

MEMORANDUM

DATE: October 15, 2021
TO: Alternative to the Bar Exam Task Force
FROM: Madeleine S. Campbell
RE: Supreme Court – Question No. 2

In response to the recommendations of the Task Force on Alternatives to the Bar Exam, the Supreme Court has asked a number of questions. I have been asked to address Question No. 2, and related public comments that have been provided to us. Question No. 2 states as follows:

“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 a 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 summarize, public comments regarding the apprenticeship pathway raised concerns about the following: untested analytical skills; lack of proven ability to understand and use legal concepts; the potential that law schools lower standards; inability to find a mentor; working in only one or two areas of law, but being licensed to practice in all areas; lack of standardization; too many or too few hours required; objection to the portfolio concept; and the idea that anonymous testing is superior.

ISSUE OF ENSURING LAWYERS HAVE GOOD CRITICAL THINKING SKILLS AND BROAD KNOWLEDGE OF LEGAL CONCEPTS

There is no question that analytical and critical thinking, as well as a good understanding of broad legal concepts, are essential tools for lawyers who are licensed to practice in all areas of law. These abilities and skills, however, are not the only tools. Currently, we rely mainly on testing such skills in order to qualify lawyers to begin immediately representing clients without any supervision at all. As many lawyers will readily admit, upon admission to the Bar, they did not yet have the practical knowledge or experience needed to practice law competently, including practice management skills.

If Oregon is to have an apprenticeship program, how does it ensure that those lawyers choosing that pathway have sufficient analytical skills, and legal knowledge to protect

the public? To some degree, it would have to rely on the law schools to successfully teach the more technical kind of broad legal knowledge and analysis that is tested by the current Bar exam. Perhaps this would mean the schools would need to have an approved pathway for students who want to participate in the apprenticeship program that would address some of the concerns expressed regarding breadth of legal knowledge and analytical skills. There does not seem to be a good reason that these concepts and skills cannot be both taught and measured within the three years of law school.

With respect to complementary measures taken to ensure competence in other jurisdictions, the Canadian provinces we investigated admit lawyers by means of an apprenticeship program they refer to as “articling.” However, in addition to a period of articling between nine and twelve months, provinces also require testing of applicants and/or participation in a formal training program. The testing required is not similar to that of the Uniform Bar Exam, and is more practice oriented. The exams have very high pass rates because the students very deliberately receive the kind of education and materials they need to pass the tests, which require the type of knowledge more relevant to what lawyers in practice actually do.

Many of the provinces require that articulated students attend and pass a formal and standardized practical skills course in addition to articling following law school graduation. 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 procedure. 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 subject areas of law. Students must pass open book multiple-choice tests on the basics of practicing in the areas of criminal procedure, civil procedure, business, real estate, wills, practice management, ethics and family law.

Alberta and a number of the other provinces have a standardized educational program that is required for admission in addition to the articling period. This is called the Practice Readiness Education Program (PREP). Here is a link to the PREP website: <https://cpled.ca/students/cpled-prep/>. The aim of PREP is to help 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. The program recognizes that in order to thrive in a professional legal environment, lawyers must be able to build strong relationships, demonstrate empathy and compassion, communicate effectively, manage their time and their practice, make ethical value-based decisions, and build trust.

Ontario requires both articling and passage of an open book multiple choice bar exam.

CONCERN THAT THERE WILL BE MORE MALPRACTICE CLAIMS

Concern has been expressed that not requiring passage of the current version of the bar exam will result in more malpractice claims. Being a competent lawyer, however, requires much more than a base knowledge of legal theories and concepts. It also requires: caring about 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.

The vast 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 your area of expertise, making promises you cannot keep, not doing what you said you 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.

CONCERN ABOUT LACK OF QUALITY CONTROL WITH RESPECT TO MENTORS

One way to alleviate concerns regarding lack of quality control regarding mentors is to require the student and mentor to submit an application to the Bar containing information about the mentor, the plan that will be followed and the areas of law in which the student will receive experience. British Columbia, for example, requires that the student receive experience in at least three areas of practice. The Bar approves both the mentor and the articling plan. B.C. also has a list of types of experience that the student must acquire during the articling period. Here is a link to the list:

<https://www.lawsociety.bc.ca/Website/media/Shared/docs/forms/MS-admissions/articling-check.pdf>.

IDEAS ON POTENTIAL MEASURES TO COMPLEMENT THE APPRENTICESHIP PATHWAY

Ideally, a program like the BC PLTC program would be a great complement for the apprenticeship pathway. However, it could be difficult for Oregon to set up a formal and comprehensive practice readiness program and a funding source would need to be created. Consequently, it may be necessary to place the onus on the law schools to address issues regarding potential inconsistency or quality in mentoring and limitations on breadth of experience for students choosing this pathway.

There could be a requirement that students pursuing the apprenticeship program take courses in key practice areas, focusing on Oregon law, such as those on which the BC PLTC program focusses. Law school professors teaching these subjects could, in conjunction with

the Board of Bar Examiners, create standardized tests for these subjects and establish minimum passing scores. This partnership would allow the law schools to be deliberate in steering students towards gaining the type of knowledge that will make them competent practitioners. The law schools and the Board of Bar Examiners, possibly in conjunction with practitioners in these areas, could create standardized materials to use in teaching students these subjects. Students who did not take these courses could perhaps satisfy the course requirement by passing the standardized exam.

In addition, law schools could offer other required courses for those on an apprenticeship pathway. One of these would be a course on practice management, similar to the type of training provided by the BC PLTC program. In addition to teaching basic practice management skills, this course could include a focus on gaining a knowledge and understanding of time limitation issues across all major areas of Oregon law, as well as sources of error in meeting such deadlines. Another such required course could specifically focus on critical thinking, legal analysis and writing in which students produce various types of work product in order to demonstrate proficiency in these skills.

Students who know they will be pursuing the apprenticeship program for licensure could take the foregoing two courses in the spring of their third year. For those who select it afterwards, the law schools could create summer courses that applicants would have to complete before they were eligible for the apprenticeship program. There could be a minimum grade in these subjects. Alternatively, there could be a standardized test developed by the law school professors who teach these subjects, in partnership with the Board of Bar Examiners, and establishment of a minimum passing score.

Response to Supreme Court Questions & Public Comment Oregon Experiential Pathway

Public comments have been addressed within the responses to the Supreme Court questions to the Task Force.

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?

Answer: The task force reviewed the Oregon Experiential Pathway option to determine whether that option would meet requirements 1.20 and 1.25 of the Supreme Court of the State of Oregon Rules for Admission of Attorneys. The requirements 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;
- 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 task force determined that, in combination with a passing score from the Multistate Professional Responsibility Examination, the Oregon Experiential Pathway option would require applicants to demonstrate competency in all of the above areas. In fact, the task force determined that, in some of the above areas, the Oregon Experiential Pathway option was better than either the Oregon State Bar Exam or the Uniform Bar Exam in requiring applicants to demonstrate competency.

According to a 2021 document entitled “Understanding the Uniform Bar Examination” from the National Conference of Bar Examiners (NCBE) website, 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.” Although the task force did not review the Oregon Experiential Pathway option to determine whether that option would meet above UBE readiness areas, the task force believes that the UBE areas are included in the requirements 1.20 and 1.25 of the Supreme Court of the State of Oregon Rules for Admission of Attorneys.

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?

Answer:

Introduction

Following the Oregon Supreme Court’s grant of diploma privilege in July of 2020 to graduates of the Oregon law schools, the Court in September charged an Alternatives to Exam Task Force (ATE) with examining whether durable alternatives to the bar exam existed. The Task Force delivered

a report to the Board of Bar Examiners on June 18, 2021, recommending adoption of two alternatives: (1) a curricular model titled the Oregon Experiential Pathway (OEP), and (2) a Supervised Practice Pathway (SPP). The Board of Bar Examiners met on June 25, 2021, and agreed to advance both pathways to the Court for consideration and adoption.

The Court received the proposals, discussed the proposals 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 This document addresses Question 2:

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?

Structurally, Question 2 first characterizes aspects of the public commentary and then asks two related questions about testing competency to practice law. This response addresses each issue in turn. Collectively, it concludes 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.

I. 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.

II. 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?

The answer to this question has three parts. First is whether the traditional bar exam adequately measures “academic/analytical/critical-thinking competency.” Second is what competencies should be measured as part of the licensing process. Third is whether the proposed alternative pathways adequately measure the same or different competencies as the bar exam.

A. What the Bar Exam Tests.

“Academic/analytical/critical-thinking competency” is critically important to the practice of law. The bar exam -- and most specifically the Uniform Bar Exam (UBE) administered in Oregon and more than 30 other states -- is designed to measure that competency. But the UBE may not adequately perform this function.

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.¹ With respect to the question of academic/analytical/critical-thinking competency, the 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;
- Time constraints on exams similarly distort assessment of minimum competence;

¹ IAALS is “a national, independent research center dedicated to facilitating continuous improvement and advancing excellence in the American legal system.” See *About IAALS*, IAALS.DU, <http://iaals.du.edu/about> (last visited Oct. 10, 2021).

- 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.²

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 NLLs [newly-licensed lawyers] perform.³

Based on the conclusions, the NCBE Report proposed a different approach to the UBE: “an integrated exam structure to assess both legal knowledge and skills holistically in a single, practice-related examination.”⁴ Assuming that effort proceeds, at least four to five years remain until its completion.⁵ A debate will no doubt continue, however, between NCBE and IAALS about

² See DEBORAH JONES MERRITT & LOGAN CORNETT, BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE, at 63 (Dec. 2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf.

³ *Id.*

⁴ The Report explains,

An integrated exam permits use of scenarios that are representative of real-world types of legal problems that NLLs 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.

NCBE, FINAL REPORT OF THE TESTING TASK FORCE, at 20 (April 2021), <https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Final-Report-April-2021.pdf>.

⁵ 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. THIRD REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON THE NEW YORK BAR EXAMINATION, at 7-13 (June 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

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.

B. *Competencies to Practice Law.*

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 IAALS study sought to determine the "building block" skills and attributes that are most important for new lawyers. 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 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.⁶

The current iteration of the bar exam may measure some of these building blocks, though not all. 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 interact effectively with clients, the ability to conduct research, and the ability to see the big picture. Collectively,

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 concerns with NCBE's scoring practices, noting that 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.

⁶ Building a Better Bar, *supra* note 2, at 31.

ATE deliberations reflected a desire to measure all twelve of the IAALS building blocks and that objective framed conversations about how best to build a better and alternative approach to licensure.

C. Do the Alternative Pathways Measure Different Competencies?

Yes, the proposed alternative pathways aspirationally seek to test both current and previously untested aspects of legal competency and to provide a measurable basis for doing so. At the outset, we note that the report that resulted from the IAALS study contends that “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.”⁷

That said, the current Oregon Experiential Pathway proposal 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 provide broader and deeper coverage of academic subjects than any two-day bar exam can include. Similarly, law students must write a substantial research paper that resembles a law review note, demonstrating their academic and analytical skills. 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 would also require students to take 15 credits of experiential study -- an increase from the 6 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, 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

⁷ *Id.* at 3.

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 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.

III. 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). 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.⁸ 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

⁸ 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.

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 in order 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.⁹ 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.

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. Those competencies are expressly included in the educational curriculum for the OEP, but more detailed work remains to be done in the implementation phase in order to realize that promise.

⁹ For a discussion of the literature and some analysis of the impact of Wisconsin diploma privilege, see Milan Markovic, *Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege* (August 7, 2021), available at <https://ssrn.com/abstract=3789235> or <http://dx.doi.org/10.2139/ssrn.3789235>.

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]_____

Elements of the Crime	Prosecutor’s Likely Evidence	Issues/Objections/ Contrary Evidence	Story
<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 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:

Questions 3 and 4 are responded to jointly:

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?

[Troy, we may need more research specific to non-intended benefits.]

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?

Answer: Yes. 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.

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.

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.

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?

Answer: In its analysis of the DWS program, the Task Force did not specifically research the use of alternative pathways for the specific purpose of addressing the need for Oregon lawyers to serve underrepresented communities. As the original Task Force report and the responses provided to other questions from the Court demonstrate, the OEP can significantly contribute to the diversity of the Bar. A diverse bar increases the number of lawyers who come from and can identify with the lived experiences of underrepresented communities. As such, their membership in the Bar, will support efforts to outreach and serve these communities. Additionally, this diversity has the potential to improve the profession’s understanding and access to diverse communities through the interactions lawyers have with culturally diverse colleagues.

[Troy, this may be an area where it would be beneficial to have OSB staff do further research.]

**Meeting of the Alternatives to the Exam Task Force
Oregon State Board of Bar Examiners
September 21, 2021
Zoom Meeting – Invites are sent via Outlook Calendar
Open Session Agenda**

Tuesday, September 21, 2021, 1:00 p.m.

1. Call to Order/Finalization of Agenda.

A. Roll of Attendees.

Present: Stuart Chinn, Maya Crawford-Peacock, Elizabeth Davis, Meagan Flynn, Stanton Gallegos, Brian Gallini, Kevin Gleim, Susan Grabe, Ekua Hackman, Helen Hirschbiel, JB Kim, Kendra Matthews, Joanna Perini-Abbott, Tony Rosilez, Peter Sabido, Jason Specht, David Wade, Kateri Walsh.

Admissions Staff: Troy Wood, Vickie Hansen, Sarah Haugstad.

B. Report by the Chair [Jo Perini-Abbott].

Ms. Perini-Abbott welcomed the attendees, and noted many task force members were not in attendance. Ms. Perini-Abbott asked that Troy Wood send an email to those unable to attend today offering them the opportunity to continue to participate in the task force.

2. Charge of the Court

A. Review letter from Justice Flynn

Exhibit 1

Ms. Perini-Abbott asked Justice Flynn to talk about the Court's letter and how it came about. Justice Flynn explained colleagues had asked her questions regarding the proposals she could not answer. This included questions about what the UBE is intended to measure. The questions regarding the UBE will be addressed by BBX and OCLEAB in November. Peter Sabido was a member of the portfolio group which did discuss whether the UBE weighs competency and if the proposals provide similar measurements.

B. Review public comment

Exhibit 2

The two-month public comment period garnered a number of responses. Some reflected a misunderstanding as to who was on the task force; questioning why active bar members were not included when the majority of the task force were active attorneys.

Kendra Matthews suggested defining what is meant by minimal competence, as that was a recurring question related to consumer protection. It was suggested that the IAALS Report would

be a helpful guide. Some comments seem to indicate they didn't believe there were any measures or standards.

David Wade pointed out many comments made by attorneys were from the perspective of market participants concerned about competition, rather than consumer protection.

Troy Wood, having reviewed all comments, indicated they could be organized into categories for review. Many of the categories involve issues that were beyond the scope of the Supreme Court's charge, and should not require an in-depth response from the task force. One such category were the commenters who view the bar exam as an important rite of passage. Many of the concerns will be addressed through the answers to the Court's questions and others will be resolved during the implementation phase of the proposals.

Mr. Wood addressed the timeline for responding to the Court's letter by the December 1, 2021 deadline. The BBX will need to discuss this at their November 12, 2021 meeting, so the principal draft will need to be completed before that date.

3. Subcommittees

Justice Flynn volunteered to assist in categorizing the public comments, Helen Hirschbiel and Troy Wood volunteered to assist with this task.

Tony Rosilez and Maya Crawford-Peacock agreed to continue to serve as chairs of the earlier subcommittees. They will confirm continuing participation of members returning to the subcommittees. Members will email Mr. Wood to volunteer if not previously assigned a committee. Mr. Wade suggested the subcommittees not meet in person, but rather have the chairs assign tasks and then meet after comments have been reviewed. Dean Davis requested that each law school be allowed to address comments pertaining to law school.

4. Schedule Recurring Meetings and Set Timetable for Process

Ms. Matthews, Mr. Sabido and Ms. Perini-Abbott will meet to answer questions number one and two by November 10th to allow the BBX to review their work at the November 12th BBX meeting.

The full task force should meet again on October 19th to be sure all concerns are being addressed. A final meeting the first week of November will be needed to finalize the task force's response before the BBX meeting. Mr. Rosilez stated that if comments can be categorized by September 28th, this work can be completed on schedule.

Mr. Wade moved that subcommittee chairs give assignments to members, that questions one and two be addressed by Ms. Matthews, Mr. Sabido and Ms. Perini-Abbott, that comments be

categorized, and that this group meet again to review the work of the subcommittees. The motion was seconded by Ms. Matthews. Meeting adjourned at 2:07.