

**The Committee on Legal Education and Admission to the Bar  
of the Association of the Bar of the City of New York  
AND  
The Committee on Legal Education and Admission to the Bar  
of the New York State Bar Association<sup>1</sup>**

**Joint Committee Report  
June 14, 2002**

**Editor's Note:** *The following report reflects the long-standing interest of the Association of the Bar of the City of New York in the improvement of the bar examination. This proposal for a pilot is one idea, among many, as to possible alternative processes for determining who is fit to practice law. More than ten years ago, a comprehensive examination of the bar admission process was published in this Record. That Report made several recommendations as to how to make it better. Those included the substitution of some of the then current exam with a "performance test". That suggested reform was later instituted by the Board of Law Examiners and the performance test now constitutes ten percent of the bar examination. The proposal outlined below is to conduct a pilot of an alternative way to screen applicants for admission to the bar. Performing public service of the sort proposed in the pilot is, as noted, only one such alternative vehicle for evaluating one's qualifications to practice law. Others might be explored in future Committee reports. The pilot proposed here is not seen as a substitute for or as a replacement of the current exam, but, rather, simply as another way in which an applicant's competence might be assessed. One objective of this Report is to encourage continuing full and vigorous debate of the adequacy of the current bar exam, as well as the efficacy of the pilot and other alternatives for evaluating our bar applicants.*

**Public Service Alternative Bar Examination**

**Introduction**

The Committees on Legal Education and Admission to the Bar of the Association of the Bar of the City of New York ("ABCNY Committee") and the New York State Bar Association ("NYSBA Committee") propose a pilot program which would admit to the New York State Bar

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<sup>1</sup> The State Bar Committee on Legal Education and Admission to the Bar is responsible for the contents of this Report and the recommendations contained herein. Unless and until adopted by the Executive Committee or the House of Delegates of the New York State Bar Association, no part of this Report should be attributed to the New York State Bar Association.

graduates of New York law schools who successfully complete a program of public service in the New York courts.<sup>2</sup> For the purposes of this proposal, we call this program the Public Service Alternative Bar Examination (PSABE). Successful completion means achieving a satisfactory evaluation on the various skills components that are assessed in PSABE. This proposal is a product of consultations with leaders of the judiciary, legal academia and the practicing bar.

We begin the discussion of the PSABE by setting forth the genesis of the proposal **(I)** and, briefly, our rationale for suggesting this experimental effort. We then present a summary of the pilot **(II)**, and go on to set forth the prerequisites for law graduate participation in the PSABE **(III)**. We then describe the orientation that applicants will receive **(IV)**, the four different placement experiences **(V)**, the administrative oversight necessary for the PSABE **(VI)**, and the training for PSABE supervisors **(VII)**. Finally, we conclude with a discussion of the method for evaluating, first, the applicants for PSABE **(VIII)** and then the PSABE itself **(IX)**.

## **I. Genesis of the PSABE Proposal**

At the outset, we wish to state explicitly our views concerning the current bar examination as a licensing tool. The ABCNY Committee concluded almost a decade ago that other than testing legal reasoning and analysis and memorization,<sup>3</sup> the bar exam “ignores a wide range of other essential skills. Of the skills it does select for testing, it tests them in a way that is

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<sup>2</sup> We have been encouraged in this undertaking by Dean Kristin Booth Glen of the City University of New York School of Law who has recently proposed such an alternative. Dean Glen is also a member of the NYSBA Committee that jointly presents this Report.

<sup>3</sup> Now that libraries of legal information are available at every lawyer’s desk, the ability to memorize large amounts of material is no longer – if it ever was – a testing objective worthy of the extraordinary resources devoted to the bar exam.

far removed from how those skills might be applied in practice.”<sup>4</sup> Since 1992, there has been little change.

Thus, we do not believe that obtaining a passing grade on the current bar examination by itself indicates minimal competence to practice law. While legal reasoning and analysis are critical to competent lawyering, and, therefore, a necessary component of minimal competence, they alone are not sufficient for a new lawyer to practice law. We must all acknowledge, therefore, that the current bar exam tests only a few of the core competencies required to practice law and that it does so largely out of context. While we support the recent adoption of the Multistate Performance Test (MPT) in New York, it comprises only a very small part of the exam and only minimally remedies the severe shortcomings in the current exam.

The testing environment for the current bar exam makes it impossible to successfully test all of the skills required by a lawyer faced with a real client with real problems.<sup>5</sup> Our current exam, therefore, provides to the bar and the public a false sense that new lawyers enter the profession with a firm grasp of all areas of New York substantive law and with the skills necessary to successful application of that law.

We believe that at least some of the resources that law graduates expend on studying for the bar after graduation, both in terms of time and money, could be more productively redirected to providing public service at a time when the courts of this state are struggling with increasing caseloads and large numbers of unrepresented litigants.

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<sup>4</sup> Committee on Legal Education and Admission to the Bar, Report on Admission to the Bar in New York in the Twenty First Century – A Blueprint for Reform, 47 The Record of the Bar Association of the City of New York 464, 480 (1992).

<sup>5</sup> See American Bar Association Section of Legal Education and Admissions to the Bar, Legal Education and Professional Development (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) (July 1992), hereinafter “The MacCrate Report.” See, also, ALI-ABA Committee on Continuing Professional Education, A Model Peer Review System: Discussion Draft 11 (1980) (setting out six elements to measure legal competence, and identifying other components to good lawyering, such as counseling, interviewing and negotiating).

In addition, as the 1992 Committee found, and as more recent documentation, including the LSAC National Longitudinal Bar Study, has reiterated, the existing bar examination has a substantial disparate effect on minority law graduates, thus undermining the profession's efforts to increase diversity in the bar. It is the hope of both Committees that the proposed pilot will more fairly judge competence of both majority and minority applicants..

There are several ways in which applicants have been admitted to practice law in New York. Currently, the majority of applicants complete three years of law school and then pass the bar exam. There are, however, other methods of admission to the bar. Experienced lawyers admitted to practice in states that allow attorneys admitted in New York to practice without examination may be admitted without passing the New York bar exam.<sup>6</sup> One may still complete an apprenticeship after only one year of law school and then take the bar exam.<sup>7</sup> In the relatively recent past, lawyers whose law school education was interrupted or who were prevented from sitting for the bar examination by active duty in the armed services were admitted without taking the bar exam.<sup>8</sup> The PSABE is proposed as still another alternative method of admission to the bar<sup>9</sup>

This proposal is a pilot, experimental program offered initially for a limited number of applicants as an additional method of admission to the practice of law in New York. We believe that the PSABE will enable law graduates to provide meaningful service to both the courts and

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<sup>6</sup> See 22 NYCRR § 520.10. The Appellate Divisions maintain a list of reciprocal jurisdictions. They are: Alaska, District of Columbia, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Virginia, Washington, Wisconsin, and Wyoming.

<sup>7</sup> 22 N.Y.C.R.R. § 520.4

<sup>8</sup> See Rule 3-A of the Court of Appeals for the Admission of Attorneys and Counselors at Law (7/19/45) (World War II and Korean conflict); see also 22 NYCRR § 526.1 (6/17/69) (Vietnam).

<sup>9</sup> One state, Wisconsin, continues to dispense with any bar exam for any graduates of a Wisconsin law school. There is no evidence of any injury to the citizens of Wisconsin from the use of this "diploma privilege."

litigants. We envision evaluating PSABE participants using a variety of assessment methods, on a broad range of the MacCrate lawyering competencies. Our proposal also contemplates providing the applicants with the necessary supervision to enable them to offer useful service. The pilot is intended to demonstrate the validity of the PSABE as an appropriate measure of an applicant's "minimum competence to practice law unsupervised."<sup>10</sup>

We recognize that there is a desire on the part of the profession for some kind of credentialing experience as a condition for admission to the practice of law. For that reason, this proposal seeks to provide applicants with ample opportunity to perform a wide array of lawyering skills on which they can be evaluated for competence. We hope, therefore, that the PSABE will be accepted as one such credentialing experience. We suggest that funding to develop and implement the proposal be sought from a variety of private sources with the assistance of OCA.

Finally, we note, as has the MacCrate Report,<sup>11</sup> that ensuring that all practicing attorneys are minimally competent is a continuing process that begins before law school, continues during law school and goes on throughout the rest of every lawyer's career. Both the organized bar and the law schools must recognize and meet this joint responsibility, no matter what kind of testing is used at the threshold of practice.

## **II. Summary Description of the Pilot Public Service Alternative Bar Examination**

A limited number of graduates of law schools located in New York State will be permitted to participate in the Public Service Alternative Bar Examination (fewer than 200 over the two-year pilot). During the first year of the pilot, 50 applicants will participate in the PSABE

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<sup>10</sup> This is the formulation first utilized by John Holt-Harris, former Chair of the New York Bar Examiners, John A. Holt-Harris, Jr., *Examining Ourselves: Observations of a Bar Examiner*, 65 B. Examiner 4,6 (1996).

<sup>11</sup> See The MacCrate Report, *supra*, note 5.

in New York City. During the second year of the pilot, the program will be repeated for an additional 100 applicants in New York City, and for 50 applicants in an upstate county. Each applicant who elects and is randomly selected by lottery to participate in the PSABE will be required to participate in an orientation and then work full-time for a three-month period in one or more placements located within the New York State Unified Court System under the direct supervision of court personnel. Applicants will draft opinions, conference cases, assist unrepresented litigants and serve as mediators. Applicants will be supervised to ensure that they are performing useful service and will be evaluated by their immediate supervisors and by outside evaluators on a broad range of lawyering competencies. Applicants will be evaluated by direct assessment of their on-the-job written work, their on-the-job performance of services, simulation exercises and through limited written exams. Following their admission to the Bar, applicants will be required to provide 150 hours of pro bono work in the Courts over the following three years.

Successful implementation of the pilot PSABE requires the cooperation of the fifteen New York law schools, the legal community as a whole, including the practicing bar, the New York State Unified Court System and, of course, the State Board of Law Examiners.

### **III. Law School Prerequisites to Participation and Placement**

Participation in the PSABE is predicated upon the successful completion of several law school prerequisites. Under the pilot program, a prospective applicant will be required to express a commitment to participate in the PSABE program and complete certain prerequisites prior to graduating from law school.

The applicant will be required to successfully complete two prerequisites through law school course work, first a practical requirement: eight credits in experiential courses such as

lawyering skills simulation courses, live-client clinical courses, or externship placements; and second, a doctrinal requirement: a four-credit course in New York State civil practice and procedure. Both of these requirements are described in detail below.

Our review of the current course offerings in the State's law schools leads us to conclude that few adjustments to the curricula of the State's schools will be required to allow applicants to meet the coursework prerequisites specified here. The applicant will, of course, be required to complete all other requisite course work and successfully graduate from law school prior to placement in the PSABE program.

*The Practical Requirement: A Lawyering Skills Course, a Clinical Course or an Externship Placement*

The practical requirement could be satisfied by participation in one or more experiential course offerings including clinical programs (*e.g.*, a clinic involving work with real clients), skills/simulation courses (*e.g.*, trial advocacy, negotiating, counseling and interviewing, or similar oral skills simulation course), or externship placements (*e.g.*, a judicial internship or externship or similar placement, preferably with a state judge, agency, department or government entity).<sup>12</sup> A classroom component would be required in order for these courses to satisfy this

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<sup>12</sup> Both Committees note that all of the State's law schools already offer courses that appear to satisfy this prerequisite. For example, our review of course catalogues and other materials indicates that most State law schools currently offer some form of clinical education program, internship and externship placements and skills courses that could readily fulfill the first prerequisite. *See generally* Albany Law School 2000-2001 Course Catalogue (listing various fellowships, public policy internships, clinics and field placements, including those with various State agencies or offices within the Executive branch of State government); Brooklyn Law School Course Catalogue (listing several seminar courses, including one specializing in the art of negotiation, litigation settlements and matrimonial agreements); Benjamin N. Cardozo School of Law of Yeshiva University, 2000-2002 Course Catalogue (listing, among other upper level courses, various seminars and skills courses such as those with a focus on interviewing and counseling and negotiation and conflict resolution, as well as a specific Family Court clinic); Columbia Law School 2001 Course Listings (reflecting a number of workshops, clinics and seminar courses, including those in mediation, negotiation and human rights issues); Cornell Law School, 2000-2001 Course Catalogue (detailing various clinical courses, externships and seminars, including a Law Guardian externship, a Neighborhood Legal Services externship and various public interest clinics available as upperclass courses); Fordham University School of Law 2000-2001 Academic Year Catalogue (listing a variety of clinical education courses, including dispute resolution, negotiation, family advocacy clinics and clinical externship seminars); Hofstra

prerequisite.<sup>13</sup> Meeting the practical requirement should also enhance the applicants' interactive and communication skills and provide the applicants with constructive feedback on their research, analysis, writing and interactive skills.

In allowing a wide array of courses to satisfy this requirement, it is the hope of the Committees that all students desiring to participate in the PSABE will be encouraged and able to do so, including evening and part-time students who might otherwise be discouraged from participation in live-client clinics or externships due to their employment obligations or other outside scheduling demands.

*The Doctrinal Requirement: New York Civil Practice and Procedure*

Equally important to an applicant's preparation for a placement within the New York State Unified Court System is the requirement that each applicant successfully complete a course on civil practice in New York State.<sup>14</sup> The Committees recognize that not every law school in the State presently offers such a course. However, for the vast majority of New York law

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University School of Law 2001 Course Listings (offering numerous clinical courses as well as three "live client" clinics, each with a seminar component to develop skills such as interviewing, counseling and negotiation); New York Law School 2001-2002 Course Catalogue (offering various clinics, seminar courses and skills courses, as well as internship and externship placements within the New York State court system, at law firms, government agencies and public interest organizations); New York University School of Law 2000-2001 Course Descriptions (offering many clinical courses with a seminar component, as well as a variety of litigation clinics and externship placements with a seminar component); Pace University School of Law Course Description Guide (listing numerous seminar, skills and clinical courses, as well as "Guided Externship" opportunities which involve a field placement); St. John's University School of Law 2000-2001 Course Catalogue (listing elective course offerings such as clinical externship placements and court and case management programs); Syracuse University College of Law 2000-2001 Catalogue (listing various clinics, clinical program courses, seminars and skills courses, including those related to negotiating, conflict resolution, mediation and trial practice); and Touro College Jacob D. Fuchsborg Law Center Curriculum Guide (listing a variety of clinics, including those with a focus on family law and legal institutions, seminars and skills courses).

<sup>13</sup> This requirement is consistent with the American Bar Association accreditation standards for awarding academic credit for courses involving field placements.

<sup>14</sup> As a general rule, students who elect not to take such a course during their time of study receive instruction in New York civil practice and procedure by taking a bar preparatory class prior to sitting for the New York State Bar Examination. For obvious reasons, such an option is not available to those applicants electing to participate in the PSABE.



schools, this doctrinal course requirement does not appear to pose an obstacle for students electing to participate in the PSABE.<sup>15</sup>

We believe that exposure to and instruction in New York practice and procedure is essential to prepare applicants for their PSABE placements. Underlying this requirement is the Committee's belief that an applicant would benefit greatly by gaining an understanding of the technical provisions of New York's Civil Practice Law and Rules (the "CPLR"), specifically those related to pleadings, discovery, general motion practice, jurisdictional rules and special proceedings. Such instruction would, by necessity, touch upon a range of proceedings, as well as highlight diverse issues that could arise in the context of lower court actions. To underscore the diverse nature of the State court system, as it is presently structured, this course should afford the applicant a broad understanding of the subject matter that may arise in specialized court proceedings, such as those taking place in Family Court, Surrogate's Court, Civil Court, Housing Court, Small Claims Court and the Court of Claims, all of which are thought to be appropriate future placement locations for applicants in the PSABE program.

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<sup>15</sup> See, e.g., Brooklyn Law School Course Catalogue (offering a course in New York Civil Practice which includes the study of the structure and jurisdiction of the New York courts, the commencement of actions, disclosure devices, trial practice and special proceedings); Benjamin N. Cardozo School of Law, Yeshiva University, 2000-2002 Course Catalogue (offering New York Practice, which is described as an introduction to the procedural laws and rules of practice in the state courts of New York); New York University School of Law (offering, among its elective classes and seminars, a course in New York Practice); Fordham University School of Law 2000-2001 Academic Year Catalogue (listing New York Practice as one of many civil practice and litigation electives); Hofstra University School of Law 2001 Course Listings (offering a course in selected problems in New York practice, which provides an overview of the State court system and focuses on civil litigation in New York State courts); New York Law School 2001-2002 Course Catalogue (offering a course in New York Practice which emphasizes, among other things, subject matter jurisdiction, jurisdiction over parties, pleadings and motion practice); New York University School of Law 2000-2001 Course descriptions (offering New York Practice, which consists of comprehensive study of procedure and practice under the CPLR); Pace University School of Law Course Description Guide (offering New York Practice, an elective which consists of a comprehensive study of procedure and practice under the CPLR); St. John's University Law School (offering New York Practice and related civil litigation courses specific to New York); Syracuse University College of Law 2000-2001 Catalogue (offering New York Civil Practice); and Touro College Jacob D. Fuchsberg Law Center Curriculum Guide (offering New York Practice as an upperclass elective).

#### **IV. Orientation**

The orientation will take place during the applicants' first week or two in the PSABE program. It is designed to be an introduction to the PSABE generally, the courts, the unique aspects of the individual placement sites, and the various challenges that will confront the applicants during the PSABE and throughout their legal careers. Special emphasis will be placed on the responsibility the applicants will have to their specific placements and the need to be professional, responsible, prompt and courteous. As a part of the applicants' initial introduction to the PSABE and the court system, a visit to each placement site will be arranged. Visiting each placement site should provide applicants with a better understanding of the court system and the specific placements within that system.

#### **V. The Placement Experience**

The Committees propose that the PSABE placement be a full-time position of three months in duration. In arriving at this determination the Committees weighed numerous considerations, most prominently: (a) the time required to provide for a full and thorough substantive evaluation of the applicants' performance; (b) the time necessary for the applicants to make a meaningful contribution to the Court system; (c) the financial burden to the applicants of an unpaid, full-time placement<sup>16</sup>; (d) the need for the applicants to plan for, and be available for, employment opportunities following the placement; and (e) the need to have the applicants demonstrate a serious level of commitment to the program. The Committees believe that these goals are best met through a three-month placement. The placement positions would be in one

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<sup>16</sup> While "public service" may imply "sacrifice" of monetary rewards, there may be ways to alleviate the financial burdens. For example, the Committees discussed the possibility of obtaining sliding scale funding, stipends, loan forgiveness, and low-interest loans for applicants who would not otherwise be able to elect the PSABE. Furthermore, we recognize that some law school graduates must be engaged in paid employment while they study for the bar exam. This would not be possible for PSABE applicants.

or more of the areas of the court system as discussed below: judges' chambers; the central pool of court attorneys, the office of self-representation; and mediation programs.

Off-site instructors, such as law professors and professional legal trainers, will design and execute the program in conjunction with the placement coordinators. Each placement will tailor its program to its specific needs and the variety of contexts in which the applicants' performance might be observed.

#### **VI. Administrative Coordination of PSABE Program**

The Committees recommend that at least one staff member at the Board of Law Examiners ("the Statewide Administrator") be assigned to oversee the PSABE on a statewide level. This individual will work with the Office of Court Administration to oversee the methods used to train, supervise and evaluate the applicants. The Statewide Administrator will ensure consistency in the skills being taught to the applicants across the different placements, and coordinate the administrative functions of the PSABE.

The Committees propose that the first year of the pilot program be located in the New York City Civil Court because of the diversity of responsibilities and learning opportunities available within that court.<sup>17</sup> A Civil Court Administrator will have overall responsibilities for the PSABE in New York City. A Placement Coordinator will coordinate the program in each county. Within the Civil Court, we foresee at least four roles for applicants to perform. The applicants can draft opinions, conference cases, provide assistance to unrepresented litigants, and serve as mediators. We believe that these four functions are well within the ability of recent law school graduates and will offer the applicants an opportunity to practice a variety of skills, while

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<sup>17</sup> During the second year of the pilot similar placements would be developed in a County Court in upstate New York. When the program expands beyond the pilot, additional placements may become available to the applicants,

simultaneously providing a valuable service to the court system. We anticipate that one Civil Court staff member in each county will serve as overall supervisor of all participants in that courthouse. In addition, the applicants will report to their primary supervisors (the “Placement Supervisor”) in each placement site with respect to their day-to-day assignments.

Applicants will work with court attorneys, assisting in the drafting of judicial opinions. At present, the court attorneys work collectively, and are not assigned to individual judges. In this capacity, applicants will be supervised by senior court attorneys and receive direct feedback from their respective supervisor as well as the judges for whom they are writing. This role will allow applicants to apply and develop their research and writing skills.

In conferencing cases, the applicants will meet with the parties or their counsel and attempt to resolve scheduling or discovery disputes as well as facilitate settlements. This task is presently performed by court attorneys, who will supervise applicants assigned to assist in this process. Applicants performing this function will develop their interviewing and negotiation skills.

The New York State Courts are attempting to respond to the needs of the increasing numbers of unrepresented litigants by setting up offices staffed by attorneys to assist the self-represented. Applicants will be assigned to these offices, supervised by the permanent staff. While the staff of these offices do not give litigants substantive advice, they do provide advice on procedural matters and applicants will gain valuable experience with the procedural aspects of civil practice and the needs of unrepresented litigants. This function should also provide applicants with the opportunity to hone their interviewing, fact gathering and analytical skills.

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in which case, additional supervision and training will need to be coordinated. It may also be desirable to arrange placements in Surrogate’s Court, Family Court and the Court of Claims.

As mediators, applicants will be assigned to cases involving at least one unrepresented litigant. Prior to serving as mediators, applicants will undergo the 35-hour training program that is presently required of all mediators within the Court system. This training requirement may be satisfied by a mediation course or clinic taken during law school or, alternatively, by a one week training at the beginning of the PSABE program. The applicants serving in this role will be supervised by senior court personnel who regularly conduct and oversee mediation. In this role, applicants will develop their interviewing and negotiation as well as their mediation skills.

#### **VI. Training for Supervisors**

The Placement Supervisors will be either a judge, an attorney employee of the Court who has been admitted to practice for a minimum of 5 years, or an Office of Court Administration certified mediation trainer. A Placement Supervisor may supervise no more than 2 applicants during an PSABE session.

Prior to the beginning of each three-month session, all Placement Supervisors and Placement Coordinators will attend a six-hour orientation session. The following topics will be covered during the orientation session:

- Goals of the PSABE;
- Use of the standard evaluation instruments.
- Skills to be tested (referencing those discussed in the MacCrate summary);
- Developing appropriate assignments; and
- Feedback techniques.

The orientation session will be coordinated by the Statewide Administrator. The curriculum will be developed in consultation with clinical law professors or professional legal trainers. Similarly, the formulation of appropriate evaluation criteria for the various MacCrate

skills and formats for on-the-job assessments will be developed cooperatively by the court personnel and those outside consultants. The training will provide for the opportunity for supervisors to work together in small groups to design assignments, practice giving feedback and use the standard evaluation instruments. Live or videotaped demonstrations will be prepared which model appropriate feedback techniques and serve as a baseline for evaluation. Clinical law professors or professional legal trainers will lead these small groups and provide feedback to the supervisors.

Materials relevant to the training topics will be developed by the Statewide Administrator and will be provided to the supervisors before the orientation session.

During each three-month session, monthly meetings will be held for all Placement Supervisors and their respective Placement Coordinators in each county. These meetings will be facilitated by a clinical law professor or professional legal trainer. The monthly meetings will focus on issues arising at the applicants' placements such as developing meaningful and varied assignments, effective feedback and supervision, evaluation, and any unanticipated problems or issues. By the beginning of the third month, those applicants in danger of failing the PSABE will be identified and discussed in the small group monthly meeting.<sup>18</sup>

If a Placement Supervisor participates in a second three-month session, he or she will not be required to attend another orientation. However, monthly meetings will be attended by all those supervising applicants in the current three-month session. Experienced Placement Supervisors and Placement Coordinators will be encouraged to assist with subsequent orientation sessions.

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<sup>18</sup> The feedback from supervisors and discussion at monthly meetings are intended to identify applicants with difficulties in one or more skills with the intention of aiding them in reaching minimum competence by the conclusion of the pilot.

## VII. Process of Evaluating the PSABE Applicants

### Assessment of On-the-Job Performance

The primary person to evaluate the applicant's on-the-job performance will be the applicant's primary Placement Supervisor(s). Those assessment responsibilities are quite similar to the responsibilities of supervising lawyers and clinical law professors who evaluate the work performance of students they supervise. The overriding goal in the design of the assessment method is that it be fair and be applied consistently. As might occur with any supervisory relationship, there always is the possibility of subjective bias. Indeed, it is worth noting that significant problems arose during the pre-bar exam era when the apprenticeship method was the way to become a member of the bar. The absence of uniformity of the experiences for bar candidates, as well as racial, ethnic and family discrimination, were endemic to the loosely supervised and administered apprenticeship system and led to the adoption of the bar examination as a "reform" measure. The PSABE will meet this challenge through the design of a system of evaluation that not only minimizes bias and is fair, but one that is subject to the kinds of checks and balances provided by the use of multiple evaluative devices.

The PSABE supervisors will be trained to use a common set of evaluation criteria and a common quantitative scoring system. There is a substantial consensus among clinical law professors in support of the use of such uniform criteria.<sup>19</sup> For example, indicia for assessing a competent initial interview, a good counseling session, a competently prepared and executed negotiation, or a minimally sufficient jury summation are commonly used.

A second way that the PSABE performance evaluations will counter possible bias (positive or negative) with respect to a particular applicant will be an off-site evaluator who will

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<sup>19</sup> See The MacCrate Report, *supra* note 5.

also assess the work of the applicant. For example, in the *pro se* clerk context, an outside evaluator may be recruited to observe and evaluate an initial intake interview. Similarly, with respect to a legal memorandum written for a judge, an outside assessor will evaluate the work product. Such outside evaluation responsibilities will be assumed by clinical law professors or experienced supervisors, using uniform evaluation criteria. These outside evaluations, with their obvious additional cost, are intended to assist in “evaluating the evaluation process” and, if necessary, to fine-tune it for use in any expanded project.

Finally, a third complement to the direct, personal performance evaluations will be to require PSABE applicants to take two written exams summarized below. The objective here is to utilize multiple evaluation methods for the purpose of ensuring fairness.

*Supplementary Evaluation of Candidates*

We believe PSABE applicants should be required to take two separately prepared and administered written tests. The Multistate Professional Responsibility Examination (MPRE) is a separate written exam that all bar applicants must pass. A second written exam would be designed to assess the applicants’ ability to apply the law in the context of a specific lawyering problem. It would utilize basic substantive and procedural law and would not require memorization. A closed case file including facts and applicable law would be provided. While in some ways, this exam would be similar to the Multistate Performance Test or the PT used in California, the Committees believe that we should not be constrained to follow the specific formats of either of those models. For example, our written exam may have double or even triple the time allotted to complete the tasks assigned. The tasks the applicants might be asked to complete could include: a client opinion letter; an outline of direct examination; a jury summation; or a brief in support of a motion for summary judgment.



In addition to the MPRE and a single written performance test given to all applicants, the applicants will be evaluated when performing one or more lawyering skills in a simulated context. Depending on the availability of actual lawyering opportunities for the applicants in each of their placements, the PSABE placement supervisors might supplement their on-the-job evaluations with one or more simulated exercises. Applying models used in clinical legal education, an applicant might be asked to perform a simulated interview, a counseling session, a negotiating session, a mediation or simulated elements of a trial, such as the presentation of opening and closing statements, direct or cross examinations and the introduction of evidence into the record. One or more of these sessions might be taped and then evaluated by experts in the field.

*Follow-Up If Passing Evaluation Not Received*

As with the existing bar exam, the PSABE will use a quantitative measure as a passing score; it will reflect the cumulative results of all of the PSBE assessment tools. It will be analogous to the passing score now used for the existing bar exam. The goal will be to quantify minimum competence in the skills being evaluated. In many ways, it will parallel the means by which similar passing scores are developed for law school clinical skills courses. The components of the passing score will be derived from each of the assessment devices used, *e.g.*, (i) on-the-job assessments, including all oral and written tasks; (ii) any simulated skills evaluations; and (iii) the MPRE and the written performance test. Each component will include evaluations of the applicable MacCrate skills and be given a total value, and the passing score will be a cumulative score derived from adding the scores of all of the components. The various on-the-job assessments might involve multiple observations over the period of the placement. Subject to the limitation of a three month period, this would enable an applicant to repeat a task

for which a failing score was received. The weights to be given to the various components would be developed by the PSABE designers. Because of the limited number of openings during the pilot, an applicant who did not ultimately receive a passing PSABE score would only be given the opportunity to take the regular bar exam.

The PSABE would implement an appeal process similar to that already in place with respect to appeal avenues for persons failing the current bar exam. First, the current practice with respect to the passing score is for a second evaluator to read the essays whenever the bar candidate receives a score that is within 10 points of the passing score. Whatever the new score is becomes the final score. The short answer parts of the test are checked mechanically simply to ensure there was an accurate count.

Using the appeal procedures of the bar exam as a basis, the Committees have concluded that at least some of the evaluation methods for scoring the PSABE should also be subjected to re-evaluations by a second person. Thus, the written performance tests and videotaped skills performances with scores in the marginal range will be reassessed by other evaluators.

#### **IX. Evaluation of Pilot PSABE**

A necessary component of the pilot PSABE is a plan for assessing the success of the pilot and the desirability of continuing and/or expanding the program. We envision the completion of a careful analysis and evaluation of every aspect of the pilot to determine what worked and what did not work. We propose that the pilot be evaluated by an independent organization that could, using a variety of assessment methods, determine how well the PSABE accomplished its goals and make suggestions for modifications.

Such an organization would assess the success of the PSABE in completing the evaluations of the applicants as well as the extent to which the applicants provided meaningful

service to the Unified Court System. The latter would require surveys of participating judges and court personnel involved in the PSABE. The usefulness of the training of supervisors would be ascertained by reviewing the training materials and assessing their relevance to the work performed by applicants at their placement sites. The various methods used to evaluate applicants would be validated by reviewing a sample of each type of assessment to discover whether assessment criteria were being applied uniformly and fairly. A sample of applicants would be interviewed to measure the extent to which they felt they received fair evaluations and opportunities to apply lawyering skills. Applicants would also be surveyed to provide feedback on the usefulness of supervision and feedback that they received.

Any evaluation of the PSABE would need to determine the extent to which it is accepted as a credentialing experience by the practicing bar and viewed as an attractive alternative to sitting for the bar exam by those seeking admission to the bar.

We also suggest that those admitted to the bar after participating in the PSABE be followed for a period of ten years to determine the impact the PSABE had on their performance as lawyers and their career opportunities as compared to those admitted by taking the bar exam.

Finally, there will have to be follow-up evaluation on the pro bono requirement.

## **Conclusion**

We believe that the pilot PSABE we propose provides a practical alternative method of admission to the New York bar which will fairly assess applicants' abilities to practice law. At the same time the PSABE will provide meaningful service to the New York Courts, including both the service performed during the evaluation placement, and the 150 hours of pro bono service each successful applicant will have committed to serve in the court system over the three years following admission.

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\*Principal authors of the report.