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Questions for Committee Analysis – Fall 2021

1. Who does the Board protect?
2. What does public protection mean?
3. What role does the Board have in increasing diversity?
4. How does equity factor into the review of these issues?
5. How does the Board's role differ from the role of other stakeholders?
6. Who are the stakeholders and interest groups that are key to this discussion?
7. Given the Court is the ultimate decision maker, how does the Board ensure that the Court receives differing viewpoints on this issue to best allow the Court to make an informed decision?
8. What has "minimum competency" generally meant?
 - a. Educational component
 - b. Examination component
9. What are the minimum competency standards that all newly licensed lawyers must meet?
10. History and case law
11. National Trends:
 - a. How many jurisdictions are reviewing this issue?
 - i. How many jurisdictions are UBE?
 - ii. Is there information that can be shared?
 - iii. What processes have they followed?
 - iv. How were the committees/task forces formed?
 - v. Who is on the committees?
 - vi. What recommendations have been made?
 - vii. What timelines are they following?
12. Are there any examination-based alternatives to the Uniform Bar Examination?
13. What programs exist in other jurisdictions that assess competency through alternative measures to an examination?
14. Overview of the alternatives that were offered in other jurisdictions in 2020
 - a. What jurisdictions implemented alternatives?
 - b. Did they extend beyond July 2020 examination?
 - c. How many individuals participated?
 - d. Any data on the success of the programs?
 - e. What has the impact been to portability for these lawyers?
15. What issues have been raised with current licensure models?
 - a. Does a proposed solution solve that issue?
 - b. Does the proposed solution create new issues?
 - i. Are there ways to resolve new issues?
16. Are there any measures of competency that will not be reviewed as part of the process?
17. If there are options that appear too costly or administratively burdensome, are there ways to overcome those obstacles?
18. What does it mean to be a self-regulated profession?

19. How do we solicit information in a way that there is a centralized repository of information for all stakeholders to review?
20. What data would be helpful for the Committee to have?
 - a. Is that data available?
21. As we received public comments and proposals, how should this information be stored and made available to interested parties?
22. How do we address equity?
23. How do we ensure fairness and uniformity?
24. What is the impact on any decision to portability?
25. What are the costs? (Board, law schools, applicants, public)
26. Conceptually, what does the Committee envision for the final report? What do the deliverables look like? Starting point:
 - a. Overview and framework
 - b. History of the bar examination
 - i. MN
 - ii. Generally
 - c. Current licensure process
 - d. What role does each entity have in the licensure process?
 - e. Discussion of alternative approaches
 - i. Evaluation of pros and cons
 - ii. Discussion of differences in conclusions (if any) between various stakeholders
 - iii. Recommendations
 1. Continue with exam (in modified form)?
 2. Alternative pathways?
 3. Other options?
27. Other topics?


MINNESOTA LAW



Curriculum & Requirements

Note: The following is a summary of the [Academic Rules](#). Students are responsible for reading the Academic Rules and for ensuring that they comply with all graduation requirements. Students should regularly review their academic progress and enrollment details via [MyU](#), their transcript, and [GPAS](#).

J.D. Degree Requirements

To receive the J.D. degree, each student must:

- Satisfactorily complete 88 credits of Law School work
 - Note: All courses with a “LAW” course number at or above the 6000 level count toward the 88-credit minimum, as do all approved transfer credits and all approved off-campus study credits. Some graduate-level courses in other units of the University of Minnesota also count, subject to limits in Academic Rule 3.3.
- At least 64 credits of the 88 credits must be completed in courses that require attendance in regularly scheduled class sessions at the Law School, at an ABA-accredited law school from which transfer credit is granted, or in approved foreign study courses.  [Review the list of courses with a Law School course number that do NOT meet the requirement](#)
- Have six semesters of residence as a law student
 - Note: a student must be registered for 12 or more credits for the semester to count toward residency.
- Satisfactorily complete required courses:
 - The required first year courses and number of credits are: Civil Procedure I (4), Constitutional Law: Federalism and Separation of Powers (3), Contracts (4), Criminal Law (3), Legal Research and Writing (4), Law in Practice (3), Property (4), Torts (4), and an elective (3) (either Civil Procedure II, Essentials of Business for Lawyers, International Law, or Legislation and Regulation)
 - The required upper division courses (3 credits each) are:
 - One of the following courses in Professional Responsibility: Professional Responsibility; Professional Responsibility - General (Law 6661); Professional Responsibility - Business (Law 6662); Professional Responsibility - Civil Trial Lawyer (Law 6663); Professional Responsibility - Criminal Law Ethics (Law 6664); Professional Responsibility - Government (Law 6665) and Professional Responsibility - Legal Malpractice (Law 6667).
 - Legislation and Regulation (Law 6018/6078)
 - One of the following courses in constitutional law focusing on civil rights and/or civil liberties: Constitutional Law: Fourteenth Amendment (Law 6081); First Amendment (Law 6083); Equal Protection and Civil Rights Acts (Law 6084); Criminal Procedure: Investigation (Law 6085).

- Satisfactorily complete legal writing requirements through:
 - a journal or moot court in the second year; and
 - in the second or third year, an approved experience or course as stated in [Academic Rule 5.4](#).
 [Current courses for Upper Division Writing credit under Rule 5.4\(a\)\(i\)](#)
- Each student must satisfactorily complete six credits in approved experiential learning courses (the first year Law in Practice course counts toward this requirement).  [Download a list of approved experiential learning courses](#).

University of St. Thomas School of Law

J.D. Graduation Requirements

Students must complete 88 credit hours and fulfill the non-course requirements below to receive a J.D.

First-Year Courses: 31 Credits Required	Upper-Level Courses: 14 Credits Required
LAWS 600 Civil Procedure (4 cr.)	LAWS 700 Business Associations (4 cr.)
LAWS 605 Constitutional Law (4 cr.)	LAWS 705 Evidence (3 cr.)
LAWS 610 Contracts (4 cr.)	LAWS 715 Lawyering Skills III (must be taken in the second year) (2 cr.)
LAWS 615 Criminal Law (3 cr.)	LAWS 725 Professional Responsibility (must be taken in the second year) (3 cr.)
LAWS 620 Lawyering Skills I (3 cr.)	LAWS 930 Mentor Externship 2nd Year (2 semesters, 1.0 total credit)
LAWS 625 Lawyering Skills II (2 cr.)	LAWS 933 Mentor Externship 3rd Year (2 semesters, 1.0 total credit)
LAWS 630 Property (4 cr.)	Elective Credits: Students must complete 43 elective credits.
LAWS 635 Torts (4 cr.)	
LAWS 640 Moral Reasoning for Lawyers: Foundations of Justice I (<i>fall orientation week</i>) (1 cr.)	
LAWS 641 Serving Clients Well: Foundations of Justice II (<i>mid-January</i>) (1 cr.)	
LAWS 642 Business Basics for Lawyers: Foundations of Justice III (<i>mid- to late spring semester</i>) (1 cr.)	

Additional Non-Course Requirements

Mentor Externship

St. Thomas pairs each law student with a professional mentor each year of law school through our Mentor Externship Program. The overall focus of the program is on building relationships and helping students gain experience in the legal profession. First year students are required to log 18 hours of fieldwork. Second- and third-year students complete 30 hours of fieldwork per year while also completing a required one-credit seminar each year.

Experiential Learning

Students must take six credits of “experiential learning” coursework to graduate. Serving Clients Well (LAWS 641) and Mentor Externship I and II (LAWS 930 and 933) provide three of the six credits needed to fulfill the “experiential learning” requirement before graduation. The other 3 credits can come through a legal clinic, externship or another approved course with practical elements like negotiation, trial advocacy, etc.

Public Service Program

Lawyers are in a strong position to effect positive institutional and social change. As such, we expect and encourage all law students to explore a variety of ways their interests, skills and talents can best serve the public. As a requirement for graduation, all J.D. students must complete 50 hours of public service during law school.

Upper-level Writing Requirement

Each student must demonstrate competence by producing a paper or two related papers under the supervision of a professor. To meet the upper-level writing requirement, the paper must reflect substantial legal research and reflect critical analysis, contain a minimum of 7500 words including appropriate footnotes, and meet specific instructor requirements.

Office of the Registrar

Academic Requirements

Planning Form for JD Academic

Requirements [/wp-content/uploads/sites/57/2018/08/planning-form-for-academic-requirements.pdf] (PDF)

Academic requirement information can be found in the [Law School Catalog](https://mitchellhamline.edu/catalog/) [https://mitchellhamline.edu/catalog/].

JD Students matriculating in fall 2020 or later are required to earn a minimum of 86 credits and the below requirements.

First Year/Foundational Required Courses (30 credits):

- 1003-Civil Dispute Resolution (4 credits)
- 1004-Torts: The Common Law Process (4 credits)
- 1005-Criminal Law: Statutory Interpretation (3 credits)
- 1006-Contracts: Transactional Law (4 credits)
- 1651-Property: Jurisprudential and Comparative Analysis (4 credits)
- 2410-Constitutional Powers: Advanced Legal Reasoning (3 credits)
- 1415-Legal Analysis, Research, and Communication (LARC) I (3 credits)
- 1416-Legal Analysis, Research, and Communication (LARC) II (3 credits)
- 1450-Legal Methods (1 credit)
- 1452-Foundations of Practice (1 credit)

Upper Division Requirements:

- 3200-Professional Responsibility (3 credits)
- 9550/9551/9555/9556-Advocacy (3 credits) OR 9552-Advocacy: Trial (2 credits) and 9553-Advocacy: Appellate (1 credit)
- 4575-Negotiation (3 credits) OR 9014-Transactions and Settlements (3 credits)
- 2421-Constitutional Liberties (3 credits)
- 1452-Foundations of Practice (for part-time students, 1 credit)
- Upper Level Advanced Research and Writing Requirement (Long Paper: fulfilled through various courses, seminars, clinics, Mitchell Hamline publications, or independent long paper)
 - [Long Paper Courses](https://agresso.mitchellhamline.edu/mhslcourses/course.aspx?act=ctg&val=92) [https://agresso.mitchellhamline.edu/mhslcourses/course.aspx?act=ctg&val=92]

Graduation Requirements:

- Completion of Career Development Employment Survey (questions about this should be directed to the Office of Career and Professional Development)
- If a student received Title IV student loans (Direct Student loan, or Federal Stafford, Federal Unsubsidized Stafford, and/or Federal SLS programs), the student must complete on-line financial aid exit counseling (questions about this should be directed to the Office of Financial Aid)
- Completion of Perkins Loan Exit Interview, if applicable (questions about this should be directed to the Student Accounts Office)
- Six total hours of extracurricular diversity programming. Of the six total hours required before graduation, at least four hours must be completed during the student's first and second year. (questions about this should be directed to the Office of Diversity and Inclusion)

No more than 22 credits under the 86 credit requirement can be applied toward graduation from non-classroom courses:

- field placements (including externships and residencies but not clinics)
- moot court or other competitions
- publications
- independent studies, including independent long papers, independent research, and internships with faculty
- teaching assistant placements, like structured study group leaders
- dual-degree (graduate school) courses

- any course for credit that is substantially based upon time expended outside a regularly scheduled class at Mitchell Hamline or another ABA-approved law school

This does not include study abroad or distance courses.

No more than 28 credits may be earned toward the J.D. degree through courses that are designated “distance education courses.” A distance education course is one in which students are separated from the faculty member or each other for more than one-third of the instruction and the instruction involves the use of technology to support regular and substantive interaction among students and between the students and the faculty member, either synchronously or asynchronously. Source: ABA Standard 306 (a). Courses that were converted to a remote format for the Covid emergency do not count against this limit.

Requirement for Additional Curricula and/or Academic Support Programming

Students with a cumulative grade point average under 2.8 and/or students in the bottom quartile of the class at the end of a student's second academic semester will be required to complete curricula and/or academic support programming.

Academic Support curricula includes the following courses:

- 2418-Bar Preparation Strategies: MPT (offered only fall semester)
- 1204-Constitutional Criminal Procedure: Investigation and Interrogation
- 2500-Evidence
- 4001-Bar Preparation Strategies: MBE and MEE (offered only spring semester; must be taken in the final spring semester of law school)

First year students matriculating in fall 2018 or later are required to take the following course:

- 1450 Legal Methods

JD Students matriculating in fall 2016 – spring 2020 are required to earn a minimum of 83 credits and the below requirements.

First Year Required Courses (28 credits):

- 1003-Civil Dispute Resolution (4 credits)
- 1004-Torts: The Common Law Process (4 credits)
- 1005-Criminal Law: Statutory Interpretation (3 credits)
- 1006-Contracts: Transactional Law (4 credits)
- 1651-Property: Jurisprudential and Comparative Analysis (4 credits)
- 2410-Constitutional Powers: Advanced Legal Reasoning (3 credits)
- 1415-Lawyering: Advice and Persuasion (effective Fall 2020, the title of this course will be Legal Analysis, Research, and Communication (LARC) I) (3 credits)
- 1416-Lawyering: Advice and Persuasion II (effective Fall 2020, the title of this course will be Legal Analysis, Research, and Communication (LARC) II) (3 credits)

Upper Division Requirements:

- 3200-Professional Responsibility (2 or 3 credits)
- 9550/9551/9555/9556-Advocacy (3 credits)
- 4575-Negotiation (3 credits) OR 9014-Transactions and Settlements (3 credits)
- 2421-Constitutional Liberties (3 credits)

Graduation Requirements:

- Completion of upper level [Advanced Research and Writing](https://mitchellhamline.edu/dean-of-students/dean-of-student-affairs-student-life/guidelines-for-advanced-research-writing-requirement/) [https://mitchellhamline.edu/dean-of-students/dean-of-student-affairs-student-life/guidelines-for-advanced-research-writing-requirement/] (fulfilled through various courses, seminars, clinics, journals/law review, or independent study/research).
 - [Long Paper Courses](https://agrosso.mitchellhamline.edu/mhslcourses/course.aspx?act=ctg&val=92) [https://agrosso.mitchellhamline.edu/mhslcourses/course.aspx?act=ctg&val=92]
- Completion of Career Development Employment Survey (questions about this should be directed to the Office of Career and Professional Development)
- Completion of Financial Aid Exit Interview (questions about this should be directed to the Office of Financial Aid)
- Completion of Perkins Loan Exit Interview, if applicable (questions about this should be directed to the Student Accounts Office)
- Six total hours of extracurricular diversity programming. Of the six total hours required before graduation, at least four hours must be completed during the student's first and second year. (questions about this should be directed to the Office of Diversity and Inclusion)

No more than 19 credits under the 83 credit requirement can be applied toward graduation from non-classroom courses:

- field placements (including externships and residencies but not clinics)
- moot court or other competitions
- Law Review or Journal
- independent studies
- teaching assistant placements, like structured study group leaders
- dual-degree (graduate school) courses
- any course for credit that is substantially based upon time expended outside a regularly scheduled class at Mitchell Hamline or another ABA-approved law school

No more than 27 credits may be earned toward the J.D. degree through courses that are designated “distance education courses.” A distance education course is one in which students are separated from the faculty member or each other for more than one-third of the instruction and the instruction involves the use of technology to support regular and substantive interaction among students and between the students and the faculty member, either synchronously or asynchronously. Source: ABA Standard 306 (a). Courses that were converted to a remote format for the Covid emergency do not count against this limit.

Requirement for Additional Curricula and/or Academic Support Programming

Students with a cumulative grade point average under 2.8 and/or students in the bottom quartile of the class at the end of a student's second academic semester will be required to complete curricula and/or academic support programming.

Academic Support curricula includes the following courses:

- 2418-Bar Preparation Strategies: MPT (offered only fall semester)
- 1204-Constitutional Criminal Procedure: Investigation and Interrogation
- 2500-Evidence
- 4001-Bar Preparation Strategies: MBE and MEE (offered only spring semester; must be taken in the final spring semester of law school)

[Standard Degree Audit Request Form](#) [/wp-content/uploads/sites/57/2019/03/standard-degree-audit-request-form-1.pdf] (PDF)

JD Students matriculating in spring or fall 2015 are required to earn a minimum of 83 credits and the below requirements.

First Year Required Courses (28 credits):

- 1003-Civil Dispute Resolution (4 credits)
- 1004-Torts: The Common Law Process (4 credits)
- 1005-Criminal Law: Statutory Interpretation (3 credits)
- 1006-Contracts: Transactional Law (4 credits)
- 1651-Property: Jurisprudential and Comparative Analysis (4 credits)
- 2421-Liberties: Advanced Legal Reasoning (3 credits)
- 1415-Lawyering: Advice and Persuasion (6 credits)

Upper Division Requirements:

- 3200-Professional Responsibility (2 or 3 credits)
- 9550/9551/9555/9556-Advocacy (3 credits) – satisfies 3 credits of Experiential Courses
- 2410-Constitutional Law-Powers (2 or 3 credits)
- 6 credits in [Experiential Courses](#) [https://agresso.mitchellhamline.edu/mhslcourses/course.aspx?act=ctg&val=91]

Graduation Requirements:

- Completion of upper level [Advanced Research and Writing](#) [https://mitchellhamline.edu/dean-of-students/dean-of-student-affairs-student-life/guidelines-for-advanced-research-writing-requirement/] (fulfilled through various courses, seminars, clinics, journals/law review, or independent study/research).
 - [Long Paper Courses](#) [https://agresso.mitchellhamline.edu/mhslcourses/course.aspx?act=ctg&val=92]
- Completion of Career Development Employment Survey (questions about this should be directed to the Office of Career and Professional Development)
- Completion of Financial Aid Exit Interview (questions about this should be directed to the Office of Financial Aid)
- Completion of Perkins Loan Exit Interview, if applicable (questions about this should be directed to the Student Accounts Office)

No more than 19 credits under the 83 credit requirement can be applied toward graduation from non-classroom courses:

- field placements (including externships)
- moot court or other competitions
- Law Review or Journal
- independent studies
- course exchanges
- dual-degree courses
- Structured Study Group Leader, Legal Methods Student Leader, and similar teaching assistant courses
- any course for credit that is substantially based upon time expended outside a regularly scheduled class time at Mitchell Hamline or another ABA-approved law school

No more than 15 credits may be earned toward the J.D. degree through courses that are designated “distance education courses.” A distance education course is one in which students are separated from the faculty member or each other for more than one-third of the instruction and the instruction involves the use of technology to support regular and substantive interaction among students and between the students and the faculty member, either synchronously or asynchronously. Source: ABA Standard 306 (a).

LL.M. Students

Mitchell Hamline's LL.M. Program is designed for foreign law graduates who possess a law degree (LL.B. or equivalent) from outside of the United States. The program requires students to complete 24 credits including an introductory course to familiarize them with the American Legal System. Students may complete a master's thesis. Most students complete the program in one academic year (fall and spring) of study during which they focus on a specialized area of law.

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Comprehensive Competency Study MN Board of Law Examiners Working Groups

Group 1 – Bar Examination Method

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.

Name	Additional Information
David Schultz, Co-Chair	Hamline; Minnesota State Bar Association (BAAC)
Wil Fluegel, Co-Chair	Fluegel Law Office; MN Board of Law Examiners (BAAC)
Chase Andersen	Lawyers Concerned for Lawyers
Debbie Shapiro	University of St. Thomas, School of Law (BAAC)
Dena Sonbol	Mitchell Hamline School of Law (BAAC)
Joel Nichols	University of St. Thomas (BAAC)
Kim Ronning	University of Minnesota (BAAC)
Landon Ascherman	Ascherman Law; Minnesota State Bar Association (BAAC)
Nicholas Ryan	Law Office of Eric T. Cooperstein, PLLC; HCBA – New Lawyers Section
Robb Enslin	Trial Group North, Duluth, MN; Lawyer
Shawne Monahan	MN Board of Law Examiners – Public Member (BAAC)

BLE Staff: Emily Corson

BLE: Staff: Emily Eschweiler

BLE Comprehensive Competency Committee Chair: Tom Boyd, Winthrop and Weinstein - MN Board of Law Examiners (BAAC)

John Koneck, *ex officio* – President, Minnesota Board of Law Examiners

Group 2 - Experiential/Clinic Method

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.

Name	Additional Information
Cresston Gackle, Co-Chair	Cresston Law LLC; New Lawyer
Hon. Juan Hoyos, Co-Chair	Hennepin County Judge; MN Board of Law Examiners (BAAC)
Andrew Rhoades	Transportation Security Administration; Lawyers' Professional Responsibility Board – Public Member
Dean Anthony Niedwiecki	Mitchell Hamline (BAAC)
Frank Aba-Onu	Prime Therapeutics; Minnesota Association of Black Lawyers (MABL)
Jonathon Nelson	Dedicated Commercial Recovery, Inc.; HCBA - New Lawyers Section
Kate Kruse	Mitchell Hamline
Lisa Montpetit Brabbit	University of St. Thomas (BAAC)
Lynn LeMoine	Mitchell Hamline (BAAC)
Tom Nelson	Stinson; Former MSBA President
Lisa Peralta	Lawyer; Minnesota Women Lawyers
Michael Studer	Harbott, Knutson, Larson, & Holten, Crookston, MN; New Lawyer

BLE Staff: Natasha Melchionne

BLE: Staff: Emily Eschweiler

BLE Comprehensive Competency Committee Chair: Tom Boyd, Winthrop and Weinstein - MN Board of Law Examiners (BAAC)

John Koneck, *ex officio* – President, Minnesota Board of Law Examiners

Group 3 – Supervised Practice Method

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.

Name	Additional Information
Carol Chomsky, Co-Chair	University of Minnesota Law School
Megan Miller, Co-Chair	Winthrop and Weinstine; New Lawyers
Anjie Flowers	Anoka-Hennepin School District; MSBA (BAAC)
Bruce Williams	The Law Office of Bruce R. Williams, Virginia, MN
Dana Mitchell	Assistant Ramsey County Attorney; Minnesota Association of Black Lawyers (MABL)
Jennifer Peterson	Office of Lawyers Professional Responsibility
John Koneck	Fredrickson & Byron; President of the MN Board of Law Examiners (BAAC)
Julian Zebot	Mason LLP; Lawyer's Professional Responsibility Board - Lawyer Member
Leanne Fuith	Mitchell Hamline (BAAC)
Lori Thompson	White Earth Tribal Court; Minnesota Judicial Branch – Committee of Equality & Justice
Monica Gould	University of St. Thomas (BAAC)
Pat Beety	League of MN Cities; MN Board of Law Examiners (BAAC)
Scott Swanson	Retiree (formerly University of St. Thomas)

BLE Staff: AJ Dordel

BLE: Staff: Emily Eschweiler

BLE Comprehensive Competency Committee Chair: Tom Boyd, Winthrop and Weinstein - MN Board of Law Examiners (BAAC)

John Koneck, *ex officio* – President, Minnesota Board of Law Examiners

MINNESOTA BOARD OF LAW EXAMINERS
COMPREHENSIVE COMPETENCY STUDY

REPORT OF
WORKING GROUP 1- BAR EXAMINATION METHOD
MAY 9, 2022

APPENDIX D

Charge for Working Group 1 - Bar Examination Method

As a Uniform Bar Examination (UBE) jurisdiction, Minnesota is reviewing the recommendations put forth by the National Conference of Bar Examiners regarding the NextGen examination.

The tasks assigned to Group 1:

- Look at the changes that National Conference of Bar Examiners has made
- Look at those changes in light of Minnesota's history with bar examination
- Critique bar examination as a method of measuring competency
- Assess if Minnesota should adopt a "Minnesota-centric" component for the bar exam
- Define expectations of Study Group moving forward

Considerations by Group 1:

What is the history of bar exam component to attorney licensure in Minnesota? Are there bar examination options beyond the NextGen Exam?

How will the NextGen exam address racial disparities, and achieve the baseline criteria considered by the working groups?

Recommendations by Working Group 1:

Working Group 1 is in support of there being multiple pathways to licensure in Minnesota, and based on what is known of it thus far, recommends the Next- Gen Bar Exam as one pathway, though the exam presents concerns, which our Group's report will address.

Working Group 1 does not recommend the creation of a Minnesota-centric bar examination

Ongoing concerns of Working Group 1

- We do not yet know what the NextGen exam will really look like
- As of 2026, NextGen will be the only bar exam offered in Minnesota
- Statements about the fairness of the NextGen exam to all takers are not convincing

SUMMARY OF WORK PERFORMED

BACKGROUND

Minnesota has used a bar examination, in various forms, since 1891. Today, it uses the Uniform Bar Exam. The National Conference of Bar Examiners, a private company, designs and produces the Uniform Bar Exam. Founded in 1931, the NCBE develops tests, trains administrators and graders for the test, provides scoring for the test, and conducts character and fitness investigations, if requested. States that use the Uniform Bar Exam are dependent upon NCBE for the form and content of the test as well as how it is administered and graded.

In January 2021, the National Conference of Bar Examiners announced that, after three years of investigation, it would make changes to the Uniform Bar Exam in 2026. The NCBE views this activity as a routine, periodic review to reflect changes in environment and technology since the introduction of the Uniform Bar Exam. In September of 2021, the Minnesota Supreme Court designated the Minnesota Board of Law Examiners to lead an assessment of the changes and what the changes meant for Minnesota.

PROCESS

The Minnesota Board of Law Examiners formed a Comprehensive Competency Committee to study the existing and potential methods of determining if one is prepared to practice law in Minnesota. A key consideration was representation of Minnesota stakeholders in the process. Studying alternative methods to determine preparation was another paramount consideration.

The MBLE created three study groups for the task:

Group 1: The Bar Exam Method

Group 2: The Experiential/Clinic Method Group 3: The Supervised Practice Method

This report concerns only The Bar Exam Method

PARTICIPANTS

David Schultz, Co-Chair, Mitchell Hamline School of Law; Minnesota State Bar Association

Wil Fluegel, Co-Chair, Fluegel Law Office; MN Board of Law Examiners Debbie Shapiro, University of St. Thomas School of Law

Dena Sombol, Mitchell Hamline School of Law

Joel Nichols, University of St. Thomas

Kim Ronning, University of Minnesota Law School

Landon Ascherman, Ascherman Law; Minnesota State Bar Association

Nicholas Ryan, Law Office of Eric T. Cooperstein, PLLC; Hennepin County Bar Association, New Lawyers Section

Shawne Monahan, MN Board of Law Examiners, Public Member

Also attending Study Group #1 sessions are: Tom Boyd, BLE Competency Committee Chair
Emily Eschweiler, Director of MBLE
Emily Corson, MBLE Bar Admission Administrator
Mariah Colvard, MBLE Administrative Assistant

ACTIVITIES

Group 1 held three sessions to prepare this report. Co-chairs and MBLE staff designed the sessions. All participants shared their views in each session. Sessions were recorded on zoom. Minutes were taken as well. Both are available for review.

Session 1 - March 3, 2022 - 11 am - 12 pm

Nine members of the study group plus the Competency Committee Chair and staff from the Minnesota Board of Law Examiners were in attendance via Zoom.

The main responsibility of Study Group 1 is to determine if the bar exam is still a viable option for Minnesota. The group will need to determine if the changes made by NCBE will help, hurt, or maintain the current structure of the bar examination model. It is important to understand the critiques that have been offered for the existing exam. The relationship of these issues is complicated.

Points that are being considered are whether Minnesota should remain a UBE state and whether state-specific questions should be incorporated into the examination.

The importance of ensuring equitable access to the bar as well as portability of test resulted were noted.

Operational questions such as how to identify persons/groups that may have useful information and how to interest them were discussed. The group decided to invite experts on the history of the bar exam as well as the new bar exam to address the next meeting.

Members of the group expressed a range of opinions as to the value of the new bar exam, the value of a bar exam at all, and what might be a better approach. While Study Group 1 shared important insights, the group must confine itself to consideration of the bar exam.

Session 2 - March 29, 2022 - 8:00 to 10:00 am

Nine members of the study group plus the Competency Committee Chair and staff from the Minnesota Board of Law Examiners were in attendance via Zoom. Working Group 1 invited three guest speakers to address the group.

Guest Speaker #1

Margaret Fuller Corneille, former Director of the Minnesota Board of Law Examiners, who served on the Board of Trustees for the National Conference of Bar Examiners as well as several of its committees. Ms. Corneille joined MBLE in 1987 and served until 2017.

Ms. Corneille gave a history of the bar examination in Minnesota based on her research on the Minutes of MBLE meetings dating back to 1920 and her own long experience with the Board. At the end of the 19th century, graduates of the University of Minnesota were admitted by diploma privilege. Law Office Study was another path to admission to the bar.

The process for admission with law office study continued to 1941 when an ABA requirement for a law degree was instituted in Minnesota. In 1980, Minnesota adopted the Multistate Bar Exam (MBE) which was produced by National Conference of Bar Examiners. In 2001, Minnesota adopted the Multistate Performance Test, once again developed by NCBE. The grading took place locally using the grading guidelines developed by NCBE. In 2014, Minnesota adopted the NCBE's Uniform Bar Examination.

There are three parts to the Uniform Bar Exam as it is used today: the Multistate Bar Examination (MBE) 50%, the Multistate Essay Examination (MEE) 30%, and the Multistate Performance Test (MPT) 20%.

The MBE. The Multistate Bar Examination (MBE) is a 200-question, multiple-choice exam administered over a six-hour period. The MBE is used to assess an examinee's ability to apply fundamental legal principles, exercise legal reasoning, and analyze fact patterns. The MBE component is 50% of the bar exam.

The MEE. The Multistate Essay Examination (MEE) consists of six 30-minute questions used to determine effective communication in writing, specifically the abilities to:

- Identify legal issues raised by real-life, factual scenarios
- Differentiate between relevant and non-relevant information
- Present a reasoned analysis of relevant information through clarity in writing and composition
- Demonstrate an understanding of the fundamental legal principles that are relevant to the issues tested

Unlike the MBE, which is graded and scored by the NCBE, the MEE is graded exclusively by the jurisdiction administering the bar examination. The MEE component is 30% of the bar exam. The Minnesota Board of Law Examiners employs approximately two dozen volunteers who must be trained, monitored, and evaluated for consistency in the grading process.

The MPT. The Multistate Performance Test (MPT) is the third component of the UBE and consists of two 90-minute sections to examine a candidate's ability to solve a fictional

client's problem. The test was designed to assess fundamental lawyer skills and determine if those skills are adequate regardless of which area of law one may elect to practice. The MPT is 20% of the bar exam.

A composite score is cumulated and a minimum passing score is set by the Minnesota Supreme Court.

Guest Speaker#2

Kellie Early, Chief Strategy Officer of the National Conference of Bar Examiners

Ms. Early presented an update on the NextGen Activities. Ms. Early announced that Content Scope Outlines were now available. This is the first step in delineating what topics will be tested and what lawyering skills will be assessed.

There will be no new additions to the exam regarding subjects tested. Based on practice analysis results, some subjects will not continue to be tested: family law, trust and estates, secured transactions and conflicts of law.

Legal research will receive new attention. It is not now robustly assessed in MPT. NCBE is placing more emphasis on research skills along with the understanding of foundational concepts.

Foundational Concepts are:

- Civil Procedure
- Contract Law
- Evidence
- Torts
- Business Associations
- Constitutional Law
- Criminal Law
- Real Property

The scope and implementation of the study have been guided by parameters of:

- frequency (how often it comes up in practice),
- universality (common to many practices),
- risk (risk of malpractice or poor client outcome),
- general familiarity (spot issues and working with legal resources), and detailed knowledge (knowing relevant detail of doctrine).

As a practical matter, the NCBE plans to phase out the current UBE and adopt and implement the NextGen exam in 2026. Any UBE jurisdiction, like Minnesota, will thus have a choice to make in the coming years. Realistically the current test instrument will no longer be available to use, so the choice will be to either:

- (1) adopt the NextGen exam as at least one instrument to assess competence,
- (2) switch to a test to be devised and implemented that is unique to Minnesota only, and incur the cost and challenges associated with being a singular jurisdiction as opposed to the ready "portability" of scores in multi-state jurisdictions,
- (3) augment the NextGen exam with some Minnesota-centric supplemental testing to be devised and implemented by Minnesota, or
- (4) eliminate any bar exam component and move to alternate pathways to admission only.

In her presentation, Margaret Corneille addressed the workability issues regarding a Minnesota centric exam, other than score portability issues, Peg stated she had believed it may lead to many issues.

- First, she noted the time and difficulty in researching the unique law of Minnesota so the Board can put together an exam on a semi-annual basis without repeating questions.
- Second, the staff needed to generate these questions along with training individuals to grade the questions would be significant.
- Third, the Board would potentially be undermining the ability of others to come to Minnesota and pass the bar exam.

Ms. Corneille mentioned one important reason to not test Minnesota specific law is the differences between Minnesota law and general law. The differences in law are the types of things that can be covered in continuing legal education courses and providers. The specifics of Minnesota law and other topics that are particularly important may be more appropriate for a CLE program.

Guest Speaker #3

Dr. Danette McKinley, Director of Diversity, Fairness, and Inclusion Research at National Conference of Bar Examiners

NCBE is rigorous in following test design that is fair. Even so, problems exist. In judging fairness of the test, the average MBE scores by race/ethnicity for July 2021 exams, and despite procedures in place, still shows group differences in the results.

- ▶ White examinees significantly outperform other groups across time. Race, ethnicity and gender are not factors that can be changed. Socio-economic factors and

opportunity for concentrated bar exam preparation may be factors affecting results that also cannot be controlled, but may be addressable in some fashion to aim towards equality of opportunity.

- ▶ Regarding cultural differences, Dr. McKinley noted two points;
 - (1) what students bring to law schools and
 - (2) what happens in law school

During law school, there may be a difference in emphasis on content that is on the bar exam. NCBE is rigorous in using psychometric procedures to support the reliability and validity of scores.

- ▶ Educational experiences vary from law school to law school, as do how students are supported, identified after 1L and how they progress through coursework from year 2 and 3.
- ▶ Currently, the NCBE is looking at curricular differences and emphasis on certain areas a student may want to go into versus others they do not want (required versus elective courses and how that plays out in bar success). The biggest concern is that the procedures that have been undertaken have not helped identify bias that is actionable.
- ▶ New methods are being sought to detect bias. Item review is not going to be enough, and there needs to be actionable research that can inform law schools and admissions administrators to best interpret those scores.

After the meeting, Co-chair Fluegel offered a synopsis of the changes expected in the NextGen bar Exam.

Guiding Objectives for NextGen Exam

- Exam should test fewer subjects and test less broadly and deeply within subjects covered
- Greater emphasis on lawyering skills
- Exam should remain affordable
- Fairness and accessibility must continue to be ensured for all candidates
- Benefit of score portability should be maintained

NextGen Exam structure.

- **Content.** Foundational Concepts & Principles and Foundational Skills
- **Structure and Format.** Integrated exam that assesses knowledge and skills holistically, with a mix of item types and formats
- **Frequency.** The exam will continue to be offered twice per year
- **Delivery Mode.** Computer-based, at test centers or on examinees' laptops at

- jurisdiction-managed sites.
 - **Scoring.** Compensatory scoring model that produces a single combined score for admission decisions.
 - **Timing.** Single-event, summative exam at or near the point of licensure
- NextGen exam Content: Foundational Skills and Associated Lawyering Tasks**

Foundational Skills Group 1: Issue Spotting and Analysis. Investigation and Evaluation

1. In a client matter, identify which Foundational Concepts and Principles are likely to affect the outcome of the matter.
2. In a client matter, identify which facts implicate which Foundational Concepts and Principles.
3. In a client matter, identify the applicable standards of review and/or burdens of proof that will apply to legal issues in the matter.
4. In a client matter, identify the strengths and weaknesses of the client's position and the opposing parties' positions based on the relevant legal rules and standards.
5. In a client matter that requires additional factual development, identify which facts need to be explored, and/or the best strategy for exploring those facts, in order to be able to evaluate the strengths and weaknesses of the client's position and the opposing parties' positions based on the relevant legal rules and standards.
6. In a client matter, identify gaps in information obtained, suggestions for improvement, and/or grounds for objection (if applicable) based on a transcript of another lawyer's interview, deposition, or examination of a fact witness.
7. Assess the probable outcome of a claim, motion, discovery matter, or objection based on the relevant legal rules and standards.

Foundational Skills Group 2: Client Counseling and Advising, Negotiation and Dispute Resolution. Client Relationship and Management

8. In a client matter, identify which claims to recommend bringing, which remedies to recommend seeking, which evidence to present, which arguments to make, and/or how to respond to arguments, based on the relevant legal rules and standards, and consistent with the client's objectives.
9. Given a transcript of another lawyer's interaction with a client, identify gaps in information obtained and/or suggestions for improving the lawyer's effectiveness.

10. In a client matter, list 2-3 points that favor your client's position and 2-3 points that favor the opposing party's position.

11. In a client matter, list 2-3 benefits and 2- 3 drawbacks of two approaches to settling disputed issues, consistent with the client's objectives.

12. In a client matter, list 2- 3 resolutions in which both sides of the dispute could potentially be satisfied.

13. In a client matter in which your client has 3-5 objectives, but where your experience suggests that only one of them is attainable, identify the one objective that you would recommend as the top priority.

14. In a client matter, identify or describe your client's BATNA (Best Alternative to a Negotiated Agreement) and a realistic "best case" outcome you would advise seeking through negotiation and/ or "worst case" outcome you would advise accepting, consistent with the BATNA and the client's objectives.

Legal Research

15. In a client matter that requires interpretation of a statute, rule, or constitutional provision, identify which words or elements in a provided excerpt seem legally significant and/or potentially ambiguous.

16. Given a collection of legal resources and excerpts from a client file, identify the most important legal and factual issues to be resolved and the relative weight that will likely be given to different resources/file materials by the court or other tribunal.

Legal Writing and Drafting

17. Draft the specified sections of a complaint or an answer to a complaint.

18. Draft the specified sections of an affidavit.

19. Draft or edit selected specified provisions of a contract.

20. Draft an email to a client, explaining the legal implications of a course of action, updating the client on the status of the client's matter, and/or providing advice on the next steps to be taken in the matter. (Note: This task will most often relate to a transactional matter.)

21. Draft the analysis section of an objective memorandum. (Note: This task will most often relate to a transactional or compliance matter.

22. Draft the specified sections of a motion or brief.

23. Draft the specified sections of a mediation brief.

Session #3 - April 21, 2022 - 11:30 am to 1:30 pm

Eleven members of the study group plus the Competency Committee Chair and staff from the Minnesota Board of Law Examiners were in attendance via Zoom.

Jacquelynn Rothstein, Director of the Wisconsin Board of Law Examiners, gave a presentation on the use of Diploma Privilege in Wisconsin. At Wisconsin's two law schools, the University of Wisconsin Law School and Marquette University Law School, all students are required to take a 90-credit core curriculum. Graduating from the Wisconsin law schools, does not automatically guarantee admission to the bar. Students need to ensure they have taken the core curriculum and not everyone chooses to do that. If they do not meet graduation requirements including a 2.0 GPA, they are not eligible. If there are character and fitness issues keeping applicants from being eligible it will not be granted either. Law schools have a Wisconsin component to what they are teaching as well. There are two options if a student does not choose diploma privilege: Wisconsin bar exam and Proof of Practice via motion (show substantial practice of law for 3 of the previous 5 years).

For diploma privilege to work, all of the law schools need to be on board in terms of their standards for admission, curriculum, grading, how they move students through the school. One of the advantages they have in Wisconsin is that they have only two law schools so it is limited on where they can go. 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. Rothstein noted there is no difference in disciplinary matters as far as they can tell. Issues noted are more attributable to business acumen, interpersonal skills, financial pressures, etc. Rothstein pointed out that diploma privilege has been in effect for nearly 100 years in Wisconsin, if there were real problems they would have surfaced by now.

It should be noted that Diploma Privilege is being considered in depth by Study Group 2 - Experiential /Clinic Method. That group will report its findings.

The group moved on to discuss what recommendations should be made to the Comprehensive Competency Study. Four topics stood out for the members.

First, there appeared to be a lack of concern on the part of NextGen developers over racial disparities and how they will be addressed. Comments by NextGen presenters indicated that they aren't fixing something because it isn't broken. Members of the group felt NextGen developers were not recognizing the issues with the exam and not seeing what really needs to be fixed. Despite the extensive research, NextGen is still a standardized test. There was

concern that the group doesn't have enough information to understand if the differences with racial outcomes is the fault of the exam or something else, particularly law schools.

Second, members expressed concerns about the capacity of any standardized test to assess lawyering "abilities". Members agreed that law school itself does not necessarily prepare you for the practice of law and the bar exam doesn't accurately measure your ability to practice law. While NextGen promises to be more "practice-like," it is difficult to see how it will measure qualities such as professionalism. Moreover, to the extent that law schools do not specifically teach students how to take the bar exam, Minnesota law schools will likely have to evaluate whether to modify their educational programs to better prepare students for the NextGen exam.

Third, the monopolistic nature of NCBE and its control and domination of the field economically and otherwise is troubling. Competition does not exist. We are not choosing between NextGen and the Uniform Bar Exam or another measure. Suggestion was made that NextGen offer a free, on-line prep course for its exam.

Fourth, there is a lack of information about the administration of NextGen, particularly with the use of computer test centers and accommodations.

The purpose of conducting our Comprehensive Competency Study is to examine the effectiveness and fairness of the process to admit people to the practice of law in Minnesota. Study Group #1 - Bar Examination Method appreciates the thorough, years-long scientific study that has gone into NextGen, the scientific design of the test instrument itself, and the efforts to limit bias. A great number of listening sessions with stakeholders were conducted over the last few years. The group welcomes the NCBE plans to alter the current, stand-alone practical test by integrating some of the material into the subject matter testing.

Questions remain regarding the lack of concern over racial disparities and how it will be addressed in the creation of the NextGen Exam. While acknowledging that there seems to be racial disparity, based on limited evidence, for bar passage on race, a path to change that is not offered.

The consensus of the study group appeared to be:

We are handicapped by the fact that the NCBE has yet to fully articulate the precise nature of the instrument they plan to roll out in 2026,

Yet, it seems certain whatever NextGen turns out to be, the current UBE exam is going to disappear in about 2026

There does not seem to be movement toward Minnesota developing a test of its own devoting the time, effort, resources and rigor that NCBE has utilized for NextGen. A Minnesota specific CLE to acquaint applicants or new admittees with the nuances of Minnesota practice may be worthwhile.

Likewise, there seems to be little enthusiasm for a “Minnesota-centric” component to augment the NextGen version

Members agreed that, as a practical matter, if Minnesota wants a bar exam, the NextGen will be the only version available as of about 2026. The shortcomings inherent in a timed written exam, whether the current UBE or a NextGen version, will likely remain in any such timed written exam, regardless of its design.

CONCLUSION

Working Group 1 - Bar Examination Method decided to take the motion as unanimously agreed by our group and use that as the group's ultimate recommendation, subject to those concerns and advantages:

Working Group 1 is in support of there being multiple pathways to licensure in Minnesota, and based on what is known of it thus far, recommends the Next-Gen Bar Exam as one pathway, though the exam presents concerns, which our Group’s report addresses.

- **Review of essential criteria**

All working groups used the same list of criteria as the framework for their discussions.

Working Group One also employed them. While an obvious and inherent part of the foregoing analysis, the criteria are discussed specifically here. The criteria are as follows.

- 1. Ensure that members of the bar are worthy of public trust with regard to their professional competence.**

While a bar exam may judge test taking competence and some general retained knowledge, it does not measure character or integrity. It serves to assess a basic measure of competence, assuming it is designed to accurately assess an applicant’s knowledge of minimal core legal principles and – with the advent or expansion of the practical approach to testing in the NextGen exam – may also reassure the public about an applicant’s basic ability to apply such knowledge to certain legal tasks or problems.

The Committee, however, was troubled by the shared perception that any form of objective testing may not accurately assess those capacities for all test-takers, due to variations influenced by socio-economic limitations. The group's perception is that wealthier applicants could afford to devote more time to short-term test-taking preparation and review that may enhance their test performance without accurately reflecting character or competence of less financially secure applicants who may have to work to support themselves instead of studying for a bar exam.

The Committee did observe, however, that many professions use a test of some sort as a presumptive indicator of core skills.

2. **Evaluate applicant's ability to satisfy 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; and the ability to communicate with a high degree of clarity and organization.**

As noted above, if properly designed a bar exam achieves this goal to an extent, apart from the concerns noted above.

What the bar exam does not measure, however are other essential eligibility requirements, including the ability to interact effectively with clients; and the ability to conduct legal research, although the NextGen's approach are more practical testing appears an effort to achieve the latter.

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.**

As noted in topic 1 above, the Committee was genuinely concerned about the ability of a bar exam to fairly account for knowledge possessed by applicants with more limited financial means or other limitations. The NCBE's test evaluative efforts, however, suggest that NextGen will be designed with this goal specifically in mind, but whether it can yet be achieved remains unknown.

4. Ensure equal access to the practice of law and working to eliminate inequitable barriers to the practice of law on the basis of socio-economic status, race, gender, disability status, etc.

This concern about any form of bar exam was raised repeatedly in Committee meetings, and accounted for the hope that Minnesota may come to embrace multiple pathways to admission so that a more diverse bar could more readily be achieved.

5. Promote lawyer well-being.

Any form of bar exam is not designed to enhance well-being of applicants as it presents a barrier that engenders psychological, emotional, intellectual and financial pressures that can affect or exacerbate health concerns.

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.

The bar exam as promulgated by NCBE is designed with these parameters in mind and a considerable effort was devoted by the NCBE in developing a NextGen exam to these concerns. The Committee felt limited by time and resources to challenge or seek to duplicate these efforts.

A central concern of the Committee, however, was that NCBE has a complete monopoly of the testing and a large measure of preparatory studies for their exam and should be encouraged to reduce costs of applicants as much as possible.

7. Ability of law schools to implement, the flexibility of curriculum and any ABA-Accreditation concerns.

This is one of the advantages of the bar exam in that it has existed for such a lengthy period of time that – while not “teaching to the test” – law schools have developed structures and systems to assure basic bar preparation.

The Committee felt that ABA accredited schools – and particularly the three law schools in Minnesota – strive to provide the quality of legal education that should be sufficient to pass a bar exam.

8. Reliability of standards to determine meaningful, objective, and consistent results.

This is another attribute of the bar exam, as NCBE studies the science of test development and administration and has myriad data available. The Committee’s concern is that – as a monopoly – NCBE is largely judging its test instrument itself, but note that reassuringly NCBE has made data available for others to assess.

9. Available data regarding prior use of method/particular model.

This factor has been discussed above.

10. Any other considerations raised by key stakeholders

The Committee reached out earlier on and encouraged involvement and expression by stakeholders, but hopes that the public review of the group’s report will engender wider participation and comment.

Working Group 1 does not recommend the creation of a Minnesota-centric bar examination

Co-Chair Fluegel pointed out that the activities of our working group over the past few months are only the beginning of the Comprehensive Competency Study

Working Group 2 Initial Report

I. History of Working Group 2

The members of Working Group 2 are: Alix Bruce, Andrew Rhoades, Dean Anthony Niedwiecki, Cresston Gackle (co-chair), Frank Aba-Onu, Gabriel Ramirez-Hernandez, Hon. JaPaul Harris, Jonathan Nelson, Hon. Juan Hoyos (co-chair), Professor Kate Kruse, Dean Lisa Montpetit Brabbit, Lisa Peralta, Dean Lynn LeMoine, Mariah Colvard, Michael Studer, Natasha Melchionne, and Tom Nelson.

Working Group 2 was tasked with the following:

Undertake an **in-depth review of potential models that focus on experiential or hands-on methods to licensure during law school**. Evaluate the use of portfolios to show progress, time commitment by law professors and law students, a standard rubric for grading purposes, and any requirements for entry into or maintenance in the program. **Consider the “diploma privilege”** method of licensure, including what an ABA degree means, for in-state versus out-of-state law schools, and variations between law schools.

In undertaking this examination, Working Group 2 began with knowledge shared at the initial Competency Working Group meeting held on January 14, 2022, in which there was discussion of recent and extensive work performed by groups in two other states. In Indiana, a study commission published its report on December 11, 2019. In Oregon, a task force submitted various reports, including a letter dated June 18, 2021, recommending adoption of alternative pathways to bar admission including a curricular and experiential pathway based in law school. The Oregon Supreme Court has since approved this recommendation of adding alternative pathways to bar admission permanently and an implementation committee is now working on operationalizing the recommendation in close consultation with their local law schools.

During this initial period, Working Group 2 met three times, first on March 21, 2022, then subsequently on April 20 and 25. Working Group 2 also held brief collaborative drafting sessions on May 26 and 27.

At the first meeting of Working Group 2, members reviewed a collection of documents describing the work of other state task forces examining alternative pathways to bar licensure, measuring minimum competency to practice law, identifying bias in bar exam admission processes and outcomes, and proposing curricular and experiential models of bar licensure. These materials are described in greater detail later on in this report and are contained in the attached appendix.

In reviewing these documents, members of Working Group 2 identified interest in the University of New Hampshire Franklin Pierce School of Law’s Daniel Webster Scholars Honors Program in which students create a portfolio of legal work over the course of a two-year program in law school after which they are licensed to practice upon successful completion, evaluation by their board of law examiners, and graduation from law school.

Working Group 2 also identified significant cross-over with Working Group 3 which is examining a post-law school graduation supervised practice model of bar licensure, particularly in the area of evaluative measures and competencies. To that end, collaboration with Working Group 3 was established via a competencies subgroup aimed at identifying the core and minimum competencies for bar licensure that should be evaluated for in any program, whether in a clinical “during law school” setting or in a supervised practice “after law school” setting.

In discussing the potential for licensure through a clinical and experiential learning program, Working Group 2 noted that the clinical programs at each of the Minnesota law schools are especially strong in their structures and outcomes. Each law school’s clinical program features substantial skills-based learning that includes highly practical and often highly client-oriented simulation or student practice under the supervision of experts in their respective fields.

Members of Working Group 2 and 3 both identified the importance of scalability which has been raised as an issue by both Dean Brian Gallini of the Oregon task force and Director Courtney Brooks of the UNH Daniel Webster Scholars program. Members noted the potential to adapt and certify programs that already exist at the law schools in line with ABA standards for law school curriculum.

Members also expressed concern and interest in learning more about the future of portability of bar licensure when using the curricular pathway, including diploma privilege, as well as ensuring that program requirements could eventually be applied to non-Minnesota law school programs to comply with the Dormant Commerce Clause and be fair to non-Minnesota law school students.

Overall, members of Working Group 2 expressed strong interest in crafting a curricular pathway that is more skills based and more relevant to practice than the knowledge-based and speed-based bar exam.

At the second meeting of Working Group 2 on April 20, 2022, members engaged in two hour-long presentations and question and answer sessions with Courtney Brooks, Director of the UNH Daniel Webster Scholars Program, and Professor Joan Howarth of the William S. Boyd School of Law in Nevada.

Director Brooks shared an overview of the program, program outcomes, student outcomes, and reception by the New Hampshire bar and bench. Their two-year program emerged as a collaboration of the New Hampshire Supreme Court, law school, bar association, and board of law examiners. The DWS program is simulation-based and skills-focused, not focused on substantive law, and includes a pretrial advocacy simulation, simulated litigation of a case through federal courts, negotiations and dispute resolutions, community lawyering, a business transaction, and a capstone course with client counseling and interviewing of simulated clients who evaluate the students on their skills. Scoring of the evaluations is calibrated. Currently, the DWS program is capped at 24 students though Director Brooks noted the program could be scaled higher with approval of their Supreme Court and provision of additional resources for evaluation, such as additional evaluators for the simulated client interviews. Director Brooks also stated she would not be concerned if the program were condensed into one year of building skills

based on simulations followed by a year of participating in experiential learning, such as clinical student practice.

Their program has had excellent outcomes for students and the bar, their students are sought after for employment, and their students have enjoyed marked success in the legal community. No significant issues with discipline rates or other markers of competency were noted though those continue to be in need of data for further study. The scholars were also allowed to participate in traditional legal writing experiences, including moot court and law reviews, as well as clerkships. Resistance by the New Hampshire bar to the program as a path to licensure has dissipated substantially since inception of the program and the results, both practical and employment-wise, the students have achieved.

In regard to time commitment, the examiners each take roughly three hours per student per semester to provide evaluation of the students and their portfolio of work product. Finally, Director Brooks noted that of scholars program graduates, about half remain in New Hampshire and the other half practice elsewhere, taking the bar exam in another jurisdiction. The bar passage rate of their students is in the 90th percentile and has been studied by their program. Director Brooks emphasized that the scholars program is directly transferable to all states because it is skill-focused and simulations are based on federal law. Additionally, Maine and Vermont allow scholars graduates to waive in to practice after three years in practice and Massachusetts and New York allow the same after five years. Currently, Minnesota bar regulations would also allow Daniel Webster scholars graduates to waive in after three (3) years if they meet the requirements of Rule 7A.

For the second half of the meeting on April 20, members of Working Group 2 heard from and asked questions of Professor Joan Howarth. Professor Howarth has been doing extensive research on bar admission practices for a new book she has coming out entitled “Shaping the Bar: The Future of Attorney Licensing.” Professor Howarth emphasized the importance of practicing law under the supervision of a licensed attorney before practicing alone, drawing upon the experience of professionals in other fields, particularly in engineering and medicine, as well as in other jurisdictions, including Canada. Practicing under skilled supervision imparts not only practical skills, but also habits of professionalism and competence that transcend specializations. Professor Howarth stated she believes at least one-sixth of law school credits earned should be experiential and skills-based learning.

In reflecting on the information shared by Director Brooks and Professor Howarth, Working Group 2 noted that there is a distinct focus on clients and the responsibility to clients that the licensing process should also be focused on. Additionally, members observed that the bar exam itself contributes substantially negatively to law student well-being and the interest of law students and law school graduates to practice law. 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.

Between the second and third meeting of Working Group 2, Mitchell Hamline held the Building a Better Bar Conference on April 22 at which many if not all of the leading scholars on bar

licensure reform presented. The presentations were attended by some members of the working group and the materials were placed in the group's shared file drive for review.

Working Group 2 met for a third time on April 25 and heard from Dean Brian Gallini of Willamette University. Dean Gallini is a key member of Oregon's task force examining the bar exam and alternatives. Dean Gallini shared in detail the information and questions examined by their task force in deciding to recommend a clinical or curricular path to law practice. Dean Gallini noted that the task force was focused on consumer protection, the protection of the potential legal client, from lack of competence. He shared that the 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 race.

Oregon is poised to implement a curricular pathway that is a mix of experiential learning (simulation learning, clinics, etc.), along with a core base of practice-based courses for doctrinal knowledge. Students would be able to declare their intent to proceed along the experiential pathway in their 2L year and then throughout the balance of their time of their last four semesters, the student would interact with a bar examiner with the student's work culminating in a transactional path or litigation path. At this time, Dean Gallini's institution is going to start with a pilot program of approximately 40 students (out of a school size of 130) to be allowed into the program, then expand and scale from there.

In addition to its meetings, Working Group 2 has examined substantial materials on the Daniel Webster Scholar program, minimum competence, bar licensure, and the bar exam as reflected in the Appendix.

The essential elements of the Daniel Webster Honors Program at the University of New Hampshire School of Law include the following:

- Students may apply for the program at the end of their 1L year.
- Upon graduation, and upon passing the MPRE and the Good Character evaluation, the students are admitted to the New Hampshire bar.
- Students are required to maintain a B- GPA in the program, and a 3.0 GPA in their overall curriculum.
- There are roughly 20 students in each class.
- The school completed a three year "pilot" program in 2009, and graduated its first class of 13 in 2008.
- The goal of the program is to make students "client ready" by way of a practice-based and client-oriented experiential program.

- The school articulated 10 Foundational Skills, and 4 Fundamental Values, that form the conceptual core of the program.
- The assessment of the students' performance is rigorous, including the on-going and eventual development of a "portfolio" of performance, which is then evaluated by the state's Board of Law Examiners.
- The program is both experiential and curricular.
- The program was initially championed by members of the New Hampshire Supreme Court, and the support for the experiment grew from there.¹

The essential elements of the Oregon Experiential Pathway (OEP) are as follows:

- A two-year curriculum-based experiential learning pathway.
- A set curriculum during law school, culminating in a capstone portfolio and/or an examination assessment by the Bar Examiners (similar to the New Hampshire program).
- The OEP recognizes the value of experiential learning, focusing on aspects of active law practice including: document creation, client interviews, depositions, trial practice, and practice management, particularly regarding deadline management. This would establish the student's minimum competency while under the supervision of a member of the BBX.
- The recommendations of the Oregon Task Force included a sample curriculum, including the successful completion of Professional Responsibility, Evidence, a graduate writing requirement, and several of the following: state/local law, constitutional interpretation, administrative law, criminal procedure, business associations, family law, personal income tax, or trusts and estates as well as the completion of "no fewer than 9 credits of closely supervised clinical work or simulation coursework."²
- The curricular pathway begins in the student's 2L year after students apply to participate in the program.
- This pathway is designed for law students in the state of Oregon who plan to practice in the state of Oregon.

Working Group 2 examined the diploma privilege by taking a look at the practice in Wisconsin. The essential elements of the diploma privilege in Wisconsin, under which students at the University of Wisconsin School of Law or at Marquette University Law School are automatically admitted to the bar upon complying with the terms of SCR 40.03, are as follows:

¹ "New Hampshire's Performance-Based Variant of the Bar Examination," by John Burwell Garvey, Director of the Daniel Webster Scholar Honors Program (2010).

² "Recommendation of the Alternatives to the Bar Exam Task Force," Report to the Oregon State Board of Bar Examiners (June 18, 2021), *12-13.

An applicant who has been awarded a first professional degree in law from a law school in this state that is fully, not provisionally, approved by the American bar association shall satisfy the legal competence requirement by presenting to the clerk certification of the board showing:

(1) Satisfactory completion of legal studies leading to the first professional degree in law. The law school shall certify to the board satisfactory completion of not less than 84 semester credits earned by the applicant for purposes of the degree awarded.

(2) Satisfactory completion of study in mandatory and elective subject matter areas. The law school shall certify to the board satisfactory completion of not less than 60 semester credits in the mandatory and elective subject matter areas as provided in (a) and (b). All semester credits so certified shall have been earned in regular law school courses having as their primary and direct purpose the study of rules and principles of substantive and procedural law as they may arise in the courts and administrative agencies of the United States and this state.

(a) Elective subject matter areas; 60-credit rule. Not less than 60 semester credits shall have been earned in regular law school courses in the subject matter areas generally known as: Administrative law, appellate practice and procedure, commercial transactions, conflict of laws, constitutional law, contracts, corporations, creditors' rights, criminal law and procedure, damages, domestic relations, equity, evidence, future interests, insurance, jurisdiction of courts, legislation, labor law, ethics and legal responsibilities of the profession, partnership, personal property, pleading and practice, public utilities, quasi-contracts, real property, 212 taxation, torts, trade regulation, trusts, and wills and estates. The 60-credit subject matter requirement may be satisfied by combinations of the curricular offerings in each approved law school in this state.

(b) Mandatory subject matter areas; 30-credit rule. Not less than 30 of the 60 semester credits shall have been earned in regular law school courses in each of the following subject matter areas: constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibilities of the legal profession, pleading and practice, real property, torts, and wills and estates.

(c) Law school certification of subject matter content of curricular offerings. Upon the request of the supreme court, the dean of each such law school shall file with the clerk a certified statement setting forth the courses taught in the law school which satisfy the requirements for a first professional degree in law, together with a statement of the percentage of

time devoted in each course to the subject matter of the areas of law specified in this rule.³

II. Guiding Principles

Based on the above information and the analysis of the Working Group members, Working Group 2 has developed the following guiding principles:

(1) The purpose of Working Group 2 is not to examine or evaluate the current or NextGen bar exam pathway to the licensure of attorneys. We leave that to Working Group 1, and to the broader group, as well. Nor do our explorations and recommendations arise out of an assumption or a conclusion that either the existing or the NextGen bar exam are somehow flawed, intentionally discriminatory, or otherwise insufficient or inappropriate. The primary question that we are considering is whether there should be an additional pathway to licensure, providing a choice to aspiring attorneys where none now exists; and, if so, what that additional pathway should look like. Toward that end, we have most often asked ourselves the question: "Why not?" instead of "Why?" Based on our review, it appears that all three working groups believe in the importance of additional or alternative pathways to bar licensure.

We are also mindful not only of the positive opportunity before us, but also the potential for thoughtful hesitations regarding our recommendations. Put somewhat humorously, we note the old saying about how there are two things that all lawyers seem to disfavor—the status quo, and change. Our hope, though, is to not make the perfect the enemy of the good, while we explore the "art of the possible."

(2) Our explorations and recommendations are decidedly not directed toward an alternative pathway to licensure that is somehow "easier" or "less demanding" than the bar exam. Indeed, we have instead been considering pathways that may in some ways be more or differently demanding than the current bar exam experience, including both curricular and experiential elements that are directly related to the competency of new and young lawyers to practice law in Minnesota, all of which would be subject to important evaluation and assessment to ensure the continuing high quality of the practice of law in Minnesota. These pathways are firmly rooted in comprehensive studies of what competency to practice law actually is in practice, including the Twelve Building Blocks study by IAALS and most comprehensively addressed in Working Group 3's initial report.

Along the way, we should be mindful of the practicalities of this exploration, and the potential practical consequences. Based on our conversations among the Working Group, including with clinical professors, this curricular pathway could be integrated into current law school curriculum naturally and without significant disruption except for additional logistical burdens for law schools in making clinical and other programs available to all of their students as a matter of course. Similarly, an effective additional alternative pathway to licensure may have positive practical consequences for both employers and their new attorney employees—allowing new attorneys to start out as members of the bar immediately upon graduation (rather than imposing the uncertain waiting period of the bar exam results on both the employer and the new

³ Wi. SCR 40.03 (2020).

attorney employee), and avoiding the unfortunate cost inflicted upon bar exam candidates of delayed employment and the inevitable expense of the virtually-mandatory bar review courses.

(3) In terms of the curricular aspect of our explorations, we remain committed to the notion that any pathway toward licensure cannot function or succeed without a deep academic understanding of the law beyond the practice of law. Students would continue to gain academic credits in traditional doctrinal courses as well as being educated in substantive law connected with their experiential courses. during each of the student's years in law schools, with at least 15 credits of clinical experience as recommended by Professor Howarth in her presentation to the Working Group. We are considering the development of a new and unique "Minnesota Bar Curriculum," establishing the core, and perhaps somewhat conventional, courses that we believe should be studied and passed with excellence before being admitted to the bar. We are also considering a unique, to our knowledge, curricular element that would relate directly to the history and character of the practice of law in Minnesota.

(4) In terms of experiential learning opportunities during law school and before graduation and admission to the bar, we have focused on the skills and experiences that young lawyers should be introduced to and capable of prior to starting the practice of law, whether those students are currently intent on a life in trial and litigation, or in personal and corporate transactions, or in public service. Fortunately, our Minnesota law schools already have strong experiential programs and learning opportunities, all of which could and should be incorporated into the new framework that we are proposing while maintaining the core elements and guidelines of those existing programs.

(5) Because of the new and unique nature of our exploration and proposals, we envision recommending a "pilot" period of implementation and evaluation during which each law school determines a limited number of students are permitted to pursue, based on the students' choice, this additional pathway.

(6) This exploration will require new, unique, and considerable collaboration amongst the many communities that make up our legal profession including law students and newly admitted lawyers, the law schools and their leadership, faculty, and staff; the Minnesota Supreme Court and the broader judiciary; our bar associations, particularly affinity bar organizations, and members of the bar; and the ABA and LSAC, along with the Board of Law Examiners to ensure this pathway serves the needs of all in the legal community and the public. From our investigation into the diploma privilege, including the experience in Wisconsin, public interest firms and private law firms both have benefitted immensely from the immediacy and certainty of admission from the diploma privilege.

(7) This exploration will also require new and unique protocols of assessment, both with respect to the evaluation of the candidates themselves and with respect to the evaluation of the pilot program. Both 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) All that said, it seems safe to say that our Working Group 2 has been intrigued by, and impressed by, two existing models, in particular—the Daniel Webster Scholar Honors Program at the University of New Hampshire School of Law, and the new State of Oregon model. We have also been impressed by the experience and success of our neighbor to the East, Wisconsin, which has for years operated successfully by making available a "diploma privilege" to successful graduates of the two law schools in Wisconsin who wish to practice law in the State of Wisconsin. These models and the diploma privilege should be adapted to the clinical programs currently available at the three Minnesota law schools that ensures a minimum standard of competence is developed by each student. These programs should be open to each law student and not based primarily or solely on prior academic achievement.

III. Recommendations

In examining the curricular pathway and diploma privilege, Working Group 2 acknowledges there may be pushback and potential stigmatization of a curricular pathway as an easier alternative than taking the bar exam. Working Group 2 specifically rejects this analysis for the following reasons. First, a curricular pathway with substantial experience practicing law promises to raise the bar of minimum competence by evaluating competencies not currently tested on the bar exam, particularly practical skills such as client counseling, or not tested well on the bar exam, including careful evaluation of client problems. As noted by one law professor the Working Group heard from during the Mitchell Hamline conference on bar licensure, many if not all of her students who passed the LSAT with flying colors could, if permitted, simply take the bar exam review course and pass the bar exam without even setting foot in a law school. Second, a curricular pathway would not be easier than taking a bar exam given the length, program requirements, intensity of supervision, and work product. Third, based on the experience of the Daniel Webster Scholar program, adaptation of a curricular pathway done in close coordination with the law schools is likely to be a plus on a law graduate's resume given their readiness to practice.

Working Group 2 believes the curricular pathway is as good or better than the current testing regime. The core evaluation of this pathway however must simply be whether it prepares students for their first year of actual practice. Based on our reading of reports on competency and our knowledge of the clinical programs, we believe that this pathway would best prepare students for their first year of practice and set them on a course for success and competence in the law without creating any artificial barriers.

Finally, Working Group 2 expresses a strong trust in the law schools and the Minnesota legal community to ensure programs certified as curricular pathways to bar licensure will be strong and include substantial skill-building through mentorship, evaluation, and simulation.

With these thoughts in mind, Working Group 2 has concluded and therefore recommends adoption of a curricular, experiential pathway to the practice of law would ensure that members of the bar are worthy of public trust and competent to practice law across Minnesota. In examining alternative pathways to bar licensure, Working Group 2 believes our responsibility includes eliminating inequitable barriers to the practice of law and ensuring law student and lawyer well-being. To that end, this additional pathway may indeed provide a route that reduces

inequity in bar licensure, increases the diversity of the profession, and maintains well-being by providing a rigorous and solid foundation for new lawyers.

Working Group 2's remaining goals for evaluation include scalability and examination of current resources and future costs to clinical programs. Working Group 2 intends to engage with the law school clinical and externship programs on this proposal to determine their needs if the program is to be implemented. To date, Working Group 2 has members from Mitchell Hamline who have expressed support for this pathway as well as a readiness to begin examination of implementation. Outreach has been made to the programs at St. Thomas School of Law and University of Minnesota Law School and the intent is that with the solid proposal in the form of the guiding principles and recommendations below, discussions could be more fully engaged in and discussed with the law schools on implementation.

Working Group 2 believes that the curricular pathway to practice is a transformative opportunity to set the bar for legal education in a way that serves everyone equitably, from law firms and public service organizations, to law schools, to clients and the community, to law students and their families. In particular, Working Group 2 believes that this graduated and foundationally practical model of bar licensure would set students on a solid footing while also developing their skills to maintain well-being during law school and in practice.

It is the recommendation of this Working Group to create a set of minimum competence standards to certify curricular and experiential pathways to bar licensure at each of the Minnesota law schools, similar to working examples drawn from the states of New Hampshire and Oregon. These learning pathways could have two tracks: trials and litigation or personal and corporate transactions. The programs would be available to all students and would be administered by the Minnesota Board of Law Examiners to ensure each student meets minimum practice standards with the law schools providing the foundation of curricula, day-to-day evaluation, and supervision. These programs could include study of unique or notable Minnesota law-related matters, including treaties with Native American nations, amendments to the Minnesota Constitution, the requirements of the Minnesota Rules of Professional Responsibility on pro bono work, the economics of practicing law in Minnesota, and so on. Additionally, these programs could include competence on lawyer well-being by which we mean evaluating the ability of lawyers to set and hold boundaries with clients, supervisors, and themselves and to know their own limits. We believe the law schools are in the best position, although the implementation committee may have additional insight, to determine the core coursework to be required with the above firmly in mind.

This curricular pathway would, based on the models in other states, require students to elect to proceed on this pathway by the start of their second year of law school. Working Group 2 acknowledges the difficulty and rigor required in graduating from law school and expresses confidence in the law schools' clinical programs to fully train students to be prepared for their first year in legal practice. We acknowledge that our neighbors in Wisconsin have a diploma privilege based on a set of core courses and authorize their students to practice based on graduation. In evaluating adoption of the diploma privilege in Minnesota, we acknowledge the following pros and cons. First, the diploma privilege is a relatively simple, direct, and historically used route of admitting law students to the bar. Adoption in Minnesota as part of this

curricular pathway would not reduce the quality of law practice nor set a lower bar than the exam based on our evaluation of the Daniel Webster scholars program, Wisconsin's experience, and competencies served by clinical experience. We similarly note that a diploma privilege would be relatively easier to administer from the Board of Law Examiners' perspective as only regular auditing would need to be conducted, rather than an individual evaluation of each student, and would not create a bottleneck for student participation in the curricular pathway. On the other hand, we note the potential for an increased logistical burden on law schools to certify students as having obtained the diploma privilege via the curricular/clinical pathway as well as the perception, though not the fact, of some decreased level of difficulty and rigor such that those obtaining the diploma privilege are not prepared to competently practice law in their first year of practice.

This effort will require collaboration from the entire legal community to be successful. We expect that the implementation committee which operationalizes this recommendation would evaluate and determine the role and interactions between the law school clinical programs and the Board of Law Examiners. We expect that on the front end, the BLE would certify clinical programs as training students in the required areas of minimum competence and credit requirements. We would expect the implementation committee to evaluate the BLE's role on the back end, particularly in determining whether the BLE has capacity and a necessary role in evaluating each individual student's work product to determine whether they should be admitted based on their diploma and fulfillment of the curricular pathway requirements. We are inclined to believe that law schools are in a better position for this evaluation and that the BLE's role would remain auditing of the curricular pathways to ensure minimum competence in the areas identified in the IAALS study are adequately trained.

Working Group 2 recommends that pilot programs be initiated at each of Minnesota's law schools in line with the above guiding principles within one (1) year of completion of the implementation committee's work at each of Minnesota's law schools. Each of the law schools would have independent programs certified by the BLE to meet the requirements of training for the competencies identified and, beyond the estimated 15-credit client-oriented practice requirement, would allow flexibility by law schools and students to determine the structure of their pathway beginning in the second year of law school. This would necessitate close collaboration between Minnesota law schools; full-time and adjunct faculty, staff, externship and internship providers, and law students; the Minnesota Supreme Court; Minnesota bar associations and affinity groups; the LSAC; and the Minnesota Board of Law Examiners. Following this pilot implementation at each of Minnesota's law schools, the BLE would then apply the same criteria developed by the implementation committee to programs outside of Minnesota, including foreign jurisdictions to comply with the Dormant Commerce Clause and to encourage the increase of the portability of Minnesota's curricular pathway admissions.

Working Group 2 is deeply invested in this work and strongly endorses the above guiding principles and recommendations. We invite members of the BLE and Supreme Court to engage with us on these matters and help develop this pathway for the benefit of all.

Appendix

These materials were reviewed by members of Working Group 2 in evaluating the curricular pathway to bar admission and the diploma privilege.

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MBLE Comprehensive Study of the Bar Examination
Recommendations of Working Group 3: Supervised Practice
May 31, 2022

For the reasons discussed below, Working Group 3 recommends that the Minnesota Supreme Court approve development of a Minnesota Supervised Practice Pathway (MSPP) as an option for applicants who choose to follow such a pathway for licensing. For applicants who choose to follow this pathway, the MSPP would replace the bar examination as a method of demonstrating minimum competence to practice law. Applicants would still be reviewed for compliance with the character and fitness requirements for licensing and would be required to take and pass the Multistate Professional Responsibility Examination.

In this report, we describe the reasons for adopting the MSPP and outline the requirements and considerations for such a pathway. The implementation of the MSPP will require additional work to further define the pathway, and we recommend the formation of an implementation committee to create the pathway and draft any amendments required for the Rules for Admission. We recognize that full authorization of the MSPP would be made only after specific plans for the MSPP are created and reviewed.

I. Executive Summary

As charged by the Minnesota Board of Law Examiners (MBLE), Working Group 3 reviewed the possibility of adopting a pathway for licensing based on supervised legal practice work conducted after, or primarily after, graduation from law school. We reviewed supervised practice models in Canada and Utah and the recommendations adopted and plans being developed in Oregon. We also reviewed the experience of New Hampshire, which has a model of licensing based on review of portfolios created during supervised practical experience during law school. Two overarching principles guided our considerations: consumer protection (licensing only those who demonstrate minimum competence) and equity in the licensing process.

As a result of our research and discussions, the Working Group recommends the Court approve development of a Minnesota Supervised Practice Pathway (MSPP) for licensing. Graduates seeking licensing under the MSPP would complete lawyering tasks under the supervision of a licensed attorney for a specified number of hours of practice and would submit documentation of those tasks and a portfolio of work samples to the MBLE. The MBLE would review the documentation and portfolio at least once during the MSPP practice period to ensure adequate progress and again upon final submission to evaluate whether the applicant has demonstrated minimum competence to operate as a licensed attorney.

The MSPP would be one option for each applicant to choose. Applicants could instead

choose to take the Minnesota bar examination, which provides the advantage of attaining a portable exam score that can be used to satisfy exam requirements for licensure in 35 additional jurisdictions. The MSPP would not immediately result in a license that could be transferred to another jurisdiction, although the MSPP could be the basis for a portable license if other states that are developing supervised practice pathways agree to offer reciprocity for licenses obtained under similar programs.

Under either pathway, applicants would have to satisfy the other components of licensing established in Minnesota, including graduating from an ABA-accredited law school or other approved educational path, passing a character and fitness review, and passing the Multistate Professional Responsibility Examination (MPRE). Other pathways, including a possible curricular pathway recommended by Working Group 2 and the current process of obtaining a license based on years of practice in another jurisdiction, would be available.

The MBLE controls the admission of applicants through grading and standard-setting for the Minnesota Bar Examination, and the MBLE would also control admission under the proposed MSPP. This control would be accomplished by having the MBLE (a) supervise applicants' compliance with the eligibility requirements for selecting the MSPP, (b) approve, train, and oversee volunteer attorneys to supervise applicants seeking licensing through the MSPP, and (c) review submitted documentation and representative work samples to ensure the applicant meets minimum competency requirements. MBLE review of an applicant's submission will constitute an "examination of the applicant" under the current Minnesota Rules for Admission. The submitted documentation and portfolio will provide sufficient material for the MBLE to measure the applicant's skills and abilities against the minimum competency standard. Indeed, unlike the current bar examination or the revised NCBE Next Gen Bar Examination, the MSPP will require applicants to perform work under realistic law practice conditions, so it will provide a better measure of some aspects of minimum competency.

The MSPP will rely heavily on volunteer support from the Minnesota legal community to provide the guided supervision and feedback contemplated as part of the pathway. The benefits to the legal community from the MSPP and the commitment of the legal community to advancing access to justice and to creating a more diverse legal profession will motivate licensed attorneys to offer that volunteer support. In particular, members of Minnesota's affinity bar associations¹ have expressed interest in serving as volunteer supervisors in the MSPP to help improve representation of Black, Indigenous, and other attorneys of color in a profession where communities of color have historically been underrepresented. To supplement the pool that would otherwise be available, the Working Group recommends that the Supreme Court and the MBLE develop incentives to encourage participation, including offering CLE credit for

¹ Minnesota's affinity bar associations include the Hmong American Bar Association, the Minnesota American Indian Bar Association, the Minnesota Asian Pacific Bar Association, the Minnesota Association for Black Lawyers, the Minnesota Black Women Lawyers Network, the Minnesota Hispanic Bar Association, the Korean American Bar Association of Minnesota, and the Minnesota Lavender Bar Association. For more information, see <https://diversityinpractice.org/affinity-bars/>.

performing supervision and giving public recognition to supervising attorneys for contributing to the MSPP.

The Working Group recognizes that reviewing applicants' eligibility for the MSPP and applicants' portfolios will create significant additional work for the staff and members of the MBLE and a likely need to enlist the participation of additional compensated graders. In addition, development or adoption of new technology may be necessary to support the submission and review of applicants' documentation and portfolios. The resources for the additional expense could be provided in part through higher fees for applicants choosing this pathway, representing the higher administrative costs associated with the MSPP over administering the bar examination. In structuring fees, however, it is important to avoid discouraging applicants from choosing this pathway and to ensure that each applicant has the practical ability to choose any of the pathways to licensing for which the applicant is eligible. Although those who choose licensing under the MSPP may save some expenses associated with taking a bar examination, the burden of supporting this form of licensing should not be placed on the applicants choosing this path. All methods of licensing are for the benefit of the profession as well as the public and should be supported primarily through sources other than the applicants themselves. Alternative sources of support for the increased administrative work should be explored, including using funds from annual attorney licensing fees, currently used to support the MBLE and the Lawyers Professional Responsibility Board.

This remainder of this report discusses the Guiding Principles for the Working Group (Section II), the material reviewed by the Working Group (Section III), the rationale for developing additional pathways to licensing (Section IV), the recommendation to explore and seek to establish the MSPP (Section V), and the specific recommendations of the Working Group for an MSPP (Section VI).

II. Guiding Principles

In determining whether to recommend a supervised practice pathway for licensing, Working Group 3 was guided by the following considerations, as outlined in the charge to the working groups.

- The licensing process should protect the public by ensuring applicants to the practice of law demonstrate they have minimum competence to practice law prior to licensure. In particular, the licensing process should evaluate applicants' 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.
- The licensing process should 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. and 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.
- The recommendations should take into account lawyer well-being and the feasibility of implementing the recommendations.
- The standards should be reliable in order to achieve meaningful, objective, and consistent results.

In addition to the Essential Eligibility Requirements, the Working Group also considered the Building Blocks of Minimum Competence identified by the Institute for the Advancement of the American Legal System ("IAALS"). IAALS is "a national, independent research center dedicated to facilitating continuous improvement and advancing excellence in the American legal system."² In October 2020, IAALS published the result of a two-year research study of minimum competency. Through the study, which included conducting 50 focus groups with practicing attorneys (5 of those groups in Minnesota), IAALS identified the following core competencies (called "the twelve building blocks of competency"):³

- The ability to act professionally and in accordance with the rules of professional conduct
- An understanding of legal processes and sources of law
- An understanding of threshold concepts in many subjects
- The ability to interpret legal materials
- The ability to interact effectively with clients
- The ability to identify legal issues
- The ability to conduct research
- The ability to communicate as a lawyer

² See *About IAALS*, IAALS.DU, <https://iaals.du.edu/about>.

³ See DEBORAH JONES MERRITT & LOGAN CORNETT, BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE (Dec.2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf (providing additional information about the study and a further explanation of each competency).

- The ability to see the "big picture" of client matters
- The ability to manage a law-related workload responsibly
- The ability to cope with the stresses of legal practice
- The ability to pursue self-directed learning.

To ensure adequate consumer protection, any pathway to licensing should adequately assess applicants for an identified set of core competencies, drawn from the Essential Eligibility Requirements in Rule 5A and the core competencies identified by IAALS. A list of competencies combining the two would be an effective starting point for establishing alternative licensing methods.

III. Summary of Working Group Meetings

The Working Group held seven meetings to gather information and discuss the issues raised by adopting a supervised practice pathway to licensure. In addition to meetings held among Working Group members to discuss the issues, the following meetings were held:

- On March 8, 2022, the Working Group met with Kendra Matthews, member of the Oregon Task Force that studied alternatives to the bar exam and recommended to the Oregon Supreme Court adoption of curricular and supervised practice pathways for licensure. The recommendation of the Task Force was approved by the Oregon Supreme Court and an implementation committee (the Licensing Pathways Development Committee) was established.
- On March 22, 2022, the Working Group met with Professor Deborah Merritt, co-author of the IAALS study described above. On behalf of IAALS, Professor Merritt is also working with NCBE and members of the Oregon implementation team to develop tools to use in implementing the curricular and supervised practice pathways for Oregon. Professor Merritt provided information on the following aspects of establishing assessment for a supervised practice pathway:
 - Guidelines for a licensing system based on supervised practice
 - Assuring fairness in licensing through supervised practice
 - Examples of a form that could be used for supervisors to provide feedback to applicants they are supervising
- On April 26, 2022, members of the Working Group met with Catherine Bramble and Louisa Heiny, who are serving on the Utah committee that is preparing a recommendation for the Utah Supreme Court to implement a supervised practice pathway. The committee is building on Utah's experience with a supervised practice pathway established temporarily in 2020 to respond to the challenges of administering the bar exam during the pandemic.
- On April 27, 2022, members of the Working Group met with Melinda Gehris, a New

Hampshire bar examiner, to discuss her experience evaluating portfolios to license students who participate in the Daniel Webster Scholars Honors Program, a curricular path to licensure in New Hampshire.

IV. Limitations of the Current Bar Examination

The bar exam as currently written and administered in Minnesota⁴ provides an inadequate measure of minimum competence, making it both worthwhile and important to develop additional pathways to licensure. The bar exam tests only a few of the competences identified above (understanding legal processes and sources of law, understanding basic concepts of legal doctrine and applying them to new fact situations, interpreting legal materials, identifying legal issues, and communicating—in written form—as a lawyer). It does not test other critical aspects of lawyering competence (e.g., conducting research, interacting effectively with clients, acting professionally, seeing the “big picture” of matters and determining the importance of the information to the overall client matter, managing a law-related workload, coping with the stresses of law practice, and pursuing self-directed learning). In effect, it tests the ability of applicants to take the test, not the ability to practice law.

The insufficiencies of the bar examination have been identified by many scholars⁵ and confirmed by the National Conference of Bar Examiners’ own studies.⁶ The test relies heavily on memorization of many detailed legal rules and application of those legal rules in contexts divorced from how they would be used in law practice. As the IAALS study documented, new lawyers do not rely on memory; they research the law.⁷ More experienced lawyers may remember details about legal rules within their expertise, but even experienced lawyers typically review those rules to ensure accurate recall. Current bar exams also rely heavily on multiple choice questions, which does not mirror problem-solving in practice. In addition, bar exam questions are based on statements of facts written by the bar examiners, but that does not reflect how clients present legal problems or how lawyers go about answering those problems. Lawyers learn the facts through client and witness interviews, and then raise claims through creating narratives based on those

⁴ Minnesota has adopted for its examination the Uniform Bar Examination, which is provided by the National Conference of Bar Examiners.

⁵ See, e.g., Carol L. Chomsky, Andrea A. Curcio & Eileen Kaufman, A Merit-orious Path for Lawyer Licensing, 82 Ohio St. L.J. 883, 885-886 (2021); Deborah Jones Merritt, Validity, Competence, and the Bar Exam, Am. Ass’n of L. Schs. News (2017), <http://www.aals.org/about/publications/newsletters/aals-news-spring-2017/faculty-perspectives/> [citing to a 2012 NCBE job analysis which revealed gaps in minimum competence skills measured]; Kristin Booth Glen, Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession, 23 Pace L. Rev. 343, 378-79 (2003); see also State Bar of Cal., The Practice of Law in California: Findings from the California Attorney Practice Analysis and Implications for the California Bar Exam 2 (May 2020), <https://www.calbar.ca.gov/Portals/0/documents/reports/2020/California-Attorney-Practice-Analysis-Working-Group-Report.pdf> (identifying a range of skills necessary to new lawyer competencies, many of which are not tested by the existing exam).

⁶ Nat’l Conf. of Bar Exam’rs, Final Report of the Testing Task Force 6-13 (Apr. 2021), <https://nextgenbarexam.ncbex.org/reports/final-report-of-the-ttf> Final Report of the Testing Task Force; see also Deborah Jones Merritt & Logan Cornett, Inst. for the Advancement of the Am. Legal Sys., Building a Better Bar 5 (discussing two NCBE job analysis surveys).

⁷ *Id.* at 24–25 (discussing why memorization is the antithesis of the lawyering skills that should be assessed).

interviews. Asking for “answers” to formulated scenarios fails to test what lawyers actually do and therefore fails to effectively assess minimum competence.⁸

Moreover, the exams measure a variable unrelated to law practice: test-taking speed.⁹ The multiple choice portion of the UBE provides examinees with an average of only 1.8 minutes to answer each of 200 multiple choice questions—a test design that does not allow any time for thoughtfully digesting a legal problem and thinking through an analysis, but instead requires weeks of practicing rapid-fire multiple choice test-taking in order to learn the skill of answering a kind of question never faced in law practice, and to do so based on snap judgments instead of thoughtful inquiry.¹⁰ The UBE essay exam allows 30 minutes for each essay,¹¹ an unrealistic time frame for any lawyer to evaluate a scenario and write a coherent and thoughtful analysis. The performance test portion of the UBE allows 90 minutes to read the case packet and write an answer to the problem posed, a pace not representative of law practice.¹² If speediness were an important characteristic of lawyering, having a speeded exam would be sensible, but that is not the case. Lawyers work under time pressures, of course, but their time constraints are not at all like the pressures of the bar exam. In fact, the notion that memorization and speediness might be useful in resolving client matters in practice conflicts with the standards of diligence and competence that are the foundation of our professional and ethical obligations as lawyers.

The problems with the bar exam are compounded by the fact that the test-makers provide only general statements of the subject areas that will be tested, not complete statements of the principles of law themselves. This leaves test-takers uncertain about exactly what law they must learn and therefore dependent on purchasing extensive outlines developed by commercial test preparation companies, detailing the law that those companies predict will be tested.

Bar exams also have a long history of disparate outcomes based on gender, race, and economic status, unrelated to the competence and quality of the examinees. Bar examinations were first adopted as part of a strategy to exclude people then considered undesirable, by race, by ethnicity, and by socioeconomic class.¹³ Statistically, in jurisdictions where data is available, the percentage of BIPOC (Black, Indigenous, People of Color) applicants who pass the exams is persistently and consistently lower than for White applicants.¹⁴ These disparities have appeared in

⁸*See id.* at 64.

⁹*See, e.g.,* Andrea A. Curcio, Carol L. Chomsky & Eileen Kaufman, Testing, Diversity, and Merit: A Reply to Dan Subotnik and Others, 9 U. Mass L Rev. 206, 235.

¹⁰*See id.* at 236–38 (illustrating, in a step-by-step manner, the thought processes examinees must go through to answer a bar exam multiple choice question).

¹¹*Multistate Essay Exam*, Nat’l Conf. of Bar Exam’rs, <https://www.ncbex.org/exams/mee/>.

¹²Curcio, Chomsky & Kaufman, *Testing, Diversity, & Merit*, *supra* note 9, at 226–27.

¹³*See, e.g.,* Joan Howarth, *Shaping the Bar: The Future of Attorney Licensing* (2022); Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 64–66, 127–28 (1976); R. Scott Baker, *The Paradoxes of Desegregation: Race, Class, and Education, 1935-1975*, 109 Am. J. Educ. 320, 328 (2001); George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 J. Legal Educ. 103, 104, 113 (2003).

¹⁴*See, Joan W. Howarth, The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 Geo. J. Legal Ethics 931, 952-55 (2020)

multiple bar exam administrations at least since the early 1990s.¹⁵ In 2020, 66% of Black law school graduates passed the bar exam on their first try, as contrasted to 76% for Latinx candidates and 88% of White candidates.¹⁶ The disparity only got worse in 2021.¹⁷ These results are reinforced by a study by the AccessLex Institute confirming that bar exam results are largely a function of the applicants' resources.¹⁸ Those most likely to pass are candidates who have the resources to study full-time for two months after graduation, purchase expensive bar preparation courses and materials, and not be distracted by family obligations.¹⁹ These results are linked to the stark racial disparities produced by the bar exam, since candidates of color have been less likely to have the financial resources necessary for bar exam success.²⁰ Stereotype threat – the impact on performance caused by concern of reinforcing stereotypes of ability linked to one's identity – may intersect with other aspects of the exam, including speediness, to exacerbate the challenges for BIPOC applicants.²¹

The NextGen bar examination being developed by the National Conference of Bar Examiners will respond to some of the concerns that are raised here.²² The NCBE has said it will test fewer subjects, that it will distinguish between legal rules that applicants need to know and those that applicants need only be familiar with, and that it will incorporate testing on the applicants'

¹⁵Numerous studies have detailed disparities. See, e.g., Linda F. Wightman & Henry Ramsey, Jr., Law Sch. Admission Council, LSAC Nat'l Longitudinal Bar Passage Study, at viii (1998), <https://lawschooltransparency.com/reform/projects/investigations/2015/documents/NLBPS.pdf> (showing, inter alia, eventual pass rates of 77.6% for Black candidates and 96.7% for White candidates); Nat'l Connf. of Bar Exam'rs, Impact of Adoption of the Uniform Bar Examination in New York 166 tbl.4.2.24 (2019), <https://www.nybarexam.org/UBEReport/NY%20UBE%20Adoption%20Part%202%20Study.pdf> (finding that Black candidates passed at 68.5% and White candidates passed at 90.1%); *California Bar Examination Statistics*, ST. BAR CAL., <https://www.calbar.ca.gov/admissions/law-school-regulation/exam-statistics> (through clickable links, showing similar disparities from 2009–2018 across multiple racial and ethnic categories every year). Many states do not collect data on race and ethnicity, but the consistent pattern of disparate outcomes across test administrations makes it likely the same results would be found in each state.

¹⁶Am. Bar Ass'n, Summary Bar Pass Data: Race, Ethnicity, and Gender 2020 AND 2021 BAR PASSAGE QUESTIONNAIRE 1 (2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/stastat/20210621-bpq-national-summary-data-race-ethnicity-gender.pdf.

¹⁷ Karen Sloan, The Racial Gap in Bar Exam Pass Rates Got Worse in 2021, <https://www.reuters.com/legal/legalindustry/racial-gap-bar-exam-pass-rates-got-worse-2021-2022-05-02/#:~:text=graduates%20who%20took%20the%20bar,to%20ABA%20figures%20released%20Monday>.

¹⁸AccessLex Inst., Analyzing First-Time Bar Exam Passage on the UBE in New York State 5–6 (May 2021), <https://www.accesslex.org/NYBOLE>.

¹⁹*Id.* at 11, 15, 49.

²⁰Deborah Jones Merritt, Carol Chomsky, Claudia Angelos & Joan Howarth, *Racial Disparities in Bar Exam Results—Causes and Remedies*, BLOOMBERG L. (July 20, 2021), <https://news.bloomberglaw.com/ip-law/racial-disparities-in-bar-exam-results-causes-and-remedies>.

²¹*Id.* That effect would not be surprising because working memory is a key component of successful test-taking. Jared Cooney Horvath & Jason M. Lodge, *What Causes Mind Blanks During Exams?*, Conversation (Oct. 25, 2016), <https://theconversation.com/what-causes-mind-blanks-during-exams-67380>. Stereotype threat affects working memory. Toni Schmader & Michael Johns, *Converging Evidence That Stereotype Threat Reduces Working Memory Capacity*, 85 J. Personality & So. Psych. 440, 451 (2003); Belle Derks, Michael Inzlicht & Sonia Kang, *The Neuroscience of Stigma and Stereotype Threat*, 11 Grp. Processes & Intergroup Rels. 163, 164 (2008).

²² See <https://nextgenbarexam.ncbex.org/>

knowledge of more legal skills.²³ It is possible that the NCBE will provide a detailed listing of the legal rules that applicants should know, making preparation for the exam more focused. If those changes are implemented effectively, the NextGen bar examination – projected to be available in 2026 – will likely be an improvement as a tool for assessing minimum competence. But it will still not assess a number of the critical skills for minimum competence (e.g., interacting directly with clients, conducting rather than knowing about how to do research, coping with the stresses of law practice, managing a law-related workload, communicating orally) and when it focuses on skills, the test will necessarily focus on knowledge about the skills rather than performing them in actual practice. It will likely continue to test through multiple-choice questions at least in part, a particularly problematic way to test lawyering competence. It is also unclear whether the test will remain speeded, and whether it will continue to have disparate outcomes as a high-stakes exam. Even if the NCBE goals for the NextGen bar examination are attained—and that remains to be seen, as the development process continues—a written exam is still not a complete test of competence, and is in any event only one way of demonstrating competence. The Working Group believes that the MSPP should be developed as an option that a candidate for licensing may choose for presenting evidence of competence.

V. Recommendation of the Working Group

Based on our research, consultation, and discussions, the Working Group concludes that consumers can be protected and equity served by offering applicants multiple pathways to licensing, including a Minnesota Supervised Practice Pathway (MSPP). Much work needs to be done to create and operate such a pathway, but work being done in other states (notably Oregon and Utah) demonstrates the possibility of establishing a workable, fair, and equitable system that will allow applicants to demonstrate competence more fully than is possible using the current bar exam and more fully than is likely using the yet-to-be-fully-developed NextGen bar exam. The Working Group recommends that an implementation committee be established to develop a plan for offering the MSPP. Such a plan would include specification of:

- the eligibility requirements to apply for the MSPP to licensing;
- the minimum competencies that would need to be established for licensing;
- the number of hours of supervised practice required for licensing;
- the nature of lawyering tasks that would be eligible to be counted as supervised practice hours, and whether some of those hours could be performed in supervised settings in law school;
- the requirements for practicing lawyers to become supervising attorneys in the MSPP;
- the nature of the training required of supervisors in the program;
- the nature of the portfolio that applicants would assemble to document and

²³ The NCBE lists legal research, legal writing, issue spotting and analysis, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, and client relationship and management as skills to be included in the NextGen exam.

- demonstrate minimum competence;
- how applicant portfolios would be assessed for licensing, including rubrics to be used for assessment to ensure consistency and reliability;
- how oversight would be conducted to ensure that applicants are achieving adequate progress and supervisors are performing their responsibilities effectively and fairly.

In the next section, the report addresses further the rationale for creating the MSPP and offers preliminary judgments and recommendations about the implementation considerations listed above.

VI. Creating a Supervised Practice Pathway

The Working Group recommends the Minnesota Supreme Court direct the MBLE to create a viable and equitable Minnesota Supervised Practice Pathway (MSPP) to licensing based on the outline presented here and the additional specifications developed through an implementation committee. Section A below expands on the rationale for creating such a pathway. Section B offers a more detailed discussion of implementation considerations, including those listed above. Section C addresses an assortment of other considerations relevant to the creation of a successful MSPP.

A. Rationale for a Supervised Practice Pathway

A supervised practice pathway will respond to the problems with the current reliance on a knowledge-oriented and speed-based examination, whether that is the current UBE or the envisioned NextGen bar examination. As discussed above, that kind of examination necessarily focuses primarily on what applicants *know* rather than what they can *do*. Even if adjusted to include questions about attorney skills, the examination will be limited to what applicants know about the required skills and whether they can restate that knowledge quickly, rather than testing their actual skills.

In contrast, an experiential pathway, whether grounded in supervised work in law school or supervised work after graduation, provides the opportunity to evaluate applicants' actual performance of the skills that attorneys use in practice. Professions such as medicine and architecture have long required demonstration of skills, and the legal profession would benefit from incorporating a demonstration of skills in attorney licensing. A supervised practice pathway will protect the consumers of legal services by ensuring that the newly licensed attorney has gained meaningful practical experience designed to ensure the person has met the competency requirements set forth in Rule 5 and in the IAALS Building Blocks. During the period before the applicant's licensing, the public will be protected by having a licensed, practicing lawyer supervising the applicant's work prior to their admission to the practicing bar.

A supervised practice pathway is also better designed to establish competencies that matter most in protecting client interests. A recent study documents that there is no relationship between attaining a higher score on the bar examination and the number of complaints, formal charges, or

disciplinary actions taken against attorneys in the jurisdictions reviewed.²⁴ Most complaints against and discipline of lawyers result from lapses such as lack of diligence, inadequate communication, and mishandling of client funds,²⁵ all of which will be better addressed in the supervised practice pathway than in a bar examination.

The MSPP model we propose would require applicants to establish their minimum competence by engaging in a specified number of hours of supervised legal practice and submitting to the Minnesota Board of Law Examiners both documentation of the activities in which the applicant engaged and a portfolio of non-privileged work-product created during the applicant's supervised practice. A bar examiner would then review the submitted documentation and certify that the applicant has demonstrated minimum competence. The bar examiners would evaluate the applicant's portfolio based on a rubric that connects the applicant's work to a listing of required competencies and the activities, skills, and knowledge that evidence those competencies.

In proposing the MSPP, the Working Group considered the experience of Canada, which has long employed an "articling" program providing for an apprenticeship before admission, and Utah, which adopted a supervised practice program for 2020 as an emergency measure during the pandemic and is currently preparing a proposal for a more permanent supervised practice pathway. We also considered the report of the Oregon Alternatives to the Bar Exam Task Force, which recommended adoption of a supervised practice pathway that was approved by the Oregon Supreme Court, and the experience from New Hampshire, where bar examiners have been licensing based on review of portfolios created as part of the Daniel Webster Scholars Honors Program.²⁶ We believe that those programs demonstrate that a supervised practice pathway can be successful and offer models for designing such a pathway. Our confidence is bolstered by the belief that one of the most effective ways to train new practitioners to provide competent representation is through practical experience.

²⁴ Mitchel Winick, Victor Quintanilla, Sam Erman, Christina Chong-Nakatsuchi, and Michael Frisby, Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards, AccessLex Institute Research Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793272. See also Milan Makovic, Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3789235 (forthcoming in Georgetown Journal of Legal Ethics) (comparing disciplinary data from bar examination states with data from Wisconsin and demonstrating that the bar examination requirement has no effect on attorney misconduct).

²⁵ See Leslie Levin, Christine Zozula, and Peter Siegelman, A Study of the Relationship between Bar Admissions Data and Subsequent Lawyer Discipline (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2258164). The study reported that attorneys most often received discipline for failing to communicate with clients (20.0%), lack of diligence (17.93%), and failure to safeguard client property (11.26%). Only 4.14% of disciplinary sanctions related to "competence"—and even some of those cases may have reflected incompetence in areas that are not tested by the bar exam. See Deborah J. Merritt, Bar Exam Scores and Attorney Discipline, at Law School Cafe, blog post at <https://www.lawschoolcafe.org/2017/06/03/bar-exam-scores-and-lawyer-discipline/>

²⁶ We note that the California Blue Ribbon Commission of the State Bar of California is also considering recommending creation of curricular and supervised practice pathways to licensing. While there is no currently operating program in California, their ongoing work may provide additional models for consideration as the MSPP is developed.

The Working Group recommends that Minnesota design its own program, rather than adopt the existing models from Canada or Utah, in order to ensure satisfaction of our identified minimum competencies. Developing a Minnesota program will also provide the opportunity to engage with constituencies in the state to ensure the MSPP is accepted by the profession and the public as an appropriate pathway to licensing and that the ultimate plan responds to the needs and perspectives of those constituencies.

In this report, we outline aspects we believe should be part of a Minnesota Supervised Practice Pathway based on the information we have reviewed and discussed. To provide context for the recommended Minnesota Supervised Practice Pathway, we provide here some comments on the models reviewed from other jurisdictions. We also note that Oregon is taking steps to design a supervised practice pathway with the assistance of IAALS and NCBE, and the Oregon plan may serve as a particularly helpful model for Minnesota.

In Canada, law school graduates must complete a 9 to 12-month period of apprenticeship referred to as "articling." Some provinces include a formal practice-orientated educational program that must be completed during the articling year. Applicants also must complete some type of "barrister" or "solicitor" exam that occurs during the articling period that is administered by the relevant licensing authority. The Working Group is not recommending an articling model for Minnesota because a lengthy apprenticeship of the type required in Canada appears to create barriers that keep some people who are qualified to practice law from being admitted. One significant barrier is the availability of meaningful, paid articling positions and who gets selected for those positions, making it easier for those with resources and those with connections to the legal community to find positions. An apprenticeship of this type also creates opportunities for employers to abuse their position of authority over the applicant, since the applicant is dependent on the employer's approval for an extended period of time. The Working Group believes that the proposed design of the MSPP will avoid or limit those problems. The Working Group also concluded that a well-designed supervised practice program should make it unnecessary to also require an examination.

In 2020, Utah adopted a modified-diploma privilege/supervised practice program in recognition of the difficulties created by the pandemic.²⁷ The pool of applicants was limited to those who had not previously sat for any bar examination and who had graduated from an ABA-accredited law school with a bar examination passage rate of 86% or greater (the pass rate satisfied by both Utah law schools). Applicants were eligible for admission to practice after 360 hours of supervised practice. Utah created rules regarding the kind of work that could be done to qualify²⁸ and the state pre-approved several pro bono programs as qualified to provide supervised practice. The rules established to implement the Utah Supreme Court order can serve

²⁷ See UTAH STATE BAR DIPLOMA PRIVILEGE RESOURCES, <https://utahdiplomaprivilegeorg.wordpress.com/> (last visited April 25, 2022).

²⁸ See <https://utahdiplomaprivilegeorg.files.wordpress.com/2020/04/signed-2020.04.21-bar-waiver-order-final-1.pdf>

as a partial model for establishing the specifics of the MSPP. The Working Group recommends against adopting the restricted eligibility adopted by Utah in the emergency conditions of 2020. A well-designed supervised practice pathway should be available to any applicant who chooses it, and there is no reason to connect eligibility to the bar exam pass rate of the applicant's school rather than to the performance of the particular applicant in the program. We note, too, that Utah is currently drafting a proposal to adopt a more permanent version of a modified-diploma privilege/supervised practice program, and the proposal will recommend participation without the restrictions adopted in 2020.

Oregon does not yet have an operating supervised practice pathway, but the Oregon Supreme Court has approved development of both a curricular pathway and a supervised practice pathway similar to the one recommended by this Working Group. Professor Merritt, the Institute for the Advancement of the American Legal System, and the NCBE are working together to develop structures and processes for a supervised practice pathway, with the assistance of psychometricians to ensure the processes will produce valid and reliable results. The implementation committee should monitor developments in Oregon to learn from their approach.

B. Implementation Considerations

Creating the MSPP will require an implementation period to allow development of the structure for supervised practice and the training of supervisors and bar examiners to ensure they can carry out their responsibilities effectively and equitably. This portion of the report outlines aspects of the MSPP that should be addressed by an implementation committee. Subsection 1 considers candidate eligibility for the MSPP. Subsection 2 discusses the requirements to serve as a supervising attorney in the MSPP. Subsection 3 discusses the time requirements for the supervised practice work. Subsection 4 discusses the nature of the supervised practice work to be done by the applicant. Subsection 5 discusses the required documentation of the applicant's supervised work. Subsection 6 discusses how to evaluate candidates seeking admission to licensure pursuant to the MSPP. Finally, subsection 7 outlines additional considerations for the proposed MSPP process.

As noted earlier, the MSPP should be structured and implemented to ensure not only validity (licensing those with minimum competence) but fairness and equity in licensing. That means designing the system so that it does not place undue burdens on non-traditional law students, does not solely benefit law graduates with pre-existing connections in the field, identifies and trains volunteer supervisors to mentor applicants and recognize their own implicit bias, crafts a fair and unbiased rubric system to review applicants' portfolios, and avoids any stigma in the legal community or among potential clients for applicants who gain licensure through this (or any) model of licensing. These considerations should continue to be central to the work of an implementation committee.

The implementation period will also allow drafting and adoption of changes necessary in the Rules of Admission to accommodate the MSPP. The Working Group does not believe a

change in state law is required. Minn.Stat. 481.01 delegates to the supreme court the responsibility to “by rule . . . prescribe the qualifications of all applicants for admission to practice law in this state” and charges the Board of Law Examiners “with the examination of all applicants for admission to practice law” with examinations to be held “[a]t least two times a year.”²⁹ The statute does not specify what form the “examination” must take. If, as recommended here, the MSPP includes evaluation by the Board of Law Examiners of applicant portfolios demonstrating minimum competence, that should satisfy the requirement of “examination” of applicants.

1. Eligibility

The MSPP offers an option that would substitute for a single component of admission: sitting for and passing the Minnesota bar examination. The Working Group recommends that the universe of people who are deemed qualified applicants for admission via the MSPP should mirror (but not expand or contract) the universe of people who are deemed qualified to sit for the Minnesota bar exam. Those qualifications are set out in Rule for Admission 4A.³⁰ The MBLE would establish the specific rules governing application for the MSPP, but the Working Group believes it is important that the rules provide for the following:

- The applicant need not seek admission via the MSPP immediately upon graduation from law

²⁹ M.S.A. 481.01: “The supreme court shall, by rule from time to time, prescribe the qualifications of all applicants for admission to practice law in this state, and shall appoint a Board of Law Examiners, which shall be charged with the administration of the rules and with the examination of all applicants for admission to practice law. . . . At least two times a year the board shall hold examinations and report the result of them, with its recommendations, to the supreme court. Upon consideration of the report, the supreme court shall enter an order in the case of each person examined, directing the board to reject or to issue to the person a certificate of admission to practice.”

³⁰ RULE 4. GENERAL REQUIREMENTS FOR ADMISSION

A. Eligibility for Admission. The applicant has the burden to prove eligibility for admission by providing satisfactory evidence of the following:

- (1) Age of at least 18 years;
- (2) Good character and fitness as defined by these Rules;
- (3) One of the following:
 - (a) Graduation with a J.D. or LL.B. degree from a law school that is provisionally or fully approved by the American Bar Association;
 - (b) (i) a bachelor’s degree from an institution that is accredited by an agency recognized by the United States Department of Education or foreign equivalent;
 - (ii) a J.D. degree or equivalent from a law school attended following completion of undergraduate studies;
 - (iii) the applicant has been licensed to practice law in any state or territory of the United States or the District of Columbia in 60 of the previous 84 months; and
 - (iv) the applicant has been engaged, as principal occupation, in the practice of law for 60 of the previous 84 months in one or more of the activities listed in Rule 7A(1)(c); or
 - (c) the applicant has been licensed to practice law in any state or territory of the United States or the District of Columbia for at least 10 years.
- (4) Passing score on the written examination under Rule 6 or qualification under Rules 7A, 7B, 7C, 8, 9, or 10. An applicant eligible under Rule 4A(3)(b) but not under Rule 4A(3)(a) or 4A(3)(c) must provide satisfactory evidence of a passing score on the written examination under Rule 6 and is not eligible for admission under Rules 7A, 7B, 7C, 8, 9, or 10;
- (5) A scaled score of 85 or higher on the Multistate Professional Responsibility Examination (MPRE); and
- (6) Not currently suspended or disbarred from the practice of law in another jurisdiction or any foreign jurisdiction.

school, although the rules may require application within a stated period after law school graduation if the graduate has not practiced law in the interim. That time limitation ensures that the skills and knowledge acquired in law school are still remembered sufficiently at the time of supervised practice so that the applicant has the required base of knowledge.

- The applicant should not be restricted to applying for admission solely via the MSPP. The implementation committee should address how fees should be structured if a person seeks admission via both the bar examination and the MSPP at the same time or sequentially.
- Prior failure of a bar examination should have no impact on a person's ability to seek admission via the MSPP. The MSPP should be considered a fully effective means of establishing minimum competence, so failing to pass a previously administered bar examination should have no impact on an applicant's eligibility. Similarly, failure to satisfy the MSPP should typically have no impact on a person's ability to seek admission through the bar examination or other pathway, because failure to satisfy the MSPP may mean only that the applicant has not at that time demonstrated minimum competence. If a failure to satisfy the MSPP is instead related to ethical concerns or behavior that undermines confidence in the ability of the applicant to perform adequately as a lawyer, those concerns could be documented and flagged for consideration upon a subsequent application.
- An applicant whose portfolio is considered inadequate when first submitted should be able to apply again for licensing under the MSPP by submitting a new or updated portfolio.
- There should be no artificial "cap" on how many people can apply for admission via the MSPP at any one time. Because each applicant must identify a qualified supervising attorney, it is expected that the number of applicants will be limited, especially in the first years of the program, but the MBLE should prepare to evaluate for licensing all applicants who choose this route.
- At least initially, there is unlikely to be infrastructure within the MBLE to formally assist an otherwise qualified applicant to locate a qualified supervising attorney. As demonstrated in Utah, it may be possible to develop a set of pro bono supervised practice opportunities that can be made available to all applicants, which will also expand the availability of legal services. While the goal is to have most supervised practice work be paid, not unpaid, providing pro bono opportunities will be a helpful aspect of the MSPP. As the MSPP program develops, the MBLE should explore whether it can help increase the pool of supervisors and offer additional assistance in matching applicants to supervisors.

2. Requirements for Supervising Attorneys

The requirements for being a supervising attorney should include the following:

- An active Minnesota license.
- A specified number of years of experience as a licensed attorney, with a specified number of those years being engaged in practice in Minnesota. The number of years of experience for supervisors should be determined by the implementation committee. The requirement is meant to ensure the supervisor has sufficient experience to provide effective feedback and guidance to an applicant and sufficient connection to practice in Minnesota to provide guidance on Minnesota law and practice. Based on requirements established in other jurisdictions, the Working Group suggests five years of experience, with two of them in Minnesota.
- No record of public discipline during the supervising attorney's career in any jurisdiction and no record of private admonition in the three years prior to applying to become a supervising attorney. The Working Group considers the three-year-window on private admonitions to be sufficient because private admonitions occur only in matters that are considered "isolated and non-serious." An isolated instance of a non-serious violation should not be a permanent bar to being a supervisor. Supervisor applicants should be required to disclose any private admonitions they have received (which would otherwise be confidential and therefore not known to the MBLE) and those charged with certifying supervisors may determine if the particular private admonition warrants denial of the application.
- Completion of any training requirements set out by the implementation committee. Such training must include training in equity and inclusion comparable to the Intercultural Development Inventory.

The Working Group makes the following recommendations with respect to the recruiting and supervision of supervising attorneys in the MSPP:

- The implementation committee should establish an application process for attorneys to be certified as supervising attorneys. The certification process should be completed before the attorney supervises any practice activities under the MSPP.
- Consistent with the practice in other programs or plans allowing supervised practice for licensing, the Working Group recommends that the MSPP allow the certified supervising attorney to delegate to another licensed attorney (even one who does not meet all of the other requirements for serving as a supervising attorney) the obligation of directly supervising an applicant's daily activities. For example, a partner in a firm may be the supervising attorney, while a third-year associate is, on a daily basis, working directly with the applicant. With appropriate rules in place, the Working Group believes that the use of such intermediate supervisors is appropriate. The Utah model of supervision contemplates a "hub and spoke" model, by which a single qualified supervisor acts as the "hub"--having

the primary responsibility to work with the applicant to plan a set of experiences that will demonstrate minimum competence across the range of competencies—with other attorneys acting as the “spokes” of the wheel, supervising and providing feedback on a series of individual practice experiences. That is an appropriate model to follow and will result in applicants receiving supervision and feedback from multiple sources, a valuable experience for the applicant.

- The implementation committee should consider whether an exception to the active license requirement should be made for judges acting as supervisors who might otherwise not meet the requirement of maintaining an active license as outlined above. The resolution of this issue likely turns on the specific activities that will qualify as supervised practice hours, a point left unresolved by the Working Group at this stage. If the final implementation rules include as qualifying activities work for a judge, then the Working Group believes it is also appropriate to create an exception to the supervising attorney requirements for judges.
- There should be no limit on the number of qualified supervised attorneys an applicant may have. An applicant need not do supervised practice hours in a single employment or volunteer setting. The applicant will thus not be beholden to a single supervising attorney to accomplish the work needed for admission, which will help limit the possibility of having a supervisor abuse its position of authority over the applicant, a concern repeatedly expressed in our discussions. Allowing multiple supervisors will also make it more possible for applicants to find placements where they can do qualified supervised practice work.
- To better ensure an adequate pool of qualified volunteers, the Working Group recommends that the Supreme Court and the MBLE develop incentives to encourage qualified volunteers to participate, including offering CLE credit for supervising work and giving public recognition of supervisors for contributing to the MSPP. It may also be appropriate to allow attorneys to indicate in their advertising and public credentials that they (or some of their practice members) are certified supervising attorneys for the MSPP. As noted earlier in this report, Working Group believes that the benefits to the legal community from the MSPP and the commitment of the legal community to advancing access to justice and to creating a more diverse legal profession will motivate licensed attorneys, including those from Minnesota’s affinity bars, to offer that volunteer support.

3. Supervised Practice Hours

The Working Group has not specified the number of qualified hours that an applicant should work under supervision to qualify for admission under the MSPP. We note that Utah required 360 hours in their emergency supervised practice rule but the Utah Task Force will be recommending 240 hours as the appropriate measure for their more permanent supervised

practice rule. The Oregon Task Force recommended completion of 1000 to 1500 hours of supervised practice in approved qualified activities, but their implementation committee is considering a reduction of that amount.

The number of hours required is only one aspect of demonstrating competence, because applicants would have to submit documentation of competency established in the activities. The critical question is not how many hours of practice are necessary to attain competence, but how many hours of practice will likely result in work product that shows satisfaction of the range of competencies required. While it is impossible at this stage to know what that number will be, the Working Group believes that a requirement in the range of 240 to 360 hours for the MSPP would be desirable, along with a specification of the range and type of activities required and review of the resulting portfolio. If an applicant is able to demonstrate the required competencies, failing to meet an unreasonably high threshold with respect to hours completed should not stand in the way of licensing.

No matter how many supervised hours are required, the Working Group believes that specification in hours is preferable to specifying the requirement in weeks or months of practice. Using hours as the metric will make it more possible for applicants to find supervising attorneys and to complete the requirements of the MSPP. Applicants may find it difficult to locate an attorney who is willing to provide supervision for the entire set of supervised practice activities or one placement where the applicant can spend a specified number of full-time weeks or months. There may be practitioners who could provide meaningful supervision for a shorter term or for a particular project and there may also be meaningful supervised pro bono opportunities that an applicant could participate in. All of these opportunities would be more available if the hour's requirement can be satisfied in hour or partial-hour increments rather than in weeks or months.

The Working Group recommends that the required hours be completed within a year of approval of the MSPP application so that the work is done in a concentrated-enough fashion to warrant a conclusion that the portfolio demonstrates current minimum competence.

The Working Group agreed that the rules should allow a limited portion of the qualifying hours to be earned during law school (perhaps 20%). Allowing hours to be earned during law school can tap into the well-developed faculty-supervised experiential programs in law schools. An applicant who has engaged in experiential work during law school is especially well situated to begin supervised practice work after graduation, and the additional practice experience should be recognized as counting towards the demonstration of minimum competence.

If a curricular pathway is established along with the MSPP, it will be especially appropriate to permit documented law school hours to partially satisfy the MSPP. Our recommendation to limit the number of law school hours that can be counted for the MSPP acknowledges that hours performed during law school are especially focused on learning in

addition to “doing” the skills, and the focus of the MSPP should be on documented work conducted after graduation.

We note, too, that if supervision by a Minnesota licensed attorney is a requirement, even with respect to law school experiential hours, applicants who attended law school outside Minnesota may not be able to count experiential hours towards the MSPP. If the implementation committee concludes that law school experiential hours should always be eligible to count for the MSPP, then the implementation committee may propose an exception to the state licensing requirements for supervisors in the case of hours done in a faculty-supervised experiential course.

4. Supervised Practice Activities

The Working Group believes that the list of qualifying supervised lawyering activities should be focused on activities that tangibly relate to developing the applicant's legal competence as detailed in the essential eligibility requirements in Rule 5 and the Building Blocks identified by IAALS. The implementation committee may identify possible qualifying activities for each aspect of minimum competence, and those activities could be listed on an online “dashboard” for use by both applicants and supervisors. Qualifying activities would likely fit within the following general areas:

- All activities related to the direct representation of clients;
- Advising businesses and their employees;
- Developing or implementing policies and practices for nonprofit organizations or government agencies;
- Meeting with the supervising attorney or other attorneys on case matters, professional development or ethical matters;
- CLE courses and other professional trainings or workshops as would be typical of an attorney in that area of practice (but with a limitation on the number of CLE hours that qualify);
- Activities related to practice management, including maintenance of client trust accounts;
- Activities related to acquiring and demonstrating proficiency in relevant law-related technology.

In Section 5 of this report, we offer further recommendations on identifying lawyering tasks to be performed in the MSPP and how those might be connected with the minimum competencies

to be assessed. The Working Group also makes the following recommendations regarding the MSPP supervised practice activities:

- Administrative, ministerial and purely paralegal activities should not qualify, or a cap should be placed on the number of hours that can be earned while engaged in those activities, but time spent in supervising the work of paralegals and other non-lawyers should qualify, as such supervision is an important aspect of maintaining a law practice.
- The implementation committee should consider whether to count, or limit eligibility of, activities such as document review that, while often important to client service, may have limited professional growth potential.
- The implementation committee should consider whether to include as qualifying activities work for judges typically undertaken by judicial law clerks. The work of law clerks typically includes substantial research and writing, as well as close review and evaluation of the work of attorneys, all of which would help establish minimum competency. As long as the MSPP includes a requirement that the applicant demonstrate a full range of competencies, including work connected with client representation, the Working Group recommends that law clerk work qualify for inclusion. As noted above, if this activity is included, an exception to the requirement that the supervising attorney have an active Minnesota license might be necessary for judges.
- The implementation committee should consider how the MSPP will interact with Minnesota's rules on student practice during law school and the rules on licensing in Minnesota of experienced attorneys from other jurisdictions.
- While supervised practice hours can be completed in appropriate pro bono or low bono settings, this program is not intended to provide admitted members of the Bar with free or low-cost labor from applicants seeking to complete qualified work. Applicants employed by or in the offices of supervising attorneys can and should be paid a reasonable wage for their work. This is a reasonable expectation because, like the work of very junior attorneys, law students, and graduates awaiting bar exam results, much of the work of the MSPP applicant will be billable to clients (assuming that practice is properly disclosed in client retainer agreements) or would be performed by other compensated employees.

5. Documenting Supervised Activities

The Working Group recommends that the implementation committee establish a process for documenting qualifying activities. The process may include a form asking the applicant to identify which of the identified minimum competencies are reflected in the activity and to describe briefly (in a sentence or two) how the applicant engaged with the identified competencies. The supervisor might be asked to review and approve the form and provide brief

feedback on the applicant’s performance. Professor Merritt provided a sample of such a form in conjunction with her presentation to the Working Group. As noted earlier, Professor Merritt, IAALS, and NCBE are working with the Oregon Licensing Pathways Development Committee to establish a supervised practice pathway; the forms and processes recommended in Oregon may be helpful sources for creating similar processes in Minnesota. It is recommended that the implementation committee explore the availability of technological tools to facilitate the submission of all such documentation.

The Working Group recommends that the implementation committee develop a non-exclusive list of tasks that lawyers may engage in, and that list may be used by applicants and supervisors to document activities performed. A list will be helpful in allowing applicants and supervisors to plan, identify, and document tasks undertaken, perhaps in a dashboard that allows easy navigation. The list should be non-exclusive, however, to permit flexibility in identifying tasks undertaken that are not on the published list. In developing a task list, the implementation committee might draw from the 179 lawyering tasks identified in the NCBE Testing Task Force survey³¹ and the 117 lawyering tasks identified in the California Practice Analysis (CAPA).³²

As an example of what might be developed, CAPA identifies four “areas of responsibility” for lawyers (Establishing and Maintaining Relationships, Practice Management and Administration, Factual and Legal Analysis, and Resolutions) and then identifies subcategories within those areas of responsibilities and lawyering tasks within those subcategories. In the category of “Establishing and Maintaining Relationships,” CAPA lists the following:

Establishing the client relationship

1. Identify the client(s)
2. Assess potential conflicts of interest
3. Manage conflicts throughout representation
4. Determine the client’s goals and expectations
5. Evaluate competence to represent the client’s interests
6. Manage referrals to and from other attorneys
7. Define the scope of the attorney-client relationship
8. Explain the client’s obligations and responsibilities
9. Manage third-party involvement in representation of the client(s)
10. Document the engagement (e.g., engagement letter, arbitration agreement, fee agreement, conflict waiver)
11. Document the decision to decline representation

³¹ See <https://nextgenbarexam.ncbex.org/reports/phase-2-report/#1583773966800-92d6f957-a5d4>

³² The list of competencies, tasks, legal topics, and subtopics can be found on pages 26-30; the report may be accessed at <https://www.calbar.ca.gov/Portals/0/documents/reports/2020/California-Attorney-Practice-Analysis-Working-Group-Report.pdf> at pages 26-30

Maintaining the client relationship

1. Update the client(s) through the matter
2. Respond to client inquiries
3. Resolve disputes with clients
4. Document termination of the representation

Communicating with others

1. Determine disclosure or notice obligations
2. Determine confidentiality obligations
3. Communicate with opposing counsel or parties
4. Communicate with other interested persons (e.g., media, regulatory bodies, insurers)
5. Manage communications with other interested persons (e.g., media, regulatory bodies, insurers)
6. Communicate with witnesses, consultants, or experts
7. Manage communications with witnesses, consultants, or experts

In addition to identifying lawyering tasks, as illustrated above, the implementation committee would identify the specific set of competencies that must be demonstrated, using Rule 5A and the IAALS building blocks as a guide. For example, the minimum competencies could be defined as:

- (1) Acting professionally and in accordance with the rules of professional conduct, including being honest and candid with clients, lawyers, courts, the Board, and others;
- (2) Conducting research effectively;
- (3) Understanding legal processes, sources of law, and threshold concepts in a range of relevant practice areas;
- (4) Interacting effectively with clients;
- (5) Interpreting legal materials, identifying legal issues, and performing legal reasoning;
- (6) Recalling factual information and integrating that information with complex legal theories;
- (7) Communicating with clients, lawyers, courts, and others with organization and clarity;
- (8) Seeing the “big picture” of client matters and using good judgment on behalf of clients;
- (9) Coping with the stresses of legal practice, including complying with deadlines and time constraints, managing a professional workload responsibly, and using good judgment in conducting one’s professional business;
- (10) Avoiding acts that exhibit disregard for the rights or welfare of others;
- (11) Acting diligently and reliably in fulfilling one’s obligations to clients, lawyers, courts, and others;
- (12) Using honesty and good judgment in financial dealings on behalf of oneself, clients,

- and others; and
- (13) Learning from experience and pursuing self-directed learning.

When documenting supervised practice hours, applicants and supervisors could specify and briefly describe a task, the time spent in the task, and its connection to one or more of the competencies listed. The supervisor might add a brief evaluation of whether in the supervisor's view the applicant demonstrated competence or mastery or was still learning the identified skills to be acquired.

The processes that are developed to allow documentation of supervised practice hours must allow for effective tracking of the activities undertaken and the connected competencies and must also be an easily used system that will not unduly burden the applicant or supervisor with time consuming tasks not necessary for assessing minimum competence. The examples and description given here are a preliminary set of sample tasks and competencies offered to make the possibilities for shaping the MSPP more concrete, but are not meant as specifications for the program. As noted earlier, Oregon is developing a plan for a supervised practice pathway, advised by the researchers at IAALS and the psychometricians at NCBE, and the Minnesota implementation committee can draw on the expertise developed in that implementation effort to create a workable, effective, equitable, valid, and reliable supervised practice pathway for Minnesota.

6. Evaluation of Participants Seeking Admission via the MSPP

In recommending the MSPP, the Working Group relies on the fact that applicants to the MSPP who have graduated from an ABA-accredited law school will have passed courses totaling at least 83 credit hours and will have received training and instruction during law school in areas of lawyering knowledge and skills that are critical to ensuring attorney competence. These areas include training that prepares law graduates to be effective, ethical, and responsible members of the legal profession, instills knowledge and understanding of substantive and procedural law, and provides critical skills training through coursework and simulated or experiential opportunities.

In particular, the American Bar Association (ABA) requires that all law students in an ABA-accredited law school take and pass (1) courses totaling at least 83 credit hours, (2) experiential courses totaling at least 6 credit hours, (3) at least two faculty-supervised writing courses, and (4) a course in professional responsibility. The ABA also requires that students are provided at least two opportunities to learn about bias, cross-cultural competency, and racism related to law practice.³³ The law schools are required to establish learning outcomes that include achieving

³³ ABA Standard 301, 302, and 303 for Programs of Legal Education, Standards and Rules of Procedure for Approval of Law Schools 2020-2021, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf. The requirement in Standard 303(c) for education on bias, cross-cultural competency and racism was added recently and became effective in February 2022. *See*

competency in outcomes that parallel a number of the competencies required for admission to the bar as described in Rule 5A and the IAALS building blocks. Although graduating from law school under these requirements does not by itself establish minimum competence to be licensed, the MSPP supervised practice component of licensing would be built upon the foundations established by the ABA requirements.

With that as a base, the review of the MSPP applicant's documentation and portfolio should provide sufficient evidence that the applicant has demonstrated minimum competence sufficient to be licensed. The implementation committee should develop rules on the range of tasks that applicants will be required to include in their work to ensure that the applicant will show minimum competence across a range of lawyer responsibilities. The implementation committee or the examiners themselves should develop a rubric for portfolio review, which will help the examiners or graders be consistent and reliable in their evaluations. The rubric would also be shared with applicants and supervisors so they would know the basis on which the submitted materials will be judged. Rubrics that have been developed for review of law school clinical work and that are being developed in other jurisdictions can be used as models in the implementation process in Minnesota.

The documentation and work product should be submitted at least once during the MSPP period so that the MBLE can confirm that the applicant is making appropriate progress in performing activities and collecting the work product necessary to demonstrate minimum competency for admission. The final portfolio would be submitted at the end of the MSPP period.

The portfolio review regulations will also have to lay out the procedures to be used if the MBLE is concerned at any point that the work product submitted fails to meet minimum competency requirements. As noted earlier, if an applicant submits a portfolio for review and it is judged insufficient to demonstrate minimum competence, that should not preclude the applicant from resubmitting a portfolio for review, as long as all activities submitted are eligible as MSPP hours.

The MBLE will remain responsible for admission recommendations to the Court. A favorable recommendation in this context will effectively certify that the applicant has completed the ordinary prerequisites to admission (graduation requirements, passing the MPRE, payment of fees, passing character and fitness evaluation), met all of the practical requirements of the MSPP, and that the applicant's portfolio demonstrates minimum competence.

7. Other Considerations

- The MSPP pathway to admission will not include any formal assistance by the MBLE to applicants looking for supervising attorneys, but the implementation committee should establish a mechanism for outreach to attorneys who may be willing and able to provide

supervision. In creating the MSPP, the implementation committee or the MBLE should establish a list of attorneys who have expressed a willingness to supervise if someone working with them seeks licensing through the MSPP. As described earlier in this report, in 2020, Utah established connections with a set of supervisors in pro bono settings who were willing to provide supervision to attorneys volunteering within their programs. We encourage the implementation committee to take similar steps to identify supervisors for pro bono work that may be done by applicants. At the same time, we recognize that many recent graduates will have neither the time nor resources to permit them to engage in pro bono lawyering during their first year of practice, so we have not included an expectation that pro bono activities be included in the qualifying supervised activities.

- The Working Group recommends that both supervisors and applicants be surveyed at least annually about their experience in the program as a part of the MBLE oversight of the program, as a way of identifying concerns about supervisor performance, and to collect feedback to help improve the program. The Working Group also recommends that implementation of the MSPP include a process for supervisors and applicants to contact a designated individual to seek support and assistance if the supervisor or applicant has concerns about the work or supervision occurring in the MSPP. To protect confidentiality and the integrity of the MSPP process, it seems advisable to have different individuals assigned to deal with supervisor and applicant concerns.
- The Working Group is not recommending that applicants be required to take specific courses or experiential learning opportunities during law school. Any such requirements would mean that students would not have the desired flexibility to choose the MSPP at any point in their journey to licensing and would thus limit an opportunity that should be available to all who seek licensing.
- The Working Group is not recommending that applicants be required to achieve or maintain a certain academic standing while in law school or upon graduation to be eligible to participate in the MSPP. Academic standing varies among students for many reasons, many of which are not related to the applicant's ability to successfully practice law. If the applicant successfully completes the requirements of their law school's *Juris Doctor* Program and the law school confers a J.D. degree on the graduate, the Working Group recommends that the graduate have the opportunity to seek licensing through the MSPP.
- The Working Group is not recommending a requirement that applicants take an exam in addition to the MSPP activities and certification. The Working Group believes that a supervised practice pathway will stand on its own as an effective demonstration of minimum competence and should be a distinct and separate pathway to licensing.
- Because other states are working to develop their own systems of supervised practice that may be comparable in organization and effect to the contemplated MSPP, the Working

Group recommends that the implementation committee consider ways to provide reciprocity for work done under similar programs in another state, including the possibility of crediting for MSPP hours that were performed in another state or to approve another state's experiential licensing as demonstrating minimum competence for Minnesota licensing.

- We also note that several other states (notably Utah³⁴ and Oregon³⁵) have mandatory new attorney mentoring programs that may be helpful to draw upon in designing a supervised practice program, since the oversight by the supervising attorney is in some ways similar to the feedback that mentors are expected to give to new attorneys in those programs.

VII. Conclusion

The Working Group believes that there is substantial evidence to support offering multiple pathways to attorney licensure, as long as each maintains rigor of evaluation, ensures that new lawyers enter the profession with the knowledge and skills that they need to serve clients, and establishes equitable access to the legal profession. The MSPP would meet this call.

The Working Group believes that the MSPP, on its own, will ensure public protection and minimum competency for licensing new lawyers in Minnesota. If additional pathways are considered as the result of the work undertaken in this MBLE comprehensive study of the bar examination, the Working Group recommends that the Minnesota Supreme Court and the MBLE consider areas of overlap and how aspects of those pathways might be combined to produce more effective expansion of licensing opportunities.

For the reasons discussed above, the Working Group respectfully requests adoption of the Minnesota Supervised Practice Pathway model as a pathway to licensing. The Working Group urges the formation of an implementation committee to operationalize the recommendations included here and to draft the implementing Rules for Admission.

Submitted by members of Working Group 3:

Co-chairs:

Carol Chomsky, University of Minnesota Law School
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Patricia Beety, League of MN Cities
Anjie Flowers, Anoka-Hennepin School District
Leanne Fuith, Mitchell Hamline School of Law
Monica Gould, University of St. Thomas School of Law

³⁴ See <https://nltp.xinspire.com/content/overview>.

³⁵ See <https://www.osbar.org/nlmp>,

John Koneck, Fredrikson & Byron
Dana Mitchell, Ramsey County
Jennifer Peterson, Office of Lawyers' Professional Responsibility
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January 6, 2023

TO: Minnesota State Board of Law Examiners

FROM: Deborah J. Merritt, Distinguished University Professor Emerita, The Ohio State University
Carol L. Chomsky, Professor of Law, University of Minnesota

RE: Creation of Pilot Supervised-Practice Program

We appreciate and applaud the work that the Board is doing to explore non-exam pathways to measure attorney competence. We support the Board's expressed interest in a pathway that would assess competence based on portfolios of work product assembled during law school. We both spoke in support of that proposal at the public hearings.

As reflected in our comments during the hearings, we understand the Board's concern that it does not have the resources or expertise to take on the development of a full post-graduation licensing program. During those hearings, however, we were impressed by the comments of Scott Swanson, who encouraged the Board to consider recommending a pilot program that would allow some recent graduates to demonstrate their competence by presenting portfolios of work product compiled during post-graduate supervised practice.

As Mr. Swanson noted, there are recent graduates who have demonstrated excellence in the workplace but have struggled to pass the bar exam—often failing by just a few points. Any law-school based program would come too late to assist those graduates and the clients they might serve, as well as for graduates who might face the same obstacle in the next few years as the law-school based program is developed and implemented.

To serve the public effectively, and to expand opportunities for graduates who can demonstrate their competence, we encourage the Board to consider proposing (in addition to the educational pathway) a pilot supervised-practice program that would be open to recent exam-takers who narrowly failed the bar exam. We think such a pilot program would be manageable, even with limited resources. The pilot, for example, could include individuals who have taken the Minnesota bar exam during the last five years and failed that exam by no more than 5 points. In the pilot, those candidates could demonstrate their competence based on the principles laid out by Working Group 3 (Supervised Practice) and informed by program rules and rubrics that have already been implemented for a small program in Oregon. Once developed, the pilot could also be offered to candidates who fail the exam by no more than the specified margin in the next several exam administrations.

A pilot supervised-practice program would complement the educational pathway—and would help in development of that pathway. That has been Oregon's experience: it created a small

supervised-practice pathway that is now informing development of both an educational pathway and a more permanent supervised-practice one.¹

If the Board is interested in recommending a pilot supervised-practice program, we would be happy to work pro bono to develop that recommendation and (if accepted by the Minnesota Supreme Court) to continue working on the design and implementation of that pilot. We have relevant experience that could assist the Board in that work. Professor Merritt co-directed the IAALS *Building a Better Bar* study cited in the Board's public notice, helped write the rules governing Oregon's supervised-practice program, developed all of the rubrics and training materials used in that program, continues to assist Oregon in administering the program, and has advised several other states on non-exam pathways to measure attorney competence. Professor Chomsky was a key member of the IAALS research team, co-chaired the MBLE Working Group on Supervised Practice, has longstanding connections with the Minnesota legal community, and has written extensively on assessment of lawyering skills.

We outline below the reasons why we think it would be advantageous for the Board to recommend a pilot program of this nature and why such a program would be feasible if adopted by the Minnesota Supreme Court.

Reasons to Recommend a Pilot Supervised-Practice Pathway

- The program would be a small one, limited to candidates who failed the bar exam by just a few points during the last five years, and perhaps extended to the small group of candidates who fail by just a few points in the next several administrations. This pilot would allow the Board to explore the advantages and challenges of a supervised-practice pathway without committing immediately to a more permanent pathway.
- The portfolio requirements and rubrics used in a pilot supervised-practice pathway would be quite similar to ones used in an educational pathway. Developing those requirements and rubrics would inform ongoing development of the educational pathway—as well as of any more permanent supervised-practice pathway.
- Although Minnesota does not track the race/ethnicity of bar candidates, national statistics suggest that candidates who fail the bar exam are disproportionately people of color.² They fail the exam for reasons unrelated to competence, including the stereotype threat they experience when taking high-stakes multiple-choice exams and a lack of financial resources to support intense bar preparation.³ Recommending this pilot pathway, therefore, would further the Board's commitment to equity.

¹ Oregon developed its limited pathway as part of remediation for challenges faced by February 2022 exam takers. The heating unit failed in the building where that exam was administered, resulting in extremely cold temperatures and a large number of exam failures. The Oregon Supreme Court offered to examinees who failed the exam an opportunity to demonstrate their competence through supervised practice.

² ABA SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR, SUMMARY BAR PASS DATA: RACE, ETHNICITY, AND GENDER 1, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2022/2022-bpq-national-summary-data-race-ethnicity-gender-fin.pdf (last visited Jan. 2, 2022).

³ See ACCESSLEX INST., ANALYZING FIRST-TIME BAR EXAM PASSAGE ON THE UBE IN NEW YORK STATE 5–6 (May 2021), <https://www.accesslex.org/NYBOLE>

- The candidates eligible for this pathway failed an outdated exam that will be replaced within the next few years. It is particularly fitting for them to have the opportunity to demonstrate their competence in other ways.
- The candidates eligible for the proposed pilot suffered the lasting trauma of the pandemic and George Floyd's murder while in law school and/or preparing for the bar exam. Offering a non-exam pathway to future law students while overlooking the challenges faced by these recent graduates would undermine the Board's commitment to equity.
- Data from California suggest that supervisors would be very satisfied with the work of candidates participating in a pilot supervised-practice program, that those candidates would be particularly hard-working, that they would increase the diversity of their workplaces, and that they would allow their organizations (including nonprofits and government agencies) to serve more clients. A description of the California data, which is just emerging, is attached to this submission.

The Feasibility of Developing and Implementing a Pilot Supervised-Practice Program

- Professor Merritt worked with the Oregon State Bar's Regulatory Counsel to develop the supervised-practice program for examinees who failed Oregon's February 2022 bar exam. The Oregon Supreme Court approved the program rules in July, and participants began enrolling in November. If the Board recommends a pilot supervised-practice program, and the Supreme Court accepts that recommendation, a working group could readily adapt the rules, rubrics, and other tools developed in Oregon to create a pilot supervised-practice program in Minnesota.
- Oregon's program follows the principles and parameters laid out by MBLE's Working Group 3 (Supervised Practice). In particular, Oregon's program requires candidates to submit portfolios of work product to its Board of Bar Examiners, which then evaluates the competence of the work product. Oregon has developed rules and rubrics for that evaluation that minimize the burden on examiners, while protecting the public through a fair, valid, and reliable system of assessment.
- In addition to developing rules and rubrics for the Oregon program, Professor Merritt has recorded a series of training videos for the program. She would be able to share all of those materials with Minnesota—or create new versions of them tailored to choices made by Minnesota's Board and stakeholders.
- Through her work with Oregon and other states, Professor Merritt is quite conversant with psychometric principles. She has also discussed aspects of Oregon's supervised practice program extensively with members of Oregon's Board of Bar Examiners and the Oregon committee designing more permanent non-exam pathways to licensure. She would be able to explain various options to Minnesota's Board and stakeholders, allowing Minnesota to efficiently design a pilot program tailored to its needs.
- Professor Chomsky has worked extensively, both nationally and within Minnesota, to explore alternative models for assessing attorney competence. She is familiar with

psychometric principles, with the work done in Oregon and other states, and with the discussions of MBLE's Working Group 3 (Supervised Practice). Like Professor Merritt, she could help the Board develop a recommendation for a pilot supervised-practice program, work with any committee appointed to implement that program, and assist with implementation.

Preliminary Data from a Study of California's Supervised-Practice Pathway

Deborah J. Merritt

In July 2020, the California Supreme Court lowered the passing score on the bar exam by the equivalent of 5 points.⁴ Six months later, the Court approved a supervised-practice pathway for test-takers who had failed the bar exam by no more than 5 points during the previous five years.⁵ That pathway continues in effect for eligible candidates.⁶

In fall 2022, Professor Merritt helped the California State Bar design a survey to determine the success of this pathway. In return, the State Bar granted her access to the survey data. She has just started analyzing the survey results but has identified numerous positive results related to supervised-practice pathways. The discussion below reflects the analyses and interpretations of Professor Merritt, not of the California State Bar.

California's supervised-practice pathway is designed for the particular circumstances generated by the change in the bar passing score; it is likely quite different from a supervised-practice pathway Minnesota might develop. The California pathway requires only 300 hours of supervised practice and a positive evaluation from the candidate's supervisor(s) rather than production of work product assessed by bar examiners. Data from participants in the California program, however, offer insights into the operation of other types of supervised-practice programs.

Diversity and Equity

MBLE and its working groups have expressed strong commitments to equity in the licensing process. Some stakeholders have wondered whether a supervised-practice pathway would offer equitable access to women, people of color, first-generation graduates, or graduates with disabilities. The California data are largely reassuring on this point, although the survey results suggest the need to improve opportunities and satisfaction among candidates with disabilities.

⁴ California lowered its cut score from 1440 to 1390. That change was equivalent to a change from 144 to 139, using the scale adopted by Minnesota and most other states.

⁵ Supreme Court of California, Administrative Order 2021-01-20 (Jan. 28, 2021), <https://newsroom.courts.ca.gov/sites/default/files/newsroom/2021-01/20210128062716391.pdf>.

⁶ Supreme Court of California, Administrative Order 2022-12-21 (Dec. 23, 2022), <https://newsroom.courts.ca.gov/sites/default/files/newsroom/2022-12/S277623%20-%20Admin.%20Order%202022-12-21%5B40%5D.pdf> (extending the pathway to December 31, 2025).

By fall 2022, 673 individuals had participated in California’s supervised-practice pathway. Another 1154 candidates were eligible for the pathway but had not participated.⁷ In total, therefore, about 1827 candidates were eligible for the pathway. A small percentage of them (4.1%) did not identify their race or ethnicity. The remaining candidates were almost evenly divided between candidates who identified as white (49.7%) and those who identified as people of color (50.3%).⁸

The candidates of color were considerably more likely to participate in the supervised-practice pathway than their white counterparts: 59.6% of the eligible candidates of color participated in the pathway, compared to 33.2% of eligible white candidates.⁹

Candidates of color who pursued the pathway, moreover, have been slightly more successful than white candidates in obtaining full licenses. By fall 2022, 84.6% of the participants of color had been admitted to the bar along with 82.4% of white participants.

Candidates of color, finally, were as satisfied with the program as white candidates. On a 5-point scale (ranging from 0=Extremely dissatisfied to 4=Extremely satisfied), responses from candidates of color averaged 3.28 while those from white candidates averaged 3.33—a difference that did not reach statistical significance ($p = .744$). About two-thirds of both candidates of color (65.9%) and white candidates (66.9%) indicated that they were “extremely satisfied” with the program.

Female candidates have had a similarly positive experience with the pathway.¹⁰ 39.7% of eligible women participated in the pathway, compared to just 33.9% of eligible men. Comparable percentages of women (83.9%) and men (83.1%) have successfully completed the program to date. And women who participated in the pathway were significantly more satisfied with the program than men who participated. Women rated the program an average of 3.46 on the 5-point scale, while men offered an average rating of 3.12 ($p = .015$).

First-generation college graduates also fared well within California’s supervised-practice pathway. A higher percentage of first-generation candidates (39.4%) than other candidates (36.8%) participated in the pathway. A particularly high percentage of first-generation

⁷ The State Bar determined eligibility in fall 2022, when the survey was administered. It is possible that some individuals who were eligible at the program’s start (in early 2021) lost their eligibility by retaking and passing the California bar exam in 2021 or 2022. That number, however, is likely to be small. The number of eligible candidates in fall 2022 should be close to the number who were eligible at the program’s start.

⁸ California’s data provides these categories for race/ethnicity: White, Black, Hispanic, Middle Eastern or North African, Native Hawaiian or Other Pacific Islander, Asian, American Indian or Alaska Native, Multiracial, and Other. For these analyses, I grouped the latter eight categories as people of color. In future analyses, I will be able to look more closely at some of the racial/ethnic groups.

⁹ I have not calculated statistical significance for this comparison or for others based on the full population of individuals eligible for the program. These comparisons reflect actual population numbers rather than estimates based on a sample of the population. The difference between candidates of color and white candidates in their program participation is quite substantial.

¹⁰ A small number of candidates (1.3% of the pathway participants and 1.9% of those who were eligible but did not participate) declined to identify their gender. Another four individuals identified themselves as non-binary. Two of the non-binary individuals participated in the program and two did not. The number of non-binary individuals was too small to support further analysis so I excluded them, as well as those who did not identify gender, from these analyses.

candidates (90.1%), furthermore, has successfully completed the pathway. Just 83.8% of other candidates have succeeded so far. The two groups of candidates, finally, express similar satisfaction levels: an average of 3.37 for first-generation candidates and 3.27 for others ($p = .493$).

I cannot determine, unfortunately, whether candidates with disabilities were as likely to pursue California's supervised practice pathway as other candidates; data for that analysis are missing. Among candidates who pursued the pathway, however, about one in twelve (7.6%) identified themselves as having a disability. Those participants, unfortunately, were significantly less satisfied with the pathway than other participants. The latter recorded an average satisfaction rating of 3.36, while the average rating recorded by participants with a disability was just 2.98 ($p = .041$). Candidates with disabilities have also been somewhat less successful in gaining admission to the bar through the pathway. Four-fifths of them (79.6%) had gained admission by fall 2022, compared to almost nine-tenths (87.0%) of candidates who did not identify themselves as people with disabilities.

It is possible, of course, that new lawyers with disabilities are more dissatisfied with their practice than other lawyers—regardless of participation in a program like California's supervised-practice pathway. Lawyers with disabilities continue to face serious challenges in the workplace that can lead to both dissatisfaction and difficulty completing assigned work. California's pathway program, moreover, was a short-term program without ongoing support for candidates. When constructing more permanent supervised-practice pathways, designers can focus more directly on the challenges faced by candidates with disabilities. The Oregon committee charged with developing that state's supervised-practice pathway, for example, has worked with the Oregon Attorneys with Disabilities Association to design a supervised-practice pathway using universal design principles.

Availability of Supervisors

Stakeholders have also wondered whether sufficient supervising attorneys would be available to support a supervised-practice pathway to licensure. Once again, data from California are encouraging.

Among the candidates who were eligible for the pathway program but did not participate, only 6.8% indicated that they had difficulty finding a supervisor.¹¹ Availability of supervising attorneys, therefore, appears to have hampered only a small number of eligible candidates. Male candidates were significantly more likely than female candidates to indicate that they had difficulty finding a supervisor ($p = .042$). Candidates of color and white candidates did not differ significantly in identifying the lack of a supervisor as an obstacle ($p = .378$). Nor did first-generation candidates differ significantly from others in naming this obstacle ($p = .626$).

¹¹ By far the most common reason for failing to participate was that the eligible candidate had not heard about the program in time. The California State Bar advertised the program on its website but did not initially attempt to contact eligible candidates directly. After discovering how many candidates lacked knowledge of the program, the California Supreme Court extended the program, *see supra* note 6, and the State Bar has committed to notifying all eligible candidates directly.

Sufficient data are unavailable, unfortunately, to analyze the extent of difficulty that candidates with disabilities faced in finding supervisors.

Supervisors who participated in the program were very satisfied with the work that candidates performed for them. Almost two-thirds (62.1%) were “very satisfied” and most of the rest (31.3%) were “satisfied.” Only 6.7% expressed any dissatisfaction with the work performed by candidates.

In addition to their satisfaction with the candidates’ work, supervisors pointed to several other advantages they derived from the pathway program. A supermajority (85.2%) of the supervisors who responded to the survey indicated that their pathway candidates were “especially hardworking” and benefited their organization to a “moderate” or “great” extent because of that hard work. A similar percentage (85.9%) responded that the pathway candidates allowed their organization to serve more clients. And three-quarters of the respondents (75.5%) indicated that the pathway candidates benefited their organization by adding diversity.

Conversely, supervisors identified few drawbacks to working with pathway candidates. A modest percentage (17.0%) found their practice burdened to a “small extent” because pathway candidates made mistakes that newly licensed lawyers wouldn’t have made. But only 12.9% experienced this burden to a “moderate” or “great” extent—and 70.1% of the supervisors checked “none at all” when asked about this potential burden. Similarly, only a minority of supervisors indicated that pathway candidates burdened their practices to some extent by requiring more training than newly licensed lawyers.

The greatest burden identified by supervisors was that pathway candidates needed more direct supervision than newly licensed lawyers; that supervision was a program requirement. A quarter (25.9%) of supervisors thought that requirement burdened their practice to a “small” extent; 14.7% felt that burden to a “moderate” extent; and 8.9% indicated that the need for supervision burdened their practice to a “great” extent. Notably, however, half of all supervisors (50.4%) responded that the supervision requirements for pathway candidates imposed no burden at all.

From: Patrick Costello
Sent: Thursday, January 5, 2023 11:36 AM
To: BLE
Subject: comment on bar exam requirement

Minnesota State Board of Law Examiners
180 East 5th Street, Suite 950
St. Paul, Minnesota 55101
via: email: ble@mbcle.state.mn.us

As one who passed bar examinations in Iowa, Nebraska, and Minnesota before the advent of the Multi-state Bar Exam, I will explain my reasons for keeping the requirement of passing a test to be admitted to practice law.

For those concerned about disparities in test results among groups, all objections based thereupon are counted by W.E.B. DeBois in his book The Soul of Black Folks.

Moving beyond race, ethnicity, and economic status as arguments against bar examination, I want you to question your study group's solutions.

The bar examination has kept out of the legal profession those who do not know or can not remember the law as it was taught to them in law school. This is how it should be. It is hard to deny that incompetency can and is tested by examination. It may be more challenging to argue competency is correctly measured by examination.

The bar exam, a requirement universally accepted for a long time, has not been shown to be defective in meeting the goal of assurance to the public that those who are lawyers know the law. This is not to say: tea must be good for you; 1.4 billion Chinese can't be wrong. Alternatives to the bar exam have not been adequately reviewed.

Objections to the bar examination are primarily from those who did not pass the exam or those concerned they may not pass due to poor grades in law school or their enrollment in low-ranked law schools. Taking the complaints from that group as a good reason to question the efficacy of the bar exam is odd.

Passing a bar exam has a more significant advantage for those marginal students because in doing so, they demonstrate their ability to the bar examiners and the public.

Patrick Costello
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507-662-6621

TO: Minnesota Board of Law Examiners

FROM: Carol L. Chomsky, Professor of Law, University of Minnesota

RE: Creation of Experiential Education Pathway

DATE: January 5, 2023

I appreciate and support the Board's support for development of an experiential-education pathway to licensure. As the Board noted, the law schools themselves will have to play an important role in developing such a pathway. In order to facilitate that development, I urge the Board to establish a committee, chaired by a member of the Board, charged with designing a workable pathway.

Although the ultimate goal of the committee would be to develop specifics for licensing individuals based on work done in law school—e.g., determining the kind and number of courses required, the documentation to be supplied by applicants, the nature of supervisory and evaluative responsibilities by instructors and by Board members or designated graders for licensing--the committee would need to begin its work by identifying the competencies to be measured for licensing. As the Board noted, there are several models available that can be adapted to identify the necessary competencies, including the *Building a Better Bar* report, the California Practice Analysis, and the NCBE practice analysis being used to develop the NextGen Bar Exam. That work product will also be foundational for development of a supervised-practice pathway, whether the Board decides to propose a pilot supervised-practice pathway as I and Professor Merritt have recommended in a separate comment or defers that development until later.

To accomplish its objectives, the committee would benefit from having members from each of the Minnesota law schools, including teachers of clinics and field placements who will be most familiar with the schools' experiential programs. Law school participation in the committee would not mean they are committing to offering the pathway once developed, but it would help the Board and the Supreme Court develop a program that is more likely to work for the law schools. The committee would benefit as well from participation from practicing lawyers who were members of the working groups, as they have shown themselves interested in creating alternative pathways and many understand the competencies needed in junior attorneys. For identification of the competencies, the committee would benefit from having several members of the Board participate, since the Board is responsible for specifying competence for the purpose of licensing. I also urge the Board to include as a member of the committee or as a designated expert Professor Deborah Merritt, who has written guidelines for how to develop an experiential-education pathway and has participated in the ongoing discussions to create an Oregon Experiential Pathway to licensure in that state.

As the Board has expressed an interest in having an experiential-education pathway be scalable, the Board may wish to specify its preference for a program that would allow students

to use already available courses (clinics, field placement courses, and doctrinal courses) to demonstrate competence rather than requiring students to take a narrowly prescribed set of courses or requiring the law schools to develop additional offerings. Each of Minnesota's law schools has robust clinical and experiential programs that I believe can form the basis for documenting competencies for the purpose of licensing, and designing the experiential-education pathway to use those robust programs would make the pathway available to more students with the least disruption of the law schools' curricular choices.

I appreciate the Board's work in the comprehensive review process and I am happy to assist the Board as it continues its efforts.

Comments Received in Response to March 20, 2023 Public Notice:

1. April 25, 2023 – Claudia Angelos, Clinical Law Professor, New York University School of Law, Comment in support of curricular alternative to bar examination
2. April 26, 2023 – Andrea Curcio, Professor of Law, Georgia State University College of Law and Marsha Griggs, Professor of Law, Washburn University School of Law, Support for Exploration of alternative law licensing pathways
3. April 26, 2023 – Eileen Kaufman, Professor of Law Emerita, Touro Law School, and Mary Lu Bilek, Former Dean and Professor of Law, UMass Law School and CUNY Law School
4. May 1, 2023 – Carol Chomsky, Professor, University of Minnesota Law School, Comments on Proposed Recommendations Related to the Bar Exam
5. May 1, 2023 – Joan Howarth, Distinguished Visiting Professor, William S. Boyd School of Law, MSU Law Dean Emerita, Comments on BLE Recommendations
6. May 1, 2023 – Deborah Jones Merritt, Distinguished University Professor and John Deaver Drinko/Baker & Hostetler Chair in Law Emerita, Moritz College of Law, The Ohio State University, Support for Proposed Recommendation Related to the Bar Exam
7. May 1, 2023 – Gary W. Jenkins, Dean and William S. Pattee Professor of Law, University of Minnesota
8. May 1, 2023 – Anthony Niedwiecki, President and Dean, Mitchell Hamline School of Law (Appendices omitted.)
9. May 1, 2023 – Joel Nichols, Interim Dean and Mengler Chair in Law, University of St. Thomas
10. May 1, 2023 – Cheryl Dalby, Minnesota State Bar Association

From: Angelos, Claudia <angelos@mercury.law.nyu.edu>
Sent: Monday, April 24, 2023 1:50 PM
To: BLE
Subject: Comment on Bar Licensing Recommendations
Attachments: Comment on Recommendation 6 - Claudia Angelos.pdf

Dear Mr. Koneck and Board of Law Examiners,

I attach a comment in support of the MBLE's Recommendation 6 on attorney licensing.

I am grateful for the opportunity to comment on this important proposal.

Very truly yours,

Claudia Angelos
Clinical Professor of Law
New York University School of Law



New York University
A private university in the public service

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Professor Claudia Angelos

To: Minnesota State Board of Law Examiners
From: Claudia Angelos
Clinical Professor of Law
New York University School of Law
Re: Comment in support of curricular alternative to bar examination
Date: April 25, 2023

For more than thirty years I have been a clinical law professor at New York University School of Law. I am one of the now many hundreds of faculty members from law schools across the nation who teach clinical courses in which law students learn to identify and research applicable law and to engage in legal analysis. More important, however, under real-world conditions of uncertainty but under close supervision, our students learn to counsel and represent clients, explore facts, generate strategies, work to achieve outcomes, improve communication skills, develop professional identities, and internalize the habits of preparation and reflection that make lifelong learners and trustworthy attorneys.

I write at your invitation to comment on – and to support - the MBLE's Recommendation 6, which calls for the creation of an Implementation Committee to develop a pathway to attorney licensing based on assessment of an applicant's work in clinical courses during law school. It is certainly time for law schools to have the opportunity to take responsibility for graduating people who have the foundational knowledge, skills, and professional values necessary to entry into the profession.

The many recent criticisms of the current written, timed, memory-based bar examination as the only means of attorney licensing are proving increasingly well-founded. It excludes people of color at disproportionate rates. Success depends on economic resources for bar prep courses and time away from work. It rests more on tradition than on validation. Its passing scores seem random. It fails to assess whether applicants have many of the skills and values demanded by our profession for practice. Artificial intelligence tools pass it at higher scores than human law graduates. A better written bar examination such as the upcoming NextGen exam under development by the National Conference of Bar Examiners will be better. But it will not be as good as a sound education in lawyering.

Clinical law professors, including many in Minnesota, have now spent decades studying, writing about, and applying learning theory to the education of lawyers. We know how to assess and to improve the performance of students in attorney roles. No matter what clients and matters our students handle, they learn skills that they can transfer to other practice settings. We engage them in the challenges of cross-cultural work. We teach them the urgency and the professional satisfaction of providing access to justice for the underserved.

The clinical programs at Minnesota's three law schools are very well-regarded nationally, each well known for the rich and rigorous experiential education they provide. While the development of an innovative and forward-looking program such as that outlined in Recommendation 6 will present challenges, the Implementation Committee will have an exceptional opportunity to lead in the development of a law-school based licensure assessment program.

I envy the promise of this possibility in Minnesota and would be very happy to help in any way I might.

From: Andrea Anne Curcio <acurcio@gsu.edu>
Sent: Wednesday, April 26, 2023 5:53 AM
To: BLE
Cc: Marsha Griggs
Subject: Comment on Recommendations for Alternative Pathways for Lawyer Licensing
Attachments: comment to MN April 26.docx

Attached please find our comments on the recommendations for alternative pathways to lawyer licensing.

Thank you for all your work on this issue.

Sincerely,

Professors Curcio & Griggs

Andrea [Andi] Curcio
Professor of Law
Georgia State University College of Law
85 Park Place
Atlanta, GA 30303
404 413-9157

you can read my most recent publications at: https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=55478

To: Minnesota State Board of Law Examiners

Fr: Professors Andrea A. Curcio, Marsha Griggs

Re: Support for Exploration of alternative law licensing pathways

April 26, 2023

We are law professors who have extensively researched and written about legal education, law licensure reform, and equity issues, and we either teach in or are familiar with the experiential offerings in our own and other law schools around the country. We write to applaud the work the MBLE has done as part of its comprehensive study of attorney licensing and to encourage you to explore both law-school based (Recommendation 6) and supervised practice (Recommendation 7) alternative law licensure pathways.

As recognized in the reports underlying your Recommendations, there is ample evidence of the disparate impact of the bar exam on people with limited financial resources, people of color, and those with disabilities, and substantial questions have been raised about the validity of the exam as a measure of competence to practice law. We support and admire Minnesota's willingness to take a leadership role in the exploration of alternative pathways to licensure to address these issues.

A pathway based in experiential education during law school has wonderful potential to establish that law graduates who follow that pathway possess minimum competence to practice law because they will have demonstrated a much wider range of necessary skills and shown the ability to use those skills to represent clients. It also would address disparities we see in the current exam process that affect people of color and those with disabilities. Graduates choosing that pathway would not have to stop working for eight to ten weeks and pay thousands of dollars to bar prep companies to become licensed. And they would prove their competency without having to take a high stakes standardized exam known to have disparate outcomes. The Minnesota law schools all have strengths that make them particularly well-suited to developing an experiential curricular pathway to licensure: Mitchell Hamline has a nationally respected experiential education program; St. Thomas is a leader in work on professional identity formation; and the University of Minnesota is a flagship school that is one of the strongest public law schools in the nation with a vibrant set of diverse clinical and experiential offerings. Relying on them to work together to build an experiential pathway to licensure is likely to produce a program that can serve as a role model throughout the country.

While we recognize that the Board's focus for now is on an experiential curricular pathway, we respectfully suggest that a supervised practice pathway is also worth exploring at the same time – particularly because much of the work being done to develop a curricular pathway could be easily adapted to a supervised practice pathway. We also note that data from a temporary supervised practice program in California (currently being analyzed by Professor Curcio) shows success in developing and demonstrating lawyering skills in the participants, and the program

particularly benefitted California lawyers in rural areas, potential licensees of color, and graduates working in access-to-justice organizations and those without significant financial resources. It is likely that a program in Minnesota would yield similar results.

Whether you decide to pursue development of only an experiential pathway or both pathways, we will be happy to lend our expertise to this project should you need it.

Thank you for allowing us the opportunity to submit this comment and thank you for all your work exploring these important developments in attorney licensing.

Sincerely,

Andrea A. Curcio

Professor Andrea [Andi] Curcio
Georgia State University College of Law

Marsha Griggs

Professor Marsha Griggs
Washburn University School of Law

From: Eileen Kaufman <Ekaufman@tourolaw.edu>
Sent: Wednesday, April 26, 2023 2:33 PM
To: BLE
Subject: public comments
Attachments: Comment to Minnesota State Board of Law Examiners.docx

Attached please find our written comments to the Board's recommendations regarding alternative pathways to licensure.

Thank you for your attention.

Sincerely,

Eileen Kaufman

Eileen Kaufman
Professor of Law Emerita
Touro Law School
225 Eastview Drive
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email: ekaufman@tourolaw.edu

Proud past Co-President of the **Society of American Law Teachers (SALT)**. SALT is a community of progressive law teachers working for justice, diversity, and academic excellence. To become a member, join at saltlaw.org.

Dear Members of the Minnesota State Board of Law Examiners:

We write to applaud the Board for using an open, thoughtful, and thorough process to consider modifications to the lawyer licensing rules in Minnesota. We also write to support Recommendation 6, proposing the creation of an Implementation Committee to explore and develop an alternative to the bar exam that candidates could complete during law school. Finally, we write to encourage creation of a second Implementation Committee that would complement the work of the first Committee by exploring and developing a limited pilot project in which graduates could demonstrate their competence while working after graduation for public service organizations designated by the Minnesota Supreme Court. This pathway, known as a “Lawyers Justice Corps (LJC),” would complement a curricular pathway, assist graduates who were unable to participate in a curricular pathway, and expand access to justice for the many Minnesotans who currently lack representation.

In its recommendation 7, the Board has noted that a licensing path based on post-graduation supervised practice would benefit the public. At the same time, it expressed concern about the cost involved in developing such a program and uncertainty about “new challenges and unforeseen consequences.” We suggest that, given the groundwork already laid by other states considering proposals for, or actually implementing, supervised practice, the resources involved in developing a Lawyers Justice Corps post-graduation pathway would be significantly less than the MBLE fears. Under the LJC concept, public interest employers would hire graduates through their ordinary hiring process and pay them their usual salaries. Such employers would train the graduates using their existing programs, which data indicates are already extensive (see below). Our research also suggests that public interest employers are eager for a licensing path like the LJC because graduates would be able to start working during the summer, the pathway offers a rigorous assessment of competence, and candidates can continue their work without interruptions from bar study or test failure.

A Justice Corps thus offers compelling benefits: it provides a valid, feasible, reliable, and fair way to measure minimum competence; it addresses and ameliorates the crisis in access to justice; and it increases much needed diversity in the profession.¹ An LJC would require little additional time or resources beyond what will be required for the curricular pathway described in Recommendation #6. Development of an LJC would put Minnesota in the forefront of the national effort to provide a better

¹ ABA data reveals a shocking 24% disparity between white and black first-time test takers in 2021. https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2022/2022-bpq-national-summary-data-race-ethnicity-gender-fin.pdf.

way of licensing lawyers and to promote diversity and expand legal services to the poor. In the remainder of this comment we offer some additional detail about the Lawyers Justice Corps and the evidence supporting that concept.

What Is the Lawyers Justice Corps? The basic concept of a Lawyers Justice Corp is to provide a cadre of public interest lawyers, committed to providing legal services to underserved individuals and populations, who are able to begin work immediately upon graduation. The Minnesota Supreme Court would designate qualifying organizations, who would themselves select participants via their ordinary hiring practices and pay the participants an entry-level salary. Candidates would commit to working for the organization for at least one year and would be trained and closely supervised for a six-month period. This pathway would require rigorous review of the candidates' competency through specially designed rubrics, already in use in Oregon, applied to portfolios of work product. Or the rubrics could be adapted based on the rubrics developed by the Implementation Committee for a curricular pathway created based on recommendation 6. Work product would be evaluated, not only by the supervising attorney, but also by outside evaluators. Candidates would begin working at legal services offices in May instead of August and thus the roughly 500 hours that candidates typically spend on bar prep would instead be spent representing under-served clients.

Psychometric Principles Supporting a Lawyers Justice Corps. Researchers associated with IAALS (the Institute for the Advancement of the American Legal System) and NCBE have written about the validity, reliability, fairness, and feasibility of assessment systems based on supervised practice.² Their research guide cites some of the extensive psychometric literature supporting the growing use of workplace-based assessments for licensing and other purposes. Those guidelines would inform development of a pilot Lawyers Justice Corps.

Empirical Support for a Lawyers Justice Corps. The validity, feasibility, and fairness of a supervised practice pathway, and particularly one structured as a Lawyers Justice Corps, are supported by data from California's Provisional Licensure Program (PLP). Professor Deborah Merritt (The Ohio State University) and Logan Cornett (IAALS) worked pro bono with the California State Bar to develop a survey administered to PLP participants. Professor Eileen Kaufman (one of the undersigned) is now analyzing that data with Professor Merritt and Professor Andrea Curcio (Georgia State University). The survey responses demonstrate the fairness and feasibility of a supervised practice pathway, and they lend particular support

² Logan Cornett, Danette McKinley, & Deborah Jones Merritt, Guidelines for a Licensing System Based on Supervised Practice (2022).

to a pilot pathway developed in collaboration with public defenders, legal aid offices, and other nonprofits. Here are just some of the data supporting that type of pilot program:

- The public interest organizations who participated in the PLP were significantly more likely than other employers to have training and mentoring programs in place for new lawyers.³
- The PLP was broadly inclusive, but this was especially true for public interest organizations. Those organizations were more likely than other employers to hire first-generation college graduates, licensees who identified as GLBTQIA+, licensees who identified as people with disabilities, women, and people of color.⁴
- Provisional licensees allowed public interest organizations to serve more clients. Fully 95% of supervisors working for those organizations reported this benefit from California's PLP.⁵
- Supervisors at public interest organizations also praised the PLP for increasing the diversity of their practice teams. More than 93% of public interest supervisors cited this benefit.⁶
- Supervisors at public interest organizations were particularly likely to express willingness to continue supervising current or future licensees. 85.6% of the public interest supervisors indicated immediate willingness to do so, and another 11.3% were unsure. Only 3.2% of public interest supervisors ruled out further participation.⁷

Given these results and the Minnesota State Board of Law Examiners' agreement "that the public would benefit from a high-quality post-graduation pathway to licensure that involve intense supervision by licensed practitioners," we respectfully suggest that such a committee be designated to look closely at a supervised practice pathway, and to begin development of a pilot Lawyers Justice Corps.

Sincerely,

³ 98.3% of supervisors at public interest organizations reported those programs, compared to 72.1% of supervisors working for other employers ($p < .001$).

⁴ On the first three criteria, the differences between public interest organizations and other employers was statistically significant: $p = .027$ for first-generation college graduates; $p < .001$ for licensees who identified as GLBTQIA+; and $p < .001$ for licensees who identified as people with disabilities. The race/ethnicity and gender differences both approached significance at the conventional level: $p = .055$ for race/ethnicity; $p = .078$ for gender.

⁵ Provisional licensees expanded client service at other organizations, but the benefit was not as large. 85.4% of supervisors in other organizations reported this benefit ($p = .005$).

⁶ About three-quarters (74.3%) of other supervisors in other organizations cited this benefit ($p = .007$).

⁷ A substantial majority of supervisors working in other places were also willing to consider continued work with provisional licensees. Two-thirds (67.6%) expressed immediate willingness to do so, and 17.4% were unsure. The interest expressed by supervisors in public interest organizations, however, was significantly greater ($p < .001$).

Eileen Kaufman
Professor of Law Emerita
Touro Law School

Mary Lu Bilek
Former Dean and Professor of Law
UMass Law School and CUNY Law School

From: Carol Chomsky <choms001@umn.edu>
Sent: Monday, May 1, 2023 11:51 AM
To: BLE
Subject: Comment on the MBLE Recommendations on attorney licensing
Attachments: Chomsky Submission to MBLE May 2023.pdf

Please find attached my comment on the Board recommendations, in response to the Public Notice on March 20, 2023. Thank you.

Carol L. Chomsky
she/her/hers
Professor, University of Minnesota Law School
612-625-2885
Faculty Profile at <http://www.law.umn.edu/facultyprofiles/chomskyc.html>
Past Co-President, Society of American Law Teachers (saltlaw.org)

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TO: Minnesota State Board of Law Examiners

FROM: Prof. Carol Chomsky, University of Minnesota Law School

RE: Comments on Proposed Recommendations Related to the Bar Exam

I commend the Board for the extensive work it has done to explore Minnesota's attorney licensing process and the thoughtful set of recommendations it has presented for public comment. I attended the meetings held by the Board starting in October 2021 when it began its comprehensive review and offered some initial thoughts about the problems with the current attorney licensing process based on my scholarly work in this field. I served as co-chair of one of the Working Groups convened by the Board in January 2022 and I participated in each of the four public listening sessions the Board has held regarding its emerging recommendations. As a result, I have seen the care with which the Board has acted throughout this process and I commend the Board for producing a set of forward-looking proposals built on the information gleaned through that work. I support all seven of the Board's recommendations, though I urge the Board, and the Court, to go a bit further with respect to the last one. I submit my comments on the recommendations on my own behalf as a scholar who has published and advocated in the field of attorney licensing.

Recommendation 1: Adoption of the NextGen Bar Exam. The shortcomings of the current bar exam are well documented, and some of them are likely to be addressed in the NextGen exam being developed by the NCBE. According to the NCBE, the test will substantially reduce the amount of memorization required to be successful and it will incorporate at least some testing about lawyering skills, not just examination of knowledge and application of the law. I therefore support the recommendation to adopt the NextGen Bar Exam as an improvement over the current exam. It will be important for some license applicants to take an exam that will provide a portable score that can be used to be licensed in other states.

But we do not yet know enough about the content of that new exam or the nature of the questions that will be asked of test-takers. To help establish that the exam will be a fair test for applicants, the MBLE should ensure that NCBE provides sufficient guidance to applicants and law schools about what will be on the exam—both the substance that will be tested and the manner of testing. And

given the disparate outcomes of the current exam,¹ the MBLE should ask the NCBE to collect and share data on the outcomes as the NextGen tests are administered, both in prototype and when used for licensing, including results for various demographic groups.

Recommendation 2: Standard Setting. At this stage, the Board simply recommends participating in a standard setting exercise through the NCBE to determine the appropriate cut score and notes that Minnesota currently requires a 260, while other jurisdictions range from 260 to 273. It is premature to address the specifics of setting the cut score of an exam that has not yet been fully developed, but I urge the Board and the Court to consider that we have no evidence that maintaining a lower cut score compared with other jurisdictions has led to any concerns about competency of new attorneys. Especially given the history of racial disparities in high stakes testing and evidence that unduly high cut scores exacerbate those disparities, we should be loath to make the cut score more difficult to attain.

Recommendation 5: Amending the Supervised Practice Rules. In keeping with my comments below about the efficacy of a supervised-practice pathway to licensing, and the problems associated with high stakes testing, I support this change. It recognizes that if a graduate has been working effectively under supervision of a licensed attorney, and the supervising attorney is willing to continue such supervision, the fact that the graduate has failed the written exam should not automatically terminate their ability to continue those arrangements.

Recommendation 6: Creating an Implementation Committee to Explore and Develop an Alternative Experiential Curricular Pathway to Licensing. I strongly support this recommendation. Although the NextGen Bar Exam will be better than the exam's current incarnation, it will remain a test of knowledge *about* lawyering skills, not a test of those skills themselves, and it may continue to have a disparate outcome, as do many high stakes standardized tests. An experiential curricular pathway to licensing—one allowing some applicants to document their competence through coursework in clinics, externships, and simulations and through presentation to the examiners of portfolios of their work—will ground licensing in a demonstration of actual lawyering skills applied to real rather than (only) manufactured scenarios.

While I am most familiar with the offerings at the University of Minnesota, I know that the programs at all three Minnesota law schools offer robust experiential opportunities for law students to develop and demonstrate their knowledge and skills while working with faculty who provide the appropriate feedback and supervision. We already have in our law schools the curricular experiences that can be the basis for licensing. As noted in Recommendation 6, the Implementation Committee envisioned by the Board can use insights gleaned from the Daniel Webster Scholar Honors Program, the various practice analyses, and the IAALS study to design a pathway that will be valid, fair, and reliable—and feasible using the experiential programs already in place in our law schools. The outline provided by Mitchell Hamline is a helpful foundation for that work.

¹ The racial disparities have been documented repeatedly, most recently in Scott DeVito, Erin Lain, and Kelsey Hample, *Onerous Disabilities and Burdens: An Empirical Study of the Bar Examination's Disparate Impact on Applicants From Communities of Color*, *Pace Law Review* 2023 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4406981).

The stunning recent developments in artificial intelligence (AI), coming too late for the MBLE to consider in its discussions, make even clearer the relevance of a curricular (and supervised-practice) pathway to licensing. ChatGPT's performance on versions of the bar exam—achieving a score better than 90% of humans taking that exam²—makes abundantly clear that a written examination focused on remembering legal rules and writing quick analyses of hypothetical sets of facts will not test competence to *be* a lawyer. Experts agree that AI will have an enormous impact on all types of law practice. This does not mean that AI will replace lawyers; it means that AI will profoundly affect the way in which each lawyer practices. As a result, our definition of minimum competence will shift substantially. Knowing how to use AI intelligently will become a central component of that competence, and skills like client counseling, fact gathering, legal research, project management, and creative problem-solving will become even more important than they are now. Those skills—including the ability to use AI intelligently in law practice—are precisely the skills that will be tested in any experiential pathway, but that can be tested in only a limited fashion on a written exam. To protect the public, Minnesota will want to embrace assessments conducted in law school experiential courses or the workplace, which can determine over time whether the candidates can handle the complexities of a legal practice.

Recommendation 7: A Supervised Practice Pathway. While acknowledging that “the public would benefit from a high-quality post-graduation pathway to licensure” that would involve supervision by licensed practitioners, the Board expressed concern whether it has the tools and resources to successfully develop and implement such a program at this time. The Board suggests that “[a]dopting and developing Recommendation 6 would provide additional data and time for continued analysis, and may produce standards and tools that can be utilized in a post-graduation pathway.” Nonetheless, the Board concludes that “if the Court determines that it is interested in pursuing this pathway that the Court create a Committee to design and provide additional guidance to the Court.”

I urge the Court to create such a Committee to explore a post-graduation supervised-practice pathway to licensure, which can work with the Implementation Committee for Recommendation 6 to establish the foundations for both pathways. Working together will make it more likely that the standards and tools developed for the curricular pathway will, indeed, work with a post-graduation pathway. And working together will ensure that the standards and tools developed for the curricular pathway will satisfy the practicing bar that the result will be a program that will indeed establish minimum competence for those who follow and satisfy it.

Although I understand the Board's concerns about resources, the fact that Oregon has already implemented a limited supervised-practice pathway (materials available at <https://www.osbar.org/plp>) and has already circulated a well-developed plan for a broadly applicable post supervised-practice pathway (available at <https://lpdc.osbar.org/>) provides confirmation that such a pathway can be developed with a manageable devotion of resources. It

² Daniel Martin Katz, et al., *GPT-4 Passes the Bar Exam*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4389233, (Mar. 20, 2023); see also Michael James Bommarito & Daniel Martin Katz, *GPT Takes the Bar Exam*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4314839, (Dec. 31, 2022).

also responds to the Board's expressed need for "guidance on how to reduce subjectivity; recruit, evaluate, and train supervisors; and effectively administer such a program." Oregon has addressed those issues in its planning and may well be far along in implementing their plan as we develop our own.

The Board also expressed uncertainty over the extent to which a supervised practice pathway would increase access and diversity and/or create new challenges and/or unforeseen consequences. The experience in both Oregon and in California (which has implemented a limited supervised-practice pathway for those who received exam scores that would be passing under the recent reduction of the California cut score) reduces the possibility of such unforeseen challenges and consequences. Moreover, data from the California experience suggests that a supervised-practice pathway would increase the diversity of workplaces and would also address equity concerns that already exist in law practice but often go unaddressed. I have copied below analysis of the relevant California data presented by Professor Deborah Merritt as part of her recent comment to the California Blue Ribbon Commission.

As with Recommendation 6, an implementation committee for a supervised-practice pathway may focus on creating a limited pilot program "that would provide guidance on future expansion." Such a pilot might include, for example, applicants who narrowly failed the current bar exam in the past five years, recent graduates who are hired to work in designated public interest organizations that already have or are willing to develop supervision for their new attorneys, and/or graduates of non-ABA-approved schools (including foreign lawyers) who are able to find a supervisor in Minnesota. With the California and Oregon experiences as a base, Minnesota is poised to create its own pilot supervised-practice pathway to lay the groundwork for possible future expansion. I urge the Court to pursue this opportunity now rather than wait until a curricular pathway is further developed in order to build on the foundation already laid and to ensure parallel developments of both experiential pathways.

APPENDIX

April 10, 2023

TO: State Bar of California

FROM: Deborah Jones Merritt, Distinguished University Professor Emerita
Moritz College of Law, The Ohio State University

RE: Public Comment on Report and Recommendations from the Blue Ribbon
Commission on the Future of the California Bar Exam

....

I. Inclusiveness of the Pathway Provisional Licensure Program (Pathway PLP)

The California Supreme Court directed the Commission to consider “any information that may be gleaned from California’s experience with its temporary provisional licensure program.” As the Report notes (p. 30), survey data related to that program was not available when the Commission voted on resolutions in early November. Basic data about program participation rates, however, was available and is quite relevant to some of the Commission’s concerns about assessing minimum competence through supervised practice.¹

The Pathway PLP allowed some candidates who had failed the California bar exam to establish their minimum competence by performing 300 hours of supervised legal work and obtaining a positive evaluation from their supervisor.² Some of the individuals who were eligible for this program bypassed it, retaking the bar exam and obtaining a passing score.³

Of the remaining 1,827 (who had not retaken or passed the bar exam), 673 had enrolled in the Pathway Program by September 2022. State Bar data shows that white men were the second largest demographic group eligible to participate in the program, yet they enrolled at significantly lower rates than women of color, men of color, and white women. Provided the

¹ I received the data in connection with my pro bono work assisting the California State Bar in designing surveys addressed to PLP participants. My agreement with the State Bar allows me to analyze the data and publish results, as long as I do not divulge personally identifiable information. I am not sure if the BRC previously requested basic data about program participation from the State Bar, but I urge the Commission to review this important data before finalizing its Report.

² This program was offered to individuals who had obtained a score between 1390 and 1439 on a California bar exam offered between July 2015 and February 2020. See <https://www.calbar.ca.gov/Admissions/Special-Admissions/Provisionally-Licensed-Lawyers>.

³ According to the State Bar, 863 individuals took this course. I do not have demographic data about those individuals, although the Commission could request that information from the State Bar if desired. Given the disparate impact of the California bar exam, discussed further below, adding that data to the analyses almost certainly would show that the Pathway Program was even more advantageous to women of color, men of color, and white women than I report here.

same opportunity to pursue a supervised-practice route to licensure, in other words, women of color, men of color, and white women were more likely than white men to pursue that opportunity. This table shows the numbers and percentages for each demographic group:⁴

	Number Eligible for Pathway	Number Participating in Pathway	Percentage Participating in Pathway Program
Women of Color	503	217	43.1%
Men of Color	373	138	37.0%
White Women	408	145	35.5%
White Men	453	143	31.6%

The differences in this table are both statistically ($p = .003$) and practically significant. Women of color, men of color, and white women were substantially more likely than white men to participate in the Pathway Program.

This participation addresses a key question raised by Commission members: whether members of historically disadvantaged groups would be able to find supervisors for a supervised-practice licensing pathway. Clearly those groups were able to do so; in fact, they were more likely to participate than white men.⁵

Data from the Pathway Program also shows that, as of September 2022, women of color, men of color, and white women were slightly more successful than white men in completing the program. This table shows the numbers and percentages of completion rates for each demographic group:

	Number Enrolled in Pathway	Number Who Had Completed Pathway	Percentage Who Had Completed Pathway
Women of Color	217	183	84.3%
Men of Color	138	117	84.8%
White Women	145	122	84.1%
White Men	143	116	81.1%

⁴ The table omits 90 individuals for whom the State Bar lacked information about race and/or gender. The omitted individuals account for only 4.9% of the population. The table also omits two individuals who identify as nonbinary. That number is too small to support statistical comparisons and, when combined with information about race/ethnicity, would risk identifying the individuals.

⁵ We do not know why particular individuals failed to enroll in the Pathway Program. They might not have heard about the opportunity, might have been unable to find a supervisor, or might have lost interest in obtaining a California law license. The reasons for non-participation don't affect the bottom-line reported above because the Commission was justifiably concerned about equitable access to a supervised-practice licensing path. Women of color, men of color, and white women may have been more likely than white men to hear about the program, to decide to participate, and/or to find a supervisor. All of these factors relate to access.

The differences in this table are not large enough to be statistically significant, but they are informative.⁶ Contrary to the concerns of some Commission members, biases or harassment did not prevent women of color, men of color, or white women from obtaining licenses based on supervised practice—even though they needed to obtain positive evaluations from their supervisors. Indeed, the candidates from these historically disadvantaged groups were more likely than white men to have completed the program successfully by September 2022.⁷

The basic participation data gathered by the State Bar does not include sufficient information to assess the experience of first-generation college graduates, candidates who identify as LGBTQIA+, or candidates with disabilities. The survey response data does contain that information and would reassure Commission members on numerous points. That data also shows that the percentage of Pathway participants reporting discrimination or harassment (6.8%) is considerably lower than the percentage of Canadian articling candidates reporting those experiences. Pathway participants who reported discrimination and harassment, moreover, were as satisfied with the program as other participants—perhaps because those problems exist in many parts of our educational system and profession. We should address those endemic problems, but California-specific evidence shows that they are not a reason to deny women of color, men of color, and white women the opportunity to demonstrate their competence through supervised practice.

I understand that the Commission will not have time to review the extensive results from the PLP surveys before finalizing its Report and Recommendations. But even without those survey results, the Pathway data cited above provides strong, California-specific evidence that a supervised-practice licensing path would benefit demographic groups historically disadvantaged by the bar exam. I urge the Commission to include this information in its Report and to recommend establishing a group that will further explore licensing paths based on supervised practice and/or experiential education.⁸ That working group can build on results of the PLP survey as well as initiatives in other states.

• • • •

⁶ When analyzing a full population, as here, statistical significance is relatively unimportant. The percentages reported in the table represent the actual outcomes for all members of the population, not merely an estimate based on a sample of the population.

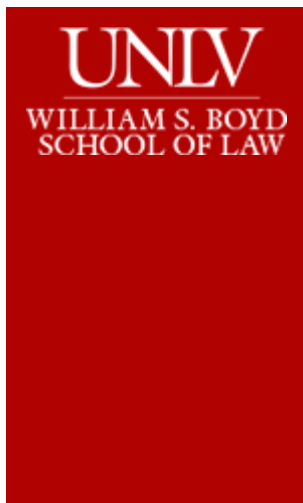
⁷ Most other participants were still active in the program. Only a small percentage (5.8%) had suspended or terminated their participation.

⁸ Although the Pathway data relates only to a supervised-practice pathway, there is no reason to exclude experiential education pathways from consideration by any new working group. That pathway has proven highly successful in New Hampshire and is being explored by other states. A licensing path rooted in experiential education would be the least costly licensing path for licensees and would be likely to show high levels of inclusiveness. These pathways, like ones based in supervised practice, can offer valid, reliable, fair, and feasible assessments of minimum competence.

From: Joan Howarth <joan.howarth@unlv.edu>
Sent: Monday, May 1, 2023 1:38 PM
To: BLE
Subject: Comment on BLE Recommendations [attn: John Koneck]
Attachments: Howarth Minn 050123.pdf

Thank you for the opportunity to comment. My comment is attached.

Kind Regards,
Joan Howarth



Joan Howarth

Distinguished Visiting Professor

William S. Boyd School of Law

Dean Emerita, MSU College of Law

author of *Shaping the Bar: The Future of Attorney Licensing*, <https://www.sup.org/books/title/?id=32230>



joan.howarth@unlv.edu

TO: Minnesota Board of Law Examiners [attn: John Koneck, Chair]
FROM: Joan Howarth, UNLV Distinguished Visiting Professor; MSU Law Dean Emerita
RE: Comments on BLE Recommendations
DATE: May 1, 2023

Thank you for the opportunity to comment on the Board's impressive project to consider its licensing practices. I am heartened and impressed that many of the values and concerns you have noted – data-driven decision making; public protection; access and equity, portability; reduction of cost – track the principles I have identified in my recent book, [SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING](#) (Stanford University Press 2023).

SHAPING THE BAR starts with some history of our licensing practices, bar exams *and* legal education, because our current licensing problems are a product of that history. Our task today is to design licensing for the inclusive, client-oriented profession that the public needs without complacency about the problems of licensing methods that originated when the profession held different values.

SHAPING THE BAR offers guidelines for designing valid, reliable, fair, and feasible ways to assess competence, whether through written exams or pathways that do not rely on high stakes written exams. SHAPING THE BAR supports the BLE's recommendations, including adoption of the *NextGen* and consideration of portfolio pathways, whether within legal education or through post-graduation supervised practice. *See Clinical Residencies*, Chap. 12. One theme of SHAPING THE BAR is that we should ask less of bar exams and more of law schools. No one should be licensed to practice without supervision without some experience having practiced with supervision.

Yes, the *NextGen* promises to be a better bar exam. *See SHAPING THE BAR*, chap. 15. I applaud your recommendations regarding the need for Minnesota's careful attention to standard setting, including public notice, for the *NextGen*. The standard setting, or cut score decisions, could exacerbate unjustified racial and ethnic pass rate disparities, or reduce them. Minnesota shines as a jurisdiction that has adopted a fair and reasonable UBE cut score, impressive in a national landscape in which too many cut scores are based on protectionism, uninspiring standard setting protocols, or no protocols at all. I remember that former Justice Alan Page was an important voice in Minnesota's standard-setting. Minnesota's historic and ongoing understanding that cut score decisions implicate equity concerns and your reasonable, non-protectionist cut score stand out. I urge Minnesota to be active in NCBE's efforts regarding standard setting, not just waiting to make the least bad choice

from options the NCBE offers. Standard setting is a policy decision in which your values, history, and experience are important, nationally.

We have the opportunity to rethink licensing – whether bar exams or supervised practice requirements – to advance the core values of public protection and equity. Thank you for undertaking this work so thoughtfully. I am available to try to be helpful in any way I can.

From: Merritt, Deborah <merritt.52@osu.edu>
Sent: Monday, May 1, 2023 9:53 AM
To: BLE
Subject: Attn: John Koneck (public comment)
Attachments: Merritt.MN Comment.pdf

Please see the attached comment supporting the Board's recommendations. Thank you for the invitation to comment.

Deborah Jones Merritt
Distinguished University Professor
John Deaver Drinko/Baker & Hostetler Chair in Law Emerita
The Ohio State University Moritz College of Law
Cell: 614-361-6402

April 25, 2023

TO: Minnesota State Board of Law Examiners

FROM: Deborah Jones Merritt, Distinguished University Professor and
John Deaver Drinko/Baker & Hostetler Chair in Law Emerita
Moritz College of Law, The Ohio State University

RE: Support for Proposed Recommendations Related to the Bar Exam

I commend the Board for its thoughtful review of Minnesota's licensing process and for the seven recommendations it has announced for public comment. As a scholar who has studied minimum competence extensively and who has worked with several states to evaluate their licensing systems, I support all seven of the Board's recommendations. I write here to elaborate briefly on my support for three of those recommendations.

Recommendation 1: Adoption of the NextGen Exam. I had the privilege of serving on NCBE's Content Scope Committee and then helped draft several of the prototype NextGen questions that are being piloted nationally. From that experience, I strongly support the Board's decision to adopt the NextGen exam. The exam will offer a much more effective assessment of entry-level lawyering competence than the current exam. NCBE appears committed to reducing the amount of memorization required for the exam, to testing more lawyering skills, and to achieving a better balance of multiple-choice and constructed-response questions.

The NextGen exam, however, will require significant changes in the way that students prepare for the bar exam. That process of change may impose particular burdens on students who are first-generation law students and/or lack confidence in their lawyering abilities. Ultimately, I believe that these students will be more successful on NextGen than on the current UBE, but the transition may be difficult. I encourage the Board, as it adopts NextGen, to press NCBE to share sample questions, a detailed content outline, and other exam information as soon as possible. Law schools are already anxious for this information, and it is essential to support faculty who will be preparing students for the new exam.

Recommendation 2: Standard Setting. I applaud the Board for recognizing the importance of standard setting and for recommending that Minnesota participate in any standard-setting exercise for the NextGen exam. I encourage the Board to engage fully in that process and to consult widely with others about the best method for setting the NextGen cut score. I have

followed standard-setting exercises as a scholar for more than 20 years,¹ and have seen that lawyers struggle more than other professionals to define minimum competence. We are much more accustomed, as lawyers, to comparing ourselves to others and grading on a curve than to setting a standard for minimum competence.

Previous standard-setting exercises in law have suffered from numerous flaws, including a failure to require the standard setters to take the exam and review their own scores before attempting to set an appropriate passing score. This step is an essential best practice for standard setting, and it is particularly important in a profession that is marked by a wide range of specialties and practice areas. Indeed, the best way to set an appropriate passing score for the NextGen exam may be to draw that score from samples of practicing lawyers who complete portions of the exam.

Recommendation 6: Exploration and Development of an Alternative Assessment That Can Be Completed During Law School

This is the most important of the Board's recommendations and one that I very strongly support. NextGen will be a better exam than the UBE, but it will still fall short of assessing key competencies; it is likely to continue the current exam's disproportionate racial impact; and it will still impose significant financial burdens on test-takers. A well-designed curricular pathway can offer a valid, reliable, fair, and feasible way to assess the minimum competence of candidates for bar admission.²

I had the honor of consulting with a committee of Mitchell Hamline faculty and staff who conducted an initial exploration of the feasibility and desirability of creating an experiential curricular licensing path. That very thoughtful group generated a set of principles that would provide an excellent foundation for the Implementation Committee recommended by the Board. I know faculty and staff members at the other two Minnesota law schools who are equally excited about the possibility of creating a licensing path based in experiential education. Minnesota's three law schools are nationally recognized for their strong clinical, externship, and other experiential courses, so the Board and Minnesota Supreme Court have an opportunity to lead other states in this area.

In my own work as a faculty member, I moved from teaching purely doctrinal courses to actively supervising two in-house clinics. That transition made clear to me the importance of clinical work in solidifying students' understanding of doctrinal principles, in developing

¹ I published my first article on this topic in 2001: *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CINCINNATI L. REV. 929 (2001) (with Lowell Hargens and Barbara F. Reskin). I believe that Minnesota relied upon some of the ideas from that article when evaluating a proposed increase in its passing score.

² The psychometric literature offers numerous guides for constructing this type of licensing path, and I have attempted to summarize that literature for jurisdictions interested in adopting an experiential education licensing path. See Deborah Jones Merritt, *Client-Centered Legal Education and Licensing*, 107 MINN. L. REV. __ (forthcoming 2023); Deborah Jones Merritt & Logan Cornett, *Guidelines for Developing a Lawyer Licensing System Based on Experiential Education* (2022).

essential lawyering skills, and in preparing graduates to work directly with clients. By requiring participants in a curricular licensing path to complete significant experiential work (including several credits in a closely supervised clinic or externship), Minnesota will assure a higher level of public protection than any written exam can achieve.

From my experience as a clinical professor, finally, I know that experiential courses offer an excellent context for evaluating minimum competence. Students will be able to gather work product in portfolios that bar examiners can evaluate independently. Experiences in New Hampshire and Oregon suggest that bar examiners find this task quite suitable.³ Indeed, it may be easier to judge the minimum competence of authentic work product than to grade essay questions produced under time pressure.

Conclusion

Thank you for the opportunity to comment on the Board's proposed recommendations. I am very impressed by the work of the Board and its working groups, and I would be happy to assist pro bono with any further exploration and development of new licensing pathways in Minnesota.

A handwritten signature in black ink, reading "Deborah Muir". The signature is written in a cursive, flowing style.

³ Oregon's bar examiners recently completed grading a small number of portfolios submitted as part of that state's provisional licensure program. I helped the Oregon State Bar draft the rules and rubrics for that program, and I currently serve as the program's ombudsperson.

From: Law School Dean's Office <lawdeansoffice@umn.edu>
Sent: Monday, May 1, 2023 3:52 PM
To: BLE
Cc: Katy Hunt
Subject: Implementation Committee Feedback
Attachments: BLE Implementation Committee 05012023.pdf

Hello,

Please see the attached letter from Dean Garry Jenkins.

Many thanks,
Katy Hunt

Katy Hunt | Executive Assistant to the Dean
[University of Minnesota Law School](#) | 229 19th Avenue South | Minneapolis, MN 55455
hunt0901@umn.edu | P. 612-625-8086
Personal Pronouns: She/Her
(More about pronouns and why I list them [here](#))

May 1, 2023

John Koneck, Esq.
President, Minnesota Board of Law Examiners
Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd, Suite 110
St. Paul, MN 55155
ble@mbcle.state.mn.us

Dear Mr. Koneck,

Thank you for the opportunity to provide comments on the recommendation submitted to the Minnesota Supreme Court by the Minnesota Board of Law Examiners to convene an Implementation Committee to explore an alternative assessment supplemental to the bar exam.

On behalf of the University of Minnesota Law School, we would welcome the opportunity to be part of a conversation about the possibility and design of an alternative assessment model for the licensure in Minnesota as we continue to consider whether such an option would be viable and appropriate for Minnesota Law.

We do think it is critical that any potential alternative assessment model fit alongside the current curriculum and experiential learning opportunities at the Law School. If the Court does ultimately decide to create an Implementation Committee, we would likely participate and seek to ensure that any proposed requirements fit with the Law School's existing curricular program and available fiscal resources, without requiring additional curriculum, additional staffing, or unintentionally distorting the curricular choices presently undertaken by students. Moreover, we would also seek to better understand how any potential proposal that we might consider implementing would ultimately fit the needs of our student and alumni population, especially in light of the likely limited portability of the resulting license. Finally, with the NextGen Bar Exam scheduled to be introduced in 2026 (and to incorporate new testing of legal skills), we anticipate devoting substantial efforts to fully understand and respond to any new needs and impacts of that significant change. Accordingly, our final decision making and efforts to develop an alternative assessment model may depend on new developments with the NextGen bar exam.

With the information we have to date, we have not yet decided if an alternative assessment is right for the University of Minnesota Law School, but we are open to continued discussion should the Supreme Court decide to move further.

Sincerely,



Garry W. Jenkins
Dean and William S. Pattee Professor of Law

From: Niedwiecki, Anthony <Anthony.Niedwiecki@mitchellhamline.edu>
Sent: Monday, May 1, 2023 12:08 PM
To: BLE
Subject: Comment on BLE Recommendations on Bar Exam
Attachments: Board of Law Examiners - 5-23.pdf; Report of Mitchell Hamline Curricular Pathway Working Group_04_28_2023.pdf; Report of Mitchell Hamline Curricular Pathway Working Group_with appendices.pdf

Board of Law Examiners:

I have attached a letter and a proposal in support of Recommendation #6. Please let me know if you have any questions.

Anthony Niedwiecki | President and Dean
Bonner Family Chair
651-290-7510 | Fax: 651-290-6426

Pronouns: he|his|him

Mitchell Hamline School of Law
875 Summit Ave. | St. Paul, MN 55105

Great in theory. **Even better in practice.**

May 1, 2023

Board of Law Examiners,
Attn: John Koneck, Board Chair
180 E. 5th Street, Suite 950
St. Paul, MN 55101

Chair Koneck:

I am writing to comment on the Board of Law Examiner's (BLE) recommendations published on March 20, 2023. Specifically, I am attaching a proposal that is responsive to Recommendation #6. As you know, I have been a big proponent of offering alternatives to the bar exam, and I participated in Working Group 2.

To provide the BLE and the Minnesota Supreme Court with more details about how a pilot experiential curricular pathway would work, I formed a working group at Mitchell Hamline to develop a more detailed proposal. Our goal is to help decision makers better understand how this kind of pathway might work.

In March, the Board of Law Examiners published recommendations from its competency study, including the recommendation that an implementation committee be formed with representatives from all three Minnesota law schools to further explore the development of an experiential curricular pathway. I strongly support this recommendation. The attached proposal details some of our ideas on how this pathway would work and frames some of the issues that an implementation committee would face.

Our proposal is based on the idea that an experiential curricular pathway would benefit the public while also being more equitable. First, this pathway could be a more valid and rigorous evaluative tool of minimal competency because it will evaluate real legal work done by the applicant. Second, this will be a more equitable option for many students, especially part-time students who are unable to spend any significant time studying right before a bar exam because of family or work obligations. As the only school in Minnesota with a part-time program, this is especially true at Mitchell Hamline.

We would be willing to participate in a pilot program once the implementation committee completes its work and will take any steps or incur any costs associated with implementing a pilot program at Mitchell Hamline. We believe these costs would be minimal compared to the

costs associated with preparing for and taking a bar exam. As detailed in our proposal, this may require us to provide additional support to students throughout law school to ensure that they are successfully completing the requirements of an experiential curricular pathway.

We plan to share this proposal with the Minnesota Supreme Court when the BLE makes its final recommendations to the Court. We welcome any comments or suggestions about our proposal from the BLE or BLE staff in the meantime.

Once again, I want to thank everyone who worked so hard on the review of attorney licensing in Minnesota and for including the law schools in the process. The close working relationship between the BLE and the Minnesota law schools is something that I have not previously witnessed in my 25 years in legal education.

I look forward to continuing our work together as we implement significant changes to the bar exam and attorney licensing in Minnesota.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Anthony Niedwiecki', written over a horizontal line.

Anthony Niedwiecki
President and Dean

TO: Dean Niedwiecki

FROM: Working Group on Experiential Curricular Pathway to Bar Licensing

DATE: April 28, 2023

In January 2023, in response to the Minnesota Board of Law Examiner's competency study of the Minnesota bar licensing process, a working group of interested faculty and staff members formed at Mitchell Hamline to study the feasibility and desirability of developing an experiential curricular pathway. At that time, the Board of Law Examiners had issued a preliminary report suggesting an interest in developing a pilot program for a curricular pathway, and the Mitchell Hamline working group was focused on how Mitchell Hamline could develop such a pilot program within our curriculum.

The Mitchell Hamline working group included faculty members with teaching experience in both doctrinal and skills courses, including clinics, externships, and legal writing; staff members from our instructional design team with expertise in the development of rubrics to assess learning outcomes; and faculty and staff persons with leadership in career and professional development, lawyer formation, and in student affairs.

The group has met every other week since the end of January 2023. Beginning in February, our meetings also included two national experts on bar licensure, Joan Howarth and Deborah Merritt, who served as consultants to our group. We have reviewed materials from the Daniel Webster Scholars program in New Hampshire and examples of portfolio materials from the ongoing work in Oregon, which has already implemented a limited supervised practice pathway to bar licensure; has published a more permanent version of that program for public comment; and is developing a complementary curricular pathway to licensure.

In March, the Board of Law Examiners published recommendations from its competency study, including the recommendation that an implementation committee be formed with representatives from all three Minnesota law schools to further explore the development of an experiential curricular pathway. We support this recommendation, and it has shifted the focus of our working group to how we could memorialize and share some of the knowledge and general recommendations gained from our preliminary internal discussions in a way that might usefully frame some of the issues that an implementation committee would face.

We believe that an experiential curricular pathway would be both feasible and desirable as an alternative to the bar exam if developed in accordance with the following principles, which have emerged from our preliminary discussions:

- A curricular pathway should provide a genuine alternative to the bar examination by measuring the skills and competencies needed for entry-level practice.

- A curricular pathway should be based on bar examiners' independent assessment of a portfolio of student work completed in already-existing experiential courses rather than requiring law schools to develop a sequence of new courses.
- A curricular pathway should address racial, ethnic, and gender disparities in bar licensing as if required by law.¹
- Portfolio materials should be appropriately redacted to permit anonymous assessment of applicants' work.
- Applicants should satisfactorily complete appropriate experiential and doctrinal coursework in law school.
- A pilot program should initially be limited in size and provide opportunities for interim feedback for applicants on their portfolio materials.

This report addresses these points and identifies additional issues that would need to be resolved in the development of a curricular pathway, including: (1) the skills and competencies to be assessed in an experiential curricular pathway; (2) what a portfolio of materials might include; (3) what curricular requirements should be required in addition to the portfolio; and (4) the kinds of infrastructural and student support that would be needed in a pilot project.

Skills and competencies

The first step in developing an experiential curricular pathway would be to identify the skills and competencies that would be assessed to determine entry-level competence for law practice. The identification of these skills and competencies is important in establishing the validity and reliability of a licensing system based on portfolio review.²

The validity of an assessment method is defined by how closely the assessment criteria measure the skills and competencies that candidates should possess to competently practice law. The traditional bar licensing system requires applicants to demonstrate knowledge of substantive law through a test format that requires memorization of a diverse body of legal standards and performance under time pressure. Critiques of traditional bar examination licensing have noted that competent law practice differs from this assessment method in several ways. Rather than relying on memorized content of general knowledge under time pressure, law practice requires careful and thorough legal research of focused questions based on the law of a specific jurisdiction. Moreover, some skills required in entry-level practice go untested in a bar examination format, such as legal research and client management, advising, and counseling skills. These critiques go to the validity of the traditional bar examination format.

¹ We draw this criterion from the "twelve guiding principles" for licensing in Joan W. Howarth, Shaping the Bar, Chapter 11, which is attached as an appendix. Although the racially disparate outcomes produced by traditional bar testing have survived Title VII scrutiny on grounds that they are not employment tests, Howarth argues that bar licensing systems apply rigorous self-scrutiny to the persistently disparate results produced by high-stakes testing.

² We are indebted to Deborah Merritt for her analysis of validity, reliability, and fairness in portfolio review assessments in an article that is forthcoming for publication in the Minnesota Law Review, which is attached as an appendix.

Because a portfolio review process would be based on assessing applicant work produced under conditions that more closely resemble entry-level law practice, it holds out the promise of producing a high level of validity. To validate the specific skills and competencies necessary for entry-level practice, an implementation committee would benefit from reviewing the work that has been conducted by the National Conference of Bar Examiners in their practice analyses and by the Institute for the Advancement of the American Legal System (IAALS) in their study and report, *Building a Better Bar*. The NCBE analysis was based on a nationwide survey of practicing lawyers, while the IAALS study drew on focus groups with newly licensed lawyers and supervisors. The two studies offer complementary insights into the kinds of tasks required in entry-level practice and provide an important baseline for entry-level competence.

As a result of the NCBE's validity analysis, the NCBE is in the process of revising the bar examination materials it produces and supplies to states. The NextGen bar examination will focus less on memorization and more on integration of legal knowledge and skills. Although these changes are welcome, the NextGen bar examination will still be a high-stakes test offered in a time-pressured setting, a format that has been shown to produce racially disparate outcomes. A licensing system based on the review of portfolio materials would move the assessment of entry level competence even closer to the aims of the NextGen bar examination by integrating knowledge and skills while avoiding the pitfalls that are likely to persist in any regime based solely on high-stakes testing.

In addition to being valid, an assessment method needs to be reliable. The reliability of an assessment method is its ability to produce the same results each time it is used. In a portfolio-based assessment, reliability can be achieved through assessment of the same underlying skills and competencies across numerous items in a portfolio and by different examiners who calibrate their assessments. Each piece of work in an applicant's portfolio would also need to be evaluated using standardized rubrics.

As an example of how this might be achieved, we reviewed Oregon's supervised practice rubrics for assessing minimum competencies in two types of practice-based written materials, client encounters, and negotiations, which we have included as an appendix. We think it would be feasible to create similar materials for a pilot project in Minnesota. At Mitchell Hamline, we have the benefit of an experienced instructional design department with expertise in developing rubrics that measure learning outcomes and align assessments of student work with course-level outcomes. Should an implementation committee be formed to develop materials for a pilot program, Mitchell Hamline would be well-positioned to assist in that effort.

Portfolio materials

In our discussions, we considered what kind of work might be included in a portfolio, and we share our thoughts from these preliminary discussions.

Portfolio contents: To help standardize the evaluation of portfolio materials and to ensure that applicants can demonstrate a range of entry-level lawyering competencies, the implementation

committee will need to develop a content list for portfolio materials. We were impressed with the portfolio materials that are being developed for the supervised practice pathway in Oregon, and several features of those materials could be easily transferred to work produced by students while in law school. For example, the Oregon supervised practice portfolio requirements include:

- 8 pieces of written work that address a substantive legal matter and provide a prediction, recommendation, or conclusion;
- 2 client interviews or counseling sessions that are assessed by a supervisor; and
- 2 negotiations assessed by a supervisor.

This list of Oregon materials from the supervised practice pathway recognizes that an applicant's work product will occur in a particular legal setting that might be limited in the type of work that can be produced. Applicants in a curricular pathway, however, would have the opportunity to take law school courses that expose them to a broader range of experiences and produce a wider variety of types of work, such as:

- An example of persuasive advocacy (e.g. briefs, motions, petitions, oral arguments)
- An example of objective analysis (e.g. memos, letters/emails to clients)
- An example of transactional drafting (e.g. contracts, leases, or other documents with the force of law)

Work product from real-practice settings: In a curricular pathway, applicants would have the opportunity to submit coursework based on simulated practice assignments from legal writing courses, competitions, trial advocacy courses, or other courses like client counseling or negotiation. To demonstrate entry-level competence, however, applicant portfolios should include at least some material produced in a real practice setting, such as a clinic or an externship. Simulated problems created for classroom teaching or intermural competition are valuable for developing and demonstrating skills, but they are often constructed in simplified ways. To demonstrate entry-level competence, applicants should also demonstrate their ability to address the needs, interests, and values of an actual client in the context of the law of a particular jurisdiction.

We considered whether it might be possible for applicants to submit portfolio materials produced from non-curricular sources, such as part-time jobs, work as research assistants, or volunteer opportunities with the Minnesota Justice Foundation. We recommend that, at least in the pilot period, the source of real practice work product should be experiential coursework. The ABA has specific standards defining what counts as experiential coursework, which require that experiential courses "integrate doctrine, theory, skills, and legal ethics and engage students in performance of one or more . . . professional skills."³ These standards also require direct supervision of student work by a faculty member or externship supervisor, opportunities for feedback on student performance, and opportunities for reflection. Because Minnesota does not

³ ABA Standards for the Accreditation of Law Schools, Standard 304(a)(1).

yet have a program for recruiting and training supervisors in a supervised practice pathway, the pilot program would benefit from using the existing framework for supervision and feedback in the ABA standards.

We also discussed the client confidentiality issues of including materials from real practice settings. In the Oregon supervised practice materials, this protection is accomplished through client consent, redaction, and conflict checking to ensure that bar examiners have not been involved in the matter from which portfolio materials are submitted.

Contextualizing the work product: To properly evaluate portfolio materials, bar examiners should be able to understand the materials in the context in which they were produced. This can be accomplished by requiring that portfolios include contextual materials, such as an overview memorandum addressing the applicant's learning plan; a description of the applicant's coursework and experiential learning experiences; and where/how the applicant's materials demonstrate each of the entry level skills or competencies specified in the pathway.

Each example of work in the portfolio might also include a cover memo explaining the context in which it was produced, and the steps taken in producing it. For example, cover memos in the Oregon supervised practice materials include questions to provide context for practice-based work product, such as:

- What is the purpose of this work product? How does it fit within your overall strategy for the matter?
- List 3-5 legal rules, principles, or practices that you needed to know to complete this work product. Then note how you acquired knowledge of each rule, principle, or practice.
- How did you acquire the factual information you needed to complete this work product?
- Did you rely on a sample or template to create this work product? If so, why did you choose that sample or template? What challenges did you face in adapting the sample or template to your project?

Portfolio materials might also include supervisor evaluations of the work, which can be used both to authenticate that the work product was completed by the applicant and to attest that it demonstrates accurate legal analysis. Portfolio materials might also include reflective memos written by the applicant, particularly for portfolio materials like client interviews, client consultations, and negotiations.

Redaction to permit anonymous assessment: When we first began discussing what a portfolio might include, we considered including materials such as law school transcripts, a resume, and recordings demonstrating the applicant's skills, such as recorded direct or cross-examinations or oral arguments. However, to ensure fairness in the bar admission process, we became mindful of the ways in which the identities of the applicants would need to be protected. We discussed how this might be accomplished through redaction of work product materials to remove identifying

information; transcription of oral work product; and law school certification that curricular requirements had been met.

Curricular requirements

In addition to the portfolio of work product demonstrating skills and competencies, a curricular pathway should include some basic distribution requirements in the applicants' coursework that ensure that the applicant has successfully completed experiential and doctrinal courses of an appropriate range and depth.

Experiential coursework: To demonstrate depth of experiential learning, one of our national experts has recommended that a curricular pathway should include at least 15 credits of experiential coursework, 6 of which would involve direct client work in clinics or externships.⁴ Fifteen credits is roughly the equivalent of one semester of law school, and would represent approximately 675 hours of experiential coursework, 270 hours of which would be earned through direct client work in supervised practice settings of clinics or externships. Current ABA standards require that all law school graduates take at least 6 experiential credits, which can be earned through any combination of simulation courses, clinics, or externships.⁵ This pathway would more than double that baseline requirement.

The requirement of fifteen experiential credits is consistent with the requirement that applicants in Oregon's supervised practice pathway complete 675 hours of supervised practice and the curricular requirements in the Daniel Webster Scholars program. The Daniel Webster Scholars program is based on a specialized track of simulation courses that cover trial advocacy, transactional drafting, negotiations, and client counseling, which the Daniel Webster scholars complete over the course of two years in law school. In addition to these simulation courses, the program requires six credits of a clinic residency.

Although the Daniel Webster Scholars program has demonstrated success,⁶ we would not recommend creating a similarly specialized track of coursework for Minnesota applicants on a curricular pathway. The Daniel Webster Scholars program was created in 2005 at a time when the ABA experiential education requirements were lower and when law schools offered fewer experiential courses. Each law school in Minnesota already offers a robust menu of experiential courses to its students. It would be unduly burdensome for each law school in Minnesota to create a specialized track of classes for applicants rather than permitting applicants to utilize already-existing curricular opportunities to meet an experiential education requirement.

⁴ Joan Howarth, Shaping the Bar, Chapter 13.

⁵ Mitchell Hamline currently meets this requirement through two 3-credit courses: Advocacy (which teaches basic advocacy skills) and either Transactions & Settlements or Negotiation (each of which teaches basic problem-solving skills).

⁶ The IAALS conducted a study showing that Daniel Webster Scholars outperformed lawyers who had been licensed through a bar exam. Their study is published in a monograph entitled Ahead of the Curve: Turning Law Students into Lawyers.

We considered whether an experiential education requirement—particularly the requirement of direct client experience in clinics or externships—might create a barrier to our part-time students, who often combine law school with full-time jobs. To complete 6 credits of clinics or externships, applicants would need to invest a total of 270 hours of time in supervised practice.⁷ Our experience in developing clinic and externship opportunities for part-time students in our blended program indicates that many part-time students are able to find the flexibility in their schedules to complete experiential coursework despite the other demands on their time. Moreover, because studying for the bar examination also requires a significant investment of hours during a relatively short period of time,⁸ part-time students may appreciate the option to invest the time in experiential coursework and supervised practice that could be spread over multiple semesters and summers rather than concentrated in a comparatively limited span of time for bar review.

Doctrinal coursework: In creating the NextGen bar examination, the National Conference of Bar Examiners has refined the scope of its bar-tested content, cutting back on bar-tested doctrine and expanding its testing of foundational skills. A portfolio assessment method would be consistent with the integrated format adopted by the NextGen bar examination of testing foundational knowledge within the context of demonstrating foundational skills. However, a curricular pathway could also include certification that applicants successfully complete coursework in defined areas of foundational knowledge.⁹

Most of the foundational knowledge content tested on the bar examination is covered in required first-year courses in law school, and students must successfully complete them to advance in their legal studies. For example, in their first year of law school, Mitchell Hamline students complete required courses in criminal law, torts, civil procedure, contracts, property, and constitutional law.¹⁰ A curricular pathway could include a requirement that students complete a slightly longer list of required courses that track all the areas of foundational knowledge tested on the bar examination. For example, to complete coursework that covers the newly designed doctrinal content scope, Mitchell Hamline students would need to take three 3-credit courses beyond what is currently required for graduation: Evidence, Constitutional Criminal Procedure, and Business Associations.¹¹

We discussed what it would mean to “successfully complete” required doctrinal coursework. For example, to remain in good academic standing, Mitchell Hamline students must maintain a 2.2

⁷ Consistent with ABA standards for in-class and out-of-class time per credit, Mitchell Hamline requires students in clinics and externships to log 45 hours for each academic credit.

⁸ Most bar preparation programs suggest 500-600 hours of study over the course of two months.

⁹ The NextGen bar examination has designated eight subject matter areas as foundational knowledge: business associations and relationships; civil procedure; constitutional law; contracts; criminal law and constitutional protections of accused persons; evidence, real property, and torts.

¹⁰ Part-time students complete these courses over the first three semesters of law school.

¹¹ Depending on content coverage in our two constitutional law courses, students might also need to take Administrative Law.

GPA, which is between a C and C+ average. To demonstrate minimum competence, it seems appropriate to require that level of performance in the courses designated as foundational content scope courses. We discussed whether students should be required to earn at least a C or C+ in each of the classes on the list. However, we noted that this might preclude students who have a difficult time during their first year of law school but are subsequently able to gain and maintain good standing in law school. Many of our students are the first generation in their family to graduate from college, and it sometimes takes time for them to understand and adjust to the expectations of law school. As noted above, success in bar-style assessments requires skills of memorization and performance under time pressure that do not correlate well with entry level law practice. We would not want an unduly high standard of performance on law school exams, which also test memorization and performance under time pressure, to hinder applicants' ability to pursue a pathway to licensure that is designed to provide an alternative measure of entry level competence. And, as members of our working group noted, not even the bar examination requires an applicant to demonstrate minimum competence in each doctrinal area of law; it scores applicants based on their overall performance across multiple subjects.¹²

As discussed above, we are mindful of the need for anonymous review of applicant materials, which would preclude the use of law school transcripts to authenticate successful completion of specified coursework. An implementation committee, however, could define uniform standards for required experiential and doctrinal coursework so that a law school could certify that applicants had met the standards through the curriculum offered at their law school.

Infrastructural and student support

We recognize that a pilot program for a curricular pathway will be a learning experience for the law schools and for the Board of Law Examiners. Even a thoughtful and comprehensive planning process is unlikely to anticipate every issue that will arise in the process of implementation. We therefore recommend that the initial applicant pool be limited in size and that there be systems developed to facilitate regular communication between the law school and the Board of Law Examiners.

Within the law school, we recommend that a person be designated as the liaison or coordinator of the licensing pathway. Our current bar passage support includes academic advising about coursework, student affairs counseling about character and fitness review, and bar passage tutoring and support. We anticipate that an additional type of academic advising will be necessary to support students' choices about what experiential courses to take so that they will produce the work product necessary for a strong portfolio. We also anticipate that support will be needed to assist students in compiling and appropriately redacting their portfolio materials.

From the Board of Law Examiners, we recommend that a system be developed for interim review of portfolio materials so that students can be properly advised about the appropriateness of the

¹² For example, an applicant can pass the bar by scoring well overall, even if their score on questions testing a particular subject—like civil procedure—fell below minimum competence.

materials they are including in the portfolio. We note that interim review is part of the process in both the Daniel Webster Scholars program and the supervised practice pathway in Oregon.

Although adopting an experiential curricular bar licensing pathway will impose some costs on both participating law schools and the Board of Law Examiners, we believe that those costs will be relatively modest, especially if an experiential curricular pathway can be built on the basis of existing experiential courses. The current licensing system is expensive for students, who pay for bar preparation courses and forego income while studying for the bar exam. Investing modest sums in an alternative pathway can help to align licensing with entry-level practice, ease the financial burdens on law students, and make the legal profession more inclusive.

Conclusion

We thank you for the opportunity to study the possibility of an alternative experiential curricular bar licensing pathway in Minnesota. We have learned a lot through this process, and we look forward to continuing to work on implementation if approved in Minnesota.

Working Group on Experiential Curricular Pathway to Bar Licensing

Leanne Fuith (co-chair)

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From: Nichols, Joel A. <joel.nichols@stthomas.edu>
Sent: Monday, May 1, 2023 3:47 PM
To: BLE
Subject: Letter to the Board of Law Examiners on Report/Recommendations to the MN Supreme Court
Attachments: BLE letter from St Thomas on May 1 2023.pdf

Dear Board of Law Examiners,

Please see the attached letter regarding the Competency Study. Feel free to contact me with any questions. Thank you for your consideration and the opportunity to comment.

Best regards,
Joel

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May 1, 2023

Minnesota Board of Law Examiners
Attn: John Koneck, Board Chair
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Dear John,

Thank you for the opportunity to comment on the Board of Law Examiners' proposed report and recommendations to the Minnesota Supreme Court regarding the bar examination and non-exam pathways. We continue to appreciate the BLE's partnership, and the work of the Board and so many members of the bar on this comprehensive project.

The University of St. Thomas School of Law strongly favors adoption of the NextGen Bar Exam (*Recommendation 1*). We also endorse Recommendations 2-4 regarding setting a cut score and related rule changes. We encourage cooperation with other jurisdictions, as much as possible, to ensure the continued portability of the bar exam that has occurred over recent years as states adopted the Uniform Bar Exam.

If the Court creates an Implementation Committee to further explore an alternative assessment to the bar exam that could be completed within law school, the University of St. Thomas would willingly participate. We readily acknowledge the limitations of admission by bar exam only, which hopefully will be less acute with the shift to the NextGen Bar. At the same time, we also acknowledge several concerns that were raised during the Working Groups of the competency study regarding possible unintentional incentives generated by curricular pathways – that might impact portability for graduates/applicants; that might influence curricular and pedagogical choices; and, particularly, that might negatively impact resource considerations at the law schools.

Because more work and study remain about what any alternative pathway would look like, the University of St. Thomas is not certain how it would participate in such a program but we would imagine doing so if it could benefit our students as a whole and also be feasible from an administrative standpoint.

With warm regards,



Joel A. Nichols
Interim Dean and Mengler Chair in Law

From: Cheryl Dalby <cdalby@mnbars.org>
Sent: Wednesday, April 26, 2023 4:42 PM
To: BLE
Subject: MSBA Comments RE: BLE Recommendations
Attachments: Dalby Letter to Koneck re bar exam.pdf

Good Afternoon,

Attached please find comments from the Minnesota State Bar Association regarding the Board of Law Examiners' recommendations concerning the bar exam and alternative pathways to attorney licensure.

Please feel free to contact me with any questions.

Sincerely,
Cheryl Dalby

Cheryl Dalby (she/her) | **Chief Executive Officer**
612-278-6334 | cdalby@mnbars.org

Minnesota State Bar Association
Hennepin County Bar Association
Ramsey County Bar Association





April 25, 2023

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Minnesota Board of Law Examiners

Attn: Jon Koneck, Board Chair

Minnesota Judicial Center

25 Rev. Dr. Martin Luther King Jr. Blvd, Suite 110
St. Paul, MN 55155

Dear Mr. Koneck,

On behalf of the MSBA, I submit the following comments in response to the recommendations of the Board concerning the bar exam and alternative pathways to attorney licensure.

1. NextGen Bar Exam:

The MSBA has significant concerns regarding the bar exam's impact on BIPOC test-takers in terms of inherent bias and notes this issue is not fully addressed in the Board's recommendations. An ABA report from May 2022 revealed bar exam passage rates broken down by race, ethnicity, and gender. The report revealed that white test takers were more likely to pass the bar exam in 2021 than test takers of other races and ethnicities. Among white men and women taking the bar exam for the first time, 85% passed. By comparison, 61% of Black first-time test takers passed, 72% of Hispanics, 47% of Hawaiians, 70% of Native Americans and 79% of Asians.¹

Based on early information released by the National Conference of Bar Examiners about the forthcoming NextGen Bar Exam, the Board's recommendation that Minnesota adopt the NextGen Bar Exam is a preliminary step toward a better system of attorney licensing in Minnesota, but it does not fully address the substantial racial, ethnic and gender disparities documented in the examination process itself. The MSBA strongly encourages the Board to explore alternative pathways to attorney exam passage rates. We cannot stop with the adoption of the NextGen Bar Exam.

Overall, the MSBA believes it is likely the NextGen Bar Exam will be an improvement over the current uniform bar exam. The practice of law has changed and the bar exam needs updating to test important lawyering skills. The Board's recommendations appear to indicate that the NextGen Bar Exam will do that.

¹ Stephanie Francis Ward, In recently released data, ABA parses out bar passage rates by race, ethnicity and gender, ABA Journal (May 2, 2022, 10:29 AM) <https://www.abajournal.com/web/article/data-on-bar-passage-rates-by-race-released-by-aba>.

Additionally, given the number of people who come to Minnesota after taking the bar elsewhere, and the number of Minnesota graduates who proceed to practice elsewhere, the MSBA also agrees portability is an important and legitimate concern and the NextGen Bar Exam will address this. Minnesota graduates should not be at a disadvantage if they choose to practice elsewhere.

The MSBA further questions how students will adequately study for NextGen during the transition phase. Bar exam study currently focuses on reviewing many questions and topics that were included on prior bar exams. When the NextGen Bar Exam is rolled out, there will be no old exams to assist students in preparation. The MSBA requests that the Board partner with Minnesota's law schools to ensure students will be able to adequately prepare for NextGen with appropriate study tools and aids. As a consumer of NCBE products, the Board is in a position to press the NCBE to create preparation materials that will help students in this process.

Finally, the MSBA notes there is no appeal process for someone who fails to pass the bar exam, and perhaps there should be. Alternatively, the MSBA suggests those who fail the exam be allowed to become licensed through supervised practice or other means. The MSBA recommends the ability to appeal apply only to the human-graded portion of the exam (i.e. the essay portion) and only where the examinee was within five points of passing. The appeal could consist of writing a brief or something similar on a topic of the Board's choosing. Particularly because NextGen will be new, an appeals process is important.

2. Review of Minnesota Cut Score:

The MSBA supports the Board's request for further study and comment regarding the appropriate cut score for Minnesota after it adopts the NextGen bar exam. A study of cut scores in other markets and having the Board administer sample NextGen bar exams to a population of law students from representatively diverse backgrounds to determine the most appropriate cut score will be important prior to administration of the new exam. The Board should ensure there is transparency in the composition of the practice test takers. Data from a few years of administering NextGen will also be critical in helping determine whether the chosen cut score was appropriate or needs adjustment for the future.

3 and 4: Adopt rule changes for the UBE and NextGen related to admission by motion and transfer of UBE scores:

The MSBA supports the Board's proposed amendments to Rules 7B and 7C and agrees these changes will aid in the transition from UBE to NextGen.

5. Revision of Supervised Practice Rules:

The MSBA supports the Board's recommendation that a student practitioner who fails the bar exam be allowed to continue in supervised practice so long as they notify their supervising attorney of the fact within ten days, and the attorney agrees to continue the supervision.

6. Alternative assessment to the bar exam to be completed in law school:

The MSBA strongly supports creation of alternatives to the bar exam, including a pathway with a foundation in the work a new graduate completes while in law school. No law school would be required to offer such a program but doing so is likely to provide a competitive advantage. All schools already offer experiential clinic opportunities to students that would support the development of an alternative curricular pathway to licensure.

The MSBA fully supports the Board's recommendation for a Court-appointed Implementation Committee to bring to fruition an alternative assessment to be completed in law school. Rather than an interested member of just one affinity bar, the MSBA recommends a representative from each affinity bar be invited to participate on the Implementation Committee. The MSBA further believes that the Board should continue to be responsible for the successful completion of this initiative rather than shifting responsibility for bar exam alternatives entirely to the Implementation Committee. Alternatively, the Court may choose to be responsible for completion of this initiative.

7. Supervised Practice:

Among other things, the Board raises a concern over whether the necessary support exists within the practicing bar to support supervised practice and suggests the Court form a Committee to further develop the idea if it is so inclined. The Board indicates supervised practice may be a more viable alternative if and when an alternative assessment option is developed since the programmatic elements may be similar for both.

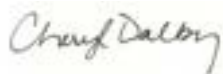
The MSBA acknowledges that certain segments of the legal market, for example large firms, may initially be reluctant to participate in a supervised practice program in part because of the cost of training first-year associates. However, big law represents a small portion of the legal field overall. Legal aid is one aspect of the legal profession that might benefit greatly from supervised practice as demonstrated by efforts to embrace the use of professional practice technicians to help close the access to justice gap in Minnesota and around the country.

Finally, the MSBA is concerned that in the absence of a structured, uniform standardized system of supervised practice, any program could lead to financial exploitation and disparate results.

Despite these concerns, the MSBA strongly supports a supervised practice pathway to licensure, believing the potential benefits of a supervised practice pathway in addressing the racial, ethnic, and gender barriers of a bar exam outweigh the possible pitfalls. The MSBA encourages the Board to affirmatively recommend to the Court that a supervised practice pathway be further explored. The MSBA recognizes the Board's hesitancy to embrace this pathway may be due in part to the staff resources required to recruit sufficient attorneys to participate. The MSBA notes a pilot project may be an appropriate first step and the MSBA is a likely partner in this work. The Board and the Court could monitor the results and curtail or expand the program as warranted.

Thank you for the opportunity to provide these comments.

Sincerely,

A handwritten signature in cursive script, appearing to read "Cheryl Dalby", written in dark ink on a light-colored background.

Cheryl Dalby

**Minnesota Lawyer Demographics –
Percentages by Admission Year for Attorneys who have Chosen to Provide
Demographic Information**

Combined (all active status lawyers):

Admission Year	White	Black/ African American	Asian Pacific Islander	Hispanic Latino	Native American/ Alaskan	Multiple Chosen	Demographics Known	Demographics Unknown
1970	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	87.80%	12.20%
1980	99.04%	0.00%	0.96%	0.00%	0.00%	0.00%	88.14%	11.86%
1990	94.56%	2.42%	0.00%	1.51%	0.91%	0.91%	85.75%	14.25%
2000	89.59%	1.95%	4.56%	1.74%	0.65%	1.52%	86.33%	13.67%
2010	90.11%	2.04%	4.08%	0.78%	0.78%	2.20%	82.51%	17.49%
2011	87.83%	2.14%	5.26%	1.32%	0.99%	2.47%	82.27%	17.73%
2012	88.48%	3.40%	5.17%	1.33%	0.30%	1.48%	82.86%	17.14%
2013	87.37%	2.11%	5.56%	1.65%	0.30%	3.01%	83.86%	16.14%
2014	88.29%	2.68%	4.65%	1.69%	0.85%	1.83%	85.52%	14.48%
2015	86.66%	2.76%	4.45%	2.45%	0.31%	3.53%	84.68%	15.32%
2016	84.56%	3.78%	6.40%	1.97%	0.66%	2.79%	84.12%	15.88%
2017	80.98%	4.23%	7.80%	2.11%	0.81%	4.07%	86.62%	13.38%
2018	80.53%	5.16%	6.99%	3.33%	0.67%	3.33%	81.77%	18.23%
2019	77.36%	4.86%	8.66%	5.93%	0.91%	2.28%	85.01%	14.99%
2020	77.94%	6.24%	8.56%	3.05%	0.73%	3.48%	85.91%	14.09%

2020 Census Data for Minnesota:¹

- White alone: 77.5% (compared to 61.6% nationally)
- Black alone: 7.0% (compared to 12.4% nationally)
- Asian alone: 5.2% (compared to 6% nationally)
- Hispanic: 6.1% (compared to 18.7% nationally)
- American Indian and Alaska native alone: 1.2% (compared to 1.1% nationally)
- Native Hawaiian and Pacific Islander alone: 0.1% (compared to 0.2% nationally)
- Other race alone: 3.0% (compared to 8.4% nationally)
- Two or more races: 6.1% (compared to 10.2% nationally)

¹ [https://www.census.gov/library/stories/state-by-state/minnesota-population-change-between-census-decade.html#:~:text=Race%20and%20ethnicity%20\(White%20alone,%25%2C%20up%20from%2054.9%25\)](https://www.census.gov/library/stories/state-by-state/minnesota-population-change-between-census-decade.html#:~:text=Race%20and%20ethnicity%20(White%20alone,%25%2C%20up%20from%2054.9%25).). NOTE: Numbers do not equal 100% because of differences in how census calculates Hispanic versus not Hispanic

Active Status Lawyers with MN Addresses:

Admission Year	White	Black/ African American	Asian Pacific Islander	Hispanic Latino	Native American/ Alaskan	Multiple Chosen	Demographics Known	Demographics Unknown
1970	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	92.31%	7.69%
1980	99.47%	0.00%	0.53%	0.00%	0.00%	0.00%	88.32%	11.68%
1990	95.44%	2.11%	0.00%	1.05%	0.70%	1.05%	85.59%	14.41%
2000	89.69%	1.55%	4.90%	1.80%	0.52%	1.55%	86.03%	13.97%
2010	91.31%	1.54%	3.47%	0.77%	0.39%	2.51%	82.62%	17.38%
2011	89.19%	1.77%	4.52%	1.18%	0.79%	2.55%	81.57%	18.43%
2012	89.29%	2.90%	4.90%	1.09%	0.36%	1.45%	83.99%	16.01%
2013	87.78%	1.50%	5.45%	1.69%	0.38%	3.20%	84.58%	15.42%
2014	90.25%	2.53%	3.25%	1.44%	0.72%	1.81%	85.76%	14.24%
2015	87.23%	2.79%	3.39%	2.79%	0.20%	3.59%	86.08%	13.92%
2016	85.26%	3.42%	5.34%	2.56%	0.43%	3.21%	83.72%	16.28%
2017	82.84%	4.81%	6.64%	1.37%	0.92%	3.43%	87.40%	12.60%
2018	84.76%	4.52%	4.52%	2.86%	0.71%	2.62%	81.55%	18.45%
2019	80.57%	4.59%	5.24%	5.46%	1.09%	3.06%	84.81%	15.19%
2020	83.91%	3.70%	6.30%	2.39%	0.87%	2.83%	85.98%	14.02%

Active Status Lawyers with Out of State Addresses:

Admission Year	White	Black/ African American	Asian Pacific Islander	Hispanic Latino	Native American/ Alaskan	Multiple Chosen	Demographics Known	Demographics Unknown
1970	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%
1980	94.74%	0.00%	5.26%	0.00%	0.00%	0.00%	86.36%	13.64%
1990	89.13%	4.35%	0.00%	4.35%	2.17%	0.00%	86.79%	13.21%
2000	89.04%	4.11%	2.74%	1.37%	1.37%	1.37%	87.95%	12.05%
2010	84.87%	4.20%	6.72%	0.84%	2.52%	0.84%	82.07%	17.93%
2011	80.81%	4.04%	9.09%	2.02%	2.02%	2.02%	86.09%	13.91%
2012	84.92%	5.56%	6.35%	2.38%	0.00%	1.59%	78.26%	21.74%
2013	85.71%	4.51%	6.02%	1.50%	0.00%	2.26%	81.10%	18.90%
2014	81.29%	3.23%	9.68%	2.58%	1.29%	1.94%	84.70%	15.30%
2015	84.77%	2.65%	7.95%	1.32%	0.66%	3.31%	80.32%	19.68%
2016	82.27%	4.96%	9.93%	0.00%	1.42%	1.42%	85.45%	14.55%
2017	76.40%	2.81%	10.67%	3.93%	0.56%	5.62%	84.76%	15.24%
2018	70.72%	6.63%	12.71%	4.42%	0.55%	4.97%	82.27%	17.73%
2019	70.00%	5.50%	16.50%	7.00%	0.50%	0.50%	85.47%	14.53%
2020	65.94%	11.35%	13.10%	4.37%	0.44%	4.80%	85.77%	14.23%

Comparative Data:

	White	Black/ African American	Asian Pacific Islander	Hispanic Latino	Native American/ Alaskan	Multiple Chosen
Overall Active Status Lawyers - as of 2020	90.53%	2.66%	3.39%	1.50%	0.50%	1.42%
Aggregate - 1 to 10 Years of Practice - as of 2020	84.51%	3.75%	5.94%	2.59%	0.57%	2.64%
Admitted in 2020 - ALL	77.94%	6.24%	8.56%	3.05%	0.73%	3.48%
Admitted in 2020 - MN Address	83.91%	3.70%	6.30%	2.39%	0.87%	2.83%
Admitted in 2020 - Out of State Address	65.94%	11.35%	13.10%	4.37%	0.44%	4.80%
2020 U.S. Census Data	77.50%	7%	5.20%	6.10%	4.80%	6.10%

Sources:

Minnesota Attorney Registration System (MARS) Data

<https://www.mncourts.gov/mncourtsgov/media/PublicationReports/MJB-Annual-report-2020.pdf>

[https://www.census.gov/library/stories/state-by-state/minnesota-population-change-between-census-decade.html#:~:text=Race%20and%20ethnicity%20\(White%20alone,%25%2C%20up%20from%2054.9%25\).](https://www.census.gov/library/stories/state-by-state/minnesota-population-change-between-census-decade.html#:~:text=Race%20and%20ethnicity%20(White%20alone,%25%2C%20up%20from%2054.9%25).)

Current Bar Examination:

Minnesota currently administers the Uniform Bar Examination (UBE). The UBE is comprised of three components: the Multi-state Bar Examination (MBE), the Multistate Essay Examination (MEE), and the Multistate Performance Test (MPT). Minnesota adopted the MBE in 1980, the MPT in 2001, and began administering the UBE in 2014.

The MBE is a 200-question multiple choice exam administered in two three-hour blocks. 175 of the questions are scored and 25 are unscored pretest questions.¹ The questions are evenly distributed between Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Real Property, and Torts. The purpose of the MBE is to assess an examinee's ability to apply fundamental legal principles, exercise legal reasoning, and analyze fact patterns. Subject Matter outlines and sample questions are available on the NCBE's website.² The MBE is scored on a scale between 40 and 200 and is calculated by a psychometric process called equating that adjusts raw scores of the current examination to account for differences in difficulty level and makes it possible to compare across examinations.³ The MBE portion of the examination is scored electronically by the NCBE. All U.S. jurisdictions except for Louisiana and Puerto Rico use the MBE.⁴

The Multistate Essay Examination is comprised of 6 questions. Examinees have three hours to complete this portion of the examination. The MEE score comprises 30% of the final UBE score. The topics covered may include "Business Associations (Agency and Partnership; Corporations and Limited Liability Companies), Civil Procedure, Conflict of Laws, Constitutional Law, Contracts (including Article 2 [Sales] of the Uniform Commercial Code), Criminal Law and Procedure, Evidence, Family Law, Real Property, Torts, Trusts and Estates (Decedents' Estates; Trusts and Future Interests), and Article 9 (Secured Transactions) of the Uniform Commercial Code. Some questions may include issues in more than one area of law. The particular areas covered vary from exam to exam."⁵ The MEE is intended to test an applicant's ability to identify legal issues, ascertain relevant facts, present a well-reasoned analysis of relevant issues, and demonstrate an understanding of the legal principles relevant to solving the legal issue presented.⁶ The NCBE publishes MEE Questions and Analyses of older examinations for free and makes available more recent materials for purchase for a nominal fee.⁷ The MEE questions of Minnesota examinees are graded by Minnesota licensed attorneys.

¹ <https://www.ncbex.org/exams/mbe/preparing/> (last visited May 10, 2023)

² <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F226> (last visited May 10, 2023);

<https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F17> (last visited May 10, 2023)

³ <https://www.ncbex.org/exams/mbe/scores/> (last visited May 10, 2023)

⁴ <https://www.ncbex.org/exams/mbe/> (last visited May 10, 2023)

⁵ <https://www.ncbex.org/exams/mee/preparing/> (last visited May 10, 2023)

⁶ <https://www.ncbex.org/exams/mee/> (last visited May 10, 2023)

⁷ <https://www.ncbex.org/exams/mee/preparing/> (last visited May 10, 2023)

The Multistate Performance Test is designed to simulate an assignment an entry level lawyer may receive from a supervising lawyer and each MPT contains a File and a Library. The File consists of the facts of the case and the assignment. The Library contains research materials that may or may not be relevant to the matter. The examinee is to use the Library to analyze the issue and to perform the task. All of the materials that an examinee needs to complete the task are contained within the File and Library. The MPT is designed to test an examinee's ability to perform fundamental lawyering skills in a simulated setting. Examinees receive two MPT questions and have three hours to provide their response. The MPT comprises 20% of the examination. The MPT questions of Minnesota examinees are graded by Minnesota licensed attorneys.

Jurisdictions are not required to participate in the Uniform Bar Examination to purchase the NCBE's test products. There are currently 41 jurisdictions, including Minnesota, that participate in the UBE. Scores range from 260 to 273. Minnesota is one of five jurisdictions whose cut score is 260.

Minimum Passing UBE Score*	Jurisdiction
260	Alabama, Minnesota, Missouri, New Mexico, North Dakota
264	Indiana, Oklahoma
266	Connecticut, District of Columbia, Illinois, Iowa, Kansas, Kentucky, Maryland, Montana, New Jersey, New York, South Carolina, Virgin Islands
268	Michigan
270	Alaska, Arkansas, Colorado, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wyoming
272	Idaho, Pennsylvania
273	Arizona

Source: <https://www.ncbex.org/exams/ube/score-portability/minimum-scores/> (last visited 5/30/23)