Building a Better Bar: The Twelve Building Blocks of Minimum Competence

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Executive Summary

The bar exam tries to distinguish minimally competent lawyers from incompetent ones: it exists to protect the public from the harms of incompetent legal representation. That protection is critical to maintaining the integrity of the profession, but the bar exam achieves that goal only if it effectively assesses minimum competence. The unfortunate reality is that, although the bar exam has existed for more than a century, there has never been an agreed-upon, evidence-based definition of minimum competence. Absent such a definition, it is impossible to know whether the bar exam is a valid measure of the minimum competence needed to practice law or an artificial barrier to entry.

While there have been a handful of efforts to gain an empirical understanding of the skills and knowledge new lawyers use in their early years of practice, few researchers have explicitly sought to define minimum competence. The few attempts to probe minimum competence have relied on surveys, which lack the ability to delve into the nuances of new lawyers' work. Surveys do not allow new lawyers to describe their work in detail or to explain *how* they use their skills and knowledge in that work.

We designed this study to address these substantial gaps in our knowledge, build on the existing research, and develop an evidence-based definition of minimum competence. In the latter half of 2019 and early 2020, we conducted 50 focus groups using a protocol we developed to gather data about the knowledge and skills new lawyers need to practice competently. Of those focus groups, 41 were conducted with new lawyers, while the remaining nine were conducted with those who supervise new lawyers.

The data from these focus groups suggest that minimum competence consists of 12 interlocking components—or "building blocks."

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

Further, our data led us to five insights about appropriate, accurate assessment of minimum competence:

- Closed-book exams offer a poor measure of minimum competence to practice law;
- Time constraints on exams similarly distort assessment of minimum competence;
- Multiple choice questions bear little resemblance to the cognitive skills lawyers use;
- Written performance tests, in contrast, resemble many of the tasks that new lawyers perform; and
- Practice-based assessments, such as ones based on clinical performance, offer promising avenues for evaluating minimum competence.

Based on our findings, we propose 10 recommendations for courts, law schools, bar associations, bar examiners, and other stakeholders to consider in their efforts to move towards evidence-based lawyer licensing.

> **Recommendation One:** Written exams are not well suited to assessing all aspects of minimum competence. Where written exams are used, they should be complemented by other forms of assessment.
>
> **Recommendation Two:** Multiple choice exams should be used sparingly, if at all.
>
> **Recommendation Three:** Eliminate essay questions from written exams and substitute more performance tests.
>
> **Recommendation Four:** If jurisdictions retain essay and/or multiple choice questions, those questions should be open book.
>
> **Recommendation Five:** Where written exams are used, provide more time for all components.
>
> **Recommendation Six:** Candidates for licensure should be required to complete coursework that develops their ability to interact effectively with clients.
>
> **Recommendation Seven:** Candidates for licensure should be required to complete coursework that develops their ability to negotiate.
>
> **Recommendation Eight:** Candidates for licensure should be required to complete coursework that focuses on the lawyer's responsibility to promote and protect the quality of justice.
>
> **Recommendation Nine:** Candidates for licensure should be required to complete closely supervised clinical and/or externship work.

Recommendation Ten: A standing working group made up of legal educators, judges, practitioners, law students, and clients should be formed to review the 12 building blocks and design an evidence-based licensing system that is valid, reliable, and fair to all candidates.

The legal profession prides itself on its integrity. But if we are to meet our own expectations—and those of the public—we must adopt an evidence-based definition of minimum competence. We must also use that empirically grounded definition to shape the lawyer licensing system. Our research provides the critical first step on this path.

Introduction

Professional licensing systems attempt to shield the public from incompetent practitioners, but they can also harm consumers by insulating professions from unwanted competition.[1] Historically, these systems have also been used to exclude people of color and other groups deemed "undesirable" from law and other professions.[2] James Willard Hurst, a preeminent legal historian, warned of these conflicting tendencies within the United States legal profession. After reviewing the rise of written bar examinations during the first half of the twentieth century, Hurst concluded: "[I]n the face of perennial cries about an 'overcrowded' bar, and because the bar mirror[s] the prejudices of its society, the integrity of the examination system require[s] careful watch."[3]

Despite Hurst's warning, we in the legal profession have not kept close watch over our examination system. Jurisdictions developed written bar exams without any serious attempt to define the minimum competence that their exams purported to measure.[4] Experts defended these exams by noting that the questions tracked the required law school curriculum and that scores correlated with both law school grades and LSAT scores.[5] Neither of those measures, however, were empirically tied to minimum competence for practice.

Without a secure, evidence-based definition of minimum competence, we cannot claim that the system for licensing lawyers protects the public from incompetent legal representation. Nor can we sever the current system from its undeniably racist and protectionist roots.[6] Our profession urgently needs to define the minimum competence needed to practice law, to ground that definition in empirical evidence, and to use that grounded definition to inform the licensing process.

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[1] *See generally* WHITE HOUSE REPORT, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf; Brian E. Clauser, Melissa J. Margolis & Susan M. Case, *Testing for Licensure and Certification in the Professions*, *in* EDUCATIONAL MEASUREMENT 701 (ROBERT L. BRENNAN ed. 2006).

[2] *See, e.g.,* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976); R. Scott Baker, *The Paradoxes of Desegregation: Race, Class, and Education*, *1935-1975*, 109 AM. J. EDUC. 320 (2001); Clauser et al., *supra* note 1, at 702; George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103 (2003).

[3] JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 284 (Lawbook Exchange 2011).

[4] *See, e.g.*, RUDOLPH J. GERBER, LAWYERS, COURTS, AND PROFESSIONALISM: THE AGENDA FOR REFORM 55 (1989) ("Evidence that the examination reflects the practice of law in any way is rarely presented"); Stephen P. Klein, *Summary of Research on the Multistate Bar Exam*, BAR EXAMINER, Aug. 1983, at 10, 13 ("No studies have attempted to correlate MBE scores with 'success as a lawyer' because of the difficulty of obtaining agreement as to a valid measure of success.")

[5] *See, e.g.*, GERBER, *supra* note 4, at 55-56; Klein, *supra* note 4, at 12-13.

[6] *See e.g.*, AUERBACH, *supra* note 2; Shepherd, *supra* note 2.

Over the last decade, a few researchers have started work on defining minimum competence. In 2012, the National Conference of Bar Examiners (NCBE) published the results of its first job analysis survey.[7] Over 1,600 newly licensed lawyers responded to that survey, providing information about the tasks they performed and the knowledge, skills, and abilities they needed for their work. NCBE commissioned an expanded practice analysis in 2019, obtaining survey responses from 3,153 newly licensed lawyers and 11,693 more senior lawyers.[8] During the same year, the California State Bar sponsored a pair of surveys that gathered responses from 16,190 attorneys practicing in that state.[9]

The results of these surveys offer important insights into the work that new attorneys do, but they are not sufficient on their own to define minimum competence. The surveys designate very large knowledge areas, such as "contracts" or "evidence," without exploring the type of knowledge that new attorneys need within those areas. Similarly, they ask respondents to identify needed skills without explaining how they use those skills. Most important, the surveys conducted by NCBE and the California Bar did not ask respondents to distinguish foundational skills and knowledge that they brought into the workplace (and that might most readily constitute minimum competence) from skills and knowledge acquired over their initial practice years.

To provide a more nuanced and comprehensive view of minimum competence, we designed a national study using 50 focus groups to probe new lawyers' work. In addition to asking for more detail about the knowledge and skills that new lawyers used during their first year of practice, we explored how they obtained those competencies. Did they bring the competencies into the workplace? Or did they acquire knowledge and skills as needed, building on more foundational competencies?

Our research suggests that new lawyers do not rely upon a static set of legal rules and skills carried into the workplace. Instead, their knowledge and skills evolve continuously during their

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[7] STEVEN S. NETTLES & JAMES HELLRUNG, A STUDY OF THE NEWLY LICENSED LAWYER (2012). NCBE is a nonprofit that, among other services, develops bar exam components for jurisdictions throughout the United States. NAT'L CONF. BAR EXAMINERS, 2019 YEAR IN REVIEW 3, https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F258 [hereinafter "YEAR IN REVIEW"]. The organization currently offers four different exams: the Multistate Bar Examination (MBE), which includes 200 multiple choice questions; the Multistate Essay Examination (MEE), which includes six essay questions; the Multistate Performance Test (MPT), which "consists of two performance tasks . . . that a newly licensed lawyer should be able to accomplish"; and the Multistate Professional Responsibility Exam (MPRE), which includes 60 multiple choice questions focused on professional conduct. *Id*. at 13-14. NCBE offers its services the 50 states, District of Columbia, and five island territories, for a total of 56 jurisdictions. *Id.* at 13. Of those jurisdictions, 54 used the MBE in 2019; 42 used the MEE; 48 used the MPT; and 54 used the MPRE. *Id*. at 12, 14.

[8] NAT'L CONF. BAR EXAMINERS TESTING TASK FORCE, PHASE 2 REPORT: 2019 PRACTICE ANALYSIS 13 (2020) [hereinafter "PHASE 2 REPORT"].

[9] STATE BAR OF CALIFORNIA CAPA WORKING GROUP, THE PRACTICE OF LAW IN CALIFORNIA: FINDINGS FROM THE CALIFORNIA ATTORNEY PRACTICE ANALYSIS AND IMPLICATIONS FOR THE CALIFORNIA BAR EXAM 9 (2020) [hereinafter "CAPA STUDY"].

early practice years. This cognitive adaptability appears to be new lawyers' key to success: it is essential for them to navigate an ever-changing landscape of laws and client problems.

Our data allowed us to probe this adaptability further: we identified 12 interlocking competencies that allow new lawyers to serve clients effectively during their first year of practice. We propose that these competencies—or building blocks—constitute the minimum competence needed to practice law.

We describe those building blocks in this report, as well as the evidence supporting them. We also highlight the relationship between licensing and access to justice. The United States suffers from a profound justice gap. Decades of research has shown that most civil justice issues people experience are never taken to a lawyer or to the courts.[10] Large proportions of civil cases in state courts—about three-quarters according to one study—involve at least one self-represented litigant.[11] Further, research demonstrates that individuals that go through court processes without representation tend to have worse case outcomes than their represented counterparts.[12] This justice gap affects much of our society, but strikes particularly hard for low-income individuals and people of color.[13]

A licensing system that imposes unnecessary barriers to admission may exacerbate the justice gap. At the same time, a system that fails to screen for key competencies may subject clients, especially the most vulnerable, to poor representation. To protect the public and preserve access to justice, jurisdictions must define minimum competence as precisely as possible—and then apply that definition in the licensing system. Employing an evidence-based definition of minimum competence to inform lawyer licensing creates a sweet spot that assures competent representation by the largest possible pool of lawyers.

We have organized this report into three broad sections. The first section reviews notable prior research and describes our study's method. The second section details three types of insights drawn from our focus group data: 1) insights into the context in which new lawyers practice; 2) information about the 12 building blocks those lawyers needed for minimum competence; and 3) perspectives on tools for assessing competence. The final section offers our recommendations for

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[10] Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence,* 9 SEATTLE J. FOR SOC. JUST. 60 (2010) [hereinafter *The Impact of Counsel*].

[11] NAT'L CENTER FOR ST. CTS., THE LANDSCAPE OF CIVIL JUSTICE IN STATE COURTS 32 (2015), https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf.

[12] *The Impact of Counsel*, *supra* note 10, at 69; D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013).

[13] *See* LEGAL SERVICES CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf; Brian Libgober, *Getting A Lawyer While Black: A Field Experiment*, 24 LEWIS & CLARK L. REV. 53 (2020); Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 Annual Rev. of Sociology (2008).

an evidence-based licensing system, together with three examples of systems that could effectively assess the building blocks of minimum competence.

Background

Prior Research

Surprisingly few studies have probed the knowledge and skills that new lawyers need to represent clients competently. Almost a century ago, Karl Llewellyn asked wryly, "What *is* this doing of lawyers? Whither are we to head our students? We do not know."[14] Scholars have repeated that sentiment over the decades, decrying the lack of systemic research into the competencies that lawyers need for their work.[15] We highlight here, however, some key studies that informed our research.[16]

The first empirical studies of lawyer competence date from the 1970s. Leonard Baird, a senior research psychologist at the Educational Testing Service (ETS), conducted the largest of those studies.[17] Baird mailed surveys to 4,000 graduates of six representative law schools, seeking information about the importance of 21 skills and knowledge areas in their work.[18] Respondents rated the importance of each competency on a 3-point scale and also identified the competencies that were "key elements" of their practice. The latter designation meant that "adequate performance would not be possible in its absence."[19] Table 1 lists the competencies that at least a third of Baird's respondents tagged as "key elements" essential for adequate performance.

Table 1: Competencies Necessary for Adequate Performance (Baird 1977)

Competency	**Percentage Identifying as "Key Element"**
Ability to Analyze and Synthesize Law/Facts	67.0
Knowledge of Statutory Law	60.5
Ability to Write	55.6

[14] K.N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 654 (1935) (emphasis original).
[15] *See, e.g.*, FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 123-24 (1981); Deerdra Benthall-Nietzel, *An Empirical Investigation of the Relationship Between Lawyering Skills and Legal Education*, 63 Ky. L.J. 373, 373-74 (1974).
[16] Some of these studies suffer from methodological defects but we do not critique them here. Instead, we simply describe the background against which we worked.
[17] Leonard L. Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264 (1977). As the title of Baird's article indicates, his survey also probed the extent to which law schools prepared graduates to practice with these competencies.
[18] *Id*. at 273. The 4000 surveys yielded 1600 usable replies, although about 700 surveys did not reach their addresses. Baird excluded the latter to suggest a response rate of "approximately 50 percent." *Id*. at 267. Including all surveys in that calculation would yield a response rate of 40.0%.
[19] *Id*. at 273.

Competency	Percentage Identifying as "Key Element"
Ability to Be Effective in Oral Communication	51.6
Ability to Research	43.3
Ability to Draft Legal Documents	43.0
Ability to Counsel Clients	41.4
Ability to Negotiate	39.5
Knowledge of Procedural Rules of Courts, Etc.	35.0

As the table suggests, Baird's respondents attached higher importance to abilities than to knowledge: seven of the nine highly rated elements were abilities. Among knowledge areas, the respondents reported that statutory law was far more important than any other field. Knowledge of common law and constitutional law, in fact, do not even appear in the table. Only 25.1% of Baird's respondents believed that knowledge of common law was essential for their work, and just 15.3% attributed that importance to constitutional law.[20]

Three other surveys from this era focused on lawyers practicing in particular states or cities. The largest of those surveys, conducted by Robert Schwartz in 1973, asked 1,200 California lawyers to rate the importance of 15 different skills and knowledge areas.[21] Like the respondents to Baird's survey, Schwartz's respondents identified a large number of skills as critical for their law practice. More than half labeled analyzing cases (63.6%), legal research (56.9%), investigating the facts of client cases (56.3%), and counseling clients (53.5%) as "essential" for their work.[22]

More than half (56.1%) of Schwartz's respondents also identified "knowledge of substantive law" as essential,[23] but they distinguished sharply between that knowledge and "memorizing legal concepts." Only 4.0% of respondents believed that memorizing legal concepts was essential to their practice.[24] Memorization of legal concepts, in fact, received more "not useful" ratings than any other item on the survey: almost one-third of respondents (29.3%) labeled memorization as not useful.[25]

[20] Curiously, Baird's respondents also viewed knowledge of the "ethics of the profession" as relatively unimportant, with just 16.9% marking that knowledge as a key element. *Id.* The 1970s, however, were a time when lawyer codes of professional conduct suffered some skepticism. During those years, for example, the Supreme Court struck down the minimum fee schedules maintained by some bar associations under the umbrella of professional ethics. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). That context may have affected responses on this point.
[21] Robert A.D. Schwartz, *The Relative Importance of Skills Used by Attorneys*, 3 GOLDEN GATE U. L. REV. 321 (1973). Schwartz was a member of the California bar who conducted the survey independently. He received 634 replies, yielding a response rate of 52.8%. *Id*. at 321.
[22] *Id.* at 325.
[23] *Id*.
[24] *Id.*
[25] *Id.*

Deerdra Benthall-Nietzel sent an expanded version of Schwartz's survey to a random selection of 959 Kentucky lawyers.[26] These lawyers, like Schwartz's respondents, attached little importance to "memorizing legal concepts." That competency ranked last in importance on a list of 30 skills and knowledge areas.[27] Once again, moreover, respondents distinguished between memorization and knowledge. "Knowledge of statutory law subjects" received the highest mean rating on Benthall-Nietzel's survey.[28] Respondents needed to know about these subjects but not memorize them. Echoing Baird's national findings, meanwhile, the Kentucky respondents attached little importance to knowledge of common law subjects.[29]

Wrapping up studies from the 1970s, Frances Kahn Zemans and Victor G. Rosenblum surveyed 825 randomly selected Chicago practitioners.[30] These researchers asked respondents to rate on a 5-point scale "the degree to which" 21 competencies were "important or unimportant in [their] practice." The skill of fact gathering topped the list in importance: 69.7% of respondents rated that skill "extremely important," another 23.3% rated it "important," and the skill earned a higher mean importance score than any other competency.[31] Other highly rated competencies included the "capacity to marshal facts and order them so that concepts can be applied," "instilling others' confidence in you," "effective oral expression," and the "ability to understand and interpret opinions, regulations, and statutes."[32] Knowledge of substantive law placed sixth on the list, and knowledge of procedural law fifteenth.[33]

These early surveys did not distinguish between the competencies needed by junior lawyers and those required by more senior colleagues. Bryant G. Garth and Joanne Martin focused more closely on entry-level competence in two surveys conducted during the early 1990s.[34] One survey, mailed to a random sample of 1,500 junior lawyers practicing in Chicago, asked respondents to rate the importance of 17 skills and knowledge areas on a 5-point scale.[35] Oral

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[26] Benthall-Nietzel, *supra* note 15, at 377. Benthall-Nietzel, a law graduate, was a special assistant to the dean at the University of Kentucky College of Law when she conducted the survey. 416 lawyers responded, yielding a response rate of 43%. *Id*. at 377.
[27] *Id*. at 384.
[28] *Id.*
[29] The mean importance rating for this competency placed fifth from the bottom on Benthall-Nietzel's list of 30 competencies. *Id.* Knowledge of administrative procedure was deemed even less important, ranking third from the bottom. Knowledge of trial and appellate procedure ranked in the middle of the 30 competencies. *Id.*
[30] ZEMANS & ROSENBLUM, *supra* note 15. The American Bar Foundation supported this study by Zemans, a political scientist, and Rosenblum, a professor of law and political science at Northwestern University. Their study elicited responses from 548 attorneys—a response rate of 66.4%. *Id*. at 19.
[31] *Id*. at 125.
[32] *Id.*
[33] *Id.*
[34] Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469 (1993). Garth and Martin were the director and assistant director of the American Bar Foundation.
[35] *Id*. at 471-72. Garth and Martin defined junior lawyers as those who had been licensed for no more than six years. *Id*. at 471. The response rate from these lawyers exceeded 50%. *Id*.

communication earned the top score, followed closely by written communication.[36] Other cognitive skills—including legal analysis and reasoning, drafting legal documents, and diagnosing and planning solutions for legal problems—also received high marks. Respondents rated each of these skills as more important than knowledge of substantive or procedural law.[37]

Garth and Martin's second study drew on telephone interviews with more than 115 hiring partners in Chicago firms.[38] Garth and Martin asked these partners to distinguish between knowledge and skills that they wanted new lawyers to bring to the workplace and those that could be developed on the job. Nine-tenths of the hiring partners wanted new lawyers to bring oral and written communication skills into the workplace, while less than a third sought knowledge of substantive or procedural law.[39] The latter competencies, hiring partners indicated, could be developed on the job. The partners thus agreed with junior lawyers that cognitive skills like communication were more important for new lawyers than knowledge of particular legal principles.

In the new millennium, Marjorie Shultz and Sheldon Zedeck adopted a different method for identifying the competencies that new lawyers need to practice effectively. Relying on hundreds of individual and group interviews with lawyers, law students, legal educators, judges, and clients, Shultz and Zedeck identified 26 factors, "important in the eyes of these varied constituencies, to being an effective lawyer."[40] They did not attempt to rank those factors, but reiterated the importance of skills like analysis and reasoning, researching the law, fact finding, questioning and interviewing, writing, speaking, and negotiating.[41] They also highlighted the importance of several new competencies, including creativity/innovation, problem solving, practical judgment, listening, strategic planning, organizing, business development, working with others, integrity/honesty, stress management, self development, and the ability "to see the world through the eyes of others."[42]

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[36] *Id*. at 473.
[37] *Id.*
[38] *Id*. at 471. The partners all worked at firms with at least five partners. *Id.* The authors report a "better-than-50-percent response rate" for these interviews. *Id*.
[39] *Id*. at 490. The percentages for each category were: oral communication (91%), written communication (90%), knowledge of substantive law (30%), knowledge of procedural law (28%). Hiring partners and junior lawyers did differ on at least one score. High percentages of hiring partners wanted new lawyers to bring library legal research skills (92%) and computer legal research skills (84%) into the workplace. *Id*. Junior lawyers, in contrast, rated these skills as relatively unimportant. *Id*. at 475. The results are reconcilable on the grounds that employers wanted lawyers to possess these skills but, over the first five years of practice, they were not as important as other skills and knowledge.
[40] MARJORIE M. SHULTZ & SHELDON ZEDECK, FINAL REPORT: IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING 25 (2008). Shultz was a Professor of Law at the University of California--Berkeley, and Zedeck was a Professor of Psychology at the same campus.
[41] *Id.* at 26-27.
[42] *Id*. Shultz and Zedeck, notably, did not include knowledge of legal principles as one of their effectiveness factors. This may reflect their ultimate research goal, which was to develop new measures to select students for law school

None of these studies were authored or commissioned by bar examiners. NCBE did not gather empirical evidence of the competencies needed by new lawyers until 2011, when it commissioned a job analysis to explore that question. An electronic instrument surveyed recently licensed lawyers about: their practice areas; the tasks they performed; and the knowledge, skills, or abilities they used for that work.[43] Results showed the overwhelming importance of a long list of cognitive skills, including written communication, listening, oral communication, critical reading, synthesizing facts and law, legal reasoning, issue spotting, researching, and information gathering.[44] Knowledge of substantive or procedural law was much less important. Twenty-five different skills, in fact, were deemed more important than the highest rated knowledge area on the survey.[45]

NCBE recently updated this study as part of a three-year, multi-phase study to "identify core competencies for newly licensed lawyers and explore when and how those competencies should be assessed."[46] This electronic survey, which secured 14,846 responses, probed multiple aspects of junior lawyers' practice: the frequency and criticality of tasks performed; importance of substantive knowledge areas; criticality of skills, abilities, and other characteristics; and needed proficiency level for technological abilities.[47] Once again, the survey revealed the relative importance of skills compared to knowledge, although the gap was not as large as in NCBE's earlier study. Table 2 lists, in descending order of importance, the 20 knowledge areas, skills, abilities, and other characteristics that respondents deemed most important.[48]

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admission; knowledge of legal principles would not be relevant in that context. Their extensive interviews, alternatively, may have suggested that this knowledge is less important than the factors they identified.

[43] NETTLES & HELLRUNG, *supra* note 7. The researchers defined recently licensed lawyers as those who had been licensed within the last three years. *Id*. at 8. The survey suffered from a low response rate (8.4%), but the authors' analyses persuaded them that the results were sufficiently reliable and representative. *Id.* at 9.

[44] *See* Susan M. Case, *The NCBE Job Analysis: A Study of the Newly Licensed Lawyer*, THE BAR EXAMINER, Mar. 2013, at 52, 55.

[45] *Id*. at 54-55.

[46] *About*, TESTING TASK FORCE, https://testingtaskforce.org/about (last visited Oct. 10, 2020).

[47] *Id*. at 11, 13. NCBE administered the survey through a portal on its website, which remained open for just over two months. *Id*. at 12. Newly licensed lawyers (those licensed for three years or less), as well as more senior lawyers with direct experience working with or supervising newly licensed lawyers, were eligible to complete the survey. *Id*. at 1, 11. Given the manner of administration, it is impossible to calculate a response rate—but 3,153 newly licensed lawyers and 11,693 more senior lawyers provided usable answers. *Id*. at 13. Due to the length of the survey, each respondent answered questions on just part of the full instrument. *Id*. at 12.

[48] These ratings are drawn from Table C.1, *id.* at 57-58, and Table D.1, *id*. at 62-63. For knowledge areas, we report the mean "importance" assigned by all respondents to the survey (*i.e*., both newly licensed lawyers and those who worked with or supervised those lawyers directly). For skills, abilities, and other characteristics, we report the mean "criticality" rating from all respondents. Both importance and criticality were measured on four-point scales ranging from 0-3. *Id*. at 10-11. To the extent respondents attributed different meanings to "importance" and "criticality," the comparison may understate the value respondents attached to skills, abilities, and other characteristics: an "important" competency may not be "critical." Both scales, however, used "essential" for the top rating, reducing this difference.

Table 2: Top Twenty Knowledge Areas, Skills, Abilities, and Other Characteristics (NCBE 2020)

Critical/Analytical Thinking	2.8
Identifying Issues	2.8
Integrity/Honesty	2.8
Written Expression	2.8
Written/Reading Comprehension	2.8
Adapting to Change, Pressure, or Setbacks	2.7
Advocacy	2.7
Conscientiousness	2.7
Fact Gathering	2.7
Observant	2.7
Oral Comprehension	2.7
Practical Judgment	2.7
Professionalism	2.7
Rules of Professional Responsibility and Ethical Obligations	2.7
Civil Procedure	2.6
Collegiality	2.6
Continuous Learning	2.6
Contract Law	2.6
Oral Expression	2.6
Researching the Law	2.6

Three knowledge areas (Professional Responsibility, Civil Procedure, and Contract Law) qualified for the 20 most important competencies, and a fourth (Rules of Evidence) fell just outside the top 20—but the dominance of skills, abilities, and other characteristics is notable. Equally noteworthy, four of the 10 most highly rated knowledge areas cover subjects that are only minimally tested on the current bar exam: Legal Research Methodology, Local Court Rules, Statutory Interpretation Principles, and Sources of Law.[49]

The California State Bar sponsored a practice analysis during the same year as the NCBE survey. This study, which garnered responses from a total of 16,190 attorneys in that state, had two components: a long-form, conventional survey administered electronically, and an experience sampling method survey.[50] The latter survey consisted of brief email questions sent to respondents at random times during the day; these questions asked respondents to report what they were doing in real time. Together, these surveys probed several issues: how frequently

[49] *Id*. at 57. The Multistate Performance Test requires some knowledge of statutory interpretation and sources of law, but that test comprises a small part of the bar exam in most states. Knowledge of legal research methodology, statutes of limitations, and local court rules does not appear to be tested in any form.

[50] CAPA STUDY, *supra* note 9, at 7, 9. The long-form survey enjoyed a response rate of 8%. The response rate for the experience sampling method survey was 18%. *Id*. at 9.

respondents performed tasks, used competencies, or applied legal knowledge; the criticality of any lack of proficiency; when in their careers respondents were first expected to perform particular tasks; and the depth of knowledge they needed to perform those tasks.[51]

Results of the California study tracked those of the NCBE study in several ways. Civil Procedure and the Rules of Professional Responsibility, for example, emerged as the most important areas of knowledge on both surveys. Drafting and writing, research and investigation, issue spotting, fact gathering, and communicating, similarly, appeared as important skills in both studies. In other respects, however, the results diverged. California respondents rated Tort Law, Employment Law, Criminal Law and Procedure, Family Law, and Administrative Law more highly as knowledge areas than did their national counterparts.[52] It is not clear whether these differences reflect actual variations in practice focus or differences in survey wording, method, or response rates.

IAALS, finally, contributed to the literature on lawyer competency through its 2015 *Foundations for Practice* survey.[53] That survey was designed to understand the legal skills, professional competencies, and personal and interpersonal abilities—collectively, "foundations"—that new lawyers need to be successful as they begin their careers. More than 24,000 respondents from all 50 states assessed 147 foundations, indicating whether each one was "necessary immediately for the new lawyer's success in the short term," "not necessary in the short term, but must be acquired for the lawyer's continued success over time," "not necessary at any point, but advantageous to the lawyer's success," or "not relevant to success."[54]

The foundations most often selected as immediately necessary included a constellation of workplace competencies: the ability to keep information confidential, punctuality, honoring commitments, integrity and trustworthiness, treating others with courtesy and respect, listening attentively and respectfully, and promptly responding to inquiries and requests. More than 90% of respondents marked each of these competencies as necessary immediately for a new lawyer's success.[55]

Only half (50.7%) of the *Foundations* respondents believed that new lawyers needed to "maintain core knowledge of the substantive and procedural law in the relevant focus area(s)" in

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[51] *Id*. at 8-9.
[52] *Id*. at 22.
[53] ALLI GERKMAN & LOGAN CORNETT, FOUNDATIONS FOR PRACTICE: THE WHOLE LAWYER AND THE CHARACTER QUOTIENT (2016) [hereinafter FOUNDATIONS FOR PRACTICE]. Bar organizations distributed survey links to an estimated 780,694 attorneys. ALLI GERKMAN & LOGAN CORNETT, FOUNDATIONS FOR PRACTICE: SURVEY OVERVIEW AND METHODOLOGICAL APPROACH 4 (2016) [hereinafter FOUNDATIONS METHODS]. The estimated response rate was relatively low (3.1% $\pm$ 0.6%), but the large number of responses provided adequate reliability. *Id*. at 5. Indeed, with 24,137 responses, the *Foundations* survey secured 62.6% more responses than NCBE's recent practice analysis. *Compare id. with* PHASE 2 REPORT, *supra* note 8, at 13.
[54] FOUNDATIONS FOR PRACTICE, *supra* note 53, at 6.
[55] *Id*. at 26.

the short term.[56] The other half of respondents believed this knowledge could be developed over time. More than five dozen distinct competencies, in fact, outranked knowledge of doctrinal law as necessary in the short term. Table 3 reports just a selection of those competencies.[57]

Table 3: Selected Foundations Necessary in the Short Term (IAALS 2016)

Foundation	**% Necessary in the Short Term**	**Foundation**	**% Necessary in the Short Term**
Keep Information Confidential	96.1	Gather Facts	67.3
Integrity	92.3	Request & Produce Written Discovery	65.3
Listen Attentively and Respectfully	91.5	Effectively Perform Case Analysis & Statutory Interpretation	65.0
Attention to Detail	87.8	Have a Commitment to Justice & the Rule of Law	62.1
Effectively Research the Law	83.7	Have an Internalized Commitment to Developing Toward Excellence	61.3
Speak Effectively as a Legal Professional	80.1	Recognize & Resolve Ethical Dilemmas in a Practical Setting	60.9
Write Effectively as a Legal Professional	78.1	Cope with Stress in a Healthy Manner	60.3
Understand & Apply Legal Privilege Concepts	77.0	Critically Evaluate Arguments	55.4
Draft Pleadings, Motions & Briefs	72.1	See a Case or Project Through from Start to Timely Finish	53.7
Identify Relevant Facts, Legal Issues & Informational Gaps or Discrepancies	71.0	Maintain Core Knowledge of the Substantive and Procedural Law in the Relevant Focus Area(s)	50.7

We draw two lessons from this review of prior research. First, although the methods of these studies vary, their results converge: cognitive skills like communication, research, legal analysis, and critical thinking are central to minimum competence. Knowledge of specific legal principles is much less important, and memorization of those principles has little value. Second, most prior research has relied upon surveys. Although those surveys generate useful insights, they provide

[56] *Id.* at 31.
[57] Data in Table 3 are drawn from *id*. at 30-34.

little detail about how lawyers acquire the competencies they need and how they apply those competencies in the workplace. As a result, we designed our study to examine the latter questions more closely.

Method

Our study is unusual in both its scale and national scope. We led a team of 28 researchers in more than a dozen locations to conduct 50 focus groups. These efforts yielded more than 75 hours of transcribed discussions, including insights from 201 subjects.

Researchers

A core team of four researchers planned the project, prepared initial materials, secured Institutional Review Board approval, and recruited two dozen additional professionals to serve as focus group facilitators and observers.[58] One facilitator led each focus group and one observer supported the facilitator in each group. The 14 facilitators, including three from the core team, received detailed written instructions and attended a 1.5 day training session on best practices for effective facilitation. That session included a 90-minute focus group in which facilitators practiced their techniques.[59]

The 14 observers received the same written materials, as well as supplemental information on the observer's role. They also participated in a two-hour online training session. Throughout the project, the core team answered questions from facilitators and observers.

Our team of 28 facilitators and observers included a mix of law faculty, law school administrators, law students, and social scientists. Twenty-one were women and seven were men. Seventeen were white; seven were Black; three were Asian; two were Latinx; one was Native Hawaiian or Pacific Islander; and one was Armenian.

Geographic Distribution of Focus Groups

To choose locations for our focus groups, we first identified the percentage of lawyers that each state contributed to the national total in 2017 (the most recent data available when the project was planned).[60] From that data, we selected the five states that contributed the highest

[58] The study was approved as exempt research by Institutional Review Boards at both the University of Denver (1419179) and The Ohio State University (2019E0545).
[59] This practice group was composed primarily of authentic participants, but we included two plants—each a lawyer—to play the roles of an overly talkative group member and a shy one. This allowed facilitators to practice handling those situations.
[60] *National Lawyer Population Survey: Lawyer Population by State*, Am. Bar Ass'n (2018), https://www.americanbar.org/content/dam/aba/administrative/market_research/National_Lawyer_Population_by_State_2018.authcheckdam.pdf (reporting resident active attorney count in each state for 2017).

percentages of lawyers (New York, California, Texas, Florida, and Illinois); five states that ranked in the second quintile (Ohio, Georgia, Minnesota, North Carolina, and Colorado); one that ranked in the fourth quintile (Nevada); and one ranking in the bottom quintile (Maine). As shown in Table 4, those 12 states also represent eight of the nine census divisions.[61]

Table 4: Distribution of Focus Groups Across States

State	Focus Groups	State's Percentage of Lawyers Nationally	Rank Among States	Census Division
New York	8	13.2	1	Middle Atlantic
California	8	12.7	2	Pacific
Texas	4	6.8	3	West South Central
Florida	2	5.8	4	South Atlantic
Illinois	3	4.7	5	East North Central
Ohio	4	2.8	11	East North Central
Georgia	5	2.5	13	South Atlantic
Minnesota	5	1.9	15	West North Central
North Carolina	3	1.8	18	South Atlantic
Colorado	2	1.6	20	Mountain
Nevada	3	0.6	34	Mountain
Maine	3	0.3	43	New England
Total	50			

[61] Lawyer counts for 2019, the most recent data, are substantially similar. New York, California, Texas, Florida, and Illinois remain the top five states in that order. Ohio now ranks tenth, moving into the top decile of states. Georgia, North Carolina, and Colorado each moved up a spot as well, although those three states remain in the second quintile with Minnesota (rank unchanged). Nevada moved down one spot to 34th, while Maine remained at 43rd. *See National Lawyer Population Survey: Lawyer Population by State*, AM. BAR ASS'N (2020), https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2020.pdf (2020) (reporting resident active attorney count in each state for 2019).

Within these 12 states, we selected locations that would produce an array of diverse local economies and practice environments, including rural regions.[62] Our 50 focus groups spanned these 18 locations:

- Los Angeles, California
- Silicon Valley, California
- Denver, Colorado
- Orlando, Florida
- Atlanta, Georgia
- Chicago, Illinois
- Portland, Maine
- Rural Maine
- Minneapolis, Minnesota
- Las Vegas, Nevada
- New York, New York (Manhattan)
- New York, New York (Queens)
- Rural New York
- Raleigh, North Carolina
- Rural North Carolina
- Columbus, Ohio
- Rural Ohio
- Houston, Texas

Recruitment of Participants

We used a layered approach, as described by Richard Krueger, to assemble focus groups.[63] The first layer included 41 groups of junior lawyers, defined as graduates of United States law schools who: a) were first licensed between January 1, 2016, and January 31, 2019; and b) had worked for at least 12 months in one or more positions that required a law license. The second layer consisted of nine groups of more experienced lawyers ("supervisors") who had directly supervised at least one junior lawyer during the two years preceding the study.

To recruit junior lawyers, we compiled lists of those lawyers from online, public directories in each state or county. Some of those directories provided email addresses; when they did not, research assistants gathered addresses from public sources such as employer websites. We emailed a standard invitation to these lawyers, describing the project and inviting them to participate in a focus group. Interested junior lawyers completed a brief online survey to confirm their eligibility for the study and provide basic demographic data.

Supervisor status was difficult to identify from public sources, so we used a snowball method to recruit these participants. The research team in each location contacted colleagues to gather names and email addresses for lawyers who might qualify for the study. These potential participants, like the junior lawyers, received an email invitation describing the study and

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[62] All "rural" lawyers practiced in counties labeled at least 50% rural by census data. *See* Rural America, U.S. Census Bureau, https://gis-portal.data.census.gov/arcgis/apps/MapSeries/index.html?appid=7a41374f6b03456e9d138cb014711e01 (last visited Sept. 21, 2020). By holding two of these focus groups online, we were able to include lawyers from several counties in the same session.

[63] *See* Richard A. Krueger & Mary Anne Casey, Focus Groups: A Practical Guide for Applied Research 28 (5th ed. 2015).

inviting them to participate. They also completed the online survey to confirm eligibility and provide demographic data.

Most of our focus groups included participants with a mix of demographics and employment settings. We composed 12 of our junior lawyer groups, however, to specifically target perspectives sometimes missing from a general understanding of the attorney experience: five of these groups included only people of color, four included only women, and three included only solo practitioners.[64] We also conducted four groups with junior lawyers in rural areas. We did not convene groups of lawyers focused on other shared characteristics, such as disability, in this study. We regret that omission, as those perspectives would have further enriched the data; we encourage future research exploring the experiences of new lawyers with disabilities and other shared characteristics.

We limited the number of participants in each focus group session, which allowed us to probe each participant's perspective in depth, while still providing a forum for interactive discussion. Our 50 groups included a total of 200 participants, with groups ranging in size from two to seven.[65] The mean, median, and mode for group size were all 4.0. We also included one interview with a single subject, which arose when other members of a planned focus group were unable to attend. That interview followed the same focus group protocol. After adding that interview to the database, we had a total of 201 participants: 159 junior lawyers and 42 supervisors.

Participant Demographics

Table 5 summarizes demographics that we collected for our focus group participants. All of the junior lawyers in our study were licensed between 2016 and 2019, reflecting our selection criteria. Most supervisors, of course, obtained their licenses in earlier years; more than half were licensed before 2001.[66] Reflecting the relative seniority of this group, their median age (52 years) was somewhat older than the median age of lawyers, judges, and judicial workers in the United States (46.5).[67]

[64] *See id.* at 81 (discussing the use of such specialized groups).
[65] We carefully reviewed the transcripts for two-member groups to assure that the conversation was interactive enough to include them as focus groups. We found no difference in the quality of discussion between these groups and the larger ones.
[66] Two supervisors obtained their licenses after 2015. During the focus group discussions, they explained that very junior lawyers in their organizations supervised newer colleagues. The participation of these junior supervisors was consistent with our request for lawyers who *directly* supervised new lawyers.
[67] *See Lawyers, & Judges, Magistrates, & Other Judicial Workers*, DATA USA, https://datausa.io/profile/soc/lawyers-judges-magistrates-other-judicial-workers (last visited Sept. 12, 2020).

Table 5: Demographics of Participants (Percentages Calculated Within Columns)

	Junior Lawyers n = 159		Supervisors n = 42		Total n = 201	
Year First Admitted to Bar						
1985 or Earlier			11	26.2	11	5.5
1986-2000			11	26.2	11	5.5
2001-2015			18	42.9	18	9.0
2016	22	13.8	1	2.4	23	11.4
2017	72	45.3	1	2.4	73	36.3
2018	64	40.3	0	0.0	64	31.8
2019	1	0.6	0	0.0	1	0.5
Birth Year	**#**	**%**	**#**	**%**	**#**	**%**
1968 or Earlier	5	3.1	22	52.4	27	13.4
1969-1973	5	3.1	4	9.6	9	4.5
1974-1978	5	3.1	8	19.0	13	6.5
1979-1983	18	11.3	5	11.9	23	11.4
1984-1988	45	28.3	2	4.8	47	23.4
1989-1993	81	50.9	1	2.4	82	40.8
Gender[68]						
Woman	99	62.3	19	45.2	118	58.7
Man	58	36.7	23	54.8	81	40.3
Race/Ethnicity[69]						
American Indian or Native Alaskan	1	0.6	0	0.0	1	0.5
Asian	12	7.6	4	9.6	16	8.0
Black or African American	22	13.8	6	14.3	28	13.9
Hispanic or Latinx	14	8.8	3	7.1	17	8.5
Native Hawaiian or Pacific Islander	1	0.6	0	0.0	1	0.5
White	92	57.9	25	60.0	117	58.2
Other	9	5.7	2	4.8	11	5.5
Multiracial/Multiethnic	8	5.0	1	2.4	9	4.5
Prefer Not to Answer	0	0.0	1	2.4	1	0.5
First Generation						
No (Parent Had College Degree)	126	79.2	32	76.2	158	78.6
Yes (No Parent Had College Degree)	33	20.8	10	23.8	43	21.4

[68] We asked participants to identify their gender as "woman," "man," or "other," and also offered an option of "prefer not to answer." Two junior lawyers checked the latter option and we have excluded them from our calculation of gender percentages.

[69] Participants were instructed to select all race/ethnicity options that applied to them. We have grouped all participants who selected more than one option into the "multiracial/multiethnic" category.

The junior lawyers in our focus groups appear to be slightly older than their national peers. The junior lawyers in our groups were, on average, 30 years old when they were first sworn into the bar; their median age at that time was 28. Although we lack national data on the average age of lawyers when first licensed, their average age at law school graduation is 28, with a median age of 26.[70] New lawyers commonly obtain licenses within a year of law school graduation, making our junior lawyers likely 1–2 years older than their peers.

Our study also included a higher percentage of women and people of color than comparable national pools. Women make up half (50%) of recent law graduates,[71] but constituted 62.3% of the junior lawyers in our study. Our percentage of women supervisors (45.2%), similarly, was higher than the percentage of women in the profession as a whole (38.0%).[72] People of color constituted 42.1% of the junior lawyers in our study, compared to 30.6% among recent graduates.[73] Most notable, more than a third of our supervisors (37.6%) were people of color while just 13.4% of lawyers nationally are people of color.[74]

Junior lawyers in our focus groups, conversely, were somewhat less likely to be first-generation college students than junior lawyers nationally. About one-fifth (20.8%) of focus group members fell in that category, compared to about 27% of law students nationally.[75]

These differences in representation, which stemmed in part from our use of specialized groups, should not affect the insights drawn from this qualitative study. The study was not designed to detect any differences in participant perspectives based on age, gender, race/ethnicity, or first-generation status; for our purposes, it was important only to include diverse voices from these categories.

We did not collect data from participants on a number of other characteristics (such as disability, religion, or sexual orientation). It is quite possible, as a result, that the study does not adequately reflect perspectives of lawyers with disabilities, lawyers from some religious traditions, or

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[70] NAT'L ASS'N FOR LAW PLACEMENT, JOBS & JDS: CLASS OF 2017 64 (2018).
[71] *See* AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW 4 (2019), https://www.americanbar.org/content/dam/aba/administrative/women/current_glance_2019.pdf.
[72] *See id.* at 2. Women were also more likely to respond to NCBE's recent practice analysis. *See* PHASE 2 REPORT, *supra* note 8, at 38 (47.7% of respondents were women).
[73] *See* ACCESSLEX INST., LEGAL EDUCATION DATA DECK 15 (2019), https://www.accesslex.org/sites/default/files/2019-11/AccessLex%20Legal%20Education%20Data%20Deck_Nov%202019.pdf.
[74] *See Labor Force Statistics from the Current Population Survey: Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity*, U.S. Bureau of Labor Statistics, https://www.bls.gov/cps/cpsaat11.htm (last modified Jan. 22, 2020) (86.6% of lawyers were white). NCBE's practice analysis also drew somewhat more responses from lawyers of color than their representation in the workforce. PHASE 2 REPORT, *supra* note 8, at 38 (79.3% of survey respondents identified themselves as White or Caucasian, compared to 84.8% of lawyers nationally).
[75] LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, LOOKING AHEAD: ASSESSMENT IN LEGAL EDUCATION 10 (2014 Annual Survey Results).

lawyers with a particular sexual orientation. Further work tapping those insights could enhance the perspectives we offer here.

Participant Employment Settings and Practice Areas

Columns two and three of Table 6 show the employment settings for our focus group participants. We combine supervisors and junior lawyers in that table because each supervisor represented a setting in which some junior lawyers worked. Sixteen of the junior lawyers in our study worked in two different settings during their first year of practice, so the total number of employment settings is 217 rather than 201.

Columns four and five contrast those numbers with data reported by the National Association for Law Placement (NALP) for the class of 2017, the modal year in which our junior lawyers earned their law degrees.[76] We filtered the NALP data to include only jobs that required bar admission, because our study included only lawyers with jobs that required a license.[77]

Table 6: Focus Group Members and 2017 Graduates, By Employer Type

Employer Type	**Focus Groups**		**All 2017 Graduates**	
	#	**%**	**#**	**%**
Solo Practitioner	21	10.4	408	1.9
2–10 Lawyer Firm	47	23.4	5,793	26.4
11–50 Lawyer Firm	33	16.4	2,698	12.3
51–100 Lawyer Firm	10	5.0	797	3.6
101–500 Lawyer Firm	26	12.9	1,974	9.0
501+ Lawyer Firm	26	12.9	4,610	21.0
Business	7	3.5	1,107	5.0
Government	21	10.4	2,700	12.3
Public Interest	26	12.9	1,869	8.5
Total	217		21,956	100.0

As column five shows, the most common employment setting for new lawyers nationally is in small law firms employing 2–10 lawyers; more than a quarter of new lawyers work in those firms. That was also the most common work setting for our focus group participants. In other respects, our participants differed from their peers in two ways. First, we deliberately oversampled solo practitioners to assure consideration of those perspectives; 10.4% of our

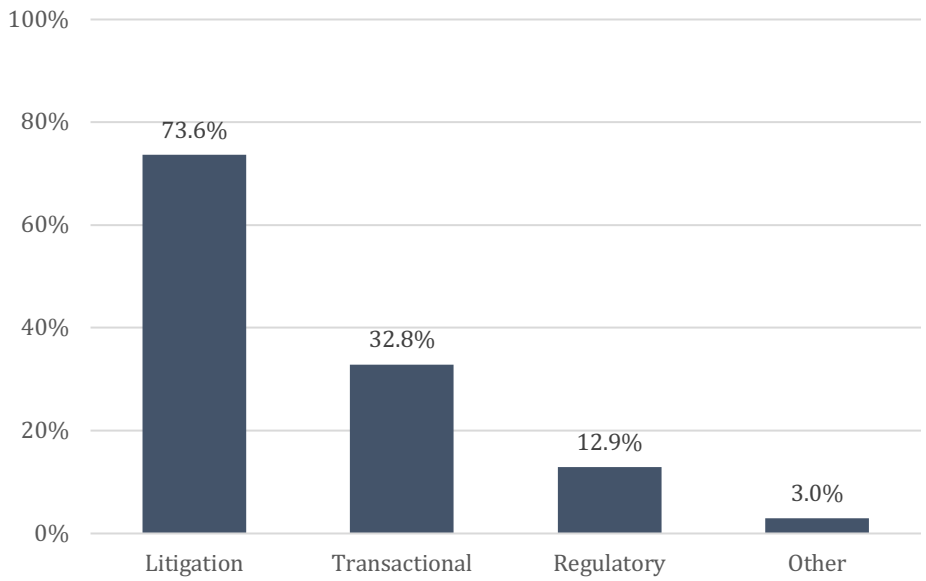
[76] Nat'l Ass'n for Law Placement, Class of 2017 National Summary Report, https://www.nalp.org/uploads/Classof2017_NationalSummaryReport.pdf (last visited Sept. 21, 2020). NALP reports jobs held by graduates 10 months after law school graduation. Although we report only data for the Class of 2017, employment settings for the Classes of 2016, 2018, and 2019 were comparable.

[77] NALP counts judicial clerkships as jobs for which bar admission is required, but those positions do not always require a license. We excluded judicial clerkships from counts of new-lawyer jobs in this table and elsewhere.

participants started a solo practice during their first year, compared to just 1.9% of graduates nationally. Second, that focus (combined with some self-selection) led to underrepresentation of lawyers working at the largest law firms. Our participants, however, spanned all employment areas and their overall distribution was similar to that of new lawyers nationally.

In addition to gathering information about employment setting, our intake survey asked participants to characterize their practice as litigation, transactional, regulatory, or "other." Participants could choose more than one designation. As Figure 1 shows, about three-quarters of participants handled litigation, and about a third engaged in some transactional work. About an eighth specified regulatory work and 3.0% indicated that at least some of their practice fell in the "other" category.[78] We could not find comparable data for lawyers nationally, so we cannot compare our participants to the broader population. However, our participants are roughly consistent with those in the *Foundations for Practice* study, where two-thirds worked in litigation, 40% engaged in transactional work, and just under a quarter had a regulatory component in their practice.[79]

Figure 1: Participant Practice Area (n = 201)



During focus group discussions, we gleaned more particularized information from participants about their practice areas. As Table 7 reveals, our 201 participants described working in more

[78] The "other" category included bankruptcy, immigration, international arbitration, mediation, investigations, workers compensation, municipal government, and trusts and estates. In this figure, as in Table 6, we combine responses of supervisors and junior lawyer; the former group supervised junior lawyers in their practice areas.
[79] FOUNDATIONS METHODS, *supra* note 53, at 12.

than 50 distinct fields.[80] We cannot estimate the percentage of new lawyers working in each of these fields from a qualitative study, but the number of practice areas covered by only 201 lawyers suggests the diversity of contemporary practice.

Table 7: Participant Practice Areas

Animal Rights Law	Elder Law	Municipal Law
Antitrust	Employee Benefit Law	Patent Law
Banking Law	Employment Law	Personal Injury
Bankruptcy—Business	Energy Law	Privacy and Data Security
Bankruptcy—Consumer	Environmental Law	Product Liability
Business Litigation	Family Law	Professional Licensing
Business Transactions	Health Care Law	Public Benefits Law
Cannabis Law	Housing Law	Real Estate—Commercial
Civil Litigation	Immigration Law	Real Estate—Residential
Civil Rights Law	Insurance Law	Securities Law
Commercial Litigation	Intellectual Property	Special Education Law
Communications Law	International Arbitration	Tax
Construction Law	International Tax	Trusts and Estates
Corporate Finance	International Trade	Veterans Law
Corporate Law	Juvenile Law	Voting Rights Law
Criminal Defense	Labor Law	White Collar Investigations
Criminal Prosecution	Liquor Licensing	Workers Compensation
	Mergers and Acquisitions	

Most of the junior lawyers in our focus groups worked in more than one of the fields listed in Table 7. It was common, for example, to combine "civil litigation" with a particular subject matter. Participants, however, also combined very different practice areas. This occurred when they: changed jobs, as 41.5% of the junior lawyers in our focus groups did; worked for more than one supervisor or department; represented clients (such as a municipal government) with varied needs; and engaged in pro bono work. Pro bono work was particularly likely to broaden the scope of a participant's practice; those matters and clients were very different from the work focus group members performed for paying clients.

[80] We include the practice areas described by supervisors in this table because we asked them to describe only areas in which they supervised junior lawyers. Drawing lines between practice areas chosen for the table required considerable discretion. "International tax," for example, could be considered part of a broader "tax" practice area. We followed the lead of participants in drawing these lines. When a subject discussed a field as a distinct practice area, we included it on the above list. One subject, for example, described a cannabis practice that was distinct from other regulatory or business areas; the same was true for a subject who handled a significant number of liquor licensing issues.

Focus Group Protocol

We conducted focus groups between August 12, 2019, and May 27, 2020. Forty of the groups met in person, while ten convened virtually after the onset of the COVID-19 pandemic. Protocols were the same for both in-person and online groups, with minor differences for the consent processes.[81]

All facilitator/observer teams used standard protocols, which differed slightly for junior lawyers and supervisors. Following the informed consent process, participants used a worksheet to list the types of work they performed during their first year of licensed practice—or that new lawyers performed under their supervision. This exercise was designed to help group members recall that work before beginning group discussion and to encourage participation in the conversation. Following the protocol, facilitators then asked questions focused on eight topics:

- Legal principles/doctrines used during the first year of practice
- Whether new lawyers were familiar with those principles/doctrines when they started practice and, if so, how they attained that familiarity
- Description of unfamiliar legal principles/doctrines that new lawyers had to learn during their first year and means of learning them
- Skills used during first year of practice
- Whether new lawyers were familiar with those skills and, if so, how they achieved that familiarity
- Means of developing new skills needed during the first year
- Mistakes made during the first year and skills, knowledge, or supervision that would have helped avoid the mistake
- Degree to which subjects and skills tested on the bar exam tracked competencies participants needed to begin serving new clients

Facilitators used the protocol questions to cover all topics and stimulate discussion among the focus group participants. After facilitators concluded discussion, they invited the observer to pose one or two concluding questions. Observers used those questions to clarify or extend earlier discussions.

Analysis

All focus group sessions were audio recorded and professionally transcribed. A research team member compared each transcript to the recording to correct mistakes and assure accuracy. We

[81] In-person participants signed a consent form; for online groups, we obtained a waiver of the requirement for documentation of consent but reviewed the consent form with the group and obtained verbal consent from each participant before beginning.

then de-identified the transcripts, substituted code names for actual names, and deleted the recordings—all of which are steps critical to ensuring qualitative research is conducted ethically and responsibly.

We used QSR NVivo (version 12) qualitative analysis software to code the transcripts. Our analysis rested on grounded theory, employing 1) close reading of data to generate codes; 2) continuous reflection on coded data through internal memos and feedback sessions; and 3) multiple rounds of revising codes, recoding data, and verifying findings.[82]

Because the dataset was so large, we began by coding comments according to broad categories suggested by the research protocol. These categories included: a) practice areas, b) tasks, c) knowledge needed, d) means of acquiring knowledge, e) reliance on memory, f) skills needed, g) means of acquiring those skills, h) mistakes made during the first year of practice, and i) perceived connections between the bar exam and needed competencies. These categories allowed us to collect relevant comments from different sections of each transcript.

The authors coded several transcripts in this manner and shared the results with two other IAALS team members. Those researchers reviewed the authors' coding and joined the authors for a two-day session reviewing the coded transcripts, discussing themes unearthed by the initial coding, and reviewing a fresh transcript together. From this work, we identified several key themes—drawn from the voices in the transcripts—that we used to develop new codes.

In subsequent reviews of the transcripts, we further refined our codes to focus on when participants acquired needed knowledge or skills. Did they acquire those competencies from law school classes, while studying for the bar exam, while working for employers before licensing, from other sources (such as college programs or extracurricular activities), or only after licensing? Similarly, did the possession of certain knowledge and skills facilitate ready acquisition of others? If so, then the former competencies were more likely to constitute *minimum* competence.

When making these judgments, we paid particular attention to the mistakes that participants reported making during their first year of practice. If those mistakes harmed clients (as many did), they pointed to competencies that should have been present before beginning practice. We also noted comments regretting the lack of particular knowledge or skills during the first year of practice. Even when not linked directly to mistakes, these comments reflected competencies that new lawyers wished had been part of their initial competence.

[82] *See* H. RUSSELL BERNARD, AMBER Y. WUTICH & GERY W. RYAN, ANALYZING QUALITATIVE DATA: SYSTEMATIC APPROACHES 224-42 (2d ed. 2016) [hereinafter SYSTEMATIC APPROACHES]; GRAHAM GIBBS, ANALYZING QUALITATIVE DATA 49 (2007).

After these initial rounds of coding and discussions, we reviewed participants' comments line-by-line to develop additional codes.[83] Almost every competency described in this report includes several facets; codes for those distinctions arose from close examination of participants' discussion.

Our team devoted a full seven months to coding data. During that time the authors generated numerous internal memos and interim reports to elucidate the data;[84] we also convened in person and virtually to gather feedback from our full research team and several external experts.[85] Through this iterative process, we continuously revised codes, grouping and regrouping data to yield the insights summarized in this report.[86]

Although we were familiar with the literature on lawyer competence before beginning the study, we did not attempt to link our findings to that literature until the final two months of coding. This kept our coding grounded in the data rather than influenced by existing literature. Once we began linking our findings with existing literature, we noticed many parallels—but also some differences. This partial congruence assured us that we had identified meaningful themes, but had not been driven by previous research.

During the final stages of analysis and writing, we verified results by reviewing data supporting each finding. At the same time, we searched for conflicting viewpoints and noted them where applicable.[87] Throughout this report, we document findings through the extensive use of citations to individual participants; in many cases, we also quote those participants.[88]

To protect privacy, all citations use code names rather than the participant's actual name. Code names with the prefix "S" represent supervisors; those with the prefix "O" represent solo practitioners. We have edited quotes to remove identifying information, as well as minor grammatical errors and verbal fillers.

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[83] *See* SYSTEMATIC APPROACHES, *supra* note 82, at 224 (importance of line-by-line coding); GIBBS, *supra* note 82, at 51-53 (same).
[84] *See* SYSTEMATIC APPROACHES, *supra* note 82, at 228, 240 (importance of frequent memoing); GIBBS, *supra* note 82, at 144 (same).
[85] *See* SYSTEMATIC APPROACHES, *supra* note 82, at 237 (use of stakeholder feedback to verify model).
[86] *See id.* at 224 (stressing importance of iteration).
[87] *See id.*at 230, 240 (discussing use of negative case analysis).
[88] *See* GIBBS, *supra* note 82, at 97 (importance of providing evidence through quotations).

Findings and Insights

Our primary research question focused on illuminating the knowledge and skills that new lawyers need to serve clients during their first year of practice, but we also gathered insights on two other points. First, participants described the context in which they exercised their knowledge and skills, noting the breadth of their practice areas, their interactions with clients, and the type of supervision they encountered. Second, at the end of each session, they reflected on how the bar exam compared to the knowledge and skills they used during their first year of practice.

We explore all of these insights in this section, beginning with the information participants offered about the context of their practice. We then move to the heart of our discussion, describing the 12 building blocks of minimum competence that we distilled from participants' comments. We close this section with our participants' reflections on their own licensing processes.

Practice Context: The World of New Lawyers

The employment data in the previous section, together with comments from our focus group members, indicate that new lawyers inhabit a sprawling, complex world. They work for many types of organizations and practice diverse kinds of law. That diversity has implications for licensing: a newly licensed lawyer may enter any of dozens of practice areas.

Study participants reported four other features of their world that bear upon licensing:

- State and local law played a prominent role in their work
- They rarely relied upon memorized rules
- They engaged frequently with clients
- A majority assumed substantial responsibility for client matters during their first year, with little or no supervision

We discuss each of those features below. In addition, we describe the specialized world of lawyers who open a solo practice within a year of bar admission.

State and Local Law

Focus group members reported that they were more likely to rely upon state and local law in their work than on federal law. Almost half of participants indicated that they worked exclusively or primarily with state and local law. A similar proportion worked with a mixture of state, local, and federal law. Only about one in 10 of the lawyers in our focus groups relied

primarily or exclusively on federal law. Some of the lawyers who relied primarily on state law, meanwhile, needed to understand the law of multiple states. Corporate clients engaged in transactions and litigation that touched many states,[89] and even some individual clients had legal problems that crossed state lines.[90]

This feature of entry-level law practice has important implications for licensing. Contemporary bar exams focus heavily on federal law and general principles. Indeed, 36 jurisdictions have adopted NCBE's Uniform Bar Exam (UBE), which tests only those areas.[91] New lawyers, however, more often apply state and local rules. As we explain further below, this mismatch between testing and practice led some new lawyers to make mistakes while representing clients.

A uniform bar exam, whether designed by NCBE or others, offers important benefits for both lawyers and clients: new lawyers can move easily among jurisdictions, and clients can retain lawyers capable of practicing in multiple states. Any uniform exam, however, must account for the fact that new lawyers are more likely to apply the laws of particular states—which are often highly individualistic—than rules of federal law.

Memorization

Participants in our focus groups stressed that new lawyers should *never* rely on principles memorized during law school or for the bar exam. Doing so was "a bad way to practice law"[92] or even "malpractice."[93] "If you do anything memory-based in the practice of law," one new lawyer volunteered, "you'll get sued."[94] Other new lawyers offered similar comments:

- "No partner in a firm would ever say, 'Just go off your memory, don't consult any books, just say what you think you need to say and move on.'"[95]
- "There's just no point [in relying on memory]. I need to cite a specific statute. I need to cite a specific rule of law . . . . I'm not going to be just like, 'I think it's 21 days.'"[96]

[89] *See, e.g.,* S.Archie (We do "deals in so many different states"); Grace (describing portfolio loans bridging numerous states).
[90] O.Scarlett ("even just in family law, there's families that are all over the country").
[91] YEAR IN REVIEW, *supra* note 7, at 13; Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 1 (2019). Some of these jurisdictions require candidates to complete a supplemental exercise on state law, but those exercises are more informal than the bar exam. *Id*. at 51-53. Among jurisdictions that have not adopted the UBE, many administer at least some of NCBE's exam components, *see supra* note 7, which also focus on federal law, model rules, or general principles.
[92] Zara.
[93] Mila; O.Ethan; Leo; Trevon; Emery.
[94] Freya.
[95] Faith.
[96] Mila.

- "I don't think any attorney just goes, 'Oh what was that case? What was that fact or what was that rule?' We check and triple check and then we make sure that the law is a law and it hasn't been overruled and that the statutes are still legit."[97]
- "We had a saying, 'why look it up when you can speculate?' Which is to say we looked everything up. . . . I mean, there's a statute, there's a rule, there's a case."[98]

Supervisors concurred. "Read the rule before you give an answer," one declared.[99] "I often am reminding new lawyers that there's a rule book that they should look at," another agreed.[100] These supervisors often distinguished between familiarity with the law and memorization. New lawyers needed the former, they agreed, but not the latter.[101]

Some focus group members noted that, as they acquired experience in their practice area, they began to rely more extensively on memory.[102] This experience-based memory, however, differed from attempts to recall principles memorized for law school or the bar exam.[103] Deep familiarity with legal principles gained through hands-on practice helped lawyers become more efficient. Memorization of rules for exams, in contrast, served little practical purpose.

This aspect of first-year practice also bears upon licensing. New lawyers, according to our focus group members, should not rely on memorized principles to address client problems. Instead, they should check sources carefully. Licensing exams that require extensive memorization do not develop minimum competence. Indeed, they may distract lawyers from developing the competencies they need.

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[97] Nia.
[98] Elijah.
[99] S.Dexter.
[100] S.Lola.
[101] *See, e.g.*, S.Archie ("every corporate attorney we get I tell them, go buy the corporate code and just spend 15 minutes every day reading it from front to back, and it's not that you're going to memorize it. It's not that you're going to know it, but when you come across something, you'll know, 'Oh, I remember seeing it, and I can go look it back up.'"); S.Hunter ("I have not experienced, nor would I have expected anybody to have a full working knowledge of either one of the rules of civil procedure or evidence. The young lawyers that I have been most impressed with have an understanding of how they work together.").
[102] *See, e.g.*, Maeve; Heidi; Tripp; Porter; O.Sebastian; O.Ethan ("a year or two in, you can rely on things because you've seen it so much. But early on you haven't seen enough of it to rely on your memory. You should be scared straight then, which I was, to look up everything three or four times"); O.Ralph; Emma; Quinn; Ezra; Maya.
[103] *See, e.g.*, Arlo ("that kind of memorization and the ability to recall on demand . . . , it doesn't come in the two or three months that you're studying for the exam, . . . that comes after you've been practicing in the same area for years.").

Client Contact

A considerable majority of the junior lawyers in our focus groups reported substantial client contact during their first year of practice.[104] Solo practitioners, of course, communicated directly with their clients, and so did most lawyers working for government or public interest organizations. A majority of new lawyers in firms of 2 –50 lawyers also interacted directly with clients, as did about a third of new lawyers in larger firms. Many of our participants expressed surprise at their degree of client interaction:

- "My firm is so small that the first day, [my supervisor was] putting a lot of things on me. So, I really needed to know how to interact with clients because I do a lot of on the phone with clients, managing expectations. I had no idea how to do any of that when I first came in."[105]
- "As a first year associate I was a major point of contact for most of my clients, which surprised me . . . . Being able to talk to the CFO of a big company was not something I expected but I had to develop that skill really quickly."[106]

Supervisors confirmed this degree of client interaction: a sizeable majority of supervisors reported that they relied on new lawyers to work directly with clients during their first year.[107] Even supervisors who shielded their lawyers from direct client contact wanted those lawyers to develop a client-centered approach to cases. New lawyers, in other words, needed to put

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[104] We did not ask directly about client contact, so the number of participants who described that contact during their first year probably underestimates the total number who had some of that contact. On the other hand, our focus groups included a higher percentage of solo practitioners than the national percentage of solos among first-year lawyers. *See supra* Table 6. Overrepresentation of those solos probably increased the percentage of participants reporting client contact. Even after excluding solos from the count, however, almost three-fifths of the junior lawyers in our focus groups described direct contact with clients.

We wondered whether the slightly higher age of our focus group members, *see supra* note 70 and accompanying text, could partially explain the substantial degree of client contact we detected. At least among our participants, however, non-solos who described client contact had the same median age (28) as those who did not describe that contact. Mean ages, similarly, were virtually indistinguishable: 29.9 for non-solos who reported client contact, 29.7 for those who did not.

A qualitative study like ours cannot quantify the extent of client contact among first-year lawyers. The contact, however, does appear to be extensive.

[105] Adanna (litigation associate in a firm of 2-10 lawyers).

[106] Reese (transactional associate in a firm of 501+ lawyers).

[107] *See, e.g.,* S.Mylah ("we're a big believer in getting people contact with clients as soon as possible. That's a big help to us."); S.Jill ("they need to know how to speak to clients"); S.Carter ("Even our new attorneys do have a fair amount of client contact"); S.Vivian ("They have to put their hands on the case, talk to a client."); S.Donald; S.Josh; S.Lydia; S.Brooke; S.Dexter; S.Wesley; S.Eloise; S.Jason; S.Rose.

themselves in the shoes of their clients, understanding the client's concerns, goals, and constraints.[108]

Client contact, in sum, is commonplace for new lawyers. Those lawyers are not sequestered in libraries, conducting research and writing memos. Instead, they engage directly and deeply with clients. A licensing system should account for this feature of contemporary practice, assuring that new lawyers are competent to handle client interaction.

SUPERVISION

Some of our focus group members described employers who offered close supervision and supportive learning environments during their first year. "I was very babied," one new lawyer from a large firm recalled. "I had a mentor who was a partner. I was spoon fed, we had weekly meetings. I was in a firm that was very much about making sure I got the base down."[109] A new public defender, similarly, described his office as "really awesome" because "everyone was there to answer your questions" and "[t]hey actually assigned us a mentor, like a senior attorney in the felony department that was there to just answer our questions."[110]

A majority of new lawyers, however, described workplaces where they assumed substantial responsibility for client matters with little or no supervision. Some described workplaces where they were "thrown in the fire"[111] or "dropped into the deep end."[112] This experience was particularly common in small firms, government agencies, and nonprofits:

- "I walked in on my first day, we weren't even barred yet. I think they were billing me as a paralegal at the time, and they handed me 40 cases and said 'go.' There was no instruction."[113]
- "I was in a division by myself. Had a trial partner, but she hadn't passed the bar yet. So all the cases were mine, everything was on me."[114]
- "Like literally being dropped . . . [My supervisor said,] 'Okay. We have intakes

[108] *See, e.g.*, S.Sadie (new lawyers need "to problem-solve for a client, which requires you to understand, what is their motivation?"); S.Wyatt ("young lawyers don't understand the way businesses operate. . . .It's like, what is this business? What is this client trying to do? What are the client's objectives?").
[109] Savannah. *See also* Mike ("I think our law firm at least recognizes that people will be coming to the firm with a wide range of workplace skills. And so part of the training during their first month is just focused on how to send a professional email.").
[110] Malik.
[111] Cecelia; Jasper. *See also* Kinley ("like by fire"); Natalia ("feet to the fire"); London ("feet to the fire").
[112] Alice; Kennedy. *See also* Zara ("throwing you in the deep end"); Gavin ("throw you in the deep end"); Khepri ("a lot of just throwing you in"); Cadence ("very jump in"); Kali ("fall on your face"); Ezra ("put out there" to learn "by losing in court"); Paisley ("dropped into having to do stuff right away"); Heidi ("learn on the fly"); Brinda (same); Layla (same).
[113] Ava (litigation associate at 11-50 member firm).
[114] Colton (prosecutor).

today. I can't do them. They can't do it. You got to do it.' . . . I'm like, 'I don't know what I'm looking for.'"[115]

- "So I had interned where I work right now and it was like night and day. As soon as I got that license it's like, 'All right, you're on your own now. You can sign things, just review it.' I didn't have to get supervising attention or anything. I kid you not, it was night and day."[116]
- "I have been doing my own work from the very beginning. . . . All the clients are mine, everything is mine. Right at the beginning, I started doing parole board hearings as well. I observed one, then did my own right after. I feel like I haven't really had a period of training wheels. I don't really know what that feels like."[117]

These new lawyers felt unprepared for this level of responsibility, and they worried about harming clients. One associate at a small firm responded to three motions for summary judgment during her first week, without any supervision or direction. "I had never seen one before," she recalled, "so I was just sitting there crying and researching."[118] An attorney at a nonprofit organization handled a difficult eviction trial during her first year, before she had much trial experience. "No one else was available to handle the case," she remembered, "and I did it. It was . . . one of the harder types of cases to do, and my clients ended up losing the trial. And just knowing that someone was evicted, it really wears on you, like feeling like what else you could have done."[119]

Even at large law firms, some new lawyers reported "very little supervision."[120] At one large firm, senior lawyers directed a new lawyer to calculate the damages for an international arbitration award. They did not review her work and an error reduced the client's award.[121] More generally, new lawyers complained that they made mistakes because "[partners and sometimes senior associates take] for granted that you have the same level of familiarity with whatever it is that's going on."[122] One partner at a very large firm even discouraged associates from bothering her with questions. "She sent me a personal email," a new lawyer recalled, "saying that I should never ask that question, questions like that, again."[123]

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[115] Alice (lawyer assisting low-income workers for a nonprofit).
[116] Carson (real estate associate at 2-10 member firm).
[117] Morgan (public defender).
[118] Binan.
[119] Valeria. *See also* Lisa (new associate at 2-10 member firm handled mediation on 10 minutes' notice); Jenna (new associate at 11-50 lawyer firm handled a complex motion after a call "at 7:30 or 8:00" the night before).
[120] Kira.
[121] Ellen.
[122] Zara.
[123] Axel. *See also* Jack (litigation associate at a 101-500 member firm) ("We need to review 100,000 documents for privilege. [You get a] packet on privilege, . . . and go. And that starts on day one."). Another new lawyer attributed the lack of guidance at large firms to the reduction in incoming class sizes at those firms, which reduced the number

Even when new lawyers received adequate supervision on paying matters, they often handled pro bono cases on their own. Firms encouraged them to handle these cases with little supervision so that they would acquire needed skills and learn to take responsibility for client matters. One supervisor explained enthusiastically: "We have first year attorneys arguing domestic violence restraining orders, and doing landlord tenant, and doing asylum cases, and they're given tremendous responsibility." [124]

New lawyers generally appreciated these opportunities, but they voiced discomfort at learning essential skills by taking responsibility for vulnerable clients. "I feel very conflicted about this," one new lawyer confessed. "Sometimes I feel like we're sending bad lawyers to people who are in desperate need of help."[125] "I've handled a couple of family law matters as pro bono," another recalled, "and that's brand new. Had no idea any of that prior, during, after law school."[126]

Some supervisors acknowledged that they and their colleagues often lacked time to guide new lawyers. "And while I'm sitting here," a partner at a large firm reflected, "I'm realizing that sometimes I don't have that type of patience with like, the young associates in my firm. Because it's just like, we're too busy."[127] In another group, a supervisor at a small firm admitted:

> I take full blame that sometimes I've got to slow down long enough to teach it to [the new attorneys] so that they can give me back what I want from them. I've got to invest the hours of my own time in order for them to be able to give back to me, which they normally want to. But if I don't do that, that's on me.[128]

Supervisors also recognized that many of them lacked effective feedback skills. "I'm working on trying to find that balance," a government lawyer explained, "between more directly conveying there's a concern, and not crushing the new young spirit."[129] A lawyer at a large firm agreed that many supervisors need to improve their feedback style. His firm held "a training session for [its] partners to learn how to give feedback" because "that's one of the things that we did not learn in law school, and it has to be taught."[130]

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of experienced associates who could guide new lawyers. Rather than "20, 25 to a class," he explained, "now there's four." Without enough experienced associates to consult, new lawyers "need to ask the partners" for help, "but the partners are the ones who are used to that 20 person associate class [and] they don't know how to train you." Mason.

[124] S.Peter. *See also* S.Josh ("I have sent some of the new attorneys [to a family justice clinic] because I think it's a great way to learn . . . . You've got essentially a self-represented litigant that's there for help, and give them legal advice.").

[125] Jacob.

[126] Emery.

[127] S.Adam.

[128] S.Caroline.

[129] S.Jasmine.

[130] S.Justin. *See also* S.Lydia ("I send all of my supervisors to attend training sessions so that they know, how do we promote the professional growth in someone within our office?"); S.Archie ("And talk about skills that they don't

At the same time, several supervisors blamed new lawyers for being too delicate or failing to respond to feedback. "There's a lot of crying," one supervisor declared. "Trust me. There's a lot of crying, man."[131] Another complained that "we're not supposed to critique students [or new lawyers] because they might take it personally, and we might hurt their feelings."[132] These supervisors believed that some new lawyers neglected to learn from their mistakes even when offered feedback. If "I bled all over" your document "on six different versions," one supervisor observed, "I don't understand why you don't understand" the problems.[133]

The comments from both new lawyers and supervisors suggest that new lawyer supervision is far from optimal in the legal workplace. Improvements might be made, and we hope to offer some suggestions in future work, but the licensing system should assume lack of supervision: that is the reality in the workplace. New lawyers in the United States receive seven years of post-secondary training; it is not unreasonable for employers and clients to assume that licensed graduates are minimally competent to practice on their own. If that is not true, then we need to adjust both the education and licensing systems.

Solo Practitioners

As noted above, very few lawyers establish a solo practice during the ten months following law school graduation. For the class of 2019, only 242 graduates did so; that was just 1.1% of jobs requiring bar passage.[134] Even during the Great Recession, the percentage of solo practices never exceeded 4.5% of jobs requiring a law license.[135] Despite these small numbers, bar examiners justifiably worry about licensing solo practitioners. These lawyers seem particularly likely to practice without supervision; they may also practice in multiple fields. Our research, however, suggests that this picture is more nuanced.

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have, that lawyers don't have, and this is from the first year to the 50th year. There's no management training in law school like zero. . . . They don't know what positive feedback is versus negative feedback.")

[131] S.Justin.

[132] S.Brooke.

[133] S.Jasmine.

[134] Nat'l Ass'n for Law Placement, Class of 2019 National Summary Report, https://www.nalp.org/uploads/Classof2019NationalSummaryReport_.pdf (last visited Sept. 6, 2020). *See supra* note 77 for a description of how we counted jobs requiring bar admission.

[135] Nat'l Ass'n for Law Placement, Class of 2012 National Summary Report, https://www.nalp.org/uploads/NationalSummaryChart2012.pdf (last visited Sept. 6, 2020) (3.8%); Nat'l Ass'n for Law Placement, Class of 2011 National Summary Report, https://www.nalp.org/uploads/NatlSummChart_Classof2011.pdf (last visited Sept. 6, 2020) (4.4%); Nat'l Ass'n for Law Placement, Class of 2010 National Summary Report, https://www.nalp.org/uploads/NationalSummaryChartforSchools2010.pdf (last visited Sept. 6, 2020) (4.2%); Nat'l Ass'n for Law Placement, Class of 2009 National Summary Report, https://www.nalp.org/uploads/NatlSummaryChartClassof09.pdf (last visited Sept. 6, 2020) (4.1%); Nat'l Ass'n for Law Placement, Class of 2008 National Summary Report, https://www.nalp.org/uploads/natlsummary2008.pdf (last visited Sept. 6, 2020) (2.6%). *See also supra* note 77 (describing our convention for counting jobs requiring bar admission).

Several of the solo practitioners in our study began their work within incubators.[136] That setting gave them ongoing access to mentors, specialized instruction, and practitioner networks. For those solos, the incubator experience offered as much (or more) guidance as new lawyers reported from some law firms, government offices, and nonprofits. Focus group members described the support from incubators as "really incredible,"[137] "a tremendous resource,"[138] and "blessed."[139]

Other solos secured ongoing guidance by establishing strong relationships with another attorney. Two solo junior lawyers in our study shared office space with a more senior lawyer and were able to rely upon those lawyers for guidance.[140] Others consciously developed mentoring networks. "I started to put together a few groups of other attorneys and entrepreneurs," one explained, with each group "narrowly focused on either the practice of law, some of the financial elements, or growing a business."[141]

The solo practitioners in our focus groups also tended to limit the scope of their practices. More than half focused their services on a single area, such as immigration, family law, estate planning, or criminal defense. Others combined closely related fields such as family law and estate planning. Some, however, did maintain a more general practice—usually designed to serve the needs of moderate-income individuals in a rural area.

Several solos, finally, showed striking thoroughness in preparing for their work. One explained that she "knew from my first day [of law school] that I'm going to be an immigration attorney."[142] She deliberately enrolled in immigration and administrative law classes, as well as a year-long clinic that handled some immigration cases. That academic work supplemented her language skills and prior experience practicing law in Russia. Another solo, who planned to focus on intellectual property matters, took courses and a clinic in that area.[143] A third participant took family and juvenile law courses, completed a clinic in that field, and clerked for a family court judge before opening a solo practice in family law.[144]

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[136] For general information on incubators, see *Legal Incubators*, AM. BAR ASS'N, https://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main/ (last visited July 29, 2020).
[137] O.Eleanor.
[138] O.Ethan.
[139] O.Alejandro.
[140] O.Gary. ("I rented office space from another attorney who'd been practicing a long time. So he had templates and stuff I could use."); O.Mack ("I'm located in an office building with two other solo practitioners, one of whom is my mother.").
[141] O.Ethan.
[142] O.Galina.
[143] O.Thea.
[144] O.Garrett. *See also* O.Tessa (completed externships with a matrimonial lawyer and legal aid juvenile rights practice to prepare for solo practice in family law); O.Ethan (completed LLM tax program to prepare for a solo practice focused on tax and business work).

These comments suggest that new solos practice in a somewhat different context than colleagues may imagine. The solos in our focus groups were deliberate in choosing practice areas, preparing for their practice, and assembling appropriate advisors and mentors. For solos who worked in incubators, their advisors approached supervisor status. The new solos in our study did voice a need for additional preparation in opening and operating a business,[145] which they obtained through mentors and CLE, but their experiences otherwise paralleled that of other new attorneys. The licensing system, in other words, should account for the presence of solo practitioners—but should also acknowledge that those lawyers frequently practice in contexts that offer substantial ongoing support.

* * *

Licensing does not occur in a vacuum. A definition of minimum competence should account, not only for the services that clients need from new lawyers, but for the environment in which those lawyers practice. Our study, together with other research, suggests that six factors shape that environment: new lawyers practice in a wide variety of areas; they use state and local law more often than federal law; they rarely rely upon memorized rules; they engage frequently with clients; they assume substantial responsibility for client matters with little supervision; and, when they practice solo, they often draw upon considerable preparation and support. Against that backdrop, how should the legal profession define minimum competence? We turn next to that challenge.

Twelve Building Blocks of Minimum Competence

A conventional vision of minimum competence imagines a bucket of memorized legal rules accompanied by a few skills that new lawyers use to scoop and serve those rules. The current bar exam reflects that vision, testing recall of a large number of specific rules, application of those rules, analysis of materials presented in a case file, and writing under tight time constraints.

Our research suggests that minimum competence is more complex. New lawyers in our focus groups did not base their first year of practice on a static set of rules and skills that they carried into the workplace. Indeed, as we explained above and detail further below, they rarely relied upon legal rules that they had memorized in law school or for the bar exam. Instead, these new lawyers drew upon more basic concepts and research skills to identify specific rules needed to represent clients effectively.

[145] *See, e.g.*, O.Isla ("Business skills are very important when you have your own law firm."); O.Ethan ("I really look at my practice, because I work for myself, in the three skill brackets. It's my skills as a practitioner, as an attorney, my skills as a businessman and my skills as an entrepreneur."); O.Brodie ("that's probably one of the steepest learning curves I had, not on the legal side, but just in terms of managing a business."); O.Cassidy ("So even if you know how to manage the IOLTA account, . . . there were still so many other aspects of being an employer and just being a business that I needed.").

The lawyers in our focus groups also reported that they lacked key knowledge about the legal system, such as the role of administrative agencies and alternative dispute resolution practices. They also scrambled to acquire skills—such as interviewing, fact gathering, counseling, and negotiating—that were essential to competent practice. Preparing for the current bar exam gave them knowledge they did not need, while omitting knowledge and skills they did need.

By analyzing the insights of our focus group members, we identified 12 interconnected competencies—which we term "building blocks"—that allowed them to practice effectively. We propose that possession of these building blocks constitutes minimum competence: new lawyers who possess these building blocks are able to represent clients with little or no supervision. Equally important, lawyers who possess these building blocks are able to build continuously on that foundation, increasing competence throughout their careers.

To adequately protect clients, the licensing system must assure that new lawyers possess all 12 of these building blocks. Some building blocks are difficult to assess through conventional licensing exams, but they can be tested through educational requirements, supervised practice in clinics or workplaces, portfolios, simulations, and other means. A serious licensing system, one focused on protecting the public, cannot omit essential competencies simply because they are difficult to test.

We describe below each of the 12 building blocks identified by our research. The order of discussion does not reflect the blocks' relative importance; all are critical components of minimum competence. Instead, we have organized the discussion to aid reader comprehension. The 12 building blocks are:

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

Throughout the discussion, we frequently use the words "understanding" and "ability" to describe a building block, rather than the more common terms "knowledge" and "skills." We do

that to underscore the difficulty of separating knowledge from skills.[146] Every skill rests upon some knowledge, and knowledge requires skills for expression. "Understanding" and "ability" more readily convey the blend of knowledge and intellectual skills that lawyers need for their work.

The Ability to Act Professionally and in Accordance with the Rules of Professional Conduct

The new lawyers in our focus groups took their professional responsibility seriously. Several, in fact, suggested that Professional Responsibility was the most important subject tested during the licensing process.[147] "I didn't think I would need professional responsibility information much," one reflected, "but I kind of do, and I find myself kind of questioning things a lot."[148] Professional responsibility, another commented, "is a daily conversation that you have with other people [and] with yourself. You need to know where those boundaries are."[149]

These new lawyers had studied the rules of professional conduct in law school and for the bar exam, but they still struggled to apply those rules in practice. It was hard to identify ethical issues in the moment while interacting directly with clients, supervisors, or opposing counsel. "In actual practice," one new lawyer confessed, "you see how things [go] sideways really quickly, and without even realizing it."[150] Others referred to the constant balancing that ethical practice requires. "You're put in impossible situations as attorneys," one lamented. "You want to be zealous advocates, but at the same time you have to be ethical and you need to follow the rules."[151]

Focus group members suggested that professional conduct was a "learned skill" rather than a set of black-letter rules.[152] Without more experience practicing that skill, some newly licensed lawyers made mistakes. One revealed her client's bottom line to a mediator without obtaining the client's authority.[153] Another afforded too much autonomy to a minor client who was not competent to make decisions on her own.[154] An in-house attorney inadvertently compromised attorney-client privilege when she didn't notice that third parties were present at an in-house

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[146] *See generally* LINDA H. EDWARDS, THE DOCTRINE SKILLS DIVIDE: LEGAL EDUCATION'S SELF-INFLICTED WOUND (2017).
[147] O.Sebastian; Carson; Renata; Selena; Leal, Ensley, Elijah.
[148] Brianna.
[149] Leah.
[150] Carson.
[151] Nina. *See also* Brianna ("I thought that professional responsibility, that part of my career would be very common sense, but it's not really, not in all aspects.").
[152] Nina.
[153] Lisa.
[154] Quinn.

meeting.[155] One new litigator waived privilege for client documents without thinking through the ramifications,[156] while others asserted the privilege too broadly when responding to discovery requests.[157]

The new lawyers in our groups also struggled to deal with unethical or unprofessional behavior by others. A few had to confront co-workers—including paralegals, senior attorneys, and non-attorney managers—about ethical violations.[158] Others faced uncomfortable situations with clients or opposing counsel.[159] Once again, they wished for more experience navigating those conversations.

One subset of these challenges was particularly troubling: Clients, colleagues, and others sometimes displayed unprofessional bias based on race, gender, or sexual orientation. "As a young female public defender," one new lawyer noted, "I've had judges make inappropriate comments. Opposing counsel, same."[160] Lawyers of color referred to "subtle nuances," as well as overtly "disrespectful or rude" statements.[161] A Latina lawyer had to refer some immigration clients to a male colleague because "Latino clients, male clients, do not respect me."[162] An LGBTQ lawyer working in a large firm reported that both her gender and sexual orientation affected professional relationships.[163]

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[155] Khepri.

[156] S.Vivian. *See also* Alice ("Another thing that's very fresh in my mind would probably be inadvertent disclosures . . . . It's just a matter of . . . making sure that you're not doing your client a disservice by giving something up that you don't necessarily have to give up.")

[157] Mike; Gemma; Jack; Ellen.

[158] Trinity ("I've been put in a situation where some things, some methods are being expected of me that I disagree with."); Athena (partner insisted on citing case that did not support argument); Kennedy (disagreement with a "rogue paralegal"); Cecelia ("You're fighting with your boss because he said do this and you're like, 'wait a minute. I don't even, I don't know if car accident ever happened.'"); Henry ("But it became difficult when I would see things like ethical violations [by my boss]. . . . I didn't really know what to do, which is why I left.").

[159] Henry (opposing counsel omitted key provisions when reducing a plea bargain to writing); Soren (client failed to reveal prior felony conviction); O.Thea ("Clients do lie" and sometimes "it comes out in the middle of a hearing or a trial. And [then you have to know] how to preserve your integrity while still zealously advocating for your client and being able to do that on the spot."); Jasper ("how to deal with aggressive attorneys, but at the same time maintain professionalism").

[160] Morgan. *See also* Athena (partner was "slightly sexist"); Ensley ("It is harder being a female in a male dominated corporate-type environment, and seeing there are very few women or even people of color at that level.").

[161] Ezra; O.Ivy. *See also* Rodrigo ("When I initially joined a firm, I think I knew only one other person who was Latinx in the entire office. It took several months for me to become accustomed to and comfortable with the idea that I was primarily surrounded by white males.")

[162] Renata.

[163] Hailey. Participants did not mention discrimination based on disability, but that likely reflects either an absence of disabled lawyers from our focus groups, *see supra* pp. 22-23, or their reluctance to discuss that discrimination in the setting we provided. Research shows widespread discrimination, both subtle and more overt, against lawyers with disabilities. *See, e.g.*, Peter Blanck, et al., *Diversity and Inclusion in the American Legal Profession: First Phase Findings from a National Study of Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 23 U.D.C. L. REV. 23 (2020). Nor did our participants mention discrimination based on religion, political viewpoints,

Supervisors in our focus groups agreed that professionalism and adherence to the Rules of Professional Conduct are essential components of minimum competence, but they highlighted different concerns than the new lawyers. Several supervisors worried that new lawyers lack sufficient commitment to their clients and the profession. Lawyers, one admonished, should not watch the clock and think, "'Oh, it's five o'clock, it's time to check out.'"[164] Another agreed that "a lot of the junior attorneys are very focused on doing the task, wrapping it up, and ending their day," rather than following through on client matters.[165]

Supervisors also complained that some new lawyers fail to understand their role on a workplace team. Those new lawyers were too outspoken in group meetings with a client[166] or produced assignments late, forcing colleagues to work over a weekend.[167] A few mishandled interactions with paralegals and other office staff.[168] These matters of intra-office professionalism weighed heavily on supervisors' minds.

These comments suggest that the supervisors and new lawyers in our focus groups valued somewhat different attributes of professionalism. Supervisors placed a premium on long hours and deference; new lawyers were more concerned about unethical or biased behavior by supervisors, clients, and others. This study cannot mediate those differences; it is one that new lawyers and supervisors should explore. The data, however, do suggest that all lawyers recognize the importance of professionalism in their work.

In that way, the findings correspond with other recent studies, which consistently rank professional conduct as an essential element of minimum competence.[169] Our research, however, shows that new lawyers need more than simple knowledge of the black-letter rules of professional conduct. Despite that knowledge, new lawyers made mistakes that compromised client interests. They also recounted struggling to identify ethical issues in practice and respond

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or other characteristics. Once again, these kinds of discrimination likely exist in the legal workplace but were not reflected in the focus groups.

[164] S.Lydia.

[165] S.Rose. Supervisors, of course, may not accurately perceive the attitudes of new lawyers. Several new lawyers reported that supervisors had exhorted them to be more "proactive" and to "take ownership" of their matters. Mila; Penelope. The new lawyers responded that they weren't being lazy; instead, they lacked sufficient confidence to push matters ahead on their own.

[166] S.Caroline.

[167] S.Akeem.

[168] S.Lydia; S.Juniper.

[169] *See* PHASE 2 REPORT, *supra* note 8, at 22, 57 (professional responsibility is the most important knowledge area for new attorneys); CAPA STUDY, *supra* note 9, at 14 (professional responsibility is the most critical subject for new attorneys to know); FOUNDATIONS FOR PRACTICE, *supra* note 53, at 26 (including several facets of professional responsibility among the top ten foundations necessary for practice in the short term). Respondents to at least one earlier study, conversely, rated "knowledge of ethics of the profession" relatively unimportant for practice. Baird, *supra* note 17, at 273 (only 29.6% of respondents attached "great" importance to that knowledge; half that number considered this knowledge a "key element"). As we explained above, *supra* note 20, those responses may reflect the particular spirit of that era.

to unethical conduct by others. To perform with minimum competence, new lawyers need both knowledge of the rules and experience applying those rules in real-life situations. They need, in other words, the *ability to act* professionally and in accordance with the rules of professional conduct.

In addition to highlighting the need for more experience applying rules of professional conduct, our study identified a possible gap in new lawyers' understanding of those rules. The rules provide that, in addition to representing clients, each lawyer serves as "an officer of the legal system" and as "a public citizen having special responsibility for the quality of justice."[170] The members of our focus groups rarely discussed these aspects of professionalism. Two public defenders noted that they sometimes commiserated with clients about the unfairness of the criminal justice system,[171] and one prosecutor reflected on his role in a system that might be unjust:

> I come home at night, sometimes I think about it, was this the right offer I made on this case? Should I have done something different? And at the end of the day, did I do the right thing? Because you've seen, growing up, so much times where justice has been mishandled, innocent people are sitting in jail and at the same time, I don't, it's a new time, new generation. I don't want to be the one to keep doing the same thing. But same time, I don't want to be looked at as, 'Oh, this person is a new attorney so they're a weak prosecutor.'[172]

Others, however, mentioned "justice" or "fairness" only as part of legal standards they applied or as instrumental arguments used to advance the needs of individual clients.[173] The lack of attention to broader concepts of justice may stem from our protocol: we focused on the knowledge and skills that new lawyers used to serve clients during their first year of practice. Focus group members, therefore, may not have thought about their complementary roles as officers of the court and public citizens.

Other studies, however, suggest that even if we had asked directly about these roles, participants might have rated them as less important than other aspects of professional responsibility. Only 60% of respondents to NCBE's practice analysis rated "social consciousness/community involvement" as moderately or highly critical for new lawyers.[174] A similar percentage (62.1%) of respondents to IAALS' *Foundations for Practice* survey thought that a "commitment to

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[170] MODEL RULES OF PROF'L CONDUCT Preamble (AM. BAR ASS'N 2020).
[171] Melanie; Penny.
[172] Jasper.
[173] *See, e.g.,* Rodrigo (concepts of "fundamental fairness" to inform arguments); O.Callie (using "concepts of equity" to combat prosecution arguments); Raelynn (fairness hearings for merging companies); Axel (fair and equitable treatment standard for international arbitrations); Art (fair compensation for eminent domain).
[174] PHASE 2 REPORT, *supra* note 8, at 63.

justice and the rule of law" was necessary for new lawyers in the short term.[175] These are substantial percentages, but not as high as those reported for many other competencies.

These findings raise an issue for our profession to reflect upon: What is the relationship between minimum competence and the lawyer's role as a public citizen? When we license new lawyers, do we seek only minimum competence in representing clients? Or, do we also seek a commitment to the lawyer's "special responsibility for the quality of justice"?

The murders of George Floyd and many other people of color, combined with ongoing racism, inequity, and inequality, have provoked a profound national discussion about the nature of justice in the United States. Do we want new lawyers to be capable of and committed to engaging in that discussion—as well as in other discussions of justice that will emerge during their careers? Our study does not answer that normative question, but it is one for jurisdictions to ponder as they define this first building block of minimum competence. If minimum competence includes awareness of a lawyer's role in seeking societal justice, then the licensing system should reflect that commitment.

An Understanding of Legal Processes and Sources of Law

Some new lawyers in our focus groups confessed that, even after completing law school and passing the bar exam, they lacked a basic understanding of key legal processes. They understood the federal court system, but not the structure of state and local courts. Nor did they know much about administrative or legislative processes. Arbitration and mediation were new to them, and processes related to transactions (such as recording title) were virtually unknown.

- "What I really needed to learn was the procedure, specifically California procedure, which my school had no interest in teaching me."[176]
- "I didn't really know how they worked, administrative agencies, until I started actually digging into the things I was asked to [do]."[177]
- "When I started my job, I didn't know the difference between mediation and arbitration, which is so basic."[178]

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[175] FOUNDATIONS FOR PRACTICE, *supra* note 53, at 13.
[176] Diego.
[177] Mateo. *See also* Kori ("There's a huge layer of admin law that comes into play a lot of times where the statute might say one thing, but the administrative rule says another thing. And I never took admin law in law school and I think if I could go back I would take admin law because it's everywhere for every single thing almost that you look up, there's some sort of administrative issue that comes up that is often conflicting. And I think that's one of the things I struggle with the most."); O.Galina ("Administrative law. I'm glad I've taken it. And when I think about different areas of practice, you stumble [into] government. And [you need to have] familiarity with how this machine works.").
[178] Enid.

- "[To draft documents] I needed to know . . . where do I find the local rules, how do I ensure this document's enforceability in wherever I'm filing it and literally how do I record this in that relevant jurisdiction?"[179]

Supervisor participants concurred that many new lawyers lack this basic understanding. New lawyers, they suggested, hold a warped view of the legal system in which federal law dwarfs state and local law, while courts overshadow legislatures, agencies, and alternative dispute resolution processes. Focus group members faulted both law schools and the bar exam for creating this lopsided view of the legal system. "I really truly just don't understand why there's so much emphasis towards the federal," one solo practitioner declared, "when almost everything, I mean other than constitutional law, most people are going to go into some kind of state law, right?"[180]

As reported above, about nine-tenths of the new lawyers in our focus groups worked at least sometimes with state and local law; almost half worked primarily with those laws. To assist clients effectively, these new lawyers had to invert their acquired vision of the legal system. Until they did, mistakes occurred. "For instance," one supervisor explained, "the discoverability of a lawyer's communications with an expert is different under [our] state law and federal law."[181] He learned to watch new lawyers carefully to make sure they did not damage clients by assuming that state law paralleled federal law.

Other supervisors and new lawyers told similar stories. One new lawyer relied upon the federal establishment clause in a brief without realizing that the state constitution imposed stricter rules.[182] Another confused state and federal environmental laws.[183] A third recalled:

> So, some of the basic rules of evidence in my brain just automatically were the federal rules. I would get in the trenches preparing for trial, would think that I knew exactly how something was coming in under the federal rules, and then realize that state rules apply and I would have to bring things back in or figure out that I was wrong. That happened a number of times my first year just because I was so conditioned to just go straight to the federal rules in my brain without really recognizing that there was a distinction right off the bat.[184]

In addition to confusing state and federal laws—or overlooking state and local rules entirely—new lawyers' preoccupation with federal processes sometimes prompted them to confuse

[179] Grace.
[180] O.Callie.
[181] S.Wyatt.
[182] S.Antonio.
[183] S.Jasmine.
[184] London.

weights of authority. They would cite federal court interpretations of state law, even when controlling state court decisions were available.[185]

Both new lawyer and supervisor participants stressed that new lawyers do not need to know specific state or local rules before they start practice. Instead, they simply have to realize the importance of these laws—and their accompanying judicial systems—rather than assuming that federal law always controls. A proper *understanding* of the role of state and local law, combined with acquisition of the other building blocks, would allow them to serve clients competently.

Focus group members raised similar concerns about new lawyers' lack of familiarity with legislative processes, administrative agencies, and alternative dispute resolution channels. New lawyers did not have to be fully proficient in navigating those channels, but they had to understand the key role of these processes in our legal system and possess threshold concepts (discussed in the next section) related to these processes.

These findings accord with results from the practice analyses conducted by NCBE and the California Bar. "Local court rules" and "sources of law" ranked among the ten most important knowledge areas in NCBE's survey—higher than several subjects traditionally tested on the bar exam.[186] "Alternative dispute resolution" ranked lower, but tied with conventional bar subjects "criminal procedure" and "real property law" in importance.[187] About half of all respondents also rated "legislative process" and "administrative law and regulatory process" as moderately or highly important.[188]

The California Bar structured its survey of knowledge areas differently, but specified knowledge of both federal and state law within each knowledge area—signaling the importance of state rules.[189] Respondents to California's survey, meanwhile, ranked "administrative law and procedure" high enough that the Working Group recommended adding the subject to the bar exam.[190] These findings support our conclusion that an understanding of all legal processes, including those in states, legislatures, administrative agencies, and alternative dispute resolution forums, is a building block of minimum competence.

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[185] S.Jasmine.
[186] PHASE 2 REPORT, *supra* note 8, at 57. Among traditional bar subjects, only the Rules of Professional Responsibility, Civil Procedure, Contract Law, and the Rules of Evidence ranked above these two knowledge areas. Tort Law tied in importance with Sources of Law. *Id.*
[187] *Id.*
[188] *Id.*
[189] CAPA STUDY, *supra* note 9, at 30-38.
[190] *Id.* at 14, 16. The California survey did not include alternative dispute resolution as a knowledge area. Legislation appeared on the survey but was not rated highly enough for the working group to recommend its addition to the bar exam. *See id*. at 15-17.

An Understanding of Threshold Concepts in Many Subjects

Throughout our focus group discussions, new lawyers and supervisors stressed that new lawyers need to possess "basic knowledge," and to understand "foundational concepts"[191] rather than detailed legal rules. Most were adamant, in fact, that new lawyers should not rely upon memorized rules during their first year of practice. As noted above, they believed that memorization was "dangerous" and "borderline malpractice."[192] Rather than rely on memory, they urged, new lawyers should use their basic knowledge of doctrinal concepts to identify issues and research specific rules.

Focus group participants often struggled to characterize the type of "basic knowledge" needed for entry-level practice. Cognitive scientists use the phrase "threshold concepts" to capture the type of knowledge subjects were describing. A threshold concept is an insight that transforms understanding of a subject. These concepts, which are often counterintuitive, distinguish individuals who have begun to master a subject from all others. Threshold concepts allow new learners to understand the "how" and "why" of their field rather than simply the "what."[193]

Jurisdiction is an example of a threshold concept in law. Lawyers know that an aggrieved person cannot walk into any court and file a lawsuit against any defendant. Instead, there are many types of courts in the United States and almost all of them limit the kind of disputes they hear. Similarly, each court has power to command only certain defendants to appear before it. Lawyers also know that these jurisdictional limits arise from a mixture of constitutional provisions, statutes, and rules. This understanding is far from intuitive to those outside the legal field, but it is critical to a new lawyer's success.

Once a lawyer masters the threshold concept of jurisdiction, the concept is transformative. A lawyer who understands the concept—rather than merely memorizing some of the rules—would never think to file a lawsuit without checking the court's subject matter jurisdiction and considering whether the court has personal jurisdiction over the defendant.

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[191] Emma; S.Josh; Harper; O.Alejandro; S.Vivian; S.Justin; O.Eleanor. *See also* Axel ("general understanding"); S.Lincoln ("rudiments," not "deep knowledge"); S.Carter ("having a well-rounded handle on the basics"); Rob ("broad concepts"); Quinn ("very basic legal concepts" and "good ground level understanding"); Arev ("foundational ground"); London ("pillars of the background information"); Phillip ("broad legal principles"); Owen ("baseline understanding"); Amy ("major fundamental principles"); Nina ("broad understanding"); Gemma ("floating sea of background knowledge")

[192] Bruce; Rebecca; Jacob; Emery. *See supra* notes 92-103 and accompanying text.

[193] For further discussion of threshold concepts, see JAN MEYER & RAY LAND, THRESHOLD CONCEPTS AND TROUBLESOME KNOWLEDGE: LINKAGES TO WAYS OF THINKING AND PRACTISING WITHIN THE DISCIPLINES (2003) (report first proposing recognition of threshold concepts); Jan Meyer, *Threshold Concepts and Pedagogic Representations*, 58 EDUC. &+ TRAINING 463 (2016) (recent overview).

Another threshold concept is the principle that evidentiary rules disfavor the use of character evidence at trial. Lawyers understand that our legal system judges individuals based on their specific acts, not their general character. Disreputable people are entitled to relief when they are wronged, and model citizens face consequences when they break the law. New lawyers who understand this distinction between the focus of a lawsuit and the parties' character can easily identify character evidence and check local rules governing admission of that evidence.

The phrase "threshold concepts" thus offers an apt description of the foundational knowledge that new lawyers need for minimum competence. This building block focuses on understanding principles and policies that govern the law, rather than memorizing specific black-letter rules. Rules differ from jurisdiction to jurisdiction as well as over time; threshold concepts allow lawyers to identify issues, search for the appropriate rule, and see nuances in the rule. As one new lawyer explained, these concepts reveal "what makes that area of law tick."[194]

Focus group members offered several examples of how these threshold concepts undergirded their first year of practice. A real estate lawyer coordinating multistate transactions explained that she was able to master details of the recording statutes in each state because she was guided by "the overarching property principle of first in time first in right."[195] A public defender relied on her "basic understanding" of the rule against hearsay to research specific exceptions in her state.[196]

Memorization of detailed rules for the bar exam, notably, may have interfered with understanding of threshold concepts. Several supervisors, for example, complained that new lawyers failed to understand jurisdiction—even though they would have studied specific jurisdictional rules for the bar exam.[197] Learning the requirements for diversity jurisdiction in federal court did not help these lawyers learn the jurisdictional constraints of their state courts; on the contrary it may have distracted them from focusing on the essential meaning of jurisdiction. A focus on threshold concepts, rather than detailed rules, would have better served these lawyers and their clients.

This distinction between threshold concepts and memorized rules echoes findings from some early studies of minimum competence. More than half of the respondents to a 1972 survey of California lawyers rated "knowledge of substantive law" as essential, but just 4.0% believed that "memorizing legal concepts" was essential.[198] Kentucky lawyers similarly rated "memorizing

[194] Nathan.
[195] Grace.
[196] Morgan.
[197] S.Josh.
[198] Schwartz, *supra* note 21.

legal concepts" last in importance on a list of 30 skills and knowledge areas used in their practice.[199]

More recent surveys have not asked respondents to distinguish between memorization of detailed rules and broader conceptual knowledge.[200] Respondents to those surveys, however, have consistently identified skills—including legal research—as more important than knowledge of any doctrinal subject. These responses support our research finding that an understanding of threshold concepts matters for minimum competence, but recall of specific doctrinal rules does not.

The Ability to Interpret Legal Materials

Focus group members agreed that proper interpretation of legal materials is central to a lawyer's work. The materials themselves are widely available to the public: many clients can find ordinances, statutes, agency rules, and judicial opinions in libraries or online. Lawyers provide value to their clients not because they can access legal materials, but because they know how to interpret them.

To interpret legal materials properly, group members suggested, lawyers must know the difference between holding and dictum in judicial opinions, the role of precedent, canons of statutory construction, and rules for interpreting contracts. They must also read carefully and attend to details, allowing them to focus on fine distinctions in contracts, statutes, and opinions.[201]

Most of the new lawyers in our focus groups were comfortable with their ability to interpret judicial opinions. A few also lauded their law schools teaching them statutory interpretation:

- "Using the statutory interpretation principles that I learned in law school is probably the main thing that I applied from my three years."[202]

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[199] Benthall-Nietzel, *supra* note 15, at 384.

[200] The CAPA survey asked respondents to rate the "level of knowledge" of each knowledge area "required when performing the task," using a 5-point scale that ranged from "Recall from memory" to "Synthesize/Evaluate." CAPA Study, *supra* note 9, at 9. Ratings for all areas averaged 3.0 ("Apply") or higher. Ron Pi, California Attorney Practice Analysis (CAPA) Study Slide Deck, slide 16 (2019) (unpublished PowerPoint) (available at https://www.dropbox.com/s/q8fx9cjzzr8dtxf/CAPA%20Power%20Point.pdf?dl=0).. These responses confirm that attorneys need more sophisticated thought processes than rote memorization when working with legal principles. Answers to the survey, however, do not reveal whether attorneys drew their underlying knowledge from memory or other sources.

[201] *See* Grace ("When you're reading cases in a casebook, if you miss two sentences, you still walk away with the gist of it, but if you're reading a contract and you missed two sentences and those two sentences, God forbid, set liability standards or change how the contract is governed, you've missed a really critical point. And that has happened to me a lot.").

[202] Blakely.

- "Something that was very beneficial from law school, which was surprising to me, but I guess in hindsight isn't, [was] the legislation class. Just because there's so much statutory interpretation stuff that you ultimately end up doing, whether it's civil or criminal."[203]

Others, however, felt unprepared to interpret the statutes and regulations that formed a substantial part of their practice:

- "So it's a lot of statutory interpretation [in my practice] and I wish I'd taken statutory interpretation in law school."[204]
- "Law school focuses almost exclusively on case analysis and my work is, I never look at a case, it's all statutory interpretation and regulations."[205]
- "[I]t took me probably eight months to figure out that there's also the [state] Administrative Code that has provisions that sort of link up [with state statutes]."[206]
- "Sometimes people don't even know that there's a definitions part of the statute because it's in a whole different part . . . . Or [there are] some other statutes that are related but perhaps not directly cited."[207]

New lawyers also needed more guidance on contract interpretation. They observed that law school teaches the principles of contract formation, but not how to read or interpret contracts. In practice, one explained, "you read the contract and then you argue about what it means rather than saying 'was there a contract or is this an offer?' That doesn't really come up, but just reading and interpreting the language."[208]

Even litigators noted their need for better contract interpretation skills. One prosecutor commented: "The contract thing is actually a big deal for us, too, because as you probably know, 97% of criminal cases negotiate. . . . You know, a guilty plea agreement is a contract. So, anything that we don't say is going to be construed against us."[209] A civil litigator agreed:

> I write contracts all the time because I write settlement agreements. So, I have to know how to write that. And I interpret contracts all the time because it's like, 'Okay, this person is claiming that they just tripped and fell here.' . . . I have to

[203] Faith.
[204] Mateo.
[205] Penelope.
[206] John.
[207] O.Garrett.
[208] Sam. *See also* O.Mark (commenting on the difference between studying contracts and drafting them). Note, however, that new lawyers may need to learn principles of contract formation as part of the threshold knowledge they carry into the workplace.
[209] Amy.

> find it in the contract where it says I'm not responsible for that or where the insurance says what they do and do not cover.[210]

Once again, these findings are consistent with results from other recent studies. In NCBE's practice analysis, "statutory interpretation principles" tied for sixth place among the knowledge areas ranked most important by respondents.[211] Respondents, similarly, rated interpret laws, rulings, and regulations and evaluate how legal document should be construed among the most frequent and critical tasks performed by new lawyers.[212] In CAPA's survey, review the documents collected and review relevant documents and records both appeared among the top 10 tasks rated by respondents.[213] And 65% of the respondents to the IAALS *Foundations for Practice* survey indicated that it was necessary in the short term for new lawyers to "effectively use techniques of legal reasoning and argument (case analysis and statutory interpretation)."[214] Our study adds contracts to the list of legal materials that new lawyers must interpret, while affirming the importance of interpreting judicial opinions, statutes, and administrative regulations.

The Ability to Interact Effectively with Clients

As outlined above, more than half of the new lawyers in our focus groups worked directly with clients during their first year. Supervisors confirmed this degree of client contact and expressed their need for new lawyers to work with clients—or at least to think in a client-centered manner.

The new lawyers in our study felt woefully unprepared for this work. They noted the wide range of clients they faced, from homeless veterans to company CFOs, truculent teenagers to dying grandparents, business managers to battered spouses. They had difficulty identifying with disabled clients as well as those of different races, genders, nationalities, socioeconomic statuses, and educational backgrounds. Some clients did not speak English, and almost none were familiar with legal jargon. Many clients were suffering personal or business crises.

Our focus group members used words like these to describe the gaps they had to bridge when communicating with clients:

- "How do you talk to somebody who is in jail?"[215]

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[210] Sue. *See also* Sam ("Maybe this is just the modern times, but everything is governed by a contract.").
[211] PHASE 2 REPORT, *supra* note 8, at 57.
[212] *Id.* at 42. Respondents also attributed substantial importance to a third task, "Determine lawfulness or enforceability of contract or legal document." *Id*.
[213] CAPA STUDY, *supra* note 9, at 21.
[214] FOUNDATIONS FOR PRACTICE, *supra* note 53, at 11.
[215] Tripp.

- "[I had to learn] how to interact with executives, because I went straight in-house."[216]
- "All my clients are really poor. They're from a very different world than I'm from."[217]
- "We have a lot of business or corporate clients who don't want to hear no."[218]
- "You try so hard to put yourself in an individual's shoes to say, okay, if I were losing my house or if I were losing my car, how would I react?"[219]
- "A huge part of the work is legislation and talking with legislators . . . It's a delicate balance of they do think they know everything but they don't necessarily know everything."[220]
- "A lot of our clients have disabilities that make it very difficult for them to follow or speak, or you really need to meet them where they are."[221]

More specifically, new lawyers described three clusters of abilities that they needed to work effectively with clients:

1. The ability to gain a client's trust, gather relevant facts, and identify the client's goals.
2. The ability to communicate regularly with clients, convey information and options in terms that a client can understand, and help the client choose a strategy.
3. The ability to manage client expectations, break bad news, and cope with difficult clients.

Each of these abilities was essential for new lawyers during the first year. These abilities, moreover, have distinctively legal aspects. New lawyers need more than simple "people skills"; they need the ability to interact with clients in a lawyerly way.

Gaining Trust, Gathering Relevant Facts, and Identifying Client Goals

The first step in representing clients was to gain their trust, elicit relevant facts, and identify goals. New lawyers repeatedly stressed the difficulty of these tasks. "Especially as a new attorney," one lamented, "how do I convince this person that, I just started off and your freedom

[216] Nan.
[217] Bruce.
[218] Gabrielle. *See also* Penelope (client "didn't want to hear" that their plan would break the law); Piper ("Who at the client am I talking to? What are their business interests? What do they not want to hear?")
[219] Ezra.
[220] Tara.
[221] S.Rosalyn.

is in my hands, but I have you, I've got you. You can trust me."[222] A new lawyer representing immigrants agreed: "If they're not trusting you, they're not going to tell you what you need to know to create a strong case for them."[223] Even business lawyers had to work to develop client trust:

> Law school teaches you to do the research, law school teaches you how to write, oral advocacy. It does not teach you how a client thinks, it does not teach you how clients' business people think. So in order to really understand your client, you have to have lots of institutional knowledge, work with people, see what their goals are, and make yourself a valuable part of their team.[224]

Gathering facts from clients was especially challenging for new lawyers. In law school, one new lawyer explained, "they give you a set of facts" and "those are the only facts that exist in the world."[225] In practice, she had to develop the skill of "getting more facts from the client and knowing which facts to ask for," as well as the ability to "phrase questions to clients in a way that they understand what kind of information you're trying to get, and they give you the information that's actually useful to you."[226] Supervisors agreed that new attorneys needed to do more "fact digging" with clients, "going back to ask some more questions to get really to the bottom of what's happening."[227]

Deciphering client goals was equally important. "Sometimes," one supervisor reflected, "we don't ask the client, 'Well, what does victory look like? What's your goal here?"[228] Another supervisor agreed that new lawyers don't pay enough attention to client goals:

> One thing that I noticed that a number of the young lawyers struggle with, which is helping a client get to yes. Which is not, 'well the law says this, so no, you can't do that.' [Instead, we need new lawyers to say] 'The law says this. So if you want to accomplish your business goal, you will need to do these things.' . . . Clients are not looking for us to tell them what they cannot do. They're looking for us to help them understand how to accomplish their business objectives.[229]

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[222] O.Callie.
[223] Izad.
[224] Rob.
[225] Penelope.
[226] *Id*. *See also* Thomas ("It didn't really matter what job it was, if I had a client in front of me, being able to talk to them, establish rapport, make sure I was getting the facts, being able to lead them to what was legally the issue, not what they thought was the issue").
[227] S.Vienna. *See also* S.Hunter ("people should come out of law school understanding that it is the facts that drive the outcomes"); S.Rosalyn ("knowing what facts you need to get" from a client and "getting those facts, is really the more difficult part" of legal work); S.Tabor ("The ability to make effective child custody arguments really starts from how you begin to cull facts and . . . how you let the client kind of explain their history to you.").
[228] S.Dexter.
[229] S.Tierra.

Several new lawyers elaborated on the same theme. "I didn't really understand," a new in-house lawyer commented, the importance of "trying to understand the goals of what our business clients want to do. Just because they have a certain idea of how to do it that may not be legal doesn't mean we can't find something legal to do, to try to get to the same result."[230] Participants in another group nodded in agreement when a lawyer at a mid-sized firm observed: "we have to figure out this meandering way of getting to where they want to go that's legal, so just asking the right questions so that you know what their actual final goal is" allows you to "get there in a way that actually makes sense."[231]

Communicating with and Counseling Clients

New lawyers in our focus groups described their need to communicate frequently with clients, especially when clients lacked experience with the legal system. "The number one complaint from clients of lawyers," one declared, "is lack of communication, or poor communication, and not being told what the hell is going on in their case."[232] "Especially in the discovery phase," he continued, clients don't understand the demands placed on them or the slow progress of the case. Taking time to "touch base" and offer "a lot of handholding" was essential for building client relationships.[233]

Equally important, new lawyers had to learn effective counseling skills. Several contrasted their advocacy skills with advising ones. They "felt very confident" with the former but not the latter.[234] When "writing for the court," one explained:

> [Y]ou want your message to be, 'My client is right and here's why.' But when you're writing to the client, you want them to know if they are wrong and what you, what you need to do about it. Not that you're hiding anything from the court or anything like that, but it's just very different roles.[235]

Other new lawyers described learning how to "coach [clients] through a tough choice,"[236] and helping them assess the costs and benefits of each course of action. "I do that all the time with my clients," a new lawyer from a small firm noted, "just like laying out like these are all the possibilities and their likelihood. Do you really want to do this or do you want to walk away from it and just like call it a day?"[237]

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[230] River.
[231] Gabrielle.
[232] Leah.
[233] *Id*. *See also* Mason (describing a "tickler system" for client communications); Melanie ("one thing I had to learn early was I had to check what my assumptions on what my client understood the process to be").
[234] *See, e.g*., Piper; Maya.
[235] Piper.
[236] O.Eleanor.
[237] Paisley.

Managing Expectations, Breaking Bad News, and Coping with Difficult Clients

Some new lawyers in our focus groups grappled with clients living with mental illnesses, trauma, and other life challenges. Counseling these clients was difficult, especially when delivering bad news. "Somebody can know the black-letter law inside and out," a bankruptcy lawyer observed, "and then their first day on the job they are sitting in front of somebody who is incredibly worried, incredibly anxious." There "hasn't really been any formal training," he continued, "on what do you do when this person's on the brink of tears and you have to take him in front of the judge."[238]

New lawyers in our groups had to overcome their initial desire to please clients, learning to deliver bad news candidly. "It was a really hard skill for me to learn," a new family lawyer admitted, "because I was kind of a pleaser at first. . . . But now I don't really care if they don't like what I have to say and advise them. I tell them they didn't hire me to be a cheerleader."[239] Another new lawyer learned to be "straightforward" about problems because his attempts to "tiptoe around" them led to misunderstandings.[240]

Several new lawyers described costly mistakes that stemmed from their inexperience working with clients. One new lawyer had to redraft an estate plan because he forgot to ask the client about his partner's citizenship status.[241] Another was admonished by a judge when she failed to prepare her client for an unexpected ruling and the client screamed uncontrollably in the courtroom.[242] Still another reached a poor result because she did not take her client's mental illness into account.[243] Several new lawyers struggled to deal with clients who lied to them or a judge.[244] Others sent emails that clients found abrasive.[245] Even when they did not report specific mistakes, new lawyers described learning to interact with clients as "trial and error" or "trial by fire."[246]

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[238] Owen. *See also* Ezra ("client hand-holding and maintenance was just, it was profound. It was daunting.")
[239] Camila.
[240] O.Ernest.
[241] Carson. *See also* O.Sebastian (discussing a hearing he lost because he had not obtained sufficient information from his client).
[242] Cadence. *See also* S.Tabor (New lawyers "unnecessarily create crises by, for example, not properly preparing the client for what may happen, the range of possibilities that may happen at a negotiation or a status conference. That's where we see things gone south.")
[243] Quinn.
[244] *See e.g.,* Soren; O.Thea.
[245] *E.g.,* Cole.
[246] Rob; Leal; Athena; Liam; S.Lance; O.Brodie; Tripp; Layla; Colton; Lucia; Henry; S.Rosalyn. *See also* Rob ("Law school teaches you to do the research, law school teaches you how to write, oral advocacy. It does not teach you how a client thinks, it does not teach you how clients' business people think.").

Research dating back to the 1970s reinforces the importance of abilities related to client interaction. More than 40% of the respondents to Baird's national survey reported that client counseling was a "key element" of their practice and that "adequate performance would not be possible in its absence."[247] Respondents to Schwartz's survey were even more emphatic: more than half of them marked both counseling clients and investigating the facts of client cases as "essential."[248] The Chicago lawyers who responded to the Zemans and Rosenblum survey collectively considered fact gathering the most important competency for lawyers.[249]

More recent studies rate client interaction skills as even more critical for new lawyers. More than 90% of the lawyers responding to NCBE's latest practice analysis reported that new lawyers responded to client inquiries (93%), identified goals and objectives in client matters (93%), conducted factual investigations (94%), and informed clients about the status of matters (92%).[250] Eighty-nine percent interviewed clients, client representatives, or witnesses.[251] Respondents rated all of these tasks as equally or more important than any knowledge area.[252] Respondents to the California Bar study similarly rated advising clients among the top 10 tasks performed by new lawyers.[253]

Respondents to IAALS' *Foundations for Practice* survey likewise stressed that key relationship skills are "[n]ecessary immediately for the new lawyer's success in the short term."[254] More than nine-tenths of respondents identified the need for new lawyers to promptly respond to inquiries and requests (91.0%), listen attentively and respectfully (91.5%), and treat others with courtesy and respect (91.9%).[255] More than three-quarters (77.7%) needed new lawyers to exhibit tact and diplomacy immediately, while more than two-thirds wanted them to demonstrate tolerance, sensitivity, and compassion (69.2%) and to proactively provide status updates to those involved on a matter (73.5%).[256] These skills nurture all relationships, but are especially important when interacting with clients.

Another IAALS study, *Think Like a Client*, supports the importance of client interactions from a different perspective: that of the clients. That study, though exploratory in nature, found that clients place a premium on a lawyer's interpersonal and communication skills. In particular,

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[247] *See supra* Table 1.
[248] *See supra* notes 21-22 and accompanying text.
[249] *See supra* note 31 and accompanying text.
[250] PHASE 2 REPORT, *supra* note 8, at 42.
[251] *Id*.
[252] The mean criticality of these client-related tasks ranged from 2.5 to 2.7 on a three-point scale. *Id.* Among knowledge areas, only Professional Responsibility earned a 2.7, with four other subjects (Civil Procedure, Contract Law, Rules of Evidence, and Legal Research Methodology) achieving means of 2.5 or 2.6.
[253] CAPA STUDY, *supra* note 9, at 21.
[254] FOUNDATIONS FOR PRACTICE, *supra* note 53, at 6.
[255] *Id*. at 26.
[256] *Id*. at 30.

clients value prompt responses, proactive status updates, comprehensible explanations of legal matters, and lawyers who are kind, empathetic, courteous, and respectful.[257]

Given the centrality of clients in the early days of law practice, it is surprising that law schools and the bar exam do not focus on this component of minimum competence. "It's so shocking," one new lawyer exclaimed, "considering how much of a lawyer's job is client management that there's nothing about it in law school. It's amazing!"[258] "It all comes back to a client," another mused. "We have a client and the bar doesn't address that at all. It's like it doesn't exist."[259]

Our licensing system cannot credibly claim to protect clients unless it assesses candidates' ability to interact effectively with them. This building block requires a range of essential lawyering abilities, such as respecting client autonomy, gaining client trust, gathering relevant facts from clients, working with clients to identify their goals, conveying technical legal information in lay terms, and managing expectations about uncertain processes. Without these abilities, new lawyers lack minimum competence.[260]

The Ability to Identify Legal Issues

Throughout our focus groups, new lawyers and supervisors emphasized the importance of identifying legal issues when working on client problems. This competency includes the ability to a) identify legal claims and remedies that might address a client's needs ("diagnosis"), and b) pinpoint legal and practical obstacles to achieving any proposed resolution ("treatment"). Resolving a single client matter can require a lawyer to identify dozens of issues.

Many focus group members observed that identifying issues in practice differs from the "issue spotting" they did for law school tests and the bar exam. Exams present compact fact patterns, often with words that flag issues. Clients, on the other hand, tell stories that are complicated and incomplete. They lack knowledge of some relevant facts and dissemble about others. They often focus on one legal issue or solution when another might be more appropriate. Issue spotting for

[257] Logan Cornett, Inst. for the Advancement of the Am. Legal Sys., Think Like a Client (2019), https://iaals.du.edu/sites/default/files/documents/publications/think_like_a_client.pdf..
[258] Owen.
[259] Khepri. *See also* S.Jill (supervisor's comment that new lawyers have "never actually talked to a client before. . . . [T]hey didn't learn that in law school.").
[260] Although all lawyers must be able to interact with clients, minimum competence does not require specific forms of interaction. Some disabled lawyers cannot communicate orally, but can communicate effectively in writing, through sign language, or through interpreters. Lawyers for whom English is a second language may lack the full fluency of native English speakers. These lawyers, however, are still able to interact effectively with clients; in fact, they may communicate particularly well with clients who share their disability or native language. The ability to interact with clients focuses on the interactive skills described in the text, not on a particular medium of communication.

exams was superficial; issue identification in practice required three related abilities and sets of knowledge:

1. The ability to think critically, with an emphasis on the word *critical*
2. An understanding of threshold concepts in a wide range of legal subjects
3. The ability to interact effectively with clients

Critical Thinking

The lawyers in our focus groups described critical thinking as the first step in identifying issues. Law school taught them to read court decisions and other documents with skepticism. As critical thinkers, they looked for ambiguities, loopholes, and questions. A new lawyer working in a large firm's real estate department explained:

> When reviewing, whether it's closing documents or a survey, [I'm] just looking for red flags. And I think that prior to law school, when I would read something that wasn't the way I would approach reading. Whereas now when I'm reading, I'm trying to understand how things fit together, where there are holes, things like that that might be problem areas.[261]

A solo practitioner described a similarly critical approach to reading statutes. That process, he noted, "is not exactly intuitive."[262] Instead, law school taught him to question the meaning of words used in statutes, identify definition sections, and search for interpretive case law.

The same critical thinking skills helped new lawyers isolate components of a client's problem. "You have to break the problems down," one new lawyer reported, "into what are the material elements of this problem, and how can we distill it out in a way that we know exactly which elements we need to attack."[263] A subject who worked in-house for a national company used similar words: "[You need to] think through an issue, or something that's presented to you, critically. . . . Just kind of go . . . piece by piece, if you will, to understand what the issue is and then to develop an action plan to solve that issue."[264]

Both new lawyers and supervisors observed that new lawyers sometimes carry their critical thinking too far. One new lawyer thought she was "pretty good" at drafting contracts until she began handling very expensive properties. Then she started worrying about too many eventualities: "What would happen in this scenario, and what would happen in this scenario?"[265]

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[261] Raseel.
[262] O.Garrett.
[263] Trevon.
[264] Layla.
[265] Victoria.

Another new lawyer described this tendency as "catastrophizing."[266] A supervisor summed up this problem by recalling:

> "When I was a young lawyer, I saw two kinds of lawyers. You get a case and there would be, as in any case, an unlimited number of things you could do, and then there would be maybe five to 10 that really made sense. And there were some lawyers that wanted to do everything, wanted you to do everything, and then there were others that [wanted to do] just the things that made sense."[267]

Despite this tendency to overthink matters, our focus group members agreed that critical thinking is an essential component of issue identification. At least during their first year, new lawyers were better off identifying too many issues than missing a key problem.

Understanding of Threshold Concepts

Understanding of threshold concepts, discussed above, plays a key role in identifying issues. These concepts give new lawyers the language, insights, and policies they need to identify issues. One supervisor referred to this type of knowledge as a series of "lenses" that allow new lawyers to identify issues.[268] New lawyers in our groups similarly described "key words" and "triggers" drawn from concepts that had "seep[ed] into [their] subconscious."[269] A solo practitioner referred to these concepts as an "index" that gave him "a good place to start" when analyzing client issues, "instead of having a whole encyclopedia and having to be like, where the heck do I go?"[270]

New lawyers and supervisors in our groups agreed that the conceptual understanding needed for identifying issues is quite general. Indeed, broad understanding of many areas is more beneficial than detailed knowledge of a single area. The supervisor who described "lenses," for example, did not seek associates with deep knowledge of his practice area (privacy and data security). Instead, he preferred new lawyers with a broad understanding of constitutional law, contracts, bankruptcy, dispute resolution, and civil procedure: those areas provided "a full complement of lenses, through which to look at an issue."[271] New lawyer participants concurred that this type of "broad understanding" was most helpful for identifying issues.[272]

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[266] Zara.
[267] S.Lincoln.
[268] S.Jason.
[269] Trevon; Harper; O.Isla. *See also* O.Brodie ("slight memory").
[270] O.Ernest.
[271] S.Jason. *See also* S.Tabor (supervisor preferred new lawyers who are "able to kind of think through kind of maybe four or five different areas and the way they intersect" over ones familiar with his practice area); S.Beryl (new lawyers need to be more "well rounded").
[272] Nina; Noah ("broad concepts"); Nathan ("basic understanding").

Client Interaction

Issue identification in practice is interactive and iterative. New lawyers described how they had to conceptualize issues from complex and fluid client stories. As one new lawyer explained:

> You start with people's lived experiences. So someone comes to you and they are pregnant and are being discriminated against because they're pregnant. You're going to look to what laws cover pregnancy discrimination, and then kind of build out from there. . . . But your job also is to identify all of the other issues that are arising, right? Like maybe they come to you for that, but there's also race discrimination. There's also caregiver discrimination. . . . And so it's really more the skill of issue spotting and then learning the law based on those issues that you saw.[273]

A government lawyer stated more bluntly: "A lot of times the first thing that somebody says may not be the actual thing that they're looking for. . . . You find a roundabout way to actually get to what the answer is that they were actually looking for."[274] That "roundabout way" required an ongoing process. New lawyers began with the client's initial presentation, identified possible resolutions, sought additional input from the client and others, and identified new issues. Client goals, facts, and issues often changed throughout this process.

Lawyers who remained flexible were best able to serve their clients. A new lawyer working for a large national firm, for example, described a client who had received a government notice of deficient reports. If the lawyers had limited themselves to assessing the deficiency of the client's reports, the client would have owed the government a substantial penalty. The lawyers, however, posed a question that the client had not thought to raise: did the law actually require this client to file those reports? The lawyers were able to tell the government, "Actually, those reports can't be deficient because [the client was] never required to file them in the first place. So you can't consider them when you're imposing a penalty."[275]

Even when new lawyers had little direct client interaction, they needed similar skills to identify issues in supervisors' requests. Like clients, supervisors were not always clear about their needs. When listening to a supervisor, one lawyer explained, "you're issue spotting of course for the legal principles and the relevant facts to your particular case. But it's also the soft skill of picking up the issues that are important to particular partners, when they're asking you a question."[276]

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[273] Tara. Many of our subjects, like this new lawyer, used the phrase "issue spotting" for the work they did in practice. In our text, we use the phrase "identifying issues" to distinguish the more complex work in practice from that performed on exams.
[274] Art.
[275] Eden. *See also* Delaney (describing efforts to "finesse" information from a client "to get the information that we needed, but not making them worried about it yet until we had the chance to do our research").
[276] Emery.

Supervisors acknowledged that this was an important skill for new lawyers. A full group of senior lawyers nodded their agreement when one supervisor said:

> I found the best new lawyers are the ones who . . . understand the end goal and are then thinking broadly as they're doing the research. For example, maybe [my supervisor] should have actually been asking this question, and here is what she really needs to know about this issue, not just the narrow issue that she asked me about.[277]

Other studies confirm the importance of issue identification in new lawyers' work. NCBE's recent practice analysis ranks "identify issues in client matter, including legal, factual, or evidentiary issues" as both the most critical and most frequent task performed by new lawyers.[278] The task also rated highly among respondents to CAPA's survey, where "identify legal and factual issues" ranked fifth among tasks,[279] and IAALS' *Foundations for Practice* survey, where nearly three-quarters (71.0%) indicated that the ability to "identify relevant facts, legal issues, and informational gaps or discrepancies" was necessary immediately upon graduating law school.[280]

There is no doubt that the ability to identify issues is a key component of minimum competence. Our research reveals that this ability is also a complex one: it requires more than the issue spotting tested on exams. Issue identification in practice requires critical thinking skills, an understanding of threshold concepts in many practice areas, and the ability to interact with a client or supervisor in a way that brings hidden issues to light.

The Ability to Conduct Research

The lawyers in our focus groups repeatedly stressed the importance of research abilities during the first year of practice. "I always tell my friends," one lawyer concluded, "that lawyering isn't knowing the answer to a legal question, it's knowing how to get the answer."[281]

New lawyers did not describe just one type of research. Instead, they needed research abilities to perform at least four different tasks:

- To answer specific legal questions posed by clients or supervisors
- To check or update their knowledge of legal doctrine

[277] S.Lola.
[278] PHASE 2 REPORT, *supra* note 8, at 42.
[279] CAPA STUDY, *supra* note 9, at 21
[280] FOUNDATIONS FOR PRACTICE, *supra* note 53, at 31.
[281] Eden.

- To acquire facts and non-legal information for client matters
- To find information about local rules or practices

Research to Answer Specific Legal Questions

At some point during their first year, most new attorneys in our focus groups had to answer a specific legal question posed by a client or supervisor. For a few attorneys, this task formed the bulk of their work.[282] New attorneys described a wide variety of sources for performing this research: commercial databases like Lexis or Westlaw, free databases offered by bar associations, treatises, in-house knowledge banks, and Google searches. For some questions, new lawyers turned directly to statutory codes.

To perform this work effectively, focus group members explained that they needed to know both a range of research methods and how to choose the appropriate method for each situation. Some clients, for example, could not afford to pay for research in a commercial database. To address client needs, lawyers often combined research methods. As one litigator at a mid-sized law firm explained: "I think the most important thing that I learned was starting with Google, even Wikipedia sometimes, because it's free and much, much cheaper than Westlaw, and then using Westlaw to get into the nitty gritty."[283]

Research to Check and Update

As discussed in detail above, the new lawyers in our focus groups rarely relied upon memory during their early months of practice.[284] Even when they recalled the details of a legal rule, they checked sources to confirm their recollection. More often, they remembered only a general concept and had to check the specific rule in their jurisdiction. They were also wary of changes in the law, so would double check sources to update their knowledge.

This checking and updating relied on research methods similar to the ones used for researching new legal issues: lawyers turned to databases, treatises, and the internet. For this type of research, some also used outlines or "cheat sheets" that they had created for themselves.[285] Others used rules, statutes, desk books, and treatises that they had highlighted or tabbed; relevant provisions were then easy to find.[286]

Supervisors encouraged new lawyers to check and update their knowledge this way, rather than rely upon half-remembered rules. "I think that the most important thing," one partner declared,

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[282] *See, e.g.*, Ed ("For me, it was really just research and writing. It's pretty much all I did . . . .").
[283] Jacob.
[284] *See supra* pp. 30-31.
[285] Nia; Emma; O.Willow; Jenna.
[286] *E.g.*, Brianna.

"is will you go and look at the book? Because . . . if I have a question, maybe I should read the rule and not just look at it, actually read it."[287] Failing to consult sources directly led to mistakes. "I know I've seen where people gave us the right answer from a regular rule point," one supervisor recalled, "and then someone was, 'Oh, did you check the local rules?' And then you realize: 'Oh wait, we totally missed something.'"[288]

Research to Acquire Facts and Non-Legal Information

New lawyers in our focus groups drew most of the facts about client matters from supervisor reports or interviews with clients. Sometimes, however, they had to research facts or principles in other fields. A lawyer handling family law matters observed that she turned to a psychiatry treatise "as much as my statute book" because she needed to understand her clients' mental health conditions.[289] A corporate lawyer similarly consulted a book of math and finance formulas to aid his practice.[290] Many new lawyers researched the industries in which their clients worked so that they could better understand the clients' concerns.[291]

Individual cases sometimes required even more specialized research. A supervisor practicing environmental law explained:

> If you're going to litigate a case about a certain gizmo or a certain subject area, you need to learn the subject area. If I'm going to handle a case about wind power turbines, I need to learn about wind power turbines or [in a different case] I need to learn about the life cycle of a certain turtle.[292]

A new prosecutor struck a similar note, recalling that he researched animal hunting practices in order to successfully bring charges under the state's hunting code.[293] And a solo practitioner learned about the computer system that generates birth certificates in order to defend a client accused of fraudulently producing those certificates.[294] For all of these tasks, new lawyers needed research skills that transcended traditional legal research.

Research to Find Local Rules and Practices

Local rules and practices presented a special challenge to new lawyers. Many of them did not realize that these rules existed—or that judges and government offices could publish highly

[287] S.Dexter.
[288] S.Jasmine.
[289] Mila.
[290] Mason.
[291] *See, e.g.*, Penelope (health care); Trevon (corporate transactions); Nora (genetics); O.Cassidy (retirement plans); S.Rosalyn (pharmaceuticals)
[292] S.Eloise.
[293] Brayton.
[294] O.Callie.

specialized orders governing their own courtrooms or departments. Traditional reference sources, moreover, often omit these local rules and practices. New lawyers scrambled at first to find local rules and orders.

Websites for local courts and agencies sometimes offered answers. "Some judges are very, very nitpicky about the exact form that you file for them," one new lawyer explained. "So, I have had the instance where I file something, and then I get an angry call from the judge's clerk saying 'you didn't use his form.' And then I go online" to find that form.[295]

Other times, research required contacting the right official or colleague. Supervisors commented that new lawyers often overlooked the value of cultivating relationships with government clerks and contacting them for help. "It's just the clerk's office," one supervisor declared. "Just call them and ask them the question. It'll take less than a minute."[296] Whether websites, clerks, or other sources provided an answer, the ability to find information about local rules and practices was an essential part of the research package new lawyers needed for their work.

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Once again, other studies underscore the importance of this building block for minimum competence. During the 1970s, 43.3% of respondents to Baird's national survey ranked "ability to research" as an essential skill for lawyers.[297] An even higher percentage of California lawyers (56.9%) ranked legal research as essential during the same era.[298]

More recently, NCBE's 2010 job analysis affirmed the importance of legal research as a key competence: respondents ranked four types of research as more critical than knowledge of any doctrinal area.[299] The same pattern emerged in NCBE's 2019 practice analysis, which reported three different types of research as among the most frequent and critical tasks performed by new lawyers: researching case law, researching statutory and constitutional authority, and researching secondary authorities.[300] Similarly, researching "laws and precedents" appeared second on the California Bar's list of key tasks,[301] and the ability to "effectively research the law" was the legal

[295] Binan.
[296] S.Akeem.
[297] Baird, *supra* note 17, at 273.
[298] Schwartz, *supra* note 21, at 324.
[299] Case, *supra* note 44, at 56, 54. The four varieties of research (conducting electronic research, researching statutory authority, researching regulations and rules, and researching judicial authority) averaged criticality ratings of 3.19 or higher on a 4-point scale. *Id.* at 56. The most critical area of doctrinal knowledge, civil procedure, earned an average rating of just 3.08, with other subjects falling well below that level. Constitutional law, for example, achieved an average rating of just 2.29. *Id*. at 54.
[300] PHASE 2 REPORT, *supra* note 8, at 42. Researching administrative regulations, rules, and decisional law also ranked highly, appearing in the fifteenth slot on the list. *Id*. Researching court rules was also listed: 89% of respondents indicated that new lawyers perform this type of research, and it had a criticality rating similar to some other types of research. *Id.*
[301] CAPA STUDY, *supra* note 9, at 21.

skill that the most respondents (83.7%) to the *Foundations for Practice* study identified as necessary for new lawyers to possess in the short term.[302]

Studies thus point consistently to research as an essential part of the skillset for new lawyers. Our work builds on that consensus by demonstrating that this is not a unidimensional skill; new lawyers must be able to apply research skills in multiple settings and for multiple purposes. A valid licensing system should assess the ability to conduct research, and should do so in a manner that reflects application of this skill in real-world practice.

The Ability to Communicate as a Lawyer

Prior studies regularly rank communication skills as key elements of a lawyer's minimum competence.[303] Our focus group members sounded the same theme. They suggested, however, that the current licensing scheme overlooks five key facets of this competency. New lawyers, they stressed, must be able to:

- Communicate concisely;
- Communicate in language that clients understand;
- Choose communication methods that are effective for each audience and setting;
- Attend carefully to communications from others; and
- Negotiate effectively.

Communicating Concisely

Lawyers are too wordy, participants told us: today's workplace demands succinct communication.[304] Emails, for example, have replaced memos and briefs as the dominant form of written communication. One new attorney observed, "Not everybody in law school goes out in the world and writes briefs. That's not a thing. But I can tell you that if you are practicing law, you are writing email."[305]Another reported, "I think I've written one formal legal memo and it was two-and-a-half pages, which was considered long." Instead, "most of the time I am communicating through email, very quick emails, back and forth, trying to convey the important information in a concise way."[306]

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[302] FOUNDATIONS FOR PRACTICE, *supra* note 53, at 31.
[303] *See supra* pp. 9-17.
[304] *See, e.g.*, River ("I think as lawyers we tend to be a little more verbose than a lot of other professions, and if you write more than two sentences or three sentences, I have noticed that our business clients will not read the email."); William ("So many of my stake holders aren't attorneys. A lot of times they're lay business people and they don't want to read verbose attorney [writing]").
[305] Athena.
[306] River.

Supervisors concurred with the need for better, more concise emails from new attorneys. "I do agree with everybody," one summarized, "that the written, the email communication could be better. Most of our clients are business owners. They don't want to read six paragraphs."[307] Supervisors also faulted new lawyers for failing to title emails appropriately, organize their text, or adopt the appropriate "tone."[308]

Brevity also mattered in oral communication. "Oral presentation is so important," one new lawyer explained:

> When you get in front of a senior attorney, you might get a minute to explain what you're asking or what you need before you lose their attention. And then that becomes a mark on you. . . . Staff meetings, you're constantly being judged and graded, I think, in all of your ways of presenting yourself.[309]

Whether communicating in writing or orally, the advice new lawyers got from supervisors was "more Hemingway, less Dickens."[310]

Using Language that Clients Understand

New lawyers struggled to find the appropriate words for communicating with clients. Even "practical" law school classes, one observed, "didn't teach us how to talk to clients, how to get someone who's charged with some heinous event to trust you well enough to tell you what's happening."[311] A prosecutor confessed: "One skill that actually I didn't think I would need that I still don't feel like I really have is talking with victims. It's definitely a skill and I'm not great at it."[312]

Written communications with clients posed similar difficulties. How well did the client understand the legal context? Would the lawyer insult the client by simplifying concepts? Or would simplification encourage understanding?

In addition to these challenges, new lawyers discovered that supervisors sometimes forwarded their emails or memos directly to a client. As a result, they had to write for two audiences at once. As one new lawyer reported, "you really have to kind of know, am I drafting this email [just for the partner], or is the partner going to forward this to the client? Is this an internal email

[307] S.Justin.
[308] S.Jasmine; S.Archie; S.Hazel.
[309] Ella.
[310] Todd.
[311] Whitney.
[312] Colton.

where I can ask this question?"[313] Whether communicating with clients directly or through their supervisors, new lawyers did not feel sufficiently prepared to address clients.

Choosing Effective Communication Methods

Although focus group members highlighted the importance of concise communication, they agreed that some matters require more extensive treatment. Choosing the appropriate treatment was a necessary part of their competence. "Sometimes the response is a short email," one new lawyer explained. "Sometimes the answer is a spreadsheet. Sometimes it's an actual legal memo. . . . I have to make the call."[314] Supervisors observed that new lawyers sometimes made the wrong call: "I actually gave a new lawyer a do-over this week," one said:

> I asked the lawyer to research a preemption issue and I got an email back that was a paragraph that says we're not preempted, we can do it. No citations, I mean literally it was a paragraph. And we all know preemption is a sticky doctrine, you cannot explain a preemption issue in a paragraph. So I sent it back to her.[315]

In addition to choosing the depth of treatment, new lawyers had to identify effective communication channels. Was email best? Or would a phone call, text message, video chat, paper memo, or face-to-face interaction be better? New lawyers tried to discern the preferences of their client or colleague. "What is the expectation around how we communicate with our clients," one new lawyer mused. "Do we email? Do we call? All [of] those are sort of moving targets because every client is different."[316]

Several participants suggested that new lawyers default too often to email or text messages. "In a true millennial way," one new lawyer confessed, "I hate talking on the phone. I would like to send an email and then I can get a response in writing."[317] Supervisors repeatedly complained about this tendency. "I get so frustrated," one explained. "It's either IM or texts or email. And you get in this loop where [new lawyers] keep coming back with questions, and it's like if you were going to have more questions, pick up the phone. . . . Let's talk through this instead of me

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[313] Raelynn. *See also* Athena ("I've been on emails, it's gotten forwarded to outside counsel on a deal, and I'm like, Oh that was that was my actual email. You didn't, call them, and summarize what I said, you just, whoosh, right out the door.").
[314] Freya.
[315] S.Jasmine.
[316] Hailey. The most effective means of communication in any situation depends on the constraints and preferences of both parties. Disabilities make it difficult for some lawyers and clients to use particular channels of communication. Other factors, such as incarceration, illiteracy, or lack of internet access may also affect a client's choice of communication means. Minimum competence requires lawyers to find effective communication channels; it does not require them to use particular channels.
[317] Sue. *See also* Mila ("Remember, like I'm a millennial, so I'm like weird about using the phone.")

having to process 50 different emails."[318] "If it's gone back and forth twice," another agreed, "pick up the phone. I think that's something that my newer attorneys really don't realize."[319]

Some focus group members, finally, noted that new lawyers did not know how to communicate effectively during trial court or administrative hearings. The new lawyers who participated in those hearings found they were "a lot different" than the appellate arguments they had practiced in law school.[320] Rooms were arranged differently and the proceedings were more informal.[321] One supervisor added that she "struggled with attorneys that don't know how to address a judge or a justice. That's a problem because that's something you should learn from the very beginning.[322]

Attending to Communications from Others

Effective communication requires reception as well as transmission. Many focus group members faulted new lawyers for failing to attend carefully to messages sent from others. They often referred to this problem as a failure to "listen," but it was clear that the failure could occur either in written or oral communication.

"Listening is vital," one supervisor declared:

> But a lot of new lawyers don't seem to have that and maybe it's maturity, but I think it's something that can be practiced. You need to listen to what your clients are saying. You need to listen in our area to what members of the public are saying. You need to listen to what the other lawyer at the other end of the phone is saying to read between the lines, 'what does that lawyer really want?'[323]

"I think listening is huge, one of the biggest skills as an attorney that we have and need," a new lawyer from another group agreed.[324]

Listening to oral communications, some new lawyers thought, was particularly challenging. "When someone speaks to you," a new litigator reflected, "it's different than seeing it in writing in front of you."[325] One new lawyer added that good listening includes attending to the speaker's

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[318] S.Archie.
[319] S.Hazel. *See also* S.Brooke ("Do you text with clients? Do you email? When to know like you say, when to know to just pick up a phone."); S.Akeem ("There's this hesitancy to just pick up the phone. . . . If we're just trying to figure some fact out or something, just pick up the phone and just call them. So this, you know, communication could get better.").
[320] Penny. *See also* Faith ("very different").
[321] Penny; Faith.
[322] S.Jill.
[323] S.Eloise. "Or especially if the lawyer's talking in front of his or her client," this supervisor continued, "you need to be able to filter out, well some of what the lawyer is saying is for the benefit of the client."
[324] Cole.
[325] Enid.

body language and "read[ing] the room." "Because things vary so much" she continued, "in courtroom to courtroom, lawyer to lawyer, client to client. You have to be able to kind of really almost intuit a little bit."[326]

An important part of receiving communications from others, finally, was knowing when and how to ask questions. "For me," a transactional lawyer at a large firm said:

> I think the number one thing is learning how to listen and ask the right questions. . . . I made the mistake, I did it maybe two times at the very beginning where I would hear the assignment, write it down, I wouldn't ask questions and as I'm sitting there trying to work on it, I have no idea what exactly is the point or what they want or what the goal is, how long it's supposed to take me to do, when they want it by.[327]

Supervisors agreed that "it's really important for a lot of the [new] attorneys to just be willing to ask questions."[328] In addition to seeking information from supervisors, they had "to learn to be a little skeptical" with clients and go "back to ask some more questions to get really to the bottom of what's happening."[329]

Negotiating

Focus group members identified negotiation as a distinctive communication style that was essential for their work. Negotiation, they noted, is quite different from advocacy. As new lawyers, they had to learn to "be collaborative," "give a little to get a lot," and "work together" with opponents.[330] The "litigious" argument styles they learned in law school did not work well during negotiations.[331]

In addition to negotiating with opposing counsel, new lawyers had to negotiate with union agents, pro se opponents, and their own clients. One new lawyer working in-house even negotiated fee arrangements with outside law firms:

- "I do a lot of labor negotiation. So it's interesting because sometimes it is another attorney on the other side, but a lot of times it's a business agent for a union

[326] O.Tessa.
[327] Kori.
[328] S.Jill; S.Antonio ("many of them are afraid to ask questions . . . so we've had to remind people, at the beginning of an assignment is the time to ask the questions"); S.Hudson ("I'm trying to get them to aspire to be the best attorney that they can be. . . . Ask questions."); S.Hazel ("I think the most important thing is still an energetic, very bright, inquisitive, new attorney that's willing to ask questions.").
[329] S.Vienna.
[330] O.Sebastian; O.Callie.
[331] O.Callie.

who's not an attorney. So I guess approaching that in different ways has been an interesting thing to learn."[332]

- "Sometimes negotiating with your own clients on what we'd be willing to accept on a civil case, they think it's worth a ton of money and you're . . . trying to negotiate them to a reasonable place because ultimately going to trial wouldn't really benefit them."[333]
- "Being in-house counsel, . . . the first negotiation is getting all the executives on board with the same deal. Getting them all to agree that we should go after this deal on these terms is sometimes a bigger battle than negotiating it with opposing counsel afterwards."[334]
- "I remember one of my first discussions with my boss at the time and asking, he was like, 'Reach out to outside counsel if you need to, talk about budget and things like that.' . . . And so, that's something that I had not done as far as negotiating price and what we can pay."[335]

Several new lawyers wished they had taken negotiation classes in law school; a few suggested these classes should be required. One tax attorney explained that, as someone who planned to do transactional work, he thought negotiation and mediation classes were only for people who planned to "do that for a living." Only after beginning his practice did he realize how much time he spent negotiating with clients and colleagues; then he wished he had been encouraged or required to study negotiation in law school.[336]

Supervisors agreed that "negotiation skills are huge," and "absolutely important" in law practice.[337] One supervisor observed, "What I see lacking is the ability to negotiate provisions into a contract. . . . [New lawyers] know the elements of different types of laws. It's just the question of negotiating contracts, or just negotiating in general, that seems to be lacking. Which is what we spend a lot of time [doing]."[338]

One new lawyer, finally, confessed that his lack of negotiation experience led to a legal aid client receiving less than an optimal result:

> I was trusting some of the representations that the other side made about a specific third party beneficiary and I had been communicating with that third party beneficiary. So, I thought we were kind of all on the same page. I found out

[332] Brielle.
[333] Faith.
[334] Nan.
[335] Layla.
[336] William.
[337] S.Lydia; S.Hazel.
[338] S.Antonio.

> afterwards, 'Oh no, that was—he was just totally bullshitting me.' Excuse my language. It still worked out. It was still a good result for the client. But I probably could've . . . . It would've been better if I had been more aggressive and I wish someone had encouraged me to be more aggressive in the negotiation.[339]

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Since at least the 1970s, researchers have reported the importance of communication in law practice. Baird's national survey, completed during that decade, included writing, oral communication, drafting, and negotiating among the nine competencies most necessary for adequate performance. More recently, NCBE's 2019 practice analysis ranked "written expression" as one of the most critical abilities for new lawyers, more important than knowledge of any doctrinal subject.[340] "Oral comprehension and expression" were also critical, equaling or exceeding the importance of all but one doctrinal subject.[341] "Negotiation" fell somewhat lower on NCBE's list, although 79% of all respondents—still a considerable majority—identified that ability as moderately or highly critical.[342]

Respondents to the *Foundations for Practice* study similarly stressed the importance of communication skills, although in a somewhat different order. These respondents identified the ability to "listen attentively and respectfully" as the communication skill most necessary for new lawyers in the short term, with 91.5% of respondents noting the importance of that skill.[343] Speaking and writing professionally also received widespread recognition, with 80.1% and 78.1% of respondents identifying those abilities as necessary in the short term, respectively.[344] Like respondents to the NCBE practice analysis, *Foundations* respondents less frequently rated negotiation skills as necessary in the short term.[345]

This research, together with ours, establishes that communication is an essential building block of minimum competence. Our research, however, updates and adds nuance to the existing

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[339] Bruce.
[340] PHASE 2 REPORT, *supra* note 8, at 62. Written expression received a criticality rating of 2.8 on a three-point scale. Professional responsibility, the most highly rated knowledge area, received an importance rating of 2.7. *Id*. at 57. Other knowledge areas rated no higher than 2.6.
[341] *Id*. at 62. These abilities received criticality ratings of 2.7 and 2.6 respectively. *Id.* Among knowledge areas, only Professional Responsibility achieved a mean importance rating of 2.7, with two other subjects reaching a mean of 2.6. *Id*. at 57.
[342] *Id.* at 63. The California Bar's survey asked respondents about fewer types of communication, but its respondents ranked creation of written documents as more frequent and critical than any other task performed by new lawyers. CAPA STUDY, *supra* note 9, at 21.
[343] FOUNDATIONS FOR PRACTICE, *supra* note 53, at 30.
[344] *Id*.
[345] About two-fifths (38.3%) of these respondents thought the ability to "negotiate and advocate in a manner suitable to the circumstances" was necessary in the short term, although almost all respondents thought it had to be acquired at some point. *Id*. at 16. The California Bar asked respondents about the importance of "negotiation and closing," but that ability did not reach the top ten list of abilities included in the report. CAPA STUDY, *supra* note 9, at 21, 26.

literature. Contemporary law practice requires new lawyers to communicate concisely, use language that clients understand, choose effective communication methods for each situation, attend closely to communications from others, and negotiate effectively. The licensing system should assure that candidates possess those capacities.

The Ability to Understand the "Big Picture" of Client Matters

Focus group members urged that lawyers must see the "big picture" in client matters to represent clients competently. New lawyers, they suggested, often lack that ability. One supervisor summarized this perspective by observing that new lawyers need "to think more at the forest level and less at the tree level."[346] A new lawyer offered a similarly graphic explanation. "It took a few cases, seeing the full life cycle of the case, to really understand strategy," she explained:

> Because before, it was just kind of like you're in a computer game, where it's this map and it's all grayed out and black and you have to make progress in the game to see that there is a mountain or a river. . . . [N]ow I kind of have a fuzzy feeling of I know what the whole map is, and I can navigate a better way for each client in the map.[347]

A lack of experience with "forests" or "maps," according to our focus group members, caused at least two problems. First, without the ability to see the big picture, new lawyers could not effectively manage projects. When given responsibility for their own cases, which was common in many organizations, they struggled to manage those cases. Even when working as part of a larger team, they sometimes missed critical deadlines because they did not understand the full project's timeline.

One new lawyer in a small firm, for example, described how she inadvertently held up a real estate transaction for two weeks because she did not understand the scope of the project or her role in coordinating work by other parties to the transaction. The delay created "chaos" because it occurred at the end of the year. "I literally didn't even know I had the ball to drop," she recounted, "but I dropped it."[348]

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[346] S.Tierra. *See also* S.Evan ("[K]nowing the rules is critical, assuming that they can put it in a conceptual framework. . . . I've seen young kids come in that to some extent know the rules. . . . [But] they haven't thought through what that means.").

[347] Mila. *See also* Rob ("I understood the legal concepts, but I didn't understand the interplay of those concepts. For example, the FRCP, you know the rules inside and out, you just don't understand how the case progresses. . . . That's an area that I was lacking."); Gemma ("Where does my task fit in the big picture?"); Elijah ("I came in knowing the patent law. But the thing that I needed to learn most that was unfamiliar was all the pieces and parts go together in the flow of a patent litigation.").

[348] Kori. *See also* Ava ("My partner would be like, 'What? You didn't do that two months ago? Why not?' I said 'I have no idea that existed.'"); Khepri ("I was told to do point B. I literally was told to do something in the middle of

Other focus group members described similar experiences. A new lawyer who worked for a state agency struggled to understand the different types of hearings he attended, along with the documents and evidence needed for each; he lacked a clear understanding of how the hearings related to one another.[349] A transactional lawyer at a large firm, similarly, neglected to bring key documents to a closing because she misunderstood the overall structure of the deal.[350]

Failure to understand the big picture caused a second failing among new lawyers: they had difficulty developing strategies to guide client matters. These new lawyers knew the rules, but they did not know how to combine the rules into a successful strategy. A new lawyer working for a small law firm noted:

> [You have to know] how to build an entire case for your client, spotting all of the legal issues, determining what type of evidence you need, what type of experts you need, things of that nature. That was a lot. I was overwhelmed when I first started because they just threw me in there. And I just had to figure it out.[351]

Lawyers who worked for larger employers similarly struggled to understand the big picture of the matters they worked on. A new litigator at a large firm recalled:

> You don't really know the first time you look at a complaint, what to do with it. Okay, yeah, there's some rules that I should be applying. But it isn't until you've kind of seen discovery and how it goes and then even the end goal of trial, you don't really know how to analyze and evaluate big picture items, like how are we going to conduct discovery? Are we going to do expert depositions before or after this mediation, let's say? Or are we going to do plaintiff's deposition before expert disclosures or after? How are we going to prepare our strategy big picture?[352]

A lawyer at another large firm noted similar challenges in transactional work: "It's difficult to know what the next step is, and I think when you first start, you wonder, is it because I don't know what I'm doing? Is that the reason I don't know what the next step is? Or is it because the next step isn't clear and I need to ask the partner?"[353]

Supervisors commented on the same failing. "What I have to teach the new associates," an estate lawyer explained, "is the cause and effect. . . . They can look at a book and see how to write a

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the process. . . . And then either the third party or my employer would be, 'So what about A, B and C?' And I was, 'I don't know what A, B, and C are. . . . What you're even talking about?'").

[349] Thomas.

[350] Grace.

[351] Leal. *See also* Rebecca ("not knowing the life cycle of a case").

[352] Nina.

[353] Penelope.

will or a trust, but they don't really understand how it works, so I have to teach them the consequences of their actions."[354] A litigator agreed that "we've had some really smart first years that really understand the discovery rules, but they don't really understand how to use them and kind of the strategy that goes into it." New lawyers, this supervisor concluded, need to be able to see rules and client matters "from 10 feet away."[355]

While previous studies did not ask respondents about "big picture thinking," they inquired about some related abilities. NCBE's practice analysis determined that sizeable majorities of new lawyers engage in identifying goals and objectives in client matters (89%) and developing strategy for those matters (86%).[356] Considerable majorities also reported that practical judgment (94%), managing projects (93%), and strategic planning (75%) were moderately or highly critical skills.[357]

Respondents to the California Bar survey identified "advise the client regarding the benefits, risks, and consequences of a course of action," an ability that requires thinking about the big picture, as one of the top ten abilities new lawyers need.[358] Similarly, half of the respondents to IAALS' *Foundations for Practice* study considered the ability to "recognize client or stakeholder needs, objectives, priorities, constraints, and expectations" to be necessary in the short term.[359] Although studies characterize "big picture thinking" in different terms, they repeatedly confirm the importance of that ability as a component of minimum competence.

The Ability to Manage a Law-Related Workload Responsibly

Lawyers handle heavy workloads and owe special duties of care to their clients. "There's such a deep level of responsibility that comes with being a lawyer," one new lawyer observed.[360] As a result, workload management assumes special importance. The failure to manage workload effectively, many participants agreed, could irrevocably harm clients. They pointed to three components of this building block: careful time management, meticulous organization, and effective collaboration.

[354] S.Kannon.
[355] S.Hudson.
[356] PHASE 2 REPORT, *supra* note 8, at 42.
[357] *Id.* at 62-63.
[358] CAPA STUDY, *supra* note 9, at 21.
[359] FOUNDATIONS FOR PRACTICE, *supra* note 53, at 20.
[360] Hailey.

Time Management

Focus group members referred frequently to the importance of time management. A partner at a large firm declared: "One of the things that we work really hard on from the beginning is not doctrinal, . . . it's just simple time management. . . . If you can't manage your time, then we really can't use you."[361] A new lawyer similarly observed that "the job of being a lawyer is all time management."[362]

Our participants distinguished between the time-management skills that sufficed for college and law school, and those needed to manage time effectively in practice.[363] The volume of work in practice was heavy, even compared to law school.[364] In addition, new lawyers had to switch priorities quickly and triage emergency matters when they arose; law school gave them more control over their schedules.[365] New lawyers also learned that they had to estimate the time needed for each project and notify team members if they were unable to meet deadlines.[366]

The most important aspect of time management for our participants was balancing speed with quality: neither clients nor supervisors appreciated quick work if it was shoddy. Several new lawyers erred on the side of speed and described mistakes they made as a result.[367] Supervisors agreed that some new lawyers "rush through things and that's where the mistakes are made."[368]

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[361] S.Adam.
[362] Cadence.
[363] John (even "working part-time and family and five classes and juggling all that" during law school did not prepare him for "what being a practicing attorney would be"); S.Eloise ("I think when you go through law school, you have a lot of control over your schedule. . . . And then when you are a new associate, you don't control anything."); S.Vienna ("If they worked in a clinic then they might've had one client," while in practice they're "managing 75 clients and [need to be] able to triage and manage the caseload"); Jasper ("when we were in law school, we had, what? Like two, three weeks to do a memo? Plenty of time to research, find all the cases."); O.Callie ("I remember being a law clerk, a student, and having to cover one or two motions at a time, and even then complaining that I had no life and I was so stressed out. Now that I had to cover all of my normal stuff and prepare to argue five motions a week, it was insane.")
[364] *See, e.g.,* Tripp ("There are prosecutors in larger jurisdictions [who] . . . might have 20 minutes to review the case file to get up on the facts before they need to start calling witnesses."); Raegan ("We're in the court every single day and sometimes we have anywhere between 10 and 15 cases on our docket and they only set them between 8:30 and 11:00.").
[365] John; Carson; S.Juniper (supervisor commented that "it's in the process of juggling everything [that] I think [new lawyers] are lacking").
[366] Raseel ("I think one of the hardest things is knowing how long things take. . . . I would think something would take an hour and then I'd start working on it and it was six hours later and I was still not done yet."); S.Lola ("They don't have any sense of how long any particular task is going to take, it's really hard to figure that out until you're doing it over and over again."). Supervisors expressed particular frustration with new lawyers who failed to notify them that an assigned project was taking longer than expected. *See, e.g*., S.Wesley ("The worst thing you can do is to leave me [without notice]. Did you not understand me? Did you forget about it? . . . I think there's a reluctance to call up and say, 'yes, I said I'd have it for you tomorrow, I don't have it.' You got to call me.").
[367] Noah; Oliver; Brinda; Jackson.
[368] S.Josh.

One counseled new lawyers to "slow down" because "I'd rather have the quality work, not the quantity."[369]

When asked how they developed appropriate time management skills, most focus group members drew a blank. Several suggested they learned these skills out of necessity, with "feet to the fire."[370] Their mistakes, for example, taught them to plan ahead so that they would have time to revise and check their work.[371] A few mentioned advice from mentors[372] or working with co-counsel.[373] One partner from a mid-sized firm noted that "in at least one case," his firm had "hired a time management coach" for an associate who was struggling with that skill.[374]

Organization

Organization overlaps with time management, but our focus group members had to organize much more than their time. They also had to organize emails and files so that they could separate client matters and jump quickly from one matter to another. As one new lawyer explained, "keeping each project straight, and knowing what's going on in that particular project is really key because you do not want to say or do for one client what you should be doing for another client."[375] Another proclaimed more bluntly: "If you aren't organized, you can't do this job. You will commit malpractice. You will miss deadlines, and I think it's the most important part of being an attorney."[376]

In addition, new lawyers who handled litigation or regulatory matters had to organize documents, records, and discovery related to their work. A lawyer for a small criminal defense firm described working on his own to sort and organize a "massive amount of discovery" for a federal drug conspiracy case; his efforts paid off when he found material that the prosecutor had overlooked.[377] An attorney for a nonprofit, similarly, sorted thousands of pages of permits,

[369] S.Josh. *See also* S.Lydia ("take the time that you need").
[370] London. *See also* O.Isla.
[371] Emery.
[372] London.
[373] Melanie.
[374] S.Wesley.
[375] Anika.
[376] Mila. *See also* Amy ("You have to be on top of your cases and know what's going on and emails. Yeah, like constant emails, constant."); Penelope ("Even just like sorting emails because you get a million emails and you have to keep all of them and knowing where to find them later."); Ava ("You have to be really, really good at juggling a million different tasks and staying organized."); Raelynn ("It's like, you've got, all right, 20 emails came in, and three of them are for this matter, this matter, that kind of stuff."); Anika ("As a specialist, I'm on 30 different projects with 30 different clients at any one time."); Camila ("It's 12 plates spinning at once."); Kira ("Being more organized . . . [is] so necessary now that I have 100 cases.")
[377] Henry.

inspection reports, and other documents to "pull a story" that would support her client's regulatory claim.[378]

New transactional lawyers in the focus groups often shouldered responsibility for organizing all the documents related to an upcoming deal. "Our role," one explained, is "about being organized and keeping track of all the different things that need to get done prior to closing, and at the different stages of the deal."[379] "It's 100% an organization job," another declared.[380] In addition to creating checklists and organizing materials physically, these associates kept mental lists of the status of each transaction, allowing them to respond to questions from senior lawyers on the deal.[381]

Some focus group participants developed organizational skills in law school or while studying for the bar exam,[382] but most needed more preparation. Organizing the documents for a legal dispute or transaction was more challenging than organizing class notes or flashcards. Over time, new lawyers developed organizational approaches, but they wished that someone had taught them "practical things, like this is a good way to keep all of your cases organized" when they started work, rather than forcing them to reinvent the wheel.[383]

Workplace Collaboration

In almost every employment setting, new lawyer participants worked with supervisors, peers, and subordinates. "Managing up, down, [and] sideways" was yet another skill they needed.[384] Some participants struggled to identify their supervisors' expectations and to meet idiosyncratic preferences. "Learning to understand what the different [partners] want, even when they may assign you exactly the same thing," was essential.[385] Diplomatically managing requests from competing bosses was equally challenging, especially in firms where "each partner thinks that they're their own chiefdom really, and for each partner, their matter is the most important thing."[386] Some new lawyers needed to learn how to tactfully correct a supervisor's mistakes.[387]

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[378] Ella. *See also* Lisa ("Prepping for trials . . . that's where the organization comes in and you pull everything that you've done in one case together.").
[379] Delaney (corporate law).
[380] Mason (loan finance). *See also* Gavin (trusts and estates); Raseel (real estate); William (tax).
[381] Grace ("The partners that come to me because they're like, 'I don't know where we are in this closing,' and I'm like, 'Here's where we are. It's calendared and here's your critical dates."); Jeff ("There's 20, 30 different tasks and they're all moving along at different paces and you had to know at specific moments where each of those tasks were as you went along. Because people would often ask you in a meeting or on the phone like where are we on this?"); Delaney ("We're expected to be available to know what's going on, . . . just keeping track of all the things that come up so that we can then be responsive to the client. That's heavily emphasized.").
[382] Anika (law school); Camila (law school); Emma (bar exam); Izad (bar exam).
[383] Jan.
[384] Ensley.
[385] Levi. *See also* Trevon.
[386] Trevon; Zara.
[387] Piper; Diego.

Managing down was even more novel than managing up. Few new lawyers had supervisory experience but, even at small firms, they often needed to delegate work to paralegals or student workers.[388] In larger firms, some new associates found themselves managing whole teams of paralegals, document reviewers, and—after the first year—more junior associates.[389] The most challenging management task, according to focus group members, was correcting paralegals who were older and more experienced than the new lawyers.[390]

A few new lawyers drew on law school experiences to handle these management challenges. Work for law journals or student organizations gave them some experience working with teams, including supervisors and subordinates.[391] Others regretted their lack of experience, noting yet another set of skills that they had to learn on the job.[392]

* * *

The elements of this building block emerged in other research, although sometimes in different terms. "Calendar deadlines" appears among the ten tasks rated most important by respondents to the California Bar's survey; that task implies a need for organization and time management.[393] NCBE's practice analysis, similarly, lists the ability to "develop specific goals and plans to prioritize, organize, and accomplish work activities," as one of the ten most important tasks for new lawyers.[394]

The *Foundations* study probed competencies related to workload management in particular detail, finding that more than 70% of respondents named each of these 13 abilities as necessary for new lawyers in the short term: maintaining a high-quality work product, treating others with courtesy and respect, exhibiting tact and diplomacy, having a strong work ethic, taking ownership, taking individual responsibility for actions and results, understanding when to engage a supervisor, adapting work habits to meet demands, honoring commitments, arriving on time for meetings, working cooperatively and collaboratively as part of a team, expressing disagreement thoughtfully and respectfully, and prioritizing and managing multiple tasks.[395]

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[388] Renata; Mila; Selena; Rebecca.
[389] Kennedy; Trevon; Jeff; Gemma; Phillip.
[390] Kennedy; Mila.
[391] Reese; Phillip; Molly.
[392] *See, e.g.*, Kennedy ("That was not—it was not glanced upon, it was not poked at, nothing in law school."); Zara ("I've learned how to manage up and think about working on teams through reading advice columns that people will submit, saying like 'My job is horrible. What do I do?'"); Jeff ("that's not something you practice in law school").
[393] CAPA STUDY, *supra* note 9, at 21.
[394] PHASE 2 REPORT, *supra* note 8, at 42. Other highly rated tasks included "consult with colleagues or third parties regarding client matters," and "schedule meetings and other work activities." *Id.*
[395] FOUNDATIONS FOR PRACTICE, *supra* note 53, at 30-34.

Licensing systems often overlook time management, organization, and collaboration as components of minimum competence, but our research—combined with that of others—shows that these abilities are part of the bedrock of competence. To repeat the words of one subject, "you can't do this job" without them.[396]

The Ability to Cope with the Stresses of Legal Practice

Law is a stressful career, and new lawyers in our focus groups frequently voiced those stresses. Being responsible for clients, one said, is "like the weight of the world."[397] "I just feel this great responsibility for the fate of these people,"[398] another agreed. Several distinguished the stresses of practice from those felt in law school. "In law school," one new lawyer recalled, "if I didn't answer a question, I was the only one that had to kind of be responsible for it. But now, I'm responsible for somebody's case. And that is the fearful part."[399] "Now you're dealing with actual, real people and people's lives," another commented.[400]

Supervisors struck a similar chord. "One of my biggest concerns when I'm interviewing new attorneys," one observed, "is their ability to act quickly in an emergency situation, how they're going to handle it . . . because in the real world it's not like a case in class."[401] This supervisor probed candidates' ability to handle stress during interviews, "asking questions like, when you handle situations, stressful situations, what do you do? Because that'll be very informative for me."[402]

The ability to cope effectively with stress is essential—not just to an attorney's well-being, but to serving clients. Lawyers who cannot cope with stress may abuse alcohol or drugs; they may also experience debilitating depression. Those conditions sometimes lead to professional failures.[403] Even short of those problems, some new attorneys in our study admitted that stress had caused them to make mistakes.[404]

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[396] Mila.
[397] William.
[398] O.Isla.
[399] Lisa.
[400] Kali. *See also* Freya ("it's really stressful whenever you have, even if it's a small matter, you have a client."); Riley ("high stress and anxiety of litigating eviction cases and having high stakes in your cases"); John ("there's so many things that you don't think about when you're getting ready to practice law that are just additional stressors").
[401] S.Jill.
[402] *Id.*
[403] *See See* NATIONAL TASK FORCE ON LAWYER WELL-BEING, THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE 8-9 (2017), https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf [hereinafter "NATIONAL TASK FORCE REPORT"].
[404] O.Isla; Brinda ("I was so stressed, that it resulted in me including an incorrect address," which endangered timely filing of an IRS document). *See also* Jasper ("I think honestly what I noticed with the first year attorneys when I feel like there's a slip up in professionalism, it comes from the stress.").

Other research agrees that stress management is an essential ability for new lawyers. Majorities of respondents to the *Foundations for Practice* survey indicated each of the following stress-related competencies was necessary for lawyers immediately upon entering the profession: "cope with stress in a healthy manner" (60.3%); "exhibit flexibility and adaptability regarding unforeseen, ambiguous, or changing circumstances" (58.1%); "exhibit resilience after a set-back" (55.7%); "make decisions and deliver results under pressure" (56.3%); and "react calmly and steadily in challenging or critical situations" (60.8%).[405] Similarly, almost 90% of supervisors responding to NCBE's practice analysis rated "stress management" as moderately or highly important for new lawyers.[406]

The ABA has recognized the importance of well-being for all lawyers: it adopted a resolution that "supports the goal of reducing mental health and substance use disorders" and urges courts, bar associations, and regulators to "consider the recommendations set out" in a comprehensive report from the National Task Force on Lawyer Well-Being.[407] One of those recommendations, notably, is to "Modify the Rules of Professional Conduct to Endorse Well-Being As Part of a Lawyer's Duty of Competence."[408]

The ability to cope with stress is difficult to test through conventional exams.[409] Nor should courts use character and fitness committees to determine that some candidates are not fit enough to handle the stresses of law practice. Coping with stress is an ability that can be developed. One way to develop and assess this ability is by requiring candidates to successfully complete real-world practice experiences in clinics, externships, or other settings. As we explain in the final section of this report, assessment of all 12 building blocks requires innovative approaches to licensing; we need to move beyond a system that relies heavily on written exams.

The Ability to Pursue Self-Directed Learning

Many of the new lawyers in our focus groups were surprised by the lack of training and supervision they received during their first year. They had to navigate new practice areas and

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[405] FOUNDATIONS FOR PRACTICE, *supra* note 53, at 17.
[406] PHASE 2 REPORT, *supra* note 8, at 62. The California Bar did not include abilities related to stress management on its survey.
[407] Am. Bar Ass'n, Resolution 105, https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_2018_hod_midyear_105.pdf (adopted 2018).
[408] NATIONAL TASK FORCE REPORT, *supra* note 403, at 26.
[409] Participants in our study often noted the stress they suffered studying for the current bar exam; some suggested that this stress prepared them for similar stresses in practice. Experiencing stress, however, does not demonstrate competence in coping with that stress. The legal profession suffers high rates of depression and substance abuse among licensed attorneys. See Patrick R. Krill, Ryan Johnson & Linda Albert, The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys, 10 J. ADDICTION MED. 46 (2016). These unfortunate statistics suggest that, although all licensed attorneys experience the stress of taking the bar exam, many have not developed sufficient competence in coping with that stress.

acquire new skills on their own, with little instruction. To represent clients competently, they had to take control of their own learning.

Focus group members devised several techniques to accomplish this goal. A new lawyer in a legal aid office organized a "series of internal trainings," as well as a "resource library" for herself and other junior lawyers.[410] A new prosecutor, similarly, created a knowledge bank for his office by soliciting materials from more senior colleagues. "I just sent out an email saying, 'Everyone send me your best work,'" he recalled. "And I opened up a Google Drive and dumped it all on there. And now everyone thinks I'm Mark Zuckerberg."[411]

Several new lawyers realized that they could learn from documents stored on office hard drives. "There was always a common drive that everybody had access to," one attorney revealed, "so I would literally just search 'letter responding to eviction notice,' and I would follow that template."[412] Another enterprising lawyer tutored herself on insurance law by studying a standard motion created by a colleague and reading all of the sources cited in that motion.[413]

New lawyers also learned to seek guidance from professional associations and listservs. "You have a question," one lawyer explained, "and you put it up there and someone will bite."[414] They also valued CLEs, both for the direct content and for allowing them to meet senior colleagues who might become mentors.[415]

In addition to using these techniques, new lawyers stressed the need to admit their own limitations and ask questions. "Just knowing when to ask for help," one new lawyer offered:

> I think is definitely a learned skill because sometimes you think, okay, I really don't want to ask for help because I don't want to look stupid, I don't want to look like I don't know what I'm doing, I don't want to get fired because I have no idea what I'm doing, it's my first year. But being able to know, okay, this is something that I need to ask somebody about, that's definitely a learned skill.[416]

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[410] Riley. *See also* Harper (new lawyers organized a weekly "case discussion group" with their supervisor so that they could "noodle through a case" and "just bounce it around").
[411] Carter. Some lawyers at large firms benefited from formal knowledge bases provided by the firm. *See, e.g.,* Victoria ("Our firm has . . . a database of all the documents that are filed or drafted. And I can just go on there and look up like initial discovery requests or initial disclosures or motions in limine"). New lawyers in smaller organizations, however, had to create their own alternatives.
[412] Alice. *See also* Tripp; Lillian ("for most things that we do, there's going to be some sort of sample").
[413] Brianna.
[414] Liam (criminal law). *See also* Nala (veterans' law and housing law).
[415] Ezra; Kori.
[416] Nina.

Self-directed learning, in other words, requires knowing what you don't know—as well as possessing the initiative and ingenuity to fill in those gaps.

Respondents to NCBE's practice analysis identified "continuous learning" as an essential ability for new lawyers: 93% of new lawyers and 95% of more senior ones thought this ability was moderately or highly critical.[417] The mean criticality score for this ability was higher than that for most individual knowledge areas.[418] The IAALS' *Foundations for Practice* study also supports the importance of self-directed learning. Majorities of respondents to that survey indicated that these abilities were necessary immediately out of law school: "understand when to engage a supervisor or seek advice in problem-solving" (75.2%); "have an internalized commitment to developing toward excellence" (61.3%); "show initiative" (74.8%); "intellectual curiosity" (61.8%); and "resourcefulness" (57.6%).[419] These abilities all support self-directed learning.

Given the complexity of law practice, it is difficult to imagine any lawyer succeeding without the ability to engage in self-directed, continuous learning. During the first year, this ability is an essential component of minimum competence.

Assessing Minimum Competence

The validity of a licensing process depends not only on carefully defining the facets of minimum competence, but also on accurately assessing them. At the end of each focus group discussion, we asked participants to reflect on how well the bar exam had evaluated the skills and knowledge they needed for their first year of practice. Their responses, combined with the nature of the 12 building blocks, offer five insights:

- Closed-book exams offer a poor measure of minimum competence to practice law.
- Time constraints on those exams similarly distort assessment of minimum competence.
- Multiple choice questions bear little resemblance to law practice.
- Written performance tests, in contrast, resemble many of the tasks that new lawyers perform.
- Practice-based assessments, such as ones based on clinical performance, offer promising avenues for evaluating minimum competence.

We discuss each of these insights below.

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[417] PHASE 2 REPORT, *supra* note 8, at 62.
[418] *Id*. at 62 (mean criticality rating of 2.6 for continuous learning); *id*. at 57 (only three knowledge areas achieved mean ratings of 2.6 or above). The California Bar survey did not include items related to the ability to learn continuously.
[419] FOUNDATIONS FOR PRACTICE, *supra* note 53, at 31-33.

Closed-Book Exams

Focus group members sharply criticized the use of closed-book exams for licensing. As discussed above, the new lawyers in our focus groups rarely relied on memory to address client problems. Supervisors, similarly, discouraged reliance on memory.[420] A closed-book bar exam, therefore, bore little relationship to practice:

- "One thing that always kind of bothered me about the bar was, you're not allowed any reference materials, which is entirely unlike anything in real life, because you always can go look it up in real life. So . . . that never made very much sense to me, I guess."[421]
- "[The bar exam] requires memorization, yeah. It seems strange and backwards . . . . [M]y real life is not a memorization test."[422]
- "I feel like [the bar exam] was very much a memorization game for me, which is not at all relevant to my practice because we look up everything anyway and nothing needs to be memorized."[423]
- "I have absolutely zero idea why you would ever make the bar exam memory-based. . . . It doesn't make any sense to me. I always thought that the bar exam should be like some of the exams that I took in law school that I felt were very effective which was, you need to have an understanding of the baseline. If you don't have an understanding of the baseline, having the book next to you is not going to save you."[424]

Instead of reflecting practice, participants suggested, closed-book exams distract from testing more important competencies. "One of the most frustrating parts," one new lawyer explained, "is that in many ways the bar exam isn't really understanding, taking the time to contemplate, reflect upon, and respond to" a client problem; "[i]t's just what can I remember in this time period."[425] Another new lawyer noted that law school exams required him to "analyze" and "really critically think about what's going on." The bar exam, in contrast, was "a reversion to just memorize as much as you can"—more like his testing experiences in high school and college.[426]

[420] *See supra* pp. 30-31.
[421] O.Gary.
[422] Zara.
[423] Binan.
[424] Freya.
[425] Faith.
[426] William.

Time-Pressured Exams

Focus group members also criticized the time pressure that candidates face on current bar exams. Competent law practice, they pointed out, requires investigation, reflection, and research. Experienced lawyers sometimes offer immediate advice to clients, but new lawyers should hesitate to do so. Instead, new lawyers should take the time to gather appropriate information, consult sources or peers, and formulate an answer.

A few new lawyers challenged this assessment, noting that they sometimes had to respond quickly to client or supervisor demands.[427] Most, however, agreed that even requests for rapid-fire answers in practice afforded more time than questions on the bar exam. When time-sensitive client demands arose, moreover, new lawyers usually were familiar with the facts and law surrounding the matter. Very few situations required a response in the 1.8 minutes allotted per multiple choice question on the Multistate Bar Exam (MBE), or even in the 90 minutes allowed for the Multistate Performance Test (MPT).[428] The "false time pressure of the bar" made it "inauthentic."[429]

This unrealistic structure, focus group members suggested, had two negative effects. First, preparing for such a time-pressured exam taught new lawyers the wrong lesson. "Most of the big mistakes we make," one supervisor declared, "are created by time pressure, people get in a hurry. They get careless."[430] New lawyers confirmed this perspective, citing numerous mistakes they made because they worked too quickly.[431] Competent law practice, they advised, requires care—not speed.

Second, time-pressured exams exclude candidates who have all the building blocks of minimum competence but do not respond to questions as quickly as their peers. Speeded exams frequently disadvantage test-takers with disabilities; they may also disadvantage women, people of color, older test-takers, and examinees with low socio-economic status.[432] Our data suggest that the speed demanded by the current bar exam is not a component of minimum competence to practice law. As one supervisor observed:

> I've never hired someone because they're very fast at answering 60 questions. I would consider re-evaluating the approach of testing for speed. . . . Some people

[427] Trinity; Jasper; Cecelia; Colton.
[428] *See Preparing for the MBE*, Nat'l Conf. Bar Examiners, https://www.ncbex.org/exams/mbe/preparing/ (last visited Sept. 26, 2020) (Multistate Bar Exam requires candidates to answer 200 questions in three hours); *Preparing for the MPT*, Nat'l Conf. Bar Examiners, https://www.ncbex.org/exams/mpt/preparing/ (last visited Sept. 26, 2020) (90 minutes for each performance test). For further information on the adoption of these tests, see supra note 7
[429] Zara. *See also* Trevon ("less authentic to real practice").
[430] S.Archie.
[431] Noah; Anika; Brinda; Trevon; Jack; Emery; Nan. *See also supra* notes 367-369 and accompanying text.
[432] Ruth Colker, *Test Validity: Faster Is Not Necessarily Better*, 49 Seton Hall L. Rev. 679, 689 (2019).

> process information more slowly and that's okay. I think this urgency that's put on people who take the bar exam . . . should be reevaluated.[433]

A time-pressured bar exam, a new lawyer agreed, "is not a measure of who's smart. It's who can type fast or who can read fast."[434] In the real world of practice, a solo practitioner concluded, a lawyer who is thorough will "chew up and spit out" one who relies on speed.[435]

Multiple Choice Questions

Many focus group members faulted multiple choice questions for failing to test the competencies they most needed as new lawyers. Their critiques raised five distinct points. Multiple choice questions:

- Do not assess written or oral communication skills.
- Do not reflect real-world issue identification skills.
- Test memorized jurisdiction-specific facts, rather than threshold concepts.
- Ignore the crucial nature of strategic thinking and adversarial argument.
- May have built-in implicit bias.

First, participants noted that these questions do not assess written or oral communication. Given the centrality of communication in a lawyer's work, they felt that any licensing exam should devote more time to constructed-response answers than to multiple choice ones. "Written stuff would be more helpful," one lawyer volunteered, "than a ton of multiple choice. And more accurately test people."[436]

Second, subjects suggested that multiple choice questions offer only a very weak test of the issue identification skills needed in practice. The lawyers in our focus groups repeatedly distinguished the issue identification they did in practice from the issue "spotting" featured on multiple choice tests. Identifying issues in practice, they explained, is fluid and interactive. New lawyers identify issues as they engage with clients or supervisors; they ask follow-up questions, check sources, and refine their understanding of issues. Good issue identification is iterative.

Multiple choice questions, in contrast, provide brief canned facts with no opportunity to ask follow-up questions. These questions also tend to reveal the issue, rather than require the test-taker to recognize it. The candidate's task is simply to recall the correct rule governing the issue.

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[433] S.Justin.
[434] Penny.
[435] O.Ethan. Another solo practitioner added: "I very rarely charge by the hour. So if I need to stay up all night or do whatever it is to be a product I'm proud of, I can. I can put in all those extra hours that I want to feel good about it." O.Cassidy.
[436] Liam.

This question, drawn from a prior Multistate Bar Exam, illustrates the problem that subjects discussed:

> A defendant was prosecuted for mail fraud. At trial, the defendant moved to have all witnesses excluded from the courtroom, and the court granted the motion. The government named the investigating FBI agent as its designated representative. Upon learning that the agent would be giving testimony during the trial, the defendant moved that the agent also be excluded from the courtroom.
>
> Should the defendant's motion be granted?
>
> (A) No, provided that the government can show that the agent's presence is essential to the presentation of its case.
>
> (B) No, because the government has a right to have its designated representative remain in the courtroom throughout the trial.
>
> (C) Yes, because the agent's testimony might be influenced by the testimony of other witnesses.
>
> (D) Yes, because the defendant has a right to exclude all persons who may be called as government witnesses.[437]

The question states the issue: should the defendant's motion to exclude the FBI agent be granted? Rather than testing the candidate's ability to identify a possible issue in an ongoing trial, the question tests a different ability: once alerted to this issue, can the test-taker remember the specific provisions of Federal Rule of Evidence 615 (which governs removal of witnesses)?

The third defect noted by focus group members is that, as the above example suggests, multiple choice questions tend to test recall of jurisdiction-specific, detailed rules rather than an understanding of the threshold concepts that new lawyers need to know in practice. The specific rules governing mandatory exclusion of witnesses from the courtroom are far from the "basic knowledge" and "foundational concepts" that contribute to minimum competence.[438] These rules assume importance only when a case goes to trial, which is rare in today's world, and they vary from state to state. A competent lawyer would check the governing rules before answering the sample question above.

Fourth, multiple choice questions overlook the strategic thinking and adversarial arguments that lawyers use in practice. As one new lawyer explained, these questions are "so opposite to how

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[437] *MBE Sample Test Questions*, NAT'L CONF. BAR EXAMINERS 3 (2016), http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F17 (question 14).
[438] *See supra* pp. 46-49.

we were trained and how we practice. In litigation my answer is picked for me. They're like, okay, our answer is C and do everything you can to make [it so]."[439]

In the sample question above, for example, the "correct" answer is (B): Under Federal Rule of Evidence 615, a party cannot automatically exclude the other party's designated representative from the courtroom. A party that wanted to exclude the witness, however, might persuade the judge to adopt answer (C). Judges retain considerable discretion to control their courtrooms, despite Rule 615. If excluding the FBI agent were important to the defendant's case, defense counsel certainly would at least urge the judge to pursue that route. Answer (B) is the "best answer" only in a sterile world without additional facts, strategy, and advocacy. "In a field where so often the answer is 'it depends' or [is] so fact specific," one new lawyer concluded, "it just doesn't make sense to say all of a sudden the answer is very clearly one of these four choices."[440]

Two focus group members, finally, worried that multiple choice questions might include implicit bias or "disenfranchise particular segments of our population."[441] Given systemic racism, even the appearance of possible bias worried them. As one new lawyer concluded, "that's really dangerous, especially for the legal field where there are a lot of people who need representation, who are vulnerable populations. I just think that that's a bad way to test for our field."[442]

Written Performance Tests

Although the lawyers in our focus groups criticized several aspects of the bar exam, they praised the written performance tests that NCBE currently offers. Those test questions ask examinees to create a specified document (such as a memo, client letter, or contract provision) based on a file of client information, cases, statutes, and other materials.[443] The test-takers work entirely from the provided materials, rather than drawing upon memorized legal rules. These performance tests, new lawyers agreed, most closely parallel the work they do during the first year of practice.

"The performance test is actually exactly what I did as a first year lawyer, and still do regularly," one new lawyer declared.[444] Another new lawyer commented: "My first lawyer job I remember

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[439] Aubrey. See also O.Ethan ("there's no multiple choice questions in real life").
[440] Harper. *See also* Jackson ("There are four answers. Two of them are yes, two of them are no . . . If both 'yes' descriptions of how to get there are valid, then there's really not a better answer because frankly in practice you need both."); Camila ("There's so much ambiguity in what we do on a day to day level that it would make more sense for me to write three more essays than it would to do all these . . . multiple choice."); Ellen ("In real life often it will be two [answers] that are very close, and of course it depends on what facts you don't have in the question . . . . It would be malpractice to just pick an answer.").
[441] Rebecca; O.Alejandro.
[442] Rebecca.
[443] *See Preparing for the MPT*, NAT'L CONF. BAR EXAMINERS, https://www.ncbex.org/exams/mpt/preparing/ (last visited Sept. 26, 2020) (describing format of these tests, which are known as the "Multistate Performance Tests" or MPT).
[444] Enid.

thinking, 'Oh my God it's just like the performance test.'"[445] Other focus group members characterized the performance tests as "valuable,"[446] the "most useful" part of the bar exam, [447] and "very practical."[448] These reactions parallel ones that NCBE received in its study of stakeholder perspectives on the bar exam.[449]

Building on this praise, focus group members recommended that bar examiners expand the performance tests to include negotiation, client engagement, and more transactional skills. A solo practitioner, for example, proposed that a performance test might "lean towards a negotiation kind of perspective where you're not necessarily trying to be so combative but more trying to find a middle ground."[450] A question could accomplish that end by asking examinees to outline a negotiating strategy based on the case file. Another new lawyer suggested incorporating questions about client relations into performance tests. Rather than asking examinees simply to outline their advice to a client, for example, the question could ask them to think through the client's possible reactions and how the lawyer should respond to those reactions.[451]

In addition to these suggestions, numerous focus group members noted that the 90 minutes allotted to each of NCBE's performance test questions were far too short. "At a law firm," one new lawyer offered: "I wouldn't just have an hour and a half to read everything and write a memo on it. If anything, if I only had an hour and a half, my boss would expect just an email with a quick answer. It's just not realistic."[452]

Another new lawyer concurred, suggesting that "it just makes no sense" to expect lawyers to spend only "45 minutes to read and digest the material, and 45 minutes to draft the appropriate response that wouldn't get you a malpractice suit."[453] A supervisor endorsed these views, recalling that the performance test was "this huge thing that would take a week in real life but you have [90 minutes] to write . . . . And I was like 'Oh my God.'"[454]

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[445] Nia.
[446] Cole.
[447] Reese; Eden.
[448] River.
[449] NAT'L CONF. BAR EXAMINERS TESTING TASK FORCE, YOUR VOICE: STAKEHOLDER THOUGHTS ABOUT THE BAR EXAM 3 (2020), https://testingtaskforce.org/wp-content/uploads/2020/03/FINAL-Listening-Session-Executive-Summary-with-Appendices-2.pdf ("The MPT was widely viewed as the component that is most representative of the skills needed for [newly licensed lawyers] at the point of entry to practice.").
[450] O.Callie.
[451] *See* Carson ("I think it even would have been helpful if, for example, in the performance test they added something that said, 'Oh now your client breaks down in the meeting, what do you do? They just start crying, how do you handle that?' Because that actually happens a lot to me.").
[452] Brianna.
[453] River.
[454] S.Connor.

Practice-Based Performance

Some of the 12 building blocks are difficult, or impossible, to test effectively through written exams. A valid licensing system, however, cannot ignore facets of minimum competence simply because they are difficult to assess in written form. Practice experiences offer one way to assess competencies like the ability to act professionally, client interaction, communication with multiple audiences, awareness of the big picture in client matters, workload management, coping with stress, and self-directed learning. Practice experiences can also assess other competencies in a natural environment rather than in the artificial atmosphere of a written exam.

In theory, mandatory practice experiences could occur during law school (as part of clinical courses or externships) or after graduation through short-term apprenticeships. Our findings about workplace supervision, however, raise cautions about reliance on externships or post-graduate apprenticeships. Despite the best intentions of workplace supervisors, many lack the time or expertise to supervise students or new lawyers closely, provide appropriate feedback, and assess development of building blocks.[455] Practicing lawyers must put their clients, not new lawyers, first.

Law school clinics owe duties to clients, but they maintain much smaller caseloads than practicing lawyers. The educators who teach these clinics also have expertise in supervision and feedback; those are well developed pedagogies.[456] Legal educators who teach in clinics, therefore, are well equipped to assess the building blocks of minimum competence that cannot be tested on a written exam. A licensing system that required candidates to complete supervised clinics during law school could effectively assess many of the building blocks identified in this report.[457]

New lawyers in our focus groups repeatedly cited clinics as essential in preparing them for the first year of practice:

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[455] *See supra* pp. 33-36.

[456] *See, e.g.,* Kimberly E. O'Leary, *Weaving Threads of Clinical Legal Scholarship into the First-Year Curriculum: How the Clinical Law Movement Is Strengthening the Fabric of Legal Education*, 26 CLINICAL L. REV. 357 (2019).

[457] Closely supervised externships, with sufficient involvement of legal educators, might serve the same purpose. Those experiences, however, would have to be carefully designed to provide the supervision and feedback offered in clinics. Supervisors would also have to be trained on effective assessment practices and governed by the same rules against arbitrary grading that bind faculty. For thoughtful discussion of ways to incorporate some of these elements into externships, see, *e.g.*, Jodi S. Balsam & Margaret Reuter, *Externship Assessment Project: An Empirical Study of Supervisor Evaluations of Extern Work Performance*, 25 CLINICAL L. REV. 1 (2018); Elizabeth G. Ford, *Toward A Clinical Pedagogy of Externship*, 22 CLINICAL L. REV. 113 (2015); Karen A. Jordan, *Enhancing Externships to Meet Expectations for Experiential Education*, 23 CLINICAL L. REV. 339 (2016).

- "I gained a lot of familiarity with client communication and the substantive law in the clinics . . . . I knew the process and I knew what it looked like or what it should look like, and that gave me a lot of confidence."[458]
- "I was in a year-long clinic my third year of law school. It was transactions focused and . . . it felt like having basically an entire year of having worked at a law firm. . . . Hosting a conference call, speaking to the client, asking good thoughtful questions to the client, kind of active listening, all these different things that come in handy every day. I feel like I first really got to practice those in my clinic in law school."[459]
- "I also took a clinic as we mentioned and I think that experience prepared you in a unique way . . . . So you have a client that's coming in, how do you manage client expectations? How do you have that initial meeting? How do you continue to interact? What is the demeanor that you take or the approach that you want to have as a lawyer?"[460]
- "I did the clinic, and I think everybody should be required to do the clinic. Because it is the only time you will actually see a case and have to decide what to do with it. . . . I don't think the first time you get to communicate with a client on your own [should be] when you're licensed. I think you need to have practice and have somebody to look over your shoulder and seeing how you're doing it beforehand."[461]

We did not ask subjects directly about their experience with clinics; they volunteered these comments (and many similar ones) in response to questions about how they learned the competencies needed in practice. As the comments suggest, clinics introduced students to essential abilities that they did not learn elsewhere in the curriculum or while studying for the bar exam. Clinics also integrated learning from multiple classes, helping students understand the bigger picture of client representation. Clinics, finally, helped students adjust to "the weight of being a lawyer" and learn mechanisms for coping with that responsibility.[462]

Supervisors were equally enthusiastic about the role of clinics in developing minimum competence:

- "I think a very valuable thing would be clinical experience."[463]
- "Clinical experience is such a big deal."[464]

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[458] O.Garrett.
[459] Nolan.
[460] Trevon.
[461] Raegan.
[462] Layla. *See also* William ("giving people that entryway without the full responsibility").
[463] S.Lincoln.
[464] S.Jill. All other members of this focus group nodded emphatically after this statement.

- "I would say too, I find that the lawyers . . . that are the most successful seem to be the ones that have . . . hands on experience sort of like you were saying with the rest. I'm surprised the law schools across the country haven't gone to [you] have to complete a residency before you can graduate from law school."[465]
- "I do feel like the students coming out of clinics come with stronger skills for the work we do."[466]
- "Again, I think the practicums are really good. Just so you get a chance to go into the courtroom and take a plea or work with a client and really think about how to connect with somebody using normal English language."[467]

Building on this endorsement of clinics, several focus group members explicitly suggested requiring completion of a clinical experience before licensing. Law schools, they suggested, could devote some or all of the third year of law school to this experience.[468] In one focus group, new lawyers enthusiastically elaborated a concept of clinical rotations, similar to those required in medical school. Rotations, they thought, would develop "well-rounded" competencies needed for practice while also helping students identify practice areas that suited them.[469]

Some participants, stressing the impact lawyers have on clients, volunteered that it was irresponsible for the profession to license lawyers without requiring some sort of clinical experience. One supervisor found it "terrifying" that lawyers could represent clients on their own without some practical experience.[470] A new lawyer agreed, deploring that lawyers "don't have something like a residency. You get your bar card and . . . now you can sign documents that affect people's lives."[471] Other new lawyers compared the lack of clinical training in law with the rigorous clinical requirements in medicine:

- "Why would you ever operate on someone for the first time as a doctor? Please do it observing and a thousand times before I'm put under. It's the same thing with a lawyer. Right? . . . You need hands on experience."[472]
- "The idea that you can go through just three years of school, sit through a two and a half day exam . . . that tests, for a lot of us, things that we are never going to employ ever again. And then you show up in a courtroom three days after being barred because that's what your employer expects of you. I think the level of preparation that most of us feel in that situation compared with our peers who are

[465] S.Vivian. This supervisor indicated that she thought the impact of clinical or other hands-on experience was long lasting, improving the performance of "the lawyers, not just the associates, that are in our firm."
[466] S.Vienna.
[467] S.Hazel.
[468] Colton; Adanna; Savannah; Mike; Jeff; Gemma; Faith; Penny; William; Layla; Levi.
[469] Sahad; Gabrielle; Khepri.
[470] S.Brooke.
[471] Penny.
[472] Autumn.

> in medicine, they've done it a million times before. They've been there and they've been evaluated by so many other people over so much longer of a period of time, in so many different kinds of situations."[473]

Participants, finally, noted that the current licensing system discourages some students from pursuing clinical work; they focus instead on doctrinal classes that they hope will prepare them for the bar exam. A supervisor summed up this challenge, noting that some students "limited themselves to, 'I need to pass the bar, I have to do really well in class and I have to be at the top of my class,' but then have very little like experience dealing with the real world outside of lectures."[474] The licensing system, participants agreed, needs to reflect the "real world," not law school lectures.

[473] Hailey.
[474] S.Jill.

Recommendations

The findings in this report offer a comprehensive, evidence-based definition of minimum competence to practice law. That competence, according to our research, consists of 12 interconnected building blocks. All aspiring lawyers should demonstrate possession of these building blocks before receiving a license.

Our research also provides insights into the best mechanisms for assessing these competencies. Focus group members identified written performance tests and supervised practice experiences as the most authentic replications of their work as first-year lawyers. Closed book exams, multiple choice questions, and time-pressured exams offer much less valid assessments.

In this section, we integrate these findings to offer 10 recommendations for developing an evidence-based licensing system. We group these recommendations by assessment method, rather than building block, because each assessment method is capable of evaluating multiple building blocks. At the end of the section we offer three examples of how jurisdictions might combine these suggestions in a comprehensive licensing scheme.

When implementing these recommendations, jurisdictions should apply principles of universal design, which promote accessibility for all test takers—particularly those with disabilities. As the *Standards for Educational and Psychological Testing* state, "fairness to all individuals in the intended population of test takers is an overriding, foundational concern" that affects the validity of a test.[475] Accessibility for disabled test takers and others should not be an afterthought. Instead, "characteristics of all individuals in the test population . . . must be considered throughout all stages of development, administration, scoring, and interpretation so that barriers to fair assessment can be reduced."[476]

We address our recommendations to courts, law schools, bar associations, and bar examiners in every jurisdiction, as well as to national organizations concerned with legal education and licensing. Our study offers a blueprint for evidence-based licensing, but constructing that system will take time, resources, and commitment. Educators and examiners will have to commit to protecting the public, rather than existing curricula or assessment methods that no longer serve that purpose. Any implemented licensure process, including those that incorporate recommendations from this study, must also be evaluated to assure validity, reliability, and fairness. These tasks will benefit from both collaborative efforts among jurisdictions and innovations sparked by a single jurisdiction.

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[475] Am. Educ. Research Ass'n, et al., Standards for Educational and Psychological Testing 49 (2014) [hereinafter "Standards for Testing"].

[476] *Id*. at 50. For further discussion of accessibility and the bar exam, see Haley Moss, *Raising the Bar on Accessibility: How the Bar Admissions Process Limits Disabled Law School Graduates*, 28 Am. U. J. Gender Soc. Pol'y & L. 537 (2020).

Written Exams

All or part of six building blocks lend themselves to assessment through a written exam: familiarity with the rules of professional conduct, understanding of legal processes and sources of law, understanding of threshold concepts, the ability to interpret legal materials, the ability to conduct research, and the ability to communicate in writing.

Other building blocks are difficult to measure through written tests. Current exams often purport to test issue identification but, as explained above, the issue spotting tested on exams varies substantially from the issue identification needed in practice.[477] Other formats offer a more authentic assessment of that building block.

Written exams, similarly, offer only limited opportunities to test effective listening or negotiation. A written exam can evaluate basic listening comprehension by asking examinees to respond to audio prompts, but cannot effectively judge listening skills that depend on engagement between the speaker and listener. Negotiation might be tested by asking examinees to outline a negotiating strategy, including anticipated responses from an opponent, but these exercises tap only some of the required competencies.

Still other building blocks (project management, seeing the big picture in client matters, coping with stress, and learning continuously) are quite difficult to assess through a written exam. Test-takers could recite best practices in these areas, but could not effectively demonstrate their competence.[478]

These limitations on written tests yield our first recommendation:

> **Recommendation One:** Recognize that written exams assess, at most, only half the building blocks that constitute minimum competence. If written exams are used, focus them on testing familiarity with the rules of professional conduct, understanding of legal processes and sources of law, understanding of threshold concepts, the ability to interpret legal materials, the ability to conduct research, and the ability to communicate in writing. Complement any written exams with other forms of assessment designed to assure possession of other building blocks, while ensuring that all components of the licensing process are accessible.

Our research also supports four recommendations related to the format of any written exam. We list each recommendation followed by the reasoning behind it.

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[477] *See supra* pp. 57-61.

[478] As noted above, simply taking a stressful exam does not assess a candidate's ability to handle stress in a healthy manner. *See supra* note 409.

Recommendation Two: Use multiple choice tests sparingly, if at all.

Focus group members consistently criticized multiple choice tests as inconsistent with the cognitive skills that lawyers use in the workplace. These tests are more efficient to grade than other written formats, which may reduce the expense of licensing exams. They also aid reliability, which is an important concern in licensing. If the exams do not test the competencies that new lawyers need, however, their benefits are meaningless: they will not protect the public.

Constructed-response items, which require test-takers to answer a question in their own words, offer a more authentic assessment of lawyering skills. Reliability in scoring these responses has greatly increased through adoption of rubrics, rater calibration, and other techniques.[479] Artificial intelligence has also shown promise in reducing the cost of this scoring—not by replacing human graders entirely but by limiting the number of answers that human graders must review.[480] Given the significant problems that our study and others have identified with multiple choice exams used to license lawyers, jurisdictions should explore other options for assessment.

Recommendation Three: Eliminate essay questions from written exams and substitute more performance tests.

Performance tests allow assessment of multiple building blocks, including an understanding of legal processes and sources of law, the ability to interpret legal materials, familiarity with the rules of professional conduct, an understanding of threshold concepts, and effective written expression. Focus group members also identified these tests as particularly authentic measures of the work they did as new lawyers. For these reasons, performance tests can play an important role in licensing.

Essay questions, in contrast, add little to assessment. The writing style and format do not parallel the written forms that examinees use in practice; nor do these questions improve reliability or efficiency in grading. The bar exam can better test the building blocks of minimum competence by substituting additional performance tests for essay questions.

Performance tests, finally, can be adapted to measure research abilities—a building block that current exams fail to address. Rather than providing closed universe files to candidates for every performance test question, jurisdictions could require candidates to conduct their own research on one of more of these exercises.

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[479] *See e.g.*, CATHERINE A. MCCLELLAN, CONSTRUCTED-RESPONSE SCORING—DOING IT RIGHT, 13 R&D CONNECTIONS 1 (2010); Isaac A. Bejar, *A Historical Survey of Research Regarding Constructed-Response Formats*, *in* ADVANCING HUMAN ASSESSMENT: THE METHODOLOGICAL, PSYCHOLOGICAL AND POLICY CONTRIBUTIONS OF ETS (RANDY E. BENNETT & MATTHIAS VON DAVIER eds. 2017).

[480] *See* ANDRÉ A. RUPP, ET AL., AUTOMATED ESSAY SCORING AT SCALE: A CASE STUDY IN SWITZERLAND AND GERMANY (2019), https://onlinelibrary.wiley.com/doi/epdf/10.1002/ets2.12249;); Bejar, *supra* note 479.

Recommendation Four: If jurisdictions retain essay or multiple choice questions, make those questions open book.

The earliest studies of lawyer competence revealed that memorization has little value in law practice.[481] Our research amply confirms those findings. Minimum competence does not depend upon memorization of legal rules. On the contrary, memorization generates mistakes: attorneys forget nuances of the rules or fail to realize that a rule has changed. Closed-book exams also undercut a basic tenet of law practice, that lawyers should quote controlling language and cite supporting statutes or case law to support a position. Sources matter when practicing law.

Lawyers do need to internalize an understanding of threshold concepts, but closed-book exams offer a poor means of testing that type of memory. Lawyers do not apply threshold concepts directly to client problems; instead, they use those concepts to find more detailed, jurisdiction-specific rules that they apply to the problem. Candidates could recite threshold concepts on a written exam, but it is difficult to apply those concepts without access to more detailed rules. An exam that attempts to test application of concepts, therefore, must make the detailed rules available.[482]

The answer to this conundrum is to give candidates the detailed rules they need to answer exam questions. Performance tests already take that route by giving candidates a closed universe of legal materials. If jurisdictions retain multiple choice or essay questions, they should provide similar resources or allow candidates to consult any source during the exam.

This approach will test knowledge of threshold concepts without requiring unproductive memorization. As one of our focus group members explained, "you need to have an understanding of the baseline" to succeed on an open-book exam.[483] Threshold concepts are that "baseline" for finding and applying more detailed points of law. By allowing candidates to check outlines, rule books, and other sources, an open-book bar exam could effectively test knowledge of threshold concepts—while also replicating the type of recall, research, and application of rules that lawyers use in the workplace.

Open-book exams have two other virtues related to minimum competence. First, these exams encourage candidates to create reference outlines for use during the exam. Those outlines become resources that new lawyers can draw upon during their early practice years.[484] Second,

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[481] *See supra* pp. 10-11.
[482] Educators recognize that applying a concept requires greater understanding than simply recalling the concept. *See* Deborah J. Merritt, *Bloom's Taxonomy and the Bar Exam*, RAISING THE BAR, Jul. 2019, at 3, https://www.accesslex.org/raising-the-bar-july-2019 (describing the structure of Bloom's Taxonomy, in which application requires more cognitive skill than recall). Bar examiners prefer to test higher-order skills, like application, rather than rote recall. *Id.*
[483] Freya, *supra* text accompanying note 424.
[484] *See supra* pp. 80-82.

open-book exams encourage test-takers to consult the language of rules and statutes directly, rather than relying on memory. New lawyers should keep relevant rules and statutes, including their jurisdiction's rules of professional conduct, close at hand when they practice. Open-book exams help instill that habit.

Recommendation Five: Provide more time for all written exam components.

New lawyers and supervisors in our groups agreed that new lawyers should work carefully, taking time to check and reflect, rather than rush through assignments. Clients are at risk when lawyers hurry.[485] The bar exam, participants noted, teaches lawyers the opposite lesson: current exams place a premium on speed. Focus group members criticized even the performance test, which they otherwise praised, for its unrealistic time constraints. In practice, they declared, even an experienced lawyer would not absorb a new client problem, analyze sources in a novel field, and create a cogent written analysis within 90 minutes.

The same concerns apply to multiple choice and essay questions, if examiners choose to retain them. Rather than encourage new lawyers to generate slapdash answers, bar examiners should develop time limits that encourage thoughtful responses. Careful pretesting with junior lawyers may help establish those more reasonable timeframes.[486] That pretesting should include lawyers with disabilities to assure that time limits are consistent with universal design.

Coursework Requirements

Several building blocks are difficult to assess through written exams; for these building blocks, coursework requirements provide an attractive option. Most jurisdictions already require candidates to earn a law degree before taking the bar exam.[487] Those rules implicitly require candidates to complete courses designated by the schools' accrediting bodies. In the 19 states that require graduation from an ABA-accredited law school,[488] for example, candidates must complete at least two writing courses, two credits of coursework in professional responsibility, and six credits of experiential coursework on their path to bar admission.[489] Jurisdictions could

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[485] *See supra* pp. 83-84.

[486] *See* STANDARDS FOR TESTING, *supra* note 475, at 90 ("time limits should be determined so that examinees will have adequate time to demonstrate the targeted knowledge and skill").

[487] Only seven states currently allow candidates to qualify for the bar through law office study: California, Maine, New York, Vermont, Virginia, Washington, and West Virginia. NAT'L CONF. BAR EXAMINERS & AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 9-10 (2020), http://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020_021820_Online_Final.pdf.

[488] *Id*.

[489] AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS: 2019-2020 16 (2019), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-and-rules-of-procedure.pdf [hereinafter ABA STANDARDS].

specify additional coursework to assure that candidates have learned about and been assessed on various building blocks.

At one extreme, jurisdictions could require aspiring lawyers to complete coursework covering each of the 12 building blocks. This type of comprehensive coursework could support licensing based primarily (or even solely) on degree completion. Alternatively, licensing authorities could use coursework to assure competency in just a few building blocks that are not easily tested on written exams.

Two competencies lend themselves particularly well to coursework requirements: client interaction and negotiation. Our research shows that the ability to interact effectively with clients is critical during the first year of practice—and that many new lawyers lack this ability. Negotiation, similarly, is a key competency that many new lawyers lack. Both of these skills are difficult to test on written exams and expensive to assess through simulations. Required coursework, however, can assure that new lawyers have learned about these building blocks, practiced them, and been assessed on them.

> **Recommendation Six:** Require candidates to successfully complete three academic credits of coursework that develop their ability to interact effectively with clients. These credits should focus specifically on client interaction and should include opportunities for students to practice that interaction and receive feedback. Instructors should understand that successful completion of the course signifies that the student possesses the ability to interact effectively with clients as an entry-level lawyer.

> **Recommendation Seven:** Require candidates to successfully complete three academic credits of coursework that develop their ability to negotiate. These credits should focus specifically on negotiation and should include opportunities for students to practice that interaction and receive feedback. Instructors should understand that successful completion of the course signifies that the student possesses the ability to negotiate effectively as an entry-level lawyer.

We recommend three credits of work on each of these subjects because a three-credit course allows sufficient time for learning, practice, and reflection.[490] If law schools cannot make space for these courses in the curriculum, then jurisdictions could authorize candidates to pursue this work under the guidance of third-party providers—just as graduates currently purchase bar review courses from third parties. The centrality of client counseling and negotiation to entry-level practice, however, makes a compelling case for including these courses in the three-year

[490] Under ABA rules, each academic credit must include at least 45 hours of work (either in class or otherwise). *Id.* at 21. Three academic credits, therefore, would reflect at least 135 hours of work. *Id.* at 22 (Standard 310).

law degree. Law students already pay high tuition for those degrees and should not have to purchase supplemental coursework elsewhere.

These two recommendations explicitly tie academic assessment to entry-level competence in order to remind instructors that these courses play an essential role in the licensing system. Some observers have suggested that professors apply more rigorous grading standards when they know that their decisions contribute directly to licensing.[491]

We recommend, finally, a third coursework requirement to round out the essential building block of professional conduct:

> **Recommendation Eight:** Require candidates to complete three academic credits of coursework focused on the lawyer's role as "a public citizen having special responsibility for the quality of justice."[492]

Our research suggests that new lawyers pay less attention to this component of their professional responsibility than to other aspects of that building block. Professions, however, are defined by their dual "commitment to serve in the interests of clients" and "the welfare of society in general."[493] To maintain law's status as a respected profession, it is essential that minimum competence include awareness of this aspect of a lawyer's identity. That is particularly true given increased public attention to lack of access and institutional racism within our legal system. To be minimally competent, lawyers must be cognizant of their professional responsibility for promoting justice.

Courses fulfilling this requirement could examine any area of the legal system as long as they focus on a lawyer's role as a public citizen rather than as a client representative. Courses would not dictate any particular view of justice, but would encourage healthy discussion and debate—all with the goal of developing a fully rounded view of the lawyer's professional responsibility.

Clinical Experience

Closely supervised clinical experiences are ideal for teaching and assessing many of the building blocks needed for minimum competence. Clinical work requires students to act professionally, interact with clients, identify issues, and communicate in realistic environments. This work also deepens students' understanding of legal processes and sources of law, threshold concepts, legal and non-legal research, and the interpretation of legal materials. Clinical experiences, finally,

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[491] *See, e.g.*, Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "Maccrate" Entry to the Profession*, 23 PACE L. REV. 343, 355-–56 (2003).
[492] MODEL RULES OF PROF'L CONDUCT Preamble (AM. BAR ASS'N 2020).
[493] Howard Gardner & Lee S. Shulman, *The Professions in America Today: Crucial But Fragile*, DAEDALUS, Summer 2005, at 13, 14.

offer a feasible way to teach and assess competencies that are otherwise difficult to teach and assess, even in other law school courses: seeing the big picture, managing workload, coping with stress, and learning continuously.[494]

Two other types of coursework—externships and simulations—offer students some of the same benefits.[495] Each of these course types, however, lacks one of the educational benefits that clinics provide. Externships expose students to real-world practice, but they separate practice from pedagogy; employer needs dominate in these settings.[496] Simulations, in contrast, offer well planned pedagogy, but lack the realism of clinics and externships.[497] Clinics are the only courses that consistently integrate realism and pedagogy.

Focus group members repeatedly voiced their surprise that the legal profession licenses lawyers without mandating clinical experience. New lawyers in our groups went further, expressing their own discomfort at serving clients without that experience. They noted that clinical education is especially important for protecting the vulnerable clients many of them served without supervision—including on pro bono cases. To protect those clients and others, clinical experiences should become an essential part of the licensing process.

> **Recommendation Nine:** Require candidates to complete at least four academic credits of closely supervised clinical work, as well as at least four more academic credits of additional clinical or externship work.

This recommendation focuses on clinics and externships, rather than simulations, for two reasons. First, the realism afforded by clinics and externships is essential to fully develop several building blocks.[498] Second, Recommendations Six and Seven already require simulations related to client counseling and negotiation. Taken as a whole, our recommendations require a package

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[494] For further discussion of the role that clinics play in teaching and integrating competencies, see ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 110-16 (2007); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW 120-22, 158-61 (2007).

[495] We use the terms "clinic," "externship," and "simulation" to designate three widely recognized forms of experience-centered courses. *See* Deborah Maranville et al., *Incorporating Experiential Education Throughout the Curriculum*, *in* BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 162, 162 (Deborah Maranville et al. eds., 2015). ABA accreditation standards recognize the same three categories but use the phrase "field placements" to designate externships. ABA STANDARDS, *supra* note 489, at 19.

[496] *See* Maranville et al., *supra* note 495, at 175-76.

[497] *Id.* at 175.

[498] *See also id*. at 175:

> Simulation courses do not present students with the full complexity and ambiguity of real life that is so important for fully integrating knowledge, skills, and values. Nor do students have the responsibility for real-world clients that is so important for professional identity formation and can foster a commitment to addressing access to justice issues through their service to the community, or offer the challenges of interacting inter-culturally within the full range of difference presented by client populations.

of simulations, clinical experiences, and externships that work together to develop minimum competence.[499]

Recommendation Nine, furthermore, offers just a starting point for mandatory clinical experiences. Ideally, aspiring lawyers would complete at least 15 credits of clinical work (equivalent to a full semester) before receiving licenses.[500] We propose here four credits of closely supervised clinical work, complemented by four additional credits of clinical or externship experience, as the bare minimum needed to assure minimum competence. This recommendation assures that new lawyers receive supervision and feedback in at least one clinic, together with additional hands-on experience through externships or clinics.[501]

Over time, jurisdictions should consider raising this requirement to 15 or more credits, with at least eight of those credits drawn from closely supervised clinics. This type of phased approach would give law schools time to shift curricular resources into clinical programs.[502]

Putting the Pieces Together

Constructing an evidence-based licensing system will take time and thought. We have identified three possible components of a system (written exams, coursework, and clinical experience), but jurisdictions could explore other options. The Daniel Webster Scholar Honors Program at the University of New Hampshire, for example, offers a licensing model based on coursework, simulations, and assessment of comprehensive portfolios.[503] Licensing systems in other nations

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[499] For clinics to become part of the licensing process, they must be accessible to all students with disabilities. Clinical educators have started this work, but more must be done. *See generally* Alexis Anderson & Norah Wylie, *Beyond the ADA: How Clinics Can Assist Law Students with "Non-Visible" Disabilities to Bridge the Accommodations Gap Between Classroom and Practice*, 15 CLINICAL L. REV. 1, 2 (2008); Sande Buhai, *Practice Makes Perfect: Reasonable Accommodation of Law Students with Disabilities in Clinical Placements*, 36 SAN DIEGO L. REV. 137 (1999).

[500] For discussion of 15-credit requirements, see Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICK. L. REV. 551, 575-76 (2018).

[501] The median number of credits in clinical courses is five; in externships the median is four. ROBERT R. KUEHN ET AL., CENTER FOR THE STUDY OF APPLIED LEGAL EDUCATION, 2019-20 SURVEY OF APPLIED LEGAL EDUCATION 31, 44 (2020), https://uploads-ssl.webflow.com/5d8cde48c96867b8ea8c6720/5f5bcf9641910f246b95ead9_Report%20on%202019-20%20CSALE%20Survey.pdf. Most students would satisfy the eight-credit minimum by completing two clinics or one clinic and one externship. *See also* Maranville et al., *supra* note 495, at 163 (a "best practice" for experiential education is "requiring real supervised practice experience—preferably one law clinic and one externship—for all students").

[502] Legal educators sometimes argue that providing clinical experiences to all students would dramatically raise the cost of legal education. As Robert Kuehn has shown, however, this claim is unfounded. *See* Robert R. Kuehn, *Universal Clinic Legal Education: Necessary and Feasible*, 53 WASH. U. J.L. & POL'Y 89 (2017). Schools may have to shift resources from other focus areas, including the extensive support often provided for faculty scholarship, but it is possible to offer extensive clinical programs without raising tuition. *See id.* at 103.

[503] *See Daniel Webster Scholar Honors Program*, UNIV. N.H. FRANKLIN PIERCE SCH. LAW, https://law.unh.edu/academics/daniel-webster-scholar-honors-program (last visited Sept. 25, 2020); ALLI GERKMAN

and professions provide other promising models.[504] Innovative responses to the challenges of administering the bar exam during the COVID-19 pandemic, finally, may offer useful lessons for the future.[505]

As noted above, jurisdictions should follow the principles of universal design for their licensing system.[506] Jurisdictions must also consider the "how" and "when" of any written exams. Will written exams be administered just twice a year, following the current schedule? Can they be administered more often—or divided into components that candidates complete at different times? If exams are divided into components, how will that affect costs to candidates—including the costs to disabled test-takers of securing accommodations for each component? What role will computers play in these exams? The 12 building blocks invite licensing systems that are more diverse, encompassing a variety of exams, coursework, and educational experiences. Weighing the pros and cons of those opportunities, however, will take time and study.

To pursue these questions, we offer our final recommendation:

> **Recommendation Ten:** Create a working group of legal educators, judges, practitioners, law students, and clients to review the building blocks outlined in this report and design an evidence-based licensing system that is valid, reliable, and fair to all candidates. Charge this group with keeping abreast of ongoing research related to minimum competence and licensing methods. Although the group should be a standing one, and should continuously review licensing practices, membership should turn over frequently. Membership should also be as diverse as possible in terms of race, disability, ethnicity, sexual orientation, gender identity, age, and other characteristics.

A working group of this nature would assure more widespread stakeholder engagement—importantly, including clients who are the intended beneficiaries of the licensing process—in design and maintenance of a jurisdiction's licensing system. It would also encourage attention to

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& ELENA HARMAN, AHEAD OF THE CURVE: TURNING LAW STUDENTS INTO LAWYERS (2015), https://iaals.du.edu/sites/default/files/documents/publications/ahead_of_the_curve_turning_law_students_into_lawyers.pdf (independent assessment of the program).

[504] *See, e.g.*, Practice Readiness Education Program (PREP), CAN. CTR. PROF'L LEGAL EDUC., https://cpled.ca/students/cpled-prep/ (last visited Sept. 25, 2020) (describing bar admission program that has replaced the bar exam in four Canadian provinces); Licensing Examinations, LAW SOC'Y ONT., https://lso.ca/becoming-licensed/lawyer-licensing-process/licensing-examinations (last visited Sept. 25, 2020) (open-book bar exam); Andrea Anne Curcio, Carol Chomsky & Eileen Kaufman, *How to Build a Better Bar Exam*, 90 N.Y. ST. B.A. J. 37 (Sept. 2018) (discussing Ontario approach); Joan W. Howarth & Judith Welch Wegner, *Ringing Changes: Systems Thinking About Legal Licensing*, 13 FLA. INT'L L. REV. 383 (2019) (discussing licensing approaches from several professions).

[505] *See* Marsha Griggs, *An Epic Fail*, 64 HOWARD L.J. 1 (2020) (discussing jurisdictions' varied responses).

[506] *See supra* notes 475-476 and accompanying text.

relevant research; scholarly interest in lawyer competence and licensing is growing.[507] A standing group with frequent turnover, finally, would assure regular review of licensing components combined with the continuous addition of fresh perspectives. As law practice and client needs evolve, so should the licensing system.

[507] *See, e.g.*, Robert R. Kuehn & David R. Moss, *A Study of the Relationship Between Law School Coursework and Bar Exam Outcomes*, 68 J. LEGAL EDUC. 62 (2019); Victor D. Quintanilla & Sam Erman, *Productive Mindset Interventions Mitigate Psychological Friction and Improve Well-Being for Bar Exam Takers*, RAISING THE BAR, Winter 2020, at 7, https://www.accesslex.org/raising-the-bar-january-2020; Richard Trachok, *Nevada Bar Exam Study: The MBE-Predictor of What?*, NEV. LAW., November 2019, at 26.

Example Licensing Systems

What would a licensing system look like if jurisdictions adopted the recommendations outlined in this report? There is room for considerable variation and experimentation, but we offer three example systems to illustrate possible contours of an evidence-based licensing system. Each of these examples assumes that jurisdictions would also conduct character and fitness review.[508]

Note that jurisdictions do not need to choose a single licensing system. A jurisdiction could offer candidates two or three pathways to licensure, with each path assessing building blocks in a different manner.

Example One: Test-Centered System

This example most closely resembles current licensing systems by focusing on written tests. It updates that system, however, to include all of the building blocks that are essential for minimum competence. In a system like this one, a jurisdiction could offer all of the written tests during a single multi-day examination period or spread them over time—perhaps allowing candidates to choose when they complete each written component.

Requirement	**Building Blocks Tested**
Multiple choice, open-book exam testing familiarity with and application of the Model Rules of Professional Conduct	Knowledge portion of the ability to act professionally
Written exam testing research abilities, using either multiple choice or performance test format	Ability to research legal rules and non-legal matters
Multiple choice, open-book exam testing knowledge of legal processes, sources of law, and interpretation of legal materials	Understanding of legal processes and sources of law, ability to interpret legal materials
Four performance tests using case files and a limited universe of materials. Each test would allow at least 3 hours for completion	Ability to act professionally, understanding of legal processes and sources of law, understanding of threshold concepts, ability to interpret legal materials, ability to identify

[508] For discussions of the character and fitness process, see, *e.g.*, Jennifer Aronson, *Rules Versus Standards: A Moral Inquiry into Washington's Character & Fitness Hearing Process*, 95 WASH. L. REV. 997 (2020); Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 493 (1985). Discussion of that process is beyond the scope of this study.

Requirement	Building Blocks Tested
	issues, ability to communicate as a lawyer in writing
Successful completion of at least 3 credits of coursework on client interactions	Ability to interact effectively with clients; ability to communicate as a lawyer
Successful completion of at least 3 credits of coursework on negotiation	Ability to communicate as a lawyer
Successful completion of at least 3 credits of coursework focused on the lawyer's role as a public citizen	Public citizen component of the ability to act professionally
Successful completion of at least 4 credits of closely supervised clinical work	All 12 building blocks. Blocks covered by written exams or coursework would be assessed in a fuller, more natural way than through those requirements. In addition, this requirement would assess the blocks not covered by other types of assessment: the ability to see the "big picture" in client matters, the ability to manage workload, the ability to cope with stress, and the ability to learn continuously
Successful completion of at least another 4 credits of clinical or externship work	All 12 building blocks. Blocks covered by written exams or coursework would be assessed in a fuller, more natural way than through those requirements. In addition, this requirement would assess the blocks not covered by other types of assessment: the ability to see the "big picture" in client matters, the ability to manage workload, the ability to cope with stress, and the ability to learn continuously

Example Two: Experience-Centered System

This example reduces reliance on written exams without eliminating them entirely. The example focuses instead on more experiential education and assessment. As in the first example, a jurisdiction could offer the written components during consolidated exam periods or could offer them to candidates at different times.

Requirement	**Building Blocks Tested**
Multiple choice, open-book exam testing familiarity with and application of the Model Rules of Professional Conduct	Knowledge portion of the ability to act professionally
Written exam testing research abilities, using either multiple choice or performance test format	Ability to research legal rules and non-legal matters
Two performance tests using case files and a limited universe of materials. Each test would allow at least 3 hours for completion	Ability to act professionally, understanding of legal processes and sources of law, understanding of threshold concepts, ability to interpret legal materials, ability to identify issues, ability to communicate as a lawyer in writing
Successful completion of at least 3 credits of coursework on client interactions	Ability to interact effectively with clients; ability to communicate as a lawyer
Successful completion of at least 3 credits of coursework on negotiation	Ability to communicate as a lawyer
Successful completion of at least 3 credits of coursework focused on the lawyer's role as a public citizen	Public citizen component of the ability to act professionally
Successful completion of at least 6 credits of closely supervised clinical work	All 12 building blocks. Blocks covered by written exams or coursework would be assessed in a fuller, more natural way than through those requirements. In addition, this requirement would assess the blocks not covered by other types of assessment: the ability to see the "big picture" in client matters, the ability to manage workload, the

Requirement	Building Blocks Tested
	ability to cope with stress, and the ability to learn continuously
Successful completion of at least another 6 credits of clinical or externship work	All 12 building blocks. Blocks covered by written exams or coursework would be assessed in a fuller, more natural way than through those requirements. In addition, this requirement would assess the blocks not covered by other types of assessment: the ability to see the "big picture" in client matters, the ability to manage workload, the ability to cope with stress, and the ability to learn continuously

Example Three: Diploma-Centered System

This system encourages licensing authorities and law schools to work together in developing and assessing minimum competence. Jurisdictions offering this path type of path would license lawyers based on successful completion of well-defined coursework.

Requirement	Building Blocks Tested
Successful completion of at least 3 credits of coursework on professional responsibility	Ability to act professionally
Successful completion of at least 3 credits of coursework on research	Ability to research legal rules and non-legal matters
Successful completion of at least 6 credits of coursework on legal writing	Ability to identify issues, ability to communicate as a lawyer
Successful completion of at least 21 credits of coursework drawn from these areas: contracts, torts, civil procedure, criminal law and procedure,	Understanding of threshold concepts

Requirement	Building Blocks Tested
constitutional law, property, and evidence[509]	
Successful completion of at least 3 credits of coursework in each of these areas: (1) state/local law, (2) legislation or statutory interpretation, (3) administrative law or processes, and (4) alternative dispute resolution processes[510]	Understanding of legal processes and sources of law, understanding of threshold concepts, ability to interpret legal materials
Successful completion of at least 3 credits of coursework on client interactions	Ability to interact effectively with clients; ability to communicate as a lawyer
Successful completion of at least 3 credits of coursework on negotiation	Ability to communicate as a lawyer
Successful completion of at least 3 credits of coursework focused on the lawyer's role as a public citizen	Public citizen component of the ability to act professionally
Successful completion of at least 8 credits of closely supervised clinical work	All 12 building blocks. Blocks covered by written exams or coursework would be assessed in a fuller, more natural way than through those requirements. In addition, this requirement would assess the blocks not covered by other types of assessment: the ability to see the "big picture" in client matters, the ability to manage workload, the ability to cope with stress, and the ability to learn continuously
Successful completion of at least another 7 credits of clinical or externship work	All 12 building blocks. Blocks covered by written exams or coursework would be assessed in a fuller, more natural way than through those requirements. In addition, this

[509] Candidates would not need to complete coursework in each of these areas; instead, the 21 credits would be drawn from any combination of the seven areas. The requirement attempts to generate knowledge of threshold concepts similar to what might be required for an open-book exam testing the seven subjects that currently appear on the Multistate Bar Exam.

[510] A variety of courses might satisfy each of these categories. A course on "Local Government Law," for example would satisfy the "State/Local" requirement, but so would any course focusing on the doctrinal law of a state or locality. This requirement is intended to assure exposure to the importance of state and local law, without requiring study in any particular field. Similarly, any course within the Alternative Dispute Resolution curriculum would satisfy that requirement; the course would not have to survey all alternatives to dispute resolution.

Requirement	Building Blocks Tested
	requirement would assess the blocks not covered by other types of assessment: the ability to see the "big picture" in client matters, the ability to manage workload, the ability to cope with stress, and the ability to learn continuously

The requirements in this example total 69 credits, although most of those requirements allow considerable choice among subject areas. Since ABA accreditation standards require at least 83 credits of academic work to secure a J.D.,[511] the course requirements in this example permit at least 14 credits (a full semester) of completely elective courses. The system, in other words, structures the JD program while still allowing considerable student choice. Jurisdictions could expand that choice further by allowing candidates to count some courses toward more than one of the requirements in the example.

[511] ABA STANDARDS, *supra* note 489, at 22 (Standard 311).

Conclusion

The rules we use to license new lawyers define us as a profession. Are we a profession that serves clients, listening to their stories, helping them identify goals, and guiding them to solutions? Are we one that relies upon research and critical thinking? Are we problem solvers and negotiators as well as advocates? Do we know how to handle stress? Do we act professionally and recognize our special responsibility for the quality of justice? If these characteristics define our work, then they should be assessed during licensing.

In this national study, we asked new lawyers and their supervisors to describe their work to us. Using their voices, we identified 12 building blocks that constitute minimum competence for practicing law. The words in this report are not those of legal educators or bar examiners; they are the words of new lawyers and their supervisors. By listening to their perspectives, we can create an evidence-based licensing system—one that reflects the work we do, protects the public, and avoids protectionism or bias. As professionals, we owe the public no less.