

**MINNESOTA BOARD OF LAW EXAMINERS**  
**COMPREHENSIVE COMPETENCY STUDY**  
**Report and Recommendations**

**Dated: June 1, 2023**

**Minnesota Board of Law Examiners**

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## Introduction and Summary:

Since June 2021, the Minnesota Board of Law Examiners (Board) has been engaged in a comprehensive study of the Minnesota bar examination, including alternative approaches for evaluating the competency of applicants to the Minnesota bar. On June 22, 2021, the Board publicly announced its plans to commence a two-year study and advised that it would file a report and recommendation with the Minnesota Supreme Court no later than June 1, 2023.<sup>1</sup> The primary objective of the Board when commencing the study was to determine whether the Board should recommend to the Court that Minnesota remain a Uniform Bar Examination (UBE) jurisdiction after the current version of the examination sunsets. Implementation of the next generation of the examination (hereinafter referred to as “NextGen”) is scheduled for July 2026.<sup>2</sup> The National Conference of Bar Examiners (NCBE) anticipates sunsetting the current version of the exam sometime in the next five years.

The Board also determined that it would be important to examine what alternatives existed to administering the NextGen and whether those alternatives might be equal or better measurements of attorney competence. Finally, the Board also considered whether an independent assessment of minimum competence is necessary. In other words, is it necessary to require a bar examination to further the Board’s purpose of ensuring that those admitted have the necessary competence to “justify the trust and confidence that clients, the public, the legal system, and the legal profession place in lawyers”?

The Board has sought broad stakeholder input, carefully considered the future of the examination, and reviewed possible alternatives. In guiding its work, the Board has examined the prospective changes to the examination, critiques of the current exam, challenges identified by recent examinees and prospective examinees, impact of recommendations on law school curriculum, portability of examination scores, available resources, equity considerations, and diversity of the Minnesota bar.

The Board began this study on its own initiative pursuant to Rule 3B of the Rules for Admission to the Bar, with the Court’s knowledge and support.<sup>3</sup> The Board’s initial discussions began in 2018 following the creation of the NCBE’s Testing Task Force, and intensified following the Testing Task Force’s release of recommendations for the next generation of the bar examination in January 2021.<sup>4</sup> The Board’s work considered concerns raised by recent graduates, including the class of 2020, who graduated during a global pandemic and period of racial reckoning. Their voices amplified critiques of the existing regulatory processes and called on courts, regulators, and bar examiners to critically review the existing pathways to licensure. The Minnesota State Bar Association (MSBA) further called upon the membership of the bar to carefully reimagine the

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<sup>1</sup> <https://www.ble.mn.gov/wp-content/uploads/2021/06/Public-Notice-June-21-2021.pdf> (last visited 5/12/23)

<sup>2</sup> <https://nextgenbarexam.ncbex.org/about/implementation-timeline/> (last visited 5/28/23)

<sup>3</sup> Rule 3B of the Rules for Admission to the Bar outlines the authority of the Board of Law Examiners.

<sup>4</sup> <https://nextgenbarexam.ncbex.org/reports/final-report-of-the-ttf/> (last visited 5/12/23)

examination, and the MSBA has been an active and vital participant in the Board's process. The three Minnesota law schools have also been engaged participants in this process and the Board appreciates and recognizes the challenges unique to the law schools, with both the prospective changes to the examination as well as potential alternatives. Finally, the Board could not have accomplished this project without the Working Groups that were formed to study and make recommendations on this issue.

The Board recognizes that it is not the only entity that has studied this issue. In October 2021, after the Board had announced its study, the MSBA filed a Petition with the Court to form an independent Task Force to review this issue or, in the alternative, to expand the membership of the Board of Law Examiners. The Board did not take a position to either oppose or support the MSBA's Petition to create a Task Force. Instead, the Board provided the Court with information on the Board's current process and advised the Court that the Board stood ready to participate fully in any process to study this issue, whether created by the Board, the Court, or the MSBA.

In January 2022, the Court denied the MSBA's Petition. In its Order, the Court recognized that the "validity of a written examination as a tool to measure competency to practice law and promote our public protection objectives has been the subject of debate and study, including recently." It noted that it agreed with the MSBA that study of this issue was of the "utmost importance" and that "diversity of viewpoints, perspectives, and experiences must inform the Board's work." It also recognized that the Board is responsible for implementing measures to ensure competence. In determining the standards for competence, the Court noted that Minnesota "must account for diversity in age, ethnicity, gender, geographic location, and practices of the applicants and the clients who rely on Minnesota lawyers for their legal needs." The Court indicated that it supported the work underway by the Board but that nothing the Court stated in its denial of the MSBA's Petition should "discourage the MSBA or other interested bar associations and legal practice organizations from separately evaluating Minnesota's methods for licensure or alternative pathways to licensure." The Court encouraged the deepest and broadest look into these issues by the Board or by any interested party. Contemporaneous with the issuance of the Order, the Board brought together diverse Working Groups to consider and review this issue and provide reports. These Working Groups included participants suggested by the MSBA. The MSBA also funded an outside consultant to facilitate two July 2022 listening sessions and two December 2022 listening sessions to solicit input on this issue.

Throughout the process, the Board has been mindful that achieving its purpose of ensuring those who are admitted have the necessary competence and character to justify the trust and confidence that clients, the public, the legal system, and the legal profession place in lawyers does not simply mean maintaining status quo. Instead, the Board has sought broad input, invited feedback at multiple steps of the process, and reviewed the issue with an open mind. The following report summarizes the work that the Board has engaged in over the last two years and the [Board's recommendations](#).

## History:

Before looking to the future, the Board looked to the past. To be admitted to the Minnesota bar an applicant must meet two competency-related requirements: 1) satisfaction of the educational requirements outlined in Rule 4A(3)<sup>5</sup> and 2) passage of a bar examination or years of practice in a U.S. jurisdiction.<sup>6</sup>

Minnesota has a long history of administering some form of bar examination dating back to the creation of the Board and the promulgation of the first set of “Rules for the Examination and Admission of Attorneys” in 1891.<sup>7</sup> Between 1891 and 1921, provisions existed that allowed graduates of the college of law of the state university to be admitted without examination within a specified number of years in lieu of examination.<sup>8</sup> Admission of lawyers based on graduation from law school instead of examination has been commonly referred to as a “diploma privilege.” Applicants not graduating from an approved in state law school were required to take an examination, both oral and written. Based on the records in the Board’s office, this examination appears to have consisted of two days of written examination and one day of oral examination before the Board. During this same time period, Minnesota permitted admission through apprenticeship in a law firm followed by an examination instead of attendance at law school. After a specified period of law office study, applicants were eligible to sit for the bar.

Since 1921, applicants seeking admission to practice law in the state of Minnesota have been required to pass some form of examination administered by the Board. In 1941, Minnesota amended the Rules to require graduation from an American Bar Association (ABA)-accredited law school as a prerequisite for sitting for the examination.<sup>9</sup>

The current case law in Minnesota indicates that a determination by the Court to deviate from the requirement of an examination requires careful consideration. In *In re Dolan*,

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<sup>5</sup> The Board received three comments during this process related to this first prong, which is not the subject of this current study. (See footnote 4 to November 14, 2022 Public Notice advising that the Board continues to study Rule 4A(3) separate from this issue and that the Board welcomes feedback and proposals for future consideration.) Two comments raised the issue of the ABA-accreditation requirement: one related to foreign educated graduates with LL.M. degrees; one related to graduates of state accredited U. S. law schools. The Board also received during this period a request from the State of Washington to consider allowing transfer of lawyers admitted under their Law Clerk Program, an affordable alternative to law school similar to apprenticeship. These comments have been provided to the Board’s Rules Committee that continues to study the issue of educational pathways for foreign educated graduates, U.S. graduates of non-ABA accredited law schools, and law office study.

<sup>6</sup> Applicants admitted based on years of practice have typically taken a bar examination prior to practicing; Minnesota does not preclude applicants admitted to another jurisdiction without sitting for an examination from admission based on years of practice under Rule 7A.

<sup>7</sup><https://www.mncourts.gov/mncourtsgov/media/AdministrativeFileArchive/Board%20of%20Law%20Examiners%20C5-84-2139/1891-May-29-Atty-Exam-Adm-Rls.pdf>;

<sup>8</sup> Id; Chapter 35 § 2279; <https://www.revisor.mn.gov/statutes/1905/cite/35/pdf>; [1925-07-15-Atty-Exam-Adm-Rls.pdf \(mncourts.gov\)](https://www.revisor.mn.gov/laws/1921/0/Session+Law/Chapter/161/pdf); <https://www.revisor.mn.gov/laws/1921/0/Session+Law/Chapter/161/pdf>; <https://www.mncourts.gov/mncourtsgov/media/AdministrativeFileArchive/Board%20of%20Law%20Examiners%20C5-84-2139/1925-07-15-Atty-Exam-Adm-Rls.pdf>

<sup>9</sup> Recent Rule changes have broadened permitted educational avenues.

the Minnesota Supreme Court stated that “[t]he standard for admission to the bar of this state has long been the passage of a written bar examination and graduation...from a law school which is approved, provisionally or fully, by the American Bar Association.” *In re Dolan*, 445 N.W.2d 553, 554 (1989). In *In re Dolan*, the Court stated that the determination to grant a waiver would “not be lightly made” and would “depend on, among other things, the demonstrated competence of the applicant in the years of practice following law school.” 445 N.W.2d 553 at 557 (Minn. 1989).

## **Overview of the National Conference of Bar Examiners Examination Revisions:**

In January 2018, the NCBE appointed a Testing Task Force to retain outside consultants to undertake a comprehensive three-year study of the Uniform Bar Examination (UBE). The purpose of the NCBE’s study was to ensure that the bar examination appropriately tests skills new lawyers are expected to have and knowledge new lawyers are expected to know. In Phase 1 of the NCBE’s study, ACS Ventures, LLC, a psychometric consulting firm, facilitated listening sessions that took place between November 2018 and June 2019.<sup>10</sup> ACS Ventures asked participants for feedback on various topics, including:

- What parts of Multistate Professional Responsibility Exam (MPRE) and bar examination should be retained?
- What parts should be dropped or modified?
- What should the next generation of the exam look like?
- What cautions should be shared regarding changes?
- Any other information individuals wished to provide

The listening sessions identified the following themes:<sup>11</sup>

- The Multi-state Performance Test (MPT) is a strength<sup>12</sup>
- The Multi-state Bar Examination (MBE) tests appropriate core content, but tests too deeply
- The test needs to place a higher emphasis on skills and research and should test understanding versus memorization
- Constructed-response items are favored over multiple-choice
- Simulated cases could provide a more realistic assessment

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<sup>10</sup> Focus groups included: Conference of Bar Admission Administrators Fall 2018 Meeting; the Association of American Law Schools 2019 Annual Meeting; the 2019 UBE Jurisdiction Forum; the 2019 ABA Midyear Meeting; a 2019 LSAC/NCBE Legal Educators Conference; the 2019 NCBE Annual Bar Admissions Conference; the 2019 ABA Diversity and Inclusion Center and Pipeline Council; the 2019 Association of Academic Support Educators Conference; the 2019 ABA Deans Workshop; and a meeting in June 2019 of the ABA Young Lawyers Division.

<sup>11</sup> The full Phase 1 report is available here: <https://nextgenbarexam.ncbex.org/reports/phase-1-report/> (last visited May 28, 2023)

<sup>12</sup> An overview of the current exam is attached as **Appendix J**.

- There should be more consistency between UBE jurisdictions in what score is required to pass<sup>13</sup>
- A focus should be placed on evaluating the impact of exam on underrepresented populations
- The cost of taking the examination should be kept reasonable
- More time should be allowed to respond to questions; the exam should assess knowledge, not speed

In Phase 2, the Testing Task Force developed a practice analysis survey to collect data on skills and knowledge necessary for newly licensed lawyers and distributed the survey nationally with the assistance of state bar associations and boards of law examiners.<sup>14</sup> 14,848 lawyers completed the survey, including 3,153 newly licensed lawyers and 11,693 non-newly licensed lawyers. In Minnesota, the Court authorized the Board to send the survey link to all active status lawyers and the MSBA assisted by distributing the survey link in their weekly newsletter. 803 Minnesota licensed lawyers completed the survey (5.7% of the responses received). The NCBE also compared the top ranked knowledge areas to a similar practice analysis conducted in 2012.

	2019 Rank	2012 Rank
Rules of Prof. Resp.	1	8
Civil Procedure	2	1
Contract Law	3	10
Rules of Evidence	4	3
Legal Research	5	5
Statute of Limitations	6	6
Local Court Rules	7	N/A
Statutory Interpretation	8	7
Sources of Law	9	N/A
Tort Law	10	11

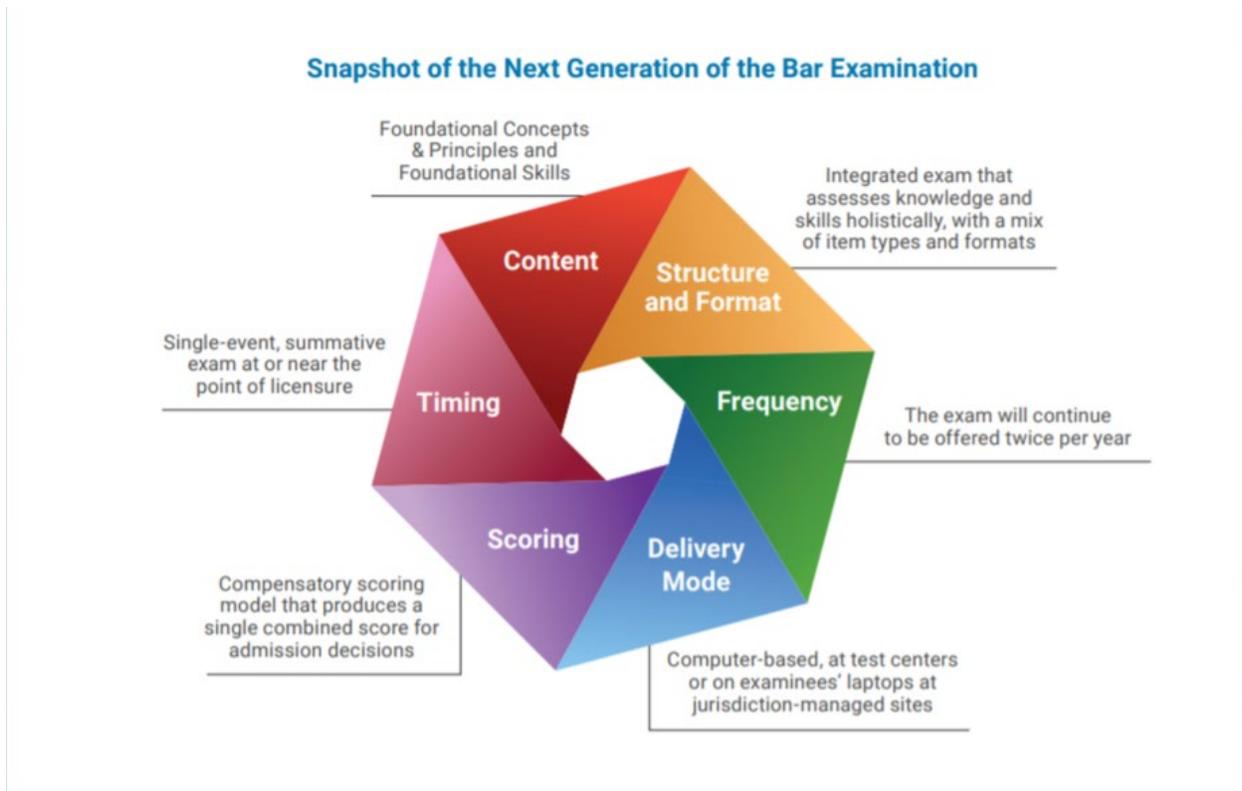
The practice analysis also identified that newly licensed lawyers should be able to research secondary authorities, schedule meetings, negotiate or facilitate resolutions, research administrative regulations, rules, and decisional law, identify issues, inform clients about the status of matters, consult with colleagues, research statutory and constitutional authority, develop strategy, and interview clients and witnesses.

<sup>13</sup> At the time of the focus groups, the passing score range was 260 to 280. The current score range is 260 to 273. Minnesota's current passing score is 260. <https://www.ncbex.org/exams/ube/score-portability/minimum-scores/> (last visited May 28, 2023)

<sup>14</sup> <https://nextgenbarexam.ncbex.org/reports/phase-2-report/> (last visited May 28, 2023)

In Phase 3<sup>15</sup> of the Testing Task Force’s study, a Blueprint Development Committee (BDC) recommended seven skill domains, 103 representative tasks, and 11 knowledge areas for testing and determined the test should be 30-40% skills and 60-70% knowledge.<sup>16</sup> A separate Test Design Committee (TDC) analyzed the structure, assessment methods, administration, score interpretation, accessibility, and fairness.<sup>17</sup>

Based on their assessments, the NCBE provided the following snapshot of the Next Generation of the Bar Examination:<sup>18</sup>



The Testing Task Force next turned the project over to an Implementation Committee to design the exam. The Implementation Committee’s work is still ongoing, but their charge is to: develop the content specifications identifying scope of coverage, draft new types of questions for integrated testing of knowledge and skills, ensure accessibility for candidates with disabilities, and conduct analysis to ensure fairness for diverse populations of candidates. They are also engaged in field-testing new item formats and

<sup>15</sup> <https://nextgenbarexam.ncbex.org/reports/phase-3-report/> (last visited May 28, 2023)

<sup>16</sup> The BDC included 17 practicing lawyers from 13 jurisdictions; 14 were female and 10 were people of color.

<sup>17</sup> The TDC included 11 educators, 9 bar examiners, 6 bar administrators, and 2 Justices. 10 of the panelists were female and 7 were people of color.

<sup>18</sup> <https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Next-Gen-Bar-Exam-Recommendations.pdf> (last visited May 28, 2023)

new exam content, pre-testing examinations on a diverse pool of potential examinees, establishing the scoring processes and psychometric methods for equating and scaling scores, and developing test administration policies and procedures. At some point in the future, the Implementation Committee will also assist jurisdictions with score setting exercises to determine the appropriate passing score on the new exam and provide study materials and sample test questions to help candidates prepare.<sup>19</sup>

Overall, the biggest changes to the examination will be:

- the separate testing components (MEE, MPT, and MBE) will no longer be test products available for jurisdictions to purchase; instead, the examination components will be integrated;
- the revised test will have a heavier focus on skills;
- family law, trusts and estates, and secured transactions will no longer be tested; and
- the subject matter being tested will be focused on core issues rather than deeper knowledge of a subject area.

The NCBE anticipates that the first administration of the NextGen will be in July 2026. While the NCBE will continue to make available the UBE materials for a period of time, it will be limited as the creation of testing materials for two different examinations is not sustainable long term. Accordingly, Minnesota will need to move to the NextGen or find an alternative.

Following its receipt of the Testing Task Force report and recommendations, the Board began its own study to assess this and related issues.

### **Overview of Study Process:**

The Board has carefully and methodically studied this issue, sought broad input, and discussed at length the impact of the ultimate recommendations. The process had five phases, which will all be discussed in greater detail below.

- Phase 1: Initial public notice in June 2021, followed by four public meetings of the Minnesota Board of Law Examiners' Competency Committee in the Fall of 2021 that focused on setting the framework of the analysis, foundational work, opportunity for public comment, meeting with the Minnesota law schools, and hearing from experts.
- Phase 2: Creation of the Working Groups comprised of broad stakeholder involvement, development of baseline criteria for evaluation, Working Group meetings, and publication of the Working Group reports in June 2022.
- Phase 3: Discussions with the Bar Admissions Advisory Committee (BAAC) in June 2022, two public listening sessions in July, and discussion by the Board.

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<sup>19</sup> As will be discussed further in the recommendations, the Implementation Committee is still finalizing the process and timing for determining the score on the next examination as of the date of this report. Updates will be provided to the Court as the Board learns additional information.

- Phase 4: Issuance of the Board’s preliminary determinations in November 2022, two public listening sessions in December 2022, and continued request for written feedback.
- Phase 5: Issuance of the Board’s draft recommendations and request for further written input on or before May 1, 2023, for incorporation into the Board’s June 1, 2023, Report and Recommendations.

### **Phase 1: Initial Public Notice and Fall Meetings:**

On June 21, 2021, the Board issued a public notice outlining the scope of the Board’s two-year study and inviting written comment and opportunity to present.<sup>20</sup> The public notice provided information on the current UBE and outlined the comprehensive process the NCBE had followed in appointing a Testing Task Force to retain outside consultants to undertake a comprehensive, three-year study. The public notice advised that the NCBE’s study had determined that the NextGen will:

- test foundational concepts and principles and foundational skills;
- be an integrated examination that assesses knowledge and skills holistically;
- continue to be offered twice per year;
- be computer-based at a centralized testing location;
- produce a single combined score and that scoring will be compensatory (meaning that a strong performance on one part of the exam can balance a weak performance on another section); and
- be given at or near the point of licensure.

The notice also provided information related to the impact of the changes on Minnesota as discussed in the above section.

On September 14, 2021, the Board posted notice of the four meeting dates for the fall sessions, advised that a portion of three of the meetings would be allocated for public comment, and advised that the Board continued to welcome written comments.<sup>21</sup> The Board also created a link on the home page on the Board’s website to make the materials easier to access and broadly circulated notice.<sup>22</sup> The agendas for the meetings and the Zoom links to attend were published to the Board’s website in advance of the meetings, and parties that had expressed interest in the matter were provided instructions as to how to access the materials on the Board’s website. Minutes of the meetings were posted following the meetings.

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<sup>20</sup> <https://www.ble.mn.gov/wp-content/uploads/2021/06/Public-Notice-June-21-2021.pdf> (last visited May 28, 2023)

<sup>21</sup> <https://www.ble.mn.gov/minnesota-board-of-law-examiners-committee-sets-first-four-meeting-dates/> (last visited May 28, 2023)

<sup>22</sup> See <https://www.ble.mn.gov/> linking to <https://www.ble.mn.gov/bar-exam/competency-study-2021-to-2023/> (last visited May 28, 2023)

## Fall Meeting 1: September 21, 2021

On September 21, 2021, the Committee held its first public meeting. During the meeting, the Committee discussed the general purpose of the study and advised that it planned to be as transparent as possible during the process. The Board reviewed the timeline for the project, the tentative agendas for the next three meetings, the framework for the process, and discussed stakeholders that should be consulted in the review and how to involve those stakeholders in the project. Materials were provided to the Committee on a similar process that Oregon had just completed.<sup>23</sup> The framework for the Board's analysis and the questions that the Board sought to answer during this process is attached as **Appendix A**.

The stakeholder groups that the Board identified during this initial discussion included:

- New lawyers (up to the first 10 years of practice and in diverse practice settings)
- Law students from each of the Minnesota law schools
- Representatives from each of the Minnesota law schools
- Legal employers (including representation from metropolitan employers and greater Minnesota; private and public employers; small and large employers; etc.)
- Judiciary
- Public and lawyer members of the Minnesota Board of Law Examiners, the Board of Professional Responsibility, and the Client Security Board Consumer protection groups
- Clients and prospective clients, including from those communities that are traditionally underrepresented in the practice of law
- Minnesota State Bar Association members (both BAAC representatives and other identified by MSBA leadership)
- Affinity Bars, including representation from organizations comprised of traditionally underrepresented categories of lawyers
- Any other interest group identified during the information gathering process

## Fall Meeting 2: October 6, 2021

The Committee next met on October 6, 2021, and heard from Professor Carol Chomsky, who reviewed an updated timeline for the Next Generation Exam, and briefly discussed similar projects being undertaken in other jurisdictions.

Professor Chomsky discussed three topics: 1) what minimum competence means, including the national study conducted by the Institute for the Advancement of the American Legal System (IAALS); 2) what she sees as deficiencies in the current exam and how to create a better exam, including reference to the NextGen and the plans of the

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<sup>23</sup> The Agenda, Minutes, and Meeting materials are available at <https://www.ble.mn.gov/bar-exam/competency-study-2021-to-2023/> (last visited May 28, 2023)

NCBE; and 3) alternative pathways for licensure that have been proposed or suggested (not as a replacement to the exam but as an alternative to the exam).

Professor Chomsky discussed the nationwide practice analysis conducted by IAALS that included 50 focus groups in 18 locations (noting that five focus groups took place in Minnesota).<sup>24</sup> The focus groups consisted of new lawyers and those who supervised new lawyers. The researcher's findings included the following:

- Many new lawyers engage directly with clients with very little supervision.
- New lawyers need more training on how to communicate with clients to solicit the information needed to represent the client effectively; new lawyers also need better training to know what information they need to solicit.
- Lawyering skills matter more than doctrinal knowledge. (Focus group participants learned a lot by trial and error.)
- New lawyers do not rely on memorization.
- New lawyers rely on recognizing threshold concepts and then looking up the specific information.
- Care and preparation matters more than speed.

Based on the study, IAALS developed twelve building blocks of interlocking competencies that newly licensed lawyers should possess:

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

Professor Chomsky noted that in her opinion, the current written examination tested only 5 of the 12 building blocks. It is missing key components such as interviewing clients and conducting research. Additionally, the exam asks examinees to remember the law instead of understanding the law. The multiple-choice questions require significant ability to recall. The current exam also asks that applicants memorize rules with exceptions to exceptions and requires that applicants respond quickly.

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<sup>24</sup> See also, The Twelve Building Blocks of Minimum Competence, published October 28, 2020, available at [https://iaals.du.edu/sites/default/files/documents/publications/building\\_a\\_better\\_bar.pdf](https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf) (last visited May 11, 2023)

Professor Chomsky recommended that the Board continue to keep a focus on the questions and provide pressure to the NCBE to reflect on the concerns that have been raised as it continues studying this issue. The NCBE has noted that the NextGen will test fewer subjects and focus on threshold concepts, which is good, but more detailed subject matter outlines on what is tested are important. She also stated that she would discourage multiple choice questions as they are least effective to replicate what lawyers do, increase testing the ability to conduct research, eliminate harsh time limits, and provide for an open book format. Professor Chomsky also encouraged the Board to provide input into how the ultimate cut score would be determined on an integrated examination, noting that Minnesota has done a good job of setting a reasonable cut score (unlike California).

The Board could also propose alternative pathways to the examination. She noted that the Daniel Webster Scholars Program in New Hampshire provides a strong curriculum, but is resource heavy. Another route is a clinical pathway during law school where students could participate in a specific number of supervised clinical hours. Supervised practice following graduation could be a third route. Portfolios could be reviewed following rubrics or standards on what must be certified.

During the discussion that followed Professor Chomsky's presentation, the Committee discussed that portability of scores was not part of the IAALS study, and that the Committee would want to consider whether any proposed alternative would create challenges for portability. The Committee also discussed the importance of law school participation in this process. Uniform standards will be important as it will be challenging to appropriately evaluate candidates without those.

At the conclusion of Professor Chomsky's presentation and the Committee's discussion, the Committee briefly discussed updates to the NextGen's Implementation timelines, and an overview of the discussions currently taking place in California, Georgia, Utah, New York, Oregon, and Washington State.

### Fall Meeting 3: November 8, 2021

On November 8, 2021, the Committee met with representatives from the three Minnesota law schools. The Committee reviewed the ABA accreditation standards, specifically Chapters 3 (Program of Legal Education) and 5 (Admissions).<sup>25</sup>

The ABA's accreditation standards for programs of legal education include:

- At least two credits in professional responsibility;
- One or more experiential component of at least six credits;
- A legal writing course in the first year and a legal writing course in a subsequent year;

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<sup>25</sup>See also 2022-2023 Standards and Rules for Approval of Law Schools for further information. [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2022-2023/2022-2023-standards-and-rules-of-procedure.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2022-2023/2022-2023-standards-and-rules-of-procedure.pdf) (last visited 5/11/23)

- 83 credit hours of instruction, of which 64 must be “in regularly scheduled classroom sessions or direct faculty instruction” (Standard 311a); and
- “At least 75 percent of a law school’s graduates in a calendar year who sat for a bar examination must have passed a bar examination within two years of their date of graduation.” (Standard 316)

The ABA standards do not require a specific course curriculum. Each law school sets its own academic requirements. The Committee reviewed the academic requirements for each of the Minnesota law schools as part of the materials for the meeting.<sup>26</sup> While there are not specific ABA requirements for courses, most first-year programs included courses in subjects tested on the bar exam, including civil procedure, contracts, torts, constitutional law, criminal law, and property, as well as courses in legal writing and lawyering skills.

Chapter 5 of the ABA Standards sets out the standards for admissions and student services for ABA-Accredited Law Schools. Included in the provisions is a requirement that law schools only admit “applicants who appear capable of satisfactorily completing its program of legal education and being admitted to the bar.”

The Committee discussed with the law schools an overview of licensure models, ranging from the bar examination to Wisconsin’s model of requiring certain courses while in law school and then granting in-state students who satisfactorily complete the program and meet its requirements licensure upon graduation and character and fitness review. The Committee also discussed pre-graduation and post-graduation apprenticeships with portfolio components. The Committee discussed that with the wide range of possibilities and the significant impact of any proposed change to the law schools, the law schools were a significant stakeholder in this process and the Board sought information about any factors or criteria the schools wanted the Working Groups and Board to consider when making recommendations to the Court.

Representatives from the law schools acknowledged that this is not an easy issue and encouraged the Board to consider both the aggregate data as well as individual stories. It is important to have accountability and standards, but also important that the Board takes seriously its obligations as the gate keeper and to ensure that the mechanisms in place are aligned with protecting the public and not just a reflection of how we have done this in the past. The Board should be intentionally proactive on this issue and come to the discussions with a frame of mind of engaging these questions. The current approaches have some costs at the systemic level and personal level. The law schools discussed the current programs in place on professional formation as well as the clinical offerings. The mental health and well-being of applicants should be a consideration. The law schools also noted that the Board should consider whether the exam provides the Board with sufficient information to determine whether applicants are capable of serving clients. The law schools expressed interest in the experiential learning models that were part of Oregon’s proposal and noted that COVID highlighted some of the inequities of the current

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<sup>26</sup> The current Academic Requirements for the Minnesota law schools are attached as **Appendix B**.

examination and the cost (both mental and financial) of studying for and preparing for the current examination.

During the discussion, concern was expressed that with the exam, one either passes or fails, and if one fails, one must wait months to retake the exam. With a capstone type program, one is receiving frequent feedback that can be utilized to improve. Participants noted the significance of the voices of the newest lawyers who had just completed the process and the importance of public protection, and recognized that there are many viewpoints in this process. A concern was raised that requiring mandatory mentorship or apprenticeship might exclude the same individuals from the process that the current process excludes and that the Board should be mindful of that potential outcome in examining this issue. Individuals with diverse backgrounds who are first generation lawyers may need additional assistance finding quality mentors. The law schools agreed that the mentorship program is resource intensive.

The participants discussed that 20% of the applicants who sit for the Minnesota bar in Minnesota are from out of state. Additionally, Mitchell Hamline advised that the online/hybrid program is comprised of roughly 20% in-state students, compared to their in-person programs, which are 80% in-state.

The participants discussed that adding additional options did not necessarily mean eliminating the examination as an option. The examination allows for portability to other jurisdictions and for some applicants may be the best pathway to licensure. Additional discussion took place on the importance of educating the public should an alternative option be proposed and that the program would need to be designed in a way that would lend itself to public trust. The Board's purpose is to protect the public; the public also needs to have confidence that lawyers are competent. Perception is important, but managing perception is also important.

Following the discussion with the law schools, the Committee reviewed the substance of two comments that had been received on this issue. One individual noted that he was a Native American who did not pass the bar on his first attempt. He strongly opposed eliminating the bar exam. The other correspondence provided a thoughtful reflection of the commenter's experience in not passing the bar on the first attempt and suggested that seeking out comments directly from those who did not pass as to their experience would provide the Board with very helpful insights into the process. The Committee discussed that the second submission contained a helpful summary of some of the risk factors in determining passage and challenges of the bar examination.<sup>27</sup>

#### Fall Meeting 4: December 8, 2021

The fourth meeting took place on December 8, 2021. The Board heard testimony from Daniel Stein, a May 2021 Yale graduate who sat for the July 2021 bar examination. He stated that he supported consideration of alternative pathways. He asked the Committee

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<sup>27</sup> The first comment is available for review at the Board offices. The second commenter asked that the comments be summarized and not part of the public record.

to consider whether the current exam is a test of resources or competence. He noted that he had prepared for the exam the same way that he would prepare for Jeopardy, that those who had the time to focus solely on the examination had an advantage, and that there is too much of an emphasis on memorization. He stated that he believes there are interpersonal, research-driven, and critical thinking skills that are more aligned with the kind of work lawyers do on a day-to-day basis.

Following the public comment period, Kellie Early from the NCBE presented on the upcoming changes to the bar examination. She noted that the guiding objectives for the NextGen include:

- Testing fewer subjects and less deeply within the subjects covered;
- Placing a greater emphasis on lawyering skills;
- Maintaining exam affordability;
- Ensuring fairness and accessibility for all candidates; and
- Maintaining score portability.

Ms. Early stated that the revised examination will test in 8 foundational topics: civil procedure, contract law, evidence, torts, business associations, constitutional law, criminal law, and real property. It will also focus on 7 foundational skills: legal research, legal writing, issue spotting and analysis, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, and client relationship and management. Ms. Early noted that the Content Scope Committee, comprised of 21 members from 16 jurisdictions, will be providing guidance to the Implementation Steering Committee regarding how broadly and deeply to test the doctrinal and skills areas. The Committee has representation from 15 law schools and includes 10 women and 11 men. The Committee is comprised of 12 White members, 5 Black members, 3 Latinx members, and 1 Asian member.

In looking at breadth of coverage, the Content Scope Committee has been asked to review:

- Frequency: does this come up often in entry-level practice?
- Universality: is this common to multiple practice areas?
- Risk: does ignorance of the topic create a significant risk of malpractice or poor client outcomes?

The Committee is also looking at depth of knowledge:

- Level 1 (general familiarity): newly licensed lawyers (NLLs) should be able to spot issues and work efficiently with legal resources
- Level 2 (detailed knowledge): NLLs should know the relevant details of the doctrine without consulting legal resources
- Factors to be considered: complexity of topic, context in which topic typically arises, and are the legal rules and rule components relatively stable and universal?

Dr. Danette McKinley, Director of Diversity, Fairness, and Inclusion Research for the NCBE, focused her discussion on fairness in testing. She advised that the NCBE follows the Standards for Educational and Psychological Testing that was last updated in 2014.<sup>28</sup>

Dr. McKinley provided the definition for testing in Professional and Occupational Credentialing:

Licensing requirements are imposed by federal, state and local governments to ensure that those who are licensed possess knowledge and skills in sufficient degree to perform important occupational activities safely and effectively.<sup>29</sup>

Dr. McKinley noted that test organizations focus on the following when looking at examination fairness:

- Test design, development, administration, and scoring;
- Validity of test score interpretations for intended uses from the intended examinee population;
- Accommodations to remove construct-irrelevant barriers; and
- Safeguards against inappropriate score interpretations and uses.

In test development, there is also the necessity to engage in sophisticated psychometric processes that include:

- Pilot and field testing including:
  - Multiple Choice Questions (MCQ's) and various constructed response (CR) formats;
  - Practice-based item sets;
  - Constructed response (rubric development and tryout); and
  - Subgroups analyses (gender, race)
- Score linking (equating) and scaling with the goal to have interchangeable scores across jurisdictions and over time.

Ultimately, a new examination will require a standard setting exercise to determine an appropriate passing score. Passing scores for the NextGen will be set at the jurisdiction level, similar to the process followed for UBE scores. The NCBE will facilitate standard setting exercises to assist jurisdictions and will incorporate empirical data into the standard-setting process. Ultimately, the standard setting will provide a range, and the jurisdictions will factor in policy considerations.

Participants asked Dr. McKinley if the NCBE has any data that might explain the disparities on the examination in light of all the safeguards for design that are taken and what the NCBE will be doing to address performance disparities of demographic groups in the NextGen. Dr. McKinley advised that research is ongoing, but an important factor may be access to resources.

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<sup>28</sup> <https://www.apa.org/science/programs/testing/standards> (Last visited May 11, 2023)

<sup>29</sup> *Id.* at 174.

The Committee concluded the meeting by briefly discussing the Working Group process and Phase II of the study.

## **Phase 2: Working Group Process**

The Working Group process began in January 2022 and continued through May 2022. The Board worked with the MSBA, the Minnesota law schools, and others to bring together a diverse group of perspectives to discuss this issue. In January 2022, the Board invited all interested parties to focus group discussions to talk about this issue and to frame up further questions for review. The January meeting resulted in the creation of baseline criteria to guide the process:

1. Ensure that members of the bar are worthy of public trust with regard to their professional competence.
2. Evaluate applicant's ability to satisfy the Essential Eligibility Requirements under Rule 5A of the Rules for Admission to the Bar, including:
  - an understanding of threshold knowledge in core subjects;
  - an understanding of legal processes and sources of law;
  - an ability to reason, recall complex factual information, and integrate that information with complex legal theories;
  - the ability to determine the importance of the information to the overall client matter;
  - the ability to communicate with a high degree of clarity and organization;
  - the ability to interact effectively with clients; and
  - the ability to conduct legal research.
3. Account for diversity in the age, race, ethnicity, gender, geographic location, and practices of applicants and the clients who rely on Minnesota lawyers for their legal needs.
4. Ensure equal access to the practice of law and work to eliminate inequitable barriers to the practice of law on the basis of socio-economic status, race, gender, disability status, etc.
5. Consider law student and lawyer well-being.
6. Evaluate feasibility in terms of scalability, flexibility, and costs and resources required for implementation: e.g., to applicants, law schools, administration, the bar, regulators, MBLE staff, etc.
7. Evaluate the ability of law schools to implement, the flexibility of curriculum and any ABA Accreditation concerns.
8. Review the reliability of standards to determine meaningful, objective, and consistent results.
9. Consider data regarding prior use of method/particular model.
10. Other considerations raised by key stakeholders.

The participants in the January session were invited to participate in one of three Working Groups to discuss the issues further and to provide the Board with reports. During the process, the Working Groups were encouraged to invite outside participation if the group identified relevant stakeholders or interested parties. Board members also participated.

Board staff helped facilitate the process, but the Working Groups primarily conducted their own research and review of the issues. The full membership of the Working Groups is attached as **Appendix C**.

The Working Groups were asked to look at the following issues:

1	In January 2021, the National Conference of Bar Examiners (NCBE) announced that as the result of a comprehensive three-year study, changes will be made to the bar examination. Implementation of these changes is anticipated to be in 2026. As a Uniform Bar Examination (UBE) jurisdiction, Minnesota is reviewing the recommendations put forth by the NCBE regarding the NextGen examination. As part of this study, Group 1 will look at the recommended changes as well as any critiques of the revised examination as one of the models of the bar examination method. The group will also consider whether Minnesota should consider a state specific component (versus testing general principles of law). We would also ask this group to discuss the long-standing history of the bar exam component to attorney licensure and its level of importance moving forward, including how it has evolved and the expectations as it moves forward.
2	Group 2 will undertake an in-depth review of potential models that focus on experiential or hands-on methods to licensure (e.g. apprenticeships) during law school. Components to consider when evaluating models utilizing this method include: use of portfolios to show progress, time commitment by law professors and law students, standard rubric for grading purposes, set baseline for law students to enter experiential program, etc. As part of this group’s work, we would ask Group 2 to also consider the “diploma privilege” method of licensure. When studying this method, the group will consider what an ABA degree means, in-state versus out-of-state law schools, and variations between law schools.
3	Group 3 will undertake an in-depth review of post-graduation, supervised practice with a Minnesota licensed attorney. During this review, the following components may be considered: number of supervision hours, documentation of progress, set standards or objectives for the adequate completion of supervision/program, how to verify that the individual is competent as a generalist and not just in one area of law, whether there is enough support in the legal community to provide a substantial number of practitioners to participate in this program each year, etc.

Because the Board is recommending changes consistent with the findings of Working Groups 1 and 2, this report will go into greater detail on their processes and their findings. Because the Board is not recommending adoption of Working Group 3’s recommendations at this time, this report will provide a brief summary and an explanation as to why the Board does not currently recommend the changes. The Board will rely on the full Working Group 3 report (attached as an Appendix) to provide further information to the Court should it wish to pursue that pathway at this time, and will focus on the aspects of Working Group 3’s report that are most relevant to implementing Working Group 2’s recommendations.

## Working Group 1:

Working Group 1, chaired by Wil Fluegel and David Schultz, met three times. The first session focused on methodology, identifying issues for further exploration, and whom it would be helpful to invite to present. The group discussed that the primary focus of Working Group 1's work would be to determine if the bar exam is still viable and if the changes that the NCBE will be making to the examination help, hurt, or maintain the current structure of the bar examination model. The group noted that it would be important to understand the critiques that have been offered for the existing exam, and the issue is complex.

During the second session, Margaret Fuller Corneille, former Director of the Minnesota Board of Law Examiners, who also served on the NCBE's Board of Trustees as well as several of its committees, presented the Working Group with an overview of the current examination and information on the history of the exam in Minnesota. The Working Group next heard from Kellie Early, Chief Strategy Officer of the NCBE, who updated Working Group 1 on NextGen activities. Ms. Early noted that the Content Scope Outlines had been published and that this was the first step in delineating what topics will be tested and what lawyering skills would be assessed. The Working Group then heard from Dr. Danette McKinley, who acknowledged that even by rigorously following test design that is fair, demographic disparities still exist. White examinees significantly outperform other groups across time. Socio-economic factors and opportunity for concentrated bar preparation may be factors affecting results, and equality of opportunity is a concern. The NCBE uses rigorous psychometric procedures to support the reliability and validity of scores. Educational experiences vary from law school to law school and how students are supported may impact results. The biggest concern is that so far, the procedures that have taken place have not helped identify actionable bias. New methods are being sought to detect bias, but item review alone will not be enough and there needs to be actionable research that can inform law schools and admission administrators on how to best interpret scores.

Working Group 1 discussed that with the changes coming from the NCBE, Minnesota will realistically have four choices:

1. Adopt the NextGen as at least one instrument to assess competence;
2. Create a test unique to Minnesota, which would incur cost and challenges associated with being a single jurisdiction exam, including the loss of score portability;
3. Augment the NextGen with Minnesota-centric supplemental testing to be devised and implemented by Minnesota; or
4. Eliminate any bar exam component and move to alternative pathways to admission only.

Ms. Corneille addressed the workability of Minnesota creating its own examination, noting the time and difficulty of researching the law and formulating unique examination questions on a semi-annual basis without repeating questions. Significant staff resources would be involved in exam creation. It would involve significant resources to appropriately

train graders. A state-specific examination could also undermine the ability of out-of-state graduates to come to Minnesota and pass the examination. She noted that state-specific law is appropriately addressed through continuing legal education courses.

Following the meeting, co-chair Wil Fluegel summarized for the Working Group the NextGen changes. This summary is contained in Working Group 1's report which is attached as **Appendix D**.

In the third session, the Working Group heard from Jacquelynn Rothstein, Director of the Wisconsin Board of Law Examiners, on the use of the diploma privilege in Wisconsin for graduates of Wisconsin's two law schools, the University of Wisconsin Law School and Marquette University Law School. To qualify, students are required to take a 90-credit core curriculum and obtain a minimum 2.0 GPA.<sup>30</sup> Ms. Rothstein noted that for diploma privilege to work, the law schools need to agree to admission standards, curriculum, and grading. There is a clear understanding of what the coursework is and what is required. The Court knows the respective faculties and deans, and are quite comfortable with the students that enroll and graduate. Applicants who did not attend a Wisconsin law school are required to sit for Wisconsin's examination.<sup>31</sup> (Wisconsin is not a UBE jurisdiction and tests on state-specific law on the essay portion of its exam; Wisconsin does use the MBE.) Ms. Rothstein noted that she is not aware of any differences in disciplinary matters between those admitted via diploma privilege and those admitted another way. The Working Group noted that Working Group 2 was also considering the diploma privilege in its work and would be reporting its findings.

Working Group 1 shared the following observations and recommendations with the Board based on its study:

1. The Working Group would like to see the NCBE do more to address racial disparities in the examination. Members of the group felt that the NCBE was not adequately addressing this issue. Group members did not feel that they had enough data to know if the disparities were intrinsic to the examination or caused by another reason.
2. Can a standardized test assess lawyering abilities? The Working Group discussed that law school does not necessarily prepare all law students for practice, but the bar exam does not accurately measure an ability to practice law. While the information presented by the NextGen is promising, it is difficult to see how it will measure professionalism. Further, the law schools will need to evaluate whether they will need to change their programs to prepare students for the NextGen.
3. The Working Group expressed concern that there is no competition. The Board does not have another vendor choice. The Working Group would like to see the

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<sup>30</sup> <https://www.wicourts.gov/sc/rules/chap40.pdf> (last visited May 28, 2023)

<sup>31</sup> In 2021, the Wisconsin Board of Bar Examiners received 423 applications for character and fitness certification from prospective graduates of the Wisconsin law schools. Wisconsin tested 206 examinees. 124 applicants were successful, an overall passage rate of 60%. <https://www.wicourts.gov/courts/offices/docs/bbe21.pdf> (last reviewed May 28, 2023) The score required to pass in Wisconsin is 258.

NCBE offer a free, online prep course for examinees to mitigate the cost to examinees who spend significant money purchasing bar preparation courses.

4. The Working Group is concerned that there is not more information on how the NextGen will be administered, particularly related to computer-based testing and testing accommodations. The Working Group also expressed concern that it was being asked to make a recommendation on an examination that has not yet been fully developed. However, the Working Group noted that the thorough, years-long design, the scientific design of the examination, and the efforts to limit bias by the NCBE in the creation of the exam were a good start. The Working Group noted that Minnesota does not have the time or resources to develop an examination with the same level of rigor that the NCBE has utilized for creation of the NextGen exam.

The consensus of Working Group 1 is that the group is in support of there being multiple pathways to licensure in Minnesota, and based on what is currently known, recommends the NextGen bar examination as one pathway, while expressing the above noted concerns. Working Group 1 did not recommend the creation of a Minnesota-centric bar examination.

## Working Group 2

Working Group 2, co-chaired by Cresston Gackle and Hon. Juan Hoyos, met three times to discuss the issue, and held two brief collaborative drafting sessions prior to submission of the report. Working Group 2 also worked with Working Group 3 on discussing rubrics and metrics that would work for both pathways.

Working Group 2 collected documents describing the work of other states, identifying bias in the bar examination admission process and outcomes, and proposing curricular and experiential models for assessment. Members identified interest in the Daniel Webster Scholars Program in New Hampshire and discussed the potential of relying on the strong clinical programs at each of the Minnesota law schools as a way to potentially scale experiential pathways. Some concern was expressed about future portability for applicants who were admitted through an alternative pathway and members noted that consideration should be given to how individuals who attend law school out of state may qualify.<sup>32</sup> Overall, Working Group 2 expressed strong interest in creating “a curricular pathway that is more skills based and more relevant to practice than the knowledge-based and speed-based bar exam.”

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<sup>32</sup> The following jurisdictions that allow admission on motion do not allow attorney admitted by diploma privilege in another jurisdiction to be admitted on motion: The states that do not are Alabama, Alaska, Arizona, Colorado, Georgia, Idaho, Kansas, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Oregon, and Utah. Tennessee requires a petition for waiver and a hearing. Wyoming requires a waiver. NCBE Comp Guide, Chart 15: <https://reports.ncbex.org/comp-guide/charts/chart-15/> (last visited May 13, 2023)

At the second meeting, Working Group 2 heard from Courtney Brooks, Director of the University of New Hampshire Daniel Webster Scholars Program (DWS), and Professor Joan Howarth of the William S. Boyd School of Law in Nevada. DWS is a two-year program developed as a collaboration between the New Hampshire Supreme Court, the University of New Hampshire, and the New Hampshire Board of Law Examiners.<sup>33</sup> Ms. Brooks stated that the program is simulation-based and skills-focused, and simulates lawyering activities, including negotiation, dispute resolution, litigation of a case through federal courts, community lawyering, and a capstone course interviewing simulated clients who evaluate the student's skills. Currently, the program is limited to 24 students. The program has excellent outcomes for students and graduates of the program are highly sought. Ms. Brooks provided the Working Group with information on the time commitment for the New Hampshire Board. The examiners each spend roughly three hours per student per semester evaluating the students and their portfolio of work product. About half of the students who graduate the program stay in New Hampshire, and half practice elsewhere, taking the bar exam in the other jurisdiction. The passage rate of program participants is in the 90<sup>th</sup> percentile. Maine and Vermont allow scholars graduates to waive into the bar after three years of practice. Massachusetts and New York allow the same after five. The Working Group noted that Minnesota's Rule 7A would allow for scholars' graduates to waive into Minnesota after three years.

In the second half of the meeting, Working Group 2 heard from Professor Joan Howarth, who has conducted extensive research on this topic and has published a book entitled, "Shaping the Bar: The Future of Attorney Licensing." Professor Howarth emphasized the importance of supervised practice before licensure, noting the parallels to other professions. She believes that 1/6 of the law school curriculum should be devoted to experiential and skills-based learning and that practicing under supervision enhances practical skills, professionalism, and competence.

Following the presentations, the Working Group discussed that the licensure process should include a distinct focus on clients and the responsibility to clients. Concerns were raised that the bar exam process contributes negatively to the well-being and interest of law students and noted that a "practice pathway would provide a consistent, reflective, and graduated experience that would serve as a foundation for a student's confident and competent entry into the practice of law."

During the third meeting, the Working Group heard from Dean Brian Gallini of Willamette University, a member of Oregon's task force examining the bar exam and alternatives. Dean Gallini stated that his task force was focused on consumer protection and the protection of the potential legal client. Working Group 2's report notes that Dean Gallini stated that Oregon's task force concluded that closed-book exams "offer a poor measure of minimum competence, time constraints on the bar exam distort an assessment of minimum competence, and multiple choice questions bear little resemblance to cognitive skills or practice. In addition, there are substantial gaps in bar exam passage rates by

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<sup>33</sup> "Successful Webster Scholars pass a variant of the New Hampshire Bar exam during their last two years of law school and are sworn into the New Hampshire bar the day before graduation." <https://law.unh.edu/academics/daniel-webster-scholar-honors-program> (last visited May 13, 2023)

race.” Oregon is in the process of creating a curricular pathway that would combine experiential learning with a core base of practice-based courses for doctrinal knowledge. Students would declare an intent to participate in their second year and would participate for their last two years of law school.

Working Group 2 indicated that in addition to their meetings, they reviewed substantial materials related to the Daniel Webster Scholars program, minimum competence, bar licensure, and the bar exam, as reflected by the Appendix to their materials. Working Group 2’s report, attached as **Appendix E**, summarized the DWS Program and Oregon’s “Experiential Pathway.” Like Working Group 1, Working Group 2 examined Wisconsin’s diploma privilege option. Working Group 2’s report contains a more detailed summary of the requirements for graduation under this program.

Working Group 2’s report also contains eight guiding principles related to their work, including:<sup>34</sup>

1. Working Group 2’s purpose was not to evaluate the current exam or the NextGen pathway to licensure. Working Group 2 looked at the question of whether an additional pathway to licensure should be considered and if so, what the pathway should look like. Working Group 2 recognized the positive opportunity, but also the potential for thoughtful hesitation noting “there are two things all lawyers seem to disfavor – the status quo, and change.”
2. An alternative pathway, if structured correctly, should not be viewed as “easier” or “less demanding.” Evaluation and assessment are essential and important components of the pathway, which is “firmly rooted in comprehensive studies of what competency to practice law actually is in practice.” Working Group 2 determined that the curricular pathway could be incorporated into law school without significant changes to their programs, and would have a positive impact for both prospective employees and new lawyers. The pathways would allow employment upon graduation and would eliminate the costs associated with delayed employment and “virtually-mandatory bar review courses.”
3. Any pathway to licensure should be rooted in a deep understanding of the law beyond the practice of law. The program could be structured to require core courses. Working Group 2 also noted that a curricular element specific to the “history and character of the practice of law in Minnesota” could be incorporated into the program.<sup>35</sup>
4. The experiential learning should focus on what skills and experiences a lawyer needs to successfully begin practice, and should be equally applicable to various types of practice. Working Group 2 recognized that the clinical and experiential programs in the Minnesota law schools are strong and could be incorporated into the program’s framework.
5. Because the program is new, Working Group 2 envisions a pilot.

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<sup>34</sup> These have been paraphrased; the Guiding Principles outlined by Working Group 2 are available on pages 7-9 of their report.

<sup>35</sup> In addition to the recommendations of Working Group 2, the Board has also previously received recommendations from members of MAIBA (Minnesota American Indian Bar Association) to consider testing Native American law and tribal courts.

6. Collaboration of a broad stakeholder group on the creation of the program will be important to “ensure this pathway serves the needs of all in the legal community and the public.”
7. Assessments should be “rigorous and reliable, and their hallmarks should include equity, validity, reliability, fairness, feasibility, and the alignment of the spheres of education, licensing, and the practice of law in Minnesota.”
8. Working Group 2 was impressed by the programs in New Hampshire, Oregon, and Wisconsin and these programs could provide guidance for the creation of a program in Minnesota that ensures a minimum competence standard. Working Group 2 would like to see the program open to all law students and not based “primarily or solely on prior academic achievement.”

With those principles in mind, Working Group 2 recommended the creation of a curricular pathway and stated that it believes “the curricular pathway is as good or better than the current testing regime” and it would best prepare students for practice without creating artificial barriers. Working Group 2 also expressed a strong trust in the Minnesota law schools and the legal community and that the curricular pathway would be “strong and include substantial skill-building through mentorship, evaluation, and simulation.” Working Group 2 also believed that the curricular pathway has the potential to address the responsibility we have as a legal profession to eliminate inequitable barriers and to increase diversity, while still maintaining well-being and providing a rigorous and solid foundation for new lawyers.

Working Group 2 recognized that to be successful, the program would require strong collaboration from the legal community. Significant details would need to be addressed to implement the program, even on a pilot basis. However, as Working Group 2 noted in their first guiding principle, “[o]ur hope, [...] is to not make perfect the enemy of the good, while we explore the ‘art of possible.’”

### Working Group 3

Working Group 3, co-chaired by Carol Chomsky and Megan Miller, was tasked with reviewing the possibility of adopting a licensure pathway based on supervised legal practice following graduation from law school. In its report, attached as **Appendix F**, Working Group 3 recommended that the Court approve development of a Minnesota Supervised Practice Pathway (MSPP) for licensure. The program would require that graduates work under the supervision of a licensed attorney for a specified number of hours and would submit documentation and a portfolio of work to the Board to evaluate whether the applicant has demonstrated minimum competence to be licensed as an attorney in Minnesota. Working Group 3 proposed that the Board would 1) review applicants’ compliance with the eligibility requirements, 2) approve, train, and oversee volunteer attorneys to supervise applicants, and 3) review the documentation and work samples to ensure minimum competence.

Working Group 3 acknowledged that this pathway would “rely heavily on volunteer support from the Minnesota legal community to provide the guided supervision and

feedback contemplated as part of the pathway.” Significant work would need to be done to establish a workable, fair, and equitable system, but the result would be a pathway that would allow applicants to demonstrate competence more fully than is possible through a bar examination. Working Group 3 pointed to the work already being done in other jurisdictions (including Utah and Oregon) that could provide Minnesota with a framework.

In conducting its work, Working Group 3 met four times. At its first meeting, Working Group 1 met with Kendra Matthew, a member of the Oregon Task Force that studied alternatives to the bar exam and recommended to the Oregon Supreme Court the adoption of a curricular pathway and a supervised practice pathway for licensure. The recommendation of the Task Force was approved in Oregon and the Licensing Pathways Development Committee has been formed to implement these pathways in Oregon. In the second meeting, the Working Group met with Deborah Merritt, co-author of the IAALS study described by Professor Chomsky in the October 6, 2021 Committee meeting discussed above. Professor Merritt provided insights on developing tools for implementing both pathways and has been working with Oregon on its development. In the third meeting, the Working Group met with Catherine Bramble and Louisa Henry who are serving on a Utah committee that is preparing a recommendation to the Utah Supreme Court to implement a supervised practice pathway based on Utah’s successful experience with a temporary pathway adopted in 2020 in response to the pandemic. In the final meeting, the Working Group met with Melinda Gehris, a New Hampshire bar examiner, to discuss her experience evaluating portfolios of participants of the Daniel Webster Scholars Program.

Working Group 3 outlined the limitations of the current bar examination, noting that it does not test critical aspects of lawyering competence and relies heavily on memorization. The report also critiqued the timed aspect of the current examination, noting that speededness is not an important characteristic of lawyering. Working Group 3, like both Working Group 1 and 2, noted the disparate impacts of the examination based on gender, race, and economic status. Working Group 3 noted that applicants with the financial resources for bar prep materials and the ability to engage in two months of focused, full-time study are at an advantage to candidates that need to work or who have family obligations.

While Working Group 3 believes that some of these issues will be addressed by the NextGen bar examination, it will not solve all the concerns raised, making it appropriate to consider and assess alternatives.

### **Phase 3: BAAC Meeting, Second Public Notice, and July Public Listening Sessions**

#### **BAAC**

On June 17, 2022, the Board met with the Bar Admissions Advisory Council (BAAC). The BAAC is comprised of members of each of the Minnesota law schools, members of the Board, and three representatives from the MSBA. The purpose of BAAC is to consult on “matters of general policy concerning admission to the bar, amendments to the Rules,

and other matters related to the work of the Board.”<sup>36</sup> In advance of the meeting, the Board provided the BAAC members with the three Working Group reports. Following updates from the Court’s liaison, Justice G. Barry Anderson, the Deans of the three law schools, and the MSBA, the BAAC discussed the comprehensive bar exam study.

The Board Director, Emily Eschweiler, provided an overview of the process. Ms. Eschweiler advised the BAAC that the Board hoped to understand better what the process looked like for various stakeholders and if there was buy-in from various stakeholders to alternative processes. The Board also wanted to understand whether prospective programs would address the economic and equity challenges that have been raised. Ms. Eschweiler provided a brief overview of each of the Working Group’s recommendations and noted that the MSBA had funded a consultant who would be moderating two listening sessions in July to discuss the Working Group reports. The Board would then be discussing and providing its next public notice outlining the Board’s preliminary positions on these topics in the fall of 2022. Following the public notice, the consultant would then moderate two additional public listening sessions.

The BAAC discussed that ultimately, any changes would be the Court’s decision to make. The participants asked if the Board had a sense of the Court’s position. The Director noted that based on the January 2022 Order, the Board understood the Court to be interested in exploring an alternative pathway if there was a clear way to determine competence. The Board’s goal is to provide recommendations that are realistic (cost effective and public protection focused) while also addressing equity and access to justice concerns.

Participants voiced both an interest in exploring alternative pathways and concerns. Timing is an important element to law schools for both the NextGen and for alternative pathways, as programs take time to develop and the law schools want to be in the best position to prepare their students for assessment, whatever the assessment may be.

### June 21, 2022 Public Notice

On June 21, 2022, the Board issued a public notice providing an update on the process and providing the Working Group reports.<sup>37</sup> The public notice also provided the baseline criteria that the Board asked the Working Groups to consider. The public notice invited members of the legal community and the public to participate in two listening sessions in July to further discuss the issue and advised that the Board continued to welcome written public comments on this issue.

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<sup>36</sup> Rule 19 of the Minnesota Rules for Admission to the Bar.

<sup>37</sup> <https://www.ble.mn.gov/wp-content/uploads/2022/06/Public-Notice-Competency-Study-June-2022.pdf>  
(Last visited May 28, 2023)

## July Listening Sessions

The Board held two public listening sessions by Zoom on July 11 and July 20, 2022. The sessions were moderated by John Phelps, a consultant hired by the MSBA, to assist with the project. The agenda for both listening sessions consisted of a brief overview of the study, followed by time to provide comments on the three reports and additional comments on this issue.<sup>38</sup>

In addition to Board staff and Tom Boyd, the Competency Committee Chair, 11 individuals attended the July 11, 2022 session and 15 individuals attended the July 20, 2022 listening session. A significant number of the participants were members of the Working Groups.

Some themes identified during the listening sessions included the following:

### Bar Exam Pathway:

- While the NextGen seems the right direction, it is difficult to make a firm recommendation until we can see what the examination will actually look like
- The changes are reassuring, but still largely unknown
- Concerns were raised that it will still require memorization and speed
- A participant noted that the NextGen would be “just another exam” with the same shortcomings as the current exam, requiring additional loans and stress
- The exam did not make the participant a better lawyer; it possibly assisted with time management under stress, but that was already learned during law school
- It will not solve the issue of the five-month delay between graduation and admission for those who pass, and the longer delay for those who have to take the examination a second time and may not be licensed for up to a full year after they graduate
- The NextGen provides important portability for graduates
- The NextGen would complement a process that includes experiential alternatives

### Curricular Pathway:

- This may be a better pathway for non-traditional students
- Scalability may be a challenge
- Experienced lawyers commented that this pathway is likely to prepare students better for practice than the current process
- Concerns were raised about portability and how out-of-state law students could participate
- Working Group 2’s report seemed to focus on Minnesota law schools. Participants questioned whether the pathway would be too narrow

### Post-graduation Pathway:

- This may provide a better alternative for non-traditional law students

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<sup>38</sup> <https://www.ble.mn.gov/wp-content/uploads/2022/07/Agenda-for-Public-Listening-Sessions.pdf> (Last visited May 28, 2023)

- Concerns were voiced about possible competition once a supervised candidate became licensed and whether they would take clients from the firm. Lawyers are unique in that they do not have non-competes. It was noted that this could result in members of the bar not wanting to participate in this type of program
- Private practice attorneys would need to balance goodwill for the profession with their own business needs
- Law school externships could provide a good model for this pathway
- Reporting requirements for supervising lawyers would need to be easy and not burdensome
- Queries were made as to whether the Minnesota law schools might be able to partner with the bar to develop this pathway

Other:

- Stress generated by the bar examination should be factored into the ultimate recommendations. For many the current process is “overwhelming” and failure can be associated with being unworthy or a “bad lawyer”
- For any experiential pathway to work, practicing lawyers will need to adopt a sense of ownership in the process and be committed to supervising and evaluating candidates
- Concerns were raised that the current bar admission process does not go far enough to allow foreign educated graduates with LL.M.s and graduates from state accredited law schools not accredited by the ABA to sit for the exam. Questions were also raised as to whether foreign educated graduates would be able to participate in the experiential pathway<sup>39</sup>

Written comments received by the Board relevant to this study advocated for eliminating corporations law from the examination and suggested that every lawyer should have a one-year apprenticeship.

Following the listening sessions, the Board met in September 2022 and discussed these issues. Overall, the Board supported all of the recommendations made by the Working Groups, but raised concerns with the resources required for a post-graduation pathway. The Board expressed a strong interest in making sure that the programs, even on a pilot basis, are set up to be successful. The Board determined that any pathway should require some activity beyond graduation from law school as the current rules, case law, and state statute support a continuation of an assessment separate from graduation with an ABA-accredited degree. Accordingly, the Board determined that it would not support a Wisconsin-type diploma privilege. It would support a program similar to the Daniel Webster’s Scholars Program where graduates are deemed to have satisfied the bar examination requirement through successful completion of the program. However, the

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<sup>39</sup> As noted earlier in the report, the Board did receive written comments related to the educational components as part of this process. Similar comments were provided during the listening session. Participants were advised that the current study is focused on the examination prong of competency and the Board is still separately reviewing the educational components. The Board does not currently have a time frame in which it anticipates concluding its review, but does not anticipate proposing any changes to the educational standards in the next year as it continues to review and study this complex issue.

Board determined that the program likely worked better on a small scale (24 students) in a state with only one law school. Alternatively, the Board determined that based on both the work of Working Group 2 and Working Group 3, it could see a potential for a successful pathway during law school and indicated it would support a recommendation to the Court to create an Implementation Committee to design a pilot program.

#### **Phase 4: Issuance of November Public Notice and December listening sessions**

##### **November Public Notice**

In November 2022, the Board issued its third public notice outlining its preliminary determinations and providing opportunity for additional input.<sup>40</sup> The public notice also invited participation in two public listening sessions in December. The Board's notice stated that it believed Minnesota should continue to offer an examination and that the NextGen Exam appears to be the best option based on the information currently known, but that the Board also supports exploring an experiential option during law school as an alternative pathway to licensure. The notice advised that the Board did not support a proposal that would make graduation from an ABA accredited law school the sole requirement. The notice also advised that while the Board saw benefits with a post-graduation pathway, it had reservations on the Board's ability to successfully create and implement a post-graduation pathway at this time. The Board reiterated that access to justice, equity, and the financial burden to applicants remained at the forefront of any decisions or recommendations made.

##### **Listening Sessions**

The Board hosted two additional listening sessions, on December 5 and 15, 2022, for attendees to share their comments and/or testimony regarding the Board preliminary recommendations. Notice of these meetings was sent to entities that had expressed prior interest in this issue and the MSBA published the information in their weekly Legal Digest. Most, but not all, of the participants in the December listening sessions were also members of the Working Groups. Including the speakers, 13 individuals participated in the December 5 listening session and 17 participated in the December 15, 2022, listening session.<sup>41</sup> Tom Boyd started both meetings by welcoming participants and providing an overview of the process. John Phelps moderated both sessions.

At the December 5 meeting, Professor Deborah Merritt and Professor Joan Howarth spoke. Comments were consistent with the comments previously provided to the Working Groups. Professor Merritt also addressed how to create experiential requirements that include psychometric guidelines so that they can be equitably applied. She noted that the experiential pathway could align well and build upon current law school curriculum

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<sup>40</sup> <https://www.ble.mn.gov/wp-content/uploads/2022/11/Public-Notice-November-2022.pdf> (last visited May 28, 2023)

<sup>41</sup> This number does not include Board staff; Tom Boyd, chair of the Competency Committee; or John Phelps, the moderator.

and that the pathway would not discriminate on financial resources or evoke stereotypes regarding examinees of color. Professor Howarth noted that setting the passing score on the NextGen exam will be a critical factor in determining whether the new test will provide more equitable outcomes. Professor Howarth encouraged the focus on the law school experiential model to be student competencies and not accreditation of the law school programs. She suggested requiring students to take 15 experiential credits, 6 of which include direct representation. These comments were supported by discussion later in the listening session that noted a curricular pathway is likely the most cost effective, but it is not a simple task. Developing the competencies and then applying them to the current programs would be important.

Following the presentation, a discussion took place related to the recommendations. Professor Merritt noted that the NCBE was behind schedule. While the NCBE is being careful in its process, the delay is causing concern for law schools. Participants discussed the challenges in getting feedback and that many in the broader legal community did not seem to know that there were prospective changes to the exam.

While some participants supported the Board's decision to focus first on the curricular pathway, another participant expressed disappointment that the Board seemed to be pushing aside the important topic of equity for examinees of color who had already failed the exam but would be wonderful lawyers.

At the December 15 meeting, Ann Motl spoke on behalf of the Minnesota Disability Bar Association. Ms. Motl reminded the Board to consider accommodations in the implementation of every pathway being considered. She spoke about the current accommodation process, noting the cost barrier to many applicants in obtaining the testing necessary to obtain accommodations. Additional testing may not be covered by insurance, adding stress and financial burden. This cost creates inequitable barriers to access for applicants who would otherwise make excellent lawyers. To the extent that the next examination continues to embrace speed, persons with disabilities will be disadvantaged. The playing field is not level for those with disabilities who are unable to sit for long periods of time. Ms. Motl supports adoption of a diploma privilege. The Multistate Performance Test (without time limits) would be a secondary option.

Following Ms. Motl's presentation, general discussion occurred. Participants agreed that examining the accommodations process would be an important part of implementation. In addition to formal and legal requirements, the Board was encouraged to consider best practices. The Director of Disability at Mitchell Hamline expressed interest in collaborating with the Board, noting that the law school's process is more collaborative and in-depth rather than paper based. Chase Anderson from Lawyers Concerned for Lawyers (LCL) noted that he works with a lot of law students and graduates who are dealing with a high rate of anxiety related to the exam. Participants also encouraged the Board to consider how the equitable administration of justice can be enhanced and how bias in the legal profession can be reduced.

## Written Feedback

The Board received three public comments during this period related to the competency study.<sup>42</sup> These comments are attached as **Appendix G**. One comment supported keeping the bar examination. Two of the comments responded directly to the creation of a post-graduation experiential pathway.

### **Phase 5: Issuance of the Board’s draft recommendations and request for further written input on or before May 1, 2023, for incorporation into the Board’s June 1, 2023, Report and Recommendation.**

The Board reviewed and discussed this matter further in January and March 2023. Following the March Board meeting, the Board issued its fourth public notice inviting comments on the seven recommendations that the Board planned to submit to the Court.<sup>43</sup> The Board received 10 comments in response to the request for public comment. These comments are attached as **Appendix H**.

Six of the comments were from law professors across the nation who support the implementation of alternative pathways, the three Minnesota law schools all provided written feedback, and the Minnesota State Bar Association submitted a response.

#### Law professor responses:

- Support for the Board’s decision to adopt NextGen
- The current bar exam excludes people of color at a disproportionate rate
- Success on the bar exam depends on economic resources.
- Clinical law professors have spent decades studying, writing about, and applying learning theory to educating lawyers
- A curricular pathway would be innovative and forward thinking
- Discussions related to the cut score are premature until the test has been fully developed, but racial disparities need to be considered when the matter is considered; there is a lack of evidence that a lower cut score had led to higher disciplinary concerns
- Comments urged Minnesota to continue to be “reasonable” and “non-protectionist” in selecting a cut score
- Artificial Intelligence (AI) is going to change the way that lawyers practice and is going to shift the definition of minimum competence
- They stand willing to assist the Court in any way they can in the development of experiential components

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<sup>42</sup> One comment related to the educational requirements was provided during this period. This comment has been provided to the Board’s Rules Committee for future consideration. The Board is unclear as to whether another comment received is relevant to the matter and appears to have possibly been written by a ChatBot. It has not been attached.

<sup>43</sup> <https://www.ble.mn.gov/wp-content/uploads/2023/03/Public-Notice-March-2023.pdf> (last visited May 28, 2023)

- Some comments urged the Board to not defer recommendations on the supervised practice pathway, noting that a supervised practice pathway would increase diversity in the profession and address equity concerns that already exist in practice but go unaddressed
- One comment suggested that a post-graduation component could be created that would allow graduates to demonstrate competence while working after graduation for a public service organization. Under this proposal, public interest employers would hire graduates in their ordinary process, pay them their usual salaries, and provide training. This would allow for a post-graduation program that would require little additional time or resources beyond the curricular pathway

#### Minnesota law school responses:

**University of Minnesota** – If the Court does create an Implementation Committee to develop a curricular pathway, the University of Minnesota would like to participate to ensure that any proposed requirements would fit within current curriculum and would not distort current curricular choices. The University of Minnesota is undecided as to whether it would participate in an alternative assessment model, but open to continued conversations if the Court decides to move further. Portability for graduates is important and the final decision may be impacted by the new developments of the NextGen bar exam. The comment noted that with the NextGen scheduled to be introduced in 2026 and with the NextGen incorporating new testing of legal skills, the university anticipates substantial efforts to fully understand and respond to those changes.

**Mitchell Hamline** – Mitchell Hamline strongly supports the creation of an experiential pathway. The school has formed a working group to create a proposal to show how a pilot experiential pathway could work. This pathway would benefit the public and be more equitable. The pathway would allow for a more valid and rigorous assessment of minimum competence as it would review real work. It would also address concerns of students who are not able to take time off to study for the bar exam due to family or work obligations. Following the Board’s submission of this report to the Court, Mitchell Hamline plans to file its proposal with the Court.

**University of St. Thomas** – St. Thomas strongly supports adoption of the NextGen examination. St. Thomas endorses the Board’s recommendations related to a standard setting exercise regarding the NextGen cut score and proposing rules that allow portability. St. Thomas stated that more work needs to be done on what an alternative pathway would look like before knowing whether it would be the right fit for St. Thomas. If the program is feasible and would benefit their students, then they would likely participate.

#### Minnesota State Bar Association:

The Minnesota State Bar Association agrees that the NextGen bar exam is an important first step to improve the licensure process, but believes it does not go far enough to fully address racial, ethnic, and gender disparities. The MSBA acknowledged that portability

is important and that the NextGen would address that. Because the NextGen would be a new examination, the MSBA urges the Board to consider whether an examinee who achieves a score within five points of passing should be able to appeal the human-graded portion of the examination.<sup>44</sup> The MSBA supports further discussion and careful consideration of the cut score, and agrees with the proposed amendments to Rule 7B and 7C to transition to the NextGen. The MSBA also supports the Board’s proposed amendments to the Supervised Practice Rules that would allow Supervised Practitioners, with proper notice, to continue to be eligible even if they do not pass the examination. The MSBA strongly supports the development of a curricular pathway. The MSBA also supports a supervised pathway and believes that the potential benefits outweigh the possible pitfalls. The MSBA noted that “a structured, uniform standardized system of supervised practice” would be required to avoid potential concerns. The MSBA acknowledges the Board’s hesitancy from a resource perspective, but suggests a pilot project and offered the MSBA would be a likely partner in the work.

## Additional Relevant Topics

### Minnesota Bar Passage and Transfer on Motion

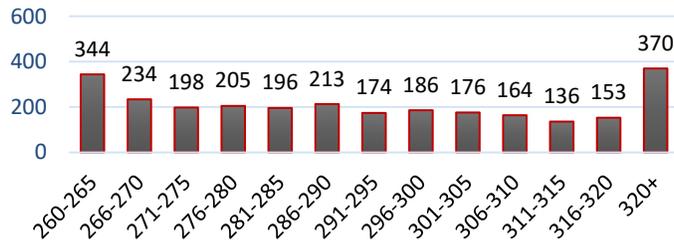
The Board publishes bar passage statistics in its annual report. Overall, bar passage over the past four years has ranged from 69.41% to 77.94% and first-time test takers passage rates have ranged from 79.51% to 86.56%. The following is the breakdown by law school:

Law School	2019		2020		2021		2022	
	Overall	1 <sup>st</sup> -Time						
<b>U of MN</b>	89.29%	93.33%	95.68%	98.48%	92.67%	96.43%	94.44%	96.08%
<b>St. Thomas</b>	70.13%	81.98%	67.09%	78.33%	66.12%	77.10%	73.81%	89.52%
<b>Mitchell Hamline</b>	64.52%	74.26%	65.40%	73.68%	57.52%	66.12%	72.35%	83.62%
<b>Other Schools</b>	65.48%	77.46%	77.71%	88.11%	70.86%	82.64%	77.93%	79.69%
<b>Total All Schools</b>	<b>70.39%</b>	<b>80.52%</b>	<b>74.20%</b>	<b>83.64%</b>	<b>69.41%</b>	<b>79.51%</b>	<b>77.94%</b>	<b>86.56%</b>

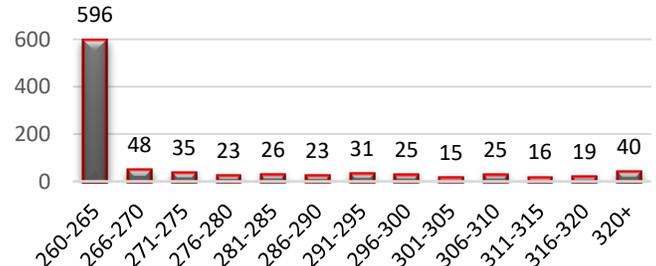
In addition to the bar passage rates, the Board has also compiled data on the number of applicants who have achieved an eligible UBE score at various score ranges, comparing those who sat for the examination in Minnesota (Rule 6) to those who transferred their UBE score in from another jurisdiction (Rule 7C).

<sup>44</sup> Under the current process, all human graded portions of the exam are re-graded by two additional graders if an individual fails and the scores are averaged. Re-grading policies vary by jurisdiction and re-grading is not considered to be “best practice” under psychometric standards. The Board does not yet know what requirements, if any, will exist related to re-grading the NextGen exam. Currently, UBE policy precludes post-release re-grading.

**Rule 6 (Passing MN Examinee)  
Score Distribution  
2018-2022**



**Rule 7C (UBE Transfer) Score  
Distribution  
2018-2022**



**Diversity**

Minnesota has not historically collected demographic information for bar applicants. On a voluntary basis, Minnesota has been asking applicants for this information since the Board deployed the online bar application in June 2022. While it may be possible in the future for the Board to provide the Court with demographic information specific to the exam in Minnesota, the Board has not yet collected enough information to make the data statistically significant.

Nationally, the ABA collects data from law schools and aggregates it in a report titled Summary Bar Pass Data: Race, Ethnicity, and Gender. In the report, the ABA breaks down first-time passage and ultimate passage (passage within 2 years of graduation from law school) and notes the following:

	2020 Ultimate	2021 Ultimate	2022 First-Time
Total Pass Rate (including diploma privilege)	92%	88%	78%
White	94%	90%	83%
Black	81%	72%	57%
Hispanic	88%	81%	69%
Asian	89%	86%	75%
Native American	80%	79%	60%
Hawaiian	76%	51%	69%
Unknown	91%	86%	73%
2 or more	91%	85%	74%

When reviewing the national data, it is important to note that the passing score varies between jurisdictions. Simulated data of eventual passage from a study in California suggests that there is a significant decrease in the disparities when a jurisdiction sets the cut score at 260, like Minnesota’s current cut score, but disparities still exist.<sup>45</sup>

The National Conference of Bar Examiners has advised that the field-testing and pre-testing exercises for the NextGen includes analysis of how various demographic groups perform on the examination. This data will be important in determining the passing score Minnesota adopts on the next examination. The timeline for score setting exercises is currently in flux, but based on the information so far provided, it will be a couple of years before the conference is prepared to assist jurisdictions with that exercise.

While the Board does not have demographic data on bar exam passage in Minnesota, the Court does have demographic information on licensed attorneys. Because reporting is voluntary, the percentage who have opted not to answer is high. Attached as **Appendix I** is a chart showing snap-shot demographic information for each year 2000-2020 and then comparative years for 1970, 1980, and 1990. This data suggests that diversity is increasing amongst lawyers with active status licenses. However, it is increasing at a higher rate for lawyers who live outside of the state than lawyers who live within the state.

## Other Jurisdictions

As noted above, Minnesota is not the only jurisdiction looking at the issues addressed in this report. Other jurisdictions include Oregon, Washington, California, Nevada, Utah, and Georgia. Oregon, Washington, and California appear to be the furthest along in their studies.<sup>46</sup>

### Oregon:

Oregon’s Licensure Pathways Development Committee (LPDC) has been working to develop the regulatory framework for two new examination formats. The Supervised Practice Portfolio Examination (SPPE) would allow applicants to work in an apprenticeship following law school and submit a portfolio of work to the Oregon Board of Bar Examiners (BBX) for review. The Committee has developed a framework and proposed rules and in March published the proposed rules to seek public comment. The LPDC is also working on the Experiential Portfolio Pathway (OEPE) that will “offer students at Oregon’s three law schools a rigorous experiential curriculum in their second

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<sup>45</sup> Figure 11 on page 18 of “Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards” posted November 11, 2020: [https://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID3711096\\_code4104547.pdf?abstractid=3707812&mirid=1&type=2](https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3711096_code4104547.pdf?abstractid=3707812&mirid=1&type=2). California is not a UBE jurisdiction. California lowered their cut score from 1440 to 1390 in 2020 (the equivalent of lowering the score from 288 to 278 on our scale).

<sup>46</sup> In 2020, a few jurisdictions adopted a limited diploma privilege in light of the pandemic. These jurisdictions included Oregon, Washington, Utah, DC, and Louisiana. These programs had varying requirements for participation and did not continue beyond the July 2020 examination. A larger number of jurisdiction, including Minnesota, denied Petitions for diploma privilege in 2020. In Minnesota’s response on this issue, the Board advised the Court that the issue required careful study and review.

and third years of law school, followed by submission of a portfolio of work to be examined by the BBX for admission to the bar.” Once the committee has completed work on this proposal it will also be put out for public comment.<sup>47</sup>

Additionally, Oregon piloted a limited Provisional License Program to allow candidates who had failed the February 2022 examination to secure licensure through a period of supervised practice. The Oregon Supreme Court authorized this program to address the potential impact on test performance during the February 2022 exam when the HVAC system malfunctioned. The program requires at least 1500 hours and additional review requirements. So far, eight lawyers have been enrolled into their program; five list district attorney’s offices as their employers, one lists a company, and two list private law firms.<sup>48</sup>

#### Washington:

Washington has been studying this issue since 2020. Based upon conversation with WSBA Board of Governor (At-Large) and member of the Washington Supreme Court Task Force on Bar Licensure Brent Williams-Ruth, Washington is in the final stages of proposing recommendations for additional pathways. The Task Force will be seeking stakeholder input this summer before filing their final report with the Washington Supreme Court in December 2023. The Task Force is proposing programs that would allow for licensure upon graduation if the lawyer completes a Licensed Legal Intern or equivalent program certifying 500 hours under a supervising attorney and applies within twelve months of graduation; and a pathway that would allow for licensure through a post-graduation six month apprenticeship program to be completed within 1 year of graduation and to include at least 500 hours. Washington would allow qualifying LLM graduates and Washington State Bar Association’s Law Clerk Admission Coursework graduates to participate in the program on the same basis of JD graduates from ABA accredited law schools.

#### California:

On May 19, 2023, the Board of Trustees of the State Bar of California reviewed recommendations of a multi-year Blue Ribbon Commission – a joint effort between the California Supreme Court and the state bar. The Board of Trustees endorsed a plan for California to develop their own bar examination to test federal and California law instead of adopting the NextGen exam.<sup>49</sup> The Commission was unable to come to a consensus on establishing a non-exam pathway. The Board directed the Blue Ribbon Commission to reconvene and develop proposals for consideration later this year.<sup>50</sup>

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<sup>47</sup> <https://lpdc.osbar.org/> (last visited May 28, 2023)

<sup>48</sup> <https://www.osbar.org/plp> (last visited May 13, 2023)

<sup>49</sup> California currently uses the Multistate Bar Examination (MBE), but does not use the Multistate Essay Examination (MEE) or the Multistate Performance Test (MPT). Instead, it combines the MBE with jurisdiction drafted questions. California tests around 10,000 applicants per year.

<sup>50</sup> <https://www.reuters.com/legal/government/california-moves-step-closer-developing-its-own-bar-exam-2023-05-19/> (last visited May 25, 2023)

### Nevada:

In Nevada, a commission has been studying the issue since March 2022. The commission filed its report with the Supreme Court in March 2023 and recommended the formation of two task forces. The first task force would be responsible for considering modified requirements for licensure in Nevada to include a foundational subject knowledge assessment and a post-J.D. performance test exam. The second task force would consider whether to recommend a requirement for supervised practice prior to licensure.<sup>51</sup> The Court has created both task forces and has requested reports no later than April 1, 2024.<sup>52</sup>

### Georgia:

A “Preliminary Report of the Georgia Lawyer Competency Task Force” was filed in Georgia on December 21, 2022. In the report it noted:

Although the bar examination is not a perfect means of assessing competence, we see no reliable and feasible alternative to it. Accordingly, we recommend that the Court retain admission by examination as the principal pathway to admission in Georgia for lawyers not already admitted to practice in another jurisdiction.<sup>53</sup>

The Commission also noted that “[a] legal education is an important component of competence, but completion of the requirements for a professional degree in law is not, without more, a sufficient guarantee of competence.” The Commission stated that requirements vary from law school to law school and that without significant oversight of the admission, curricula, instruction, and assessment, it would not be appropriate to delegate competence decisions to the law schools. Instead, an individualized assessment is appropriate. While the Task Force encouraged further study of a curricular pathway, it stated “alternatives do not seem feasible or administrable on the scale required for a jurisdiction with as many lawyers as Georgia.”

The Board will continue to monitor programs in other jurisdictions and will provide additional information to the Court as jurisdictions make determinations and programs jurisdictions implement programs.

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<sup>51</sup><https://caseinfo.nvsupremecourt.us/document/view.do?csNameID=63512&csIID=63512&deLinkID=895046&onBaseDocumentNumber=23-09738> (last visited May 28, 2023)

<sup>52</sup><https://caseinfo.nvsupremecourt.us/document/view.do?csNameID=63512&csIID=63512&deLinkID=897537&onBaseDocumentNumber=23-12141> (last visited May 28, 2023)

<sup>53</sup>[https://www.clereg.org/assets/pdf/Preliminary\\_Report\\_Georgia\\_Lawyer\\_Competency\\_Task\\_Force.pdf\\_at\\_2-14](https://www.clereg.org/assets/pdf/Preliminary_Report_Georgia_Lawyer_Competency_Task_Force.pdf_at_2-14) (last visited May 28, 2023)

## **Recommendations**

Following careful analysis and discussion, the Board makes the following recommendations to the Court:

**1. Recommendation 1: Minnesota should adopt the NextGen exam. Details related to implementation remain to be determined.**

The Board recommends that Minnesota continue to administer a bar examination following the NCBE's transition to NextGen. The Board will file a Petition at a later date that addresses Rules 6E, 7B, and 7C. The Board does not have sufficient information at this point to recommend specific language changes, but will file the Petition as soon as it can effectively do so. The development of the NextGen exam has been thorough and research driven. A thorough, psychometric approach to development relying on a detailed practice analysis has been utilized in the exam's development. Support exists for the new exam.

The exam will cover fewer subjects and the NCBE has refined the content scope based on the practice analysis conducted as part of the Testing Task Force study and will place a greater emphasis on lawyering skills. The NCBE released the content scope on May 25, 2023.<sup>54</sup> Licensure portability and scalability are important criteria in the decision. The Board recognizes that a significant number of graduates from Minnesota law schools apply for admission in other jurisdictions and that a significant number of applicants who sit for the Minnesota bar attend law school in other states. The Board shares the concerns of the Minnesota State Bar Association and others who have commented on the disparate impact of the current examination. The Board will work to ensure that standard setting exercises consider diversity.

- a. Because the examination is not yet finalized and policy decisions are not yet known regarding regrades, the Board is not in a position to comment on regrades for the NextGen. Under current policy, any regrade after the release of scores negates an UBE score. The Board instead regrades prior to score release. If an examinee does not achieve a passing score, the essays are sent to the additional grading team members (for a total of three graders for each of the 8 questions, a total of 24 individuals per exam). The scores are then averaged for the applicant's final score. The Board does not recommend any changes to Rule 6I, related to failing examination scores, at this time.
- b. The NCBE has not yet provided a clear timeline for standard setting. Additional information will be made available to the Court once it is known. The timeline for the standard setting may impact the recommendation of whether to adopt the NextGen in July 2026, or to recommend later adoption. Until a score is set, the Board may also not be in a position to recommend transfer of NextGen scores to Minnesota.

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<sup>54</sup> <https://nextgenbarexam.ncbex.org/reports/content-scope/> (last visited May 25, 2023)

- c. The NCBE has advised that it will make available the current test instruments (those which make up the UBE) for a period of time after the first administration of the NextGen exam. The Board understands that time is of the essence for the law schools to best prepare their examinees for the examination and so a definitive decision on implementing the NextGen is also of the essence. The Board does not currently have enough information to make a recommendation as to whether Minnesota should adopt the NextGen exam for its first administration in July 2026. The Board will continue to press the NCBE for updated timelines in order to provide enhanced recommendations on this issue.
- d. A factor in the timing determination is the standard setting exercises that will be used to identify an appropriate passing score range for the new exam. At this time, the Board does not have enough information to know when those exercises will occur. The Board will continue to press the NCBE for updated timelines in order to provide enhanced recommendations on this issue.

**2. Recommendation 2: The Board will file a Petition to propose modest changes to the Supervised Practice Rules.**

The Board will file with the Court proposed changes to the Supervised Practice Rules that will allow the Board to waive the requirement that certification as a Supervised Practitioner terminates upon failing the examination. The Board will also recommend extending the eligibility duration from 18 months to 24 months, to allow four examination cycles instead of three. This change is recommended to address concerns raised related to employment, the impact of failing the examination on the first attempt, and the examination being available to take only twice per year. To ensure that the public is protected, the Board will recommend that the rules require that the supervising attorney knows that the individual has not achieved a passing score and still agrees to act as the supervising attorney.

**3. Recommendation 3: Create an Implementation Committee to further explore and develop a curricular-based pathway for assessment.**

The Board recommends that the Court create an Implementation Committee for the purpose of further exploring and developing an alternative assessment to the bar examination that could be completed during law school and would be curricular-based. The Implementation Committee would then propose Rule amendments to the Minnesota Rules for Admission for consideration and adoption by the Court.

During the Competency study, the Board reviewed compelling information that a comprehensive portfolio review, while more time consuming than administration of the bar examination, would provide increased assurances that the recent graduate possesses the competence necessary to succeed in the practice of law if the portfolio is methodically developed. The three Minnesota law schools already have in place robust clinical and experiential learning programs and have the skills and expertise to

successfully move this concept forward. The Board agrees that additional experiential training would be beneficial to new lawyers.<sup>55</sup> In making this recommendation, the Board envisions a pathway that increases the experiential requirements and practice experience of participants in a meaningful and robust way, while still designing the program to create an assessment of both foundational knowledge and skills.

The Implementation Committee will be responsible for creation of rubrics, metrics, and measurements for the Board to evaluate participants in the program. The Board recommends that Court consider the following when appointing the Implementation Committee:

- At least two representatives from each of the Minnesota law schools;
- A representative from the Minnesota State Bar Association;
- A representative from each affinity bar interested in participation;
- A member of the Minnesota Disability Bar Association;
- A representative from the New Lawyer Section, who sat for the Uniform Bar Examination (in any state) within the last five years;
- At least one member of the Board of Law Examiners;
- At least one member of the of the Board of Professional Responsibility;
- At least one member of the public;
- Members of the bar who supervise new lawyers, representing different fields of law.
- A national expert on alternative pathways.

The Implementation Committee should be charged with:

1. The development of assessment criteria, to include consideration of:
  - a. The skills and assessment measured in the [IAALS](#) study;
  - b. The [practice analysis](#) completed by the NCBE, as well as the recent [California](#) and [Florida](#) practice analyses to determine the threshold concepts new lawyers should know and how those would be assessed in a non-exam assessment; and
  - c. Equity and cost.
2. Identification and creation of pilot programs, noting the following:
  - a. The Board's review and the Working Group reports both reference a University of New Hampshire program that allows for graduates to become licensed upon graduation without sitting for the New Hampshire bar exam. The [Daniel Webster Scholar Honors Program](#) is an impressive and highly competitive program. The school accepts 24 students into the program each year and integrates testing and evaluation into the process. The program was developed through a joint collaboration between the New Hampshire Supreme Court, New Hampshire's sole law school, and the New Hampshire Board of Law Examiners. At the conclusion of the program, the graduates are deemed to have passed the bar exam through the testing

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<sup>55</sup> ABA Accreditation Standard 303(a)(3) currently requires six (6) experiential learning credits.

that takes place during the program and through a portfolio review process.<sup>56</sup> The graduates are highly sought after and an independent study by the Institute for the Advancement of the American Legal System supported the quality of the education this program provides.

- b. The Board discussed that it would support collaboration on developing a similar program in Minnesota, but questioned whether it was realistic to believe that this program could be significantly expanded without a reduction in its efficacy or a significant increase in cost.
  - c. The Board supports innovation and the creation of a portfolio-based assessment model. As noted by the Working Groups, the law schools are in the best position to propose a rubric that meets the appropriate assessment standards. The Board is interested in the creation of a pilot project that would provide guidance on future expansion.
  - d. In reviewing the 2022 ABA 509 reports from the 3 Minnesota law schools, the Board notes each of the Minnesota law schools have significant seats allocated to clinics, field placements, and simulation-based testing.<sup>57</sup>
3. Drafting a proposal for Rule amendments to the Minnesota Rules for Admission to the Bar that could be implemented on a pilot basis following further public comment and review by the Court.
  4. **Recommendation 4: Table the proposal to create a supervised practice-based pathway for assessment, and revisit that proposal following further study and experience with the curricular-based pathway for assessment.**

Having carefully considered the recommendations of Working Group 3, supervised practice programs in other jurisdictions, and the testimony and written submissions of national experts, the Board agrees that the public would benefit from a high-quality post-graduation pathway. This is further supported by the comments received from law professors during the public comment period and the comments received from the Minnesota State Bar Association.

The Board nonetheless continues to have serious concerns as to whether the Board has the tools and resources to successfully develop and implement a supervised practice program at this time, especially in light of the Board's recommendation to move forward on the curricular pathway. Unlike the law school pathway, all elements of this supervised practice program would need to be created and developed. An affirmative and robust commitment from the Minnesota-licensed lawyers would be essential to designing and maintaining such a program that could be implemented in a fair, equitable, and reliably

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<sup>56</sup> "Successful Webster Scholars pass a variant of the New Hampshire Bar exam during their last two years of law school and are sworn into the New Hampshire bar the day before graduation."

<https://law.unh.edu/academics/daniel-webster-scholar-honors-program> (last visited June 1, 2023)

<sup>57</sup> [https://law.umn.edu/sites/law.umn.edu/files/2022-12/Official\\_Guide2022%20-%20Std509InfoReport-100-12-15-2022%2014-10-45%20%281%29.pdf](https://law.umn.edu/sites/law.umn.edu/files/2022-12/Official_Guide2022%20-%20Std509InfoReport-100-12-15-2022%2014-10-45%20%281%29.pdf); <https://mitchellhamline.edu/admission/wp-content/uploads/sites/4/2022/12/ABA-2022-Standard-509-Information-Report.pdf>; <https://law.stthomas.edu/media-library/documents/required-disclosures/standard509.pdf> (last visited June 1, 2023)

accessible way. The supervised practice program is likely to incur significant costs and it is unclear to what extent it would increase diversity or create new challenges, including unforeseen consequences. Even the parties who strongly support adoption of a post-graduation pathway acknowledge there are concerns and challenges that will need to be resolved. Adopting and developing a curricular pathway would provide additional data and time for continued analysis, and may produce standards and tools that can be utilized in a post-graduation pathway. The Board would also need additional guidance on how to reduce subjectivity; recruit, evaluate, and train supervisors; and effectively administer such a program. The Board acknowledges and appreciates that national experts in this field have indicated that they would be willing to participate in this project on a pro bono basis; however, the Board does not recommend moving forward on a supervised practice program at this time.