recognize a particular legal issue, all under specific time constraints. Bar exam proponents declare that time constraints reflect the realities of the legal profession, where lawyers deal with deadlines on a daily basis, regardless of the area in which they practice.[116]

Supporters also note that the bar exam does not rely on memorization to a fault, because recitation of memorized rules does not play a greater role in preparing or passing the bar exam than it does in any other part of a student's legal education. All law students memorize the elements of causes of action, commit obscure property rules to memory, and learn to extrapolate and remember case law in order to pass law school exams.[117] Even when students take open-book or open-note tests, they must still have basic analytical systems and cognitive paradigms memorized in order to access the information quickly in a timed test situation. In addition, students have been memorizing academic information throughout their careers—from multiplication tables in grade school, to complicated formulas in undergraduate school. The bar exam is essentially no different from these situations. There is a need to memorize a finite number of black letter rules for an applicant to show that she has the ability to work with and understand those rules. Furthermore, a student does not need to memorize every single black letter rule. Generally, a student can pass the bar exam even if she misses eighty questions out of the two-hundred included in the MBE.[118]

Students who fail the bar exam do not fail because they forgot a rule or did not memorize enough rules. Students fail because they cannot identify legal issues, fail to separate relevant from irrelevant information, and lack an ability to properly organize and analyze a legal issue.[119] In

113. *Id.* at 442–43.
114. *Id.* at 444.
115. *Id.* at 445 (quoting New York Board of Law Examiners, The Bar Examination, http://www.nybarexam.org/barexam.htm (last visited June 9, 2004)).
116. *Id.* at 444.
117. *Id.* at 447.
118. *Id.* at 449.
119. *Id.* at 447.

other words, students who fail the bar exam may *know* the black letter law because they took a bar review course and have all the information they need for the exam. However, failure occurs because students do not *understand* the law. These students do not "recognize a rule when it assume[s] a different form or appear[s] in language different from what they had memorized."[120] Thus, proponents argue that the bar exam serves its essential purpose of eliminating those applicants who do not possess the requisite skills to practice law effectively.

Proponents further maintain that the bar exam's form is also effective in testing minimal competence. Bar exam critics point out that no lawyer ever encounters multiple-choice questions with four distinct answers. Proponents respond that this has little to do with the administration of the bar exam where a multiple-choice question tests a critical legal skill: the ability to read a set of facts carefully and draw reasonable legal inferences from them.[121] The bar exam is not designed to test legal skills as they are encountered in the real world, rather it is designed as a mechanism to determine whether a particular applicant possesses the skills required to succeed when confronted with real world problems. A multiple-choice question sets up a contained universe to test those skills while providing an efficient and objective way of scoring answers to those questions.

The bar exam also is criticized for requiring students to prepare heavily and take a review course. The answer to this criticism is that the bar exam is no different than any other aspect of a legal education or legal career. Students prepare intensively for law school exams by studying their notes and past exams. Practitioners prepare for trial, motions, and briefs by consulting old work that has been done on similar cases.[122] The bar exam is thus no different from law school or from practicing law. One must prepare intensively to succeed in the legal profession, where good preparation is the hallmark of a good lawyer.

Supporters of the bar exam also effectively counter the criticism that it tests many general areas of the law instead of a few specific areas in an admittedly segmented profession. They answer by stating that the bar exam correctly tests a wide range of legal subjects because most law students end up in a solo or small firm setting.[123] General testing of the law provides students with a broad basis of knowledge from which to draw so that they may pursue a career in whatever specialty they choose. Similarly, law students do not leave law school as experts in any particu-

120. *Id.*
121. *Id.* at 449.
122. *Id.* at 451.
123. *Id.*

lar field. As critics readily point out, expertise takes a number of years of specialization in a particular area, so testing law students in specific areas is unrealistic for students who are only trained in general fields of law and may not be ready to select an area of specialty.

Those in favor of the bar exam also counter the criticism that it drives curriculum and admission decisions of law schools. They argue that there should be no distinction drawn between "bar courses" and "clinical courses." In regard to admission decisions, they question: What is wrong with admitting people to law school that will do well on the bar exam? A law school's primary responsibility is to prepare students to be successful attorneys, and using indicators, such as the LSAT, to identify students who will do well in law school and on the bar exam is an appropriate method of accomplishing this goal.

Proponents of the bar exam suggest that critics of the exam fundamentally misunderstand the skills required to be successful on the bar exam and, consequently, are misguided in their criticisms of curriculum.[124] Supporters do not disagree that the bar exam may be a determining factor in law school curriculum, but state that designing a curriculum around the subjects tested on the bar exam makes no sense. There is no need to ensure that students take "bar courses" at the expense of clinical courses. In fact, a recent survey indicates that there is "little statistical evidence" that the bar exam factors into curriculum decisions about what upper level courses a school requires.[125] The skills needed to pass the bar exam are the reading, writing, and analytical skills learned in law school, no matter what course a student is taking.[126] For example, a student will acquire the same essential skills needed for the bar exam if she takes a traditional Civil Procedure course or a Clinical Litigation course. In other words, there should be no distinction between "bar courses" and "clinical courses."[127] Therefore, law schools can offer both types of courses without detrimental impact on bar passage rates.

Supporters of the bar exam also contest the idea that the bar exam has a disparate impact on minorities. They argue that research shows that a disparity existed before the bar exam, and, therefore, the exam is not the root of the problem.[128] Research shows the same impact can be found with regard to LSAT scores, law school grade point averages, and

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124. *Id.* at 452.

125. Catherine L. Carpenter, *Recent Developments in Law School Curricula: What Bar Examiners May Want to Know*, B. EXAMINER, Nov. 2005, at 39, 43.

126. Darrow-Kleinhaus, *supra* note 110, at 452.

127. *Id.*

128. *Id.* at 457–58.

bar exam scores.[129] If there are differences in passage rates among different groups they "existed before and during law school."[130] Thus, while something is causing these differences, it is not the bar exam, and the bar exam should not be changed on account of the perceived disparate impact.[131] In fact, research shows that law school GPA is the most determinative factor of bar passage:

> After controlling for law school quality, test reliability, subject matter and test type, time limits, and the ability to take tests, researchers concluded that "*the higher the law school grade point average . . . , the greater the likelihood the applicant will pass.* No other measured variable really mattered once there was control for [law school] []GPA."[132]

V. PROPOSED ALTERNATIVES TO THE BAR EXAM

The critics of the bar exam have suggested a number of alternatives to the traditional bar exam. First, the Public Service Alternative to the Bar Exam ("PSABE") would consist of a ten to twelve week evaluation in a local court system after law school is completed. Second, the Community Legal Access Bar Alternative ("CLABA") would require a one-year post-graduate apprenticeship with a newly-created charitable organization that serves the underrepresented community. Third, the Diploma Privilege, which is now only available in the state of Wisconsin, grants a law license to any student who graduates from one of the state's law schools. A fourth proposal is a combination of new testing ideas involving computer-testing and staggered-date testing. Computer testing is capable of evaluating applicants in new ways, while the staggered-date testing would be similar to the method currently used for medical profession board examinations. Finally, some states allow "law readers" to sit for the bar exam after apprenticing with a licensed attorney.[133] Each of these new proposals deals with one or all of the concerns of ensuring minimal competence, completing course curriculum, and making non-bar-specific admissions decisions in law schools, as well as minimizing the disparate impact of the bar exam on minorities and women.

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129. *Id.*
130. *Id.* at 458.
131. *Id.*
132. *Id.* at 453 (emphasis added) (quoting Stephen P. Klein, *Disparities in Bar Exam Passing Rates Among Racial/Ethnic Groups: Their Size, Source, and Implications*, 16 T. MARSHALL L. REV. 517, 523–24 (1991)).
133. *See infra* Part VI.E.

A. Public Service Alternative to the Bar Exam (PSABE)

The PSABE, proposed by Professor Kristin Booth Glen, Dean of the City University School of Law in New York,[134] would involve a ten to twelve week placement in a local court system where a candidate's real world ability to practice law unsupervised could be accurately evaluated.[135] The idea is premised on the assumption "that there is no more valid test of skills than direct observation of . . . actual, real-time performance of those skills."[136] The bar applicants would work as lawyers in a local court system and be assigned an assortment of job-related tasks.[137] Applicants would, among other things, write bench memos for judges, assist *pro se* litigants, assist in mediation sessions, or serve as arbitrators in small claims matters.[138] At the same time, court personnel who "are trained and monitored by experienced law school clinical professors" would evaluate the students.[139] If a candidate successfully completed the ten- to twelve-week work process, she would be granted admission to the bar.[140] The only additional requirement of participants in the PSABE would be the completion of 150 hours of pro bono work in the court system of their placement within three years following admission to the state bar.[141]

The principal advantage of the PSABE over the bar exam is that it would ensure competence in the profession by evaluating the essential MacCrate skills that have been identified as necessary components for the competent and successful practice of law.[142] In a real world environment, evaluators would be able to observe such skills as research ability, oral communication, negotiation, counseling, and recognizing ethical dilemmas—abilities which are generally ignored by the bar exam. The PSABE would also address the curriculum and diversity issues that are caused or exaggerated by the traditional bar exam. The PSABE would provide an opportunity for an applicant's entire legal skill set to be observed. Thereafter, law schools would likely offer—and law students would likely take—more clinical courses, where emphasis can be placed on skills relevant to the PSABE but ignored by the standardized bar

134. *See* Glen, *supra* note 63.
135. *Id.* at 1702.
136. *Id.* at 1720.
137. *Id.* at 1721.
138. *Id.* at 1725–26.
139. *Id.* at 1721.
140. *Id.*
141. *Id.* at 1723.
142. *Id.* at 1735.

exam.[143] In addition, the PSABE may avoid the bar exam's disparate impact on women and minorities by eliminating standardized tests that can negatively impact diverse applicants. It would also benefit students with coming out of law school with inadequate financial resources.[144] As discussed in Part IV, *supra*, the bar exam requires even financially-strapped students to invest thousands of dollars into a commercial preparation and review course and to devote many hours to the uninterrupted study and memorization of discrete subjects. The PSABE would eliminate this extra expense and loss of possible gainful working hours by eliminating the need for an expensive bar review course.

The PSABE entirely eliminates the need for a review course, and provides students of limited means the chance of performing PSABE court duties while simultaneously holding a night or weekend job for the ten-week period.[145] Moreover, the PSABE would push future pro bono work by requiring new applicants to perform 150 hours of pro bono work after admission to the bar, thus exposing new lawyers to the urgent need for pro bono work in any local court system.[146]

Professor Glen compares moving from the traditional bar exam to the PSABE to law reviews moving from a "grade-on" system of choosing new members to a "write-on" system.[147] In the past, grades served as a "once-removed proxy" for the skills needed to be a contributing member of a law review.[148] Currently, a writing competition is commonly used to determine new members of a law review because it measures the actual skills that the applicant will use on law review.[149] Similarly, the PSABE would evaluate the actual skills required to be a competent lawyer, whereas the once-removed proxy of the bar exam tests only memorization and knowledge of so-called black letter law.[150] Clearly, the real-time evaluation of the skills essential to be a lawyer is the primary argument for implementing the PSABE as an alternative to the traditional standardized bar exam.[151]

The PSABE is a twelve week practicum in a local court. Although students will work in a real-life courtroom, the practicum is not guaran-

143. *Id.*
144. *Id.* at 1736–37.
145. *Id.* at 1737.
146. *Id.* at 1737–38.
147. *Id.* at 1722.
148. *Id.*
149. *Id.*
150. *Id.*
151. In this system, law schools would be responsible for assuring students' mastery of the basic subjects of law while students are taking law classes. Students would have to fulfill certain prerequisites in law school before they could elect the PSABE as an alternative to the bar exam.

teed to provide the intensive evaluation of the students' legal abilities in the basic areas that are currently tested by the bar exam. Furthermore, a PSABE student may not have an opportunity to engage in detailed reading comprehension, legal issue organization, or legal analysis and writing. Finally, courtroom exposure presents experiences that are not standardized or guaranteed to be academically rigorous. This author has witnessed a variety of levels of academic rigor when observing externs who are working in courtrooms. The bar exam provides a standard and a common set of skill evaluations. Thus, the PSABE presents a solid real-world test of fundamental skills used in legal practice; however, like other programs urging real-world testing for would-be lawyers, the variety of experiences a student may encounter hinders the ability to measure a standard set of competencies as the bar exam currently provides.

B. Community Legal Access Bar Alternative (CLABA)

The second proposed alternative to the bar exam, CLABA, was initiated by a group of students at the University of Arizona College of Law.[152] The program would provide benefits to both the legal profession and the community in general. As proposed, CLABA would be a one-year, post-J.D. apprenticeship program that "will provide both reduced-fee legal counsel and representation to lower middle-income populations and serve as an alternative method of first-time attorney licensure and bar admission."[153] The one-year apprenticeship program would be implemented by a newly created, freestanding 501(c)(3) non-profit organization[154] which would serve "[i]ndividuals, small businesses, and non-profit organizations with incomes of... $15,000 to $60,000."[155] In providing these services, the organization would charge $15 to $35 per hour with limits in place depending on each case.[156] Each apprentice would serve eight weeks in each of six core practice areas: "family law and domestic relations; personal finance and planning; personal and economic injury; business finance and planning; government regulation; and misdemeanor criminal defense."[157] A full-time attorney-mentor would manage each of the core practice areas and "oversee[] case management, serve[] as attorney of record, and act[] as a coach

152. Sally Simpson & Toni M. Massaro, *Students with "CLAS:" An Alternative to Traditional Bar Examinations*, 20 GA. ST. U. L. REV. 813, 827 (2004).
153. *Id.* at 817.
154. *Id.*
155. *Id.* at 818.
156. *Id.*
157. *Id.* at 817 n.4.

and advisor for apprentices to ensure that all clients receive diligent, competent counsel and representation."[158] Throughout the process, the mentors would carry out both subjective and objective competency-based evaluations of each apprentice.[159] The first week of each core area would be structured as an orientation with the new practice group.[160] The final week of each core area would be spent reviewing files and going through a debriefing conducted by the mentor.[161] After completing work and receiving positive evaluations in each of the six core areas, the apprentice would be granted admission to the bar, subject to passing the standardized Multistate Professional Responsibility Exam ("MPRE")[162] and satisfying any local character screening process.[163] If the apprentice does not complete the program or leaves the program for any reason, she may apply to take the bar exam.[164]

The goal of CLABA would be to provide an evaluation of all essential attorney skills over a long period of time in order to ensure competency. During the year, apprentices would be given multiple objective and subjective evaluations from numerous mentors suggesting improvement in all aspects of their work.[165] Conversely, the bar exam purports to ensure competency with a two- to three-day exam that presents hypothetical situations to which the candidate must respond. CLABA, on the other hand, purports to promote improvement in legal professionalism.[166] The CLABA Institute will hire mentors with the ability to be good role models by promoting good professional ethics and competent legal skills with all of the apprentices.[167] Also, professional conduct will be encouraged because it will be part of the evaluation process.[168] An apprentice who does not return calls to clients, cuts ethical corners, or fails to be civil in her duties will be instructed to improve or she will not be recommended to the bar at the end of the period.[169] Similar to the

158. *Id.* at 818.
159. *Id.*
160. *Id.* at 830.
161. *Id.*
162. The MPRE is a short standardized test designed to ensure that all new entrants to the state bar have a threshold understanding of legal ethics and professional responsibility. While not technically a part of the bar exam, passage of the MPRE is a prerequisite to admission to most state bars. National Conference of Bar Examiners Multistate Professional Responsibility Examination (MPRE), http://www.ncbex.org/multistate-tests/mpre (last visited Dec. 4, 2006).
163. Simpson & Massaro, *supra* note 152, at 818.
164. *Id.* at 818–19.
165. *Id.* at 835–36.
166. *Id.* at 837.
167. *Id.*
168. *Id.* at 838.
169. *Id.*

PSABE, CLABA would likely avoid the disparate impact of the bar exam on minorities and women by eliminating the bar exam. It also supplies a new legal resource for members of the community who may not be able to hire a lawyer otherwise. CLABA proponents believe it evaluates all skills needed to be a lawyer and thus ensures competency among new entrants into the profession.

The CLABA is a one-year apprenticeship program that provides directed experiences in six core practice areas. This program provides higher quality finishing experiences than PSABE. Potential flaws of CLABA will occur if supervising attorney-mentors are not fully engaged in the mentorship of apprentices. Also, different levels of cases worked on by apprentices will result in differing levels of knowledge tested by mentors. The bar exam provides a standard evaluation of legal subjects and skills without regard to the human element of interest or expertise. Again, the skill set a prospective attorney will use in practice are tested—this time for an entire year—however, the problem of evaluation standardization for the entire prospective attorney class yet again provides an argument against the CLABA, just like it did with the PSABE, and also provides a lingering argument in favor of some sort of test like the bar examination.

C. Diploma Privilege

The third proposed alternative to the bar exam is the Diploma Privilege, which provides admission to the bar of a state if a student has graduated from an accredited law school within that state. Although the Diploma Privilege was widespread in the past, only one state, Wisconsin, continues to allow licensure based on graduation from law school.[170] Additionally, in 2006, New Hampshire's Franklin Pierce Law Center initiated an alternative licensure program similar to the diploma privilege whereby participants can gain licensure without taking the full bar exam.[171] The Wisconsin Diploma Privilege operates under the "thirty-

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170. *See* Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645, 645 (2000).

171. The Franklin Pierce program was initiated with the admission of "an inaugural class of 15 students" in April of 2006. Leigh Jones, *Dream Come True: No Bar Exam—N.H. Honors Program Would Replace Taking the Bar*, NAT'L L.J., May 1, 2006, at 4. The program is described as follows:

> New Hampshire's lone law school has established a first-of-its-kind program that enables graduates to obtain a license to practice law without passing the bar examination.
>
> The program at Franklin Pierce Law Center in Concord, N.H., is designed to give students practical experience during their second and third year of school,

credit rule" and the "sixty-credit rule."[172] The thirty-credit rule requires students to take ten specific classes and have a minimum GPA of seventy-seven in those classes.[173] Similarly, the sixty-credit rule "requires students to take at least sixty of their law school credits in thirty subject areas also achieving a seventy-seven average."[174] The thirty-credit and sixty-credit rules ensure that students take certain courses that should prepare them to be competent attorneys.

Proponents of the Diploma Privilege believe it protects the public from incompetent lawyers better than the bar exam. The Diploma Privilege ensures a qualified bar by encouraging substantive work by both law school students and faculty.[175] As a result of the implementation of the Diploma Privilege, law school faculty are encouraged to make exams rigorous and are more likely to fail students who do not fully comprehend the material because the bar exam will not serve as a safety net to

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> which is monitored by faculty, attorneys, and judges. After three years, participants are eligible to practice without enduring the two-day rite of passage.
>
> . . . .
>
> The Daniel Webster Scholar Honors Program is a collaborative project developed by the New Hampshire Supreme Court, the state's board of bar examiners, the New Hampshire Bar Association and Franklin Pierce Law Center, the only law school in the state.
>
> Students who successfully complete the program can become licensed after passing the multistate professional responsibility examination and satisfying the state's character and fitness requirements.
>
> . . . .
>
> Participants take regular courses in addition to classes specific to the program. They also work in simulated, clinical and externship programs. They must demonstrate an ability to practice before judges, bar examiners, faculty members and classmates in order to pass.
>
> . . . .
>
> The American Bar Association (ABA) will be watching the program 'with interest,' said John Sebert, consultant on legal education to the ABA. He said he knew of no other programs like Franklin Pierce's.

Id.

172. Moran, *supra* note 170, at 648.

173. *Id.* at 648 n.35 (quoting WIS. SUP. CT. R. 40.03(2)(b) (1995)) ("The ten courses are 'constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibilities of the legal profession, pleading and practice, real property, torts, and wills and estates.'").

174. *Id.* at 648 n.36 (quoting WIS. SUP. CT. R. 40.03(2)(a) (1995)) ("These courses are '[a]dministrative law, appellate practice and procedure, commercial transactions, conflict of laws, constitutional law, contracts, corporations, creditors' rights, criminal law and procedure, damages, domestic relations, equity, evidence, future interests, insurance, jurisdiction of courts, legislation, labor law, ethics and legal responsibilities of the profession, partnership, personal property, pleading and practice, public utilities, quasi-contracts, real property, taxation, torts, trade regulation, trusts, and wills and estates.'").

175. *Id.* at 649–51.

weed out deficient students after law school.[176] Likewise, students are aware that faculty will assign failing grades so students work hard to master the material in order to pass the course.[177] The Diploma Privilege also encourages student competence in a wide range of legal subjects instead of limiting knowledge to the six subjects covered on the standard bar exam.[178] As a result, students acquire a mastery of knowledge which includes many legal subjects offered under the thirty- and sixty-credit rules.

Another benefit of the Diploma Privilege is that it mitigates the disparate impact of the bar exam on minorities and women.[179] The Diploma Privilege provides a mechanism whereby the only screener for admission to the state's bar is the law school that the student is attending.

Furthermore, there is no evidence of adverse impact on graduates of Wisconsin law schools when it comes to taking the bar exam of other states. In 1997, ten out of twelve Wisconsin graduates passed the California bar exam, and in the Summer 1996–Winter 1997 and Summer 1997–Winter 1998 academic years, Wisconsin graduates had a 96% and 91% passage rate, respectively, on the Illinois bar exam.[180] Thus, it seems the thirty-credit and sixty-credit rules more than adequately prepare Wisconsin graduates for the traditional bar exam.

One of the biggest concerns about the Diploma Privilege is that it may prevent attorneys from moving throughout the country after practicing locally for a few years. Several state bars do not admit lawyers who have not passed a bar exam, regardless of how long the lawyer has competently and successfully practiced law.[181] This causes concern for students who are readily admitted to the Wisconsin bar, have practiced successfully for many years, and want to leave the state to take a job elsewhere but are confronted with the proposition of taking the traditional bar exam for the first time as a condition of practicing in a new state. As the statistics above show, however, the graduates of Wisconsin law schools are prepared for traditional bar exams in other states by virtue of their thirty-credit and sixty-credit curriculum.

Proponents point to three relevant factors to determine when the Diploma Privilege should be implemented as the mechanism for bar admission in a particular state.[182] First, the state should be small with a corre-

176. *Id.* at 650–51.
177. *Id.* at 651.
178. *Id.* at 652.
179. *Id.* at 653.
180. *Id.* at 650.
181. *Id.* at 653.
182. *Id.* at 655.

spondingly small practicing bar; second, there should be a close relationship among the state's bar, judiciary, legislature, and law schools; and third, both the public and the bar should hold the state's law schools in high esteem.[183] The size of the state is relevant because only in small states can a close relationship among the bar, the courts, the legislature, and the law schools be established and maintained.[184] This close relationship is vital to the success of the Diploma Privilege because it is the foundation of the ideals and requirements necessary to gain admission to the bar.[185] The dialogue between the bar, courts, legislature, and law schools about current and future expectations of law school graduates is essential to the success of the Diploma Privilege program. It would be significantly more difficult for these relationships to exist in a large state where lawyers generally deal at arms-length and there are few relationships among interested groups.[186] The foregoing factors support a Diploma Privilege system that requires students to take essential courses, promotes hard work and a rigorous curriculum in law school, and mitigates the disparate impact of the bar exam on minorities and women.

The Diploma Privilege would allow graduates of accredited law schools within the state to gain admission to the bar by taking and passing a specified curriculum. However, receipt of a diploma from a law school is not viewed in the profession as a quality assurance of competency because other states do not recognize reciprocity without bar exam passage. Passage of the bar exam provides students with freedom to move to other jurisdictions where reciprocity is granted. The Diploma Privilege licensure does not allow the attorney to move if other opportunities arise or an interest or desire to live in another jurisdiction occurs.

Therefore, unlike the PSABE and the CLABA which seek to provide new attorneys with real-world skill sets, the Diploma Privilege provides an academically competent new attorney. While the Diploma Privilege provides some standardization via the standards set for students in the classroom, it still fails to provide state-wide standardization because no two professors will teach a subject the same nor will any two law schools within the same state offer the same curricula. Thus far, only the bar exam offers that kind of standardization—albeit at the cost of disparate impact. Further, a new attorney under the Diploma Privilege wanting or needing to move to another jurisdiction would still have to take the bar exam for that state. It seems there may be no escaping the bar exam.

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183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*

D. Computer/Staggered Testing

The fourth suggested alternative to the bar exam proposes a change in how and when the bar exam is administered. This proposal can essentially be broken into two testing methods: computer-based testing ("CBT") and staggered testing. CBT would change the form in which the bar exam is given, moving away from the paper and pencil model to incorporate new technologies that test a wider range of skills in a more effective manner. Staggered testing, on the other hand, uses the medical board examinations as a model in terms of both form and timing of the bar exam, suggesting a system where applicants are required to pass multiple tests at different points in a student's law school education.

Proponents believe that CBT would allow the bar examiners to abandon the paper and pencil approach associated with the typical bar exam and replace it with a more modern testing regime. CBT has the ability to test a broader range of skills in a manner that is more closely aligned with how those skills are actually used in practice.[187] The CBT method is already successfully employed to test future architects on the Architect Registration Examination as well as future doctors on all three parts of the United States Medical Licensing Examination.[188] Advocates of CBT believe it can be used in countless ways to improve the bar exam also.

CBT has the benefit of being able to test skills that the bar exam ignores, such as research, negotiation, mediation, and counseling. CBT can create virtual clients or trials in order to force an examinee to analyze real world situations and determine an appropriate course of action.[189] An examinee could also be presented with the task of interviewing a virtual client by requiring her to watch a client interview and then to write down questions that should be asked in a follow-up interview as well as to address necessary factual inquiries.[190] The CBT interview could also be used to test mediation, counseling, and negotiation skills.

Additionally, some of the memorization aspects of the bar exam could be eliminated by testing actual legal research skills through the Internet or a research-based CD-ROM.[191] Using these tools, an applicant could be given access to the research database and use the information contained therein to respond to a series of questions based on the

187. Curcio, *supra* note 66, at 394.
188. *Id.* at 394–95.
189. *Id.* at 396.
190. *Id.*
191. *Id.* at 396–97.

laws of a particular state.[192] Questions presented could deal with issues as specific as a statute of limitations or as broad as requiring the application of a number of laws to a given fact situation.[193]

The black letter knowledge that is tested on the current bar exam could also be tested in a more practical way using CBT. For example, knowledge of evidence and trial practice could be tested by showing part of a trial and requiring the applicant to offer objections and detail the justifications behind those objections.[194] Proponents of CBT believe new technology can and should be used to improve how the bar exam is administered.[195]

Similarly, proponents of staggered testing believe that method would change not only how but also when the bar exam is administered. One example of a staggered testing model was proposed by Jayne W. Barnard, Professor of Law at the College of William and Mary, and Mark Greenspan, Associate Professor of Surgery at the Eastern Virginia Medical School and practicing attorney.[196] Their proposal is modeled after the scheme used for licensure in the medical profession.[197] In medical school, students take a series of four tests that become progressively more difficult during the course of their schooling residency.[198] The first test reviews basic foundational material, the second evaluates clinical and communication skills, the third assesses ability to make diagnoses and simple treatments, and the fourth gauges ability in complicated and specialized areas of treatment.[199] Failure to pass any of these tests makes a student ineligible to continue.[200] If a student passes all four tests and proceeds to pass all of the comprehensive examinations in her specialty, the student will become board certified and will be able to practice anywhere in the United States.[201] Staggered testing provides six benefits that the current bar exam does not. First, the process identifies students who will probably not obtain final licensure early. Second, it assesses student work over a longitudinal period of time, instead of during a one-shot exam. Third, it tests clinical skills, not just skills tested by traditional exams. Fourth, it tests the improvement of technique and

192. *Id.* at 397.
193. *Id.*
194. *Id.* at 396.
195. Computerized testing may have a negative impact on groups who have not had access to computers and are therefore not comfortable with technology.
196. Jayne W. Barnard & Mark Greenspan, *Incremental Bar Admission: Lessons from the Medical Profession*, 53 J. LEGAL EDUC. 340, 340 (2003).
197. *See id.*
198. *Id.*
199. *Id.*
200. *Id.* at 341.
201. *Id.*

judgment with increasingly difficult tests. Fifth, it identifies students who may be "book smart" but are not well-suited to be doctors because of a lack of interpersonal skills. Finally, its results are accepted throughout the United States.[202]

The staggered testing model does not attempt to transform the law licensing process into the medical testing process; rather, it tries to apply some of the advantages of the medical testing scheme to the legal licensing process. The staggered testing proposal for law schools consists of five steps: (1) an early test of legal fundamentals, (2) a test of professional and interpersonal skills, (3) a new comprehensive bar exam, (4) post graduate education, and (5) a final bar exam.[203] The early test of legal fundamentals would require law students to take the MPRE and MBE portions of the current bar exam at the end of the second year of law school.[204] Passing the MPRE and MBE would be a prerequisite for continuing into the third year of law school,[205] thus purging students who are not likely to obtain final licensure.[206]

The second part of the staggered testing proposal would be administered during the fifth semester of law school and would test "interpersonal skills, organization skills, and basic writing skills."[207] These skills could be tested by interviewing clients, researching a legal topic, organizing a file, negotiating a contract, drafting a complaint, or making a short oral argument.[208] Computer-based testing could be used to test many of the student's professional and interpersonal skills.

The third part of the test, the comprehensive bar exam, would be taken after graduation and would be structured like the essay and performance portions of the current bar exam.[209] However, the questions would "focus on integrating various bodies of law rather than zeroing in on the minutiae of specific areas of law."[210] The test would require issue spotting and analysis rather than "requiring a regurgitation of specific bodies of law" that require huge amounts of memorization.[211] If an applicant successfully completes the first three steps, she would be granted a provisional license to practice law in the state or states of her choice.[212]

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202. *Id.*
203. *Id.* at 359–63.
204. *Id.* at 359.
205. Schools could allow students to continue with the understanding that passage of both tests is required to register for the sixth semester (final semester) of law school.
206. Barnard & Greenspan, *supra* note 196, at 359.
207. *Id.*
208. *Id.* at 359–60.
209. *Id.* at 360.
210. *Id.*
211. *Id.*
212. *Id.* at 361.

Fourth, an applicant's new provisional license would be renewed every year for up to three years by attending regular Continuing Legal Education (CLE) courses and special CLE courses for new attorneys and "receiving meaningful supervision of, and regular feedback on, her work as a lawyer."[213] This regular supervision would ensure that each new lawyer received good feedback and, thus, obtained the necessary skills it takes to practice law unsupervised. This step would not, in fact, require a new lawyer to practice in a firm or government agency. Solo practitioners would simply have the burden of seeking feedback from attorneys or judges within their community.[214]

The fifth and final step of the staggered testing process would be a second and final bar exam to obtain permanent licensure as a lawyer.[215] This test would look much like the comprehensive exam, with essay and performance portions. However, the candidate would take a test that concentrates on one to three specialties in which the attorney has gained knowledge and is specific to the state where the lawyer has provisionally practiced.[216] This meaningful assessment of a lawyer's skills will rely on the attorney's real world experience in a specific area of law.[217] If the attorney passes the final test, she would be granted permanent admission to the bar of the state and could practice in all areas—not just the one tested—but she would have to disclose to clients the areas in which she has been tested.[218]

The staggered testing proposal captures all of the advantages possessed by the medical profession. Step one provides an early mechanism to identify candidates who do not understand the law and will not obtain a license.[219] Step two provides a way to test practical advocacy skills. At step three, the student would take a new comprehensive exam that would involve one or more essay questions as well as several questions that would require performance-testing. The questions would be like the current essay and performance type inquiries of the bar examinations but would focus on integrating various bodies of law rather than on minutiae of specific areas of law. They would replicate the kinds of questions

213. *Id.*
214. *Id.* at 362.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.* at 363. Currently, newly licensed attorneys may practice in any area they decide, even though they may have no experience in that area. In this system, the public would have some degree of assurance of the expertise of new attorneys based on their training and the areas in which they were tested.
219. Many law school faculties rarely fail students. This system is more honest and has integrity because students are not falsely carried through three years of law school debt to only later realize they cannot pass the bar exam.

most lawyers encounter with a new client.[220] Step four helps identify candidates who need help with legal skills that cannot be tested in the form of a standardized test. Step five is the only step geared to a particular state, while a student can go through steps one through four in any state of their choosing. The foregoing illustrates that staggered testing allows comprehensive testing of skills over a longer period of time, while also allowing students the freedom to practice in the state of their choice.

Computer/Staggered Testing is a viable alternative to the current bar exam. However, future attorneys might object to the multiple tiered-testing systems versus a one-time bar exam. This author believes that the Computer/Staggered testing method provides excellent elements to be considered in revising the current exam. This testing system contains all the elements of the current exam but provides students with more time and greater opportunities to demonstrate more skills, including those skills that are identified in the MacCrate Report.[221]

E. Law Readers

Finally, an unconventional approach to legal education may provide bar critics with another alternative. California, Vermont, Virginia, and Washington allow "law readers"—people who have apprenticed for practicing attorneys rather than attending law school—to sit for the bar exam.[222] Law readers participate in what may be characterized as entirely "clinical" preparation but are nonetheless able to sit for and pass the bar exam.[223] This is a highly unusual way to prepare for the bar exam. However, as noted, it is currently only an option in the four states mentioned above.

An entirely clinical preparation for the practice of law in today's competitive and technological society is fraught with inherent potential problems. The potential weaknesses are far too many to enumerate in a paragraph. Briefly stated, while a law reader may have developed the practical skills valued in the MacCrate report, he missed both the formal training and feedback imparted by the fine minds that make up legal academia as well as the broad classroom learning that provides a broad knowledge foundation upon which lawyers who have attended law school and sat the bar use to practice the MacCrate skills when they reach the real world. However, this system is acceptable in four jurisdic-

220. Barnard & Greenspan, *supra* note 196, at 360.
221. *See supra* text accompanying notes 62–64.
222. Rebecca Carroll, *Passing the Bar After Passing on Law School,* ROCKY MTN. NEWS, Sept. 21, 2005, at 46A.
223. *Id.*

tions, and the consumer of legal services may be subject to an incompetent attorney as a result.

Not surprisingly, proponents of the bar exam are concerned with the alternatives that critics of the exam have proposed. Their arguments are grounded in the assertion that any bar alternative will eliminate the valuable uniformity that the current system of admission provides. Undoubtedly, there is inherent value in having a uniform test throughout the country because a uniform bar exam compensates for differences in widely varying law schools and law school faculty.[224] Any alternative that does not apply to all law school students, such as the PSABE or CLABA, would be detrimental to the bar exam's uniform structure and would not control for differences among law schools. The disappearance of uniformity from the bar examination process would also create a legal hierarchy based on how a particular individual gained entrance into the profession.[225] Any differences in attaining admission to the bar could "lead to a schism in the profession and create a legal caste system, one caste including those who sat for the bar exam, the other consisting of those who chose" an alternative means of admission.[226]

Another criticism of alternatives to the bar exam is that the skills the alternatives purport to test—oral advocacy, writing memos, drafting pleadings, and other MacCrate skills—are better evaluated *in* law school. Presumably, if a law school is doing its job, a student will not graduate without having been meaningfully evaluated in these areas.[227] Thus, the argument goes, a law student should not earn his J.D. without learning practical MacCrate skills through legal writing, taking practical credits hours like trial advocacy or a clinic, and fulfilling other basic curricula requirements. To the proponents of the bar exam, earning a J.D. is confirmation from the law school that a prospective attorney passes minimum requirements to be an attorney subject to passing the bar exam.

VI. EXPERIENCES AT THE UNIVERSITY OF COLORADO

Although the University of Colorado Law School's bar passage rate was an impressive 97% in 1998, in 2003 it fell nearly ten points to 88%. In response to this drop, this author began to analyze the statistical significance of various factors that may have contributed to the decline. Through research, surveys, and compilation of the resulting data, it became apparent that the single most important predictor of bar passage

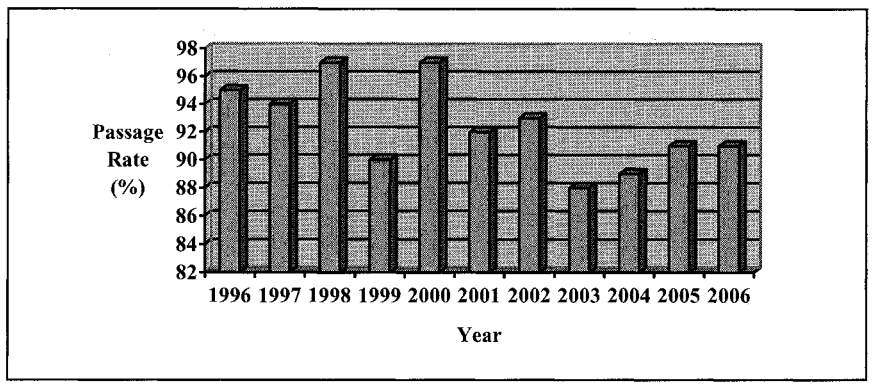
224. Darrow-Kleinhaus, *supra* note 110, at 453–54.
225. *Id.* at 454.
226. *Id.* at 455.
227. *Id.* at 454.

rate was a student's relative law school class rank. As such, CU Law implemented several academic counseling programs, including a peer tutoring program aimed at providing supplemental academic help to those ranked in the bottom of their respective classes. Based in part on these academic counseling programs, CU Law's bar passage rate rose to 91% in 2005 and remained at that level in 2006.

A. Bar Passage and the Bottom 10%

In 1998, the University of Colorado Law School's Bar Passage rate was 97%. By 2003, however, the University of Colorado's bar passage rate had declined to 88%. In 2004, the tutoring and faculty advising programs were enhanced as a response to the school's lower bar passage rate. Accordingly, in the past two years, the passage rate has increased significantly. Specifically, in 2005, the bar passage rate increased to 91%. Most recently, the 2006 bar passage rate remained steady at 91%.[228]

Figure 3: *University of Colorado Bar Passage Rate*[229]



To understand these trends, the CU Law School initiated a survey to correlate students' bar results with their LSAT scores, undergraduate GPA, ethnicity, and their self-reported study habits. Official bar passage rates are calculated by the state. Data from the Colorado Board of Bar Examiners reported herein are for first time examinees only.

228. Colorado Board of Bar Examiners, Pass/Fail Rates by Law School: July 2006 Bar Exam—After Review (Nov. 14, 2006), http://www.coloradosupremecourt.com/BLE/results/July2006/Fail%20by%20Law%20School%20Statistics.pdf.

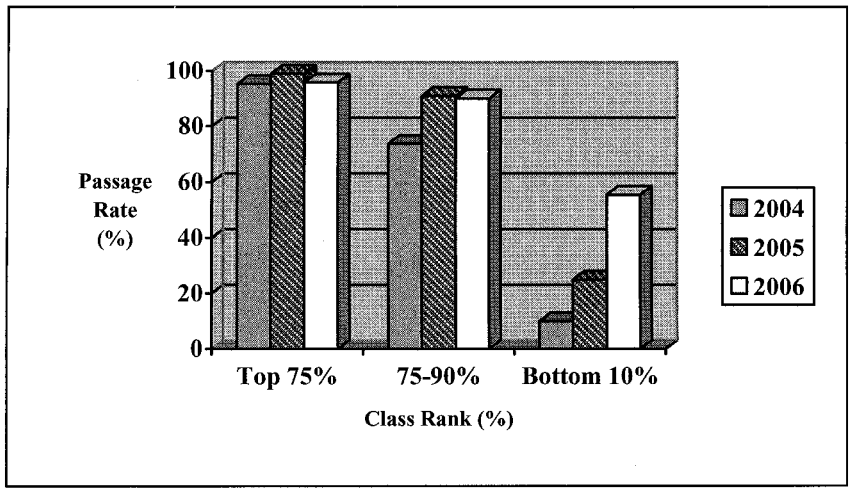
229. Colorado Board of Bar Examiners, Data Compilation (on file with author).

In 2004, 117 of 148 graduating students sat for the July 2004 Colorado bar exam and 99 passed. Of the 111 students in the top 75% of the Class of 2004, 84 sat for the exam and 80 passed. Of the 37 students in the bottom 25% of the class, 29 sat for the exam and 15 passed. Of the 14 students in the bottom 10% of the class, 10 sat for the exam and only 1 passed.

The same survey was conducted on the July 2005 Colorado bar exam. In July 2005, 123 CU students took the bar exam for their first time. Of the 129 students in the top 75% of the class, 93 sat for the exam and 92 passed. Of the 43 students in the bottom 25% of the class, 30 sat for the exam and 22 passed. Of the 17 students in the bottom 10% of the class, 8 sat for the exam and only 2 passed.

The same survey was conducted in July 2006, yielding similar results. Of the 119 students in the top 75% of the class, 96 sat for the exam and 92 passed. Of the 39 students in the bottom 25% of the class, 29 sat for the exam and 23 passed. Of the 16 students in the bottom 10% of the class, 9 sat for the exam and only 5 passed. These data indicate a high probability of failure for those students in the bottom 10% of their class.[230]

Figure 4: ***Bar Passage by Class Rank***

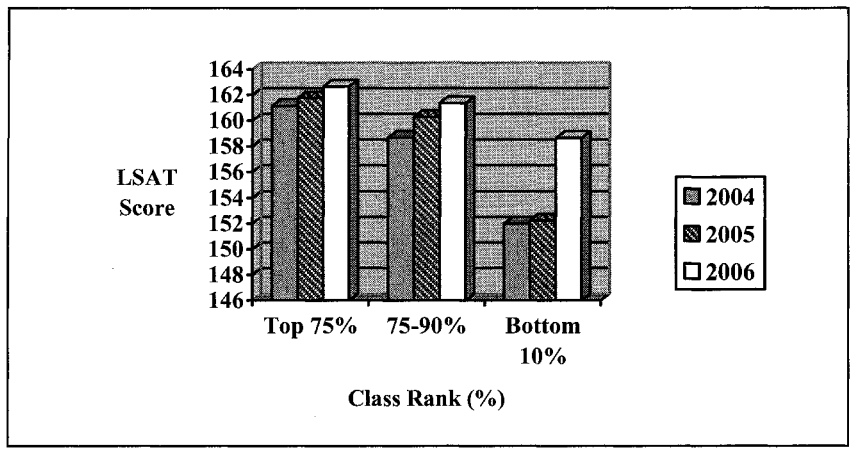


230. A false perception that is sometimes discussed behind closed doors is that diverse/minority students are the group that fall into the bottom 10% and fail. Michael Waggoner, Associate Professor of Law and Assistant Dean of Admissions and Financial Aid, studied this question in detail. He found: "Our students of color pass the bar exam at about the same rate as other takers . . . ." Memorandum from Michael J. Waggoner, Assoc. Professor, Univ. of Colo. School of Law, to the Dean's Cabinet of the Univ. of Colo. School of Law (Mar. 1, 2006) (on file with author).

These statistics reinforce the view that those in the bottom 10% are the most vulnerable to failing the bar exam and, therefore, should be provided with the additional academic support necessary to prepare adequately for the exam or, perhaps, should not be allowed to graduate. The critical issue here is that these individuals should not have to wait until the bar exam to understand that they are deficient in their legal knowledge and skills. Confronting a student with his or her deficiencies is more appropriately the role of teaching and evaluation.

These data gain more significance when average undergraduate GPA, LSAT score, and division by class rank are analyzed together.

Figure 5: ***Average LSAT by Class Rank***



As figure five illustrates, there is a marked difference in the average LSAT scores of the bottom 10% of the class compared to the rest of the class. Importantly, though, the data also reveals that the class of 2006 had a marked increase in LSAT scores amongst all students but an especially higher score amongst those in the bottom 10%. This may explain the marked increase in the passage rate of students in the bottom 10% of the class of 2006. Research shows that LSAT is a predictor of success in law school. However, if LSAT is the single factor relied upon to predict success in law school, then intervention through teaching may be of no consequence for the bottom 10% as shown above.[231]

231. However, the data from 1998 inform us that 97% of CU Law students passed the exam. This evidence clearly illustrates that the bottom 10% does not have to fail the bar exam.

Figure 6: *LSAT Score and Bar Passage Rate*

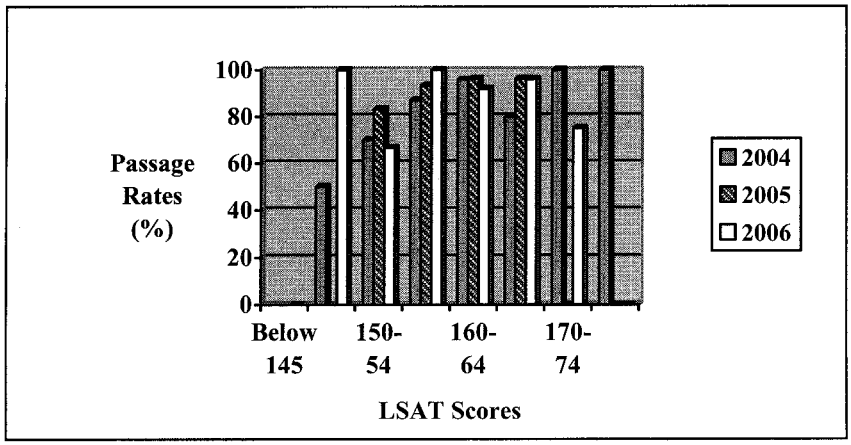
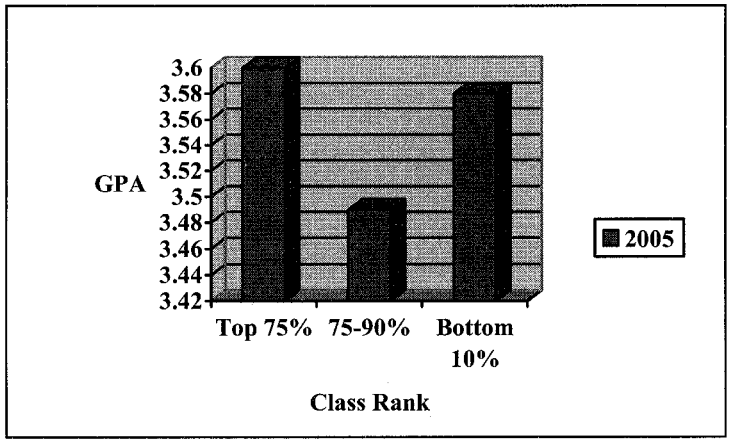


Figure six demonstrates that there is a correlation between LSAT and bar passage. Comparing figure six to figure four, it is apparent that class rank is the strongest predictor of performance on the bar exam. Furthermore, only class rank gives academic support services professionals a meaningful tool for deciding who needs academic support. In discussing class rank, one obvious criticism is often raised: in any ranking, there is always a bottom percentile. While this is necessarily true, it relates to a point discussed in the Conclusion, *infra*. Schools must recognize that there is a minimum standard at which students must be performing. Students who fail to perform at this level are falling below the threshold of necessary competence. Law schools must ensure that students who are not meeting this minimum threshold are both placed on notice, and, if necessary, advised about their potential failure of the bar exam.

Both LSAT and undergraduate GPA data were compiled for the class of 2005. These data show that undergraduate GPA is not an effective or meaningful predictor of bar passage. Figure seven shows that those in the bottom 10% of the class of 2005 had a higher average undergraduate GPA then those in the seventy-fifth to ninetieth percent range. This may be accounted for by widely varying standards at undergraduate institutions.

Figure 7: ***Undergraduate GPA by Class Rank***



This research indicates that neither the LSAT nor undergraduate GPA are as meaningful indicators of success on the bar exam as class rank, which remains the best predictor for success on the bar exam. It is important that students who fall into the at-risk category in terms of class rank not become self-defeating. Rather, they should recognize that a problem exists in their legal skills, and do everything possible to correct the problem. Some suggestions for overcoming the problems associated with class rank are provided in this article. The students at the University of Colorado School of Law all enter with superior credentials that predict success on the bar exam, and past data show that it is possible for the bar passage rate to exceed 95% at CU Law. Therefore, the recognition of need for remediation and improvement may well be the appropriate response to a low class rank so that bar passage will be assured.

B. Peer Tutoring as a Mechanism for Raising Bar Passage

To aid first-year law students in their studies, the University of Colorado Law School developed the Rothgerber Tutoring program, wherein second and third-year students receive a stipend in exchange for tutoring first-year students. Each first-year section of Torts, Contracts, Property, Civil Procedure, Constitutional Law, and Criminal Law is assigned one tutor who is selected by the professor of the section in which the tutor is assisting. The tutors meet with their respective professors and offer tutoring sessions to first-year students on a biweekly basis. These sessions focus on outlining techniques, explanation of legal concepts and analysis, developing issue-spotting skills, and essay exam writing practice.

While tutoring sessions are open to all students in the appropriate section, ideally, the program works to ensure that tutors focus on issues relevant to those students who are struggling or who feel they need more clarification or explanation of the lectures. The students, however, set the pace of the sessions. The competitive nature of law school has demanded that academic services be open to all students.[232] This challenges the tutors to be all things to all students.

The law school depends on having upper division students tutor first-year students. "At most schools, programs are run and taught by non-tenure track [faculty]."[233] In many schools, academic support program staff is often concerned about infringing upon the "doctrinal" faculty role, function, and realm of authority.[234] Although there have been marked increases in academic support services at many schools, this presence has had "little impact on the day-to-day teaching by the doctrinal faculty."[235]

However, at CU Law School, there has been an impact among some doctrinal faculty.[236] Faculty who teach first-year courses may disseminate information about exam preparation, give advice on second- and third-year course selection, direct students to the school's other academic support services, and provide informal advising about the law school experience. This system was initiated with the incoming class of 2005 on a trial basis. Strategies, such as those identified herein, focus on enhancing faculty involvement in welcoming students and promoting student learning and success.

C. Recommendations for Raising Bar Passage Rate

Based on experiences at CU Law, the author believes that enhancing academic procedures and counseling methods at law schools will better provide students with the requisite skills to pass the bar exam.

Law schools should emphasize the importance of the bar exam from the first day of orientation. They should begin to focus on mastering the law as the essential tool in passing the bar exam from the opening meet-

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232. Ellen Yankiver Suni, *Academic Support at the Crossroads: From Minority Retention to Bar Prep and Beyond—Will Academic Support Change Legal Education or Itself Be Fundamentally Changed?*, 73 UMKC L. REV. 497, 501–02 (2004).

233. *Id.* at 504.

234. *Id.* at 504–05.

235. *Id.* at 506.

236. The faculty advising programs described above are recent interventions with varied degrees of success as indicated by initial reports back from faculty. Further research on effectiveness and implementation must be done to determine if the interventions work in practice on an on-going basis.

ing at new student orientation to the final meetings in the third year.[237] Similarly, professors should stress the importance of the bar exam and be willing to answer questions about it.[238] From time to time, professors should review the most recent state bar exam, to answer questions about the exam more effectively and accurately address the knowledge and skills required to pass.[239]

In addition, law schools and professors need to become more cognizant that not all students learn the law easily, and people learn in different ways from one another.[240] Most law school deans and professors graduated at the top of their class from some of the best law schools in the country. For them, learning the law was almost second nature. However, these faculty members need to recognize that law may not come as easily to some students and should be patient in dealing with those who do not possess certain skills or when explaining especially complicated legal problems.[241] Correspondingly, law schools should recognize that students learn in different ways by encouraging students to discover how they learn, and by exploring methods of class presentation that address divergent learning styles. For example, kinesthetic learners make a connection with information in a tactile way through writing it down. Typing the information on a laptop in class may be counterproductive for these students, making it difficult for them to retain the information.[242] Significant research has been done regarding various learning styles and multiple intelligences.[243] Clearly, these bodies of knowledge about how students learn and process information could have a profound effect on how pedagogy is provided in law schools to result in more effective quality instruction and assessment. However, legal pedagogy is not the subject at hand and will require its own article for appropriate analysis and development.[244]

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237. Day, *supra* note 15, at 341.
238. *Id.* at 345.
239. *Id.* at 345–46.
240. *Id.* at 341–42.
241. *Id.* at 342.
242. *Id.*
243. *See* HOWARD GARDNER, FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES (1983); DAVID A. KOLB, EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT (1984).
244. As these suggestions are provided, the author fully realizes that not everyone will be able to pass the bar exam. However, important understanding of self through the educational process should eliminate those who are apparently not sufficiently skilled to pass the exam; or, if they continue in the study of law, it should be with the understanding of their deficits. The question is at what point should the notice be given—after a student acquires $100,000 in debt, or before? What is the honest, ethical, and morally correct action?

Law schools should encourage students to take and master bar courses for a grade. It should be stressed that mastery of these courses is vital to passing the bar exam.[245] In fact, students who do poorly in these courses should be advised to lighten their course load in order to master the basics of the bar courses.[246] "It is better that a student spend an extra semester or summer to master the bar material than graduate in six semesters and flunk the bar."[247] In order to ensure mastery in these essential courses, law professors should rely on essay examinations and not multiple-choice tests.[248] Faculty should concentrate on crafting effective essay exams that will evaluate the analytical skills needed to be a successful lawyer. If a student possesses these skills, she will likely do well on the bar exam. That said, faculty should not end the teaching relationship with a student after the exam. Professors need to provide feedback to students by deconstructing exams.[249] A professor can help a student immensely by reviewing an exam on which the student has done poorly. The professor can show the student where she went wrong, what issues were missed, and how an answer can be improved. During this process, the student can hone her issue spotting, analytical, and writing skills, all of which are essential to pass the bar exam. A fundamental principle of learning theory is that assessment drives instruction, which leads to quality learning.[250] Law students will gain knowledge and experience from the opportunity to understand their misconceptions, mistakes, and analytical errors.

In a similar vein, law schools need to give better feedback to students by instituting more rigorous grading and retention policies.[251] Many students who failed the bar exam received low B's or high C's in law school, and they did not know they were at risk of failing the bar exam.[252] Professor Christine Jones cogently stated, "[g]rading is like

245. Day, *supra* note 15, at 343.
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.* at 345.
250. As a general rule, law school professors are not prepared to teach. Their skill set is derived from traditional legal education pedagogy, which does not include methodology of teaching or an understanding of learning processes. It may be valuable for the academy to review the research from the field of education to gain a meaningful understanding of best practices in teaching as a means to enhance legal education in America. For an introduction to best practices that may be transferable to the law school experience, see RICHARD DUFOUR & ROBERT EAKER, PROFESSIONAL LEARNING COMMUNITIES AT WORK: BEST PRACTICES FOR ENHANCING STUDENT ACHIEVEMENT, (1998), and ROBERT EAKER, RICHARD DUFOUR & REBECCA DUFOUR, GETTING STARTED: RECULTURING SCHOOLS TO BECOME PROFESSIONAL LEARNING COMMUNITIES (2002).
251. Day, *supra* note 15, at 347.
252. *Id.* at 345.

parenting," where sometimes you have to give your children the harsh realities about their lack of achievement so they can develop into mature, competent adults.[253] Similarly, law schools need to give lower ranking students honest assessments of their skills and academic abilities in order to open their eyes to the risk that they may fail the bar exam. These students should also be told that students in their position often do not pass the bar exam, so they have ample opportunity to change their study habits before it is too late.[254] Also, law schools need to institute more disciplined retention policies. "It is kinder to dismiss students from law school after one semester or one year than to re-admit students who have no chance of passing the bar."[255] Law schools should compile statistics that identify the grade point average below which students seldom pass the bar exam. Professor Christian Day proposes that professors should honestly evaluate students rather than collect another few thousand tuition dollars and then hand students a degree that cannot be used to its full capacity.[256]

Law schools should strengthen their academic support offices to advise current students and graduates who fail the bar exam.[257] Effective academic support staff can identify and counsel at-risk students who will probably do poorly on the bar exam without intervention.[258] Support office staff can advise students on what classes to take, how to improve study habits, and how to take exams effectively so they can overcome their at-risk status and improve their chances of passing the bar exam. Likewise, support office staff can continue to advise graduates who fail the bar exam the first time around.[259] The staff can propose alternative study methods to a failing applicant, providing that student with improved methods for writing, preparation, and answering bar questions in order to ensure passage on the second attempt.[260]

Law schools should actively advise students on how to properly prepare for the bar exam. They should inform students about bar review courses and perhaps offer one at the school.[261] This information will help students make educated decisions as to which courses should be taken prior to the bar exam. Equally, law schools should inform students

253. Interview with Christine Jones, Associate Professor of Law, University of the District of Columbia, Clarke School of Law (Nov. 12, 2005).
254. Day, *supra* note 15, at 345.
255. *Id.* at 347.
256. *Id.*
257. *Id.* at 346–48.
258. *Id.* at 347–48.
259. *Id.* at 346.
260. *Id.*
261. *Id.* at 348.

that preparing for the bar is a full-time job, and their personal and financial affairs need to be in order to allow focused study time.[262] It must be stressed that students should not work during the bar prep time because the review is intensive and extremely important to success on the exam. Obviously, studying for the bar will come at a cost to the student who is paying for the review course and cannot earn a wage. However, the cost is small compared to failing the bar exam, and making a six figure investment in a legal education inoperable for a period of at least six months.[263] Most importantly, when reviewing bar exam practice questions, students must learn to fully analyze an issue when responding. Answering hundreds of questions, without an in-depth understanding of the proper response analysis, is a meaningless activity that will not give positive results.[264]

CONCLUSIONS AND RECOMMENDATIONS

When students enter law school they should be given learning style tests to determine which learning style and note-taking method is most appropriate for them. Law school faculties can greatly enhance the quality of education they provide by engaging in best practices that focus on assessment-driven instruction and quality feedback for students. If students do not effectively use laptop computers to take notes, they should be discouraged from using them. Academic services should be available to all students, but an emphasis should be put on students in the bottom ten to twenty-five percent of their class. These academic services should include involvement of doctrinal faculty, as well as academic support services faculty, and potentially qualified members of the upper classes. Academic services extending beyond the first year should continue to place emphasis on students in the bottom ten to twenty-five percent of their class. Students who are not performing at minimum standards

262. *Id.* at 346.

263. *Id.*

264. *DU Panel Probes Low Pass Rate . . ., supra* note 18 ("A committee of well-known University of Denver law school graduates empanelled to examine 'disturbingly low bar pass rates' has identified nine possible reasons" including too many take-home examinations, inadequate assistance for students scoring lower on the LSAT entry examination and "grade inflation leading to students thinking they are better prepared for the bar exam than they really are." Other reasons identified were failure to require 6–7 courses in law school tested on the bar exam; failure to dismiss students not making satisfactory progress; economic pressure on some to work while studying for the bar; some faculty members' view that 'professional licensure' is secondary to developing analytical and expressive abilities; statistics indicating that the bottom twenty percent of the class after first year are unlikely to pass the bar regardless of the course of study; "and a number of repeat takers who were admitted to the College of Law years ago but continue to take the bar drive down the overall passage rate.").

should be notified, and if improvement is not made, should be counseled out of law school. While this is certainly a difficult decision, it should be more difficult to cash tuition checks while knowing that a student is unlikely to pass the bar exam.

In preparing for the bar exam, students should take a bar review course. Students should be discouraged from working during bar preparation and should be reminded that after more than twenty years of investment in education, two additional months and an additional loan may be necessary to ensure bar passage. Students must become keenly aware that failure occurs because of an inability to identify legal issues, failure to separate relevant from irrelevant information, and a lack of ability to properly organize and analyze legal issues.

Finally, although a subject of some controversy, the bar exam has its place in the preparation of future lawyers. However, the time is ripe for the National Conference of Bar Examiners to consider an evolution of the bar exam to incorporate advancing technologies in assessment and understandings of the contemporary practice of law. As a profession, we have an opportunity to engage in research to better address the needs of students, the legal profession, and society to level the playing field for fairness and equity for all students.