“Standardized Clients” - - A Possible Improvement for the Bar Exam

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At the invitation of the Symposium organizers, I was urged to present a paper that calls on me to wear two hats, one as the former Chair of the Committee on Legal Education and Admission to the Bar of the Association of the Bar of the City of New York, and one as a clinical law professor concerned with improving the methods by which we teach law students and assess their level of competence. While there clearly has been considerable overlap between my meeting these two sets of responsibilities, my work on each has proceeded independently for the most part, until now.

In my capacity as Chair, I recently oversaw our Committee’s publication of a proposal, a Public Service Alternative Bar Exam. In lieu of the existing bar exam, this controversial Proposal sets forth multiple methods of assessing applicants for admission to the

1 A Public Service Alternative Bar Exam, Association of the Bar of the City of New York, June 14, 2002 (www.abcny.org, Committee Reports). This Report was a joint proposal of the Committees on Legal Education and admission to the Bar of the ABCNY and the New York State Bar Association (hereafter referred to as “Joint Proposal” or “Proposal”).

2 The current two-day New York bar consists of five essay questions (40%); fifty multiple choice questions on New York law (10%); 200 multi-state multiple choice questions (40%); and one ninety-minute written performance test (10%).


Professor of Law, New York Law School. I want to thank Rick Marsico and Susan Rosenthal for their helpful comments and suggestions; Dean Richard Matasar and New York Law School for their continuing support of my work with standardized clients; and Debra Ficarra for her excellent research assistance.
bar. The core of the Proposal involves the applicants’ provision of public services in the New York State court system. Those services would be evaluated for bar admission purposes, both by on-site supervisors and outside academic-type graders. Among other additional methods of assessment in the Proposal is the use of simulated lawyering encounters (e.g. mock interviews of clients or witnesses or counseling sessions with clients) which also would be evaluated by outside clinical academics.

Wearing my law teacher hat, I have been developing the concept of “standardized clients” as a more elaborate and more specific technique for assessing law student performance through simulation. This method of evaluating lawyering performance is based on a medical education model (“standardized patients”) that uses lay persons both to roleplay patients and then provide written evaluations of the students performing the interaction with that patient. The written feedback is on structured forms drafted by medical professors. Adapted for law schools, the actors portray clients and witnesses and the law professors prepare the evaluation checklists.

My primary goal for developing this model for law student use has been curricular improvement and not licensure revisions. Nevertheless, there is a logical and practical nexus between education and licensing, at least there should be. And, in that regard, the medical profession recently incorporated standardized patient evaluations into the licensing exam for becoming a physician. It is this analogous link of our medical colleagues’ use of this simulation technique both in the medical school curriculum and in the medical licensing exam that enables me to connect my work on these two legal profession projects for this Symposium.

My bar association committee work began as a follow-up to an earlier report that

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4See pp. infra for a description of the Joint Proposal.


6One of the standardized client forms used at New York Law School is at: http://www.NYLS.edu/Grosberg>.

7News Release, United States Medical Licensing Examination www.USMLE.org, Posted Feb. 5, 2003; announcing implementation of clinical skills exam in 2004 requiring applicants for a medical license to successfully complete a series of standardized patient exercises. USMLE also announced that a Harris poll found that 97% of Americans consider clinical skills “important or very important”; 87% want to see students pass a clinical skills exam before licensure; and 67% believe that such an exam should be added even if it costs applicants $1,000. Id.

8It is worth noting that the USMLE announcement of the imminent inclusion of SP exercises included an explicit acknowledgment that medical schools “vary in the ways they teach clinical skills.” Indeed, they go on, “some U.S. students graduate without ever having been observed in a clinical setting.” The use of the standardized patients “will establish a national standard that all students will need to meet before they practice medicine.” Id.
exhaustively and critically looked at the bar admission process in New York. The goal of the current Committee’s work is to progress beyond a critique of what exists and generalized recommendations for improvement, and move on to propose a specific alternative screening process that actually could be implemented even if only on a limited experimental basis. The result is a plan to implement a small pilot project that would establish a fair and valid licensing procedure to assess a bar applicant’s qualifications and better reflect the array of skills and knowledge needed to be a competent lawyer. Whether it ultimately would supplement or replace the existing bar exam was among the many questions purposefully left unanswered in the Joint Proposal for a Public Service Alternative Bar Exam (PSABE). The PSABE calls for very careful scrutinizing of the results of the pilot. From that post-pilot analysis, decisions could then be made as to what the next steps should be.

I must add at the outset that while the comparison with the medical profession may be logical, the law profession side of the equation is not supported by any empirical evidence. At least not yet. As I describe below, our medical colleagues have been working with standardized patients for more than three decades and have accumulated an extraordinary amount of data that validates their use of this method of evaluating medical students in school and in connection with their license application. Before we can realistically talk about using this technique as a component of law school grades, let alone as part of a high stakes test such as the bar exam, much work remains to be done. Thus, it is possible that at some future date, the use of this technique might enhance the efficacy of a public service alternative bar exam. None of this appropriate skepticism, however, should preclude serious consideration of the Committees’ Joint Proposal for a Public Service Alternative Bar Exam, irrespective of the possible future use of standardized clients. Nor should such caution deter us from considering the standardized client as a future component of that public service bar exam or any other innovative bar admission proposal. Some may feel it is too much of a stretch to facilitate discussion about changing bar exams simply on the basis of the experience of our medical colleagues. I remain encouraged, however by President Sexton’s call for us to “think out of the box” regarding the training of lawyers.

This essay will first describe in Part I, the Joint Proposal for a Public Service Alternative Bar Exam, its genesis, its political development and its key unanswered questions. In Part II, I go on to discuss in some detail my recent work in further developing the “standardized client” in a law school curricular context. Finally in Part III, I first discuss the similarities between some of the tasks of doctors and lawyers. Then, building on the experience of our medical colleagues, I on to set forth proposed empirical analyses for the use of standardized clients. It is that research

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10See Grosberg, *supra*, note 5 at 213-217 for a discussion of the extensive medical education research on standardized patients.

which might support the somewhat provocative suggestion that the legal profession might do
well once again to follow the lead of the medical profession in better serving the public’s
continuing need for competent and caring professionals. Or, putting it differently, is it alright to
think ahead to a time when the standardized client will be an integral part of the bar exam?

I. The Public Service Alternative Bar Exam (PSABE).

A. The Genesis of the PSABE Proposal. This Proposal\(^\text{12}\) is the product of an intensive
joint effort of two independent bar association committees of two similarly independent and
highly respected bar associations. Right from the start, these collaborative energies were quite
purposeful. The Chair of the NYSBA Committee, Anthony Davis, and I had worked together on
a comprehensive critique of the New York bar admission process a decade earlier. A third
central figure was Dean Kristin Booth Glen, whose views on the deleterious effects of the bar
exam and the need for drastic changes were reasonably well known in New York, and which
have since been eloquently presented in print for a wider audience.\(^\text{13}\) Recognizing that our
collective conclusion was then and remains, that a radical departure regarding bar admission was
appropriate and required, we concluded that a potential combined effort of these two committees
(and indirectly the two bar associations) would be the most effective way to engender serious
consideration by those in a position to actually make changes. While there has been very little
official response to the Joint Report,\(^\text{14}\) there has been a considerable amount of public reaction
and continued interest in the ideas reflected in the PSABE Joint Proposal.\(^\text{15}\) Indeed, this

\(^{12}\)See text at note 20, infra.


\(^{14}\)The Joint Proposal was officially submitted to the New York State Board of Law Examiners as well as to the Judge Jonathan Lippman, the New York State Chief Administrative Judge and Chief Judge Judith Kaye, of the New York Court of Appeals, New York’s highest
court. While members of the Board of Law Examiners met informally with members of the two
Committees to discuss the Proposal (and essentially dismiss it as practically impossible), there
has not been any other response. Coincidentally, within two or three months of the issuance of
the Joint Proposal, the Board of Law Examiners issued an extensive report recommending that
the passing score for the bar exam be increased by 15 points (which would result in an additional
600-1,000 applicants who would fail the exam). That Board of Law Examiners’ Report
substantially diverted the attention of the public, the Board of Law Examiners and the two
Committees from a fuller consideration of the PSABE to this new Board of Law Examiners’
Report. The opposition to the Board’s recommendation was widespread. See e.g. *In Opposition
to the Board of Law Examiners’ Proposal to Increase the Passing Score on the New York Bar
Examination*, *The Committee on Legal Education and Admission to the Bar*, 58 *Record* 98, 107 (2003).

Symposium is just such an expression of that interest. However laudatory or appropriate that collaborative political goal was, it was difficult to implement. The two relatively large committees\(^{16}\) were comprised of strong, experienced and independent-minded members representing a diverse group of practitioners, judges and academics, as well as several very recent law graduates. While there was an early consensus in favor of trying to formulate a new and distinct approach to bar admission requirements, there was clearly no consensus as to what that might be. There was recognition that the profession and the public wanted (or needed) some kind of screening or credentialing process.\(^{17}\) There also was widespread support for the notion that anything that might be proposed would have to be doable - that it would have to pass the “laugh test” in order to be taken seriously. This latter point, for example, was the basis of making the proposal a very small “pilot” so that it might be effectuated without necessitating any immediate revolutionary change in the legal profession.\(^{18}\) We circulated an earlier draft of Dean Glen’s public service proposal\(^{19}\) and that became the vehicle for much of our discussion, and ultimately, the basis upon which to shape the numerous compromises that are reflected in the final Joint Report.

**B. The Key Provisions of the PSABE.** The underlying premise of the PSABE is that the

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\(^{16}\)The membership of the Association of the Bar Committee ranged over the nearly three years of working on the Proposal from 17 to 23 and the New York State Bar Association Committee, I believe, was roughly between 25 and 35.

\(^{17}\)While there remains one state, Wisconsin, that adheres to a “diploma privilege” (for graduates of any of the three accredited Wisconsin law schools) which dispenses with a bar exam for those local graduates, the members of both Committees concluded that such an alternative was simply not feasible. See Beverly Moran, *The Wisconsin Diploma Privilege*, 2000 *Wisc. L. Rev.* (2002).

\(^{18}\)We found consolation and emotional support in this regard by our knowledge that the State of New York had previously enacted legislation that completely exempted from taking the bar exam, graduates of accredited New York law schools whose potential law careers were interrupted by military service. Such exemptions were adopted for veterans of World War II, the Korean War and the Vietnam War. The fact that there has been this group of lawyers admitted to the bar without taking or passing a bar exam, without any observable adverse impact on the public, suggested that the small number of applicants who would participate in the pilot also could be viewed as not necessarily presenting any serious danger to the public’s confidence in the competence of admitted lawyers. Indeed, as a result of a continuing survey by the New York Law Journal, it is now clear that among those admitted without having taken any kind of a bar exam are judges and distinguished members of the bar.

\(^{19}\)The major part of that earlier version is now embodied in Dean Glen’s Columbia Law Review article; see *supra* note 13.
current bar admission requirements do not adequately address the full array of skills necessary for competent lawyering\(^\text{20}\) and that the almost exclusive reliance on the current bar exam is an expensive and wasteful rite of passage which also presents an insuperable barrier to admission for a significant number of candidates. The bar also fails to acknowledge the different categories of intelligence required to be a competent lawyer that cannot be tested in a written exam.\(^\text{21}\) At the same time there was acceptance of the reality that neither a more appropriate bar exam nor an increase in clinical education would fully prepare a successful applicant to practice law.\(^\text{22}\) The goal was to reform the bar exam to better reflect lawyering competencies which might, in turn, have a positive influence on shaping law school curriculums. Reducing the gap between what is tested and what is required for minimally competent law practice was the more modest aim of the PSABE.\(^\text{23}\)

Using a randomly selected group of 50 applicants (in the first year of the pilot)\(^\text{24}\) for admission to the bar (chosen by application and lottery), the pilot applicants would be required to provide three months of public service in the New York State Courts.\(^\text{25}\) That service could

\(^\text{20}\)Public dissatisfaction with the quality of lawyering is generally assumed. However, the availability of data supporting this assumption is limited. See Linda Smith, *Medical Paradigms for Counseling: Giving Clients Bad News*, 4 *CLINICAL LAW REV.* 391, 398-9 (1998) (summarizing 1996 and 1994 surveys that found more than a quarter of consumers of legal services who were dissatisfied with the services rendered).

\(^\text{21}\)Ian Weinstein, *Testing Multiple Intelligences: Comparing Evaluation by Simulation and Written Exam*, 8 *CLINICAL L. REV.* 247 (2001). (Proceeding on the assumption that lawyers require multiple intelligences (e.g. interpersonal as well as mathematical-logical) Prof Weinstein concluded in his comparative analysis of students’ grades on simulated exercises that the skill of taking a written exam and conducting a graded simulation are independent skills. Students who do well on the latter may do less well on written exams. His study supports the propriety of including tests of interpersonal skills such as interviewing and counseling.)

\(^\text{22}\)See e.g. Richard A. Matasar, *Skills and Values Education: Debate About the Continuum Continues* 46 *NEW YORK LAW SCH. LAW REV.* 395 (2002-3). (Dean Matasar faults the profession for not meeting its share of the responsibility for preparing practitioners and ensuring their continuing skillfulness.)


\(^\text{24}\)In the second year of the Pilot, 150 applicants would participate.

\(^\text{25}\)See Glen *supra note* 13 at 1724-1729, for additional details in the PSABE Joint Proposal. Dean Glen, however, omits reference to the Proposal’s requirement of a written
include drafting opinions for judges, “conferencing” cases (to set discovery schedules or conduct settlement discussions), assisting unrepresented litigants or mediating cases. In addition to evaluating the on-the-job work of the applicants by on-site supervisors as well as by outside evaluators, the applicants also would be required to satisfactorily complete a “performance type” written exam, the multi-state professional responsibility exam and one or more videotaped simulation exercises. To be eligible to participate in the PSABE, an applicant would have to satisfy a relatively easy law school course requirement (a practical skills course and a New York State civil procedure course). After a short orientation period, the participating applicants would begin their placement in the courts. Toward the end of the three-month placement period, the applicants would complete the written performance test and the videotaped simulation exercises. The applicants also would be obligated to perform, pro bono, 150 hours of similar services in the New York Courts during the first eighteen months after admission.

Aside from the costs and administrative aspects of such an alternative bar exam, an overriding concern for the two Committees (just as it is for all boards of law examiners) was how to ensure fairness. Whatever bar admission screening process is used, it must be a valid and reliable method of testing applicants for that knowledge and those skills that are relevant to being a minimally competent lawyer. Validity requires that the method of testing measure what it purports to measure. Direct observation of the performance of the task being assessed easily satisfies that requirement. The evaluation also needs to be reliable, that it be consistent from one

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26Cf. Avrom Sherr, *The Value of Experience in Legal Competence*, 7 *International Journal of the Legal Profession* 95, 100, n.40 (2000). (In Professor Sherr’s study there was similar use of outside evaluators. Expert senior clinical professors were selected to evaluate videotaped interviews of clients to determine the value of years of experience on the quality of the lawyering performance.)

27There was considerable debate as to whether a written performance test (PT) was necessary or desirable, and, if so, what it should look like. Comparisons were made between the ninety-minute multi-state performance test and the three-hour California version. The conclusion was to leave open the details, allowing for even a longer PT if that was thought to be appropriate. Dean Glen opposed any version of the written performance test. Regarding the efficacy of the performance test, see generally Stella L. Smetanlca, *The Multi-State Performance Test: A Measure of Law Schools’ Competence to Prepare Lawyers*, 62 *U. Pitt. L. Rev.* 747 (2001).

28The Joint Proposal outlined a three-tiered administrative structure. It was acknowledged that this would be a new venture and would require some adaptability and trial and error, but that it was a viable program.

30 In light of the multiple reviewers that the PSABE anticipates using, satisfying reliability standards will be a challenge.31

C. The Key Unanswered Questions. There really are two. One is who will finance the pilot (let alone a larger application of the PSABE). For now, that remains unanswered.32 The second is the fairness question. How can the PSABE be administered in a fair and valid manner? For example, one of the methods of assessment in the PSABE calls on outside evaluators to grade an applicant’s performance either in a simulated interviewing or counseling exercise or by observing an actual interview by an applicant (e.g. interviewing a pro se litigant). Putting aside the expense issue, the expectation is that these evaluations would be done by clinical law professors. If numerous professors were used, there might be variations in their grading criteria.33 If actual interviews of real litigants were evaluated, there would likely be substantial variation in the circumstances encountered by the applicant. It could be unfair to evaluate one applicant interviewing a mentally disturbed litigant while a second clinical professor evaluates another applicant who is assisting an intelligent, calm litigant.34 This is what happened on earlier versions of the medical licensing exam. Doctors would evaluate interns seeing real patients, regardless of the nature of the patients’ illness. The variation and inconsistencies and lack of uniformity led to the conclusion that it was not a fair method. That, in turn, has led to the use of standardized patients which is much more reliable and consistent and, therefore, more fair. In law, these aspects of potential unfairness, as noted above, lead us back to the standardized client as a possible antidote. If the validity of the SC were established (as the standardized patient has been in medicine), this method of evaluation could replace the law professor assessments. It would be much less expensive and probably more consistent and, therefore, more reliable and fair. Indeed, this is the fundamental thesis of this essay.

Another aspect of fairness addressed in the bar association Committees, Joint Proposal is

30Id.

31This is where the standardized client theoretically might ameliorate this problem. Because of the absence of research as to the validity of the standardized client, however, the Committees did not consider incorporating this method of evaluating applicants.

32The Committees were hopeful that foundations, and perhaps the State, would finance the pilot. But, there also was strong sentiment for the position that any ultimate proposal reflect what should be done, regardless of the costs. It is instructive, once again to note that the National Medical Licensing Exam will, over considerable opposition of many (most particularly, new medical school graduates) be imposing an additional charge of $1,000 to each applicant to cover the costs of including standardized patient exercises in the licensing exam.

33This could also occur in grading essay question answers. Bar exam graders are trained to standardize their grading, thus minimizing this problem. The same could be done for those grading live performances.

34Even here, however, the grader could be trained to use different criteria for different situations, thereby ameliorating this problem as well.
its use of multiple methods of evaluation. In addition to an assessment of a simulated lawyering activity, the Joint Proposal calls for the successful completion of an extensive written performance test, and the MPRE. It also requires a passing score from a reviewer who observes actual lawyering work (e.g. "conferencing" or mediating cases). By using more than one or two methods, the examination limits the impact of any single method. Each different score can act as a check on over-reliance on any single indicia of competence.

The PSABE Proposal is intended to be a work in progress. The goal was to build on the extensive progress over the past thirty years in developing tools to assess lawyering performance in clinical education. Working with small numbers in a pilot, the objective is to examine closely how well this alternative works. The possible inclusion of standardized clients in such a pilot simply adds to the potential value of careful empirical analysis of the results of a pilot. Simultaneous empirical studies of the use of standardized clients, as described below, could be reinforcing. The additional public service benefit is simply another potential plus from using the PSABE. Both the PSABE and the use of standardized clients reflect efforts to consider, open-mindedly new ways to make the bar admission screening process more reflective of what practicing lawyers actually do.


A. Context for Refining the Standardized Client. From the first day of law school, we communicate to our students in many different ways, what is important and what is not so important in the legal education that is to follow, and in turn, what is important to being a good lawyer. In almost every law school in the country, the first year curriculum is essentially the same. Eight to ten required courses that include a writing and research course, and perhaps a course like the Lawyering course discussed in this paper. The other courses are typically contracts, torts, civil procedure, property, criminal law and perhaps ethics or constitutional law. The vast majority of teachers of those courses use standard casebooks and some variation of the Socratic method. All teach doctrinal/legal reasoning and analysis. While some first-year teachers will use the problem method and even a few will use simulation in one way or another, both are exceptions. None of this is news to anyone who has been in legal academia for any period of time.

What these norms mean for any efforts to teach basic interpersonal lawyering skills in the first year, or later for that matter, is that students understandably view these activities as diversions from their main task of learning doctrine and legal reasoning and analysis. That is what is important to success in the first year and that is what is important to being a good lawyer. This is the message that we communicate to them. This is a distorted view of what competent

35 This is in contrast to Dean Glen’s proposal which does not include any separate written exams. See note 13 supra.

36 The same observation has been made about first-year writing courses. See Kenneth D. Chestek, Reality Programming Meets LRW: The Moot Court Case Approach to Teaching in the First Year, 38 GONZ. L. REV. 57, 58 (2002-3). (Because the legal writing course is taught in such a different way than other first-year classes, some students think of it as an anomaly, unworthy of the same level of attention as the other more “substantive” courses.”)
There have been significant changes in the upper class curriculum over the last thirty years, primarily as a result of the growth of clinical education. But very few of those changes have found their way into the first year.


I have worked closely with four other professors on the development of the standardized client (SC). As I discuss below, the vehicle for developing the SC is our first-year Lawyering course. It is that course in which my four colleagues -- Professors Carol Buckler, Stephen Ellmann, Richard Marsico and Richard Sherwin -- and I have collaborated.

Simulation has been used in legal education for some time and in many different contexts. What has not been used is a structured, written, lay person evaluation of a law student’s performance. Only the law professors grade the students. Unlike all other forms of graduate education, legal educators have generally not employed readers (either lawyers or law students) to grade exams, or even quizzes. Thus, the notion of a non-lawyer participating in the

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41 I use the term “lay person” rather than actor because non-actors may also be trained to assume SC roles. Professionally trained actors are preferable, if available, but not critical.

42 At least I have not discovered any published accounts of the use of such structured evaluative techniques.

43 There are different ways to look at this long-standing grading tradition. One less positive view is that law professors arrogantly conclude that no one else could possibly adequately evaluate a student’s work. But a more favorable explanation is that the professor who teaches the students is in the best position to evaluate their work in light of that teacher’s goals
process that determines the successful completion of law school would be an unusual, if not revolutionary, change in the way we do things. (The typical person who has portrayed the standardized client for us and provided the written evaluation has not been a lawyer.)

Medical educators addressed this issue by conducting repeated comprehensive empirical analyses of the use of the standardized patient over many years to validate this method of evaluation. As a result of these studies, medical educators have been using graded standardized patient exercises as part of the required medical school curriculum, first on a modest low-stakes level, and, more recently, as a requirement for medical school graduation. As noted above, the medical profession, most recently, has verified the appropriateness of this method of gauging the capacity and competence of future physicians on a high stakes level. Beginning in 2004, the standardized patient will be an integral part of the medical licensing exam.

Legal educators, on the other hand, have not yet done such empirical evaluations of the use of the standardized client. Indeed, we have not done any studies. The completion of such studies indeed is a major goal of our continuing work in this area. I should add that it is by no means a foregone conclusion that we will reach the same results as our medical colleagues regarding the validity of this method for evaluating future lawyers. There are numerous questions regarding the efficacy of this means of evaluating law students that remain to be

and criteria. Still a more positive perspective is that the students are paying a lot of money and are entitled to feedback at the same level and quality as the lecturing they receive. This grading tradition does not carry over to the ultimate high stakes test -- the bar exam. Those exam answers are graded by practicing lawyers hired and trained to read and grade bar exam essay answers. See e.g. Greg Sergienko, New Modes of Assessment, 38 SAN DIEGO LAW REV. 463, 475 (2001): “The reliance of many respected colleges on noninstructor-based assessment should cause law schools to reexamine their practices.”

For a succinct summary of the basis on which the U.S. Medical Licensing Board has concluded that using standardized patient exercises as part of the licensing exam is a “valid” and reliable form of testing, see: www.USMLE.org. “Validity of the Clinical Skills Examination (CSE)”, Posted February 19, 2003; and www.USMLE.org/news/cseftresults, “An Analysis of U.S. Student Field Trial and International Medical Graduate Certification Testing Results for the Proposed USMLE Clinical Skills Examination”, Posted February 5, 2003.


B. The Lawyering Course. The central vehicle for our current use of the standardized client at New York Law School is our first-year required course, Lawyering. The goal of this two credit course is to introduce students to fact analysis and interviewing and counseling (basic clinical practice skills), while reinforcing basic legal reasoning and analysis skills. We also seek to use this contextualized approach to legal and factual analysis to model humane and ethical lawyering. Thus, in addition to our use of the standardized client as a new and unusual method of providing individualized feedback to students, the Lawyering course represents an alteration of the nature of the traditional first-year law school curriculum - - a daunting challenge in itself. We have sought to integrate the changes in the Lawyering course with the traditional goal of teaching students how to analyze and reason and articulate a synthesis of the law and facts. Putting it slightly differently, we have concluded that such changes can be accommodated more easily if those traditional first year objectives are not disturbed in any significant way. And, if they can be enhanced, so much the better.

Our development of the Lawyering course began about ten years ago and has proceeded with those guidelines in mind. Let me first describe the genesis of the Lawyering course as well as its current expanded version. I then go on to set forth my much more ambitious (but I believe still realistic goals) - - namely, to incorporate the use of standardized clients in all of the first-year courses. More about this below.

In very loose terms Lawyering represented our effort to build on Professor Anthony Amsterdam’s groundbreaking course at New York University Law School. We also sought to demonstrate the integral connection between fundamental legal reasoning and analysis skills and these applied lawyering skills. A critical difference was that our course would be taught only in large class sessions (100-120 students) whereas the NYU course was and still is taught in sections of 15-20. At the outset our course had no individual feedback and very little opportunity for students to apply the law in a simulated context. The NYU course had significant individualized instruction from full-time Lawyering faculty and many opportunities for students to conduct simulated lawyering exercises. Both the NYU course and ours have undergone numerous changes in the last decade. While the differences in class size remain, we now offer substantial individualized feedback through the use of standardized clients.

We first adapted an Amsterdam breach of contract case file to fit the needs of our large lecture course. Students worked on the case from the initial client interview through the filing of

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47 In the earlier article, I describe the genesis of the medical educators’ use of the standardized patient as well as the origins of our Lawyering course. See Grosberg, supra, note 5 at 213-227.

48 See law.NYU.edu/lawyeringprogram.

49 While I have sometimes described the NYU course as Amsterdam’s, many other were involved with the design and teaching of the course. Most recently, Professor Peggy Davis has assumed the directorship of the Lawyering program at NYU and has implemented many changes.
a summary judgment motion. When they finished they would have worked through the
applicable substantive law, the pleadings, and transcripts of depositions and interviews. We
supplemented their written immersion into the case with videotaped depictions of various
interviews and depositions in the case. At least once, we had the class “interview” someone
roleplaying a client or witness in front of the class.\footnote{I first saw this done in a simulation exercise designed by Professor Philip Schrag. Philip G. Schrag, The Serpent Strikes: Simulation in a Large First-Year Course, 40 J. Legal Educ. 555 (1990). While this obviously is not a substitute for an individually conducted session, it is a way to better engage a large class than simply lecture. The professor can comment on the various contributions when the session is over.}
Each student individually conducted a witness interview in which another student roleplayed the witness for the exercise. The videotapes, the simulated witness interview and the assigned readings on the lawyering skills, provided a base for large class discussion of the challenges confronted by a lawyer developing the case.

Our first significant innovation in Lawyering was to have each student interview a
standardized “client” (actually a witness) who then would provide written feedback to the student interviewer, using a checklist/form that the professors drafted.\footnote{There is a lengthier description of the course in my earlier article; see Grosberg, supra, note 5 at 223-227.} The final exam in the course required the student to synthesize new law and new facts in the same case file and then view a videotaped depiction of a lawyer performing one or more of the skills studied in the course and give us a written critique of that performance.

The current version of the course now includes three SC exercises arising out of three
case files in three different areas of law: torts, contracts and real property. Whereas the earlier
course was in the first semester of the first year, this revised course is in the second semester.\footnote{There were two reasons for the shift in the placement of the course. First, student feedback suggested it would be a more effective introduction to what lawyers do if they had completed a full semester of basic learning in legal reasoning and analysis. Second, we made some other curricular changes in the first year that made the shift to the spring semester a logical move. Originally, a goal of the Lawyering course was to communicate to new law students from the first day of law school that as important as learning how to read, analyze and synthesize appellate case law was, there was much more to being a competent lawyer. While the new course seems to have been successfully merged into the second semester, that goal has been relegated to a secondary concern.}
In the first case, the students conduct an initial client interview of a standardized client with a tort claim. The second case calls on the students to interview a standardized client who is a witness\footnote{As indicated above, I use the phrase “standardized client” as a term of art to encompass exercises involving a witness as well those involving a client.} in a contract case. Finally, in the third case, the students are asked to counsel a client in an
adverse possession case. As we did previously, we show several videotaped demonstrations of the same kinds of skills the students will be called on to perform.\footnote{54} For example, in the first unit involving a claim based on the negligent infliction of emotional distress, the students view a demonstration videotaped initial interview of a client with a similar tort claim before they are asked to interview the client in our case. Likewise, in the second case involving a claim of undue influence, the students first observe an interview of another witness in the case before they do an interview of their witness. And, once again, before they counsel their adverse possession client, they observe a tape of a counseling session of a client in a comparable situation. The standardized client completes a detailed evaluation checklist assessing the student performance. While the students do not receive a “grade” on their performances, they are told that if they do not prepare and conduct the interview or counseling session appropriately, they could have their grade reduced by as much as third of a grade.\footnote{55}

To put the obvious question: why use lay persons instead of professors to evaluate law student performance? The answer is: standardized clients seem to be a fair, reliable and much more cost efficient method of providing individual feedback. To provide enough professors to give individual feedback to more than five hundred first-year students on three separate exercises is simply cost prohibitive, at least for most law schools.\footnote{56} New York University is an exception. While using standardized clients is not free of charge, it seems doable.\footnote{57} It would be even less expensive if our proposal were implemented to establish a metropolitan training facility for all local law schools.\footnote{58}

\footnote{54}We are in the process of producing a DVD containing all of the videotaped vignettes - - there are now _____ - - as well as the written case file materials and the standardized client evaluation forms we use in the course. We will make these available for purchase.

\footnote{55}The issue of grading students more affirmatively on their performance in standardized client exercises goes to the heart of this discussion - - namely how to demonstrate the validity and reliability and basic fairness of this method of evaluating law student performance. That is the project in which we are now engaged.

\footnote{56}Using adjunct professors or volunteer lawyers also would be impracticable for such large numbers of simulated sessions. Hiring, training and retaining such persons does not seem achievable. Hiring lay persons as standardized clients also incurs costs but at a much lesser rate than the alternatives.

\footnote{57}We spend roughly $17,000 to provide more than 500 students with a standardized client exercise, including the individualized written feedback. The administration at New York Law School--Dean Richard Matasar and previously, Deans Harry Wellington and Associate Deans Ellen Ryerson, Jethro Lieberman and Stephen Ellmann -- has been incredibly supportive of this continuing experiment.

\footnote{58}In my earlier paper I describe how a centralized standardized client facility could be utilized by more than one law school, thereby increasing savings from the economy of scales. See Grosberg, \textit{supra note 5} at 230-233.
As in the earlier version of the Lawyering course, the videotaped demonstrations, the standardized client exercises and the substantive law and skills readings provide the basis for classroom discussions of the development of case theories in each of the cases and the challenges faced by the lawyers in the three cases. With respect to the standardized client feedback, the professors comment on their observation of a limited number of videotaped student exercises and also provide some statistical findings on the exercise. By compiling the results of the structured feedback forms, the professors have been able to show that the problems and challenges faced by the students often were typically experienced by many others. Conversely, the statistics could show how nearly all of the students were doing something right, at least from the vantage point of the evaluating standardized clients.

Finally, as it did previously, the final exam calls on the students to analyze and incorporate into their case theory new facts and law and then to provide a written critique of a videotaped depiction of a lawyer’s performance. In the current version of the course, each student receives feedback from a standardized client on three different exercises. Thus, last spring we completed more than 1,500 standardized client exercises. The students have the opportunity to view and critically analyze numerous other videotaped lawyer performances. The final exam then presents them with the challenge of putting those experiences together to synthesize their skills and case theory readings with substantive law and developing facts into viable case plans. Finally, they critically analyze a lawyer’s legal reasoning and oral lawyering skills.

Let me retreat a bit and describe briefly the process we have been using in drafting the structured feedback forms that we use and in training and preparing the standardized clients. The objective is to have all of the persons roleplaying the client or witness portray in a standardized fashion the individual involved. This means that each person is trained to assume the same profile and know the same facts and to respond appropriately to student questions and techniques so that the experience of each student is as close as possible to that of all other students.

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59 A much more limited use of standardized clients or patients has been used where the person is interviewed or counseled in front of a large lecture class, perhaps by a series of students in the class. See, e.g. Catherine A. Birndorf & Marsha E. Kaye, *Teaching the Mental Status Examination to Medical Students by Using a Standardized Patient in a Large Group Setting*, 26 *ACADEMIC PSYCHIATRY* 180 (Fall, 2002).

60 I have added to my website an example of a compilation of the assessments of student performance. See note 6 supra.

61 The training objectives are to teach the lay people to roleplay clients (or witnesses) carefully so that they respond as realistically as possible to novice efforts to elicit information. See e.g. Fernando Colon-Navarro, *Thinking Like a Lawyer: Expert Novice Differences in Simulated Interviews*, 21 *The Journal of the Legal Profession* 107,122-127 (1997). In the study discussed in this article, simulated interviews done by persons of varying degrees of experience were videotaped and then scored, NOT by the roleplaying clients but by the professors conducting the study. Such evaluations done by the teachers are the norm. Feedback
Similarly, we want each standardized client to evaluate each of the student’s performance in a like manner. This is a critical training goal. Hence, the SC’s performance is standardized both as to roleplaying and as to assessing. To do this each of the four professors teaching the course conducts three two-hour training sessions with roughly ten-twelve persons who are hired to be standardized clients. In our case, they are nearly all actors. They need not be. Probably two thirds of the training time is spent on evaluation/grading issues.

Using the medical educators’ experience with standardized patients as a model, we have drafted a written form that facilitates the completion of a structured evaluation by the standardized client. It contains three parts: one addressing the substantive content of what the interviewing or counseling law student does; one addressing the communication skills of the law student; and one giving the standardized client the opportunity to include subjective comments. There is much to be done to raise the level of sophistication of these forms insofar as the collection of data is concerned, an objective discussed below.

C. Evaluation of Our Use of the Standardized Clients. Our assessment of the success of this continuing experiment has taken many forms. Throughout, we have had the benefit of student feedback that is given on our standard course evaluation forms. In the prior Lawyering class format, we also solicited specific written evaluations from the students of the standardized client exercises. We also have had the benefit of a small group of law professors who have worked together closely on this course. Several of us have sat in on one or another of our colleagues’ classes and we have scrutinized the efficacy of these clinical teaching techniques in a

by a trained “standardized client” seems to be the exception in legal education. See also, the use of a simulated client interview as part of the specialist licensing process in Australia. Again, the sixty minute interview is videotaped and then assessed on several levels by the examiners, NOT by the person portraying the client. Adrian Evans and Clark J. Cunningham, Specialty Certification as an Incentive for Increased Professionalism: Lessons form Other Disciplines and Countries, 54 S. CAR. L. REV. 987,996 (2002).

62 Last spring, for example, we worked with 45 actors, roughly 10-12 in each professor’s group.

63 As noted above, though professional actors are not required, they are preferred. Actors are certainly available in any of the large metropolitan areas such as New York or Los Angeles. But, even in less populated areas, the medical educators’ experience is that university drama schools and the general populace have provided more than enough candidates for standardized patient duties.

64 As I discuss below, this is not the most efficient way to utilize standardized clients. Rather, the most cost efficient and effective way would be to establish a centralized facility (with interview rooms) that could be shared by more than one law school. I describe this below.

65 See note 6 supra, for website; I have added to the website one of the SC Evaluation forms used in the current Lawyering course.
a large class setting. Collaboration among law professors to design and implement a uniformly taught course is itself an unusual experience among law professors. In this instance it has been a wonderfully productive enterprise. Finally, there has been no shortage of ad hoc student responses as to all aspects of their work with the standardized clients.

With respect to student response, the view is nearly all positive. While we have not yet specifically surveyed the students on the current version of Lawyering (with three SC exercises), the standard course evaluations and the ad hoc comments have indicated quite clearly that the students have found the standardized client experiences very useful. Many students indicated that this was the first time they had the chance to talk to another person from the vantage point of a lawyer; they were appreciative. There have been many favorable observations about the value of viewing videotaped demonstrations of how to do something before they had to go out and do the same sort of thing. One recurring comment is that the students regret having put so much time into preparing to do the exercise, without getting a grade or some kind of credit for their work. Earlier comments, as noted above, suggested the experience might be more effective if not in the first semester; that is now moot since the course is in the second semester. For some other second career students, they questioned the need for these exercises, since they were quite experienced in dealing with people at all different levels. Two other recurring student comments are: 1) SC’s are not always consistent; and 2) SC’s do not always disclose information they possess.

As noted earlier, the four persons who have worked with me on the current version of Lawyering are: Professors Carol Buckler, Stephen Ellmann, Richard Marsico and Richard Sherwin. The prior version included those teachers as well as Professors Carlin Meyer and Donald Zeigler.

The student response to the questionnaire when we were using a single standardized client exercise is summarized in Grosberg, supra, note 5 at 226, note 62.

Can we include SC grades as part of the students’ course grade before we have substantiated the validity of the evaluative techniques? This is a central question. Indeed, it goes to the immediate need for conducting research to establish the validity and reliability of this method of assessing law student performance. See also, Stacy L. Brustein & David F. Chavkin, Testing the Grades: Evaluating Grading Models in Clinical Legal Education, 3 Clinical Law Rev. 299, 306-308 (1997).

This is also a response often seen in clinic and simulation course students; the students do not have to be taught how to talk to a client or a witness, because they are “grown-ups” and do not need to be taught such interpersonal skills. As in those courses, the teachers here try to present the view that honing one’s legal interviewing and counseling skills is a desirable pursuit even for the most experienced interviewer.

This comment goes to the heart of the lawyer’s communication challenge: how to relate to a client or witness so that the person fully responds to questions the lawyer needs to have answered.
As is set forth below, our goal is to work with psychometricians and design surveys and questionnaires that will provide the framework for empirical analyses regarding the appropriate use of standardized clients. Only after we can substantiate, as solidly as possible, the reliability and validity of these assessment methods, can we seriously consider them as significant components in the law school grading regime.

D. Expansion of the Use of Standardized Clients. In our Lawyering course we spend a good deal of time drawing connections between legal analysis and factual analysis (usually in the context of developing a case theory for a client) and then between a case theory and how the lawyer applies and utilizes that case theory in the context of performing a lawyering task such as interviewing a witness or counseling a client. This is the crucial means - ends analysis that is central to competent lawyering. It becomes clear quite quickly to the student - - or at least that is our hope - - that lawyers cannot effectively perform such a lawyering task unless they really have their legal analyses clear in their minds and utilizable. By placing them in role the students begin to gain an understanding of their role as a professional and the combination of skills necessary to perform those responsibilities.

When our first-year students sit down to counsel their client, Dr. Kay, about the likelihood of success in asserting an adverse possession defense to a claim for an order evicting Dr. Kay from the plaintiff’s property, those students must know the doctrinal property law nuances and must have synthesized a workable case theory for Dr. Kay, and must be able to explain their legal opinions in clear and non-condescending language to act as a translator for the client. They cannot, and from everything I have seen, do not sit down until they feel they are capable of performing this task competently. A critical component in their preparation is their analysis of the law as applied to the facts of Dr. Kay’s situation. Placing the student in role as the lawyer working with the client to solve the client’s problem is the experiential learning that is critical to good lawyering. The student must work with the client to integrate law with all of the non-legal variables that affect the client’s decision.

If first-year students had to conduct similar standardized client exercises in their other first-year courses, it is likely, I would assert, that their view of the importance of interpersonal

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73Their legal analyses are not always correct. And their counseling skills performance is not always sparkling. But, they at least go through the necessary preparatory steps in formulating the legal opinions and thinking about how they intend to transmit those opinions to Dr. Kay.

74Mark Neal Aaronson, Thinking Like a Fox: Four Overlapping Domains of Good Lawyering, 9 CLIN. L. REV. 1, 17 (2002).
Most first-year law students have an appellate moot court experience. That opportunity to use oral argument skills is useful, but does not address the need for training in basic interpersonal lawyering skills, the subject of this paper.

Grading the standardized client exercise is a critical element in this effort to alter the first-year themes. Ideally, this should not be done until empirical studies would directly support such a change, at least not for high stakes grading. The difficult issue, however, is what, if anything, might be done prior to that point with respect to non-high stakes grading. I believe that for low-stakes grading purposes (e.g. a small percentage of the grade for one law school course), we can reasonably infer based on the experience of our medical colleagues work with standardized patients that we can accept the graded evaluations of the standardized clients of our law students’ performances.

78. See Grosberg, supra note 5 at 228 where I discuss the potential use in upper class courses and in clinics and simulation courses.

79. If the SC exercise were assigned to be completed before the class discussion, the students would have to learn the law so they could properly explain it (“translate it”) to their clients. Therefore, the subsequent class discussion would presumably reflect a much deeper appreciation of the substantive issues involved. Alternatively, if the student were assigned to conduct the SC exercise after the class discussion, they would be better prepared to explain and apply the law. From the perspective of enhancing the doctrinal teaching, I think most first-year professors would prefer the first alternative.
Contextualizing doctrinal learning is no longer unusual. Simulations “enhance student motivation to learn.” I wholeheartedly concur in the observation that experiential learning can even “infuse passion” into the doctrinal learning environment. All of this can take place without a moment being taken up in class regarding the lawyering skills facets of the student experiences with the standardized client. The same thing could be repeated in each of the other first-year classes.

The cumulative effect of integrating such exercises into traditional first-year courses could be significant. First, were each exercise a component of the grade, students would understand the overall importance of mastering these oral lawyering skills. For better or worse grades remain a primary motivator for students. The relevance of the ability to interview and counsel would compare to the importance of basic legal reasoning and analysis skills that are otherwise focused on and reinforced in all of the other first-year courses. Rather than communicating to the students that these skills are relatively unimportant and relegated to a couple of credits in a thirty-credit first year, the students would be receiving the clear message that these skills were integral to all of what happens in the first year. Second, if there were a course like our Lawyering course (or perhaps as part of the typical first-year writing course), various skills themes could provide the larger context in which the students could place their various standardized client experiences. And, third, the potential impact of such required first-year experiential learning on the content and sophistication of upper class simulation courses and clinics is enormous. At NYLS, the students’ completion of three exercises in the Lawyering course has called on us to re-examine how and what we are doing in our upper class simulation and clinical courses. If the standardized client experiences were replicated in other first-year courses, the second and third year classes would be substantially different.

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80See, Lawrence M. Grosberg, The Buffalo Creek Disaster: An Effective Supplement to A Conventional Civil Procedure Course, 37 J. LEGAL EDUC. 378 (1987). See also, e.g. Alice M. Noble-Allgire, Desegregating the Law School Curriculum: How to Integrate More of the Skills and Values Identified by the MacCrate Report Into a Doctrinal Course, 3 NEV. L. J. 32, 39 (2002). (The “synergistic effect” of combining skills and doctrine.)


82Paul S. Ferber, supra, note 40 at 431.

83Deborah Maranville, Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning, 51 J. LEGAL EDUCA. 51 (2001)

84If the SC exercises were not coordinated with skills teaching in a Lawyering type course, students could easily be frustrated in their untrained attempts to perform these lawyering skills. This is a real issue that would have to be (and I believe could be) successfully addressed.

85See Noble-Allgire supra note 80.
How might such a system be implemented? Very briefly, my proposal is based on the medical education model established at the Mount Sinai Medical School Morchand Center in New York City.86 The Center would have ten to twelve interview rooms and would be administered by an educational director who would hire and train the standardized clients to roleplay and evaluate the students. That director would work with the law professors in the various subject matters to draft the problems and the evaluation forms and schedule the exercises. In New York City, for example, the law schools in the metropolitan area could participate and send their students to conduct sessions at the center in a manner similar to sending students to an externship field placement. The significant cost effectiveness of this system (based on the economy of scale) would redound to the benefit of all of the cooperating law schools. The more often a lay person could reprise a particular standardized client role, the less cost to the center. This is in fact how the Morchand Center operates in New York City for all of the local medical schools. It could be done effectively in any area with whatever the number of local law schools.

Such an expansion of the use of standardized clients is dependent on the establishment of such a center. We are in the process of seeking grants to do just that. Once established, such a center could be self-sustaining, with costs being shared by the cooperating law schools. In addition to the intrinsic educational value of the exercises that I have sought to describe above, a metropolitan center in New York or elsewhere would provide the vehicle for the completion of the kind of empirical studies that our fellow educators in medical schools have been doing for decades.

III. The Gap Between Medical Licensors and Bar Examiners

Can the legal profession make changes in the bar exam based on the experience of medical educators?87 With respect to the potential analogous use of standardized clients on a bar exam, is the empirical data gap so wide as to suggest that the analogy is pure fantasy? Based on the foregoing, it would be easy to say yes, and put off any further consideration for some distant date in the future. But, I think there is enough information to keep this discussion alive at the same time as we pursue further empirical study. In the meantime, as suggested above, the vast experience with standardized patients would seem to provide enough support for the use of low stakes educational grading by standardized clients.

A. The Similarity Between Lawyer and Physician Communication Skills. There are striking similarities between the communication challenges facing a physician speaking with a patient and a lawyer talking to a client. As two of the leading clinical education professors put it some time ago: “we have found [interviewing] analogies to medical diagnosis especially

86See Grosberg, supra, note 5 at 230-233 for a more detailed discussion of how such a legal education center would operate.

87See Andrea A. Curcio, A Better Bar Exam: Why and How the Existing Bar Exam Should Change, 81 NEBRASKA L. REV. 363, 394-8 (2002). A comprehensive discussion of bar exams and how they might be improved. Professor Curcio looks to architecture as well as medicine for models that might improve bar exams. In particular, she focuses on how we might benefit from emulating the efforts in both of those professors in using computer-based testing methods.
useful”.\(^{88}\) While the differences are also clear,\(^{89}\) a physician’s initial interview with a patient who seeks assistance for an ailment presents challenges quite similar to those facing a lawyer interviewing a client as to the problem that brought the client to the lawyer’s office. In both cases, the professional worker must obtain enough information to make a diagnosis. Both must relate to a person who may be in varying degrees of upset and unable to communicate clearly. Beyond the task of obtaining facts, there is the challenge of applying the professionals’ expertise to the specific facts of the case before them and then translating that expertise into clear, non-condescending language so that the patient\(^{90}\) or client can digest the information and then make a decision as to what they wish to do.\(^{91}\) Once again, both the physician and the attorney confront this translation-communication challenge in strikingly similar circumstances. The process of deduction is the same for both doctor and lawyer.\(^{92}\) It is because of these similarities that I first became interested in our medical colleagues’ work with standardized patients.\(^{93}\)

In an extensive and illuminating review of Donald Schön’s work, most particularly, The Reflective Practitioner and Educating the Reflective Practitioner, Professor Richard Neumann cataloged Schön’s insights and then suggested ways in which legal educators might act on those insights.\(^{94}\) Among other suggestions Neumann urges us to “subject our theories of action [lawyering notions] ... to empirical testing,”\(^{95}\) and further, that we “document in convincing detail

\(^{88}\)Gary Bellow & Bea Moulton, Lawyering 141 (1978).

\(^{89}\)For example, lawyers often have to deal with clients who have committed moral or criminal wrongs of one sort or another, a situation not often encountered by doctors. This presents different and somewhat unique interviewing challenges for the lawyer.

\(^{90}\)See e.g. Evans and Cunningham, supra, note at 1004. (Comparing the extensive empirical data assessing patient satisfaction with physician services and the dearth of information as to client satisfaction.

\(^{91}\)See Linda Smith, supra at note 20 (in-depth, comparative analysis of the task of delivering bad news by lawyers and doctors.)

\(^{92}\)Id at 149 - 153.

\(^{93}\)Fernando Colon-Navarro, Thinking Like A Lawyer: Expert-Novice Differences in Simulated Client Interviews, 21 The Journal of the Legal Profession 107, 113 (1997). The author explicitly draws the comparison between the need to learn “the process of clinical reasoning” in medicine and in law. Citing well-known medical educators (Barrows & Tamblyn) Colon-Navarro concludes that without experiential learning, neither the law graduate nor the medical graduate could effectively practice their respective professions.


\(^{95}\)Id. at 418.
the ways in which legal education is far behind all the other professions in providing reflective practice."

Finally, after looking at architecture and medicine, Neumann concludes that we ought to disseminate that documentation to the widest possible audience. Maybe then change will occur.

The medical establishment’s extensive research with standardized patients has enabled it to reach this point of including it as part of the licensing exam. That medical experience provides pragmatic and moral support for ongoing legal profession efforts to conduct similar research, and, I believe, for use of standardized clients for low stakes grading. But that support is not yet enough on which to base any decisions to use a standardized client for a high stakes exam. As Neumann pointed out, more work is required.

B. Empirical Analyses of Standardized Client Use. The use of non-lawyers and non-teachers to evaluate the performance of law students is both counter-intuitive and as I noted above, contrary to long-standing legal education traditions. That does not mean change is impossible. Rather, as was done in medical education, what it means is that we have to construct studies carefully to determine whether such lay persons can be effectively and efficiently trained to give valid evaluations. How might this be done?

An expansion of the use of standardized clients, as described above, could provide the data for this needed empirical analysis. There are, broadly, two directions in which our further examination of the use of standardized clients may proceed. First, there are empirical assessments that seek to measure the reliability, validity and efficacy of the performance and

96 Id. at 424.

97 Id. at 426.

98 But, even with all of that data, there is still opposition to the adoption of the standardized patient exercises as part of the licensing exam. See Bonnie Booth, “Delegates Oppose Testing of Clinical Skills for Licensure”, January 6, 2003, amednews.com; www.ama-assn.org/sci-pubs/amnews/pick. Medical students objected to the additional $1000 cost.

99 It is worth noting another difference between bar examiners and medical licensing examiners. In New York, for example, full-time academics are not eligible for membership on the Board of Law Examiners (a part-time position). When I confronted the Board and the Clerk of the New York Court of Appeals (who administered a solicitation of applications for a recent vacancy on the Board) as to the reason, I was informed that there was an unwritten concern that a conflict of interest would exist (causing the academic to take actions that would favor the academic’s institution). Such a policy of keeping academics off the Board of Law Examiners exacerbates the lack of constructive cooperation that is necessary to properly synchronize curricular and licensure concerns. In contrast, Dr. Laurence B. Gardner, a Professor and Vice Dean of the University of Miami Medical School, was recently elected to a two year term as chair of the National Board of Medical Examiners. www.nbme.org/examiner/SpringSummer2003/news.
evaluations by standardized clients. Second, there should be surveys assessing the degree of satisfaction of the students. We did this previously, and with minor modifications of the questionnaires we used then,\textsuperscript{100} we intend to use them again. We should look for specific guidance from medical educators as to how and in what directions we might go with respect to measuring the value of standardized clients. In addition, we should focus on developing effective checklists - the questionnaires that the standardized clients complete as their evaluation of the law student performance. The goal here is to refine our formats as much as possible, both as to content and as to methods of quantification for grading purposes. A related issue is setting the standard for a passing score.\textsuperscript{101}

It is worth noting again the astonishing difference between the quality and quantity of what medical educators have done in terms of empirical research on methods of assessing physician competence and what legal educators have done, or more specifically, not done.\textsuperscript{102} Exactly why this has been the case is an interesting issue but beyond the scope of this essay.\textsuperscript{103}

For decades, medical professors, often jointly with psychometricians, have examined in

\textsuperscript{100}Cf. A voluntary program was offered to third year medical students at Drexel University, involving eight standardized patient encounters that raised medical ethics issues. The students were asked to evaluate the program (5= strongly agree) and 207 students participating gave a 4.3 rating of “strongly agree” rating to the statement “Overall this program was a valuable educational experience.” Janet Fleetwood, Bringing Medical Ethics to Life: An Educational Programme Using Standardized Patients, \textit{Medical Education} 2002 at 1100. ]

\textsuperscript{101}Determining what is a passing score can be a complex matter. See e.g. Tim F. Wilkinson, David I. Newble & Christopher M. Frampton, \textit{Standard Setting in an Objective Structured Clinical Examination: Use of Global Ratings of Borderline Performance to Determine the Passing Score}, 35 \textit{Medical Education} 1043 (2001).

\textsuperscript{102}One need only glance at a single data base search to see the hundreds of research articles addressing these issues in leading medical research journals to demonstrate this point. One article stated that a search on the MEDLINE database for the period 1966 to 2001, for “articles that studied the reliability or validity of measures of clinical or professional competence...” yielded “2266 references”. Epstein, \textit{infra note} \textsuperscript{102} at . While legal educators have not conducted this kind of empirical research on evaluation methods, there certainly has been no shortage of scholarship in the clinical and skills area on the importance of educating future lawyers on a fuller range of applied lawyering skills.

\textsuperscript{103}A recent article in Lancet, a leading medical journal, for example, points out in the course of a thorough discussion of the full array of testing methods used to assess physician competence that there is an “increasing focus on the performance of doctors and on public demand for assurance that doctors are competent ...”. Val Wass, Cees Van Der Vleuten, John Shatzer & Roger Jones, \textit{Assessment of Clinical Competence}, 357 \textit{Lancet} 945 (March 24, 2001). One might speculate why there has not been a similar response to the public’s demand for lawyer competence.
great detail what testing methods have worked. Using the pyramid of knowledge, they have looked at alternative means to test pure knowledge (at the bottom of the pyramid), comparing multiple choice questions, true-false or single best answer methods. For problem-solving, and ultimate performance assessments involving judgment, they have compared computerized problem-solving exercises as well as observation of performance with real patients, and of course, extensive analysis of the reliability and validity of the use of standardized patients. For example, while recognizing the value of standardized patients, it is also clearly acknowledged that “performance on a [standardized patient evaluation] might not be the same as performance in real life.” Yet, it is the lack of consistency (and ultimately reliability) in evaluating medical students’ work with real patients (often dependent completely on the happenstance of the categories of illness available at the time of testing) that has been one of the driving forces for the use of standardized patients.

Another lesson from medical educators is the importance of proceeding with a completely open mind and objectively assessing the use, in our case, of standardized clients. While there are benefits, there are also costs. Refined analysis might very well show both differences between medical education and legal education insofar as the value of this technique, as well as significant shortcomings in our potential use of standardized clients. A recent extensive article, for example, went to some lengths to point out serious limitations in the use of standardized patients (as opposed to real patients) and the importance of using a variety of assessment methods.

Similarly, in another close analysis of the value of standardized patients, the author reaches the clear conclusion that while standardized patient encounters are excellent for assessing the ability to interact with a patient, they should not be used to test clinical reasoning which could be done much more effectively with written or computer based exams.

Thus, looking to the vast experience of our medical education contemporaries for guidance on empirical research gives us a very wide range of directions to pursue. With the cooperation of a first-year contracts professor, we might ask for volunteers to participate in a

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104 *Id* at 949. Law school clinicians have long recognized this reality in discussing the differences between clinics with real clients and simulation courses.

105 After a comprehensive discussion of the components of competence for a physician, the authors then go on to analyze the limitations in the various methods for assessing for such competence. In particular, the authors distinguish between a student’s ability to “show how” to do something in a standardized patient context versus the ability to “do” something in a real case situation. Videotapes of work on real cases may be a better vehicle for measurement. Ronald M. Epstein & Edward M. Hundert, *Defining and Assessing Professional Competence*, 226 *The Journal of American Medical Association* 287 (January 9, 2002).

106 Rachel Yudkowsky, *Should We Use Standardized Patients Instead of Real Patients for High Stakes Exams in Psychiatry?* 26 *Academic Medicine* 187 (Fall, 2002). (“...the difficult logistics associated with real patients typically result in nonstandardized assessments consisting of one or two case that are unsystematically selected from a nonrepresentative pool of patients. ... [results in] relatively low validity and reliability and that can be perceived as unfair.”).
standardized client experience. Assume that 80 students volunteer. We would ask 40 to participate in counseling a standardized client in a case that parallels an opinion that is the subject of class discussion. At the end of the semester (or perhaps at the conclusion of the unit in which the opinion is read), all 80 students would conduct a counseling session with a standardized client in a different case involving the same basic contract concepts. We then could compare the scores/evaluations of the two groups to determine if the results differed. This would not be the ultimate test as to the student’s ease in applying substantive knowledge since there could be other factors that might have an impact such as the greater immersion into the subject matter by the experimental group as opposed to the control group. But, it would be more clear as to the impact on interpersonal communication skills.\footnote{This is based on a medical school project that involved the use of standardized patients to teach management of a disease (in this case diabetes) over a period of time. The experimental group had multiple encounters with the standardized patient whereas the control group had none. At the end of the semester (or perhaps at the conclusion of the unit in which the opinion is read), all 80 students would conduct a counseling session with a standardized patient in a different case involving the same basic contract concepts. We then could compare the scores/evaluations of the two groups to determine if the results differed. This would not be the ultimate test as to the student’s ease in applying substantive knowledge since there could be other factors that might have an impact such as the greater immersion into the subject matter by the experimental group as opposed to the control group. But, it would be more clear as to the impact on interpersonal communication skills.}

One clear method seeking to assess the use of standardized clients is to compare the score the standardized clients gave with those of professors who observe evaluate the videotapes of the same student exercises. This is what I did in an initial experiment involving a much smaller class of 45. The results were not, however, statistically significant. With respect to the Lawyering section, this would necessarily entail much larger numbers, perhaps a random sampling of 50-100 students on each of three or more standardized client exercises. This would allow inter-rating for multiple exercises, and would approach what is done in a typical Objective Structured Clinical Exam for medical students, which usually includes eight to ten standardized patient exercises. This is sometimes referred to as comparing the standardized patient to a “gold standard” — namely the professorial evaluation. In the case of Lawyering, it would require the cooperation of several Lawyering professors to each view many videotapes and score the students observed.\footnote{Insofar as the validity of the professors’ evaluation of the students is concerned, the professorial grading is the “gold standard” because they are best qualified to determine whether the student achieved what the test called on them to achieve. There could still be some reliability issues (i.e. consistency), but as to the validity of SC’s, professorial comparisons may be critical. Cf. M.H. Swartz, et al., Global Ratings of Videotaped Performance Versus Global Ratings of Actors Recorded on Checklists: A Criterion for Performance Assessment with Standardized Patients, 74 \textit{Acad. Med.} 1028 (1999). See also, Arthur I. Rothman & Michael Cusimano, Assessment of English Proficiency in International Medical Graduates by Physician Examiners and Standardized Patients, 35 \textit{Medical Education} 762 (2001). (In this study, they concluded that the physicians were less prone than the standardized patients to negatively rate the candidates.)}
On a less scientific level, we might ask the students in a criminal law course to conduct a counseling session with a standardized client who is a criminal defendant who has to be told very bad news about the prospects of success at a trial. A pre-counseling survey might ask the students: a) what are your primary concerns? b) what is your level of comfort in giving such counseling? After the exercise, the same questions might be asked of all participants and then also to rate on a scale of 1-5 the educational value of the exercise.109

An interesting medical school project sounds very familiar. Recognizing that first year medical students at the end of their first year were quite uncertain about their clinical skills, a program using five standardized patient exercises was designed and implemented for first year students.110 The objective was to provide the new students with a “non-threatening” opportunity to identify their strengths and weaknesses as they begin work on clinical skills. The Northwestern University students were not graded and even were provided in advance with the checklists that the standardized patients would use. Whereas later standardized patient exercises were graded, these early “formative” experiences proved valuable introductions to clinical medicine.111

Changes in legal education, like the law itself, occur slowly, incrementally.112 At the same time a longer view provides a framework, a structure, within which change might place. Here, the goal is two-fold. First, legal education from the outset should fully integrate doctrine and applied lawyering skills in the law schools. Likewise, the role of the lawyer and the challenge to know what it means to be a professional should be a more integral part of the first-year experience. One vehicle to assist in this venture is the standardized client. The means of evaluating the law students’ progress would similarly reflect a synthesized notion of theory, doctrine and skills. Visual aids, interactive electronic programs, and standardized clients would all assist in these law school assessment efforts. The second long-term goal is to match the means used for any high stakes examination for entry to the profession to the integrated educative and evaluative methods which would have been established in the law schools.113

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109 This is based on a study done at the University of Iowa in which the medical students were given the opportunity to conduct several standardized patient encounters in which they had to give bad news of one kind or another. At the conclusion, the students were surveyed and the results showed positive responses to the educational value of these encounters. Marcy E. Rosenblum and Clarence Crater, *Teaching Delivery of Bad News Using Experiential Sessions with Standardized Patients*, 14 *Teaching and Learning in Medicine* 144 (2002).


111 *Id.*


113 This, of course, assumes that bar exams would continue to be needed, an assumption not necessarily agreed on.
What I am suggesting is that bar examiners and the state courts and governments that oversee what the bar examiners do, support the incrementalism necessary to produce a refined vision of how to ensure the public that lawyers are competent to practice law. There is implicit recognition that for cost reasons, we cannot replicate either the clinical model of medical education in law school or a meaningful apprenticeship system after law school. But that does not mean we do nothing toward pursuing a more well rounded preparation for law practice. That is the objective here -- to maintain and even speed up that movement.

CONCLUSION

Drawing the connection between beginning educational efforts to use standardized clients and improvements to the bar exam requires imagination, or at least faith in long-term planning. But, I believe that is exactly what is required if changes in bar admission screening are ever to take place. Inertia plays a large role in maintaining the status quo regarding bar exams. It is an especially powerful force in this area because most lawyers are so happy to put the bar exam experience behind them that they really do not want to address the more fundamental issues about the purposes of the exam. Thus, I welcomed the opportunity to tie my work with standardized clients to a far reaching proposal to experiment with alternative ways to assess applicants for bar admission. It may very well be that the use of standardized clients could be integrated into the small pilot that the New York bar association committees have proposed. The collection of data from the PSABE and the law school programs could both be valuable in assessing the worth of the standardized clients. A bonus under the PSABE would be the provision of legal services by the bar applicants participating in the pilot.