

# OREGON STATE BOARD OF BAR EXAMINERS

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16037 SW Upper Boones Ferry Road, PO Box 231935, Tigard, OR 97281-1935  
(503) 620-0222 or (800) 452-8260 • [www.osbar.org](http://www.osbar.org)

November 29, 2021

*Sent via electronic mail to:*

[Linda.L.Kinney@ojd.state.or.us](mailto:Linda.L.Kinney@ojd.state.or.us)

*And via First Class Mail*

Chief Justice Martha Walters  
Oregon Supreme Court  
1163 State St NE  
Salem, OR 97301

Re: Supplement to the Alternatives to the Bar Exam Task Force Report

Madam Chief Justice:

Pursuant to the request of the Court and the Oregon State Board of Bar Examiners, the following is the Supplemental Report to the June 18, 2021 Alternatives to the Bar Examination Task Force Report.

## I. INTRODUCTION.

Following the Oregon Supreme Court's grant of diploma privilege in July of 2020 to graduates of the Oregon law schools, the Court charged the Oregon State Board of Bar Examiners (BBX) to convene the Alternatives to Exam Task Force (ATE) to examining whether, in the future, "Oregon should grant admission to the Bar on some basis in addition to passage of the Oregon Bar Exam or the Uniform Bar Examination (UBE)."<sup>1</sup> The Task Force delivered a report to the BBX on June 18, 2021, recommending adoption of two alternatives: (1) a law school curricular model titled the Oregon Experiential Pathway (OEP), and (2) a post-graduation model in which an applicant works

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<sup>1</sup> See *September 14, 2020 Letter to Oregon State Bar Board of Bar Examiners*, OR. ST. BAR TASK FORCES (Sept. 14, 2020), <https://taskforces.osbar.org/files/2021/02/CJLetterReAdmissionsBBXTaskForces.pdf>.

closely with a licensed practitioner for 1,000 to 1,500 hours titled the Supervised Practice Pathway (SPP).<sup>2</sup> The Board of Bar Examiners met on June 25, 2021 and agreed to advance both pathways to the Court for consideration and adoption.

As reflected in the June 18 Report, the ATE recommendation presumed that securing a passing score on the Uniform Bar Examination (UBE) would remain a pathway for admission to practice law in Oregon. Thus, once adopted, the creation of two new alternative pathways would authorize three total “pathways” for admission to the practice of law,<sup>3</sup> in addition to admission through reciprocity.<sup>4</sup>

The Court discussed the June 18 Report during a public meeting on July 7, 2021, and afterward set a period for public comment, closing on August 23, 2021. After the close of the public comment period, the Court issued five questions to the ATE:

1. As contemplated by the Task Force, to what extent would the proposed alternative pathways measure aspects of legal competency that are the same as or different from those that you understand to be measured by the UBE?
2. There appears to be some public perception that the alternative pathways would measure a different (and maybe more relevant) kind of competence to practice law than does successful performance on the UBE. To the extent that a comprehensive bar exam like the UBE is viewed as a measure of academic/analytical/critical-thinking competency, is it accurate to view the proposed alternative pathways as measuring different aspects of legal competency? Did your investigation reveal any complementary measures that could

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<sup>2</sup> Alternatives to the Exam Taskforce, *Alternatives to the Exam (ATE)*, OR. ST. BAR TASK FORCES (June 18, 2021), <https://taskforces.osbar.org/ate/> [hereinafter *June 2021 Report*].

<sup>3</sup> Implementation will include not only making final substantive decisions regarding the program and their specific criteria but comprehensively revising the Rules for Admission of Attorneys (RFA). See OR. SUP. CT., RULES FOR ADMISSION OF ATTORNEYS 31 (2021), <https://www.osbar.org/docs/rulesregs/admissions.pdf> [hereinafter RFA].

<sup>4</sup> See *id.* at 62-76.

be used in conjunction with an alternative pathway to reassure the public that new attorneys possess the type of legal competency that a bar exam is perceived as testing?

3. Based on the jurisdictions that have offered some form of alternative pathway to licensing of law school graduates, what benefits or hoped-for benefits have others identified in creating those non-exam pathways to licensure?
4. Have there been any studies or assessments of whether those jurisdictions that have offered some form of alternative pathway to licensing of law school graduates have realized the hoped-for benefits?
5. Have any jurisdictions used alternative pathways to licensing as a way to address the need for lawyers to serve underrepresented communities and populations?

The Court's questions largely incorporated the overarching themes of the public commentary. This supplemental submission to the Court first summarizes the public comments and then separately addresses each of the Court's questions.

If the Court votes to move these proposals forward, the ATE expects that implementation committees will be formed. The implementation committees would consider additional public comments and research to craft the specifics of each alternative pathway plan. The plans, as implemented, would be subject to this Court's approval. This supplement leaves certain questions for the implementation committee to address.

## **II. SUMMARIZING THE PUBLIC COMMENTARY.**

The public comments vary widely. Many commentators flatly oppose abandonment of the bar exam, while others assert that the bar exam is useless. And, of course, many comments take intermediate positions. Several themes appear more than once in the commentary.

The first theme is that the bar exam tests a common set of material that all lawyers should know when they enter the profession. These comments express

a desire that lawyers possess a shared base of knowledge that ranges across different areas of practice.

Against this first theme, other commentators asserted that this shared base of knowledge is a product of success in law school, not the result of the bar exam. Some commentators pointed out that the UBE does not test Oregon law. Others asserted that the bar exam does not test skills or knowledge that are critical to success as an attorney.

A second theme is that the bar exam ensures a high standard for those admitted to practice law, and they worry that doing away with the bar exam is equivalent to lowering standards. Proponents of the second theme also suggested that the bar exam tests competencies that help to prevent new lawyers from engaging in malpractice and/or violating rules of professional conduct. Commentators who addressed this issue worried that clients would suffer harm, that the image of the profession would diminish, and that malpractice claims and premiums would increase.

As with the first theme, other commentators asserted that the bar exam does not measure all of the correct standards and that the bar exam itself is an unfair measurement of academic standards.

Both of these themes—and the responses to them—relate directly to the “academic/analytical/critical-thinking” competency in the Court’s question. They also relate to the more general question of what competencies are required for the practice of law.

A third theme centered on the experience of studying for the bar. Commentators who support the bar exam maintained that preparing for the bar exam allowed them to pull together and see connections among the materials they learned in law school, and also to learn topics they had not studied before. Some also asserted that this process tests an applicant’s work ethic, grit, and executive function. Other commentators disputed this notion, claiming instead that the bar exam was needlessly stressful and that it bore little relationship to the stresses of legal practice. Critics also tended to highlight the financial stress that can accompany the bar, because applicants often are not able to combine work and study. Several commentators also noted that this experience is often inequitable depending on the familial and financial resources and responsibilities of individual test-takers.

Fourth, and related to the third theme, some commentators suggested that the traditional bar exam tests the kind of “thinking on one’s feet” that lawyers are required to demonstrate in courtroom and other high-pressure settings. And as with the third theme, other commentators responded that the bar exam experience is not similar to the kinds of skills that lawyers need in practice.

Finally, some commenters thought that the shared experience of studying for and passing the traditional bar exam provides a commonality and bond for all members of the profession. Many lawyers found value in the idea that future lawyers should be examined in the way that they were examined, standing apart from specific competencies.

Collectively, these comments reflect disagreement about the bar exam, what it measures, and what it represents. Although they disagreed on many things, commentators shared a concern about measuring the proper competencies to practice law, both in the form of high academic standards, but also in the form of other important skills and abilities. These concerns are shared by the Task Force and were central to the Task Force’s initial recommendation.

### **III. QUESTION 1.**

*As contemplated by the Task Force, to what extent would the proposed alternative pathways measure aspects of legal competency that are the same as or different from those that you understand to be measured by the UBE?*

Through different ways, each pathway to admission—OEP, SPP and a passing UBE score—allows this Court to satisfy its obligation to ensure that an applicant has the requisite learning and ability to be admitted to practice in Oregon. Subsection A first outlines background necessary to frame a more detailed responsive explanation. Subsection B then addresses the fundamental question raised by Question 1, and then in Subsection C considers competencies measured by the UBE. Collectively, the ATE, submits in this response and more fully in the answer to Question 2, that the proposed alternative pathways are capable of testing both current and previously untested aspects of legal competency and have the promise to provide a measurable basis for doing so.

#### **A. Introduction**

Each jurisdiction in the United States is responsible for determining its own methodology for assessing the competency of a lawyer to practice in that jurisdiction. ORS 9.220 tasks the Supreme Court with ensuring that an applicant has the “requisite learning and ability” to be admitted to practice law. The methodology for establishing competence to practice is not static. The Court, through its Rules for Admission, has already adopted a variety of methods by which people at different stages of their legal careers can demonstrate the requisite learning and ability for admission. The ATE proposes that the Court adopt two others.

Until 2017, Oregon administered its own examination. At that time, Oregon used some UBE materials, including the full multiple-choice section (the “MBE”), the multi-state performance test (the “MPT”) and certain substantive essays (the “MEE”), but it also still drafted some of its own substantive essays focused on Oregon law. Additionally, the BBX was not bound to the grading rubrics proposed by the National Conference of Bar Examiners (“NCBE”). In 2017, after extensive discussions with the law schools and other stakeholders in the state, Oregon adopted the UBE in full. This Court still determines what constitutes a passing score on the UBE for admission in Oregon, but since adopting the UBE in full, Oregon no longer drafts any of its own Oregon-specific essay questions and must grade following the rubrics provided by the NCBE.

The UBE score applicants receive when sitting for the bar in Oregon is portable to forty other jurisdictions.<sup>5</sup> Applicants in those forty jurisdictions can likewise apply to Oregon if they have secured at least the UBE score set for admission in Oregon. This offers an important benefit not just the person taking the exam but also to Oregon’s bench, bar, law schools, legal employers, and legal consumers because it encourages lawyers who have established (or plan to establish) their competence through the UBE examination to consider practicing in Oregon.

Not only was the ATE expressly *not* tasked with determining whether the any consideration should be given to abolishing the UBE as a pathway to admission, the Task Force operated with the assumption that the UBE *would remain* a pathway to admission in Oregon. This was critically important to crafting the pathways proposed by the Task Force. Notably, the UBE is already “scalable”:

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<sup>5</sup> NCBE LIST OF UBE JURISDICTIONS, <https://www.ncbex.org/exams/ube/list-ube-jurisdictions>.

hundreds of people take it in Oregon each year, thousands take across the country annually. The UBE therefore offers applicants who qualify the opportunity to seek admission in Oregon pursuant to RFA 3.05 and in any other out-of-state jurisdiction that accepts the candidate's UBE score.

Understanding that the Court intended for the UBE to remain a licensure pathway, the ATE focused its efforts on proposing alternative pathways; or, stated differently, the ATE did not focus on creating a "substitution" for the UBE. As detailed in our initial report and here, we believe each of the pathways ensure that those who are admitted through them will be required to demonstrate their competence before they are admitted to practice. As the programs are implemented and improved over time, they may well develop in ways that increase the number of applicants who can establish their competence through them. And as other jurisdictions follow Oregon's lead, admission through these pathways may become more "portable" and, thus, more attractive to applicants. But whether those developments would lead this Court to abolish offering the UBE as a pathway to admission, let alone whether it should happen *now*, is not something before this Task Force.

Moreover, we note that although it can be a valuable exercise to compare and contrast what the OEP, SPP and a passing score on the UBE measure, in so doing, that inquiry should not distract attention from of the more fundamental question of whether each pathway ensures that the applicant has the requisite foundational learning and ability necessary for admission to practice law in Oregon. Accordingly, before addressing the Court's questions, we believe that the Court should first reflect on what competencies should be measured as part of the licensing process.

## **B. Competencies To Practice Law.**

The Institute for Advancement of the American Legal System (IAALS) commissioned a two-year national study to discern what constitutes "minimum competence" to practice law, based on focus groups with 201 practicing lawyers.<sup>6</sup> The report that resulted from the IAALS study contends that

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<sup>6</sup> IAALS is "a national, independent research center dedicated to facilitating continuous improvement and advancing excellence in the American legal system." *About*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <http://iaals.du.edu/about> (last visited Nov. 8, 2021).

“although the bar exam has existed for more than a century, there has never been an agreed-upon, evidence-based definition of minimum competence. Absent such a definition, it is impossible to know whether the bar exam is a valid measure of the minimum competence needed to practice law or an artificial barrier to entry.”<sup>7</sup>

That said, this Court has adopted Essential Eligibility Requirements for Admission and the IAALS study detailed “building blocks” skills. In putting forth the proposed alternatives, the ATE attempted to propose plans that would measure all of the EERs and the IAALS building blocks. We believe that a pathway that ensures that, in combination with a passing score on the Multistate Professional Responsibility Exam, requires applicants to demonstrate competency in all of the above areas and demonstrates that the applicant has the requisite learning and ability to be admitted in Oregon.

Rules 1.20 and 1.25 of the Supreme Court of the State of Oregon Rules for Admission of Attorneys are provided below:

**1.20 Standards of an Attorney:** An attorney should have a record of conduct that demonstrates a level of judgment and diligence that will result in adequate representation of the best interests of clients and that justifies the trust of clients, adversaries, courts, and the general public with respect to professional duties owed.

**1.25 Essential Eligibility Requirements:** The board considers demonstration of the following attributes, and the likelihood that one will utilize these attributes in the practice of law, to be essential for all applicants seeking admission to the Oregon Bar:

- a. Knowledge of the fundamental principles of law and application;

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<sup>7</sup> See DEBORAH JONES MERRITT & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE 3 (2020), [https://iaals.du.edu/sites/default/files/documents/publications/building a better bar.pdf](https://iaals.du.edu/sites/default/files/documents/publications/building%20a%20better%20bar.pdf) [hereinafter BUILDING A BETTER BAR].

- b. The ability to competently undertake fundamental legal skills commensurate with being a lawyer, such as legal reasoning and analysis, recollection of complex factual information and integration of such information with complex legal theories, problem solving, and recognition and resolution of ethical dilemmas; and
- c. Ability to:
  - i. Communicate honestly, candidly, and civilly with clients, attorneys, courts, and others;
  - ii. Conduct financial dealings in a responsible, honest, and trustworthy manner;
  - iii. Conduct oneself with respect for and in accordance with the law;
  - iv. Demonstrate regard for the rights, safety, and welfare of others;
  - v. Demonstrate good judgment on behalf of clients and in conducting one's professional business;
  - vi. Act diligently, reliably, and punctually in fulfilling obligations to clients, lawyers, courts, and others;
  - vii. Comply with deadlines and time constraints;
  - viii. Comply with the requirements of applicable state, local, and federal laws, rules, and regulations; any applicable order of a court or tribunal; and the Rules of Professional Conduct.

The IAALS study sought to determine the “building block” skills and attributes that are most important for new lawyers. Academic, analytical, and critical-

thinking competencies are essential to the successful practice of law, but they are not the only competencies that lawyers should possess. The study identified the following core competencies:

- 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;
- The ability to understand 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; and
- The ability to pursue self-directed learning.<sup>8</sup>

As discussed below, the ATE concluded that the current iteration of the UBE (along with the MPRE) may measure some of these building blocks and Essential Eligibility Requirements, though not all. In contrast, the Oregon Experiential Pathway and the Supervised Practice Pathway (along with the MPRE) do require an applicant to demonstrate competency in all of the above areas.

### **C. Competencies Measured by the Uniform Bar Exam vs. Alternative Pathways.**

According to the National Conference of Bar Examiners (NCBE), the Uniform Bar Exam (UBE) tests “knowledge of general principles of law, legal analysis and reasoning, factual analysis, and communication skills to determine readiness to enter legal practice in any jurisdiction.”<sup>9</sup>

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<sup>8</sup> *Id.* at 31.

<sup>9</sup> *Understanding the Uniform Bar Examination*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F209> (last visited Nov. 8, 2021).

The UBE is comprised of the Multistate Essay Exam (MEE), two Multistate Performance Test (MPT) tasks, and the Multistate Bar Exam (MBE). The MEE is weighed at 30% of the total score, the MBE at 50%, and the MPT at 20%.

The MEE is designed to test the exam-taker's writing skills as well as the ability to:

- (1) identify legal issues raised by a hypothetical factual situation;
- (2) separate material which is relevant from that which is not;
- (3) present a reasoned analysis of the relevant issues in a clear, concise, and well-organized composition; and
- (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation.”<sup>10</sup>

The MBE also tests the above skills by having exam-taker's apply legal principles and legal reasoning to analyze various fact patterns.<sup>11</sup> The MPT further tests an exam-taker's ability to use these lawyering skills in a “realistic” situation and complete tasks that entry-level attorneys should be able to complete.<sup>12</sup> This portion of the exam is designed to evaluate fundamental legal skills regardless of the area of the law in which the skills are applied.

With respect to the question of academic/analytical/critical-thinking competency, the IAALS report reached five conclusions about the current bar exam's ability to test minimum competence:

- Closed-book exams offer a poor measure of minimum competence to practice law;

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<sup>10</sup> *Multistate Essay Examination*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/mee/> (last visited Nov. 8, 2021).

<sup>11</sup> *Multistate Bar Examination*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/mbe/> (last visited Nov. 8, 2021).

<sup>12</sup> *Multistate Performance Test*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/mpt/> (last visited Nov. 8, 2021).

- Time constraints on exams similarly distort assessment of minimum competence;
- Multiple choice questions bear little resemblance to the cognitive skills lawyers use;
- Written performance tests, in contrast, resemble many of the tasks that new lawyers perform; and
- Practice-based assessments, such as ones based on clinical performance, offer promising avenues for evaluating minimum competence.<sup>13</sup>

Notably, the National Conference of Bar Examiners (NCBE) agrees at least in part with the IAALS. In an April 2021 report, the NCBE’s testing task force presented a thorough review of the UBE, concluding that the bar exam should test fewer subjects and should test less broadly and deeply within the subjects covered, and that greater emphasis should be placed on assessment of lawyering skills to better reflect real-world practice and the types of activities newly-licensed lawyers perform.<sup>14</sup>

Based on the conclusions, the NCBE Report proposed a different approach to the UBE: “[A]n integrated exam structure to assess both legal knowledge and skills holistically in a single, practice-related examination.”<sup>15</sup> But by the NCBE’s

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<sup>13</sup> BUILDING A BETTER BAR, *supra* note 7, at 63.

<sup>14</sup> NAT’L CONF. OF BAR EXAM’RS, FINAL REPORT OF THE TESTING TASK FORCE 20 (2021), <https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Final-Report-April-2021.pdf>.

<sup>15</sup> The Report explains,

An integrated exam permits use of scenarios that are representative of real-world types of legal problems that NLLs [newly-licensed lawyers] encounter in practice. Realistic scenarios are used in the current exam, but in discrete components comprised of stand-alone items, whereas an integrated exam includes item sets and a combination of item formats (e.g., selected-response, short-answer, and extended constructed-response items) within the same component. An item set is a collection of test questions based on a single scenario or stimulus such that the questions pertaining to that scenario are developed and presented as a unit. Item sets can be assembled so that all items within a set are either of the same format or of different formats. Stand-alone questions will still be used, and the exam will not consist of item sets exclusively. NCBE aims to have prototypes of integrated exam questions available later this year to share with stakeholders.

own admission, at least four to five years remain until its completion.<sup>16</sup> A debate will no doubt continue between NCBE and IAALS about the best ways to test this set of competencies—particularly around the issues of closed-book exams, time constraints, and multiple-choice questions. In sum, both the NCBE and the most current and careful analysis of the UBE’s efforts recognize that present efforts are not entirely adequate to test the competencies that the UBE is intended to address.<sup>17</sup>

The ATE likewise concluded that the current iteration of the Bar Exam does not measure all the IAALS building blocks and Essential Eligibility Requirements. For example, the traditional bar exam may help to test understanding of legal processes and sources of law, understanding of threshold concepts, ability to interpret legal materials, and ability to identify legal issues. The bar exam does not measure the ability to communicate honestly, candidly, and civilly with clients, attorneys, courts, and others; the ability to interact effectively with clients; the ability to conduct research; and the ability to see the big picture.

Again, the ATE engaged in work requested by the Court with an assumption that Oregon will continue to offer the UBE as a pathway to admission.

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*Id.*

<sup>16</sup> *Next Generation of the Bar Exam*, NCBE.ORG, <https://www.ncbex.org/about/nextgen-bar-exam/> (last visited Nov. 8, 2021) (noting the next generation of the bar exam “will take four to five years to develop and implement”).

<sup>17</sup> We note for the Court’s review that New York has reviewed the NCBE’s most recent report and expressed concerns that fall into roughly four categories. N.Y. ST. BAR ASS’N, THIRD REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON THE NEW YORK BAR EXAMINATION 7-13 (2021), <https://nysba.org/app/uploads/2021/06/9.-Task-Force-on-the-New-York-Bar-Examination-with-staff-memo.pdf>. First, the NY Task Force expressed a concern that the NCBE exam reforms propose *continuing* to test what the report characterized as the “law of nowhere.” *Id.* at 7. Second, it observes that the reform efforts remove certain core subject matter competencies. *Id.* at 8 (noting that the “new examination would no longer directly test family law, trusts and estates, secured transactions, and conflict of laws”). Third, it expressed concerns with the logistical testing method of the revised exam; that is, what the NY Task Force characterized as “a test delivered and answered solely by a computer.” *Id.* at 9 (noting that “[e]xclusive use of computer-based examinations may be unfair to persons with cognitive disabilities”). Finally, the NY Task Force expressed *continuing* concerns with NCBE’s scoring practices, noting that currently and, in the proposed revision, a candidate might get different raw scores in different jurisdictions, thereby leading a candidate to be “‘minimally competent’ to practice law in one UBE jurisdiction and ‘not minimally incompetent’ in another[.]” *Id.* at 10.

Accordingly, while noting these perceived limitations of the examination, the ATE observes that Oregon has relied on a passing score on a bar examination (currently the UBE) as a basis for admissions in Oregon for decades. This framework for licensure works to protect the legal consumer in the sense that members who are admitted via this pathway are generally proven through their practice to have been competent.<sup>18</sup>

Despite the ATE's belief that accepting the UBE as a continued option for admission is appropriate, reliance on the current bar exam as an exclusive pathway also excludes from admission other applicants who also have the requisite learning and ability to practice law in Oregon.<sup>19</sup> There is indeed troubling evidence showing an exclusionary intention when bar exams were initially adopted.<sup>20</sup> The modern bar remains exclusionary; indeed, recently released ABA data reflects that white bar takers in 2020 had a first-time pass rate that was 22% higher than Black first-time takers and 12% higher than Hispanic first-time takers.<sup>21</sup> The Court's willingness to consider the impact of this data on licensure is consistent with its historically proactive approach to considering ways to improve the admission processes in Oregon.

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<sup>18</sup> The UBE pathway measures skills and attributes like "thinking, reasoning, reading, learning, attention span, and memory" as well as "tenacity, delayed gratification, self-discipline, and self-control." Raul Ruiz, *Leveraging Noncognitive Skills to Foster Bar Exam Success: An Analysis of the Efficacy of the Bar Passage Program at FIU Law*, 99 NEB. L. REV. 141, 161-70 (2020).

<sup>19</sup> The exam disproportionately excludes those who have fewer personal resources. Applicants with less time for bar preparation, due to personal circumstances, higher debt, higher unemployment levels, and other household circumstances are less likely to pass. N.Y. ST. BD. OF LAW EXAM'RS & ACCESSLEX INST., ANALYZING FIRST-TIME BAR EXAM PASSAGE ON THE UBE IN NEW YORK STATE 2-6 (2021), <https://www.accesslex.org/NYBOLE>.

<sup>20</sup> Dan Subotnik, *Does Testing = Race Discrimination?: Ricci, the Bar Exam, the LSAT, and the Challenge to Learning*, 8 U. MASS. L. REV. 332, 365 (2013) ("In the early twentieth century, the bar was already expressing great concern over the quality of new applicants for admission, especially immigrants and their families and individuals of mixed-race parentage.").

<sup>21</sup> *Summary Bar Pass Data: Race, Ethnicity, and Gender*, ABA LEGAL ED. & ADMISSIONS TO THE BAR (July 2021), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/20210621-bpq-national-summary-data-race-ethnicity-gender.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/20210621-bpq-national-summary-data-race-ethnicity-gender.pdf).

The ATE leaves it to the NCBE to continue its efforts to improve the UBE without further commentary. The ATE's efforts, as discussed in more detail in response to Question 2, were centered on crafting additional pathways to admission that would offer a true alternative to taking and passing the UBE. In doing so, the ATE focused on not duplicating the exam but instead crafting pathways that would require applicants to demonstrate the same IAALS / EER skills as measured by the current iteration of the UBE *and* others that are not. We believe that the OEP and SPP proposals provide alternative pathways to admission to the bar that both strengthen and enhance the standards for admission.

#### IV. QUESTION 2.

*There appears to be some public perception that the alternative pathways would measure a different (and maybe more relevant) kind of competence to practice law than does successful performance on the UBE. To the extent that a comprehensive bar exam like the UBE is viewed as a measure of academic/analytical/critical-thinking competency, is it accurate to view the proposed alternative pathways as measuring different aspects of legal competency? Did your investigation reveal any complementary measures that could be used in conjunction with an alternative pathway to reassure the public that new attorneys possess the type of legal competency that a bar exam is perceived as testing?*

The Oregon Experiential Pathway and the Supervised Practice Pathway offer distinct avenues for testing and measuring competence to practice law. Accordingly, the different methods may carry with them different public perceptions. The OEP presents a novel approach to legal education curriculum, while SPP resembles apprenticeships that may be familiar to the public because of their role in training and assessing members of other professions. Each pathway requires a separate examination of how it would function to measure competency, and complementary measures are best considered within the context of each program.

##### A. Oregon Experiential Pathway.

The OEP assesses different competencies, but the thorough nature of its design renders complementary measures unnecessary, as the answers to the Court's questions explain. Subsubsection (i) first considers whether the OEP measures

competencies different from the UBE, and subsection (ii) addresses how best to reassure the public that adopting the OEP will serve as an adequate measurement of legal competency.

*i. Does the OEP Measure Different Competencies from the UBE?*

Yes. The OEP alternative pathway aspirationally seeks to test both current and previously untested aspects of legal competency and to provide a measurable basis for doing so.

But before proceeding further, we pause to clarify what competencies the current Oregon Experiential Pathway proposal seeks to cover and measure. It would require graduating law students to take a core curriculum in law school that covers traditional areas, largely leaving the traditional foundational first year completely untouched, while requiring study of core upper-level areas. These requirements, which provide broader and deeper coverage of academic subjects than any two-day bar exam can include, would essentially remain unchanged for an OEP graduate. Similarly, law students still must write a substantial research paper that resembles a law review note, demonstrating their academic and analytical skills. Materials from these academic requirements would be included in the portfolio assessed by the BBX thus providing a more meaningful evaluation of in-depth analytical work than is possible on a two-day exam. Thus, there is a significant overlap between the goals of the OEP and the goals of the bar exam with respect to academic, analytical, and critical-thinking skills.

The OEP proposal, as currently proposed,<sup>22</sup> would also require students to take fifteen credits of experiential study—an increase from the six credits that the ABA already requires of accredited law schools. Experiential work of this kind is often analogous to answering essay questions or performance tests on the bar exam. Experiential work can also help measure several other kinds of competence (or at least progress towards competence): legal research, interpreting legal issues, interacting with clients, communicating as a lawyer,

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<sup>22</sup> The Court may, of course, direct the implementation committee to ascertain whether this is the correct number of credits. It is expected that the implementation committee will work closely with the law schools to make recommendations to the Court on this point.

and seeing the big picture. It can also introduce students to managing a workload, coping with the stresses of practice, and self-directed learning.

Students enrolled in a criminal defense clinic or simulation, for example, must understand and apply the statutes under which their clients are charged, the constitutional case law affecting any searches or interrogations; the rules of evidence, statutes and rules governing collateral consequences, and statutes defining speedy trial and discovery rights. Two attachments illustrate the use and assessment of analytic and other skills in that context. Other clinics and simulations pose similarly complex interactions among doctrinal fields.

The OEP proposal, therefore, aims to assess competence in legal research and writing, issue spotting, legal analysis, argument development, understanding of the law, and attention to detail, and of keen importance, it seeks to do so more fully than the bar exam. The OEP could also provide insight into competencies and knowledge that the UBE omits: the ability to act professionally in context; understanding of state and local legal processes (including administrative, transactional, and ADR contexts); effective interaction with clients; thorough research; oral and written communication of all types; an ability to see the big picture of client matters and frame appropriate solutions; teamwork; and case management.

- ii. Did your investigation reveal any complementary measures that could be used in conjunction with an alternative pathway to reassure the public that new attorneys possess the type of legal competency that a bar exam is perceived as testing?*

The goal of the OEP is to provide a complete alternative to the UBE, so that coursework, a research paper, and experiential learning will substitute for the experiences of studying for, taking, and passing the bar exam. Also, the additional experiential credits beyond those required by the ABA could help law students develop skills faster, so that they will be closer to “practice-ready” when they graduate.

The OEP proposal suggests ways of measuring the competencies that experiential learning fosters. Clinicians and other educators have developed tools for this kind of assessment; samples appear as attachments. These skills, moreover, would be assessed by educators and, critically, by BBX volunteers

(through extensive review of portfolios providing video and written samples of student work). Portfolios, including video, will have clear guidelines designed to protect all client confidences. The OEP is also likely to be superior to the bar exam for assessing such things as work ethic, executive function, and decision making under pressure, because they would be assessed in a closer context to the work that lawyers actually do.

In addition, students pursuing the OEP would probably demonstrate as much, or more, commitment and work ethic as their peers who take a traditional bar exam.<sup>23</sup> Clinics, simulations, and externships require greater time commitments and diligence than do doctrinal courses. Students in experiential courses cannot defer their work to an end-of-semester exam. Instead, they must stay current with their work throughout the semester. Students are often assessed on how promptly they respond to client or supervisor requests, as well as on how effectively they prepare for hearings and other commitments. That preparation, just as in post-graduate practice, frequently requires intense evening and weekend work. A semester of experiential work probably tests commitment, grit, and resilience more effectively than 10 weeks of preparation for a 12-hour exam.

Nonetheless, the central and most difficult question for the OEP proposal is whether the public will be reassured that it will provide an adequate measurement of legal competency that a bar exam is perceived as testing. We are confident, however, that implementation issues can be addressed collaboratively with the three law schools to identify the best path forward for execution. Any implementation effort will no doubt need to consider a variety of factors, including whether to require classes on Oregon law, and whether the content of required classes is consistent across law schools.

Finally, one of the concerns about measuring competence at the time of licensing is to avoid later issues with malpractice and ethical issues. On this topic, there is no evidence that the traditional entry-level examination predicts which lawyers will encounter such problems.<sup>24</sup> Though national data is lacking,

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<sup>23</sup> On this point, the OEP committee heard feedback from administrators of the Daniel Webster Scholars program at the University of New Hampshire Franklin Pierce School of Law indicating that candidates sometimes dropped out of the program because it was too rigorous.

<sup>24</sup> For a discussion of the impact of Wisconsin diploma privilege, see Milan Markovic, *Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege*, GEO. J. LEGAL ETHICS (forthcoming 2022), available at <https://ssrn.com/abstract=3789235>.

a thorough Connecticut study revealed that nearly 40% of disciplinary sanctions relate to communication and diligence, the largest cohesive block of professionalism problems.<sup>25</sup> There is no obvious reason why the bar exam would better predict which lawyers would run into that type of trouble than would the OEP proposal, particularly given that OEP would subject law graduates to more extended and direct screening for that type of problematic behavior. This predictive difficulty is enhanced by the current dynamic reflecting that more discipline tends to take place later in legal careers.<sup>26</sup>

Wisconsin comes closest to offering predictive insights into whether an alternative licensing path impacts malpractice and ethics issues. Indeed, Wisconsin maintains a diploma privilege for graduates of Wisconsin law schools, thereby making the jurisdiction a natural experiment for understanding the bar examination's impact on screening out future discipline. To that end, a recent study of discipline data revealed that Wisconsin's bar complaint and misconduct charging rates are similar to or less than that of attorneys in other states.<sup>27</sup> Perhaps most importantly, the study found that "the rate of public discipline against Wisconsin attorneys who were admitted via the diploma privilege is the same as that of Wisconsin attorneys admitted via bar examinations."<sup>28</sup> Although the OEP is not a "diploma privilege" proposal, the Wisconsin findings at least broadly suggest that the traditional bar exam—by itself—is not predictive of lawyer discipline.

As for the public image of the profession, we would all like to see it improve and it is hard to know whether the traditional bar exam has served as the appropriate measure of quality assurance. Enhanced experiential training could train students to avoid these issues in a supervised context and prospective lawyers pursuing the OEP would still need to pass the MPRE.

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<sup>25</sup> See LESLIE C. LEVIN, CHRISTINE ZOZULA & PETER SIEGELMAN, LAW SCH. ADMISSION COUNCIL, A STUDY OF THE RELATIONSHIP BETWEEN BAR ADMISSIONS DATA AND SUBSEQUENT LAWYER DISCIPLINE 14 (2013), available at <https://ssrn.com/abstract=2258164>.

<sup>26</sup> David Adam Friedman, *Do We Need a Bar Exam for Experienced Lawyers?*, 12 UC IRVINE L. REV. (forthcoming 2022) (manuscript at 11-15), <https://ssrn.com/abstract=3803623>; see also Nancy B. Rapoport & Joseph R. Tiano, Jr., *Using Data Analytics to Predict an Individual Lawyer's Legal Malpractice Risk Profile: Becoming and LPL "Precog"*, 6 U. PA. J. L. & PUB. AFFAIRS, 267, 297-304 (2020) (explaining that the major "markers" of legal malpractice include staffing and workflow efficiency, billing practices, firm governance, matter oversight, and fiduciary risk).

<sup>27</sup> Markovic, *supra* note 24, at 15-24.

<sup>28</sup> *Id.*

## B. Supervised Practice Pathway.

The SPP assesses different competencies from those tested on the current bar examination. Subsubsection (i) first addresses whether the SPP measures competencies different from the UBE, and subsubsection (ii) addresses how best to reassure the public that adopting the SPP will serve as an adequate measurement of legal competency.

### *i. Does the SPP Measure Different Competencies from the UBE?*

Yes. The SPP alternative pathway seeks to test both the competencies currently tested by the UBE and those previously untested aspects of legal competency.

The SPP would require a person who otherwise meets all of the requirements found in RFA 3.05 to sit for the bar examination offered in Oregon to, instead, pursue admission in Oregon by gaining hands-on experience for 1000 to 1500 hours under the careful supervision of experienced, practicing Oregon lawyers. The reference to *hours*, not months, is significant. An applicant in the SPP model must achieve 1000-1500 hours of actual legal practice. Handling administrative work, while a necessary and real part of legal practice, would not count towards an applicant's requirements. The implementation committee will need to carefully define what counts and what does not, but the Task Force expects that these 1000-1500 hours will be spent engaging with clients, appearing in court, drafting and editing legal documents, investigating and analyzing facts, and conducting legal research.

The applicant would be doing this work under the supervision of an experienced Oregon attorney who has taken a training program on how to be a supervising attorney. The implementation committee will need to carefully define the responsibilities of a supervising attorney so that the parameters are clear from the outset. Thereafter, the supervising attorney would be responsible for certifying that the applicant met the hours requirement doing the approved types of work.

Through the course of that apprenticeship period, the applicant would put together a portfolio of work product demonstrating to the BBX the applicant's knowledge of general principles of law, legal analysis and reasoning, factual analysis, and communication skills, the competencies tested by the UBE. The portfolio can be thought of as a "real world MPT." Rather than placing an

applicant in an artificial setting to test whether they have the ability to use lawyering skills in a realistic situation and complete tasks that entry-level attorneys should be able to complete, the portfolio tests an applicant's ability to complete such tasks in a *real* setting. For example, the MPT often asks an applicant to persuasively draft a section of a brief based on an "law library" and factual summary provided to the applicant, within 90 minutes. For an SPP portfolio, that applicant will not be given a factual summary or law library. Rather, the applicant will need to interview a client (or review discovery), develop the facts, research the law, and then draft the section of a brief that is used in the client's case and in the portfolio. While not under the same 90-minute time pressure imposed by the MPT, the applicant will be under real time pressures of legal practice and completing a more multifaceted task.

The portfolio most obviously aligns with the MPT, but it will also test similar skills as those tested by the MEE and the MBE. As noted above, the MEE seeks to test an exam taker's writing skills, ability to identify legal issues raised by factual situations, separate material which is relevant that which is not, and present a reasoned analysis of the relevant issue in a clear, concise, and well-organized composition. All of these skills will be assessed in the work product provided in the SPP portfolio. The MBE also tests an applicant's ability to apply legal principles and legal reasoning to various fact patterns. Again, this is a skill that will permeate an applicant's portfolio and their everyday experiences throughout their supervised practice period.

Portfolio assessment is a common tool in professional licensing regimes, and in fact has recently been added as an option for teacher licensing in Oregon.<sup>29</sup> The Daniel Webster Scholars Program, on which the OEP is partially based, has shown that portfolio assessment can be successful in attorney licensing. For that reason, the ATE recommends that the SPP include a portfolio assessment similar to that of the OEP to ensure applicants meet the BBX's competence standards. The portfolio will be assessed by the BBX, the same entity that currently grades the bar exam to determine applicants' competency to practice law. The NCBE, the entity that administers the UBE, has agreed to provide assistance to Oregon to develop the assessment tool for the portfolio to ensure that the assessment of the portfolio will be standardized and repeatable across admission methods. This assistance will specifically ensure that the assessment of the portfolio aligns with the competencies the BBX seeks to assess, that the

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<sup>29</sup> OR. ADMIN. R. 581-022-2410 (2021); ORS 342.147(1)(b).

assessment of the SPP portfolio is comparable to the assessment of the OEP portfolio, and that the assessment results are reliable and repeatable.<sup>30</sup>

In addition to the portfolio assessment, the successful completion of 1000-1500 hours of legal work will also require an applicant to demonstrate a variety of other competencies, currently untested. For example, through the course of completing their hours, an applicant will necessarily demonstrate: the ability to act professionally and in accordance with the rules of professional conduct; the ability to interact effectively with clients; the ability to communicate as a lawyer; 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; and the ability to pursue self-directed learning. It will also provide applicants the ability to more fully develop their understanding of state and local legal processes, including in the administrative, transactional, and ADR contexts, all of which are rarely taught in law school.

The only issue not comprehensively addressed is the broadness (in terms of subject areas) of the bar exam, but we believe that the depth of meaningful experience offered by the SPP more than makes up for this lack of breadth. It is also worth noting that the UBE itself does not test Oregon law, but, instead, general principles in different subject areas. Nevertheless, this potential lack in breadth of subject-area could be mitigated in several ways through implementation. Options the implementation committee may consider are: requiring applicants to complete a variety of tasks across a variety of practice areas as part of their apprenticeship year;<sup>31</sup> requiring a breadth of CLEs during the apprenticeship period that exposes the applicant to a variety of areas of law; or requiring the portfolio to demonstrate work-product across several substantive topics. None of these specific measures are being expressly recommended from the Task Force. Rather, this list is provided just to show that there are numerous options the implementation committee may consider in addressing this issue.

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<sup>30</sup> Notably, there will be clear guidelines on portfolio items designed to protect client confidences.

<sup>31</sup> British Columbia has a similar requirement. *See Application*, THE LAW SOC'Y OF B.C., <https://www.lawsociety.bc.ca/Website/media/Shared/docs/forms/MS-admissions/articling-check.pdf> (last visited Nov. 8, 2021).

- ii. *Did your investigation reveal any complementary measures that could be used in conjunction with an alternative pathway to reassure the public that new attorneys possess the type of legal competency that a bar exam is perceived as testing?*

As detailed above, the assurances to the public that new attorneys admitted through the SPP possess the type of legal competency that the bar exam is perceived as testing will not be found in a complementary measure to the SPP but in communicating the rigors of the SPP itself to the public. Because of its scope (1000-1500 practice hours), timing (the vast majority of hours will likely take place *after* graduation from an ABA accredited law school), and supervision requirements (by both active, trained, supervising attorneys and the BBX's portfolio review), we believe that the public will be assured that people admitted via this pathway possess the type of legal competency that a bar exam is perceived as testing.

For most people who are just graduating from law school, studying for and taking the UBE, will likely remain an "easier" pathway to admission as compared to the arduous admission process anticipated by the SPP. For some, however, even if they have the requisite skills and knowledge to be admitted to practice in Oregon, proving it via the UBE may pose an undue burden. Such an applicant might include a graduate who must work full-time, or act as a full-time caregiver (or both) during the time the applicant is trying to establish the applicant's competence to be admitted. For this applicant, a non-passing score on the UBE might more reasonably be understood to reflect a lack of resources to prepare for the examination, rather than a lack of competence to practice law.<sup>32</sup> Another SPP candidate might be someone who has the requisite knowledge and skills for admission but for whom a standardized test (such as the UBE) presents a barrier that is unrelated to the question of competence.

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<sup>32</sup> The cost of the bar review course and the loss of work time studying for and taking the bar and awaiting admission is a significant burden on law students from underrepresented communities. Illustratively in this regard, the Oregon Minority Lawyers Association spends all of its resources generated from fundraising on bar review course grants to students in need. Of course, even that work does not compensate for being out of work for up to three months. Both the OEP and SPP allow students to secure work in the law without incurring bar review course expenses. Adoption of these ATEs will promote the entry to practice of lawyers from underrepresented communities and may free up some fundraising efforts from the Oregon Minority Lawyers Association for other purposes.

Because the SPP is intended to provide an *alternative* to the UBE, as noted in the initial Task Force report, we believe that the Court should resist any temptation to incorporate formal testing into this pathway for admission (beyond passing the MPRE, which remains a requirement of all pathways). When fully implemented to ensure a high quality of supervision, activities (practice activities and continuing legal education requirements) and BBX review, such testing is unnecessary.

However, as detailed in IV(B)(i), while the SPP does not contemplate testing in the form of a single (or multi-) day written examination, it will require applicants to submit substantive work-product to be evaluated by the BBX. Such an evaluation is the functional equivalent of a test but removes the artificial constraints that are inherent with a timed, closed-book exam.

Moreover, one significant benefit of the SPP as an alternative to admission is that it is *not* dependent on a law school developing a particular qualifying curriculum. Thus, applicants from law schools outside of Oregon who are qualified to sit for the Oregon bar examination can seek admission through the SPP. For that reason, while the implementation committee may end up recommending a requirement that a particular course has been taken during law school (for instance, civil procedure or evidence), the ATE strongly believes that every effort should be made to minimize requirements that *unnecessarily* tie participation in this pathway to particular activities in law school. If there is an educational requirement, beyond graduation from a qualifying law school that is deemed a necessary prerequisite to participation in this pathway, a post-graduation equivalent should be offered whenever feasible.

Many jurisdictions in Canada include, *in addition* to articling with an admitted lawyer, courses and required classes on the practice of law. For example, the Professional Legal Training Course (“PLTC”) in British Columbia is a ten-week program that emphasizes practical skills training, ethics, practice management and practice and procedure.<sup>33</sup> Classes are taught by full-time faculty with many years of teaching and practice experience and by practicing lawyers who volunteer to share their expertise. PLTC provides students with excellent up-to-date materials prepared by practitioners in the jurisdiction and students

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<sup>33</sup> *PLTC Practice Material*, THE LAW SOC’Y OF B.C., <https://www.lawsociety.bc.ca/becoming-a-lawyer-in-bc/admission-program/professional-legal-training-course/pltc-practice-material/> (last visited Nov. 8, 2021).

must pass open book multiple-choice tests on the basics of practicing in the jurisdiction. Subjects covered include criminal procedure, civil procedure, business, real estate, wills, practice management, ethics and family law. A number of other jurisdictions have a standardized educational program known as the Practice Readiness Education Program (PREP), which is designed to help new students gain practical legal knowledge and gain competencies in lawyer skills, practice management, professional ethics, as well as forming an understanding of the personal attributes needed to practice law successfully.<sup>34</sup>

While the ATE is impressed by the vigor of the educational programming being offered by some of the Canadian jurisdictions, we do not believe that the creation of these types of comprehensive post-law school courses is something that is needed to assure “the public that new attorneys possess the type of legal competency that *a bar exam is perceived as testing.*” Instead, these jurisdiction specific, practice-focused programs are likely good examples of the type of CLE programming Oregon should strive to make available to *all* new practitioners to Oregon (including those who sit for the UBE).<sup>35</sup>

For those seeking admission via the SPP, specifically, we believe that the goal of assuring an exposure to a variety of legal areas during the supervisory period is best accomplished by establishing a set of requirements within the SPP itself, such as requiring the completion of tasks in different practice areas, the attendance at particular CLEs or a requiring a broad range of topics to be addressed within the practitioner’s portfolio.

There is a degree to which the public may be concerned about increased malpractice claims if the SPP is adopted. We believe that concern is misplaced. Being a competent lawyer requires much more than a base knowledge of legal theories and concepts that are tested by the UBE. It also requires: caring about

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<sup>34</sup> *CPLED Competency Framework*, CANADIAN CENTRE FOR PRO. LEGAL EDUC., <https://cpled.ca/about-cpled/competency-framework/> (last visited Nov. 8, 2021).

<sup>35</sup> Oregon offers a far more abbreviated form of practice management education for new lawyers through its annual “Learning the Ropes” program. *2021 Learning the Ropes*, OR. ST. BAR PRO. LIAB. FUND, <https://osbplf.org/cle-classes/2021-learning-the-ropes/> (last visited Nov. 8, 2021). It also publishes extensive topic-specific practice manuals (“Bar Books”), online versions of which are free for members. *Bar Books*, OR. ST. BAR, <https://www.osbar.org/legalpubs/BarBooks.html> (last visited Nov. 8, 2021). It does not, at this juncture, have specific, comprehensive, subject-matter educational programs available targeted to new lawyers.

what you do; being curious, diligent and organized; being capable of recognizing your limitations; staying within your area of expertise; knowing what you don't know; and being a good communicator. Consistent with that, the great majority of legal malpractice cases are not the result of faulty analysis or lack of legal knowledge. Instead, the main causes are things like simple negligence, procrastination, lack of diligence, failure to communicate with clients, poor planning or strategy, failing to investigate, not recognizing conflicts, wandering away from one's area of expertise, making promises one cannot keep, not doing what one said one would do, taking bad cases or simply being human and failing to notice a rule change or an error in a document. Missed deadlines of various kinds are a major cause of legal malpractice claims. The ATE believes that the SPP pathway, which provides hands-on meaningful practice *under the supervision* of a licensed, practicing lawyer, is a meaningful way to train new lawyers how to avoid malpractice claims once they are admitted to the bar.

There is no pathway to admitting applicants to the bar that offers one-hundred percent assurance that the applicants admitted are competent to practice and those who are not admitted are not competent. As the Oregon State Bar's Standard Setting Task Force recognized in its June 23, 2021, report to the Board of Bar Examiners, despite best efforts, every bar exam is presumed to have a number of "false positives" and "false negatives":

A false positive occurs when an examinee passes the bar exam, but their true knowledge and skill do not meet the minimum competence standard. A false negative occurs when an examinee fails the bar exam, but they have requisite knowledge and skill to meet the minimum competence standard. In standard setting, false positives and negatives are assumed to occur on every exam; generally are represented by a bar exam score near the pass score level; and represent statistical anomalies that make up a small percentage of all examinees.

While false positives and negatives might be statistical anomalies, the life-altering impact they have on applicants who fail the bar exam or on legal consumers harmed by a lawyer who is not

minimally competent should be addressed in the setting of the standard.<sup>36</sup>

The goal of a pathway to admission to practice is to minimize the false positives (those admitted who are not competent) and false negatives (those not admitted who are competent).

Just as the Court has regularly assessed the bar exam with an eye on that goal, so too, the Task Force believes, the Court should be prepared to routinely assess the SPP to make sure it remains focused on that goal. Because the SPP is an entirely new pathway to admission in the United States, the BBX has been in touch with IAALS about the possibility of having IAALS help the BBX develop a plan to objectively evaluate the SPP once implemented. This type of evaluation is important to ensure: (1) the program is meeting its stated goals and (2) that it can adapt and improve over time. Just as the bar exam has not been static over the years (and is about to undergo major changes in the next few years), the ATE does not view the SPP (or the OEP) as static. Conducting this type of contemporaneous (or close to contemporaneous) review and evaluation of the SPP should serve to reassure the public about the efficacy of the pathway.

In sum, because it is in an entirely new pathway for admission in United States jurisdictions, we believe that the BBX and the Court should be proactive about reviewing and adjusting the program as it is being implemented, we also believe that the SPP pathway, as proposed, which involves extensive practitioner *and* BBX supervision of an applicant *before* admission, should assure the public that an applicant admitted via this pathway has demonstrated the requisite knowledge and skill to practice in Oregon.

## V. QUESTIONS 3 & 4.

*Based on the jurisdictions that have offered some form of alternative pathway to licensing of law school graduates, what benefits or hoped-for benefits have others identified in creating those non-exam pathways to licensure?*

*Have there been any studies or assessments of whether those jurisdictions that*

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<sup>36</sup> June 23, 2021 Letter to Oregon State Bar Board of Bar Examiners, OR. ST. BAR TASK FORCES (June, 23, 2021), <https://taskforces.osbar.org/files/2021/02/CJLetterReAdmissionsBBXTaskForces.pdf>.

*have offered some form of alternative pathway to licensing of law school graduates have realized the hoped-for benefits?*

The experiences of other jurisdictions can help inform the Court about the benefits of creating alternative pathways to licensure for law school graduates. The ATE has paid particularly close attention to the implementation experience and the observed outcomes from New Hampshire’s initiative, which from the inception of these proposals, has served as an important model. Admittedly, there is a lack of data from other jurisdictions measuring how these alternative pathways address diversity and equity concerns. IAALS has, however, offered to partner with the OSB in creating tools to measure whether these pathways, once adopted, are meeting the stated goals. This ongoing assessment will be critical to the success of these programs. With that in mind, and given the distinct nature of the alternative pathways, the benefits of each are discussed separately.

#### **A. Oregon Experiential Pathway.**

The OEP is inspired by the University of New Hampshire’s Daniel Webster Honor Scholars Program (“DWS”). DWS scholars are admitted to the New Hampshire Bar without taking the bar examination. We note at the outset that the OEP proposal has the promise to have a more widespread impact than DWS, in that it will ideally grow to be open to all students at law schools that offer the pathway.

In any event, Nixon Peabody is the largest and most prestigious law firm in New Hampshire and has a national presence. Senior Partner Scott O’Connell reports that DWS graduates are outstanding and his predisposition is to hire DWS graduates over those who take the bar examination because “they see the gray areas” and upon graduation “are reliable in litigation.”

Gordon Macdonald, the Chief Justice of the New Hampshire Supreme Court, was the Chair of the New Hampshire BBX in the implementation phase of the DWS program. He also served as Attorney General where he employed DWS scholars. He reports that the BBX had no qualms about admitting DWS scholars without examination, and that DWS produces “practice ready attorneys who are head and shoulders above the graduates of the country’s finest institutions in serving clients.” He calls DWS the “future of the profession.” He offered to testify to the Oregon Supreme Court in favor of “exporting” the program. Though the DWS

program is a selective program, it follows that expanding the program, if it helps students who perform at the top-tier by traditional law school assessment measure, will help all students become more practice-ready.

Regarding the public comment about collecting empirical data to measure the success of ATE, the Oregon BBX may be able to measure the results of the OEP by comparing the number of ethics complaints and malpractice claims filed against OEP admittees versus those who passed the bar examination. The law schools may be able to compare the employment rates of OEP admittees versus those who passed the bar examination.

## **B. Supervised Practice Pathway.**

The SPP, while drawing from other jurisdictions, is charting a new path for establishing one's competence for admission to the Bar. Several jurisdictions employed a one-time diploma privilege in response to the pandemic but it is likely too early to draw meaningful conclusions from those admissions.<sup>37</sup> Moreover, those admissions did not include a requirement of 1000-1500 substantive practice hours working under the supervision of a practicing Oregon lawyer *as well as* the submission of a portfolio of work-product that must document the applicant's competence to the Board of Bar Examiners *before* the person is admitted to the Bar.

Canada has long used a form of "articling" as its *exclusive* pathway to admit members to practice and, thus, the jurisdictions there do not offer particular insight responsive to Questions 3 and 4. Beyond that, while the various articling programs employed in Canadian jurisdictions will provide an implementation committee with a great deal of information (from possible language for rules to forms and training programs), the systems are too different from the pathway the ATE is recommending to offer meaningful insight on the strength of the Oregon proposal.

Oregon's SPP program is based on the ATE's conclusion, based upon the research and information discussed throughout this supplement and the initial

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<sup>37</sup> While no formal studies have been done assessing the effect of diploma privilege on malpractice claims or ethics complaints (and it is likely too early to have meaningful data on this point), "Wisconsin's complaint rate is nearly identical to the jurisdictional average despite its maintenance of the diploma privilege." *See* Markovic, *supra* note 24, at 18.

Task Force Report, that there are people who have the “requisite learning and ability” required by ORS 9.220 for admission for whom the requirement that they secure a passing score on UBE is a barrier to admission. No public good is served by excluding a qualified applicant from the practice of law. Indeed, the public is better-served by admission policies that recognize the limitations inherent in any approach that offers only one pathway to admission. The ATE has proposed that Oregon develop a pathway (the SPP) that is sufficiently vigorous (hours of supervised practice) and monitored by the Bar (portfolio review by the BBX) that the public, the Court and the Bar can feel confident that those who pursue it and secure admission through it meet the requirements of competency to practice law in Oregon.

While it is not a study or an assessment, the basis for believing that the SPP will accomplish the hoped-for goal of admitting members who are competent but for whom the UBE is creating an unwarranted barrier is found in the lived-experience in Oregon. Numerous members of the task force are aware of individuals who they perceive, based upon years of experience in practice, to be competent to practice but who have taken the UBE and not secured a passing score for Oregon. Sometimes these individuals have taken the exam more than one time. Some will have missed (on more than one occasion) by just a few heart-breaking points. Applicants who fall into this category (competent but not securing a passing score in Oregon) commonly have a score that would permit admission in a different UBE state. Often those applicants *have* Oregon employment; lawyers in Oregon who want to hire these applicants as lawyers but must, instead, keep them in the position of clerk or paralegal.

The resources drained from taking and retaking the bar exam while (usually) having to support at least oneself financially is significant and can make passing on future attempts that much more difficult. The Oregon State Bar has developed the ReBar program to offer assistance to such applicants if their membership to the Oregon bar would also “contribute to the OSB’s historically and/or currently underrepresented membership, or otherwise advance the Diversity & Inclusion Department’s mission,”<sup>38</sup> but too often, the more reasonable solution for an applicant will be to leave the jurisdiction. The ATE has proposed an alternative pathway that it believes, when fully implemented,

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<sup>38</sup> *ReBar Program*, OR. ST. BAR, <https://www.osbar.org/diversity/programs.html#rebar> (last visited Nov. 8, 2021).

will provide a viable approach for competent applicants to secure admission in Oregon, while weeding out those who cannot make such a demonstration.

## VI. QUESTION 5.

*Have any jurisdictions used alternative pathways to licensing as a way to address the need for lawyers to serve underrepresented communities and populations?*

Oregon has unique needs and can benefit from the advantages that each pathway affords. The OEP will pull more students deeper into clinical educational experiences. The clinics at our law schools will, in addition to building skills, provide a broader set of graduates with experience in serving underrepresented communities and populations, as a formal component of their legal education. Students will learn directly about the challenges that the legal profession faces in serving these communities in ways that many might not otherwise. The SPP can address the problem differently, providing an attractive opportunity to inspire law school graduates to begin their practice experience in underserved parts of our state. The OEP and the SPP engage with law students and new law graduates in substantially different ways, as discussed next.

### A. Oregon Experiential Pathway.

OEP clinical expansion will increase opportunities to serve underserved communities and populations as many (though not all) of the people who are served by clinics are drawn from low-income and marginalized populations. For example, the University of Oregon School of Law has a Domestic Violence Clinic, where law students have an opportunity to learn how to effectively represent low-income survivors of domestic violence, sexual assault, and stalking in civil legal matters, including protective order proceedings, family law matters, and employment and housing issues. At Lewis & Clark Law School, The Criminal Justice Reform Clinic (CJRC) guides students on projects that include addressing wrongful convictions and innocence; criminal justice reform including death penalty, amicus, and Eighth Amendment work; clemency petitions; and legal issues facing individuals returning to the community from incarceration. At Willamette University College of Law, students in the Immigration Clinic have the opportunity to represent clients, engage in factual and legal research in the area of immigration law, engage in

in-depth legal analysis and writing, and learn to work collaboratively in a team setting. That Clinic also engages in human rights fact-finding and reporting, work that has previously included a report on "Human Trafficking and Native Peoples in Oregon."

These are just a few examples of clinics at Oregon law schools where students can simultaneously enhance their legal skills while serving marginalized communities. Though hardly a panacea for the access-to-justice gap, expansion of student clinical opportunities through the OEP would expand the numbers of clients served in the public interest. Moreover, there is at least some evidence that clinical education affirms and enhances student interest in public interest law.<sup>39</sup> But more broadly, the OEP would help to establish an educational culture that expressly embraced public interest law through enhanced clinical and experiential learning, which would place public service options at the center of a student's legal education.

To be sure, enhanced exposure to public interest law may not alone generate sufficient student interest to practice in underserved and unrepresented communities. But it is at least a new and creative way to address a familiar problem. Oregon is in the bottom half of states in terms of lawyers per capita,

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<sup>39</sup> See Sally Maresh, EDUCATING FOR JUSTICE: SOCIAL VALUES AND LEGAL EDUCATION 154 (Jeremy Cooper & Louise G. Trubek eds., 1997). Through a small empirical study, Maresh found that 96% of students with a predisposition to pursuit of public interest legal work, expressed retention of that commitment after participating in a clinic. *Id.* at 163. For those with no expressed predisposition, 57% of those students indicated that their clinical experience made them more likely to consider practicing public interest law. *Id.* at 163. As factors in their attitudinal change, students mentioned

a 'personalization' of the plight of the poor, a realization that many of their clients needed representation through not fault of their own, a recognition that the integrity of the judicial system is dependent on equal access to representation regardless of individual resources, and that the 'right' to counsel is not an inalienable right.

*Id.* at 164. Of course, longitudinal studies would be welcome in this area. But the benefits of clinical education are something to behold, more broadly, and are not limited to this purpose. See Richard J. Wilson, THE GLOBAL EVOLUTION OF CLINICAL LEGAL EDUCATION: MORE THAN A METHOD 23, n.65 (2018) (better upper-level student engagement, "increased moral judgment capacity" and improved skill development).

some distance behind our nearest comparator, Washington.<sup>40</sup> When studies show that “84 % of people [in Oregon] with a legal problem did not receive legal help of any kind,<sup>41</sup> the crisis is evident.

## **B. Supervised Practice Pathway.**

Utah’s 2020 temporary “diploma privilege,” which also required 360-hours of supervised practice, affirmatively encouraged applicants to complete those supervised practice hours through public service.<sup>42</sup> Providing services to various public interest law firms and organizations while working under the supervision of an admitted attorney could be an excellent way to both gain supervision and serve under-represented communities. The ATE does not believe that there should be an expectation that any formal partnerships with the Bar will be adopted as part of initial implementation of the SPP, however, this could be something that is worked out between the Bar and certified pro bono programs in the future.

The expectation or directive to pursue pro bono opportunities to meet SPP supervision hours without having formal partnerships in place with related public interest firms has the very real potential of creating an undue burden on the very public interest groups that such a directive would be hoping to assist. Certified Pro Bono Programs endeavor to provide supervision to their volunteers on pro bono matters. These programs do not have unlimited staff capacity to do this. So, although pro bono service could be a way of obtaining supervised hours, we do not want to set an unrealistic expectation that legal nonprofits have the capacity to supervise all people who might be interested in the SPP.<sup>43</sup>

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<sup>40</sup> AM. BAR ASS’N, ABA PROFILE OF THE LEGAL PROFESSION 3 (2020). Oregon has a per capita rate of 2.9 per 1,000 population, while Washington has a rate of 3.5. *Id.*

<sup>41</sup> BARRIERS TO JUSTICE: A 2018 STUDY MEASURING THE CIVIL LEGAL NEEDS OF LOW-INCOME OREGONIANS 1 (2018), <https://olf.osbar.org/files/2019/02/Barriers-to-Justice-2018-OR-Civil-Legal-Needs-Study.pdf>.

<sup>42</sup> *Diploma Privilege Frequently Asked Questions*, UTAHDIPLOMAPRIVILEGE.ORG <https://utahdiplomaprivilegeorg.wordpress.com/> (last visited Nov. 8, 2021).

<sup>43</sup> In the implementation phase, the committee should consider how to encourage attorneys across practice areas and backgrounds to serve as supervising attorneys so the burden does not disproportionately fall on attorneys who already disproportionately sign up to volunteer and mentor throughout the legal community.

The nature of the SPP program the ATE is proposing is one in which the applicant must be *meaningfully supervised* in completing legal work for consumers. Accordingly, a supervising attorney—whether the attorney is working in private practice, for a governmental entity or a public interest group—must have the infrastructure in place to train and supervise an applicant. With time, there may well be partnerships that develop as a public interest firm figures out how it might fund a position within the firm that could offer the appropriate supervision and training for volunteers or, alternatively, to fund a staff position for an applicant seeking admission through the SPP. As capacity for supervision at legal nonprofits grows, legal services to marginalized communities would be expanded. However, it is not a foregone conclusion that Oregon’s public interest firms will be able to provide the appropriate supervision at the outset.

An expectation or directive to pursue pro bono opportunities could also create an unrealistic expectation with law students and recent grads that such opportunities will be readily available in Oregon when they may not be. While, with time, the ATE believes that partnerships between the OSB and employers may grow such that the Bar could play a role in assisting applicants with finding a match for supervised practice, it is not something that we believe can, realistically, be a formal part of the program at its initiation as it will require tremendous resources. Instead, initially, we anticipate the burden will be on a person who seeks this pathway to secure supervising attorney(s).

One arena in which the SPP could prove to provide meaningful growth for underserved populations would be the potential that small law firms in underserved parts of the state may find this program as a meaningful way to hire and train new lawyers. Currently (and, seemingly, for the foreseeable future), all of Oregon’s law schools are in the Willamette Valley and the bar exam is administered there. The incentive to seek employment in that region is heightened. Employers in more rural parts of Oregon could likely see an improvement in their ability to recruit attorneys by participating in the SPP. Applicants who work for a rural law office and make a connection with a Supervising Attorney and other attorneys in the region, could very likely want to stay and practice for that firm or in that community.

Another valuable way that the SPP could aid in serving people from underrepresented communities, is by helping to increase the diversity of the state’s lawyers. Achieving a more diverse bench and bar will improve access to

justice for all Oregonians. The passage rates of the bar exam are not race neutral. There are people who are competent to practice law, who for a variety of reasons cannot pass the bar exam. The bar exam, while seemingly okay at admitting lawyers who are competent, can in some circumstances, create institutional barriers that improperly exclude others who are *also* competent to practice law in Oregon. Adopting these alternative pathways serves as a meaningful effort to try to alleviate what might otherwise be an improper barrier to admission without sacrificing the important goal of ensuring that those who are admitted, by whatever means, are competent.

## VII. CONCLUSION.

The proposed alternative pathways test both current and previously untested aspects of legal competency and seek to provide a measurable basis for doing so. Stated differently, the proposals hold out the promise of assessing a broad range of academic/analytical/critical thinking competencies while also assessing additional skills competencies that the bar exam currently does not test at all.

These “alternative pathways” are not intended as options that lessen the requirements for demonstrating competence for admission; indeed, as detailed throughout, the robustness and vigor of these pathways may well create practitioners who are better prepared to take on practice independently than their cohorts who sit for and pass the UBE. That said, while many task force members have concerns about the bar exam as a method of measuring competence, the ATE has not recommended eliminating the bar exam. The Court’s charge was to study and identify alternatives to the bar exam, rather than a substitution for the exam. Moreover, the portability of the UBE exam score provides Oregon’s legal employers with the most diverse pool of applicants possible, which represents one of the strongest vehicles for building a more diverse and equitable bar in the shortest amount of time. Finally, Oregon’s law schools would lose a valuable recruiting tool if Oregon did not offer an exam that afforded its law school applicants a portable score to more than 40 other UBE states. By offering alternatives to licensure beyond the UBE, the task force intends to allow applicants to decide the best pathway for their particular career goals and life situation.

Whether it is through the OEP, the SPP, or the UBE, the responsibility for evaluating whether the applicant has met the criteria required by the pathway

would rest, in the first instance, with the BBX and, ultimately, the Oregon Supreme Court. Once implemented, we believe that Oregon's legal employers and consumers will come to recognize the practice-ready quality of graduates produced by these programs, and members admitted through them will be considered welcome and important additions to the Oregon bar. We therefore recommend that the Court authorize the adoption of these alternative pathways to the bar exam, contingent on the Court's approval of final implementation language to be developed through the work of implementation committees for each pathway.

Respectfully submitted,



Joanna Perini-Abbott  
Chair, Alternatives to the Examination Task Force

CC via email:

Tina Brown, Judicial Assistant to Hon. Lynn Nakamoto and Hon. Rebecca Duncan  
Lisa J. Norris-Lampe, Appellate Legal Counsel, Oregon Supreme Court  
Jason Specht, Staff Attorney, Oregon Supreme Court  
Kendra Matthews, Chair of the Oregon State Board of Bar Examiners  
Caroline Wong, Vice-Chair of the Oregon State Board of Bar Examiners

ATTACHMENT A

**Client Matter Analysis**

This planning sheet requires clinic students to identify key legal and extra-legal issues related to their client’s matter. The sheet is a tool for guiding investigation and preparing strategy. The sheet is also useful to prepare for negotiations, hearings, or a trial. Students complete the planning sheet; supervisor’s then review, offer feedback, and make assessments. This particular planning sheet was designed for a clinic that represents indigent clients charged with misdemeanor crimes. With minor adjustments, this type of tool is used in clinics focused on civil litigation, transactional counseling, immigration, and other matters.

**Client Name:** \_\_\_\_\_

**Charged Crime:** \_\_*[If a client is charged with multiple crimes, students complete this sheet for each charged crime]*\_\_\_\_\_

<b>Elements of the Crime</b>	<b>Prosecutor’s Likely Evidence</b>	<b>Issues/Objections/Contrary Evidence</b>	<b>Story</b>
<p><i>In this column, students list each statutory element of the charged crime—referring to case law if courts have added glosses to those elements. This requires close statutory analysis and case law research.</i></p>	<p><i>Here, students list each piece of evidence (witness testimony, document, etc.) that the prosecutor might introduce to prove each element. This requires the ability to apply the law to the facts of the case—as well as to understand the types of evidence a prosecutor might gather. In addition to preparing for plea bargaining, hearings, and trials, this list reminds students to request specific items through discovery.</i></p>	<p><i>In this column, students list objections (both constitutional and rule-based) to any contemplated evidence, as well as contrary evidence they might introduce. This requires thorough knowledge and application of the rules of evidence and constitutional doctrine. This also allows students to strategize evidence they want to gather.</i></p>	<p><i>Here, students plan how they will weave their evidence (and objections to the prosecutor’s evidence) into a comprehensive story if the case goes to trial. This column also allows them to record portions of the client’s story (such as a desire to enter rehab for an addiction) that would not be admissible at trial but are relevant for plea bargaining.</i></p>

ATTACHMENT B

**Sample Interview Assessment Form for Simulated Client Interview**

This form is typical of one that professors in experiential courses use to assess a student's initial interview of a simulated client. Other students or community members are trained to play the role of the simulated client. The student's interview of that simulated client is videotaped to aid the student's self-reflection as well as assessment by a supervisor.

In some programs, these assessment forms are available electronically. A bar examiner or other assessor can watch the video online, review assessments entered by the professor and student, and add their own assessment.

Name of Student Who Conducted the Interview: \_\_\_\_\_

Name of Individual Completing This Assessment: \_\_\_\_\_

Evaluate each component on a scale of 5 (Excellent) to 1 (Failure) as follows:

- 5 (Excellent): Outstanding independent work
- 4 (Good): Performs well, and is learning to work independently
- 3 (Satisfactory): Performs with basic competence, and is learning to work independently
- 2 (Almost Satisfactory): Needs maximum supervision/oversight to perform competently
- 1 (Poor): Does not perform competently

In addition to providing these numerical ratings, please give specifics when requested. If possible, give the time stamps for the portions of the video illustrating your points.

1. The student lawyer was courteous and respectful:  
\_\_\_\_\_

How did the student lawyer demonstrate courtesy and respect (or fail to do so)?

2. The student lawyer was adequately prepared for the interview:  
\_\_\_\_\_

3. The student lawyer explained their role as law student to the client:  
\_\_\_\_\_

4. The student lawyer explained confidentiality in a way that client could understand:  
\_\_\_\_\_

Please comment on the student lawyer's explanation of both their status and confidentiality:

5. The student lawyer built rapport with client:

\_\_\_\_\_

Please comment on the student lawyer's development of rapport with the client:

6. The student lawyer obtained all relevant information and, where relevant, documents, from the client:

\_\_\_\_\_

7. The student lawyer elicited the client's goals and named them back for the client:

\_\_\_\_\_

8. The student lawyer applied a client-centered approach (e.g., recognizing and responding to the client's personal, cultural and other perspectives):

\_\_\_\_\_

How did the student lawyer demonstrate this client-centered approach?

9. The student lawyer identified potential additional sources of facts, information and evidence regarding client's situation:

\_\_\_\_\_

10. The student lawyer provided space and opportunity for client questions and concerns: \_\_\_\_\_

11. The student lawyer closed by articulating next steps for both them and the client, and made a commitment for the next contact:

\_\_\_\_\_

12. Please offer any other comments on the student lawyer's interaction with the client: