

# *The Destruction and Reinvention of Lawyer Formation*

Jordan Furlong • 6 April 2020

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## **I Lawyer formation disrupted**

If you've spent the last few weeks focused on what's happening in law schools, you might think the pandemic has triggered a crisis in legal education. If you've spent that time instead focused on bar exams and articling, you might think the crisis is actually occurring in bar admission and lawyer certification. And if you've been focused on law firms' early personnel and recruitment decisions, you might instead think we're heading into a crisis in lawyer hiring and employment.

In fact, this is all one crisis in one system -- lawyer formation -- manifesting itself in different locations. The sooner we accept that fact, the sooner we can begin the process of both organizing triage to get us through the short-term hardships assailing us, and drawing up blueprints to unify the shattered fragments of lawyer formation and create an effective and legitimate system for developing new lawyers.

Here's a brief survey of the eruptions taking place across this landscape.

- [Every law school in North America has had to close its physical doors](#) because of the pandemic's physical distancing consequences. [As is the case with courts](#), legal education revolves around the school building to which everyone has to come, the professor in whose presence they must gather, and the legacy paper-based knowledge centre anchoring the whole institution. And as with the courts, the transition from real world to virtual world has been [chaotic and jarring](#).
- Also like judges, [many law professors are now having to learn video-conferencing on the fly](#), in order to convert their lectures to an online format. [Most are doing their best](#), but the effect is still something like televising a radio play. [Teaching a "digitally native" class](#), one that was designed from the start to be online, is a different beast than [delivering an in-person lecture to a camera](#) and scattering the participants to the four winds.
- Law schools in the US, after [an initial period of struggle](#) and [a series of debates within faculties](#), are also ([mostly](#)) coming around to accepting that [their grading systems will have to change to Pass/Fail](#) during this crisis. (A US school-by-school breakdown [can be found here](#).) For the most part, [Canadian law schools are doing the same](#).
- In the United States, [some jurisdictions](#) have [postponed their bar exams](#), while others [aren't sure or haven't yet](#). (This situation changes daily, so these links are probably

already out of date.) Since new graduates who can't take the bar can't be admitted to practice, [the focus has now turned](#) to [emergency diploma privilege for 2020 grads](#), or [to skip the bar exam this year](#). In Canada, Ontario became the first province to [cancel its lawyer licensing exams](#).

- Speaking of my home, one Canadian jurisdiction has already decided to [shorten the articling period from 12 to 8 months](#) to allow articling students to be admitted to practice. Saskatchewan's decision will almost certainly be followed elsewhere in the country, which should help alleviate concerns about law firms simply laying off their students before their term has been completed.
- [Law firms](#), predictably and understandably in [the teeth of a global recession](#), have [already begun](#) to lay off [associates and staff members](#). [Many more](#) surely [will follow](#), as I doubt any but the most ironclad-brand firms will avoid the same fate. [Summer law programs](#) will therefore almost certainly [all be shut down](#), and [the on-campus interview process will move to next winter](#).
- And, oh yeah -- law schools also have to worry about [postponement of the LSAT](#) and consequent delays in admitting future cohorts of students. It's not just the system's output mechanisms that are struggling -- if the input mechanisms go too, legal education has a whole new problem.

That is a staggering collection of disruptions and challenges, none of which the lawyer formation system was prepared to handle, all taking place in less than a month. (Credit where it's due: For all the chaos and upset involved, law schools and their students have managed to shift almost all their operations from in-person to online in the space of a few weeks. Has it been seamless? Hardly. But schools and students have so far succeeded where many firms and almost all courts failed.)

But here's the problem: It's almost impossible to tackle any one of these issues without having significant knock-on effects on the others.

When law schools change their grades to pass/fail, law firm recruiters have to change their student assessment systems. When the new lawyer licensing process stalls out, firms can't employ these new graduates as lawyers. When law firms scale back or postpone the hiring of new grads, new lawyer unemployment climbs and fewer people apply to law school. And so on.

More problematically, all the relevant actors in this mad scramble are independent from the other, mandated to pursue their own goals and their own survival regardless of whether that pursuit damages the other stakeholders. Nobody has either the overarching interest or the requisite authority to coordinate a unified response. Licensing bodies can't tell law schools what to do, law firms can't tell licensing bodies what to do, and law

students can't tell anyone what to do because they have no power and nobody to advocate for them.

We need to appreciate what's actually going on here. These are not myriad individual problems and complications in several related areas of lawyer education and training and licensing and hiring. This is one big problem.

*The lawyer formation process is breaking down in front of us.* It's breaking down because it's a disjointed, cobbled-together collection of self-interested fiefdoms that have been allowed to call their own shots and pursue their own goals for decades.

Just as the court system is failing because it's really about what judges and lawyers want rather than what clients and the public need, so too lawyer formation is failing because it's really about what law schools want and what regulators want and what law firms want. *Lawyer formation is not about the lawyer who's being formed.*

If the lawyer formation process were really about the lawyer, it would be holistic and unified, focused on the individual striving to become a legal professional. Instead, look at how we've separated the first several years of a lawyer's career into three disjointed periods, administered by three different entities:

- Law schools "teach the law" -- even though the bulk of what they teach and how they teach it has not changed in *more than 60 years*. That scandalous fact alone could legitimately disqualify schools from having any further role in these conversations.
- Courts and regulators "licence the lawyer" -- even though the bulk of this process involves re-teaching and re-testing students on what (we apparently believe) law schools didn't teach effectively in the first place.
- Law firms -- no, let's be real here, *clients* -- "train the lawyer," by paying either the new practitioner or their employer to figure out, on the job, how they're supposed to meet actual legal needs. Clients pay to make lawyers competent. What a disgrace.

We have separated lawyer education from lawyer training, and separated them both from lawyer licensing and entry into the profession. We've allowed this ridiculous process to continue year after year, despite knowing all its weaknesses and failings, and now we're going to pay the price of that carelessness in one lump sum.

The pandemic is, of course, the proximate cause of all this. Physical distancing forced law schools to change their teaching and grading systems and forced regulators to rethink their licensing system. The global recession -- and [maybe that's not a strong enough word](#) -- that's about to strike us like an onrushing avalanche is forcing law firms to massively recalibrate their hiring and firing decisions.

But someday, probably years from now, the pandemic will end and the economy will start to recover. Will all these aspects of lawyer formation just "go back to normal" then? I strongly doubt they will, for two reasons.

One is that this ordeal is going to last so long -- and feel even longer -- that we'll have a surprisingly hard time remembering what "normal" used to be like. Humans have a remarkable ability to grow accustomed to new conditions -- if you're not sure about that, look outside a month from now and see how many people aren't wearing masks.

But the other, more important reason why we won't just "snap back" to the old ways of doing things is that those ways have been permanently, irrevocably discredited. Those of us who've spent years advocating for change in the lawyer formation process have always been met with, "It doesn't need to be done" and "Nobody would allow it" and "That would never work."

Well, guess what? We did it anyway, because we had to, and it worked. And now we get to ask:

- If Pass/Fail is an acceptable grading system during an emergency, why isn't it acceptable all the time? Having taught a couple of law courses myself, and having experienced as an instructor how letter grades are arbitrary and indefensible, I believe Honours/Pass/Fail is the ideal assessment system -- it tells both the student and her potential future employers all they need to know about course performance. And [I'm not the only one](#) who thinks that.
- If we're willing to grant emergency diplomas to law graduates who've not passed a Bar exam, why would we force future generations of lawyers to pass a test that we've effectively conceded is merely optional to the licensing process? Why would we not go a step further and officially do away with the bar exam altogether and pursue [bar admission through alternative models](#)?
- In Canada, we're willing to say that eight months of articling is as good as 12. What about six? What about four? When [articling is already under heavy attack](#), when it's been shown to be an [abusive and discriminatory experience](#) for many students, when we're already having [serious discussions about whether the practice should be discontinued](#), why should we carry it on a day further, [especially in a pandemic](#)?
- Most seriously of all: If law firms are laying off experienced associates now, [what are the chances](#) they're going to [hire brand-new ones](#) in three, six, or nine months' time? What happens when the Class of 2020 (and maybe 2021) finds almost no job opportunities upon graduation or licensing? If the outsourcing of new lawyer training to law firms (upon which [the entire lawyer development system hinges](#)) stops, and firms survive without it -- why would firms take on this role again?

This "bucket brigade" approach to lawyer development, in which each participant takes the formative lawyer from one stage to the next, has been exposed (like all supply chains around the world) to be extremely vulnerable to disruption and no longer fit for purpose. Out of this crisis will emerge a driving need to re-unify the lawyer development system, to really rethink what it is we're trying to achieve: to develop competent, confident lawyers to serve clients and society. In order to achieve that goal, we need to:

1. Reconfigure and unify all the systems and processes of lawyer formation;
2. Centralize and empower a single authority to be responsible for lawyer formation;
3. Most importantly, refocus the lawyer formation system *on the lawyer who's actually being formed*.

That's how I see the impact of the pandemic on legal education, lawyer licensing, and legal professional development. For my thoughts about some practical steps we can take to achieve these goals, please read on.

## II Lawyer formation rescued

As was the case with the justice system breakdown I described Posts 2 and 3, and further to the problems with lawyer formation I laid out in my previous post, I want to suggest two sets of responses to the crisis in lawyer development. The first set, presented below, is designed to get our current system and the people who rely on it through these next couple of years; the second is intended to outline a new and better system to replace the one that's breaking down.

In the short term, here are seven suggestions for how we can help get law schools, regulators, and law firms through this lawyer formation crisis.

### 1. Drop the LSAT.

Law schools should stop using the LSAT as part of their applicant assessment system. Many people won't be able to write the LSAT this year, and the conditions for those who do write it will be unequal; those two facts alone are reason enough to follow this approach. Law schools can still use undergraduate marks, work experience, and personal qualities to decide who to admit. But let's be honest: The LSAT is an [elitist artifact](#) anyway. It tests only a [small number of skills](#) and [attributes](#) that lawyers need, and [it has no correlation whatsoever with one's future success as a lawyer](#).

### 2. Do online lectures properly.

As long as physical distancing lasts, schools should arrange for all lectures to be video-recorded and (along with lecture notes) uploaded, so that students can access them

asynchronously rather than having everyone pile in to a Zoom session. This should be done at least semi-professionally, with good audio, lighting and framing. Each lecture should be 20-30 minutes maximum. The designated course professor need not deliver them all. We need to shift away [from remote teaching to online learning](#).

### **3. Adapt student participation.**

Create online message boards with questions for students to answer and discuss among themselves; active or high-value contribution to these discussions would improve a student's final assessment. Increase the number of assignments for students to carry out, and encourage multimedia responses (video or podcast instead of or in addition to a written submission). Assign more work to groups, using online collaboration platforms (e.g., Google Docs); if isolation is lifted, these group projects can be converted to in-person.

### **4. Maintain Fail/Pass/Honours.**

Let's get real for a moment. Hardly anyone ever fails a law school course or fails to graduate, so we're really talking about "Pass/Honours." In practical terms, that is absolutely no different from "Consonant/Vowel." I think most professors would agree that they could divide their student into "those who did the work and learned the concepts" and "those who really stood out as brighter, harder-working, and more effective than the others." Law school is not Grade 3; we're past the stage of incentivizing children to try hard and do their best. We're developing professionals to serve the needs of others. [Let's keep a system that recognizes this reality](#).

### **5. Give up on the bar exam.**

This is simultaneously the easiest and hardest advice. Easiest, because the bar exam is little more than ["an excellent barrier to entry ...and a superb hazing ritual,"](#) in the words of Joan Howarth; it "tests [the ability to take tests, not the ability to practice law,](#)" added Allen Mendenhall. It's [archaic](#), [discriminatory](#), and [a waste of time](#). But also hardest, because [the profession just can't quit the exam](#), partly out of [habit](#), partly out of fear that [law school didn't prepare students to practice](#), and partly no doubt to industry pressure. The pandemic has made sitting for the bar almost impossible; take this as a sign, and an opportunity.

### **6. Issue "progressive" law licences.**

To mollify bar exam defenders, and as a step towards a better licensure system in future, all graduates who were unable to take the bar exam should be given conditional admissions to practice with "progressive" law licenses that place limitations on, say, the degree to which legal advice can be dispensed to individuals. Lawyers who hold progressive licences would be equivalent to "interns" who've graduated from medical

school but haven't yet achieved full "doctor" status. Passing a future bar exam (or a superior procedure; see below) would be sufficient to convert these "lawyer learner permits" to full law licences. (Also check out the Institute for the Advancement of the American Legal System's thoughtful discussions of [new lawyer licensing options](#) and [lawyer competence assessment](#).)

## **7. Incentivize new lawyer hiring.**

Governments should encourage law firms to keep hiring new law graduates by making the salaries paid to these new lawyers entirely tax-deductible for as long as the crisis lasts. Large firms can go further and split the costs (and the tax benefits) of new lawyer hiring with corporate clients, where the new hires can spend half their time. Governments should also order suspension of repayments of all student loans for this cohort of graduates, and should issue partial loan forgiveness for graduates who enter public service or who move to smaller or rural locations to practise law.

These are seven short-term steps that all the participants in the lawyer development process can take right now and over the next 18-24 months to help us through this crisis. But these measures are by nature temporary, or at best transitional as we start shifting towards a new lawyer formation regime.

Just as we're buying time by keeping the crippled court system functioning until we can build better justice institutions and procedures, so too the foregoing measures will help keep the "lawyer pipeline" going through the emergency while we develop something better to replace it. That's what I consider in the next post in this series, "Lawyer formation re-engineered."

## **III Lawyer formation re-engineered**

The pandemic is accelerating and accentuating all the trends that were already going to bring the existing system to a grinding halt. Less than eight months ago, I wrote here at Law21 about [how the lawyer development system is breaking down](#) and how we could replace it with something better.

I posited that the system would break down because law firms would hire fewer and fewer new lawyers and would thus remove themselves from their longtime de facto role as "on-the-job lawyer trainers," with knock-on effects throughout the pipeline. Legal regulators, I wrote, need to assert control over the lawyer development process in their jurisdiction: Education, training, licensing, and ongoing competence assessment all need to be carried out under unified supervision and against a comprehensive, authoritative vision for creating competent, confident lawyers to serve clients and society.



A process that I thought last August would unfold over the course of years is now happening in weeks. So I'd like to recommend that post for your review, and to use it as a launching point for the following proposal for reinventing lawyer formation in the post-pandemic era, whenever that arrives.

To make this change possible, we have to stop thinking of lawyer formation in terms of the organizations we've allowed to handle different segments of lawyer development -- law schools, bar admission entities, law firms -- and start thinking in terms of, from the perspective of, *the lawyers we are helping to form*. We need to figure out what lawyers actually need, in terms of structured instruction and supervised experience, in their first 10 years in the legal community, and only then turn our minds to which sorts of entities are best positioned to provide it.

Right now, out there working on ways to rethink and re-engineer lawyer formation are many very smart people with extensive experience in legal education. I fall into neither of those categories; nonetheless, I'd like to submit for your consideration this rough breakdown of the three elements lawyers need during their formative years.

**1. Education in core legal principles.** What are the foundational building blocks of law? Before a student learns the first thing about the rules of evidence or the standards of contributory negligence or what makes a will valid, they first need to know the essential elements of law and the benefits it offers to society. These include:

- underlying **principles** of law (fairness, due process, precedent, the rule of law, etc.)
- essential **features** of law (rights, obligations, remedies, solutions -- recall the consumer legal hub)
- key **manifestations** of law in society (procedures, guarantees, title, disputes and their resolution)

Law is not a trade, and law school is not a trade school. There's a role for what we think of as "traditional legal education," and this is it. But it does not involve textbooks and lectures and exams in "Contracts" or "Land Transactions" or "Tax" or any other "practice area" course. It involves, yes, "thinking like a lawyer," but more importantly, understanding why we have law and why we have lawyers -- the benefits they provide in terms of social stability, inter-personal reliability, individual dignity and collective responsibility.

This segment of the process is best administered in person, a group of novices learning together under the guidance of experienced educators, in order to help with socialization of new lawyers and the building of networks. Examples should be drawn from all the standard "practice areas" to illustrate points about precedents and obligations and guarantees. By the time you finish this segment, you know the "why" and "how" of law; only then would you dive deeply into the specific "what."



**2. Knowledge of legal subject matter.** While this might look like all those substantive "practice area" courses from law school, there are a couple of key differences. One is that these courses should be learned mostly online, through recorded video instruction and the completion of various "modules" that could consist of dozens or even hundreds of units, depending on how much of a specialty a student wanted to develop.

Assessment of a student's learning would be conducted by expert practitioners in each area authorized by regulators to test students as soon as they wish to be certified as having completed the course. Completing and "passing" 20 modules would give you a basic grounding; 40 would make you moderately informed; 100 could make you a budding expert.

The second difference is that there would be *no mandatory courses*. I recognize this is controversial, and you might protest that there are some things "every lawyer should know." In terms of professional identity and responsibility, I agree, and these are covered in the third section. But in terms of subject-area knowledge, I disagree. We need to stop forcing students to spend the first precious years of their lawyer formation learning about areas of the law they will never use. A highly specialized legal market needs equally specialized lawyers who learn continuously and fluidly throughout their careers.

Under this proposal, nothing would prevent a lawyer who, having completed and been certified in employment law, from changing their career plans and completing a course in patent law. The lawyer's "classmates" at any given time would encompass a broad range of novice learners and experienced practitioners, producing a far more diverse, dynamic and collaborative learning environment. "Law school" should not be a place where you spend the first three years of your career and never return; it should be a lifelong learning resource -- what CLE should have been, but never became.

We need to stop using the legal education system to satisfy our antiquated vision of a profession filled with Atticus Finches, and instead empower law students to build the types of legal careers they want to lead and serve the parts of society they want to serve in a rapidly changing world.

**3. Skills and standards of a lawyer.** This is the part of the lawyer development process that many veteran practitioners refer to as "the real world." I draw no hierarchical distinctions regarding whether these subjects are superior to any others. But here is where you'll find subjects such as:

- professional identity
- legal ethics
- professional conduct
- character and integrity
- personal empathy
- customer service

- business fundamentals
- workflow management
- financial literacy
- project management, and
- cultural competence.

Through a combination of in-person and online education, learners acquire mastery of these subjects and the practical realities of their application. Just as importantly, they will be given the chance to test these skills and this knowledge, either in three- to four-month work placement opportunities in the private and public sector, or in virtual classrooms and simulated law firms.

Does that last part sound too far-fetched? It's already happening, right now. Check out the Practice Readiness Education Program provided by the Canadian Center for Professional Legal Education, which is now substituting for the bar exam process in Alberta, Saskatchewan, Manitoba, and Nova Scotia. Also check out the Law Practice Program already well-established in Ontario. I'm confident that Canadian regulators will soon convert their articling requirement to completion of the PREP, LPP, or similar programs. Other countries should study and adapt these innovative and timely new-lawyer-competence assessment methods.

A couple of things to make clear here:

(a) This third category of learning can take place contemporaneous with the second category. Our current system teaches students knowledge of a legal subject area, and then years later, exposes them to the practical implementation of it. That's a needless disconnect. Students should be encouraged to learn how to be a lawyer in practice at the same time as learning how to be a lawyer in theory. (Integrated courses that combine items in the second and third categories could be considered.)

(b) This third category is not exclusive to the private practice of law. To be "a lawyer" is not the same as serving multiple different clients on a serial basis in the private sector. Corporate counsel, public-sector counsel, and public-interest counsel are all lawyers. This third category should provide both instruction and experience in all these different dimensions of being a lawyer (and especially in ethics and professional responsibility, which currently is taught 95% from the perspective of private practice). Among the many shortcomings of our current lawyer development system is that "private-practice lawyer" is the default setting. That needs to change.

*These are my suggestions for rethinking, re-engineering, and reunifying the lawyer formation process. Comments are welcome.*