How Should We Measure Preparedness for Admission to the Bar?

by Jeanne F. Franklin
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Supreme Court of Virginia

Senior Justice Elizabeth B. Lacy introduced the second panel discussion by framing the context in which the Virginia Board of Bar Examiners functions to assess competency to practice law. She reminded the audience that the legal profession is self-regulated, a privilege few if any other professions enjoy. Thus the stakes are high for the profession to discharge its responsibility to protect the public by ensuring the competence of those admitted to the practice of law. She added that the consumer protection factor is further challenged by the blurring of geographic and other boundaries; Virginia lawyers of the future may be practicing on a broader scale and stage in several respects.

Panel members were the Honorable B. Waugh Crigler, U.S. District Court, Western District; William D. Dolan III of Venable; Professor James E. Moliterno of Washington and Lee University School of Law; and Anita O. Poston of Vandeventer Black.

Presentations

Anita Poston of the Virginia Board of Bar Examiners provided enlightening details about the Virginia Bar examination and admission process.

In Virginia, competence is measured in three ways: an applicant must have completed an accredited law school program or a law reader program; must demonstrate his or her character and fitness to practice by means of an evaluation process conducted by a separate committee of the Board of Bar Examiners; and, must pass the examination administered by the board.

The Character and Fitness Committee moved from the earlier practice of accepting certification by Virginia law school deans as to character and fitness to the current process of reviewing extensive applicant information, with an eye to certain indicia such as suggestion of possible substance abuse issues and difficulty managing finances. Closer scrutiny of anywhere from 80 to 100 applicants may occur in each round of applications, and hearings to make a final determination of fitness may occur in the case of about thirty applicants. Once past the character and fitness reviews, applicants may take the exam.

The principle guiding the examiners' drafting of the exam is to test an applicant's "minimum competency on any given day to practice in a general law practice" and is designed to measure the entry-level practitioner. The exam has evolved and the challenge has been how to test a new practitioner in the average Virginia community. The answer at present is that the Virginia portion of the exam (as opposed to the multistate) contains nine essay questions that test from approximately twenty-seven substantive areas. The

Panel II addressed how the Virginia Board of Bar Examiners measures preparedness for admission to the bar. Panelists (left to right) were Anita O. Poston, of Vandeventer Black LLP and member of the Virginia Board of Bar Examiners; Professor James E. Moliterno, of Washington and Lee University School of Law; William D. Dolan III, of Venable LLP; and the Honorable B. Waugh Crigler, U.S. District Court, Western District. The moderator was Supreme Court of Virginia Senior Justice Elizabeth B. Lacy.

Virginia essay questions require the applicant to analyze fact patterns, spot legal issues, and note substantive, procedural, and professionalism issues in the answers.

Since 1960 when the number of applicants taking the exam was 477, the number has risen steadily to the high in 2011 of 2,022. Yet, the pass rates have not appreciably changed, although grades on the multistate portion of the exam have inched upward. Of concern, though, is a clear pattern of deteriorating writing skill.

Just as the bar examiners pay thoughtful attention to the drafting of the exam in light of its guiding principle, they give careful attention to the validity and accuracy of grading and to fairness over time. How they perform both functions includes comparing notes and ideas with other state bar examiners.

Professor Moliterno then offered his perspective on whether the bar exam is an accurate measure of preparedness to practice law. He began with his conclusion that the bar exam tests both too much and too little. He agreed that the exam serves a very important gatekeeper function but suggested that the function should bear a stronger relationship to "what is on the other side of the gate." Noting the relationship between the bar exam and what law schools teach, he framed the question as, "How do we meet the challenge of designing a test that serves its purposes but that does not have unintended, deleterious consequences?" Some of his points were:

The exam tests basic knowledge in too many subjects — preparation for twenty-seven substantive areas is too much; no lawyer knows all useful law, and it is unrealistic to test every topic that might come up in a new practice. Lawyers practice by synthesizing substantive knowledge and skill to solve a particular client problem.

The breadth of knowledge tested on the bar exam acts as a deterrent to law schools and law students who might otherwise want to depart from a more traditional legal curriculum and try innovative approaches to integrated curricula that blend subject matter with skills instruction and practice.

Of concern, though, is a clear pattern of deteriorating writing skill.

Law schools need to teach more to inculcate skill sets, including making the law students write; there should be more courses about synthesizing several substantive areas, about professional culture, values, and business, about problem solving and how to get things done — in short about the practice of law (what's on the other side of the gate).

The need for law schools and their students to pass the bar examination creates the perception that focusing on matters other than the subject areas that may be tested poses risk and thus creates insecurity about taking time and resources to try other learning approaches.

Law schools need freedom to innovate and to devote a higher percentage of their resources to such efforts.

Judge Crigler addressed the core question, "Does the bar exam test competency to practice law in Virginia?" He emphasized that the ability to communicate well orally and in writing is vital to the effective practice of law. Yet he observed that today's students tend to speak in text messaging format; in their writing, they use a lot of words but their points are not easily discernible. Judge Crigler said that writing is a real problem.

Law schools are trying to do something about the writing problem but how to cure it is not easily answered. Key points in his comments included:

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We need innovation in teaching and by implication in testing or measurement of competence in communications; we must develop new responses to competence issues.

We must not lose sight of the imperative to serve members of rural and local communities in Virginia, providing competent lawyers to fill their need for capable advice and representation. Meeting that need requires lawyers who will be able to communicate with the people in their local communities by writing well and relating effectively through oral communication.

Lawyers practicing in local communities do not necessarily know what legal problem will walk through their doors and the bar exam does need to have that in mind in assessing competence.

The great homogenization of the bar exam should not detract from the state bar examiners' role in seeing that communities within the state will be served by competent lawyers.

In response to the apparent decline in law firm hiring of summer interns, we should consider year-round law school to allow more time for honing of knowledge and skills.

A question is, how do we meet the challenge of producing law students who are prepared and productive, who will function well in their capacity as practicing attorneys? It is not just about grades and good test takers.

Mr. Dolan, former Virginia State Bar president, spoke from his vantage point as an attorney practicing in a large law firm employing young law students and graduates. He thanked the law schools for their willingness to engage in this conversation at a time when they are being asked to do more and in the face of increasing challenges.

He noted that some literature focuses on distinguishing between law students from "elite" schools who are groomed to serve the corporate community, and those from more local schools who will likely be serving individuals. However, he said he believes that the skills necessary to be a practicing attorney are universal and he views the challenge under discussion as how to "make sure that the eight million people who live in Virginia, when they have a Virginia lawyer, they have someone that we believe is competent, is ethical, and has integrity."

He drew a conclusion similar to Judge Crigler's — that the most essential and valued skill is legal writing. Significantly, it is the ability to write well that is observed and assessed in law firm legal internships and hiring decisions. Mr. Dolan elaborated that the changes in law firm hiring and practice driven by the economy (such as clients indicating that they will not pay for work done by first- and second-year associates) rein-

force the need for this skill; a primary value of the young associates' work is to write — to produce well-written and reasoned analyses.

He urged that we do something about the *US News & World Report* law school rankings which are having a distorting effect, and detract from the job of educating future lawyers. In closing, he returned to the notion of character as a core competence to practice law, and pointed out that our culture is saturated in materialism. We should remember our aspirational heritage, and remind students coming into the profession that the "lions of the bar" were lawyers who were oriented to public service.

Discussion and Suggestions

Audience discussion of the panel topic was lively and wide ranging. Nonetheless, on the specific subject of how to measure competence to practice law:

Consensus was not reached that the bar exam in its current form should be changed.

Concern was expressed about the high cost of applying for licensure and preparing for the examination on top of law school debt already accrued. In light of that, what might law schools do to help students with the bar examination?

Experience following the third-year program at Washington and Lee is that the students are not doing significantly differently on the bar exam. But that should not detract from the point that it is the fear of the exam that can drive law school and law student reluctance to engage in too innovative a curriculum.

Can law firms do more to assist with mentoring and internship experience, through which experienced practitioners will provide some practical skill instruction and assessments?

Pre-law requisites are seen as a possible way to provide and measure skills competencies, placing some of the teaching and demonstration of competence at an earlier stage in the continuum of forming legal practitioners.

The panel was concluded by Professor Reveley who also served as co-chairman of the conclave. He offered three concrete actions that could address identified issues:

- Alleviate concerns about the cost of commercial bar preparation courses for applicants and their uneven caliber of instruction by having law schools take over the function, and at lower cost to students;

- Expand law firm apprenticeships such as those offered at Gentry, Locke, Rakes & Moore LLP to enhance teaching of practical skills and core competencies;

We should remember our aspirational heritage, and remind students coming into the profession that the "lions of the bar" were lawyers who were oriented to public service.

- Take steps to address the writing problem (acknowledging that teaching writing is hard for multiple reasons) by asking law schools to make demonstration of competence in writing a condition of admission and by having the bar exam include a writing dimension.

There is a perceived tension between the function of the Board of Bar Examiners and the call upon law schools to innovate and revise curricula. Yet both parties share the common purpose of minting young lawyers who will be competent to take their place in society as servants of their legal clients. This suggests a more focused dialogue between them to confirm common goals, and generate, evaluate, and flesh out ideas that may help each perform their respective jobs to meet those shared goals, while taking into account the changing environment, including culture, resources, and identified public needs.