

Spring 2016

Contemplating Competence: Three Mediations

Judith Welch Wegner

University of North Carolina School of Law

Recommended Citation

Judith Welch Wegner, *Contemplating Competence: Three Mediations*, 50 Val. U. L. Rev. 675 (2016).
Available at: <http://scholar.valpo.edu/vulr/vol50/iss3/6>

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



Lecture

CONTEMPLATING COMPETENCE: THREE MEDITATIONS

Judith Welch Wegner*

I. INTRODUCTION

“Competence” is an old-time word, a steady word. The Merriam Webster Dictionary defines “competent” as “having the necessary ability or skills: able to do something well or well enough to meet a standard.”¹ Yet “competence” and “competent” are of great contemporary interest, since they also play an active role in current debates about performance and expectations of law students and lawyers.² Consider, for example, some recent controversies. Are non-lawyers “competent” who work for entities such as “LegalZoom” or should they be prosecuted for the unlicensed practice of law?³ Are academics “competent” if they lack significant years of practice and are better equipped to teach substantive law in various areas, but are hesitant to teach in clinical or skills courses? What obligations do law schools owe their students in preparing them to be “competent” in entering the practice of law? Are lawyers incompetent if they are not adept at using technology?

* Burton Craig Professor and Dean Emerita at the University of North Carolina School of Law. This Article provides a variation on remarks delivered for the Tabor Lecture at Valparaiso University Law School on March 19, 2015. She thanks the school for the opportunity to engage with its faculty, students, alumni, and friends on that occasion and in connection with this publication. She dedicates this Article to Mr. Glen Tabor whose important vision of engaging issues of ethics within the academy and legal profession provides a continuing inspiration to the Valparaiso community and those beyond. Any errors in this manuscript are, of course, the author’s alone.

¹ *Competent*, MERRIAM WEBSTER DICTIONARY (2015), <http://www.merriam-webster.com/dictionary/competent> [<https://perma.cc/ATH5-GJML>]. In more legal terms, competence is defined as “[a] basic or minimal ability to do something; adequate qualification.” *Competence*, BLACK’S LAW DICTIONARY (10th ed. 2014).

² See *infra* Part II (examining the Canons of Ethics and arguing that competency was an ethical duty of an attorney promoted back in 1908 and still promoted today); see also Roger C. Cramton, *Lawyer Competence and the Law Schools*, 4 U. ARK. LITTLE ROCK L.J. 1, 1-3 (1981) (discussing the debate of competency and addressing the issue of inadequate performance by lawyers and whether the low performance of lawyers is attributable to problems within the legal education system).

³ See Lauren Moxley, Note, *Zooming Past the Monopoly: A Consumer Rights Approach to Reforming the Lawyer’s Monopoly and Improving Access to Justice*, 9 HARV. L. & POL’Y REV. 533, 569 (2015) (comparing the interplay of unlicensed practice and delivery of legal services by online providers such as LegalZoom).

Within the legal profession, “competence” has a long and important history.⁴ But to many in the academy, the requirements relating to competence recently introduced as part of the American Bar Association’s (“ABA”) accreditation Standards are far from clear.⁵ This Article builds on comments offered at the Tabor Lecture at Valparaiso University Law School on March 19, 2015. That earlier talk offered perspectives on competence from the vantage of a lawyer as well as that of a law professor. This Article takes a different tack, refocusing instead on three questions about competence and offering related reflections that should help readers better comprehend competence and its significance, particularly insofar as schools endeavor to implement new ABA accreditation requirements that focus on competence.⁶

First, the Article considers: “What does competence have to do with skills and ethics?”⁷ Part II summarizes recent changes in the ABA accreditation Standards that are increasingly coming to the attention of legal academics charged with focusing institutional attention on preparing graduates who are “competent.”⁸ While acknowledging the role of skills development in the history and advocacy for change in ABA Standards, it argues that attention to skills alone fails to consider the full range of factors that should be taken into account in interpreting the new “competence” standard. It then argues that, in view of the ambiguity of the “competence” benchmark, the term should be understood not only with an eye to demands for better and more comprehensive skills

⁴ See *infra* Part II.B (evaluating how the ABA accreditation Standards for the past fifty years have changed to accommodate the desire to build competence in professional legal skills for both law students and new lawyers).

⁵ See Judith Welch Wegner, *The Accreditation Context and the Law School Mission*, in BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 3, 3–11 (Deborah Maranville et al. eds., 2015) (examining how law schools and teachers will need to adapt their curriculum to account for the new ABA accreditation Standards for competency); see also *infra* Part II.A (discussing the revised ABA accreditation Standards to help focus on the desire to increase competence among new attorneys).

⁶ See *infra* Part II.A (evaluating the new ABA’s accreditation Standard looking at the nexus between competence and skills and ethics among beginning attorneys and concluding that the phrase “competence” in a professional legal setting is vague); see also *infra* Part III (considering the standard for competency and determining whether the term “competence” in the new ABA accreditation Standard is a broad concept or a narrow concept for law schools to add within their curriculum); *infra* Part IV (discussing assessments and their relationship to competency evaluating the work place and employment setting and looking to global institutions in Europe).

⁷ See *infra* Part II (considering what competence is and how it connects to professional skills and ethics within the legal field).

⁸ See *infra* Part II (exploring the changes in the standards that law schools are focusing on to prepare graduates to be competent).

development, but also with an emphasis on the role of “competence” in crucial ABA ethics standards.⁹

The second meditation, found in Part III, asks: “What does competence have to do with context?” This Part traces academic and practitioner perceptions about the role of context in developing competence.¹⁰ Based on highly influential studies about the development of expertise, and the importance of specialist certifications within the bar, law schools and the ABA need to help students understand their personal and professional goals and foster a growing sense of professional identity early in their academic and professional careers if they expect to encourage competence, even at the beginning level.

Finally, Part IV considers: “What does competence have to do with assessment?”¹¹ Academic research such as the Carnegie Report (“Educating Lawyers”) strongly emphasizes the importance of assessment in fostering learning to achieve competence or other educational objectives. A growing number of academics understand the importance of formative assessment—that is, providing students with informal feedback to assist them in developing their understanding and skill. The revised ABA accreditation Standards impose related requirements. This final meditation contends that it is not enough to strengthen formative assessment, but also calls for changes in law school grading practices and bar examinations if lawyers’ and academics’ commitment to preparing competent beginning practitioners is to be achieved.

II. HOW DOES COMPETENCE RELATE TO SKILLS AND ETHICS?

This Part considers competence and its connections to both professional skills and ethics. While many faculty members and law schools will likely focus on the role of skills instruction in building competence, greater attention should also be addressed to ethics and related concepts, such as professionalism and professional identity, in light of the strong historical connection between the term “competence” and ethical norms.

First, Part II.A summarizes recent changes in the ABA accreditation Standards as they relate to competence.¹² As explained below, the revised

⁹ See *infra* Part II (evaluating the role of “competence” in crucial ABA ethics standards).

¹⁰ See generally *infra* Part III (exemplifying through numerous historical studies, the cognitive function of students and legal professionals and how it relates to the understanding of ethics in the legal field).

¹¹ See *infra* Part IV (comparing and contrasting the assessment of competency in both the legal and non-legal sector).

¹² See *infra* Part II.A (discussing the revisions to the ABA’s accreditation Standards that discuss the characteristics of competence in law schools).

Standards require law schools to set learning outcomes related to student competence and to assess student learning in terms of competence. Although there are general references to ethical behavior, the rationale for adding these requirements is insufficiently developed, and unfortunately these revised requirements come at a time when declining jobs and law school applications have led law schools to market their abilities to graduate students who are “practice ready” (with an implication that those students can acquire skills in law school to help them become more employable).¹³ As a result, the term “competence,” linked as it is to “professional skills” in various parts of the new Standards, is ambiguous, or at best appears to encourage more instruction in lawyering skills rather than taking a more holistic view.

Next, Part II.B provides additional background concerning earlier ABA efforts designed to foster competence within the bar and suggests that these earlier precursor statements may well have had a bearing on the development of the new Standards.¹⁴ At the same time, many of the earlier efforts treated lawyering skills instruction are part of a larger context in which ethics played a central role. Lastly, Part II.C demonstrates that for practicing lawyers, ethical obligations begin with an obligation of competence.¹⁵ After summarizing current competence requirements as found in Rule 1.1 of the Model Rules of Professional Responsibility, this Part provides a deeper historical context for current competence requirements as found in ethics formulations beginning before the Civil War.

In sum, this Part answers the original question—what does competence have to do with skills and ethics?—by reminding readers that, notwithstanding the emphasis on developing professional skills that has recurred in statements and studies by the organized bar, ethical values deserve an equal place. A commitment to ethics has traditionally been understood by the practicing bar as a key aspect of competence. Accordingly, law schools that desire to meet new accreditation requirements relating to competence need to take a broad view of what is

¹³ See Robert J. Condlin, “Practice Ready Graduates”: A Millennialist Fantasy, 31 *TOURO L. REV.* 75, 84–85 (2014) (critiquing the view that “practice ready” graduates will get a better chance at finding a job because their extensive training has made them more efficient). There is an implication that students who go to the particular law school will be “practice ready” after they graduate. *Id.*

¹⁴ See *infra* Part II.B (describing the history behind trying to build competence into the ABA accreditation Standards and how the events in history have made a difference in the Standards).

¹⁵ See *infra* Part II.C (illustrating the ethical obligations of competence in ethical norms from looking at the current version of the Model Rules of Professional Responsibility and the ABA Canons of Ethics).

required, including improving education in ethics and professionalism, rather than treating the new Standards only as a mandate for teaching more technical skills.

A. *Competence and ABA Accreditation Standards*

The ABA's Section of Legal Education adopted a number of revisions to relevant accreditation Standards in 2014.¹⁶ These requirements place considerable emphasis on "competence" as indicated below.¹⁷ Under revised Standard 301, law schools must "establish and publish learning outcomes" designed to achieve overarching objectives that include preparing graduates for "effective, ethical and responsible participation as members of the legal profession."¹⁸ Under revised Standard 302, the learning outcomes established must, "at a minimum include *competency* in the following:"

- (a) Knowledge and understanding of substantive and procedural law;
- (b) Legal analysis and reasoning, legal research, problem solving, and written and oral communication in the legal context;
- (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and
- (d) Other professional skills needed for *competent* and ethical participation as a member of the legal profession.¹⁹

¹⁶ See Judith Welch Wegner, *Assessment Plans that Support Student Learning*, in BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 25, 25–36 (Deborah Maranville et al. eds., 2015) (explaining the implications of key Standards on law school practices going forward).

¹⁷ *Id.*

¹⁸ ABA *Standards and Rules of Procedure for Approval of Law Schools*, AM. BAR ASS'N 15 (2015–2016), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_aba_standards_for_approval_of_law_schools_final.authc heckdam.pdf [<https://perma.cc/97TN-8LLK>] [hereinafter *ABA Standards*].

¹⁹ *Id.* (emphasis added). In addition, interpretation 302-1 states that:

For the purposes of Standard 302(d), other professional skills are determined by the law school and may include skills such as, interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation.

Id. at 16. Law schools are required to offer clinical or similar live-client experiences that are designed to offer students with opportunities for reflection and on such topics as the development of one's ability to assess his or her performance and level of competence. See

The loop must be closed and the school must actually measure and address its success or failure in achieving its professed learning outcomes.²⁰ “Competency” is not defined, however.²¹ The significant emphasis on assessment, along with competence requirements, pressures law schools to think deeply about how to measure student competence.²²

id. at 46. Additionally, law schools are required to retain competent faculty. See Standard 401 (under Standard 401, law school faculty “shall possess a high degree of competence”); Standard 405 (under Standard 405, schools are required to create a professional environment sufficient to recruit and retain competent faculty); Interpretation 405-7 (stating that competence of clinical faculty should be judged in the context of their duties); Standard 702 (requiring clinic space sufficient to allow competent and ethical representation). All references are to *ABA Standards*, *supra* note 18.

²⁰ See Wegner, *supra* note 16, at 26–34 (discussing how law schools should develop assessment plans by taking into account mission, purpose, learning outcomes, and varying forms of evidence). In particular, Standard 315 requires law schools to:

[C]onduct ongoing evaluation[s] of the law school’s program of legal education, learning outcomes, and assessment methods; and shall use the results of this evaluation to determine the degree of student attainment of competency in the learning outcomes and to make appropriate changes to improve the curriculum.

ABA Standards, *supra* note 18, at 23.

²¹ In contrast, a growing number of scholars have begun to probe varying understandings of “competence.” See Neil Hamilton, *Law Firm Competency Models & Student Professional Success: Building on a Foundation of Professional Formation/Professionalism*, 11 U. ST. THOMAS L.J. 6, 8–12 (2013) (providing and describing law firm competency models to understand how some law firms determine competency in workers); *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales*, LEGAL EDUC. AND TRAINING REV. 118–232 (2013), <http://letr.org.uk/wp-content/uploads/LETR-Report.pdf> [<http://perma.cc/42X4-63D5>] (describing the history and issues that Canada, Scotland, and Australia have addressed in dealing with issues of competency); see also *Briefing Paper 01/2011: Competence*, LEGAL EDUC. AND TRAINING REV. 1–2 (2011), <http://letr.org.uk/wp-content/uploads/Briefing-paper-12011.pdf> [<https://perma.cc/2JLG-B5VB>] [hereinafter *Briefing Paper*] (reviewing competence-based legal education models in England and Wales and explaining that “competent” has a variety of meanings).

²² See also *ABA Standards*, *supra* note 18, at Interpretation 315-1 (listing possible assessment methods that “may be used may be used to measure the degree to which students have attained competency in the school’s student learning outcomes”). Methods listed in Interpretation 315-1 include:

[R]eview of the records the law school maintains to measure individual student achievement pursuant to Standard 314; evaluation of student learning portfolios; student evaluation of the sufficiency of their education; student performance in capstone courses or other courses that appropriately assess a variety of skills and knowledge; bar exam passage rates; placement rates; surveys of attorneys, judges, and alumni; and assessment of student performance by judges, attorneys, or law professors from other schools. The methods used to measure the degree of student achievement of learning outcomes are likely to differ from school to school and law schools are not required by this standard to use any particular methods.

Id. Issues of assessment will be addressed in Part IV.

There is a growing literature about how law schools can comply with ABA competence and assessment requirements, but for both clinicians and for “podium” professors who may themselves not have had much practice experience, the meaning of “competence” and how to measure it is far from clear.²³ Moreover, it appears that “competence” has been increasingly linked to the vague notion of “practice-ready” law graduates, which serves more as a marketing formulation than as a meaningful benchmark.²⁴ Accordingly, law schools should consider looking to history as a better source of inspiration, in order to ground their claims in reality.

B. Historical Demands for Skills-Related Competence

Recent changes in ABA accreditation Standards that emphasize competence have captured law schools’ attention, but these changes should not be seen in isolation.²⁵ They represent the culmination of more than fifty years of advocacy designed to build competence by identifying more cohesive strategies to help law students and beginning lawyers develop wide-ranging professional skills.

Perhaps the most important early efforts to establish beachheads of clinical instruction more widely in American law schools stemmed from substantial investments by the Ford Foundation reflecting the vision of William Pincus and numerous others.²⁶ The originating vision included

²³ See Wegner, *supra* note 16, at 25–36. Few law professors, other than those involved in clinical education, themselves have significant law practice experience, and they are therefore unlikely to view themselves through the lens of requirements applicable to the legal profession. A 2014 study using survey data and data derived from the Association of American Law Schools (“AALS”) concluded that:

[L]aw schools . . . rely on law professors who have a limited range of experiences. Nearly all new hires in our study attended a small set of schools that are more likely to emphasize theory over practice. The new hires have a shared set of professional experiences, especially time as a law teaching fellow and a judicial law clerk. Missing from those experiences is substantial time outside of a law school. The lack of real-world experience affects the capacity of new hires to teach skills courses and to assist students making the transition to those real-world jobs.

Tracy George & Albert Yoon, *The Labor Market for New Law Professors*, 11 J. OF EMPIRICAL L. STUDIES 1, 37–38 (Mar. 2014).

²⁴ See Condlin, *supra* note 13, at 86–90 (debunking the notion of “practice-ready” graduates).

²⁵ See Judith Welch Wegner, *Curriculum Mapping as a Tool for Improvement*, in BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 37, 37–39 (Deborah Maranville et al. eds., 2015) (describing the nature and importance of curriculum mapping).

²⁶ See J.P. “Sandy” Ogilvy, *Celebrating CLEPR’s 40th Anniversary: The Early Development of Clinical Legal Education and Legal Ethics Instruction in U.S. Law Schools*, 16 CLINICAL L. REV. 1, 9–10 (2009) (discussing the significant contributions of William Pincus and Emory Brownell and their support for the development of legal aid clinics involving law students).

melding practice initiatives designed to offer legal services to indigent individuals as well as communities, reimagining fresh approaches to social justice and law reform, and broadening students' understanding of their professional responsibilities.²⁷ Ultimately, the initiative led to the creation of the Center on Legal Education for Professional Responsibility ("CLEPR"), and accordingly ignited the clinical movement in the United States.²⁸ This initiative led the way in melding concern for ethical and skill-development.²⁹ CLEPR oversaw significant grants in support of legal education until it disbanded in 1980.³⁰

During this same period, attention also turned to development of more narrow and specific professional skills.³¹ Chief Justice Burger can be credited as an early advocate for skills instruction relating to trial advocacy, in light of his comments in 1973 about the low level of competence among junior lawyers appearing in federal court.³² Attention to development of particular skills increased and broadened in subsequent years.³³ In 1979, the ABA's Task Force on Lawyer Competence, chaired by Cornell Dean Roger Cramton, called for expanding efforts by law schools to teach transactional skills in order to build competency in analysis, planning, and communication.³⁴ The report (and associated commentary) defined "competence" in the following terms:

A competent lawyer is knowledgeable about the fields of law in which she practices; performs techniques with skill; manages her practice efficiently; identifies issues that are beyond her competence; prepares and carries

²⁷ See *id.* at 9-19 (reviewing historical development of clinical programs and internships and related goals regarding the development of professional ethics among law students).

²⁸ See *id.* at 13-14 (discussing McGeorge Bundy's decision to grant funds to CLEPR in 1968).

²⁹ See *id.* at 8 (discussing the evolution in rationales and methods of instruction relating to legal ethics).

³⁰ See *id.* at 17 (discussing CLEPR grant programs).

³¹ See Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 227 (1973) (arguing that a program for specialized instruction in trial advocacy at law schools was overdue).

³² See *id.* at 240-41.

³³ See Cramton, *supra* note 2, at 1 (discussing findings of Cramton's report on competence).

³⁴ See *id.* at 11 (explaining skills lawyers need to practice competently and the extent to which they are taught in law schools).

through matters undertaken; and is intellectually, emotionally and physically capable.³⁵

This formulation seems to blend knowledge, skill, ethics, and stamina at its heart.

A decade later, ABA President Bob MacCrate brought to fruition the “MacCrate Report,” the product of deliberations by representatives of the larger bench, bar, and law school communities.³⁶ The MacCrate Report is well-known for at least two things. First, it framed professional development in terms of a “continuum” that includes, but stretches well beyond, law school.³⁷ Second, it created a list of “fundamental” skills and values that included the following:

Skills:

1. Problem Solving
2. Legal Analysis and Reasoning
3. Legal Research
4. Factual Investigation
5. Communication
6. Counseling
7. Negotiation
8. Litigation and Alternative Dispute-Procedures
9. Organization and Management of Legal Work
10. Recognizing and Solving Ethical Dilemmas

Values:

1. Provision of Competent Representation
2. Striving to Promote Justice, Fairness, and Morality
3. Striving to Improve the Profession
4. Professional Self-Development.³⁸

³⁵ *Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools*, ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR 9-10 (1979); see also Cramton, *supra* note 2, at 8 (elaborating on essay by lead author discussing a report).

³⁶ *Legal Education and Professional Development – An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR xi-xii (1992), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report.authcheckdam.pdf [<http://perma.cc/AK9N-8XCZ>] [hereinafter MacCrate Report].

³⁷ See *id.* at 225 (stating that professional development evaluations must be done by the individual lawyer over a legal career).

³⁸ *Id.* at 138-41.

The MacCrate Report also included extensive exploration of each of these skills and values.³⁹

The new ABA accreditation Standards clearly reflect this earlier legacy concerning the importance of skills development. Not only the Standards relating to competence, but also those requiring enhanced experiential education, emphasize the significance of professional skills.⁴⁰ At the same time, it is important for legal educators and lawyers to understand that references to “competence” should be understood against a broader background, one that relates to ethical considerations as well as technical capabilities.

C. *Competence and First Principles: Ethical Norms*

The notion of competence has a significant history within the legal profession, but not necessarily the history that most current law professors recall.⁴¹

1. Model Rule 1.1

The current version of the Model Rules of Professional Responsibility gives competence a signal place in the universe of lawyers’ values, setting forth applicable requirements regarding competence at the very start. Rule 1.1 states that “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness[,] and preparation reasonably necessary for the representation.”⁴² However, at the time the Model Rules were adopted in 1983, the drafters included important commentary, explaining that competence had first been made an express ethical requirement in 1970, but that this simple standard was difficult to apply when the notion of “competence” was not defined and was left ambiguous.⁴³ The most recent version of this requirement accordingly includes more explicit references

³⁹ *Id.* at 141–221.

⁴⁰ See MODEL RULES OF PROF’L CONDUCT pmbl. cmt. 4 (2013) [hereinafter 2013 MODEL RULES] (establishing that a lawyer should have the skills to keep in communication with the clients they are representing as a way to maintain competency).

⁴¹ See *id.* at R. 1.1 cmt. 2 (recognizing that a lawyer does not need specialized skills in a certain area of practice to be considered competent without also having a long experience in practicing law).

⁴² *Id.* at R. 1.1.

⁴³ See ABA, ANNOTATED MODEL RULES OF PROF’L CONDUCT 21 (Ellen J. Bennett et al. eds., 8th ed. 2015) [hereinafter ANNOTATED MODEL RULES] (stating that competency was not a requirement until 1970).

calling for legal knowledge and skill, thoroughness and preparation.⁴⁴ The annotations also address the need to associate with co-counsel if an individual lawyer is not herself “competent” and to maintain competence, not simply to demonstrate competence at some point in the lawyer’s career.⁴⁵ Following its adoption, this Rule has been further interpreted to require knowledge of legal principles, basic research, procedure, court rules, and most recently, technology.⁴⁶ Skills in legal drafting and analysis are also required, as is the ability to engage in necessary investigation.⁴⁷ Commentary now addresses the dilemmas of inexperienced lawyers, and the special burdens of public defenders with very heavy caseloads. The need for diligence in serving a client is also addressed in a separate rule.⁴⁸

2. Earlier Understandings of Competence

In order to gain a complete understanding of the legal profession’s views about competence, as evidenced by its ethical norms, it is worth going back in time to track the evolution of lawyers’ expectations about competence. Strikingly, leading members of the bar emphasized the importance of competence but in different terms and for different reasons well before competence gained a premier role in the Model Rules of Professional Responsibility in 1970.⁴⁹

a. Early Initiatives

Even before the Civil War, leading lawyers stressed the need for practitioners to take steps to consider issues of competence, although the term “competence” was not necessarily used.⁵⁰ For example, in 1856, David Hoffman, a Baltimore attorney, published his “50 Resolutions in

⁴⁴ See 2013 MODEL RULES, *supra* note 40, at R. 1.1 cmts. 1-5 (explaining that a competent lawyer needs legal knowledge, skill, thoroughness, and preparation skills to fulfill the competency obligation).

⁴⁵ See *id.* at R. 1.1 cmt. 2 (noting that the competence requirement can be met through other co-counsel’s knowledge of specialized areas of law).

⁴⁶ See *id.* at R. 1.1 cmt. 8 (explaining the importance of knowledge about advances in technology in retaining competency).

⁴⁷ See *id.* at R. 1.1 cmt. 2 (stating that competent lawyers need to be able to evaluate and analyze evidence).

⁴⁸ See *id.* at R. 1.3 (explaining the rule regarding diligence as a requirement for legal practice).

⁴⁹ ANNOTATED MODEL RULES, *supra* note 43, at 21.

⁵⁰ See Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1445 (2004) (explaining that competence of lawyers has been a recurring ethical concern).

Regard to Professional Department.”⁵¹ Hoffman’s 20th Resolution read: “Should I not understand my client’s cause, after due means to comprehend it, I will retain it no longer, but honestly confess it, and advise him to consult others, whose knowledge of the particular case may probably be better than my own.”⁵²

Hoffman thus emphasized the need for a lawyer to understand a client’s matter, and absent such understanding, noted the importance of confessing what amounted to a lack of competence in order to assist the client in finding more capable counsel.⁵³ Hoffman simply used plain terms in formulating his resolution, rather than adopting the more ambiguous term “competence.”

Following the Civil War, in 1869, Dean George Sharswood, of the University of Pennsylvania, wrote his “Essay on Professional Ethics.”⁵⁴ Sharswood observed that lawyers should engage in continuing study, appreciate the importance of integrity and character, and recognize that “It is in every man’s power, with few exceptions, to attain respectability, competence, and usefulness.”⁵⁵ Sharswood’s emphasis on continuing study suggests that he viewed competence as a trait developed during practice, not a characteristic attained during law school (particularly since traditional law school training was not required for practice during a period when apprenticeships and “reading the law” remained common).⁵⁶ Sharswood also concisely noted the interrelation between competence, personal regard (reputation), and successful business (usefulness).⁵⁷

⁵¹ Thomas L. Shaffer, *David Hoffman’s Law School Lectures, 1822–1833*, 32 J. LEGAL EDUC. 127, 128 (1982).

⁵² David C. Hoffman, *Fifty Resolutions in Regard to Prof’l Department*, LONANG INST. (2014), <http://lonang.com/commentaries/curriculum/professional-department/> [<http://perma.cc/4T9R-26EQ>].

⁵³ *Id.*

⁵⁴ See GEORGE SHARSWOOD, A COMPENDIUM OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW 1 (1854) (noting that the aforementioned essay was originally presented to the law class of the University of Pennsylvania in 1854).

⁵⁵ *Id.* at 168.

⁵⁶ See *id.* at 125–26 (insisting that lawyers use a structured plan to remain studious after law school because passing the bar means lawyers have just begun their legal education); Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: An Historical Framework—A History of U.S. Legal Education Phase I: From The Founding of the Republic Until the 1860s*, 39 J. MARSHALL L. REV. 1041, 1059–60 (2006) (stating that an apprenticeship was the most common preparation for a practicing lawyer during this period).

⁵⁷ See SHARSWOOD, *supra* note 54, at 168 (stating that it is every lawyer’s duty to attain competence and respectability because these principles are his only safety when relying on a business for sustenance).

Bar leaders, beginning with Colonel (Judge) Thomas Jones, also worked to develop ethics codes.⁵⁸ Judge Jones played a leading role in the development of the Alabama Code of Ethics, published in 1887.⁵⁹ It included a provision relating to “Duties to be Performed within Limits of Law,” stating that:

An attorney “owes [his] entire devotion to the interests of his client, warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability,” to the end that nothing may be taken or withheld from him, save by the rules of law, legally applied.⁶⁰

This formulation captures views relating to the identity of interest between a lawyer and his or her client and the notion of zealous advocacy that would be more fully developed in later ethical standards. To the degree that competence is a matter worth considering, the emphasis is on utmost skill and ability, rather than on minimum capability, a distinction that later was developed with regard to beginning lawyers’ competency and more experienced lawyers’ proficiency.

Strikingly, each of these early efforts by the bench and bar seemed to emphasize matters other than ethical values, be it gaining respect through proper “deportment,” linking competence and respectability, or assuring that clients got their due.⁶¹

b. ABA Canons

Once the ABA came on the scene, it adopted Canons of Ethics, beginning in 1908.⁶² Initially, the Canons stated that

⁵⁸ See Walter B. Jones, *Canons of Professional Ethics, Their Genesis and History*, 2 ALA. LAW. 247, 247 (1941) (discussing Colonel (Judge) Jones’ contribution to the development of ethical standards for the legal profession); see also Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 471–507 (1998) (including in depth discussion of the development of the 1887 Alabama Code of Ethics).

⁵⁹ See Marston, *supra* note 58, at 483–84 (describing Judge Jones’ role in advocating for a body that could prosecute unworthy bar members and provide a code for ethical conduct, which the Alabama Bar Association subsequently ratified by adopting a committee to prepare and write bills in accordance with Jones’ suggestions).

⁶⁰ Jones, *supra* note 58, at 263.

⁶¹ See SHARSWOOD, *supra* note 54, at 168 (stating that it is every lawyer’s duty to attain competency and respectability); Marston, *supra* note 58, at 494 (arguing that Hoffman’s concept of “deportment” serves as an etiquette standard instead of an ethical standard).

⁶² See James M. Altman, *Considering the A.B.A.’s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2395 (2003) (describing the ABA’s first national code adopted in 1908).

[A] lawyer owes his “entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,” to the end that nothing be taken or be withheld from [his client], save by the rules of law, legally applied.⁶³

To a significant extent, the Canons thus tracked the terms of the Alabama Code.⁶⁴ The Canons were subsequently amended to address competence more directly:

DR 6-101 Failing to Act *Competently*.

(A) A lawyer shall not:

- (1) Handle a legal matter which he knows or should know that he is not *competent* to handle, without associating with him a lawyer who is *competent* to handle it.
- (2) Handle a legal matter without preparation adequate in the circumstances.
- (3) Neglect a legal matter entrusted to him.⁶⁵

As evident from this language, the requirements came to be framed in terms of whether the lawyer had knowledge (or imputed knowledge), and whether the lawyer was competent, adequately prepared, or neglectful.⁶⁶ However, such requirements were not the end of the matter. Important dimensions of the amended 1908 Canons emphasized ethical considerations, not just disciplinary rules. Several ethical considerations associated with the Canons as amended are worth noting:

EC 1-1: A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to

⁶³ *Id.* at 2448.

⁶⁴ *See id.* (quoting Section 10 from the Alabama Code, which described the lawyer’s duty to provide zealous representation with the utmost ability and skill).

⁶⁵ ABA MODEL CODE OF PROF’L RESPONSIBILITY DR 6-101 (1980), <http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf> [<https://perma.cc/QLV2-EPP8>] [hereinafter MODEL CODE] (emphasis added).

⁶⁶ *See id.* (stating that a lawyer must know how to handle a legal matter before representing a client and must adequately prepare and not neglect matters for which he was responsible).

meet the highest standards is the ethical responsibility of every lawyer.⁶⁷

EC 6-1: Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.⁶⁸

EC 6-2: A lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs, concentrating in particular areas of the law, and by utilizing other available means. He has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of his younger associates and the giving of sound guidance to all lawyers who consult him. In short, a lawyer should strive at all levels to aid the legal profession in advancing the highest possible standards of integrity and competence and to meet those standards himself.⁶⁹

What lessons might be learned from the evolution of ethical obligations regarding competence, particularly if they are seen as a gloss on or a contrast with the subsequent Model Rules? First, competence has had a long-standing role in both current and earlier understandings of lawyers' ethical obligations, even when just viewed as an appropriate form of "deportment" or a factor in a lawyer's "reputation."⁷⁰ "Integrity" is linked to "competence" in later versions of the Canons, but the linkage is not explained in detail.⁷¹ "Integrity" was probably a notion more widely

⁶⁷ *Id.* at EC 1-1.

⁶⁸ *Id.* at EC 6-1.

⁶⁹ *Id.* at EC 6-2.

⁷⁰ *See id.* at EC 1-1 (stating that clients are entitled to professional services offered by lawyers of integrity, who "meet the highest standards is the ethical responsibility of every lawyer"); Marston, *supra* note 58, at 494 (explaining Hoffman's view of "deportment" in one of the first ethical codes drafted for American lawyers).

⁷¹ *See* MODEL CODE, *supra* note 65, at EC 1-1 (stating that clients should have access to competent lawyers who have integrity).

shared at the time than it may be today. Insofar as expectations of “competence” are rooted in differing rationales, it is imperative for educators to drive home to students the reasons that competence is a fundamental touchstone not only in law practice, but also in education today.

Second, “competence” is a nuanced and ambiguous term, rather than a simple concept. Its use in these earlier contexts reflects the realities of law practice at the time. Competence appears to encompass both aspirational desires (“utmost skill and ability” and “proficiency”) and mandatory expectations regarding handling of a “legal matter” for a client. Competence is also used to refer to handling of a “legal matter” (in the disciplinary rules) and more basic, general levels of capability (in the ethical considerations). Moreover, earlier ethical considerations emphasized the responsibilities of senior lawyers to engage in “the careful training of his younger associates and the giving of sound guidance to all lawyers who consult him.”⁷² This expectation has come under challenge during times when the organizational structures of law practice have now resulted in international mega-firms, and demands on senior lawyers have emphasized “rain-making” and billable hours rather than mentoring juniors within or outside their practices.⁷³

These distinctions suggest that context is important, and that understanding should inform legal educators’ responses to the new ABA accreditation Standards affecting law schools. Mandatory versus aspirational standards need to be distinguished, perhaps with regard to the capabilities of law graduates and expectations of more experienced attorneys. History also reveals the significance of the changing characteristics of law practice, and emphasizes the important roles of senior members of the bar who at one time had well-recognized ethical obligations to oversee junior lawyers, an expectation that seems to be declining today.⁷⁴ History reveals the importance of both skills development and ethical factors in framing a meaningful definition of “competence.” Part III pursues related questions regarding the importance of context in determining the meaning of “competence” in the new ABA accreditation Standards.⁷⁵

⁷² *Id.* at EC 6-2.

⁷³ See Thomas W. Cranmer, *The Importance of Mentoring*, 85 MICH. B.J. 14, 14 (2006) (stressing the importance of “one-on-one training” in the face of increased pressure on lawyers to bring in new business, and the problems caused by senior lawyers who hoard work instead of involving and delegating to colleagues).

⁷⁴ See ANNOTATED MODEL RULES, *supra* note 43, at 479 (obligating a supervisory attorney to ensure that junior lawyers conform to professional standards).

⁷⁵ See *infra* Part III (addressing the significance of competence within the new ABA accreditation Standards).

III. WHAT DOES COMPETENCE HAVE TO DO WITH CONTEXT?

As discussed in Part II, the new ABA accreditation Standards use the term “competence” in a way that implicates ethical obligations as well as skills.⁷⁶ Part III explores further conundrums about competence relating to the scope and application of that concept *in context*.⁷⁷ To begin, Part III.A asks whether the “competence” that is being demanded by the new ABA accreditation Standards is a broad concept that is intended to require law schools to prepare students only in “meta-competences” applicable in all fields of practice, or in some other more particularized areas of practice. It accordingly reflects, in Part III.B, on whether attention to more narrow *competencies* rather than a broader level of *competence* is expected.⁷⁸ Finally, Part III.C considers the higher standard of quality associated with specialization in substantive areas of practice in order to explore what insights might be offered about basic competence of law school graduates as required by ABA accreditation Standards.⁷⁹

A. *Competence, Meta-Competences, and Competencies*

An interesting initial question concerns whether, in requiring “competence,” the ABA’s new requirements really focus on broad “meta-competences” that may have a bearing across multiple contexts (for example, across a number of professions) or are instead intended to address much narrower “*competencies*,” that is, subsidiary elements of a more broadly defined area of “competence” (for example, competence in negotiation might include analytical, communication, interpersonal, and strategic skills). The answer is that this is not an “either-or” proposition, but instead a situation in which both “competences” and “competencies” must be addressed.

1. Meta-Competences

A number of important studies have considered the “meta-competences” that undergird the current job market in the legal profession and beyond.

⁷⁶ See *supra* Part II.A (discussing the role of competence within the new ABA Standards).

⁷⁷ See *infra* Part III (exploring the application and scope of competence contextually within professional fields).

⁷⁸ See *infra* Part III.B (discerning between narrow and specific competencies required of lawyers today).

⁷⁹ See *infra* Part III.C (reflecting upon legal specialization as it relates to competence under the new ABA Standards).

a. *Carnegie Foundation Studies*

Lee Shulman, past-president of the Carnegie Foundation for the Advancement of Teaching, has argued that there are six “commonplaces” that undergird professional work, and has contended that these commonplaces should prove central focal points for instruction in all professional education programs.⁸⁰ In Shulman’s view, the characteristics of professional work should drive the focus of professional education.⁸¹ According to Shulman, the following commonplaces are of special importance:

- Mastery of fundamental knowledge and skills (generally developed in academia);
- Capacity to make decisions under conditions of uncertainty;
- Capacity to engage in complex practice;
- Capacity to learn from experience;
- Capacity to create and participate in responsible professional community; and
- Ability and willingness to provide public service.⁸²

In Shulman’s view, professional education should prepare future professionals with these professional realities and values in mind.⁸³ The Foundation’s study of legal education found that in contrast to other fields, legal education was strong in developing thinking skills, but was weaker in preparing students with skills, and ethical values. Moreover, legal education had failed in developing effective strategies for “professional formation” that pulled together preparation for the profession as a whole, and in adopting sophisticated assessment strategies that would drive student learning.⁸⁴

⁸⁰ See Lee S. Shulman, *Theory, Practice, and the Education of Professionals*, 98 *ELEMENTARY SCH. J.* 511, 516 (1998) (introducing the six commonplaces within professional education).

⁸¹ *Id.* at 515–16.

⁸² *Id.* at 516; see also Howard Garner & Lee S. Shulman, *The Professions in America Today: Crucial but Fragile*, 134 *DAEDALUS* 13, 14 (2005) (reiterating the importance of the six commonplaces within all professions).

⁸³ See Shulman, *supra* note 80, at 525 (pointing out that the professional education connects each of the six commonplaces).

⁸⁴ See generally WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 145–61 (2007) (contending that law schools should integrate ethics instruction along with courses that emphasize traditional legal analysis and those that address practical skills in order to maximize effective assessment and professional formation).

b. *Medical Studies*

Compared to legal education, medical education has a much more well-developed body of research regarding effective educational strategies. Medical educators have repeatedly documented important dimensions of doctors' competence. Consider, for example, the following formulation of competence for doctors and medical students and their possible application in the context of law. Professional competence of medical students might require assessment of the following characteristics:

- *Cognitive knowledge*: core knowledge, basic communications skills, information management, applying knowledge to real-world situations, using tacit knowledge and personal experience, abstract problem-solving, self-directed acquisition of new knowledge, recognizing gaps in knowledge, generating questions, using resources (e.g., published evidence, colleagues), learning from experience
- *Technical*: physical examination skills, surgical/procedural skills
- *Integrative*: incorporating scientific, clinical, and humanistic judgment; using clinical reasoning judgments appropriately; linking basic and clinical knowledge across disciplines; managing uncertainty
- *Context*: clinical settings, use of time
- *Relationship*: communication skills, handling conflict, teamwork, teaching others
- *Affective/Moral*: tolerance of ambiguity and anxiety; emotional intelligence; respect for patients; responsiveness to patients and society; caring
- *Habits of Mind*: observations of one's own thinking, emotions and techniques; attentiveness; critical curiosity; recognition and response to cognitive and emotional biases; willingness to acknowledge and correct errors.⁸⁵

More recent commentary by medical educators similarly provides sophisticated insights for those in other disciplines. For example, medical

⁸⁵ Ronald M. Epstein & Edwards M. Hundert, *Defining and Assessing Professional Competence*, 287 J. OF THE AM. MED. ASS'N 226, 227 (2002) (providing characteristics of professional competence assessments of medical students).

educators have recognized that “competence” can cover knowledge, performance, reflection, and production.⁸⁶ They have also devoted much more attention to teamwork, emotional competence, and self-assessment.⁸⁷ They have made extensive efforts to improve cultural competence (capacity to work effectively with those from other cultures and experiences).⁸⁸ Quite recently, there is a growing interest in “mastery” related instruction.⁸⁹ Medical education has also developed very sophisticated evaluation practices in such substantive contexts as minimum competency for working with geriatric patients, evaluation of communication and interpersonal competences, and self-assessment.⁹⁰ Each of these developments could provide an important template for application in legal education.

c. *Studies of Employer Expectations of College Students*

Many studies by educators regarding skills needed for twenty-first century work have been conducted in recent years in order to document

⁸⁶ See Brian D. Hodges, *The Shifting Discourse of Competence*, in *THE QUESTION OF COMPETENCE: RECONSIDERING MEDICAL EDUCATION IN THE TWENTY-FIRST CENTURY* 14, 16–32 (Brian D. Hodges & Lorelei Lingard eds., 2012) (discussing competence shifts as it relates to knowledge performance reflection and production discourses).

⁸⁷ See Kevin W. Eva et al., *Blinded by “Insight”: Self-Assessment and Its Role in Performance Improvement*, in *THE QUESTION OF COMPETENCE: RECONSIDERING MEDICAL EDUCATION IN THE TWENTY-FIRST CENTURY* 131, 131–33 (Brian D. Hodges & Lorelei Lingard eds., 2012) (providing discussion on self-assessment and competence); Lorelei Lingard, *Rethinking Competence in the Context of Teamwork*, in *THE QUESTION OF COMPETENCE: RECONSIDERING MEDICAL EDUCATION IN THE TWENTY-FIRST CENTURY* 42, 42–43 (Brian D. Hodges & Lorelei Lingard eds., 2012) (assessing teamwork as it relates to competence); Nancy McNaughton & Vicki LeBlanc, *Perturbations: The Central Role of Emotional Competence in Medical Training*, in *THE QUESTION OF COMPETENCE: RECONSIDERING MEDICAL EDUCATION IN THE TWENTY-FIRST CENTURY* 70, 70–71 (Brian D. Hodges & Lorelei Lingard eds., 2012) (addressing the role of emotional competence).

⁸⁸ See Katie Crenshaw et al., *What Should We Include in a Cultural Competence Curriculum? An Emerging Formative Evaluation Process to Foster Curriculum Development*, 86 *ACADEMIC MED.* 333, 333–34, 339 (2011) (addressing cultural competence as it relates to medical professionals).

⁸⁹ See Rachel Yudowsky et al., *Setting Mastery Learning Standards*, 90 *ACADEMIC MED.* 1, 1–2 (2015) (introducing issue on “mastery learning standards,” defined as an instructional approach in which assessment is based on performance rather than on time in class).

⁹⁰ See Bruce J. Bellande et al., *Urgently Needed: A Safe Place for Self-Assessment on the Path to Maintaining Competence and Improving Performance*, 85 *ACADEMIC MED.* 16, 16–17 (2010) (addressing the role of self-assessment in competence standards); see also F. Daniel Duffy et al., *Assessing Competence in Communication and Interpersonal Skills: The Kalamazoo II Report*, 79 *ACADEMIC MED.* 495, 495–98 (2004) (analyzing competence as it relates to communication and interpersonal skills); Rosanne M. Leipzig et al., *Keeping Granny Safe on July 1: A Consensus on Minimum Geriatrics Competencies for Graduating Medical Students*, 84 *ACADEMIC MED.* 604, 604–05 (2009) (discussing competency as it relates to geriatric patients).

the skills needed for the “new” economy.⁹¹ Although college graduates typically lack the characteristics associated with law students or lawyers, it appears that society is increasingly inclined to expect undergraduates to be “work ready” and thus to possess many of the attributes of graduates in professional fields.⁹² These meta-competences are likewise not limited to the work environment in the United States.⁹³ Scholars in the United Kingdom and the European Union have further considered the core capabilities needed for success in undertaking professional work.⁹⁴

At root, then, it seems clear that certain intellectual and personal capabilities are generally necessary for success in employment in the current era. “Meta-competences” are also necessary, quite apart from professional fields, and those “meta-competences” reflect employer expectations more generally.⁹⁵ At the same time, it seems clear that employers need field-specific competencies (new lawyers do not need to perform surgery, and new doctors do not need to be able to do legal research). It is to these more narrow *field-specific competencies* that the next section now turns.⁹⁶

⁹¹ See EDUCATION FOR LIFE AND WORK: DEVELOPING TRANSFERABLE SKILLS IN THE 21ST CENTURY 53–56 (James W. Pellegrino & Margaret L. Hilton eds., 2012) (reviewing competency demands in the twenty-first century based on an increased need for interpersonal skills in a digital age).

⁹² Rebecca Flanagan, *The Kids Aren't Alright: Rethinking the Law Student Skills Deficit*, 2015 BYU EDUC. & L.J. 135, 135–36 (2015) (observing that today's college graduates are not as prepared for law school compared to previous years); see also HART RESEARCH ASSOCIATES, RAISING THE BAR: EMPLOYERS' VIEW ON COLLEGE LEARNING IN THE WAKE OF THE ECONOMIC DOWNTURN, A SURVEY AMONG EMPLOYERS CONDUCTED ON BEHALF OF: THE ASSOCIATION OF AMERICAN COLLEGES AND UNIVERSITIES 5 (2010) (explaining that employers have increased expectations through broader level of skills and higher levels of learning than in the past).

⁹³ See Stan Lester, *Professional Competence Standards and Frameworks in the United Kingdom*, 39 ASSESSMENT & EVALUATION IN HIGHER EDUC. 38, 41–42 (2014) (summarizing findings of European scholars who have also studied professional competence).

⁹⁴ See, e.g., *id.* (discussing a 2012 study that examined the frameworks and standards of competence utilized in considering professions in the United Kingdom). For observations on professional skills needed in the UK context, see Stan Lester, *Professional Standards, Competence and Capabilities*, in volume 4 of *Higher Education, Skills, and Work-Based Learning*, 31, 31 (2014).

⁹⁵ See MICHIGAN STATE UNIVERSITY, CERI RES. BRIEF 1-2010 COLLEGIATE EMP. RES. INST. 2, 17 (2010) (finding that meta-competences transcend job specific “skills and competencies”). These skills are applicable in several different situations as they depend on the “context of the assignment or task,” and they allow a person to adapt to different situations that may arise in their profession or in life in general. *Id.*

⁹⁶ See John O. Mudd & John W. LaTrielle, *Professional Competence: A Study of New Lawyers*, 49 MONT. L. REV. 11, 15 (1988) (generating a list of 149 tasks and abilities law practitioners believed were necessary to practice law).

2. Field-Specific Competencies

A number of scholars in the United States have engaged in significant studies of more specific competencies required for various professions or for the effective practice of law. This important work should shape further conversations about how field-specific *competencies* fit within the broader dialogue about competence in general.

a. *Studies of Expertise in Varied Fields: Lave and Wenger's Seminal Studies of Experts, Expertise, and Situated Learning*

In 1991, Professors Jean Lave and Etienne Wenger published their influential theory about “situated learning,” drawing on their expertise in anthropology and social sciences.⁹⁷ In their view, learning for particular fields (including expert fields such as midwifery and tailoring) requires novices to place learning within the social context in which it occurs, so that “apprentices” gradually become enmeshed in a professional community in which they are legitimate peripheral participants.⁹⁸ According to this theory, learning takes place in a “community of practice” in which learning is contextualized.⁹⁹ Lave and Wenger’s studies documented learning in contexts such as the development of competence among tailors and midwives.¹⁰⁰ Their theory suggested that the best way to build competence and expertise is to introduce novices to the full array of experiences and skills required for the accomplishment of all associated tasks so as to provide them with an overall perspective, before turning to in-depth instruction in particular tasks (for example, with tailors, measuring and sewing sleeves or sewing buttonholes).¹⁰¹

b. *Studies of Legal Performance Competencies and Related Factors*

Studies of professional competence and competencies have been underway for years.¹⁰² For example, an early study that tried to articulate

⁹⁷ JEAN LAVE & ETIENNE WENGER, SITUATED LEARNING: LEGITIMATE PERIPHERAL PARTICIPATION (1991).

⁹⁸ *Id.* at 61–87.

⁹⁹ See ETIENNE WENGER, COMMUNITIES OF PRACTICE: LEARNING, MEANING, AND IDENTITY 214 (1998) (stating that a “community of practice is a living context that can give newcomers access to competence and also invite a personal experience of engagement by which to incorporate that competence into an identity of participation”).

¹⁰⁰ See LAVE & WENGER, *supra* note 97, at 61–87.

¹⁰¹ See *id.* at 62–67.

¹⁰² See Maureen F. Fitzgerald, *Competence Revisited: A Summary of Research on Lawyer Competence*, 13 J. PROF. LEGAL EDUC. 227, 227 (1995) (asserting that studies involving legal competence have been conducted prior to 1980, but most of the studies were completed in the 1980s); see also Nancy A. Strehlow, Note, *Evaluating “Competency” Criteria: Toward a*

the dimensions of competence was performed by former University of Montana School of Law Dean Jack Mudd.¹⁰³ UCLA School of Law Professor Gary Blasi also offered a helpful framework for lawyers' professional competence in a study from 1995.¹⁰⁴ American Bar Foundation Director Bryant Garth and a colleague likewise undertook important empirical research, in the early 1990s, regarding the development of competence among junior lawyers.¹⁰⁵

More recently scholars at University of California Berkeley ("UC-Berkeley"), Professor Marjorie Shultz and Provost Sheldon Zedak, conducted a significant study involving law students, junior and senior lawyers, judges, and clients, as part of an effort to develop alternative admissions practices that could more accurately predict effectiveness in law practice. They sought to identify and evaluate competence-related "effectiveness factors" that would expand admissions criteria beyond the traditional factors of undergraduate GPA and LSAT scores.¹⁰⁶ Their larger

Uniform Standard of Lawyer Performance, 59 WASH. U. L.Q. 1019, 1019-20 (1981) (finding that once "several prominent judges" complained about lawyer incompetency, studies were conducted to discover the level of incompetency among lawyers).

¹⁰³ See Mudd & LaTrielle, *supra* note 96, at 14 (identifying a common belief among experienced lawyers that recent graduates lacked competence to perform several important professional tasks). The article also offered a list of 149 capabilities that lawyers found necessary to practice law in Montana. *Id.* at 15.

¹⁰⁴ See Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 317 (1995) (suggesting that developments in cognitive science can assist legal scholars to appreciate a wider "range of lawyering knowledge and practice" including "judgment, wisdom, expertise, and the relation of theory to lawyering practice").

¹⁰⁵ See Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 471-72 (1993) (describing survey research regarding development of competence among junior lawyers in Chicago and in more outlying areas).

¹⁰⁶ See Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 LAW & SOC. INQUIRY 620, 629, 633, 641, 654 (2011) (reporting that LSAT and GPA scores do not correlate with most of the lawyer "effectiveness factors," and that these limitations should be addressed by adding other measurable admissions criteria). See also Kristen Holmquist, Marjorie Shultz, Sheldon Zedeck & David Oppenheimer, *Measuring Merit: The Shultz-Zedeck Research on Law School Admissions*, 63 J. LEGAL EDUC. 565, 565-66 (2014) (discussing Shultz and Zedeck's research and concluding that "professional competence can be predicted with objective tests" that more effectively correlate with "likely success as a practicing, problem-solving attorney"); Marjorie M. Shultz & Sheldon Zedeck, *Final Report: Identification, Development, and Validation of Predictors for Successful Lawyering* 63, 73 (2008), https://www.law.berkeley.edu/files/LSAC_REPORTfinal-12.pdf [<https://perma.cc/3ADW-XG77>] [hereinafter *Final Report*]. Their research concluded that for many students, other approaches to admissions criteria could more powerfully predict student performance on key dimensions relating to lawyer effectiveness. *Final Report*, *supra* note 106, at 82, 87, 88. For example, first year law school GPA correlated positively with learning approach, but negatively with adjustment, ambition, sociability, and interpersonal sensitivity. *Id.* at 63. High LSAT scores correlated negatively with effectiveness in networking. *Id.* at 73. High undergraduate GPAs correlated

goal was to capture a wider range of predictors, such as those used in business and other contexts, in hopes of reducing reliance on approaches that tended to screen out talented minority students.¹⁰⁷ Shultz and Zedek engaged in empirical work to determine factors that bear on lawyer effectiveness, based on the insights of supervising attorneys, clients, and judges.¹⁰⁸ They determined that the following factors were characteristics of effective lawyers, and proposed that these factors be weighed in making admissions decisions:

1. Intellectual and cognitive (analysis and reasoning, creativity and innovation, problem-solving, practical judgment);
2. Research and information gathering (researching the law, fact-finding, questioning and interviewing);
3. Communicating (influencing and advocating, writing, speaking, listening);
4. Conflict-resolution (negotiation skills, ability to see world through eyes of others);
5. Planning and organizing (strategic planning, organizing one's own work, organizing and managing others);
6. Working with others (developing relations within the legal profession, evaluation, development, mentoring);
7. Client and business relationships (networking and business development, providing advice and counsel and building relationships with clients);
8. Character (passion and engagement, diligence, integrity and honesty, stress management, community involvement and service, and self-development).¹⁰⁹

Important recent studies by Professor Neil Hamilton, of the University of St. Thomas School of Law, and colleagues have explored the development of professional identity and related competencies in law students and

negatively with practical judgment, interviewing and questioning, developing relationships, integrity, and community service. *Id.*

¹⁰⁷ See *Final Report*, *supra* note 106, at 42 (explaining that the goal of the research project was to determine if alternative tests are capable of predicting performance as a lawyer).

¹⁰⁸ See *id.* at 24–25 (identifying “26 Effectiveness Factors” that are important to lawyer effectiveness).

¹⁰⁹ *Id.* at 26–27 (using broader headings to cluster effectiveness factors).

lawyers.¹¹⁰ In a recent analysis, published in *The Bar Examiner*, Hamilton summarized both other relevant studies of competence among law students and lawyers, and his own studies on this subject.¹¹¹ Hamilton considered a range of survey data from his studies in Minnesota, as well as other national studies.¹¹² He concluded that a number of specific competencies play an important role in the development of lawyers.¹¹³ Based on his synthesis of related studies, Hamilton cited the following competencies as important to law firms in determining the competency of associates, listing these factors from most to least importance:

1. Initiates and maintains strong work and team relationships
2. Good judgment/common sense/problem solving
3. Effective written/oral communication skills
4. Project management, including high quality, efficiency, and timeliness
5. Business development/marketing/client retention
6. Dedication to client service/responsiveness to clients
7. Analytical skills: identify legal issues from facts, apply the law, and draw conclusions
8. Initiative, ambition/drive/strong work ethic
9. Legal competency/expertise/knowledge of the law
10. Commitment to professional development toward excellence
11. Research skills
12. Commitment to firm and its goals
13. Integrity/honesty/trustworthiness
14. Delegation, supervision, mentoring

¹¹⁰ Professor Hamilton has completed numerous studies on professional identity and related issues of competency including the following works. See Neil W. Hamilton et al., *Encouraging Each Student's Personal Responsibility for Core Competencies Including Professionalism*, 21 PROF. LAW. 1, 1 (2012) (discussing "how legal education can foster each student's internalized commitment to self-development toward excellence and initiative"); see also Neil Hamilton, *Law Firm Competency Models & Student Professional Success: Building on a Foundation of Professional Formation/Professionalism*, 11 U. ST. THOMAS L.J. 6, 6 (2013) (analyzing survey data and finding that a growing number of "law firms are moving toward 'competency models' that define the characteristics of the most effective and successful lawyers in the firm" and are using these "characteristics in the assessment and development . . . of junior lawyers").

¹¹¹ See Neil Hamilton, *Empirical Research on the Core Competencies Needed to Practice Law: What Do Clients, New Lawyers, and Legal Employers Tell Us?*, 83 THE BAR EXAM'R 6-9 (Sept. 2014) (evaluating survey data from junior and senior lawyers in Minnesota, interviews, job analysis studies by the National Conference of Bar Examiners, and other studies).

¹¹² *Id.* at 8.

¹¹³ *Id.* at 9-12.

15. Pro bono, community, bar association involvement
16. Seeks feedback/responsive to feedback
17. Stress/conflict management
18. Inspires confidence
19. Ability to work independently
20. Negotiation skills
21. Strategic/creative thinking
22. Leadership
23. Demonstrates interest in business and financial arrangements with clients¹¹⁴

Hamilton also considered a slightly different list of factors that have informed Minnesota law firms in making hiring decisions as to new lawyers.¹¹⁵ Once again, in order of importance from most important to least important, these factors included the following matters:

1. *Very important/critically important competencies:* integrity/honesty/trustworthiness; good judgment/common sense/problem solving; analytical skills: identify legal issues from facts, apply the law, and draw conclusions; initiative/ambition/drive/strong work ethic; effective written/oral communication skills; dedication to client service/responsiveness to client; commitment to firm/department/office and its goals and values; initiates and maintains strong work and team relationships;
2. *Important to very important competencies:* project management, including high quality, efficiency, and timeliness; legal competency/expertise/knowledge of the law; ability to work independently; commitment to professional development toward excellence; strategic/creative thinking; research skills; inspires confidence; seeks feedback/responsive to feedback; stress/crisis management; leadership; negotiation skills.¹¹⁶

As Hamilton explains in his *Bar Examiner* article (summarizing a variety of research sources), broad notions of “competence” do not match

¹¹⁴ *Id.* at 9, 11.

¹¹⁵ *See id.* at 9-10 (summarizing very important to critically important skills or important to very important skills desired for new lawyers).

¹¹⁶ *Id.* at 10.

the actual experience in law school or practice for many junior lawyers, who tend to think that substantive doctrinal expertise is the most important factor for success.¹¹⁷ Instead, a more specific framework of “competencies” better tracks the reality of firms’ expectations.¹¹⁸ If this analysis is in fact sound, a broad notion of lawyer “competence” appears flawed insofar as it does not closely track the nature of law practice and the need for lawyers to develop more specific, narrow “competencies.”¹¹⁹

B. Field Specific Competencies

An additional dimension of “competence” relates to the different mixes of “competencies” associated with different fields of practice. The United States contrasts with the United Kingdom where licensure mechanisms distinguish lawyers with differing duties and responsibilities, including barristers, solicitors, notaries, and others.¹²⁰ A recent sophisticated study of legal education and law practice has considered not only the scope of competence in these various arenas, but also significant related questions regarding the quality of lawyer performance.¹²¹ This analysis of practice in England and Wales also reflected a much broader inquiry than has informed conversations in the United States, insofar as it considered satisfaction with the competence of both barristers (litigators) and solicitors (office lawyers), and insofar as it tapped data regarding perspectives of consumers, businesses, and others in assessing the competence of lawyers.¹²²

¹¹⁷ See Hamilton, *supra* note 111, at 12 (explaining that technical competence is ranked lower than other skills such as integrity, honesty, and trustworthiness).

¹¹⁸ See *id.* (explaining how more detailed skills and abilities match with the more general competencies).

¹¹⁹ See Tony Foley et al., *A Puppy Lawyer Is Not Just for Christmas: Helping New Lawyers Successfully Make the Transition to Professional Practice*, ANU COLLEGE OF LAW SOC. SCI. RES. NETWORK, No. 11-36, at 6 (2011) (explaining that junior lawyers gain a higher level of competence when given an opportunity for autonomy in working with clients); Vivien Holmes et al., *Practising Professionalism: Observations from an Empirical Study of New Australian Lawyers*, ANU COLLEGE OF LAW SOC. SCI. RES. NETWORK, No. 11-35, at 5 (2011) (explaining that many skills traditionally viewed as important in lawyers do not in fact correlate with lawyers’ present-day work).

¹²⁰ See LEGAL EDUCATION AND TRAINING REVIEW, *THE FUTURE OF LEGAL SERVICES EDUCATION AND TRAINING REGULATION IN ENGLAND AND WALES* 37 (June 2013) [hereinafter LETR Report] (referencing different skills and knowledge needed for different types of legal positions); see also Jane Ching, *Making a Virtue of Necessity? An Opportunity to Harness Solicitors’ Attachment to the Workplace as a Place for Learning*, 24 NOTTINGHAM LAW J. 36, 36–37 (2015) (focusing on the difference of the barrister role from other legal profession roles in England and Wales).

¹²¹ See LETR Report, *supra* note 120, at 118–52 (discussing competence and quality).

¹²² See *Briefing Paper 1/2012: Knowledge, Skills, and Attitudes Required for Practice at Present: Initial Analysis*, LEGAL EDUC. AND TRAINING REV. 7 (2012), <http://www.lettr.org.uk/wp->

702 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 50]

Unfortunately, research in the United States about lawyer competencies by field is much more limited. The National Conference of Bar Examiners commissioned a study of lawyer-tasks by subfield in 2012, but the methodology of that study relied on a very small sample size and thus its conclusions are far from definitive.¹²³ Whatever the conclusions in the research just cited, available studies suggest that necessary competencies vary by field of practice.¹²⁴

C. Lawyer Specialization

Many state bars allow lawyers to seek field-specific specialization certification.¹²⁵ The experience among state bars supports the proposition that competence must be understood in context, and suggests that proficiency requirements (a higher standard of competence rooted in a specific field) can provide insights about basic competence as required by the new ABA accreditation Standards.¹²⁶ In most circumstances, the expectations brought to bear on those seeking certification as specialists reflects a higher level of requirements including multi-faceted proficiency, rather than the lower level of competency expected of beginning lawyers.¹²⁷ Only those who have achieved and documented their

content/uploads/012012-competence-frameworks-analysis.pdf [http://perma.cc/74MM-DHFX] [hereinafter *Briefing Report*] (explaining how desirable attributes of attorneys may differ depending on clients' needs and goals).

¹²³ See Steven S. Nettles & James Hellrung, *A Study of the Newly Licensed Lawyer*, NAT'L CONF. OF BAR EXAM'RS 8-9 (2012), <http://www.ncbex.org/pdfviewer/?file=%2Fdocs%2Fdocument%2F56> [http://perma.cc/97AY-6QFT] (noting that, out of 19,872 invited participants, only 1669 usable responses were included in the analysis, which is less than a ten percent response rate).

¹²⁴ See Marcus T. Boccaccini & Stanley L. Brodsky, *Characteristics of the Ideal Criminal Defense Attorney from the Client's Perspective: Empirical Findings and Implications for Legal Practice*, 25 LAW & PSYCHOL. REV. 81, 82-83 (2001) (discussing criminal practice and the need to establish a relationship of trust and confidence with accused clients); Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 966 (2007) (discussing family law practice and the different competence level needed such as the need to care to be an effective attorney in that area).

¹²⁵ *A Concise Guide to Lawyer Specialty Certification*, ABA STANDING COMMITTEE ON SPECIALIZATION 2, http://www.americanbar.org/content/dam/aba/migrated/2011_build/specialization/june2007_concise_guide_final.authcheckdam.pdf [http://perma.cc/V2DC-HPVX] [hereinafter ABA STANDING COMMITTEE ON SPECIALIZATION].

¹²⁶ See *id.* at 4-5 (explaining that the fundamental goals of certifying specialists are to improve competence of practitioners and quality of service; objectives that can be achieved through certification systems that apply rigorous standards by certifying organizations).

¹²⁷ See, e.g., William D. Henderson, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373, 374-89 (2011) (explaining the context of general practice, specialization, and more modern practices of project management). The author thanks Alice Neece Mine, Director of the NC Bar's Specialization program, and recent chair of the ABA Standing Committee on Specialization, for her insights.

attainment of certification requirements (including experience, references, and performance on certification exams) are allowed to hold themselves out to the public as having advanced capability to address problems in designated fields.¹²⁸

Specialization became a common practice among state bars beginning in 1972.¹²⁹ Typically, state bars have adopted systems that designate context-specific fields as eligible for “specialization” and then develop systems through which those seeking certification as specialists can qualify based on a mix of demonstrated specialized practice experience, recommendations, and performance on specialized examinations.¹³⁰ Areas of specialization can range from litigation to family law, real estate, immigration, criminal law, juvenile law, and more.¹³¹

The implications of the specialization system for interpretation of base-line ABA accreditation Standards are two-fold. First, the generic notion of “competence” should only be used for raw beginners, and “proficiency” standards should instead be seen as characterizing those with greater expertise, a higher standard only achievable through a number of years of experience and further certification.¹³² Moreover, by implication, the ABA accreditation Standards should only be applied to require law schools to confirm that graduating students have achieved a base-line standard of competence. Nonetheless, given the growing pattern of specialization in practice, law schools should also help their graduates appreciate the level of expertise expected of those seeking to

¹²⁸ See ABA STANDING COMMITTEE ON SPECIALIZATION, *supra* note 125, at 4 (addressing the basic requirements for specialization certifications).

¹²⁹ See Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1004 (1994) (explaining that it has become increasingly important for lawyers to limit the subject areas in which they practice in order to develop and maintain competence); Judith Kilpatrick, *Specialist Certification for Lawyers: What is Going On?*, 51 U. MIAMI L. REV. 273, 274 (1997) (discussing California’s pilot program in criminal law, taxation, and workers’ compensation).

¹³⁰ See ABA STANDING COMMITTEE ON SPECIALIZATION, *supra* note 125, at 4 (explaining the operation of lawyer certification programs); see also *Governing Rules*, AM. BAR ASS’N ACCREDITATION OF SPECIALTY CERTIFICATION PROGRAMS FOR LAWS. 1-3 (2013), <http://www.americanbar.org/content/dam/aba/administrative/specialization/ABA%20Governing%20Rules%2006-2013%20authcheckdam.pdf> [<http://perma.cc/2HJB-9ZCX>] (explaining typical requirements for specialist certification, including substantial involvement in the specialty area, peer review including multiple references, educational experience, and an adequate performance on a written exam evaluating the lawyer’s knowledge).

¹³¹ See ABA STANDING COMMITTEE ON SPECIALIZATION, *supra* note 125, at 4 (conferring the different practices mentioned above as areas of specialization).

¹³² See Leary Davis, *Competence as Situationally Appropriate Conduct: An Overarching Concept for Lawyering, Leadership, and Professionalism*, 52 SANTA CLARA L. REV. 725, 751, 754 (2012) (explaining how learning is most effective when what is learned is applied in the real world; thus, leading to experience which should determine competence).

achieve the level of area specialists in practice, rather than concentrating efforts on merely preparing graduates for general practice.

IV. WHAT DOES COMPETENCE HAVE TO DO WITH ASSESSMENT?

A final question concerns how competence relates to assessment. The new ABA Standards make very clear that there is or should be a direct connection between the notion of competence and the idea of assessment, since the Standards demand that “learning outcomes,” such as those related to competence, be directly tied to measuring such education results.¹³³ Unfortunately, there is a good deal of uncertainty in the community of legal educators about how best to link learning outcomes and assessment strategies.¹³⁴ Part IV endeavors to help resolve these uncertainties by proceeding in two sections. Part IV.A outlines assessment strategies that have been employed with competence standards employed outside the legal context and considers their implications. Part IV.B then turns to more direct insights drawn from the legal context, including the legal context abroad and in the United States, concluding that a focus on competence necessitates reform of grading practices in law schools and bar examination assessment practices.

A. *Assessment and Competence Outside the Legal Context*

Many legal educators lack training or expertise concerning the meaning, means, and significance of assessment.¹³⁵ Those in other fields better understand that “assessment drives learning.”¹³⁶ Two homely examples may help legal educators appreciate this principle. Students often ask whether a particular topic will be on the final exam. If the

¹³³ See ABA, MANAGING DIRECTOR’S GUIDANCE MEMO 5 (June 2015) (addressing Standard 315) (relating to evaluation of programs of legal education, learning outcomes, and assessment methods). The Guidance Memo states: “Standard 315 requires that the dean and faculty evaluate its program of legal education, learning outcomes and assessment methods on an ongoing basis. The school is to use the results to determine the degree of student attainment of competency and make changes as appropriate.” *Id.* See also Mary Crossley & Lu-in Wang, *Learning by Doing: An Experience with Outcomes Assessment*, 41 U. TOL. L. REV. 269, 269–71 (2010) (explaining the relationship between assessment and student learning, and observing that assessment also provides law schools with opportunities to reform their educational programs in the face of shortcomings).

¹³⁴ Crossley & Wang, *supra* note 133, at 272–73 (explaining how educators in different countries viewed ABA accreditation requirements prior to recent reforms).

¹³⁵ See SULLIVAN ET AL., *supra* note 84, at 162–82 (discussing law schools’ shortcomings with regard to assessment).

¹³⁶ See PATRICIA BENNER ET AL., EDUCATING NURSES: A CALL FOR RADICAL TRANSFORMATION 44–45 (2010) (discussing method of using questions to assess student learning and other means of teaching); MOLLY COOKE ET AL., EDUCATING PHYSICIANS: A CALL FOR REFORM OF MEDICAL SCHOOL AND RESIDENCY 95–110 (2010).

answer is “yes,” they will study it; if the answer is “no,” they will not. Unfortunately, too, observers of the legal education landscape have failed to appreciate the implications of ill-conceived *U.S. News* rankings as an assessment tool that drives learning within the legal academy.¹³⁷ If a factor (such as entering student credentials, job data, or expenditures) can improve law schools’ standing in rankings, many schools often change their practices to enhance their performance using *U.S. News* criteria,¹³⁸ even though they should know that doing so takes them afield from sound practices and institutional missions.

Significant research in education and psychology has provided helpful insights that are rarely encountered by law professors.¹³⁹ For example, scholars such as Professor Robert Sternberg have probed the connections between intelligence, competence, and expertise.¹⁴⁰ In Sternberg’s view, abilities develop into competencies and competencies develop into expertise.¹⁴¹ Other scholars have studied the relationship between motivation and competence.¹⁴² At root, there can be important differences in achievement of various levels of competence, depending on whether motivations are implicit (internally driven) or externally driven. Other researchers have sought to track the development of hard-to-measure undergraduate characteristics, such as interpersonal and intrapersonal competences.¹⁴³

¹³⁷ See Darren Bush & Jessica Peterson, *Jukin’ the Stats: The Gaming of Law School Rankings and How to Stop It*, 45 CONN. L. REV. 1235, 1238–39 (2013) (discussing the implications of the *U.S. News* rankings); Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L. J. 229, 235 (2006) (commenting on the emphasis on LSAT scores and UGPA in characterizing student quality).

¹³⁸ BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 71–72 (2012).

¹³⁹ See Robert J. Sternberg, *Intelligence, Competence, and Expertise*, in *HANDBOOK OF COMPETENCE AND MOTIVATION* 15, 15 (Andrew J. Elliot & Carol S. Dweck eds., 2005) (discussing the tests that psychologists have done to measure intelligence).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 17. See also *How Experts Differ from Novices*, in *HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE, AND SCHOOL* 31 (John D. Bransford et al. eds., 2004). In general terms, expertise develops in phases based on experience. See also Stuart E. Dreyfus, *The Five-Stage Model of Adult Skill Acquisition*, 24 BULL. OF SCI. TECH. SOC’Y 177, no. 3, 177–79 (June 2004) (explaining the stages involved in gaining expertise in a given area). Expertise is based on content-knowledge and experience and gradually evolves from the level of beginner or novice to advanced beginner, intermediate, and proficient. *Id.*

¹⁴² See Andrew J. Elliot & Carol S. Dweck, *Competence and Motivation: Competence as the Core of Achievement Motivation*, in *HANDBOOK OF COMPETENCE AND MOTIVATION* 3, 6 (Andrew J. Elliot & Carol S. Dweck eds., 2005) (commenting on the connection between motivation and competence); Oliver C. Schultheiss & Joachim C. Brunstein, *An Implicit Motive Perspective on Competence*, in *HANDBOOK OF COMPETENCE AND MOTIVATION* 31, 31 (Andrew J. Elliot & Carol S. Dweck eds., 2005) (noting the role that motivation plays in developing competence).

¹⁴³ BRIAN M. STECHTER & LAURA S. HAMILTON, *MEASURING HARD-TO-MEASURE STUDENT COMPETENCIES: A RESEARCH AND DEVELOPMENT PLAN* vii (2014).

Considerable effort has been devoted to studying attainment of competence in a range of professional fields outside of law. For example, student competence has been defined and assessed within the field of medicine.¹⁴⁴ Although business is not generally considered a “profession,” considerable attention has nonetheless been devoted to the development of student competencies within that arena.¹⁴⁵ Close attention has also been devoted to the development of various competencies in nursing education.¹⁴⁶ Assessment of teacher competence has proved to be a highly contested area, given recent policy debates about the role of high-stakes tests and student performance in contributing to the assessment of teaching.¹⁴⁷ Development of targeted competencies, such as cultural competence, has also proved to be an important focus for assessment efforts in a variety of fields.¹⁴⁸

B. Assessment and Competence within the Legal Sector

1. Experience Abroad: Insights from the United Kingdom and Elsewhere

Within the United Kingdom and Wales, regulators, academics and members of the diverse legal professions have recently devoted significant efforts to reviewing the legal education and training system in order to see how it might need to be improved.¹⁴⁹ The associated Legal Education and

¹⁴⁴ See ZUBAIR AMIN ET AL., PRACTICAL GUIDE TO MEDICAL STUDENT ASSESSMENT vii (2006) (commenting on the need to assess medical students and their competence levels as future doctors).

¹⁴⁵ See, e.g., Anders Drejer, *Illustrating Competence Development*, 5 MEASURING BUS. EXCELLENCE 6, 6 (2001) (discussing competence in business); ENRIQUE WASHINGTON & BRUCE GRIFFITHS, COMPETENCIES AT WORK: PROVIDING A COMMON LANGUAGE FOR TALENT MANAGEMENT (2015).

¹⁴⁶ See BENNER ET AL., *supra* note 136, at 228–29 (calling for performance assessments for licensure); QUALITY AND SAFETY IN NURSING: A COMPETENCY APPROACH TO IMPROVING OUTCOMES 271–72 (Gwen Sherwood & Jane Barnsteiner eds., 2012) (recommending skills that nurses should learn during their education).

¹⁴⁷ See, e.g., BEVERLY BURNELL & HEIDI SCHNACKENBERG, THE ETHICS OF CULTURAL COMPETENCE IN HIGHER EDUCATION (2015); SIMON DOLAN & KRISTINE KAWAMURA, CROSS-CULTURAL COMPETENCE: A FIELD GUIDE FOR DEVELOPING GLOBAL LEADERS AND MANAGERS (2015); SIOBHAN LAIRD, ANTI-OPPRESSIVE SOCIAL WORK: A GUIDE FOR DEVELOPING CULTURAL COMPETENCE (2008).

¹⁴⁸ See MARIANNE R. JEFFREYS, TEACHING CULTURAL COMPETENCE IN NURSING AND HEALTH CARE: INQUIRY, ACTION, AND INNOVATION 3 (2d ed. 2010) (commenting on the focus of achieving optimal cultural competence instead of minimal competence in the field of health care); Mary A. Lynch et al., *Intercultural Effectiveness*, in BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 337, 338 (Deborah Maranville et al. eds., 2015) (discussing cross-cultural competence in the context of legal education).

¹⁴⁹ See LETR Report, *supra* note 120, at vi.

Training Review (“LETR”)¹⁵⁰ brought to bear significant scholarly reviews and summaries of current professional practices in order to illuminate diverse understandings of competence and how competence might be assessed.¹⁵¹

As part of the LETR study, Professors Julian Webb, Jane Ching, Paul Maharg, and others¹⁵² provided initial research that reviewed understandings from professional fields in the United Kingdom and elsewhere about competence.¹⁵³ Their research also summarized regulatory practices within the United Kingdom that covered qualifications of barristers, solicitors, notaries, and paralegals,¹⁵⁴ and made associated recommendations.¹⁵⁵ Among other things, their research tracks work by other scholars about competence and career preparation,¹⁵⁶ and discusses the knowledge, skills and attitudes needed to practice at present and in the immediate future.¹⁵⁷ Nevertheless, the LETR study is particularly helpful insofar as it identifies and explains practices among United Kingdom law firms in defining and assessing competence of junior and more advanced associates.¹⁵⁸

¹⁵⁰ *Welcome*, LEGAL EDUCATION AND TRAINING REVIEW (2013), <http://letr.org.uk/index.html> [<http://perma.cc/KEY6-95D8>].

¹⁵¹ LETR Report, *supra* note 120, at vi, 1.

¹⁵² *See id.* at 1, 118 (identifying members of the research team for the LETR report and discussing how competence can be developed through learning processes); *Briefing Paper*, *supra* note 122, at 1 (discussing initial research paper dealing with the differences in the use of competence-based systems of learning).

¹⁵³ *Briefing Paper*, *supra* note 122, at 1.

¹⁵⁴ *See* LETR Report, *supra* note 120, at 34, 74–76 (discussing the qualifications of various legal professionals).

¹⁵⁵ *See id.* at 62 (recognizing the weaknesses in training and pointing to how such weaknesses could be addressed).

¹⁵⁶ *See, e.g.*, Graham Cheetham & Geoff Chivers, *How Professionals Learn in Practice: An Investigation of Informal Learning Among People Working in Professions*, 25 J. EUR. INDUS. TRAINING 247, 247 (2001) (discussing how professionals become competent through experience); Graham Cheetham & Geoff Chivers, *The Reflective (and Competent) Practitioner: A Model of Professional Competence Which Seeks to Harmonise the Reflective Practitioner and Competence-Based Approaches*, 22 J. EUR. INDUS. TRAINING 267, 267 (1998) (analyzing how professionals maintain their professional competence by establishing a new reflective practitioner approach); Graham Cheetham & Geoff Chivers, *Towards a Holistic Model of Professional Competence*, 20 J. EUR. INDUS. TRAINING 20, 20 (1996) (presenting a holistic model of professional competence).

¹⁵⁷ *See Briefing Paper*, *supra* note 122, at 2 (commenting on the skills and knowledge needed to practice at different times). This research documented minimum expectations arising from multiple types of observers (including clients and complainants, and various institutional players). *Id.* at 7–8. It also provides appendices that summarize expectations at the point of qualification and at later points in practice. *Id.* at 23–36.

¹⁵⁸ *See* LETR Report, *supra* note 120, at 118 (discussing how a practitioner’s competence is measured). The LETR study referenced competence-based assessment practices for associates in major firms. *Id.* at 96–97, 118; *Associate Competency Levels*, ADDLESHAW GODDARD (2016), http://www.addleshawgoddard.com/view.asp?content_id=3056&parent

2. Experience at Home

a. *Practice-Based Insights: Experience of Employers in the United States*

There appears to be a growing interest in the United States among larger law firms that desire to define developing competence among the junior associates they employ.¹⁵⁹ Identification of competencies can be used to focus professional development training programs, as well as to create compensation systems tied to performance, rather than years served.¹⁶⁰ For example, both the ABA and the National Association for Law Placement have in recent years published assessments of competence-based strategies for professional development and compensation.¹⁶¹ In addition, a number of governmental agencies have developed competence-based standards for reviewing performance and promotion of more junior associates.¹⁶² The Shultz-Zedeck study, discussed earlier, is particularly important because the researchers' design and expertise allowed them to delineate levels of performance by junior associates in various positions based on insights from supervising attorneys, clients, and judges.¹⁶³ Unfortunately, they have only been able to conduct their empirical research based on information concerning UC-Berkeley and UC-Hastings graduates.¹⁶⁴ Although the research team, particularly Professor Zedeck, had experience relating to articulating employment standards and criteria, they focused their work on trying to determine how pre-admission capabilities might predict post-graduate

_id=787 [http://perma.cc/M7LS-Z2ER]; see also Susana Almeda Lopes et al., *A New Approach to Talent Management in Law Firms: Integrating Performance Appraisal and Assessment Center Data*, 64 INT'L J. OF PRODUCTIVITY AND PERFORMANCE MGMT. 523, 525 (2015) (discussing possible competency-based assessment of lawyers in Portugal).

¹⁵⁹ See HEATHER BOCK & ROBERT RUYAK, CONSTRUCTING CORE COMPETENCIES: USING COMPETENCY MODELS TO MANAGE FIRM TALENT 43 (2006) (offering an example of a competency model used to assess associates in a firm).

¹⁶⁰ *Id.* at 24.

¹⁶¹ See *id.* at 1, 3 (discussing the new trends in competency); NATIONAL ASSOCIATION OF LAW PLACEMENT, HOW LAWYER EVALUATIONS MEASURE UP 149, 160 (NALP Foundation for Law Career Research and Education 2015) (discussing competency levels used by firms); NALP FOUNDATION, SURVEY OF LAW FIRM USE OF CORE COMPETENCIES AND BENCHMARKING IN ASSOCIATE COMPENSATION AND ADVANCEMENT STRUCTURES 4 (2009) (discussing competence based strategies for professional development and compensation).

¹⁶² See, e.g., State of Michigan Dep't of the Attorney General, *Competency Model for Behaviorally Anchored*, http://www.michigan.gov/documents/AG_BARS_14717_7.pdf [http://perma.cc/C69Z-PLKX] (illustrating the Michigan's state agency's competence-based standard for reviewing the performance of its attorneys).

¹⁶³ See *Final Report*, *supra* note 106, at 82, 89 (discussing the Shultz/Zedeck study and implications for performance in law school and translation into the legal workforce).

¹⁶⁴ *Id.* at 36.

performance rather than using it to assess levels of competence and performance in practice for other purposes.¹⁶⁵

b. Academic Practices: Assessment Strategies, Rubrics, and Grading with an Eye to Competence

Law professors have grown increasingly sophisticated in their approaches to assessment. There is a growing literature about options for formative assessment, namely, forms of assessment that provide students with formal and informal feedback in order to help them learn.¹⁶⁶ Some scholars, particularly those involved in teaching about legal research and writing, have been especially prolific in explaining approaches to formative assessment and related rationales.¹⁶⁷ Growing attention has been given to the development of rubrics that can guide either formative or summative assessment.¹⁶⁸ In addition, those involved in developing the initial compilation of *Best Practices for Legal Education* and its successor volume published in 2015 have provided significant guidance that can assist individual faculty members in their quest to provide helpful and transparent types of formative assessment for their students.¹⁶⁹ Although

¹⁶⁵ *Id.* at 40.

¹⁶⁶ See, e.g., THOMAS A. ANGELO & K. PATRICIA CROSS, CLASSROOM ASSESSMENT TECHNIQUES: A HANDBOOK FOR COLLEGE TEACHERS 5 (2d ed. 1993) (explaining formative assessment); GREGORY S. MUNRO, OUTCOMES ASSESSMENT FOR LAW SCHOOLS 16, 103 (2000) (discussing assessment practices in law schools); LORI E. SHAW & VICTORIA L. VANZANDT, STUDENT LEARNING OUTCOMES AND LAW SCHOOL ASSESSMENT: A PRACTICAL GUIDE TO MEASURING INSTITUTIONAL EFFECTIVENESS 16–17 (2015) (discussing classroom-based formative assessments); BARBARA WOLVOORD, ASSESSMENT CLEAR AND SIMPLE: A PRACTICAL GUIDE FOR INSTITUTIONS, DEPARTMENTS, AND GENERAL EDUCATION 3 (2d ed. 2004) (addressing assessment practices in higher education); Carol Springer Sargent & Andrea A. Curcio, *Empirical Evidence that Formative Assessments Improve Final Exams*, 61 J. LEGAL EDUC. 379, 380–82 (2012) (describing use of formative assessments to provide feedback and help students learn).

¹⁶⁷ See Adam Lamparello & Charles E. MacLean, *Experiential Legal Writing: The New Approach to Practicing Like a Lawyer*, 39 J. LEGAL PROF. 135, 140 (2015) (discussing experiential legal education as a venue for formative assessment and other effective instructional techniques).

¹⁶⁸ See Jessica Clark & Christy DeSanctis, *Toward a Unified Grading Vocabulary: Using Rubrics in Legal Writing Courses*, 63 J. LEGAL EDUC. 3, 16 (2013) (discussing the use of rubrics in legal writing courses); Sophie M. Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics – Explicit Grading Criteria*, 2004 MICH. ST. L. REV. 1, 7–8 (2004) (providing insights from the foremost proponent of rubrics in law schools).

¹⁶⁹ See ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 8, 29 (CLEA 2007), <http://www.cleaweb.org/best-practices> [<http://perma.cc/TM35-G3C8>] [hereinafter BEST PRACTICES] (explaining the best practices and provides guidance to assist faculty members in this change); Judith Welch Wegner, *Implications for Traditional Grading Practices, in BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD* 423 (Deborah Maranville et al. eds., 2015) [hereinafter *Grading Practices*] (discussing the need to re-examine grading and telling teachers to reconsider).

such improved assessment practices enhance the integrity of basic approaches widely used within legal education, they unfortunately do not grapple with the core problems that are likely to be cast in more vivid relief as law schools begin to devote more serious attention to competence-based instruction and associated assessment at the institutional level.

Legal academics have long been wedded to traditional grading systems that rely upon “norm-based” standards of grading (that is, grading systems designed to compare students to each other).¹⁷⁰ Such systems should be contrasted to “criterion-based” systems that gauge student performance against an absolute scale, based on their performance in absolute terms.¹⁷¹ For example, in reviewing student writing in a legal research and writing course in the first year, a “norm-based” system would require instructors to distribute grades on a curve (X percent of A’s, Y percent of B’s, Z percent of C’s). Alternatively, a grading system might be based on stated rubrics by which students would be assessed (xxx points for research approaches and sources, yyy points for organization and analytical structure, zzz points for effective writing and use of proper organizational structures, headings, and plain English).

Law schools have long been wed to norm-based grading systems, in large part because they have desired to “sort” students in order to distribute them along a spectrum of “best,” “good,” “average,” and “sub-par” for the convenience of employers.¹⁷² Once competence becomes a core factor in assessment, professors and schools as a whole need to step back and reconsider their basic approaches, however.¹⁷³ If in fact, law schools seek to motivate students to achieve significant levels of competence, they need to remember that “assessment drives learning” as

¹⁷⁰ See Robert C. Downs & Nancy Levit, *If It Can't be Lake Woebegone: A Nationwide Survey of Law School Grading and Grade Normalization Practices*, 65 UMKC L. REV. 819, 846–47 (1997) (reviewing grading practices in a study that may now be somewhat dated); Jeffrey Evans Stake, *Making the Grade: Some Principles of Comparative Grading*, 52 J. LEGAL EDUC. 583, 583–84, 586 (2002) (suggesting how to improve traditional grading systems).

¹⁷¹ See Deborah Waive Post, *Power and the Morality of Grading – A Case Study and a Few Critical Thoughts on Grade Normalization*, 65 UMKC L. REV. 777, 778, 802 (1997) (demonstrating a critique of norm-based grading); *Grading Practices*, *supra* note 169, at 422–26 (discussing a more recent critique of norm-based grading and an argument in favor of criterion-based grading as essential in courses geared to developing competence).

¹⁷² See Joshua M. Silverstein, *A Case for Grade Inflation in Legal Education*, 47 U.S.F. L. REV. 487, 526 (2013) (arguing for inflating grades and making B- the average for good academic standing in order to avoid psychological injury to students and to allow them to be more successful in the job market); Joshua M. Silverstein, *In Defense of Mandatory Curves*, 34 U. ARK. LITTLE ROCK L. REV. 253, 263–64, 274–75 (2012) (discussing arguments in favor of norm-based grading).

¹⁷³ See *Grading Practices*, *supra* note 169, at 422–23, 425–26 (discussing why professors and law schools need to reconsider their basis approaches in assessments).

explained above.¹⁷⁴ If grades are not tied to levels of competence, students will not understand the absolute levels of mastery required of them and will continue to drift based on poor understandings of their performance in comparison to the performance of others (a matter that is not related to clear competence standards). If, on the other hand, professors understand and express absolute, criterion-referenced expectations regarding performance, such standards can serve as benchmarks, they can communicate to students in the first instance, and, in particular, if revisions of student work are allowed, can provide students with a meaningful approach to understanding the higher levels of competence to which they should aspire. Moreover, student grades based on competence and performance will in turn become a more meaningful guide to members of the legal profession in hiring students into professional roles.

c. *The Evolving Bar Examination and Competence*

The bar examination has drawn increasing criticisms from legal academics around the country in recent days.¹⁷⁵ The President of the National Conference of Bar Examiners (“NCBE”) has justified the significant reduction in cut-scores in jurisdictions around the country on the grounds that current law students have lower LSAT scores than their predecessors and therefore are “dumber” and should pass bar examinations at a lower level than those that came before.¹⁷⁶ Deans and legal academics have questioned the NCBE approach on grounds that

¹⁷⁴ See *id.* at 423–24 (discussing four reasons to reevaluate long-standing grading traditions: “the growing use of formative assessment to improve student learning; the increasing presence of skills-oriented, performance-based instruction in law schools; the increasing number of small courses for which normative curves based on statistical assumptions regarding average, inferior, and superior performance are questionable; and the need to recognize the importance of increasing competence as students progress from year to year”).

¹⁷⁵ See Natalie Kitroeff, *Are Lawyers Getting Dumber?*, BLOOMBERG (Aug. 20, 2015), <http://www.bloomberg.com/news/features/2015-08-20/are-lawyers-getting-dumber-> [<http://perma.cc/VQA3-N5ZL>] (discussing criticisms regarding the bar passage rates).

¹⁷⁶ See *id.* (discussing the recent trends involving lower bar passage rates in numerous states); *Bar Exam Scores Fall to Lowest Point in Decades*, ABOVE THE LAW (Sept. 21, 2015, 3:42 PM), <http://abovethelaw.com/2015/09/bar-exam-scores-fall-to-lowest-point-in-decades/> [<http://perma.cc/T38T-KUKF>] (discussing additional background on the decline in bar passage rates around the country beginning in 2014 and 2015); *2014 MBE Statistics*, NAT’L CONF. OF BAR EXAM’RS (2015), <https://www.ncbex.org/publications/statistics/mbe-statistics/> [<https://perma.cc/XJM3-KKPP>] (providing NCBE statistics on 2014 bar exam performance); *2014 MPRE Statistics*, NAT’L CONF. OF BAR EXAM’RS (2015), <https://www.ncbex.org/publications/statistics/mpre-statistics/> [<https://perma.cc/DHZ5-V5TH>] (providing MPRE statistics); Mark A. Albanese, *The Testing Column: The July 2014 MBE: Rogue Wave or Storm Surge?*, 84 THE BAR EXAM’R 35 (June 2015) (discussing sharp declines in 2014 bar performance).

benchmarks should be based on capacity to practice effectively, and not on scores reflecting analytical capacity prior to law school that are based on reasoning capacity and little more.¹⁷⁷ The NCBE is currently pushing a national uniform bar examination that would provide the organization with a significant revenue stream.¹⁷⁸ While cut-scores would be up to bar examiners in particular jurisdictions, it is not clear how cut-scores in particular jurisdictions might be influenced by national patterns.¹⁷⁹ As a result, skepticism has grown among deans and legal academics about NCBE practices and the possibility that state bar examiners are being influenced by a desire to limit the number of lawyers admitted in their

¹⁷⁷ See Jacob Gershman, *Are Lawyers Getting Dumber? Empty Theory or Troubling Trend*, WALL ST. J. BLOG (Aug. 20, 2015, 1:08 PM), <http://blogs.wsj.com/law/2015/08/20/are-lawyers-getting-dumber-empty-theory-or-troubling-trend/> [<http://perma.cc/U9LL-GLZY>] (discussing Brooklyn Law dean's critique); see also Natalie Kitroeff, *Bar Exam Scores Drop to Their Lowest Point in Decades*, BLOOMBERG BUS. (Sept. 17, 2015, 1:32 PM CDT), <http://www.bloomberg.com/news/articles/2015-09-17/bar-exam-scores-drop-to-their-lowest-point-in-decades> [<http://perma.cc/ZUK6-R4DZ>] (discussing declines in exam performance that were supposedly attributable to a poorer performance on multiple-choice questions, including civil procedure questions included in the exam for the first time in 2015). Scores on the multiple choice test declined from 141.5 to 139.9 (a total of 1.6 points from July 2014 to July 2015). Meanwhile many states saw dramatic declines in passing rates: Mississippi pass rates fell by twenty-seven percent, Oklahoma dropped by eleven percent, and New Mexico dropped by twelve percent, according to the Bloomberg report. *Id.* See also Deborah J. Merritt et al., *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929, 930 (2001) (discussing earlier changes in bar passing scores).

¹⁷⁸ See *Jurisdictions That Have Adopted the UBE*, NAT'L CONF. OF BAR EXAM'RS (2015), <http://www.ncbex.org/exams/ube/> [<http://perma.cc/SCM3-V7UF>] (stating the purpose of implementing a uniform bar examination).

¹⁷⁹ See *id.* (highlighting the states implementing the UBE); *Further Reading*, NAT'L CONF. OF BAR EXAM'RS (2015), <http://www.ncbex.org/exams/ube/further-reading/> [<http://perma.cc/SCM3-V7UF>] (explaining the NCBE's justifications for the uniform bar examination); Dennis R. Honabach, *To UBE or Not to UBE: Reconsidering the Uniform Bar Exam*, 22 PROF. LAW. 43, 44 (2014) (considering the benefits and draw-backs of the uniform bar exam). New York State recently decided to adopt the Uniform Bar Exam. See Mary Campbell Gallagher & Suzanne Darrow-Kleinhaus, *A Comparison of the New York Bar Examination and the Proposed Uniform Bar Examination*, 87 NYSBA J. 32, 32 (2015) (addressing New York's recent decision to adopt the Uniform Bar Exam and discussing the anticipated differences in New York bar examination practices going forward). The NCBE has advocated for the UBE on grounds that it comprises high-quality tests (multiple choice, essay, and performance tests) covering national law, and that scores by test-takers in adopting jurisdictions are portable for consideration by other jurisdictions without having to retake the test. *Id.* at 36. Those who are concerned about the movement toward a uniform test are worried that lawyers taking the UBE will not be prepared with state-specific legal knowledge. *Id.* Some, like the current author, are also concerned that using a uniform exam will soon lead to further declines in bar passage, as jurisdictions decide that they must all set standards at a level that assures that their lawyers are "above average." *Id.*

jurisdictions during an economic downturn when restructuring of the legal services market has spread throughout the land.¹⁸⁰

One of the common critiques of bar examinations concerns the limited capacity of these tests to assess candidates' competence to practice law.¹⁸¹ NCBE core testing strategies use multiple choice tests and essays to test candidates' knowledge and sophistication with especially formulated questions designed to test analytical sophistication and responses under time pressures.¹⁸² The NCBE has refused to concede their tests' limitations and indeed has refused to release data about test scores in a period of significant downturn. Critics have also expressed concern that test performance by minority candidates may have been adversely affected by stereotype threat and other similar dynamics.¹⁸³

A growing number of jurisdictions have also adopted the NCBE's "performance test" component as part of their comprehensive bar examination design.¹⁸⁴ The "performance test" requires candidates to synthesize materials and draft documents in response to varying file

¹⁸⁰ See Bryan R. Williams, *Letter From the Chair*, 83 THE BAR EXAM'R 2 (Dec. 2014) (discussing the NCBE's approach to varying bar examination processes).

¹⁸¹ See Susan M. Case, *The Testing Column: The Purpose of the Bar Exam: To Predict Success as a Lawyer?*, 78 THE BAR EXAM'R 35 (Nov. 2009) (stating that testing personnel at the NCBE accept the fact that the bar examination does not predict future performance and justify that decision by saying it could not do so); Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343, 351-53 (2003) (critiquing bar exams and recommending alternative performance-based assessment strategies); Clark D. Cunningham, *Rethinking the Licensing of New Attorneys – An Exploration of Alternatives to the Bar Exam: Introduction*, 20 GA. ST. U.L. REV. xv, xv-xvi (2004) (discussing proposals in states and practices in other countries); Judith Welch Wegner, *Cornerstones, Curb Cuts, and Legal Education Reform*, J. DISP. RESOL. 33, 33 (2013) (offering theoretical and practical observations to reform law school teaching and assessment).

¹⁸² See C. Beth Hill, *MBE Test Development: How Questions Are Written, Reviewed, and Selected for Test Administrations*, 84 THE BAR EXAM'R 23-24 (Sept. 2015) (discussing the development of MBE questions, including drafting committees and expert review).

¹⁸³ The notion of "stereotype threat" was developed by Claude Steele and his colleagues. See CLAUDE M. STEELE, WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO 92-93 (2010) (describing challenges faced by minorities in academic settings); Claude M. Steele, Steven J. Spencer & Joshua Aronson, *Contending with Group Image: The Psychology of Stereotype and Social Identity Threat*, 34 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 379, 379 (2002) (explaining the development of the notion of the "stereotype threat" and analyzing the results thereof); Catherine Martin Christopher, *Eye of the Beholder: How Perception Management Can Counter Stereotype Threat Among Struggling Law Students*, 53 DUQ. L. REV. 163, 170 (2015) (considering stereotype threat in the context of struggling law students).

¹⁸⁴ See *Jurisdictions Administering the MPT*, NAT'L CONF. OF BAR EXAM'RS (2015), <http://www.ncbex.org/exams/mpt/> [<http://perma.cc/N6QL-VK69>] (containing a list and map of states that use the multistate performance examination).

714 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 50]

materials under time pressure.¹⁸⁵ This approach was initially piloted in California in an effort to develop a more competence-based approach to bar examination testing, in effect requiring students to show their capabilities to perform competently with real lawyering tasks as they would have to do in practice.¹⁸⁶ The NCBE asserts that the different portions of its performance exam test different things and enhance the legitimacy of its testing overall.¹⁸⁷ Many critiques could potentially be levied against current practices in designing and assessing responses to nationally-normed bar examinations (including multiple choice, essay, and performance components).¹⁸⁸ For present purposes, the most salient would be that bar examinations, as currently constituted, do not truly assess competence, except to the extent that competence is understood to mean success on a test that focuses on knowledge, analysis, and performance under time pressure, where scores are closely aligned with incoming scores on the LSAT.¹⁸⁹

¹⁸⁵ See *Preparing for the MPT: Multistate Performance Test*, NAT'L CONF. OF BAR EXAM'RS (2015), <http://www.ncbex.org/exams/mpt/preparing/> [<http://perma.cc/478L-D5BT>] (displaying information on the multistate performance test, provided by the NCBE). For example, the February 2015 multistate performance test asked bar applicants to respond to the following scenario. *In re Harrison (MPT-1)*, NAT'L CONF. OF BAR EXAM'RS (2015), <https://www.ble.state.mn.us/file/Representative%20Good%20Answers%20-%20Feb%202015.pdf> [<https://perma.cc/CHB4-WT9X>]. Applicants are told that their firm represents an individual who has purchased a tract of land, currently zoned R-1 but previously used as a National Guard armory and vehicle storage area. *Id.* The purchaser assumed that the lot was "grandfathered" so that the constraints of the current R-1 district did not apply. *Id.* The purchaser sought to rezone the property for use as a commercial truck driving school, but his application was denied. *Id.* Bar applicants were asked to review materials relating to state and federal "taking" law, email, and a client interview summary, and then prepare an objective memorandum on the viability of an "inverse condemnation" action. *Id.*; see Ben Bratman, *Improving the Performance of the Performance Test: The Key to Meaningful Bar Exam Reform*, 83 UMKC L. REV. 565, 568 (2015) (suggesting that the bar exam fails to effectively evaluate attorneys' ability to practice while placing emphasis on memorization).

¹⁸⁶ See Jane Peterson Smith, *Preparing and Grading the California Performance Test*, 53 THE BAR EXAM'R 16 (Feb. 1984) (stating that California included a mandatory performance test to the bar exam in July of 1983).

¹⁸⁷ See Susan M. Case, *The Testing Column: Relationships Among Bar Examination Component Scores: Do They Measure Anything Different?*, 77 THE BAR EXAM'R 33 (Aug. 2008) (concluding that the combined aspects of the MPT and MEE are precise and reflective of an applicant's proficiency).

¹⁸⁸ See Judith A. Gundersen, *MEE and MPT Test Development: A Walk-Through from First Draft to Administration*, 84 THE BAR EXAM'R 29-34 (June 2015) (discussing how the MEE and MPT tests are developed).

¹⁸⁹ See Erica Moeser, *President's Page*, 84 THE BAR EXAM'R 6 (June 2015) (arguing that declines in LSAT scores and bar exam performance are interrelated); see also Erica Moeser, *President's Page*, 84 THE BAR EXAM'R 4 (Sept. 2015) (confirming a downward trend in bar exam scores as of July 2015); see generally Susan M. Case, *The Testing Column: Failing the Bar Exam – Who's at Fault?*, 82 THE BAR EXAM'R 34-35 (Sept. 2013) (asserting that law schools and students are partially to blame for poor performance, particularly if entering students have

What would a really powerful, meaningful, and appropriate post-graduation licensure examination in law look like? It would likely be more similar to tests of medical students who must report on what they need to do to respond to stylized patients.¹⁹⁰ It would be designed to discern the differences between levels of expertise (beginning and higher) and competence (of the sort increasingly assessed by law firms).¹⁹¹ It would allow students more opportunity to be assessed in areas in which they propose to practice (for example, aspirants who hope to engage in criminal prosecution and defense should have some opportunity to demonstrate their capability in the criminal law arena and not simply be treated in the same group as those who hope to practice in family law and estate planning).¹⁹² Might not law schools be permitted to develop programs such as those in effect in New Hampshire and New York that identify some students with solid academic performance to be assessed based on their actual performance in government and judicial agencies?¹⁹³

weak LSAT scores or undergraduate grade point averages). Case explained that those with LSAT scores of 160 had average MBE scores of 153, while those with LSAT scores of 140 had MBE scores of 132. Case, *supra* note 187, at 34–35. Case further stated that those with undergraduate grade point averages of 3.5 had above average MBE scores of 151 and those with undergraduate grade point averages of 3.0 had average MBE scores of 138. *Id.*; see also Mark A. Albanese, *The Testing Column: Equating the MBE*, 85 THE BAR EXAM’R 29–31 (Sept. 2015) (explaining efforts to equate current scores with scores in prior years). It seems difficult to square all these propositions. Law schools that admit students with weaker credentials face significant educational challenges, but many have developed strong academic support programs to bolster learning. To the degree that LSAT and MBE performance are purposely intended to correlate, it seems inevitable that some circular reasoning is at work as the MBE becomes trickier in order to maintain past patterns of performance and correlations.

¹⁹⁰ See COOKE ET AL., *supra* note 136, at 80–81, 94–95, 106–09, 143, 148 (demonstrating that medical education is widely known for using assessments of standardized patients); Karen Barton et al., *Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence*, 13 CLINICAL L. REV. 1, 3 (2006) (concluding that students working with standardized patients are better prepared to perform than those taking initial clinical examinations unrelated to standardized patients).

¹⁹¹ See Hamilton, *supra* note 111, at 12, 14 (laying out and comparing drive, entrepreneurship, leadership, and collegiality based on expertise level as the most important competencies in hiring lawyers and stating that law firms are experimenting with assessing new attorneys on additional competency standards); see also Susan Manch, *Competencies and Competency Models—An Overview*, in THE ART AND SCIENCE OF STRATEGIC TALENT MANAGEMENT IN LAW FIRMS 77–91 (Terri Mottershead ed., 2010) (discussing talent management based on competency).

¹⁹² See Judith Welch Wegner, *Response: More Complicated Than We Think*, 59 J. LEGAL EDUC. 623, 640–43 (2010) (arguing for a bifurcated bar examination).

¹⁹³ See John Burwell Garvey, *New Hampshire’s Performance-Based Variant of the Bar Examination: The Daniel Webster Scholar Honors Program Moves Beyond the Pilot Phase*, 79 THE BAR EXAM’R 17 (Aug. 2010) (discussing the methods of assessment for the Daniel Webster Scholar Program); see also Anne Zinkin & John Burwell Garvey, *New Hampshire’s Daniel Webster Scholar Honors Program: Placing Law School Graduates Ahead of the Curve*, 84 THE BAR EXAM’R 17 (Sept. 2015) (stating that DWS students maintain a portfolio and participate in

716 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 50

Might not regulatory agencies in time allow law graduates (working with their law schools) to develop portfolios demonstrating their writing capacity, clinical experiences, professionalism, and subject-matter expertise?¹⁹⁴

Would not that approach provide a better system for assessing graduates' competence, rather than continuing to rely upon traditional practices of bar examiners that test student performance on high-pressure tests that often have little to do with demonstrated competence about what will be required of beginning lawyers in practice? If regulators in the ABA, members of the bar, legal academics, and bar examiners are not asking these questions, we need to question our own competence to assess core capabilities of recent graduates who are beginning practice. There is growing concern among occupational licensing authorities about the risks of capture by members of the professions that they regulate. Lawyers need to take these questions to heart, for they are not immune from associated challenges.¹⁹⁵

This Part has considered the question of how competence relates to assessment. The new ABA accreditation Standards require law schools to identify learning outcomes related to competence and adopt much more sophisticated approaches to assessment (including both formative and summative assessment in classes and assessments that look more broadly at institutional goals).¹⁹⁶ It explored assessment strategies employed outside the legal context and then turned to ways in which competence is assessed within the legal sector abroad and in a growing number of American employment settings. It concluded by discussing areas in which competence has yet to make real inroads, both in law school grading and in traditional bar examinations. If competence is to be taken seriously as a goal within the profession, it will be essential for both legal educators and licensing entities to reconsider embedded practices and adopt new strategies that fit more meaningfully with assessing

clinical experience while receiving ongoing feedback); Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1702-03 (2002) (suggesting performance based approaches to New York bar examination).

¹⁹⁴ See Susan M. Brookhart, *Portfolio Assessment*, in 1 21ST CENTURY EDUCATION: A REFERENCE HANDBOOK 443-50 (Thomas L. Good ed., 2008) (reviewing the use of portfolios in assessing students in both K-12 and teacher education settings). The Daniel Webster Scholar Honors Program, now used in New Hampshire, could provide a starting point for creating such a system. *Supra* note 123 and accompanying text.

¹⁹⁵ See Robert A. Burgoyne & Mark Emery, *State-Action Antitrust Immunity in the Wake of North Carolina State Board of Dental Examiners v. Federal Trade Commission: What Does It Mean for State Bars and Bar Examiners?*, 84 THE BAR EXAM'R 25 (June 2015) (stating that bar associations are examining their practices to reclaim state action immunity protection).

¹⁹⁶ See Wegner, *supra* note 5, at 14-15 (discussing ABA required mission statements).

competence so as to align with best practices established elsewhere and with new regulatory demands.

V. CONCLUSION

This Essay has focused on competence as an educational and professional goal newly highlighted in recently revised ABA accreditation Standards. It offered meditations on three issues embedded in these new demands. After reviewing the long-awaited changes in ABA accreditation Standards, it reflected on the relationship of competence to skills and ethics. An initial reading of the new standards might suggest that “competence” refers primarily to skills-oriented instruction, in light of years of pressure to expand law schools’ clinical and technical skills offerings. Significantly, however, the Standards’ references to competence resonate with the competence requirements of Rule 1.1 of the Model Rules of Professional Responsibility and with precursor statements of lawyers’ ethical duties and considerations. It argued that skills offerings alone do not meet the intent of the new ABA requirements and that greater attention needs to be given to values and professional norms not merely skills.

Building on this initial meditation, Part III then reflected on how competence needs to be understood in context. It highlighted helpful research on “meta-competences” that transcend a single context such as legal practice, then briefly discussed the theory of “situated learning.” The Essay then turned to the growing body of research on specific competencies needed in the legal profession. It demonstrated that there is considerable coherence in empirical studies that address specific lawyer competencies using a range of methods. Not all of the identified competencies apply in all areas of legal practice, however. The Essay then urged that greater attention should be given to efforts to identify key competencies associated with different fields of law practice. It concluded by discussing the growth in, and importance of, specialized certification options available to more experienced lawyers. Such programs focus on lawyer quality and proficiency rather than base-line general competence. Accordingly, the ABA Standards should be understood to force law schools to attend more seriously to students’ base-level competence and a mix of more nuanced specialized competencies, rather than embracing the “practice-ready” marketing standard that has been bruited about in recent days.

Finally, Part IV meditated on the connection between competence and assessment. It first offered background on how competence is assessed in other professional fields and in other countries. It noted, in particular, the important contributions made by research associated with the recent The

LETR study in the United Kingdom that encompassed the diverse regulatory systems in place in England and Wales, and the role of competence-based assessments therein. Part IV then concluded by exploring grading systems and bar examination practices in the United States and argued that both need considerable reform if they are to become more closely aligned with the competence-based approaches demanded by the ABA.

Ultimately, this Essay has endeavored to illuminate the important ambiguities and nuances associated with the notion of “competence.” The three meditations just summarized show that this baseline notion is more complex than initially meets the eye. The Essay sought to introduce legal educators to rich understandings of competence and competencies found in other fields, nations, and contexts. Greater attention is being paid to competence in part as a means of guiding the development of learning outcomes, as a tool for increasing educational accountability, and as a standard for professional licensure. The Essay has also offered a number of concrete recommendations that legal educators and others should carefully consider: (1) give attention to the significant ethical dimensions of competence, do not just add new offerings that focus on technical skills; (2) recognize the importance of context in helping students develop competence, and engage in deeper research about the particular mix of competencies needed in distinctive professional arenas (perhaps by better understanding and learning about expectations associated with certification programs geared to particular legal specialties); and (3) grapple with the complex questions of how competence and competencies can best be assessed, and in doing so, appreciate the imperative that law school grading and bar examinations should be reformed.