

UTAH BAR ADMISSIONS WORKING GROUP
FINAL REPORT

INTRODUCTION

In April 2020, the Utah Supreme Court granted an emergency path to bar licensure for those who had applied to sit for the July 2022 Utah bar examination. The Utah Supreme Court noted that the COVID-19 pandemic made administering the exam both unsafe and unpredictable. The Court issued an order allowing applicants a path to admission if they had graduated from an ABA-accredited law school with a bar passage rate of eighty-six percent or greater and completed 360 hours of supervised legal practice under a supervising attorney by December 31, 2020.¹ While the emergency diploma privilege granted in the spring of 2020 was not intended to become a permanent pathway for licensure in Utah, the pandemic presented the opportunity to investigate alternative methods of attorney licensure. As a result, the Utah Supreme Court created the Bar Admissions Working Group (the Working Group) to examine alternative pathways to licensure in the State of Utah. Specifically, the Working Group was tasked with answering the following question: “Is the current, single path to licensure the only, or the best, way to assure that those admitted to practice have the requisite skill to practice law?”²

The Working Group, which consists of 15 individuals from a diverse cross-section of Utah’s legal community, including academicians, practitioners, and judges,

¹ Order for Temp. Amendments to Bar Admission Procedures During COVID-19 Outbreak (Apr. 21, 2020), <https://www.utcourts.gov/alerts/docs/20200421%20-%20Bar%20Waiver%20Order.pdf>.

² Memorandum from the Working Group Core Questions (on file with author).

began meeting in the fall of 2020.³ Over the following twelve months, the Working Group sought to gain a thorough understanding of Utah’s current licensure process, which primarily relies on applicant’s scores on the Uniform Bar Exam (the UBE), an exam produced by the National Conference of Bar Examiners (NCBE). The Working Group studied multiple reports analyzing the history of the bar examination and the current bar examination, including its administration, benefits, and criticisms. The Working Group also met with a number of the nation’s bar exam administration and bar reform experts—including the NCBE, Professor Deborah Jones Merritt⁴, and representatives from other states who had either implemented or were exploring alternative methods of attorney licensing. Further, the Working Group heard presentations from these experts and others who addressed bar passage rates, licensing requirements in other jurisdictions, and concerns with the current administration of the bar examination. Finally, the Working Group discussed diversity concerns within

³ The members of the Working Group include: Carrie Boren (Utah State Bar, New Lawyer Training Program Administrator), Catherine Bramble (Professor, J. Reuben Clark Law School), Raj Dhaliwai (Attorney, Ray Quinney & Nebeker), Louisa Heiny (Associate Dean for Academic Affairs, S.J. Quinney College of Law), Esabelle Khaosanga (Attorney, Strindberg & Scholnick), Michael K. McKell (Attorney, Utah Legal Team, and Utah State Senator), Marty Moore (Attorney, Peck Hadfield Baxter & Moore), Judge Camille Neider (Second District Court Judge), Judge Amy Oliver (Third District Court Judge), Justice John Pearce (Utah Supreme Court), Sarah Starkey (Legal Counsel, LHM Group), Evan S. Strassberg (Attorney, Michael Best & Friedrich LLP), Dane Thorley (Associate Professor, J. Reuben Clark Law School), Elizabeth Kronk Warner (Dean and Professor, S.J. Quinney College of Law). The members of the working group attended in their personal capacities and the views expressed in this report are theirs and not necessarily those of their respective employers and/or institutions. The Working Group would like to recognize and give special thanks to Madison Scott Roemer, Vincent Mancini, Niki Crabtree, and Josephine Holubkov for their invaluable contributions to the Working Group and this report. The Working Group also thanks Savannah Grabo, Jacob Mortenson, and Joan Keller for their significant assistance to the Working Group.

⁴ Professor Deborah Jones Merritt is a co-author of the IAALS Report (a study analyzing how minimum competence should be defined and tested). *See infra* Section II.

Utah's legal profession, issues relating to access to justice, and the impact alternative licensing could have on the general public. After approximately one year of research and meetings, and the internal discussions that followed, the Working Group unanimously voted to form a subcommittee tasked with creating a specific proposal for an alternative pathway for attorney licensure in Utah. The Working Group asked this group to prepare a proposal that could be presented to the Utah Supreme Court for its consideration.

The subcommittee consisted of five Working Group members: Utah Supreme Court Justice John Pearce, Dean Louisa Heiny from the S.J. Quinney College of Law, Professors Catherine Bramble and Dane Thorley from the J. Reuben Clark Law School, and Utah State Bar Admissions Deputy Counsel, Carrie Boren. The subcommittee met for approximately eight months. It explored all facets of what a new proposal for licensure might entail, including the optimal methods to test minimum competency to practice law, practicability for the Utah State Bar Admissions Office, feasibility for law schools, transferability for non-Utah law school students, replicability in other jurisdictions, attractiveness to bar applicants, and public and consumer protection. After robust discussions of the data, benefits, and concerns, the subcommittee presented the Working Group with a proposal to create a new pathway to licensure grounded in experiential learning, rigorous academic requirements, and supervised practice hours. After a comment and editing period, the Working Group approved the proposal, which is now before the Utah Supreme Court for consideration.

This report explains the reasoning behind and details of the Working Group's proposal. Section I begins with a brief history of the bar examination, followed by a summation of the argued benefits and critiques of the current bar examination. Section II outlines the Working Group's findings, which provided the underlying reasoning used to guide the Working Group's proposal for an alternative path to licensure. Finally, Section III details the specifics of the Working Group's alternative attorney licensing path for Utah.

I. BACKGROUND

The Working Group studied the history of attorney licensure in the United States of America. This Section begins with a brief history of attorney licensure in the United States. This Section then delves into justifications for and arguments against the current bar examination and explains the Working Group's understanding of what the NCBE's "next generation" bar examination will look like. The Section concludes with an analysis of the IAALS Report (a study analyzing how minimum competence should be defined and the best methods by which to test it) and an examination of alternative pathways that currently exist or are being developed in other jurisdictions in the United States.

A. A Brief History of the Bar Examination⁵

1. Pre-Revolutionary War

During colonial times, each American colony admitted applicants to practice law in its own way. Some colonies only admitted attorneys to specific courts' individual bars while others practiced a comity principle in which one court's admittance would be accepted by any court in that colony.⁶ For example, if admitted to the colony's *highest* court, an applicant would also have permission to practice in front of any other court in the colony.⁷ Additionally, most colonies implemented a "graded bar," in which one applying to practice before a higher court could not do so without increased training, such as an additional apprenticeship.⁸ Apprenticeships comprised a large portion of legal training and could last as long as eleven years,⁹ but their lengths and requirements varied depending on the court and colony.¹⁰

2. 1776 through the Jacksonian Era

After the American Revolution, the newly-formed states continued to have distinct requirements for applicants. For example, "[s]ome states required passage of

⁵ This discussion is necessarily truncated and discusses broad trends. A thorough examination is beyond the scope of this report.

⁶ Randall T. Shepard, *On Licensing Lawyers: Why Uniformity is Good and Nationalization is Bad*, 60 NYU ANN. SURV. AM. L. 453, 453-54 (2004) (describing colonial bar admissions procedures).

⁷ *Id.* at 454.

⁸ Daniel R. Hansen, *Do We Need the Bar Examination – A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1193-1194 (1995) (describing colonial bar admissions requirements).

⁹ Shepard, *supra* note 6, at 454.

¹⁰ See Hansen, *supra* note 8, at 1194 (noting that "[w]hen colonial legal apprenticeships were required, their lengths varied, but were generally long").

written or oral tests” and others waived these requirements for alternative legal studies, such as a clerkship.¹¹ During the Jacksonian Era, these admission standards were relaxed or even completely removed in an apparent push to open law practice to all “decent citizens.”¹² In fact, New Hampshire’s only requirement for admission to the bar was that the applicant be twenty-one or older.¹³ Any required examinations were orally administered by local courts with no standard requirements.¹⁴ For example, Abraham Lincoln famously admitted Jonathan Birch to practice law after asking Birch what books he had recently read.¹⁵

3. *The Rise of Diploma Privilege*

During the Industrial Revolution, Americans’ demand for lawyers increased. Alongside that demand grew a push to standardize bar admission.

Law schools became the vehicle to “raise standards of admission and cure large disparities in admission requirements that existed among the states.”¹⁶ Christopher Columbus Langdell revolutionized the study of law by developing a standardized curriculum for law schools, including the case and Socratic methods.¹⁷ As Langdell’s

¹¹ Shepard, *supra* note 6, at 454 & n.6 (“Courts commonly adopted loose interpretations of compliance with ‘apprenticeships,’ ‘clerkships,’ and ‘legal study’ in efforts to admit additional applicants.”).

¹² Margo Melli, *Passing the Bar: A Brief History of Bar Exam Standards*, U. WIS. L. SCH. GARGOYLE ALUMNI MAG., Summer 1990, at 3 (describing Jacksonian era bar admissions procedures).

¹³ Shepard, *supra* note 6, at 455.

¹⁴ See Melli, *supra* note 12, at 3–4 (explaining that oral examinations were “administered under the jurisdiction of the local court without any guidelines”).

¹⁵ *Id.*

¹⁶ Hansen, *supra* note 8, at 1198.

¹⁷ *Id.*

educational techniques gained traction, “law schools began to proliferate.”¹⁸ Diploma privilege, “whereby graduation from certain law schools results in automatic admission to the bar,” became more popular in an effort to entice students towards law schools and away from apprenticeships and clerkships.¹⁹ Diploma privilege enjoyed its peak popularity from 1879 to 1929.²⁰

4. *The Fall of Diploma Privilege*

As diploma privilege developed, so too did the written bar examination, which primarily served as a replacement for the previous oral examinations. In 1880, New Hampshire was the first state to form a bar examiner board.²¹ In 1855, Massachusetts gave the first written bar examination.²² Other states soon followed suit, mostly by developing written bar examinations.²³ Between 1890 and 1914, most states in the United States adopted some form of a written examination,²⁴ although a few gave oral examinations well into the twentieth century.²⁵

¹⁸ Linda Jellum & Emmeline Paulette Reeves, *Cool Data on a Hot Issue: Empirical Evidence that a Law School Bar Support Program Enhances Bar Performance*, 5 NEV. L.J. 646, 650 (2005) (discussing rise of law schools in the late 1800s).

¹⁹ *Id.*; see also Hansen, *supra* note 8, at 1200–01 (noting that diploma privilege was “necessary to entice students to attend law schools”).

²⁰ Hansen, *supra* note 8, at 1201.

²¹ Shepard, *supra* note 6, at 455–56.

²² *Id.* at 455.

²³ See *id.* at 456.

²⁴ *Id.*

²⁵ Melli, *supra* note 12, at 4.

The American Bar Association (ABA) rejected diploma privilege in 1921, stating that “every candidate should be subject to an examination by public authority,” and that “graduation from a law school should not confer the right of admission to the bar.”²⁶ The ABA reaffirmed this position fifty years later in 1971, emphasizing its belief that most law schools’ curricula do not effectively teach students to view law as a whole, but that the bar examination requires them to do so.²⁷ To help strengthen the bar admissions process, the ABA created the NCBE in 1931.²⁸ The NCBE was tasked with helping states better develop their bar examinations.²⁹ Over time, the NCBE developed the current bar examination, which is currently known as the UBE.

B. *The Current Bar Examination*

Most states require bar applicants to take and pass two exams prior to admission: the Multistate Professional Responsibility Examination (MPRE) and the bar examination. The bar examination may consist of some combination of the Multistate Essay Examination (MEE), the Multistate Bar Examination (MBE), and the Multistate Performance Test (MPT). Some states may elect to use the UBE, which includes all three components—the MEE, the MBE, and the MPT—administered on two consecutive days. These and other requirements, as well as Utah’s current bar examination structure, are discussed below.

²⁶ Hansen, *supra* note 8, at 1201 (citing NAT’L CONF. BAR EXAM’RS, THE BAR EXAMINERS’ HANDBOOK 189 (Start Duhl ed., 2d ed. 1980)).

²⁷ Hansen, *supra* note 8, at 1201.

²⁸ Melli, *supra* note 1212, at 4.

²⁹ *Id.*

1. *The Multistate Professional Responsibility Examination*

The MPRE is a 60-question two-hour multiple-choice examination administered three times per year.³⁰ It focuses on rules and codes of professional conduct provided by the ABA and works to test “candidates’ knowledge and understanding of established standards related to the professional conduct of lawyers.”³¹ Most American jurisdictions (except for Wisconsin and Puerto Rico) require bar applicants to pass the MPRE prior to admission, although each jurisdiction sets its own passing score.³² Connecticut and New Jersey will accept successful completion of a law school course on professional responsibility in lieu of a passing score.³³ The MPRE is unique in that it may be taken while the bar applicant is still in law school.³⁴ The MPRE is a separate component for licensure that is scored differently from the bar exam.³⁵

³⁰ *Jurisdictions Requiring the MPRE*, NAT’L CONF. BAR EXAM’RS, <https://www.ncbex.org/exams/mpre/> (last visited Oct. 22, 2022); see also *National Conference of Bar Examiners: MBE, MEE, MPRE, MPT Multistate Tests*, AM. BAR ASS’N, (June 26, 2018), https://www.americanbar.org/groups/legal_education/resources/bar_admissions/bartests/#:~:text=It%20is%20comprised%20of%20the,Bar%20Admissions%20Overview [hereinafter AM. BAR ASS’N, NCBE: MBE, MEE, MPRE, MPT].

³¹ *Jurisdictions Requiring the MPRE*, *supra* note 30; see also Carol Goforth, *Why the Bar Examination Fails to Raise the Bar*, 42 OHIO N.U. L. REV. 47, 52–53 (2015) (describing the MPRE and its administration).

³² See Sabrina DeFabritiis & Kathleen Elliott Vinson, *Under Pressure: How Incorporating Time-Pressured Performance Tests Prepares Students for the Bar Exam and Practice*, 112 W. Va. L. Rev. 107, 115 (2019).

³³ NAT’L CONF. BAR EXAM’RS, *Jurisdictions Requiring the MPRE*, *supra* note 31.

³⁴ Goforth, *supra* note 31, at 53.

³⁵ As with the bar exam, each jurisdiction sets its own passing score for the MPRE, ranging from 75 (Alabama, District of Columbia, Georgia, Mississippi, New Jersey, Oklahoma, Pennsylvania, Palau, Virgin Islands) to 86 (California and Utah). Based on the NCBE’s national scaled score data for MPRE administrations in 2021, 83.4% of March examinees, 79.2% of August examinees, and 81.7% of November examinees scored at least 80 on the MPRE and would have passed in a majority of jurisdictions. Percentages of examinees scoring above 90 are 67.8% for March, 59.7% for August, and 65.9% for November. *The Multistate Professional Responsibility Examination (MPRE)*, BAR EXAM’R,

2. *The Multistate Essay Examination*

The MEE is a three-hour exam composed of six 30-minute essay questions.³⁶ The essay questions draw from twelve subject areas: Business Associations; Conflicts of Law; Constitutional Law; Contracts and Sales; Criminal Law and Procedure; Evidence; Family Law; Federal Civil Procedure; Real Property; Torts; Wills, Trusts and Estates; and Secured Transactions.³⁷ At times, a single essay question will test multiple topics.³⁸ The MEE is designed to test an applicant's ability to identify legal issues, separate relevant from irrelevant material, present a reasoned analysis of legal issues, and demonstrate an understanding of how legal principles can help reach a solution.³⁹

3. *The Multistate Bar Examination*

The MBE is a 200-question multiple-choice examination that is administered in two three-hour sessions.⁴⁰ The questions test seven subject areas: Civil Procedure, Constitutional Law, Contracts, Criminal Law, Evidence, Real Property, and Torts.⁴¹ All American jurisdictions except Louisiana and Puerto Rico require the MBE as part of

<https://thebarexaminer.ncbex.org/2021-statistics/the-multistate-professional-responsibility-examination-mpre/> (last visited Oct. 22, 2022).

³⁶ *About the Bar Exam*, UTAH STATE BAR, <https://admissions.utahbar.org/about-the-bar-exam> (last visited Oct. 22, 2022) [hereinafter *About the Bar Exam*].

³⁷ *Id.*

³⁸ *Preparing for the MEE*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/exams/mee/preparing/> (last visited Oct. 22, 2022).

³⁹ Goforth, *supra* note 31, at 54.

⁴⁰ AM. BAR ASS'N, NCBE: MBE, MEE, MPRE, MPT, *supra* note 30; see also *About the Bar*, *supra* note 36.

⁴¹ *About the Bar*, *supra* note 36.

their bar exams, and it makes up fifty percent of the applicant's total score in most states.⁴²

4. *The Multistate Performance Test*

The MPT requires an applicant to complete two ninety-minute written tasks.⁴³ Each task contains a file with a memo, facts about the case, source documents, and a library with a variety of legal authorities.⁴⁴ The NCBE designed the MPT to test applicants' "legal analysis, fact analysis, problem solving, resolution of ethical dilemmas, organization and management of a lawyering task, and communication."⁴⁵ Forty-nine jurisdictions currently administer the MPT.⁴⁶

5. *The Uniform Bar Examination*

The UBE was designed and first administered in 2011.⁴⁷ It consists of the MBE, MEE, and MPT, and is administered over two consecutive days.⁴⁸ While the NCBE scores and scales the MBE (the multiple-choice portion of the exam), the administering

⁴² Goforth, *supra* note 31, at 54; *Jurisdictions Administering the MBE*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/exams/mbe/> (last visited Oct. 22, 2022).

⁴³ DeFabritiis & Vinson, *supra* note 32, at 118; *Jurisdictions Administering the MPT*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/exams/mpt/> (last visited Oct. 22, 2022) ("User jurisdictions may select one or both MPT items to include as part of their bar examinations. Jurisdictions that administer the Uniform Bar Examination use both MPT items.").

⁴⁴ Goforth, *supra* note 31, at 55-56.

⁴⁵ AM. BAR ASS'N, *NCBE: MBE, MEE, MPRE, MPT*, *supra* note 30.

⁴⁶ NAT'L CONF. BAR EXAM'RS, *supra* note 43 (revealing that forty-four state jurisdictions and five territory jurisdictions currently administer the MPT).

⁴⁷ Amy Gaiennie, *Evolution of the Bar Exam*, ABA FOR L. STUDENTS (Nov. 4, 2021), <https://abaforlawstudents.com/2021/11/04/evolution-of-the-bar-exam/#:~:text=In%202011%2C%20the%20Uniform%20Bar,scores%20with%20other%20UBE%20jurisdictions.>

⁴⁸ *Uniform Bar Examination*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/exams/ube/> (last visited Oct. 22, 2022).

jurisdictions grade the MEE and MPT (the essay portions of the exam).⁴⁹ These scores are then sent to the NCBE to be scaled against the MBE and national scores.⁵⁰ Each jurisdiction sets its own passing score (also referred to as a “cut score”), which results in a patchwork of what score is needed to demonstrate competency—that is, a passing score in a jurisdiction may be higher or lower than in the surrounding states.⁵¹ Indeed, there is a 20-point range of “cut scores” nationwide; the cut scores on the UBE range from 260 (Alabama, Minnesota, Missouri, New Mexico, North Dakota) to 280 (Alaska), with Utah joining the majority of jurisdictions at a cut score in the middle: a 270.⁵² This results in applicants who take the exact same exam being deemed “minimally competent” in one jurisdiction and allowed to practice law there, while being denied admission in other jurisdictions. For example, if an applicant scores a 269, they are not considered competent to practice law in Utah but are deemed competent to practice law in any of the 20 states and U.S. territories whose cut score requirement is below 270.⁵³ Similarly, an applicant who scores a 272, one point below Arizona’s cut score, is

⁴⁹ *Understanding the Uniform Bar Examination*, NAT’L CONF. BAR EXAM’RS, <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F209> (last visited Oct. 22, 2022); *see also MBE Scores*, NAT’L CONF. BAR EXAM’RS, <https://www.ncbex.org/exams/mbe/scores/#:~:text=MBE%20scaled%20scores%20are%20calculated,as%20compared%20with%20past%20examinations> (last visited Oct. 22, 2022) [hereinafter *Understanding the UBE*].

⁵⁰ *Id.*

⁵¹ *See, e.g., Minimum Scores*, NAT’L CONF. BAR EXAM’RS, <https://www.ncbex.org/exams/ube/score-transportability/minimum-scores/> (last visited Oct. 22, 2022) [hereinafter *Minimum Scores*].

⁵² *Id.*

⁵³ *Id.*

deemed not sufficiently competent to practice law in Arizona but is considered competent in the majority of UBE jurisdictions, including Utah.⁵⁴

According to the NCBE, the UBE increases consistency in subjects tested across jurisdictions; maximizes job opportunities for test-takers; and assures a high-quality, uniform test of minimum competence to practice law.⁵⁵ Currently, forty-one jurisdictions have adopted the UBE.⁵⁶ After taking the UBE, applicants may transfer their score and seek admission to other UBE jurisdictions.⁵⁷ Each jurisdiction allowing transfers sets its own minimum UBE score and maximum time period during which the transfer may occur.⁵⁸

6. *Other Requirements*

In addition to the UBE, some jurisdictions choose to test bar applicants on state- and locality-specific laws.⁵⁹ If a jurisdiction requires these location-specific components,

⁵⁴ Id.

⁵⁵ Understanding the UBE, *supra* note 49, at 12.

⁵⁶ List of UBE Jurisdictions, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/exams/ube/list-ube-jurisdictions> (last visited Oct. 22, 2022).

⁵⁷ *Understanding the UBE*, *supra* note 49, at 3 (“Applicants who take the UBE may transfer their scores to seek admission in other UBE jurisdictions within a certain amount of time after the scores were earned.”).

⁵⁸ *Jurisdictions That Have Adopted the UBE*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/exams/ube/score-portability/> (last visited Oct. 22, 2022) (detailing transfer requirements for UBE jurisdictions); *Maximum Score Age*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/exams/ube/score-portability/maximum-score-age/> (last visited Oct. 22, 2022); *see also Minimum Scores*, *supra* note 51.

⁵⁹ As of 2022, the jurisdictions that add state or local questions to their bar examinations include: Alabama, Arizona, California, Delaware, Florida, Georgia, Guam, Hawaii, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, Northern Mariana Islands, Ohio, Palau, Puerto Rico, South Carolina, South Dakota, Tennessee, Texas, Virgin Islands, Virginia, Washington, and Wisconsin. *See Local Components: UBE Pre-Admission Jurisdiction-Specific Law Component Requirements*, NAT'L CONF. BAR EXAM'RS,

a bar applicant who seeks to transfer their UBE score from another location may need to take these sections in addition to completing an application, transferring their UBE score, passing the jurisdiction's character and fitness requirements, and paying applicable fees.⁶⁰

All jurisdictions also require applicants to demonstrate character and good fitness to practice law.⁶¹ To determine whether an applicant possesses good character and fitness, bar examiners may consider any number of records, including an applicant's credit history, mortgage and rental payment history, military record, criminal history, driving record, traffic citations, tax filings and payments, lawsuits, background checks, child support payments, and material disclosed on the applicant's law school application.⁶² Most jurisdictions also require that applicants register during law school to facilitate this investigation.⁶³ Once admitted to the bar, legal practitioners

<https://www.ncbex.org/exams/ube/score-portability/local-components/> (last visited Oct. 22, 2022); see also *Comprehensive Guide to Bar Admission Requirements, Chart 5: Uniform Bar Examination Jurisdictions – Admission by Examination or by Transferred UBE Score*, NAT'L CONF. BAR EXAM'RS, <https://reports.ncbex.org/comp-guide/charts/chart-5/#1610472174303-4aeee78b-6a74> (last visited Oct. 22, 2022); *Jurisdiction Information*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/jurisdiction-information/> (last visited Oct. 22, 2022); *Comprehensive Guide to Bar Admission Requirements, Chart 9: Non-Uniform Bar Examination Jurisdictions – Admission by Examination*, NAT'L CONF. BAR EXAM'RS, <https://reports.ncbex.org/comp-guide/charts/chart-9/> (last visited Oct. 22, 2022).

⁶⁰ *Understanding the UBE*, *supra* note 49, at 16–17.

⁶¹ LISA G. LERMAN ET AL., *ETHICAL PROBLEMS IN THE PRACTICE OF LAW*, 19 (5th ed. 2020).

⁶² See generally *Overview of the Character and Fitness Investigation Process*, UTAH STATE BAR: BAR OPERATIONS & ADMISSIONS, <https://admissions.utahbar.org/overview-of-character-and-fitness-process> (last visited Oct. 22, 2022); see also Penelope J. Gessler & Kellie R. Early, *NCBE's Character and Fitness Investigation Services: A Look at the Present—A Vision of the Future*, 86 BAR EXAM'R 26, 26 (2017), <https://thebarexaminer.ncbex.org/article/september-2017/ncbes-character-and-fitness-investigation-services-a-look-at-the-present-a-vision-of-the-future-2/>.

⁶³ *Basic Overview*, AM. BAR ASS'N (June 26, 2018), https://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview/.

may face additional requirements to maintain their admission, including yearly continuing education hours, annual dues, and/or membership in the state bar association.⁶⁴

7. *Utah's Bar Examination*

The State of Utah first administered the UBE in February 2013.⁶⁵ Utah administers the examination over two days, with the MEE and MPT on the first day and the MBE on the second.⁶⁶ Each MPT is given the weight of two MEE essays.⁶⁷ Utah does not include any jurisdiction-specific material on its exam.⁶⁸ To be admitted in Utah, applicants must earn a combined score of 270 out of a possible 400 points.⁶⁹ Utah also accepts UBE transfer scores at or above 270 provided the score is less than three years old, or alternatively, is less than five years old if the applicant can demonstrate that they have practiced law for at least half the period of time since they received their score.⁷⁰ An applicant may also apply for admission by motion if they have practiced law full-time for three of the preceding five years.⁷¹

⁶⁴ LERMAN ET AL., *supra* note 61, at 19–20.

⁶⁵ *Jurisdiction Information: Utah*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/jurisdiction-information/jurisdiction/ut> (last visited Oct. 22, 2022) [hereinafter *Jurisdiction Information: Utah*].

⁶⁶ *About the Bar*, *supra* note 36.

⁶⁷ *Id.*

⁶⁸ *Jurisdiction Information: Utah*, *supra* note 65.

⁶⁹ *Id.*

⁷⁰ Utah Code Jud. Admin. R. 14-712.

⁷¹ Utah Code Jud. Admin. R. 14-705.

C. Justifications for the Current Bar Examination

The Working Group heard from presenters and reviewed materials that supported the bar examination, some of whom were also critical of alternative paths to licensure. This section focuses on the arguments proffered in favor of the bar examination.⁷²

1. A “Check” on Minimum Competence

The NCBE asserts that the current bar examination “is a valid measure of minimum competence for entry-level practice.”⁷³ The NCBE argues that the bar examination tests minimum competence because it uses practice analyses to ensure that those who pass have mastered the knowledge and skills required of newly licensed lawyers.⁷⁴ It asserts that other checks on minimum competence, such as supervised practice after diploma privilege, may produce “inconsistency in the qualifications of new lawyers” and “introduce subjectivity into the standards for minimal competence to serve the public”⁷⁵

⁷² The opinions shared in this section do not necessarily reflect the opinions of the authors of this report or every member of the Working Group.

⁷³ NAT’L CONF. BAR EXAM’RS, BAR ADMISSIONS DURING THE COVID-19 PANDEMIC: EVALUATING OPTIONS FOR THE CLASS OF 2020 6 (2020), <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F239> [hereinafter OPTIONS FOR THE CLASS OF 2020].

⁷⁴ *Id.* at 5 (“The content tested on the bar examination has been validated through practice analyses conducted by independent measurement firms, most recently in 2012 and again in 2019 as part of NCBE’s Testing Task Force study.”).

⁷⁵ *Id.* at 3. Some educators believe that the bar examination accurately and fairly tests for specific components of minimum competence, including writing, issue identification, and reading comprehension. They think that other components cannot be measured by an examination and should be left to law schools to develop and measure. For example, an educator who works with students who failed the bar examination found that the problem was not with bar questions, but that the students did

2. *Objective and Universal*

The NCBE contends that the bar examination avoids issues of subjectivity and ensures universal standards for qualification. For example, the NCBE argues that under a system of diploma privilege, law schools may feel pressure to pass specific students instead of only passing students who are truly prepared to practice law.⁷⁶ Additionally, students from different law schools could have inconsistent qualifications if the schools had inconsistent standards.⁷⁷ In contrast, the NCBE claims that the bar examination is “the most important reliable, independent, objective assessment of graduating student competence.”⁷⁸

3. *Encourages Better Performance*

Others assert that the examination also encourages students to excel academically while in law school, and some studies show that a student’s GPA during law school is an excellent indicator of their likelihood of passing the bar.⁷⁹

4. *A “Check” for Comprehensive Understanding*

In addition to testing for minimum competence, supporters of the bar examination argue that it “provides students with a beneficial comprehensive review of

not truly understand methods such as issue-based analysis. Suzanne Darrow-Kleinhaus, *A Response to Criticism of the Bar Exam*, BAR EXAM’R 35, 38–40 (2005) (discussing an example MBE question and students’ possible reasons for answering incorrectly, as well as law schools’ responsibility in ensuring this type of competence).

⁷⁶ See OPTIONS FOR THE CLASS OF 2020, *supra* note 73, at 3.

⁷⁷ *Id.*

⁷⁸ *Id.* at 7.

⁷⁹ See, e.g., Darrow-Kleinhaus, *supra* note 75, at 42.

the law.”⁸⁰ Without the bar, proponents of this argument argue that students are never required to show that they have a comprehensive understanding of the law, and instead receive a piecemeal education in which various areas of the law may be taught and tested in siloed courses during a student’s three years of law school.⁸¹

5. *Protects the Public*

The NCBE also argues that the bar examination protects the public.⁸² It states public protection is a priority, and that “[t]he public, and certainly legal employers, rely on passage of the bar examination as a reliable indicator of whether graduates are ready to begin practice.”⁸³ It contends that doing away with the bar examination would facilitate a path to law practice to the detriment of the public.⁸⁴ In addition, the NCBE argues that licensure tests are specifically “designed to protect the public,” whereas law schools are designed to educate.⁸⁵

6. *Mimics the Stress Experienced in the Practice of Law*

Supporters of the bar examination explain that practicing law is full of “constant testing” and outside pressures, so it is important to have similar experiences to these challenges during law school and while preparing for the bar examination.⁸⁶ They

⁸⁰ Hansen, *supra* note 8, at 1212.

⁸¹ *Id.* at 1212–13; see also Erwin N. Griswold, *In Praise of Bar Examinations*, 60 AM. BAR ASS’N J. 81, 81 (1974).

⁸² OPTIONS FOR THE CLASS OF 2020, *supra* note 73, at 3.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 8.

⁸⁶ Griswold, *supra* note 81, at 81–82.

argue the bar examination can create “competition” between the applicant and themselves, resulting in an educational and rewarding experience.⁸⁷ Others argue the bar examination mimics practice because lawyers must be able to keep a level head under the pressures of anxiety and time limits.⁸⁸ Additionally, supporters argue that the tasks on the bar examination mimic those required of actual practicing lawyers.⁸⁹ Instead of simply testing memorization, they assert the examination tests analytical skills and true understanding of the law such that students with only superficial knowledge will react to questions without applying rules or their knowledge methodically.⁹⁰

D. Criticisms of the Current Bar Examination

Critics of the bar examination believe that it is neither the sole nor best method of attorney licensure. The following section details many of those criticisms.⁹¹

1. Does Not Measure Minimum Competence

The bar examination does not test skills competent attorneys should possess, like “the ability to perform legal research, conduct factual investigations, communicate orally, counsel clients, and negotiate.”⁹² Even more, it does not “attempt to measure other qualities important to the profession, such as empathy for the client, problem-

⁸⁷ *Id.* at 82.

⁸⁸ Darrow-Kleinhaus, *supra* note 75, at 40.

⁸⁹ *Id.* at 39.

⁹⁰ *Id.*

⁹¹ The opinions shared in this section do not necessarily reflect the opinions of the authors of this report, or each member of the Working Group.

⁹² Andrea A. Curcio, *Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 447 (2002) [hereinafter Curcio, *Society of Law Teachers*].

solving skills, the bar applicant's commitment to public service work, or the likelihood that the applicant will work with underserved communities.”⁹³

At most, the exam tests memorization of broad swaths of legal minutia, legal analysis, a small degree of problem-solving, and limited written communication.⁹⁴ And although a number of studies have attempted to delineate the necessary skills and knowledge for the competent practice of law, there is no universally accepted definition of minimum competence.⁹⁵ Thus, the bar examination only tests the NCBE’s definition of minimum competence, which is problematic, because there is no correlation between lawyers’ ability to pass the bar examination and their actual ability to practice law.⁹⁶

2. Does Not Mimic Real Lawyering Tasks or Experiences

The NCBE claims that the MBE covers topics material to law practice and requires legal reasoning, skills, and knowledge. However, if “knowledge” is to mean “understanding,” the MBE’s closed-book format is ineffective, because memorization

⁹³ *Id.*; see also Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1699 n.2 (2002) [hereinafter Glen, *When and Where*]; see also ABA SEC. LEGAL EDUC. & ADMISSIONS TO BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 138–40 (1992) (listing necessary lawyering skills as “problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas”); Deborah Jones Merritt & Logan Cornett, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence*, INST. FOR ADVANCEMENT AM. LEGAL SYS. (Dec. 2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf (discussing the knowledge and skills necessary to practice law competently).

⁹⁴ Glen, *When and Where*, *supra* note 93, at 1711.

⁹⁵ Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 370 (2002) [hereinafter Curcio, *A Better Bar*].

⁹⁶ *Id.* at 371; see also William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Labor Market Control and Racial and Ethnic Performance Disparities*, 29 LAW & SOC. INQUIRY 547, 580 (2004) (discussing the Federal Trade Commission study and its findings).

does not equal understanding.⁹⁷ Indeed, the necessity of taking a ten-week bar examination “cram course” to pass the bar implies that it does not in fact test competence, aptitude, or understanding but emphasizes memorization.⁹⁸ Additionally, the MBE purports to measure “baseline content knowledge,” but applicants may not retain their knowledge after taking the bar examination, and its content covers obscure rules in a wide variety of legal areas rather than basic knowledge.⁹⁹

Finally, the MBE is fundamentally at odds with how lawyers’ practice. First, while lawyers may face time pressures in practice, courts and clients expect work product with a level of professionalism and polish that is difficult to craft under the artificial time pressures the MEE and MPT impose.¹⁰⁰ Second, unlike in practice, lawyers rely on their memory instead of looking up a rule each time they encounter a new set of facts or legal question presented by a client.¹⁰¹ Third, lawyers are not asked to choose the “most correct”¹⁰² answer from four options in the practice of law.¹⁰³

Other portions of the bar examination are also problematic. The MEE is designed to test an applicant’s ability to identify issues, apply an appropriate rule, and present legal analysis through written communication. However, it relies on memorization-

⁹⁷ Curcio, *A Better Bar*, *supra* note 95, at 374–75.

⁹⁸ *Id.*; *see also* Curcio, *Society of Law Teachers*, *supra* note 92, at 448.

⁹⁹ *See* Curcio, *A Better Bar*, *supra* note 95, at 374–75.

¹⁰⁰ *Id.* at 377.

¹⁰¹ *Id.* at 376.

¹⁰² *Id.*

¹⁰³ Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to MacCrate Entry to the Profession*, 23 PACE L. REV. 343, 367 (2003) [hereinafter Glen, *Thinking Out*].

based analysis instead of research, and its time pressures restrict an applicant's ability to think and rewrite.¹⁰⁴ Indeed, an applicant who is able to accurately, competently, and professionally answer an essay question in an untimed environment may be deemed incompetent under the examination's strict time restrictions. And while the MPT presents tasks similar to the practice of law, its ninety-minute time limit prevents applicants from carefully reading the available file and library, reflecting on the appropriate analysis, or editing their work, all of which is at odds with actual legal practice and a lawyer's ethical duties to their client.¹⁰⁵ It is highly unusual in practice for lawyers to read and synthesize novel law, study and digest a client's file including supporting documentation, and then craft a competent arbitration agreement, motion for summary judgment, judicial opinion, or thoughtful demand letter in ninety minutes or less.

3. *Does Not Protect the Public*

The NCBE ensures the public that bar passage both ensures minimum competence and the ability to represent and protect clients, however, by overemphasizing the bar examination's efficacy as a licensing tool, the profession fosters unearned consumer confidence.¹⁰⁶ Additionally, the bar examination tests the law of a hypothetical jurisdiction ("the law of nowhere"), thereby upholding the myth

¹⁰⁴ *Id.* at 376–78.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 361 ("The fourth 'perverse effect' of the bar exam is that it creates an all-together false sense of security for consumers.").

of unitary practice areas, so consumers are not well-served because the test does not reflect the diverse spectrum of jurisdiction-specific law or practice areas.¹⁰⁷ In fact, it may test law that is absent from, or even antithetical to, the jurisdiction's law in which the attorney plans to practice law or even the majority rule across the country.

Further, there is no correlation between bar passage and attorney complaints or discipline.¹⁰⁸ The most common complaints filed with attorney disciplinary agencies include incorrect preparation or filing of documents, failure to timely commence action, investigation other than in litigation, failure to communicate with clients, and lack of due diligence.¹⁰⁹ The bar examination fails to screen for any these skills, and touting its

¹⁰⁷ The Honorable Alan Scheinkam & Michael Miller, *New York Needs a New Bar Exam*, N.Y. STATE BAR ASS'N (July 27, 2021), <https://nysba.org/new-york-needs-a-new-bar-exam/> (“The UBE requires extensive memorization of federal rules and of the ‘law of nowhere.’ There is no meaningful test of the law that new attorneys will actually use. Instead, law students are trained on matters that bear little relation to the legal issues which they will encounter in New York practice.”); *see also* Glen, *Thinking Out*, *supra* note 103, at 365–66 (arguing the MBE “does not . . . test the law which practitioners will actually encounter and apply when they enter the profession.” Instead, it tests “the ‘majority view’ of the application of legal principles. This majority view is sometimes directly opposite to the rule applied in the state of administration.”).

¹⁰⁸ *See* William Wesley Patton, *A Rebuttal to Kinsler's and to Anderson and Muller's Studies on the Purported Relationship between Bar Passage Rates and Attorney Discipline*, 93 ST. JOHN'S L. REV. 43, 43–45 (2019) (explaining that neither of the two studies that conclude there is “either a causal link and/or a correlation between [b]ar passage scores and the probability of state bar disciplinary rates” contain the necessary data to support their conclusions).

¹⁰⁹ Curcio, *A Better Bar*, *supra* note 95, at 383–84. In Utah, the Office of Professional Conduct (OPC) referred 51 matters involving 33 lawyers to the Ethics and Discipline Committee for a screening hearing between 2019 and 2020. Of those lawyers, four were dismissed with a letter of caution, five were dismissed, five were privately admonished, six received a public reprimand, and 13 received a finding of probable cause that a formal complaint would be filed with the District Court. OFF. PRO. CONDUCT, ANNUAL REPORT: FEBRUARY 2021 16–17, 22–25 (2021), <https://www.opcutah.org/wp-content/uploads/2021/02/OPC-Annual-Report-2019-2020.pdf>.

efficacy as a licensing tool does not address the reality that the bar examination fails to address the public's actual complaints.¹¹⁰

4. *Discriminates on the Basis of Race*

A diverse bar is essential to equal access to justice in the United States. Limiting the number of licensed attorneys of color limits minority communities' access to representation.¹¹¹ People of color remain a minority in most law school student populations, and their representation in the legal academy has not increased at an appreciable rate. For example, in 1971–1972, Black students made up just 3.96% of students at ABA-accredited law schools; by 2001–2002 the percentage of Black students increased to 7.37%.¹¹² And, in 2021, only 7.9% of incoming law students were Black.¹¹³ But women in the same years made up 9% and then approximately 50% of students at ABA-accredited law schools, and in 2021, 57.4% of incoming law students were women.¹¹⁴ On top of this underrepresentation in law school student bodies, White bar applicants are more likely than applicants of color to pass the bar examination on their

¹¹⁰ Curcio, *A Better Bar*, *supra* note 95, at 384.

¹¹¹ Glen, *When and Where*, *supra* note 93, at 1714.

¹¹² *See id.* (citing data on Black student representation in law school student bodies from 1971–1972 and 2001–2002).

¹¹³ *The Incoming Class of 2021 – The Most Diverse Law School Class in History*, L. SCH. ADMISSION COUNSEL (Dec. 15, 2021), <https://www.lzac.org/blog/incoming-class-2021-most-diverse-law-school-class-history>; *see generally* *Law School Enrollment by Race & Ethnicity*, ENJURIS, <https://www.enjuris.com/students/law-school-race-2019.html#:~:text=Racial%20and%20ethnic%20minority%20representation%20in%20law%20schools&text=Black%20students%20represented%20the%20largest,7.57%25%20of%20incoming%20law%20students> (last visited Oct. 22, 2022) (explaining that Black student representation law school student bodies decreased from 7.91% in 2018 to 7.57% in 2019) [hereinafter *The Incoming Class of 2021*].

¹¹⁴ *See* Glen, *When and Where*, *supra* note 93, at 1714 (citing data on female student representation in law school student bodies from 1971–1972 and 2001–2002); *The Incoming Class of 2021*, *supra* note 113.

first attempt.¹¹⁵ A six-year longitudinal study by the Law School Admission Council (LSAC) found the following first-time bar examination pass rates by race: White 92%, Black 61%, Native American 66%, Hispanic 75%, Asian American 81%.¹¹⁶

Some studies show that performance on standardized tests correlates with household income, while others show that students of color perform worse on standardized exams than White students even when they graduate with the same grades from the same school.¹¹⁷

The NCBE claims that racial score discrepancies are a result of stereotype threat or race-related disparities in American education.¹¹⁸ Further, the NCBE has asserted that racial score discrepancies merely mimic racial differences in SAT and LSAT scores.¹¹⁹ However, critics argue that these consistent racial score disparities in time-

¹¹⁵ See Curcio, *A Better Bar*, *supra* note 95, at 390; see also Deborah Jones Merritt, Carol L. Chomsky, Claudia Angelos & Joan W. Howarth, *Racial Disparities in Bar Exam Results – Causes and Remedies*, BLOOMBERG L. (July 20, 2021, 2:00 AM), <https://news.bloomberglaw.com/us-law-week/racial-disparities-in-bar-exam-results-causes-and-remedies>.

¹¹⁶ Curcio, *A Better Bar*, *supra* note 95, at 390. For aggregate data from data submitted in the 2020 and 2021 Bar Passage Questionnaire, which shows similar disparities, see *Summary Bar Pass Data: Race, Ethnicity, and Gender, 2020 and 2021 Bar Passage Questionnaire*, AM. BAR ASS'N, 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 (last visited Oct. 22, 2022).

¹¹⁷ See Curcio, *A Better Bar*, *supra* note 95, at 380–83 (describing how standardized test scores correlate with income and race, and how these effects as found in the MBE make the bar examination a poor licensing tool).

¹¹⁸ OPTIONS FOR THE CLASS OF 2020, *supra* note 73, at 6–7.

¹¹⁹ *Id.*; see also Glen, *When and Where*, *supra* note 93, at 1700–01, 1715, 1736 (discussing differences in LSAT results between Black and White students).

constrained high-stakes national exams regardless of topic show that the bar examination tests test-taking skills rather than actual minimum attorney competence.¹²⁰

An AccessLex Institute study published in October 2020 examined the California minimum passing score, or cut score, which is the second highest in the nation. The study found that “maintaining a high cut score does not result in greater public protection as measured by disciplinary statistics *but does result in excluding minorities from admission to the bar and the practice of law at rates disproportionately higher than Whites.*”¹²¹

Whatever the explanation for these racial disparities in bar exam performance, the reason is certainly not that people of color are, as a group, less capable of minimum competence than White applicants.¹²² It follows, then, that the bar examination either does not actually test for minimum competence, or, at the very least, fails to correct for its race-related disparities.

5. *Discriminates on the Basis of Income*

Low-income applicants are also at a disadvantage when taking the bar examination. These applicants may have to work and support themselves or family members while studying, thus limiting the number of hours they are able to devote to

¹²⁰ Curcio, *A Better Bar*, *supra* note 95, at 390–91; *see also* Glen, *Thinking Out*, *supra* note 103, at 368.

¹²¹ Mitchel L. Winick, Victor D. Quintanilla, Sam Erman, Christina Chong-Nakatsuchi & Michael Frisby, *Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards* at 2, ACCESSLEX INST. (Oct. 15, 2020), <https://ssrn.com/abstract=3707812> (emphasis added).

¹²² Glen, *Thinking Out*, *supra* note 103, at 383.

full-time bar examination preparation.¹²³ This is significant because applicants who work while studying for the bar exam are significantly less likely to pass the bar.¹²⁴ Additionally, because federal education loans are not available to cover the cost of post-graduate licensing programs or study time, financial concerns may require low-income graduates to forgo a comprehensive bar examination review course and instead study on their own. Recent studies reveal that comprehensive bar courses, also known as “cram” courses, cost up to three thousand dollars and require hundreds of hours to complete.¹²⁵ However, these cram courses significantly increase an examinee’s chance of passing the bar on the first attempt.¹²⁶ As a result, the bar examination is a test of resources. Applicants who can afford to purchase a course and study full-time without any work obligations are more likely to pass the exam.¹²⁷

E. The NCBE’s “Next Gen” Bar Examination

The Working Group also met with the NCBE to understand the changes that the NCBE contemplates recommending for the bar examination. In 2018, the NCBE appointed a Testing Task Force “to ensure that the bar examination continues to test the

¹²³ Curcio, *A Better Bar*, *supra* note 95, at 391.

¹²⁴ See Joshua L. Jackson & Tiffane Cochran, *Approaching the Bar: An Analysis of Post-Graduation Bar Exam Study Habits*, ACCESSLEX INST. (July 13, 2021), <https://www.accesslex.org/approaching-the-bar> (noting that those applicants who did not work while studying for the bar exam had a roughly 78% chance of passing, while those who worked even just two hours per day had an estimated 63% chance of passing the bar exam).

¹²⁵ Curcio, *Society of Law Teachers*, *supra* note 92, at 448.

¹²⁶ See Curcio, *A Better Bar*, *supra* note 95, at 391; see also *Analyzing First-Time Bar Exam Passage on the UBE in New York State*, ACCESSLEX INST. (May 19, 2021), <https://www.accesslex.org/NYBOLE>.

¹²⁷ See Curcio, *A Better Bar*, *supra* note 95, at 391 (referencing an informal survey of University of Seattle law students showing the correlation between bar success and work obligations).

knowledge, skills, and abilities required for competent entry-level legal practice in the 21st century.”¹²⁸ The Testing Task Force undertook a three-year empirical study “to ensure that the bar examination continues to assess . . . minimum competencies” and “to determine how those competencies should be assessed.”¹²⁹ The study consisted of three phases.¹³⁰ The first phase included conversations with bar admission agencies, the legal academy, and the legal profession.¹³¹ During the second phase, nearly 15,000 lawyers participated in a quantitative nationwide practice analysis survey that assessed what knowledge and skills newly licensed lawyers need to properly perform their post-graduation legal work.¹³² The third phase involved two committees composed of legal educators, practitioners, and bar admission representatives who provided input on what content should be tested on the bar examination and how it should be assessed in light of the gathered data from Phase 1 and Phase 2.¹³³

The NCBE Board of Trustees voted to approve the Testing Task Force’s recommendations in January 2021, which began the implementation of a “next

¹²⁸ *NCBE Testing Milestones*, NEXTGEN, <https://nextgenbarexam.ncbex.org/about/ncbe-testing-milestones/> (last visited Oct. 22, 2022).

¹²⁹ *Overview of Recommendations for the Next Generation of the Bar Exam*, NEXTGEN, <https://nextgenbarexam.ncbex.org/overview-of-recommendations/> (last visited Oct. 22, 2022).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

generation” bar examination.¹³⁴ The NCBE claims that the new exam will use a more integrated approach, replacing the MBE, MEE, and MPT with a single test.¹³⁵ The new format aims to test fewer subjects less broadly and deeply, while emphasizing the assessment of lawyering skills.¹³⁶ Questions will be provided in “item sets,” where collections of test questions of varying formats will focus on individual scenarios or stimuli.¹³⁷ The NCBE will continue to grade question types that can be machine-scored, while jurisdictions’ bar examiners will continue grading constructed responses.¹³⁸

The Testing Task Force recommended that the new bar examination continue to be offered twice a year but suggested it be a computer-based exam, offered at computer testing centers or on candidates’ laptops at managed testing sites.¹³⁹ Additionally, while the exam will not be open-book, the NCBE anticipates that the exam will provide

¹³⁴ Paul Caron, *NCBE Approves Complete Overhaul of the Bar Exam*, TAXPROF BLOG (Jan. 29, 2021), https://taxprof.typepad.com/taxprof_blog/2021/01/ncbe-approves-complete-overhaul-of-the-bar-exam.html.

¹³⁵ Karen Sloan, *Bar Exam Overhaul Plans Go Public. So Long, MBE*, LAW.COM (Jan. 4, 2021, 2:15 PM), <https://www.law.com/2021/01/04/bar-exam-overhaul-plans-go-public-so-long-mbe/?slreturn=20210412125128>.

¹³⁶ See NAT’L CONF. BAR EXAM’RS, FINAL REPORT OF THE TESTING TASK FORCE 20–21 (2021), <https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Final-Report-April-2021.pdf> (noting that the Testing Task Force recommended that the “content of the new exam” address predetermined “Foundational Concepts and Principles” and “Foundational Skills.” Foundational Concepts and Principles include Civil Procedure, Contract Law, Evidence, Torts, Business Associations, Constitutional Law, Criminal Law and Constitutional Protections Impacting Criminal Proceedings, and Real Property. Foundational Skills consist of Legal Research, Legal Writing, Issue Spotting and Analysis, Investigation and Evaluation, Client Counseling and Advising, Negotiation and Dispute Resolution, and Client Relationship and Management).

¹³⁷ Kirsten Williams, *Bar Examiners Recommend Changes for Future Exams*, JURIST (Jan. 5, 2021, 7:29 AM) <https://www.jurist.org/news/2021/01/bar-examiners-recommend-changes-for-future-exams/>; <https://www.jurist.org/news/2021/01/bar-examiners-recommend-changes-for-future-exams/>.

¹³⁸ *FAQs about Recommendations*, NEXTGEN, <https://nextgenbarexam.ncbex.org/faqs/> (last visited Oct. 22, 2022) [hereinafter *FAQs about Recommendations*].

¹³⁹ Williams, *supra* note 137.

applicants with a “closed universe” of legal resources,¹⁴⁰ similar to the materials included with the current MPT.¹⁴¹ But, as it relates to the length and timed aspect of the new bar examination, the Testing Task Force thus far has only claimed: “If possible, the length of the exam will be reduced, but this will be done only if the necessary validity and reliability of scores can be maintained.”¹⁴² Although the design of the new format began in February 2021, the NCBE anticipates the “process to develop and deliver[y] [of] the new exam will take up to four or five years.”¹⁴³ Currently, the NCBE is developing questions for its new bar examination, and over the next three to four years, it will focus on test administration, including where and how the new bar examination will be administered.¹⁴⁴

The NCBE's current bar examination consists of three products: the MBE, MEE, and MPT.¹⁴⁵ Currently, each jurisdiction can choose to use any or all of the products.¹⁴⁶ For instance, California and Nevada use the MBE, but they supply their own state-specific essays.¹⁴⁷ Georgia uses the MBE and MPT but provides state-specific essays.¹⁴⁸

¹⁴⁰ *FAQs about Recommendations*, *supra* note 138.

¹⁴¹ *Id.*

¹⁴² NAT'L CONF. BAR EXAM'RS, OVERVIEW OF RECOMMENDATIONS FOR THE NEXT GENERATION OF THE BAR EXAMINATION 5 (2021), <https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Next-Gen-Bar-Exam-Recommendations.pdf>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *See supra* Section I.B (discussing the current bar examination).

¹⁴⁶ *Id.*

¹⁴⁷ *Jurisdiction Information: California*, NAT'L CONF. BAR EXAM'RS (Sept. 8, 2022), <https://www.ncbex.org/jurisdiction-information/jurisdiction/ca>; *Jurisdiction Information: Nevada*, NAT'L CONF. BAR EXAM'RS (Sept. 8, 2022), <https://www.ncbex.org/jurisdiction-information/jurisdiction/nv>.

And Utah, for example, utilizes the UBE, which is all three products combined into one two-day standardized exam.¹⁴⁹ However, the new bar examination will be an “integrated assessment,” meaning “[m]ost of the new test items will be presented in the context of shared scenarios and materials that apply to sets of items rather than to individual questions.”¹⁵⁰ At this time, the NCBE does not know whether or how their integrated assessment could be “‘disintegrated’ to create discrete components” for jurisdictions that wish to administer jurisdiction-specific components.¹⁵¹ In other words, jurisdictions may not have the ability to parse out the new bar examination in the same way they have done with the current bar examination.

F. The IAALS Report

The Working Group also met with Professor Deborah Jones Merritt, who co-authored “Building a Better Bar: The Twelve Building Blocks of Minimum Competence” (the IAALS Report).¹⁵² The IAALS Report was published in December 2020.¹⁵³ The Working Group found the IAALS Report to be persuasive. It explains:

The bar exam tries to distinguish minimally competent lawyers from incompetent ones: it exists to protect the public from the harms of incompetent legal representation. That protection is critical to maintaining the integrity of the profession, but the bar exam achieves that goal only if it effectively assesses minimum competence. The unfortunate reality is

¹⁴⁸ *Jurisdiction Information: Georgia*, NAT’L CONF. BAR EXAM’RS (Sept. 8, 2022), <https://www.ncbex.org/jurisdiction-information/jurisdiction/ga>.

¹⁴⁹ *Jurisdiction Information: Utah*, *supra* note 65.

¹⁵⁰ *FAQs about Recommendations*, *supra* note 138.

¹⁵¹ *Id.*

¹⁵² Merritt & Cornett, *supra* note 93.

¹⁵³ *Id.*

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.¹⁵⁴

To address this issue, the IAALS study was created to “develop an evidence-based definition of minimum competence.”¹⁵⁵ The study involved fifty focus groups in eighteen locations throughout the United States.¹⁵⁶ These locations were intentionally selected to “produce an array of diverse local economies and practice environments, including rural regions.”¹⁵⁷ The study also utilized a “layered approach” when assembling focus groups.¹⁵⁸ It included both new and more experienced lawyers. These lawyers worked in fifty distinct fields including litigation, transactional, regulatory, and other practice areas.¹⁵⁹ The study gathered data from a mix of employment settings— including solo practitioners, small law firms, large law firms, public interest, business, and government.¹⁶⁰ It also invited participants from a diverse group of attorneys, including “a higher percentage of women and people of color than comparable national

¹⁵⁴ *Id.* at 3.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 14.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 18-19.

¹⁶⁰ *Id.*

pools.”¹⁶¹ It asked, in detail, about the knowledge and skills that new lawyers use during their first year of practice and how those skills were obtained.¹⁶²

The IAALS Report concludes that “minimum competence is more complex” than what the current bar examination assesses.¹⁶³ It finds that “[n]ew lawyers . . . did not base their first year of practice on a static set of rules and skills that they carried into the workplace.”¹⁶⁴ In fact, “they rarely relied upon legal rules that they had memorized in law school or for the bar exam. Instead, these new lawyers drew upon more basic concepts and research skills to identify specific rules needed to represent clients effectively.”¹⁶⁵

Based upon these findings, the IAALS Report identifies twelve “building blocks” that demonstrate minimum competence to practice law.¹⁶⁶ These building blocks are:

[1] The ability to act professionally and in accordance with the rules of professional conduct; [2] [a]n understanding of legal processes and sources of law; [3] [a]n understanding of threshold concepts in many subjects; [4] [t]he ability to interpret legal materials; [5] [t]he ability to interact effectively with clients; [6] [t]he ability to identify legal issues; [7] [t]he ability to conduct research; [8] [t]he ability to communicate as a lawyer; [9] [t]he ability to see the “big picture” of client matters; [10] [t]he ability to manage a law-related workload responsibly; [11] [t]he ability to cope with the stresses of legal practice; and [12] [t]he ability to pursue self-directed learning.¹⁶⁷

¹⁶¹ *Id.* at 17–18.

¹⁶² *Id.* at 5.

¹⁶³ *Id.* at 30.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 31.

The IAALS Report also highlights the importance of accurately and appropriately assessing minimum competence.¹⁶⁸ It argues the following:

[1] Closed-book exams offer a poor measure of minimum competence to practice law; [2] [t]ime constraints on exams similarly distort the assessment of minimum competence; [3] [m]ultiple choice questions bear little resemblance to the cognitive skills lawyers use; [4] [w]ritten performance tests, in contrast, resemble many of the tasks that new lawyers perform; and [5] [p]ractice-based assessments, such as ones based on clinical performance, offer promising avenues for evaluating minimum competence.¹⁶⁹

The Report also provides ten recommendations to consider in a “move towards evidence-based lawyer licensing”:

Recommendation One: Written exams are not well suited to assessing all aspects of minimum competence. Where written exams are used, they should be complemented by other forms of assessment.

Recommendation Two: Multiple choice exams should be used sparingly, if at all.

Recommendation Three: Eliminate essay questions from written exams and substitute more performance tests.

Recommendation Four: If jurisdictions retain essay and/or multiple choice questions, those questions should be open book.

Recommendation Five: Where written exams are used, provide more time for all components.

Recommendation Six: Candidates for licensure should be required to complete coursework that develops their ability to interact effectively with clients.

¹⁶⁸ *Id.* at 4

¹⁶⁹ *Id.*

Recommendation Seven: Candidates for licensure should be required to complete coursework that develops their ability to negotiate.

Recommendation Eight: Candidates for licensure should be required to complete coursework that focuses on the lawyer's responsibility to promote and protect the quality of justice.

Recommendation Nine: Candidates for licensure should be required to complete closely supervised clinical and/or externship work.

Recommendation Ten: A standing working group made up of legal educators, judges, practitioners, law students, and clients should be formed to review the twelve building blocks and design an evidence-based licensing system that is valid, reliable, and fair to all candidates.¹⁷⁰

G. Models from Other Jurisdictions

The Working Group studied the two alternative licensing models in the United States: (1) diploma privilege and (2) the Daniel Webster Scholar Honors Program.

1. Diploma Privilege

In Wisconsin, students may be admitted to the bar through diploma privilege upon satisfactory completion of law school, provided they follow the thirty-credit and sixty-credit rules.¹⁷¹ The thirty-credit rule states that students must take ten specific

¹⁷⁰ *Id.*

¹⁷¹ Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645, 648 (2000). There are potential commerce clause issues with Wisconsin's diploma privilege program. A class of plaintiffs "sued members of the Wisconsin Board of Bar Examiners and the Supreme Court of Wisconsin, charging a violation of the commerce clause of Article I of the Constitution." *Wiesmueller v. Kosobucki*, 571 F.3d 699, 701 (7th Cir. 2009). They argued that Wisconsin's diploma privilege program "discriminates against graduates of out-of-state law schools who would like to practice law in Wisconsin." *Id.* The case was dismissed for failure to state a claim and the plaintiffs appealed. *Id.* The Seventh Circuit reversed and remanded the case, explaining that it was "dismissed prematurely." *Id.* at 707. It also highlighted the commerce clause issue, stating: "It is enough that an aspiring lawyer's decision about where to study, and therefore about where to live as a student, can be influenced by the diploma privilege to bring this case within at least the outer bounds of the commerce clause; for the movement of persons across state lines, for whatever purpose, is a form of interstate commerce. The effect on commerce of the discriminatory diploma privilege may be small and, if so, not much would be required to justify it. Our concern is that there may be nothing at all to justify it." *Id.* at 705 (internal citations

courses and achieve a weighted average of at least 2.0 in those courses.¹⁷² Under the sixty-credit rule, students must take sixty credits from a list of thirty subject areas, achieving the same average score.¹⁷³ Law schools must set forth a list of their courses that satisfy these rules.¹⁷⁴ Wisconsin's diploma privilege has been regarded as the "most restrictive diploma privilege statute ever written"¹⁷⁵ because diploma privilege is only available to graduates of Wisconsin's two law schools: the University of Wisconsin Law School and the Marquette University Law School.¹⁷⁶ Applicants may choose to take the bar examination instead,¹⁷⁷ and those who do take the UBE often choose to be admitted to another state's bar in addition to being admitted to Wisconsin's through diploma privilege.¹⁷⁸

It does not appear that utilizing diploma privilege has impacted attorney misconduct rates in Wisconsin. Keith L. Sellen, the director of Wisconsin's Office of

omitted). After the case was remanded, the parties reached a settlement, which ended the constitutional challenge and allowed the program to continue. *Settlement Retains Diploma Privilege*, STATE BAR WIS. (Mar. 25, 2010), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=0&Issue=0&ArticleID=5824#:~:text=March%2025%2C%202010%20%E2%80%93%20Graduates%20of,Wiesmueller%20over%20three%20years%20ago>.

¹⁷² Moran, *supra* note 171. During its research, the Working Group heard a presentation from a Wisconsin representative concerning the state's diploma privilege pathway to licensure.

¹⁷³ *Id.*

¹⁷⁴ Wis. SCR 40.03(2)(c).

¹⁷⁵ Moran, *supra* note 171, at 649 (internal citations omitted).

¹⁷⁶ *Admission to the Practice of Law in Wisconsin*, WIS. CT. SYS., <https://www.wicourts.gov/services/attorney/bar.htm> (last visited Oct. 22, 2022).

¹⁷⁷ Wis. SCR 40.04.

¹⁷⁸ *Diploma Privilege*, UNIV. WIS. L. SCH., https://law.wisc.edu/current/diploma_privilege/ (last visited Oct. 22, 2022).

Lawyer Regulation, reports that lawyer misconduct is not correlated to whether one takes the bar examination or utilizes diploma privilege.¹⁷⁹ He states:

My experience in 20 years of disciplinary regulation informs me that the causes of professional misconduct have little to do with whether the lawyer took a bar exam or was admitted by diploma privilege. These causes are, in general, a poor or nonexistent mentor; anxiety, depression and chemical dependency; inadequate organizational skills; character issues; and a lack of business acumen[.]”¹⁸⁰

Notably, as of 2019, the jurisdictions with the highest rates of public discipline were Alabama, Iowa, Arizona, Louisiana, and Oregon.¹⁸¹ For the same time period, the jurisdictions with the lowest rates of discipline were Nebraska, the District of Columbia, Oklahoma, Rhode Island, and Alaska.¹⁸² With the exception of Louisiana, each of these states administers the UBE.¹⁸³

2. *Daniel Webster Scholar Honors Program*

The University of New Hampshire Franklin Pierce School of Law graduated its first Daniel Webster Scholar Honors Program class in 2008.¹⁸⁴ The school launched the program in partnership with the New Hampshire Supreme Court and New Hampshire

¹⁷⁹ Stephen Francis Ward, *Bar Exam Does Little to Ensure Attorney Competence, Say Lawyers in Diploma Privilege State*, AM. BAR ASS’N J. (Apr. 21, 2020), <https://www.abajournal.com/web/article/bar-exam-does-little-to-ensure-attorney-competence-say-lawyers-in-diploma-privilege-state>.

¹⁸⁰ *Id.*

¹⁸¹ AM. BAR ASS’N, ABA PROFILE OF THE LEGAL PROFESSION 2022 85 (July 2022), <https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf>.

¹⁸² *Id.*

¹⁸³ *List of UBE Jurisdictions*, NAT’L CONF. BAR EXAM’RS, <https://www.ncbex.org/exams/ube/list-ube-jurisdictions> (last visited Oct. 22, 2022).

¹⁸⁴ David Brooks, *Some UNH Law Schools Grads Don’t Have to Take the Bar Exam*, CONCORD MONITOR (May 5, 2020, 6:44 PM), <https://www.concordmonitor.com/UNH-law-school-graduation-concord-nh-34312122>.

Bar in 2005 after over a decade of discussion.¹⁸⁵ Students are accepted to the program before their second year of law school,¹⁸⁶ and its curriculum is heavily experience-based, including work with practicing lawyers, appearances before judges, negotiation, mediation, counseling clients, and the creation of written and oral portfolios.¹⁸⁷ Webster Scholars pass a variant of the bar examination during their last two years of law school, and they are admitted to the New Hampshire bar the day before graduation.¹⁸⁸ They may also choose to sit for other states' bar examinations, and program alumni have been admitted to over a dozen other bars.¹⁸⁹ In 2015, a study by IAALS at the University of Denver found that Webster Scholars outperformed colleagues who had been licensed to practice law for up to two years.¹⁹⁰ University of New Hampshire law students who are not admitted to the Daniel Webster Scholars program follow the traditional pathway to licensure and take the bar examination.

H. Other States Exploring Pathways to Licensure

The Working Group understands that New York and Oregon are also pursuing alternative methods of attorney licensing. Both states have created their own task forces and have published reports explaining their findings and recommendations. Each state is discussed below.

¹⁸⁵ *Id.*

¹⁸⁶ *Daniel Webster Scholar Honors Program*, UNIV. N.H. FRANKLIN PIERCE SCH. L., <https://law.unh.edu/academics/daniel-webster-scholar-honors-program>.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

Oregon. In January 2022, following a proposal by the Alternative Pathways Taskforce Committee that detailed the need for an alternative pathway to licensure, the Oregon Supreme Court approved the creation of a committee to refine the details of two alternative pathway licensure proposals.¹⁹¹ The first pathway would create an apprenticeship program that would permit applicants to work for 1,000 to 1,500 hours under the supervision of an experienced attorney.¹⁹² The second would allow Oregon law students to spend their 2L and 3L years completing a practice-based curriculum that would allow them to bypass the bar examination.¹⁹³ As of the date of this report, both pathways are awaiting the Oregon Supreme Court’s approval.

New York. The Task Force on the New York Bar Examination was appointed in 2019 to review the impact of the UBE on New York applicants, new attorneys, other bar members, the courts, and diversity in the profession.¹⁹⁴ The Task Force concluded that the “law of nowhere” tested on the UBE does not adequately prepare New York applicants to practice law in the state.¹⁹⁵ The Task Force urged the New York Court of Appeals to create a working group to develop a new bar examination, and specifically

¹⁹¹ Karen Sloan, *Oregon Moves Closer to a Bar Exam Alternative*, REUTERS (Jan. 12, 2022, 3:19 PM), <https://www.reuters.com/legal/litigation/oregon-moves-closer-bar-exam-alternative-2022-01-12/> (“The alternative pathways in Oregon will still require further approval from the court, which has the final say on attorney licensing. But the Tuesday votes clears the way for the Board of Bar Examiners to establish a committee that will nail down the details and implementation.”).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ THIRD REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON THE NEW YORK BAR EXAMINATION, N.Y. STATE BAR ASS’N 1 (2021), <https://nysba.org/app/uploads/2021/03/Task-Force-on-the-New-York-Bar-Examination-FINAL-approved-June-12-2021.pdf>.

¹⁹⁵ *Id.* at 7.

advised the Court that the working group should consider Professor Merritt’s IAALS Report.¹⁹⁶ The Task Force also recommended that New York “consider providing two alternative pathways to admission: (a) a pathway for admission through concentrated study of New York law while in law school; and (b) a pathway for admission through supervised practice of law in New York.”¹⁹⁷ The Task Force’s report explained that minimum competency can “be demonstrated by law school achievement as well as by actual practice experience,” and that “[a]n examination is not necessarily the exclusive means to judge minimum competence.”¹⁹⁸ The decision as to whether or not to move forward with that proposal now lies with the New York Court of Appeals.

II. UTAH’S WORKING GROUP’S FINDINGS

The Working Group finds that the current bar examination is not the only or the best way to ensure that those admitted to practice have the requisite skill to practice law. The Working Group asks the Utah Supreme Court to adopt an alternative pathway to licensure, and it suggests the details of such an alternative path. As detailed below, the Working Group relied heavily upon the IAALS Report’s definition of minimum competence and its building blocks to craft the following recommendations. The Working Group believes its proposal allows applicants to demonstrate minimum competence, protects the public, and immediately addresses valid criticisms of the current bar examination.

¹⁹⁶ *Id.* at 18-19.

¹⁹⁷ *Id.* at 13.

¹⁹⁸ *Id.*

III. RECOMMENDATIONS

The Working Group proposes the following alternative licensure path for applicants to the Utah State Bar.

A. Qualifications for Pursuing the Alternative Licensing Path

An applicant must meet three qualifications to be eligible for the alternative pathway to licensure: (1) the applicant must elect to pursue the alternative pathway at the time of bar application, meaning that an applicant may not simultaneously apply to take the bar exam and follow the alternative pathway; (2) the applicant must have graduated from an ABA-accredited law school no more than five years prior to the date of their application for the alternative pathway; and (3) the applicant must not have sat for a bar examination in Utah or any other jurisdiction in the United States, including all states and territories, in order to pursue this pathway.¹⁹⁹ Notably, these three qualifications do not tie the alternative pathway option to bar passage rates, as was done for the 2020 Emergency Diploma Privilege Rule.²⁰⁰

B. Requirements for Admission Under the Alternative Licensing Path

If an applicant meets the three qualifications, the applicant must complete five requirements to be admitted under the alternative pathway. Specifically, the applicant

¹⁹⁹ The subcommittee designed the second qualification to specifically address the ABA's March 2015 Guidance Memo on Standards 303 and 304, which requires law schools to mandate a student to complete a minimum of six credits of experiential courses prior to graduation for the law school to maintain its ABA accreditation. MANAGING DIRECTOR'S GUIDANCE MEMO: STANDARDS 303(A)(3), 303(B), AND 304, AM BAR ASS'N (2015), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_standards_303_304_experiential_course_requirement_.pdf.

²⁰⁰ Order for Temp. Amendments to Bar Admission Procedures During COVID-19 Outbreak, *supra* note 1.

must: (1) graduate from an ABA-accredited law school; (2) pass all existing Character and Fitness requirements; (3) complete all requirements to demonstrate the twelve building blocks of minimum competence as set forth in the IAALS Report (this includes completing specified coursework, passing a written exam, and completing supervised practice hours requirements); (4) complete a pro bono supervised practice hours requirement; and (5) complete a final survey administered by the Utah State Bar.

Each requirement is more fully detailed below.

1. Graduate From an ABA-Accredited Law School

An applicant must satisfy all requirements for, and graduate with, a Juris Doctor from an ABA-accredited law school. This is also required for an applicant to pursue licensure via the current bar examination.²⁰¹ This requirement ensures that an applicant has been educated by a licensed ABA-accredited law school.

2. Pass All Character and Fitness Requirements

An applicant must successfully pass all existing character and fitness requirements. The purpose of this requirement is to protect the public.²⁰² This

²⁰¹ NATL' CONF. BAR EXAM'RS & AM. BAR ASS'N. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS: 2021 vii (2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/2021-comp-guide.pdf ("Each applicant should be required to have completed all requirements for graduation with a JD or LLB degree from a law school approved by the American Bar Association before being eligible to take a bar examination, and to have graduated therefrom before being eligible for admission to practice.").

²⁰² *Id.* at vii-viii ("The primary purpose of character and fitness screening before admission to the bar is the protection of the public and the system of justice. The lawyer licensing process is incomplete if only testing for minimal competence is undertaken. The public is inadequately protected by a system that fails to evaluate character and fitness as those elements relate to the practice of law. The public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their lawyers.").

requirement works to ensure that an applicant who elects to pursue the alternative pathway will be vetted for any potential concerns regarding that applicant's fitness to practice law just as they would be if they were to take the bar exam.

3. Completion of Requirement to Satisfy the Twelve Building Blocks of Minimum Competency

An applicant must demonstrate minimum competence through the requirements that the Working Group designed to evaluate the candidate's preparation in each of the IAALS Report's twelve building blocks.²⁰³

The Working Group agrees with the IAALS Report's conclusion that a written exam is not the only measure by which minimum competence in a specific area can be assessed and is actually sometimes a poor measure for assessing minimum competence in a specific area, such as "the ability to interact with clients."²⁰⁴ As a result, the Working Group considered various forms of assessment for each building block including successful completion of coursework at an ABA accredited law school, practice hours supervised by a licensed attorney, external trainings developed by industry experts, and other mechanisms to demonstrate minimum competence. Additionally, given the importance of a credible, thorough licensing system, the Working Group viewed redundancy in assessment as positive, rather than negative, and has relied upon redundant assessment in many areas to ensure that attorneys licensed under this system are sufficiently competent to practice law in Utah.

²⁰³ See *supra* Section I.F.

²⁰⁴ Merritt & Cornett, *supra* note 93.

The Working Group’s requirements for satisfying minimum competence pursuant to the twelve building blocks are detailed below.

A. Building Block 1: The Ability to Act Professionally and in Accordance with the Rules of Professional Conduct

The first building block requires an applicant to complete coursework, an exam, and an external assessment.²⁰⁵ The coursework element is satisfied upon the successful completion of a Professional Responsibility course, which is already required in ABA-accredited law schools.²⁰⁶ An applicant must also pass the MPRE. And the applicant must pass the same character and fitness requirements required of those applying to take the bar exam.

B. Building Block 2: An Understanding of Legal Processes and Sources of Law

The second building block requires an applicant to complete coursework and a written exam. The written exam component for this building block will be satisfied by passing an MPT-like essay exam.

MPT-Like Exam. This exam will be a closed-universe exercise that requires an applicant to perform a common lawyering task, such as drafting a letter to a client, a

²⁰⁵ Completion means that an applicant has earned a passing grade in a course for which credit is awarded.

²⁰⁶ The ABA program of legal education requires a law school to “offer a curriculum that requires each student to satisfactorily complete at least . . . one course of at least two credit hours in professional responsibility that includes

substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members”

AM. BAR ASS’N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS: 2022–2023 18 (2022), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2022-2023/2022-2023-standards-and-rules-of-procedure.pdf.

persuasive memorandum, or a contract provision. All necessary law will be included in the case file provided to the applicant, thereby eliminating a memorization requirement. The applicant will be required to read and understand the provided legal material, apply it to a new fact scenario, and present their analysis or argument in writing to demonstrate effective communication skills. Unlike the current MPT, the new exam will not rely on “speeded-ness” as one of its measures of assessment given the artificiality of such a constraint. Rather, applicants will be given three hours to complete the exam; this will provide applicants sufficient time to produce a thorough, thoughtful written product (this is double the time current applicants receive for an MPT on the UBE).

After consulting with psychometricians in the standardized test industry, the Working Group is persuaded that extending the time from ninety minutes to three hours will better reflect what the applicant would produce in legal practice while also minimizing the negative effects of standardized tests. Exam scorers will utilize best practices and industry-leading standards to ensure reliability and consistency between administrations, including a standard exam-taking setting, effective grader training, and calibration.²⁰⁷

The Working Group discussed the development of this kind of written exam with LSAC (the Law School Admission Council), which currently administers the LSAT. LSAC is intrigued and willing to pilot the new exam without a long-term

²⁰⁷ If other jurisdictions utilize this test, we should seek agreement on a cut score to help ensure minimum competence is defined consistently.

contract in place. With LSAC's assistance, or the assistance of a similarly situated testing company, the Working Group estimates that the MPT-like exam could be developed within six months, could be offered more than twice per year, and would cost less than the current bar examination.²⁰⁸

Coursework. The Working Group has identified three categories of required courses that ensure minimum competence under this building block through curricular requirements:

- An applicant must complete all courses listed in Category One. Category One includes the first-year writing experience as defined by ABA Standard 303; an upper-division writing experience as defined by ABA Standard 303; Legal Research; Civil Procedure; Constitutional Law; Contracts; Criminal Law; Property; and Torts.
- An applicant must complete one course from three of the four categories from Category Two. Category Two consists of: Administrative Law; Business Law; Evidence; Legislation and Regulation, Statutory Interpretation, or Legislative Process.
-
- An applicant must complete three of the ten listed courses from Category Three. Category Three consists of the following courses: Alternative Dispute Resolution; Bankruptcy; Conflict of Laws; Criminal Procedure; Estates, Trusts, and/or Wills; Family Law; Federal Courts; Intellectual Property; Commercial Law or Secured Transactions; and Tax.

²⁰⁸ In Utah, an applicant must pay a \$550.00 application fee. Additionally, if the applicant intends to use a laptop, they must pay a \$200.00 laptop application fee. Many applicants also pay for commercial bar examination courses. These courses range in cost: Barbri's course ranges from \$1,999-\$4,199; Themis' course costs \$2,695; and Kaplan's courses are listed at \$2,199 and \$3,999. *Barbri Bar Review*, BARBRI, <https://www.barbri.com/bar-review-course/bar-review-course-details/> (last visited Oct. 22, 2022); *Themis Course Pricing*, THEMIS BAR REV., <https://www.themisbar.com/pricing> (last visited Oct. 22, 2022); *Utah Bar Review Course*, KAPLAN, <https://www.kaptest.com/bar-exam/courses/utah-bar-review> (last visited Oct. 22, 2022). Additionally, working while preparing for the bar examination is negatively associated with passage rates. See Jackson & Cochran, *supra* note 124. Without considering income lost, the current bar examination costs roughly between \$2,749-\$4,949.

Students who graduated in previous years who did not complete sufficient coursework in law school and who want to pursue this alternative pathway are required to take the courses post-graduation. Otherwise, those students must take the current bar examination. No exceptions will be made to the coursework requirements listed above, as these requirements are designed to achieve minimum competence.

C. Building Block 3: An Understanding of Threshold Concepts in Many Subjects

The third building block requires an applicant to complete coursework. This coursework requirement is satisfied by filling the same course requirements detailed in Building Block 2.

D. Building Block 4: The Ability to Interpret Legal Materials

The fourth building block requires an applicant to complete coursework and an exam. The coursework component will be satisfied by completing the same course requirements stated in Building Block 2. The exam component will be satisfied by passing the MPT-like exam.

E. Building Block 5: The Ability to Interact Effectively with Clients

The fifth building block requires an applicant to complete coursework as well as a supervised practice hours component.

Coursework. An applicant will satisfy the coursework requirement by completing six credits of experiential learning as defined by the ABA that all students

are currently required to complete in order to graduate.²⁰⁹

Supervised Practice Hours. The supervised practice hours component consists of 240 total hours. It includes specific hour requirements for pro bono services (50 hours), legal research (40 hours), and client-facing work (20 hours). An applicant may not begin their supervised practice hours until after the last day of final exams in their final semester of coursework. The final semester is defined as the last semester in which an applicant earns credit toward graduation. If an applicant does not graduate because of failing to pass a course and must complete an additional semester of school to graduate, the start date for supervised practice hours will be reset accordingly. All practice hours must be completed within twelve months of the application deadline for Utah bar admission. Supervised practice hours may be completed in or outside the State of Utah so long as the supervisor is qualified to supervise the hours as detailed hereinafter.

An attorney may act as a supervisor if the attorney has: (1) an active Utah Bar license, (2) a minimum of five years as a licensed attorney in any U.S. state or territory, (3) a minimum of two years as a licensed attorney in the State of Utah, and (4) no record of public discipline in any jurisdiction in the United States.²¹⁰ A state or federal court judge also meets the definition of a supervisor, which enables applicants with state or

²⁰⁹ The ABA program of legal education requires a law school to “offer a curriculum that requires each student to satisfactorily complete at least . . . one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement . . .” AM. BAR ASS’N, *supra* note 206.

²¹⁰ See Order for Temp. Amendments to Bar Admission Procedures during COVID-19 Outbreak, *supra* note 1.

federal clerkships to pursue this pathway to licensure.²¹¹ There is also an opportunity to petition for an exception to this supervisory requirement for federal employees, including military members. Supervisors will oversee and sign off on an applicant's work product as was required under the Emergency Order granting diploma privilege to class of 2020 graduates.²¹² Notably, the Working Group is aware of no complaints regarding the practice hours requirement as previously implemented, either from supervisors concerning the workload imposed by supervising or applicants claiming it was overly burdensome to find supervisors.

The supervised practice hours component for this building block will be satisfied through 20 hours of client-facing supervised work, to be completed post-graduation as part of the required 240 supervised practice hours.

F. Building Block 6: The Ability to Identify Legal Issues

The sixth building block requires an applicant to complete coursework, a supervised practice hours component, and an exam. The coursework requirement will be satisfied by fulfilling the same course requirements detailed in Building Block 2 and successful completion of six credits of experiential learning as defined by the ABA and described in Building Block 5. The supervised practice hours component for this building block will be satisfied through the completion of the required 240 hours. The exam component will be satisfied by passing the MPT-like exam.

²¹¹ *Id.*

²¹² *Id.*

G. Building Block 7: The Ability to Conduct Research

The seventh building block requires an applicant to complete coursework and supervised practice hours. To satisfy the coursework component, an applicant must fulfill the same coursework requirements detailed in Building Block 2. The supervised practice hours component requires an applicant to complete 40 hours of legal research as part of their 240 required hours of supervised practice or to complete an additional upper-division course in legal research.

H. Building Block 8: The Ability to Communicate as a Lawyer

The eighth building block requires an applicant to complete specified coursework, supervised practice hours, and the MPT-like exam. The coursework requirement will be satisfied by an applicant's successful completion of a first-year writing course as defined by the ABA Standard 303; an upper-division writing course as defined by the ABA Standard 303, which is required for all students currently graduating from an ABA-accredited law school; and the six credits of experiential learning as described in Building Block 5.²¹³ The supervised practice hours will be satisfied when an applicant completes the 240 hours requirement. The exam component will be satisfied by passing the MPT-like exam.

²¹³ The ABA program of legal education requires a law school to "offer a curriculum that requires each student to satisfactorily complete at least . . . one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised . . ." AM. BAR ASS'N, *supra* note 206. "A law school may not permit a student to use a course to satisfy more than one requirement under this Standard." *Id.*

I. Building Block 9: The Ability to See the “Big Picture” of Client Matters

The ninth building block requires an applicant to complete specified coursework and supervised practice hours. The coursework requirement will be satisfied through an applicant’s successful completion of six credits of experiential learning as defined by the ABA and detailed in Building Block 5. The supervised practice hours will be satisfied when an applicant completes the 240 hours requirement.

J. Building Block 10: The Ability to Manage a Law-Related Workload Responsibly

The tenth building block requires an applicant to complete specified coursework and supervised practice hours. The coursework requirement will be satisfied through an applicant’s successful completion of six credits of experiential learning as defined by the ABA and detailed in Building Block 5. The supervised practice hours will be satisfied when an applicant completes the 240 hours requirement.

K. Building Block 11: The Ability to Cope with the Stresses of Legal Practice

The eleventh building block requires an applicant to complete a six-hour well-being training, which will be created and administered by the Utah State Bar Well-Being Committee based on best practices from industry-leading experts. The Working Group learned that a six-hour course could make a significant impact in improving the well-being of new attorneys. The six-hour course will work to equip new attorneys with evidence-based skills shown to help people in high-stress professions manage challenges in a healthy, adaptive, sustainable, and cognitively supportive way.

L. Building Block 12: The Ability to Pursue Self-Directed Learning

The twelfth building block requires an applicant to complete a one- to two-hour self-directed learning training, which involves the completion of a recorded module that will be developed with experts, including the Utah State Bar's New Lawyer Training Program, the Utah State Bar Well-Being Committee, and industry-leading experts. The module will inform applicants of the Utah resources for self-directed learning and model effective self-directed learning practices.

4. Completion of Pro Bono Requirement

Utah Rule of Professional Conduct 6.1, *Voluntary Pro Bono Services*, states: "Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of pro bono public legal services per year." Each applicant will be required to complete a minimum of 50 hours of pro bono supervised hours. These hours will be subject to the same timing requirements as the 240 supervised practice hours as described in Building Block 5 and will count toward the 240 supervised practice hours.

5. Completion of Final Survey

The final requirement for applicants under this proposed pathway is the completion of a survey. The survey will be designed to gather information from applicants to determine the efficacy of the new pathway to licensure and to provide information for future considerations of modifications to the new pathway to increase its efficacy in ensuring minimum competence. The Working Group will develop survey content and administration procedures using best practices to collect accurate, reliable,

and thorough data that will inform ongoing efforts to create an alternative pathway to licensure that results in a superior method for licensing new attorneys in Utah.

IV. CONCLUSION

The Working Group proposes that the Utah Supreme Court adopt an alternative method to attorney licensure for applicants seeking admission to the Utah Bar. While this pathway will not replace the traditional bar exam, the Working Group believes that the bar examination is neither the best nor the only way to ensure that individuals admitted to practice law in Utah possess the requisite minimum competence to practice law. The Working Group strongly advises the Utah Supreme Court to accept this evidence-backed proposal rather than wait for the NCBE to develop its new bar examination or continue to utilize the bar examination as the sole pathway to licensure.

Dated: [January 23, 2023](#)

Respectfully submitted,

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