The State Bar of California

OFFICE OF THE EXECUTIVE DIRECTOR

180 Howard Street, San Francisco, CA 94105 Leaht.Wilson@calbar.ca.gov

SENT VIA EMAIL

June 30, 2023

Honorable Patricia Guerrero, Chief Justice of California
Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

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

Dear Chief Justice Guerrero and Associate Justices:

On behalf of the State Bar Board of Trustees, I am pleased to transmit to the Supreme Court the Report and Recommendations of the Joint Supreme Court/State Bar Blue Ribbon Commission on the Future of the Bar Exam (BRC or commission). This report is a culmination of nearly two years of research and analysis, 19 meetings informed by impressive presentations from thought leaders in the United States and abroad, discussion and debate among members of the Blue Ribbon Commission, and thousands of comments submitted by interested stakeholders and the general public alike.

On October 26, 2020, the Supreme Court adopted the charter for the BRC, and charged it with:

> [D]eveloping recommendations concerning whether and what changes to make to the California Bar Exam, and whether to adopt alternative or additional testing or tools to ensure minimum competence to practice law. In so doing, the commission will review the results of the California Attorney Practice Analysis and the CAPA Working Group's recommendations; the results of the 2020 National Conference of Bar Examiners practice analysis and its recommendations for the Uniform Bar Exam (UBE) content and format; and the results of additional recent studies on the California Bar Exam conducted the State Bar, including data examining the pass rates of applicants of color. While its work will be grounded in these studies' empirical findings, the commission shall explore other issues to ensure that the exam is an effective tool for determining whether applicants are

> prepared to practice law ethically and competently at a level appropriate for an entry-level attorney.[1]

The BRC met between July 2021 and April 2023 to satisfy this charge, ultimately developing recommendations as related to the California Bar Exam (bar exam) as outlined below.

SUMMARY OF RECOMMENDATIONS

In summary, the BRC generated the following recommendations in response to the Court's charge regarding the bar exam:

- California should develop its own exam and not rely on the NextGen Bar Exam in development by the National Conference of Bar Examiners.
- The exam should focus more heavily on assessment of skills and application of knowledge than on memorization of doctrinal law.
- The exam should test the subject matter content (or knowledge) previously recommended by the CAPA Working Group, with the addition of professional responsibility.
- The exam should test the skills and abilities previously recommended by the CAPA Working Group.
- The Supreme Court should revise the requirement for licensing out-of-state attorneys to allow licensure without sitting for the bar exam if the attorney is licensed in a state that has reciprocity with California, with regard to all California licensees and not simply graduates of ABA-accredited law schools.
- The State Bar shall, with experts in exam development and other specialists, design an exam that is fair, equitable, and minimizes disparate performance impacts based on race, gender, ethnicity, disability, and other immutable characteristics.

In contrast to the detailed recommendations about the exam, the BRC did not develop any recommendation as to "whether to adopt alternative . . . testing or tools to ensure minimum competence to practice law." The BRC received extensive information about, and discussed alternative exam pathways at length, but did not have a majority of members supporting a recommendation to adopt, or not to adopt, an alternative pathway.

The Court is therefore being asked simply to consider the BRC's recommendations regarding the bar exam.

More detail on the recommendations and the research that informed them is included in the report and highlighted in the agenda item presented to the Board of Trustees.

[1] See the Supreme Court's announcement, and full language of the charter on the State Bar's website.

NEXT STEPS

The State Bar looks forward to the Supreme Court's action on the BRC's recommendations, and welcomes the opportunity to develop a new and innovative bar exam that effectively tests the skills and content knowledge of prospective California attorneys. In addition to transforming the content of the bar exam itself, adoption of the BRC's recommendations would allow the State Bar to fully explore new delivery approaches designed to increase exam accessibility, including increasing the frequency with which the exam is given throughout the year. The kind of wholesale reform contemplated by the BRC's recommended direction will require a careful and deliberate execution plan. To help contextualize the commission's recommendations, a brief description of some of the components of a future execution strategy are outlined below.

Exam Development

The State Bar anticipates convening a multidisciplinary steering committee to guide the development of a new exam that focuses on the skills and abilities required for entry level practice and harnesses modern technological tools to test for minimum competence. The exam itself would be constructed by an entity with extensive test development experience under the direction of the steering committee and a team of State Bar staff.

The State Bar will need to launch this effort quickly. As the Court is aware, California currently relies on the NCBE for the multiple-choice portion of the bar exam, known as the Multistate Bar Exam, or MBE. As the NCBE transitions to the NextGen Exam (expected to be deployed for the July 2026 exam), it has agreed that it will continue to make the MBE available to states through the July 2027 exam.[2] In light of existing California law[3] requiring two years' notice of any changes to the bar exam that require substantial modification to the training or preparation required for passage, at a minimum the content map and question type(s) will need to be published by February 2026.

Costs of test development will likely be high, particularly to develop the kind of interactive exam that is required to deliver on the BRC's recommendations. Bar exam expenses are funded solely by the State Bar's Admissions Fund, which is currently operating in a deficit position. As a result, alternative funding sources for test development will be sought. Options include philanthropic funding, equity investment by either the test development vendor or a third-party entity, and/or a State Bar General Fund loan. The Court should feel confident that the State Bar is fully prepared to make a sufficient up-front investment to develop the California bar exam of tomorrow.

[2] The NCBE is considering whether to offer the MBE beyond July 2027. An announcement is expected this summer; for now, the assumption is that the MBE will not be offered after July 2027.
[3] Business and Professions Code section 6046.6.

Alternative Exam Pathway

As noted above, the BRC did not develop any recommendation to the Court as to an alternative exam pathway. As evidenced in the Board's recommendation to the Court submitted on December 1, 2022, regarding extension of the Provisional Licensure Programs, the State Bar Board of Trustees does believe that the bar exam may not be the only appropriate method for determining whether a prospective licensee possesses the minimum competence required of an entry level attorney. As such, and because the BRC had already conducted significant research on the topic, at its May 2023 meeting the Board asked former members of the BRC who had expressed interest in pursuing an alternative pathway to submit a proposal for a non-exam alternative for the Board's consideration. State Bar staff expects the proposal to be submitted to the Board at its September 2023 meeting. Depending on the outcome of the Board's deliberations regarding that proposal, the Board may submit it, or a modified version thereof, to the Court for consideration subsequent to the September meeting.

CONCLUSION

The State Bar thanks the Court for launching this effort and the BRC for the considerable time and effort that resulted in the final report formally submitted today. We look forward to receiving the Court's direction in response to the commission's report, and will embrace the opportunity to develop a new California bar exam should the Court so direct.

Sincerely,

Leah T. Wilson
Executive Director

Enclosure

cc/enc: Ruben Duran, Chair, State Bar Board of Trustees
Brandon Stallings, Vice-Chair, State Bar Board of Trustees
Sunil Gupta, Principal Attorney, California Supreme Court
(These copyholders will receive the letter and enclosure.)

The State Bar *of California*

ATTACHMENT

Blue Ribbon Commission on the Future of the Bar Exam

Report and Recommendations

April 26, 2023

EXECUTIVE SUMMARY

On October 26, 2020, the California Supreme Court adopted the charter for the Joint Supreme Court/State Bar Blue Ribbon Commission on the Future of the California Bar Exam. The commission was "charged with developing recommendations concerning whether and what changes to make to the California Bar Exam, and whether to adopt alternative or additional testing or tools to ensure minimum competence to practice law."[1] The Supreme Court directed the commission to "review the results of the California Attorney Practice Analysis and the CAPA Working Group's recommendations," as well as the results of the 2020 National Conference of Bar Examiners (NCBE) practice analysis, as well the ensuing recommendations for a new bar exam, the results of recently conducted California studies on the California Bar Exam, "including data examining the pass rates of applicants of color. While its work will be grounded in these studies' empirical findings, the commission shall explore other issues to ensure that the exam is an effective tool for determining whether applicants are prepared to practice law ethically and competently at a level appropriate for an entry-level attorney." In addition, in its letter to the State Bar announcing the adoption of the commission charter, the Court noted that "the commission should also be mindful of any useful information that can be gleaned from California's experience with the temporary provisional licensure program to the extent it is relevant to the commission's charge.[2] (See Appendix A for the charter as approved by the State Bar Board of Trustees, and the Supreme Court letter.)

In July 2021, the commission embarked on carrying out their ambitious charge, and immediately began its exploration of two separate paths to licensure – a bar exam and an alternative pathway. The bar exam pathway had to address two fundamental questions: (1) should a bar exam continue to be used as a path to licensure; and (2) if so, should the exam be developed by California, testing California law, or should California adopt the NCBE's NextGen Bar Exam. The bar exam alternative pathway also had two foundational questions (1) is a bar exam alternative an appropriate method to determine minimum competence in California; and (2) if so, which of the following components should be included in a California bar exam alternative pathway: a change to law school curriculum, a post-law school supervised practice program, and assessments, whether exams, simulations, portfolio review or a capstone project. Over the course of seventeen months, the commission heard from jurisdictions in other states and countries, law schools and nonprofit agencies, psychometricians and academics, and those from other fields to learn about the different options for ensuring minimum competence and licensing new lawyers.

---

[1] See the Supreme Court's announcement, https://newsroom.courts.ca.gov/news/california-supreme-court-approves-charter-bar-exam-commission, and full language of the charter recommended by the State Bar Board of Trustees, https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000026229.pdf. Note that the Supreme Court added the words "alternative or," in front of "additional testing or tools.

[2] https://newsroom.courts.ca.gov/sites/default/files/newsroom/2020-10/October%2026%2C%202020_LTR%20SB%20BLUE%20RIBBON%20copy.pdf.

To allow the commission to make progress on their two equally important paths, the commission met in subcommittees for several months, allowing for a deeper exploration into both pathways. Ultimately, the key issues identified by each subcommittee was brought to the full commission for further discussion and possible action.

MOTIONS AND RECOMMENDATIONS

Bar Exam Pathway

After lengthy deliberations, the full Commission recommended continued use of a bar exam to assess minimum competence, and recommended that California develop its own exam, and not rely on the NCBE's NextGen Exam. While some motions include the term "California-specific" exam, the commission clarified that the term does not indicate that federal law will not be covered on the exam, rather, that the exam will be developed in California and not rely on any nationally developed content. There were several separate motions describing the commission's vision for development of a California-developed bar exam.

> **Motion**: The Blue Ribbon Commission recommends that the future, California-developed bar exam, will continue to cover legal theories and principles of general application, which would include federal law applicable throughout the United States and that, for certain subject areas such as Civil Procedure and Evidence, California law and rules may also be applicable.

The motion passed by a vote of 11-0, with seven commissioners recorded as absent from the vote.

While an initial vote moved forward the eight legal topics recommended on the CAPA report, after reviewing the public comment, the Commission circled back after reviewing public comment to include professional responsibility as well.

> **Motion**: In pursuing the use of a California-specific exam reflecting CAPA recommendations, it is recommended that the following eight legal topics be adopted for a new bar exam content outline:
>
> - Administrative Law and Procedure;
> - Civil Procedure;
> - Constitutional Law;
> - Contracts;
> - Criminal Law and Procedure;
> - Evidence;
> - Real Property; and
> - Torts.

The motion passed by a vote of 12-2, with three commissioners recorded as absent from the vote.[3,4]

> **Motion**: The Blue Ribbon Commission recommends keeping the current scope for the subject area, Professional Responsibility (California Rules of Professional Conduct, relevant sections of the California Business and Professions Code, and leading federal and state case law on the subject in addition to the ABA Model Rules of Professional Conduct and ABA Model Code of Professional Responsibility), on the future California bar exam.

The motion passed by a vote of 9-0, with one abstention and eight commissioners recorded as absent from the vote.

> **Motion**: It is further recommended that CAPA's recommendations on skills are incorporated in the new exam:
>
> - Drafting and Writing;
> - Research and Investigation;
> - Issue-spotting and Fact-gathering;
> - Counsel/Advice;
> - Litigation;
> - Communication and Client Relationship; and
> - Negotiation and Dispute Resolution.

The motion passed by a vote of 14-0, with three commissioners recorded as absent from the vote.[5]

> **Motion**: It is recommended that in developing the exam, there should be a significantly increased focus on assessment of skills along with the application of knowledge and performance of associated skills for entry-level practice, deemphasizing the need for memorization of doctrinal law. The precise weight of content knowledge versus skills should be determined after the development of the exam.
>
> The commission further recommends transparency on topics and rules to be tested, including the extent to which candidates are expected to recall such topics and rules or possess familiarity with such topics and rules.

---

[3] On November 17, 2022, following its earlier adoption of Rosenberg's Rules governing the parliamentary procedures for operating Board and subentity meetings, the Board of Trustees adopted changes to the Board of Trustees Policy Manual to allow the chair the ability to vote. Prior to that time, under the Board's interpretation of Robert's Rules of Order, the chair only voted in the event of a tie. That is why, despite the 18 members of the Commission, vote counts for actions taken prior to November 17, 2022, may only total 17.

[4] The breakdown of votes by commissioner can be found here: https://board.calbar.ca.gov/Agenda.aspx?id=16704&tid=0&show=100032993

[5] The breakdown of votes by commissioner can be found here: https://board.calbar.ca.gov/Agenda.aspx?id=16704&tid=0&show=100032993.

The motion passed by a vote of 11-0, with six commissioners recorded as absent from the vote.[6]

> **Motion**: If the Supreme Court adopts the Blue Ribbon Commission's recommendation to develop a California-specific exam, the State Bar of California, in consultation with subject matter experts in exam development and other specialists, shall be tasked to design an exam. The design shall be consistent with the guiding principles adopted by the Blue Ribbon Commission, including crafting an exam that is fair, equitable, and minimizes disparate performance impacts based on race, gender, ethnicity, disability, and other immutable characteristics.

In addition, the commission debated the extent to which those licensed in other states and other countries should be required to sit for the bar exam to gain California licensure. Unable to develop the precise details of such a policy, the commission nonetheless adopted a motion to express its strong interest in allowing for reciprocity vis-à-vis attorneys licensed in other U.S. jurisdictions but felt that more time was needed to assess the impact of the new bar exam vis-à-vis requirements for attorneys licensed in other countries.

> **Motion:** The Blue Ribbon Commission recommends that the Supreme Court revise the requirements for licensed, out-of-state attorneys in good standing to be admitted to California without sitting for the California Bar Exam to the extent that the licensing state provides the same privileges to California-licensed attorneys regardless of educational background and upon which a certain number of years of recent practice be required. The BRC recommends that in establishing the requirements, the Supreme Court explore the minimum number of years of recent practice in another state to establish minimum competence along with a demonstration of ethical and competent practice.

The motion passed by a vote of 8-1, with two abstentions and seven commissioners recorded as absent from the vote.[7]

> **Motion**: The Blue Ribbon Commission recommends that the Supreme Court defer the decision to modify the admissions requirements for foreign attorneys and foreign-educated applicants until the new California bar exam has been implemented.

---

[6] The breakdown of votes by commissioner can be found here: https://board.calbar.ca.gov/Agenda.aspx?id=16704&tid=0&show=100032993.

[7] An original motion regarding reciprocity and a breakdown of votes by commissioner at that time can be found here: https://board.calbar.ca.gov/Agenda.aspx?id=16918&tid=0&show=100035166. The language of this motion was updated following public comment to clarify that the recommendation was for reciprocity, not comity, and only if another state permits all licensed California attorneys to be admitted to their bar on motion, without sitting for a bar exam.

The motion passed by a vote of 12-1, with four commissioners recorded as absent from the vote.[8]

Bar Exam Alternative

While the commission largely reached consensus on the issues surrounding the adoption of a California-developed bar exam, no consensus could be reached on a bar exam alternative pathway. In fact, none of the five separate motions voted on the commission was able to garner a majority of commissioners present and voting. Therefore, the commission is not advancing any recommendation regarding a bar exam alternative.

> **Motion**: The Blue Ribbon Commission approve the recommendation to the State Bar Board of Trustees and the California Supreme Court that California explore a bar exam alternative for licensure to practice law. It is recommended that this exploration of an alternative pathway have a significantly increased focus on assessment of knowledge, skills and abilities for entry-level practice, deemphasizing the need for memorization of doctrinal law. The precise elements of a bar exam alternative (including eligibility and timeframe to completion) should be determined in consultation with experts, including psychometricians, to ensure the pathway is valid and reliable with a standard equivalent to the bar examination. It is further recommended that the alternative pathway shall include the following elements:
>
> **Law School**
>
> Any applicant interested in availing themselves of the alternative pathway would need to complete at least six units of experiential coursework in law school that covers CAPA's skills and abilities. However serious consideration should be given to increasing this experiential education requirement.
>
> **Supervised Practice**
>
> - There shall be a post-law school supervised practice requirement. The exact number of hours required remains to be determined, with the goal of consistency with the exam timeline to licensure;
> - Mandatory and structured supervisor training and oversight to be developed by the regulator shall be required in order to provide consistency in the supervised practice component and ensure that the supervision continues to emphasize the skills and abilities necessary for minimum competence;
> - A to be determined percentage of supervised practice hours may occur during law school; and
> - Equity, disparity and cost issues must be taken into account

[8] The breakdown of votes by commissioner can be found here: https://board.calbar.ca.gov/Agenda.aspx?id=16918&tid=0&show=100035166.

Assessment

- Summative assessment may include a capstone/portfolio, simulated in-person assignments and/or a written exam component
- Scoring and grading must be valid, reliable and conducted by the regulator

With 7 ayes, and 9 nays, the motion failed, with three commissioners recorded as absent from the vote.[9]

Motion: The Blue Ribbon Commission recommends to the State Bar Board of Trustees and the California Supreme Court that California explore a bar exam alternative for licensure to practice law. It is recommended that this exploration of an alternative pathway have a significantly increased focus on assessment of knowledge, skills and abilities for entry-level practice, deemphasizing the need for memorization of doctrinal law. The precise elements of a bar exam alternative (including eligibility and timeframe to completion) should be determined in consultation with experts, including psychometricians, to ensure the data about the pathway indicates it is valid and reliable with a standard equivalent to the bar examination. In conformity with the guiding principles of the Blue Ribbon Commission, equity, disparity and cost issues should be considered in this exploration.

With 8 ayes, and 9 nays, the motion failed.[10]

Motion: The Blue Ribbon Commission recommends in addition to the previously adopted recommendations of the Blue Ribbon Commission to adopt a California specific bar exam, the Blue Ribbon Commission recommends to the State Bar Board of Trustees and the California Supreme Court that California explore an alternative pathway to licensure, addressing the guiding principles adopted by the BRC in October 2021, that assesses the same knowledge, skills, and abilities of the revised bar exam once the exam's assessment format has been decided to ensure protection of the public.

With 3 ayes, 13 nays, and 1 member recorded as absent from the vote, the motion failed.[11]

Motion: The Blue Ribbon Commission recommends in addition to the previously adopted recommendations of the Blue Ribbon Commission to adopt a California specific bar exam, the Blue Ribbon Commission recommends to the State Bar Board of Trustees and the California Supreme Court that California explore an alternative pathway to licensure, addressing the guiding principles adopted by the BRC in October 2021, that assesses the same knowledge, skills, and abilities of the revised bar exam to ensure protection of the public.

---

[9] The breakdown of votes by commissioner can be found here https://board.calbar.ca.gov/Agenda.aspx?id=16829&tid=0&show=100034322.

[10] The breakdown of votes by commissioner can be found here: https://board.calbar.ca.gov/Agenda.aspx?id=16842&tid=0&show=100034415.

[11] The breakdown of votes by commissioner can be found here: https://board.calbar.ca.gov/Agenda.aspx?id=16842&tid=0&show=100034415.

With 5 ayes and 12 nays, the motion failed.[12]

> **Motion**: The Blue Ribbon Commission recommends to the State Bar Board of Trustees and the California Supreme Court that California does not adopt a bar exam alternative for licensure to practice law. It is further recommended that a bar exam alternative be revisited in the future, if necessary, after the implementation of a revised California bar exam.

With 8 ayes and 9 nays, the motion failed.[13]

INTRODUCTION

In February 2017, the Supreme Court of California called on the State Bar to undertake a "thorough and expedited study" of the pass rate for the California Bar Exam (CBX) to include "identification and exploration of all issues affecting California bar pass rates." The State Bar undertook four separate studies to explore the bar exam, culminating in the *Final Report on the 2017 California Bar Exam Studies*, submitted to the Supreme Court on December 1, 2017.[14] As detailed in the *Final Report*, the State Bar conducted the following studies to understand whether the CBX, as administered, was a good tool to assess whether candidates met the minimum competence required of entry-level lawyers, and to explore causes of the declining pass rate[15]:

- *Recent Performance Changes on the California Bar Examination: Insights from CBE Electronic Databases*
- *Performance Changes on the California Bar Examination Part 2: New Insights from a Collaborative Study with California Law Schools*
- *Law School Exam Performance Study*[16]
- *Standard Setting Study for the California Bar Exam*
- *Content Validation Study for the California Bar Exam*

This effort represented the most in-depth analysis of the CBX in some time. In fact, after a series of changes that were enacted throughout the 1970s and 1980s, the structure and passing score for the CBX remained in place since 1987. The only change occurred thirty years later when, in July 2017, the CBX was reduced from a three-day to a two-day format, and the relative weighting of the essay/performance test and Multistate Bar Exam (MBE) portions of the exam were adjusted in response. However, at no time previously in the State Bar's history had either a formal

---

[12] The breakdown of votes by commissioner can be found here: https://board.calbar.ca.gov/Agenda.aspx?id=16842&tid=0&show=100034415.

[13] The breakdown of votes by commissioner can be found here: https://board.calbar.ca.gov/Agenda.aspx?id=16842&tid=0&show=100034415.

[14] Available at: https://www.calbar.ca.gov/Portals/0/documents/reports/2017-Final-Bar-Exam-Report.pdf

[15] These bar exam studies may be accessed at: https://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/California-Bar-Examination-Studies.

[16] This study was referenced in the final report but was not completed until 2018.

standard setting or content validation study been conducted to inform exam content and grading modifications.[17]

Despite the historic nature of that work, it became clear that additional research was needed to ensure the reliability, validity, and fairness of the CBX; the Board of Trustees directed State Bar staff to undertake that research in its January 2018 update to the State Bar's 2017–2022 Strategic Plan.[18] Four separate studies were completed in response to this directive:

- *The Practice of Law in California: Findings from the California Attorney Practice Analysis and Implications for the California Bar Exam* (referred to as the CAPA Report)
- *Differential Item Function Analysis Report*
- *Review of the California Bar Examination Administration and Related Components*
- *A Report on the Phased Grading of the California Bar Examination*.[19]

The CAPA Report is most relevant for purposes of the work of the Blue Ribbon Commission (BRC).

The California Attorney Practice Analysis Working Group (CAPA Working Group) was formed to address a major deficiency in the initial set of studies conducted by the State Bar—specifically that, reacting to the direction of the Supreme Court and the short timeline for completion of the efforts, the content validation study relied heavily on a slightly dated national survey of practicing attorneys to determine what content should be covered on the exam.[20] A practice analysis is a "systematic collection of data describing the responsibilities required of a profession and the skills and knowledge needed to perform these responsibilities." Use of the 2012 national study, it was determined, might not have provided the State Bar with sufficient information to understand what knowledge, skills, and abilities are required for an entry-level lawyer in California. The CAPA Working Group oversaw the process for evaluating "alignment between the content of the CBX and the practice of law in California."[21]

The primary data collection vehicle for CAPA's work was a practice analysis survey. Over 16,000 participants provided roughly 74,000 survey responses. After extensive analysis of the data, comparison with the findings from a practice analysis survey conducted simultaneously by the

---

[17] This background is derived from the 2017 *Final Report* and the agenda item presented to the Board of Trustees on September 6, 2017, titled Decision and Action on Recommendation from Committee of Bar Examiners re California Bar Examination Pass Line – Return from Public Comment, accessible at: https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000019981.pdf.

[18] The Admissions Objectives in Goal 2 of the Strategic Plan were amended to add the following objectives: Objective "b. After the results of the February 2019 Bar Exam are published, evaluate the results of the two-day exam. [Objective] c. No later than June 30, 2019, conduct a California-specific job analysis to determine the knowledge, skills, and abilities for entry-level attorneys. Upon completion, conduct a new content validation study."

[19] See a discussion of each of these reports in *Report on and Approval of Recommendations Regarding the California Bar Exam Studies, Report to the Board of Trustees of the State Bar of California*, May 14, 2020, available at: https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000025918.pdf. The CAPA report contained in the agenda item was labeled draft. The final report is available at: https://www.calbar.ca.gov/Portals/0/documents/reports/2020/California-Attorney-Practice-Analysis-Working-Group-Report.pdf.

[20] This survey was conducted by the National Conference of Bar Examiners.

[21] CAPA Report, p. 3.

National Conference of Bar Examiners (NCBE), and debate among working group members, the CAPA Working Group adopted the following key recommendations:

- Adopt the following construct statement to define the general scope of the bar exam: "The California Bar Examination assesses legal knowledge, competency areas, and professional skills required for the entry-level practice of law and the effective, ethical representation of clients." The working group also recommended that entry-level defined as the first three year of practice.
- Adopt the following eight legal topics for a new bar exam content outline:
    - Administrative Law and Procedure
    - Civil Procedure
    - Constitutional Law
    - Contracts
    - Criminal Law and Procedure
    - Evidence
    - Real Property
    - Torts
- Focus the bar exam on the following skill areas:
    - Drafting and writing
    - Research and investigation
    - Issue-spotting and fact-gathering
    - Counsel/advice
    - Litigation
    - Communication and client relationship

THE FORMATION OF THE BLUE RIBBON COMMISSION ON THE FUTURE OF THE CALIFORNIA BAR EXAM

The May 2020 report to the State Bar Board of Trustees discussing the CAPA Report recommendations concluded: "The results of the CAPA study, in conjunction with the concurrent parallel undertaking by the NCBE, suggest the need for consideration of significant policy issues, including a foundational question of whether California will continue to develop its own bar exam. This question . . . will require a longer-term, deliberative planning process." The Board agreed and directed staff to move forward on partnering with the Supreme Court on the creation of a joint BRC[22].[23]

On July 16, 2020, the Board adopted a draft charter, to be finalized in consultation with the Supreme Court, and proposed the composition of the BRC, including a total number of members

[23] Minutes, May 14, 2020, State Bar Board of Trustees Meeting, available at: https://board.calbar.ca.gov/docs/agendaitem/public/agendaitem1000026246.pdf.

and the category or appointing authority for each.[24] Staff was directed to solicit nominations for submission to the Supreme Court for appointment.

BLUE RIBBON COMMISSION MEMBERS

On April 27, 2021, the Supreme Court announced the appointment of the 19-member BRC.

Member	Category Appointed to Fill
Justice Patricia Guerrero, Chair	Judges
Joshua Perttula, Vice-Chair	State Bar Board of Trustees
Susan Bakhshian	Law School Deans/Faculty
David Boyd	NCBE Testing Task Force
Alex Chan	Committee of Bar Examiners
Ona Dosunmu	California Lawyers Association
Charles Duggan	California Lawyers Association/Young Lawyer
Jackie Gardina	CAPA Working Group
Ryan M. Harrison, Sr.	Council on Access and Fairness
Dr. James Henderson	National Expert on Examinations
Esther Lin	Committee of Bar Examiners
Dr. Tracy Montez	Department of Consumer Affairs
Judge Glen Reiser (Ret.)	Judges
Natalie Rodriguez	Law School Deans/Faculty
Judge Kristin Rosi	Council on Access and Fairness
Emily Scivoletto	CAPA Working Group
Karen Silverman	Expert: Exam Software, Security, and Privacy
Mai Linh Spencer	Law School Deans/Faculty
Amy Williams	California Lawyers Association

Over time, two members rotated off the BRC:

- Justice Patricia Guerrero: Upon her appointment as Associate Justice of the Supreme Court of California (prior to her most recent appointment as Chief Justice of California), Justice Guerrero rotated off the BRC. Joshua Perttula was named Chair. A backfill appointment was not made.
- Ona Dosunmu: Upon transitioning from the role of Executive Director of the California Lawyers Association (CLA), prior to the September 2021 meeting, Dosunmu rotated off the BRC. Jeremy Evans, President of the CLA, was named to replace Dosunmu.

The revised and current roster is as follows:

Member	Category Appointed to Fill
Joshua Perttula, Chair	State Bar Board of Trustees
Susan Bakhshian	Law School Deans/Faculty

[24] The Supreme Court announced its approval of the Charter on October 6, 2020. See https://newsroom.courts.ca.gov/news/california-supreme-court-approves-charter-bar-exam-commission.

David Boyd	NCBE Testing Task Force
Alex Chan	Committee of Bar Examiners
Charles Duggan	California Lawyers Association/Young Lawyer
Jeremy Evans	California Lawyers Association
Jackie Gardina	CAPA Working Group
Ryan M. Harrison, Sr.	Council on Access and Fairness
Dr. James Henderson	National Expert on Examinations
Esther Lin	Committee of Bar Examiners
Dr. Tracy Montez	Department of Consumer Affairs
Judge Glen Reiser (Ret.)	Judges
Natalie Rodriguez	Law School Deans/Faculty
Judge Kristin Rosi	Council on Access and Fairness
Emily Scivoletto	CAPA Working Group
Karen Silverman	Expert: Exam Software, Security and Privacy
Mai Linh Spencer	Law School Deans/Faculty
Amy Williams	California Lawyers Association

CHARGE OF THE COMMISSION

The BRC was charged with "developing recommendations concerning whether and what changes to make to the California Bar Exam, and whether to adopt alternative or additional testing or tools to ensure minimum competence to practice law." The formal charter notes that, "[w]hile its work will be grounded in . . . empirical findings of [various studies on the bar exam], the commission shall explore other issues to ensure that the exam is an effective tool for determining whether applicants are prepared to practice law ethically and competently at a level appropriate for an entry-level attorney including any information that may be gleaned from California's experience with the temporary provisional licensure program to the extent that it is relevant to the commission's charge." The BRC was specifically directed to develop recommendations regarding:

- Whether a bar exam is the correct tool to determine minimum competence for the practice of law, and specifications for alternative tools should the BRC recommend that alternatives be explored and adopted.

  Should the BRC recommend that California retain a bar exam for the purpose of determining minimum competency for the practice of law, the BRC will develop recommendations regarding the following:

  - Whether there is sufficient alignment in the knowledge, skills, and abilities to be tested by the Uniform Bar Exam (UBE) with the knowledge, skills, and abilities required of entry-level California attorneys to argue in favor of its adoption by California.
  - If adoption of the UBE is recommended, whether there should be supplementary content and skills tested or trained on to meet specific California needs, and if so, modalities for that testing or training.

- Revisions to the California Bar Exam if the UBE is not recommended for adoption, addressing:
    - Legal topics and skills to be tested: The BRC will recommend legal topics and skills to be tested on the bar exam and provide specifications for supplementary testing or training for topics not recommended for inclusion on the exam itself.
    - Testing format: In light of the legal topics and skills to be tested, the BRC will determine the testing format and design of the exam. The BRC will expressly consider whether the examination, including any of its subparts, should be administered online and/or in-person.
    - Passing score: The BRC will review the appropriateness of the current bar exam pass line and whether it should be changed.

INITIAL MEETINGS AND ADOPTION OF A MISSION STATEMENT

The BRC held its first meeting on July 6, 2021. During its first three meetings, the BRC educated itself on the current format of the bar exam, the purpose of professional licensure exams, the plans for the NCBE's NextGen Bar Exam, different test format and delivery options, the recommendations of the CAPA Working Group, and alternative approaches to assessing minimum competence. As a precursor to breaking off into two subcommittees, one to delve more in depth into the exam pathway and the other to explore options for bar exam alternatives, the BRC adopted a set of guiding principles in the form of a mission statement intended as an overlay to all future discussions. The initial version of the mission statement presented to the commission for input at its September 2021 meeting was as follows:

> In carrying out its charge to develop recommendations concerning whether and what changes to make to the California Bar Exam, and whether to adopt alternatives or additional testing tools to ensure minimum competence to practice law, the Blue Ribbon Commission on the Future of the California Bar Exam is guided by the following principles:

- Admission to the State Bar of California requires a demonstration of knowledge, skills, and abilities currently required for the entry-level practice of law, otherwise referred to as minimum competence.
- Admission to the State Bar of California requires minimum competence in professional ethics and professional responsibility.
- Criteria for admission to the State Bar of California should be designed to ensure protection of the public.
- The recommended examination, or examination alternative, should be evidence-based.
- Accessibility of the examination, or examination alternative, should be an important consideration in developing the recommended approach.
- The recommended examination, or examination alternative, should minimize disparate performance impacts based on race, gender, ethnicity, or other immutable characteristics.

As a result of the input of the commissioners, the fifth bullet was modified to provide greater clarity as to the goals of an "accessible" exam or exam alternative. That bullet was changed to read:

- Fairness and equity of the examination or examination alternative, should be an important consideration in developing the recommended approach. Fairness and equity include but are not limited to cost and the mode and method of how the exam or exam alternative delivered or made available.

In addition, two members of the BRC suggested expressly adding civility to the mission statement, possibly alongside professional ethics and professional responsibility as something that individuals should be competent in for admission to the bar. Following that discussion, and additional comments, the mission statement was revised to add the following closing paragraph:

> In adopting these guiding principles, the Blue Ribbon Commission does not intend to outline all characteristics which are important to set the foundation for the successful practice of law and the protection of the public. Nonetheless, the Blue Ribbon Commission is committed to promoting the highest standards of integrity, civility, and professionalism in the legal profession, and its members will also be guided by these more general objectives.

The adopted version of the mission statement, incorporating these two changes, is included as Appendix B.

The BRC, either as a whole or through its subcommittees, convened 17 times through the end of 2022 to gather information and develop recommendations to the State Bar of California Board of Trustees and the Supreme Court consistent with its charge. In 2023, the BRC met twice—once to review a draft report that went out for a 30-day public comment period and again to meet and revise recommendations based on public comment. To avoid unnecessary confusion, this report refers only to the BRC regardless of whether the presentation was made to, and the discussions held by, the full BRC or one of its subcommittees. The only instances where a distinction is made between the BRC and a subcommittee is if the full BRC adopted a recommendation different than that presented by the subcommittee.

The remainder of this report describes the two main issues researched, analyzed, and debated over the course of the BRC's tenure: the use of a bar examination to establish minimum competence, and an alternative measure to assess minimum competence.

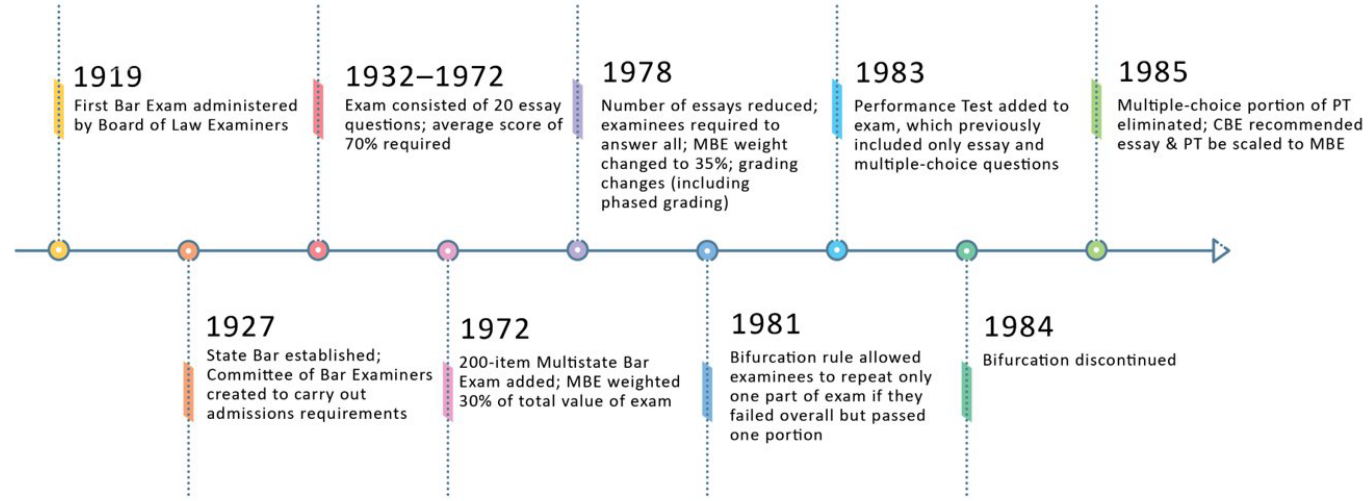
THE BAR EXAMINATION AS A MEASURE OF MINIMUM COMPETENCE

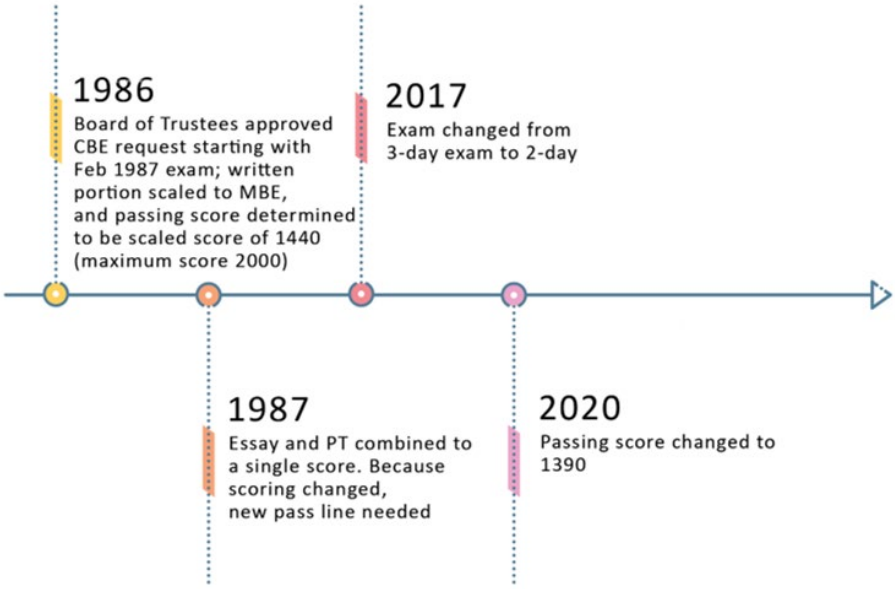
The BRC was tasked with determining whether a bar exam is the correct tool to assess minimum competence for the practice of law and whether to adopt an alternative, or additional testing or tools to ensure that minimum competence standards are met. In carrying out this task, the BRC examined the current bar exam, recommendations to revise the knowledge, skills, and abilities

tested on the bar exam, and efforts concurrently underway to revise the Uniform Bar Exam developed by the National Conference of Bar Examiners.

THE CURRENT CALIFORNIA BAR EXAMINATION

The State Bar administered its first bar examination in 1919. Over the 100-plus years of exam administration, only the 1970s and 1980s stand out as reflecting periods of exploration and change.





The Makeup and Administration of the Exam

The current bar examination is comprised of three components: five essay questions, one performance test, and 200 multiple-choice questions. The multiple-choice questions, known as the Multistate Bar Exam (MBE), are developed by the NCBE and used by California and nearly

every other U.S. jurisdiction. The exam is generally administered over two days, with 12.5 hours of testing. The number of days and testing hours may be extended for applicants with disabilities who require additional time to have equal access to the exam. Day one consists of the California portion of the exam, also referred to as the written portion. On this portion of the exam, applicants must complete five one-hour essay questions and one 90-minute performance test. The MBE is administered on day two. Attorneys licensed in other U.S. jurisdictions for at least four years are not required to sit for the MBE to become licensed in California; these attorney applicants must sit for and pass only the California portion of the exam.

There are 13 subjects tested on the California Bar Exam, 7 of which are also tested on the MBE.[25] The California bar exam is administered in-person, twice a year: in February and July. There are approximately 12 to 16 test centers made available across the state for each administration. During the pandemic, the State Bar administered the bar exam remotely. Because the NCBE owns the MBE, it establishes strict controls over how the exam may be administered. In response to the COVID-19 pandemic, NCBE authorized remote delivery of the NCBE for the October 2020,[26] February 2021, and July 2021 Bar Exams. The NCBE did not authorize remote administration of the exam after July 2021, citing exam security and examinee equity concerns, so California was required to return to an in-person administration.

Who Are the Exam Takers?

The exam populations differ in February and July. February includes a larger proportion of repeat exam takers (67 percent) and typically comprises 5,000 exam takers. In July, approximately 8,700 sit for the exam, and the majority (70 percent) are first-time takers. Exam takers come from American Bar Association (ABA)-approved law schools in California, California law schools accredited by the Committee of Bar Examiners, California law schools registered with the State Bar of California, out-of-state law schools, and California's Law Office Study Program. Exam takers also include attorneys from other states, foreign-educated law students, and attorneys barred in other countries. The highest percentage of takers, 57.2 percent, are from California ABA law schools and California accredited law schools.

Between 2001 and 2020, the proportion of nonwhite applicants rose steadily, from roughly 30 percent in 2001 to over 50 percent in 2020. There has been a steady upward trend of female applicants since 2001; approximately 55 percent of first-time takers were female in 2020, up from 48 percent in 2001. Nonwhites represent close to 45 percent of applicants from out-of-state ABA and other law schools, including law schools accredited by or registered with the State Bar of

[25] The subjects tested on the written portion of the bar exam are: business associations, civil procedure, community property, constitutional law, contracts, criminal law and procedure, evidence, professional responsibility, real property, remedies, torts, trusts, and wills and succession. The MBE tests knowledge of: civil procedures, constitutional law, contracts, criminal law and procedure, evidence, real property, and torts. A description of the scope of the topics is accessible on the State Bar's website at: https://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/California-Bar-Examination-Scope.

[26] The July 2020 bar exam was delayed due to the pandemic as states grappled with how to administer the exam early in the pandemic and the need—for most states—to transition, for the first time, to a remote delivery system.

California in the past 10 years, which is slightly higher than the proportion of nonwhites in California law schools (40 percent).[27]

The age of applicants differs significantly across school types—more so than the differences in race/ethnicity and gender. More than 80 percent of exam takers from ABA law schools (both from California and out-of-state) are under the age of 30, compared to less than 30 percent of those from California non-ABA law schools.

Passage rates on the CBX have declined steadily over the past decade. In his 2018 study, *Performance Changes on the California Bar Examination Part 2: New Insights from a Collaborative Study with California Law Schools*, psychometrician Roger Bolus found that between 2008 and 2016, the percentage of test takers passing the exam declined from 62 percent to 44 percent—a drop of 18 percentage points. He remarked: "The reasons for the decline have been subject to extensive debate. Some stakeholders have attributed the decline to changes in the examination itself, others have argued that changes in the qualifications and credentials of bar examinees may have contributed. Still others have suggested that additional factors explaining this decrease in pass rates may include changes in law school curriculums, or shifts in undergraduate educational practices or technology." The study found evidence that systematic and measurable changes in student demographics and examinee credentials over the study period help explain some portion of the decline in bar scores and passage rates. Dr. Bolus notes, "Depending on the specific bar performance measure examined (i.e., passage rates vs. test scores), changes in the antecedent credentials and other characteristics account for between roughly 20 to 50 percent of the actual decline in bar performance during the period."

Pass rates differ between first-time and repeat takers. Between 2001 and 2020, first-time takers in July had the highest pass rates on average, ranging from 54 to 74 percent. Repeat takers in July had the lowest pass rates, ranging from 13 to 42 percent. Over this same period, when holding race constant, there are negligible differences in pass rates between male and female July takers from ABA law schools. The gap in pass rates between white and nonwhite applicants persisted throughout this period at around 15 percentage points for this same group of July takers from ABA law schools. Black and Hispanic/Latino exam takers have consistently passed at a lower rate than other racial and ethnic groups.

WHAT SHOULD BE TESTED: THE CALIFORNIA ATTORNEY PRACTICE ANALYSIS

A practice analysis, sometimes referred to as job analysis, is "the systematic collection of data describing the responsibilities required of a profession and the skills and knowledge needed to perform these responsibilities." Data collected from a practice analysis are evaluated for the purpose of determining how to define the tasks performed and the underlying knowledge, skills, and abilities (KSAs) to perform those tasks required at the entry-level for a profession. Documenting the tasks and KSAs required of entry-level professionals is an essential step in the

[27] The State Bar of California began collecting disability and veteran status as part of the demographic questions in 2021. We are therefore unable to report trend data over 20 years.

development of any professional licensure exam. A practice analysis helps ensure there is a connection between the content of an exam and the actual practice of the licensees. As noted above, although the State Bar has administered the bar examination since 1919, no California practice analysis had ever been initiated until the CAPA Working Group's formation in 2018. [28]

As the primary data collection vehicle, the CAPA Working Group developed two surveys that were launched concurrently. The traditional practice survey asked the survey participant to recall their experience working in different domains during the past 12 months, while the Experiential Sampling Method survey comprised a short-real time inquiry into what participants were working on the moment they received the survey question, rather than recalling work history over the past 12 months. With over 16,000 participants providing approximately 74,000 responses, the combined methods created a robust sample of detailed data on attorney practice. After an extensive analysis of survey results and taking into account expert observations about the state of legal practice in California, the CAPA Working Group identified the following eight legal areas as critical for demonstrating minimum competence: Civil Procedure, Torts, Contracts, Evidence, Criminal Law and Procedure, Administrative Law and Procedure, Constitutional Law[29] and Real Property. This represents a reduction of subject matters from the 13 currently tested on the bar exam. In addition to the subject areas (the knowledge), the practice analysis provided substantial insight into the skills and abilities required of entry-level attorneys. Based on that data, the CAPA Working Group recommended that the California bar exam assess the following competencies: drafting and writing, research and investigation, issue-spotting and fact-gathering, counsel/advice, litigation, establishing the client relationship, maintaining the client relationship and communication. Of these competencies, it was determined that only three are assessed by the current bar exam.

THE NATIONAL CONFERENCE OF BAR EXAMINER'S NEXTGEN BAR EXAM

As California was beginning to explore needed changes to its bar exam, the NCBE began examining the Uniform Bar Exam (UBE).[30] NCBE formed a testing task force and conducted its own updated practice analysis to assist in the development of a new bar exam, referred to as the NextGen bar exam. The NCBE gathered stakeholder feedback in the initial phases of this study; this feedback guided many of its exam design decisions that reflect the following principles: greater emphasis should be placed on assessing lawyer skills that reflect real-world practice and the types of activities performed by newly licensed attorneys, the exam should remain affordable,

---

[28] For further background on how the CAPA Working Group was formed, the full report can be found here: https://www.calbar.ca.gov/Portals/0/documents/reports/2020/California-Attorney-Practice-Analysis-Working-Group-Report.pdf

[29] The application of observations in and about the practice of law resulted in, for example, keeping constitutional law in the top eight, even though survey results ranked this area lower, and determining that Professional Responsibility could be tested, taught, or otherwise assessed outside of the bar exam environment even though it ranked high in the survey results.

[30] Although California uses only one NCBE testing instrument as part of its bar exam, the MBE, there are two other components many other states use: the Multistate Essay Exam (MEE) and the Multistate Performance Test (MPT). Together, these three components are referred to as the Uniform Bar Exam, or UBE.

fair, and accessible to applicants, and, for UBE jurisdictions, score portability should be maintained.

The BRC discussed the NextGen bar exam on July 6, 2021; September 1, 2021; October 7, 2021; and February 8, 2022. In September 2021 the BRC evaluated the reasons for and against California adoption of the NextGen bar exam.[31]

Some of the identified reasons for adopting the NextGen Exam included:

- NCBE's use of professional test developers to design, develop, and pretest the exam, which helps ensure a high-quality product that is valid and reliable,
- Potential for UBE score portability—providing California bar exam takers the ability to have their exam scores recognized in other jurisdictions such that they can be admitted in those other jurisdictions without sitting for another bar exam,
- NCBE's plan to limit the test environment to third-party test centers, which would eliminate the complexity for California of contracting for and managing hotel sites,
- The KSAs derived from the NCBE attorney practice analyses are comparable to California's, so the exam is likely to test the areas that entry-level attorneys need to know to practice effectively in California.

Arguments against adoption included:

- California would have greater flexibility in the policy considerations related to the exam if it did not adopt the NextGen bar exam, such as whether to test remotely or not, or whether to offer the exam more than twice a year.
- California-specific content will not be covered on the NextGen bar exam, nor would California be in a position to dictate or adjust the exam content (e.g., testing cultural competencies, or emphasizing administrative law or litigation). An example of California content that would not be included on the NextGen bar exam includes the California Code of Civil Procedure which is more complex and contains more rules and sources of authority for rules, compared to other states.
- The NextGen bar exam format will use item types that have never been used on a bar exam. The plan is for the NextGen bar exam to use realistic scenarios that are integrated as item sets. An *item set* will consist of a collection of test questions based on a single scenario or stimulus, where the questions pertaining to that scenario are developed and presented as a unit. Questions within this unit, may include multiple-choice, essay questions, or performance tasks.

[31] Subsequent to the BRC deliberations about NextGen adoption, additional decisions have been made about how the exam will be administered: the exams will be computer-based and administered at jurisdiction-managed facilities or at computer test centers managed by a suitable vendor. The exam may be reduced from a two-day exam to a one-day exam if the necessary validity and reliability can be maintained, but it will continue to be offered only twice per year.

- The NCBE has not yet clarified how the new exam would or could be administered in a manner that accommodates those who cannot test on a computer but have made it clear that the exam will allow individuals to display their aptitude and that NCBE will provide materials based on jurisdiction determinations for candidates' needs. Given the current design plans for the NextGen bar exam, the NCBE will eliminate the exam components currently used (the MPT, the MEE, and the MBE). Jurisdictions will be required to adopt the NextGen bar exam as a whole or to develop their own exam. For California, the option to continue its current practice, that is, to procure the MBE and to continue developing the essays and performance tests, will no longer be viable once the NextGen bar exam is implemented.
- The BRC was not able to view NextGen bar exam sample questions; considerations about what the exam promised to address were based on what was known at the time.

As part of this discussion and relatedly, the BRC identified arguments in support of and against the development of a California-specific exam.

Arguments in favor included:

- The exam would test California law and allow precise alignment with the KSAs based on the CAPA recommendations.
- California would have the flexibility to develop a creative, innovative approach to exam delivery and frequency.
- California would no longer be beholden to the decisions of the NCBE for a portion (or all) of the exam.

Arguments that weighed against a California-developed exam included:

- The bar exam is currently scaled to the MBE (multiple choice) to ensure stability and consistency in performance across exams. It will be challenging to develop a psychometrically sound solution to ensure the continuing reliability and consistency of the exam independent of the NCBE (but the challenge is readily addressed through equating).
- Creating a California exam would require the development of a considerable bank of questions and could take significant time.
- Implementation of a California-developed exam would require continued assessments to ensure that the exam is measuring minimum competence.
- The possibility for applicants to transfer their exam scores for admission in other jurisdictions would not so readily exist.

DISCUSSION OF LICENSURE EXAMINATIONS

Before adopting a recommendation as to whether to transition to the NextGen bar exam or to develop a new California exam, the BRC considered various issues in professional licensure, principally dealing with licensure examinations.

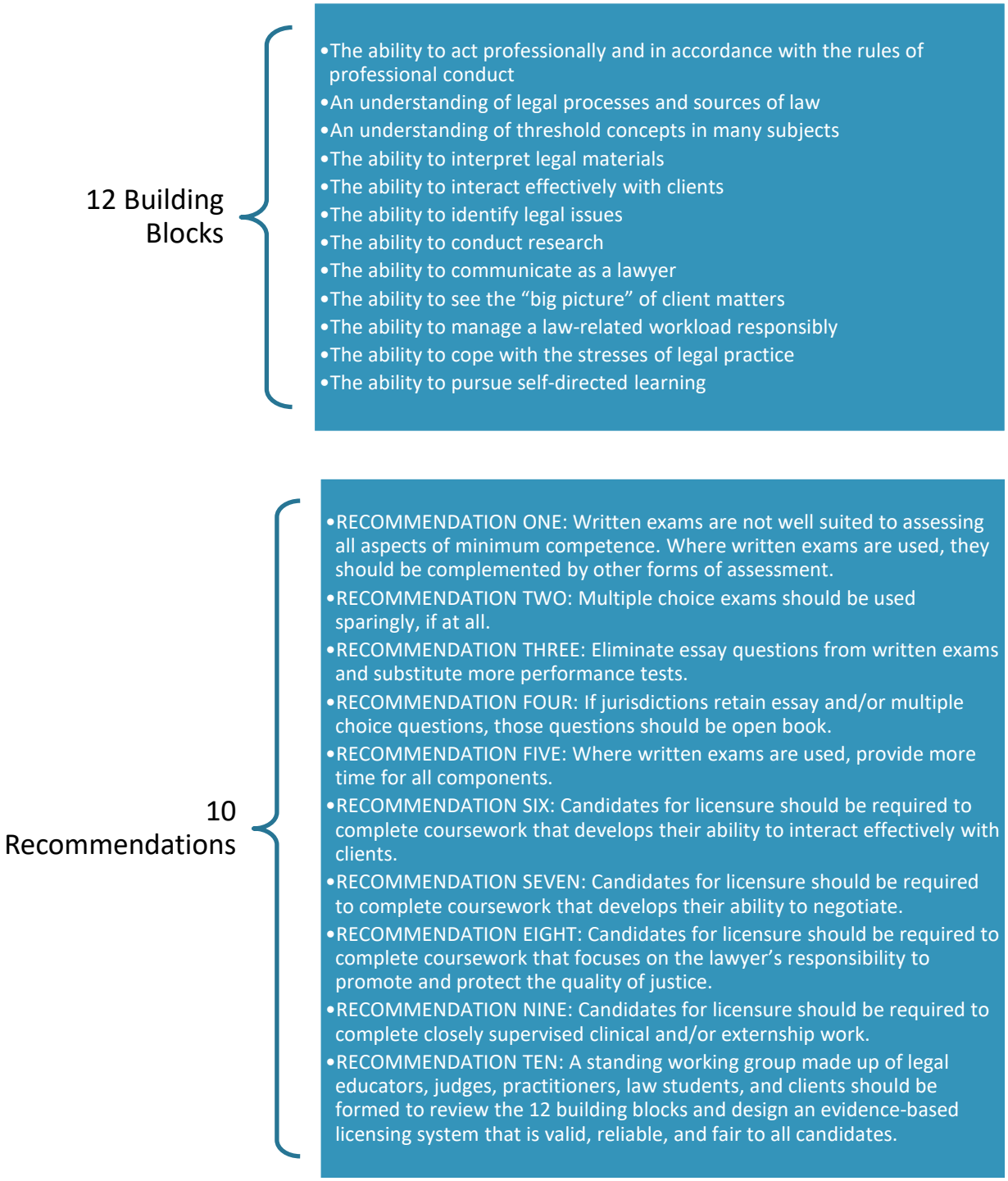
Purpose of Professional Licensure

Licensure is "the process by which an agency of government grants permission to persons to engage in a given profession or occupation by certifying that those licensed have attained the minimal degree of competency necessary to ensure that the public health, safety and welfare will be reasonably well protected."[32] Because there are many advantages that licensing provides, such as protecting the public from unqualified and unscrupulous individuals, status and recognition, and economic power by restricting entry into a profession or occupation, the licensing entity must adhere to guidelines and standards to ensure the integrity, validity, and fairness of any barrier to gaining entry to the profession or occupation.

With respect to attorney licensing in California, the State Bar grants applicants permission to engage in the practice of law by certifying that they have attained the minimum competence necessary to ensure that the public health, safety, and welfare will be reasonably protected. The California Bar Exam is developed in adherence to the Standards for Educational and Psychological Testing, standards that are widely used in the development of licensure exams.

Recently, scholars have been examining bar exams and have been highly critical of the emphasis of traditional bar exams on rote memorization. In its efforts to understand how a bar exam of the future might best be constructed, the commission explored with Deborah Merritt her study and report on *Building a Better Bar*, which distills minimum competence into 12 building blocks and includes recommendations for evidenced-based lawyer licensing based on those foundational components.

[32] Tracy A. Montez, PhD, Division Chief, California Department of Consumer Affairs, Presentation to the Blue Ribbon Commission, September 1, 2021, https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000027964.pdf.



Exam Formats, Question Types, and Delivery Modes—Impact on Accessibility, Fairness, and Performance

There are a wide variety of exam formats and question types that are used in licensure examinations. Determining what types of questions to use on an exam and what exam format should be used, such as testing through oral exam, written exam, or simulation, requires examining the intent of the exam. Licensing exams must provide a reliable method for identifying practitioners who are able to practice safely and competently. These exams need to test on the

tasks and knowledge required for entry-level practice. As set forth in its mission statement, the BRC was also committed to exploring whether certain question types or formats may be more fair or equitable or whether they may be more or less likely to lead to disparate performance based on race, gender, ethnicity, or other immutable characteristics.

Similarly, there are a variety of exam delivery options for the bar exam, paper-based, computer-delivered, oral exams, simulations, remotely delivered, at test centers, and open- and closed-book. The BRC also began an exploration of whether different delivery options could impact fairness and equity, the ability to access the exam, and whether the delivery methods were more or less likely to result in disparate performance.

In trying to ensure fairness, equity, and accessibility, the BRC also discussed the frequency of examinations. Exam formats, question types, and delivery methods that allow frequent or on-demand testing create a much more accessible option for exam takers. But if the exam were to remain structured as it is today, the administration of more frequent exams would create a significant burden. Among other things, in-person exams can be costly and require a significant amount of planning and resources making it extremely difficult to administer them more than twice a year; and the number of essay questions developed would need to be increased exponentially to maintain the exam's reliability and integrity. If the exam was delivered differently, or different question types or exam formats were used, these issues could be more easily addressed.

BAR EXAM RECOMMENDATIONS

Reflecting its consideration of both the content and exam modality issues raised during discussions regarding the NextGen and California-developed bar exams as well as professional licensure examinations more broadly, on February 8, 2022, the Exam Subcommittee adopted a motion that the full BRC recommend to the State Bar Board of Trustees and the Supreme Court pursuing a California exam in lieu of the NextGen bar exam. The subcommittee did not develop a consensus on specific aspects of the future California bar exam, such as whether it should be remote, or in-person, or whether California should adopt reciprocity. The subcommittee did recommend further exploration of issues such as reciprocity and portability and endorsed the pursuing State Bar's plan to test different modality issues and assess impacts on applicant performance. The subcommittee also recommended that staff continue to monitor the NCBE's progress on the development of the NextGen bar exam.

The BRC discussed this recommendation at its March 2022 meeting. The BRC struggled with whether it had the necessary information or was in a position to recommend specifics on exam and question design. The BRC wanted to ensure that if California were to develop its own exam, the exam format and question design avoid potential discriminatory bias, meet universal design standards, result in an exam that is fair and equitable free of bias, while ensuring compliance with the Standards for Educational and Psychological Testing.

The BRC also grappled with developing recommendations regarding various exam administration issues, including remote versus in-person testing and open- versus closed-book formats. As a result, the BRC sought clarification about the scope and breadth of the recommendations the Supreme Court would find most useful if the BRC were to recommend a California developed bar examination. In response, the Supreme Court requested that the BRC identify:

- What specific knowledge (subjects) should be tested?
- Which skills should be tested?
- What percentage of exam should test knowledge versus skills?
- Do attorneys from other jurisdictions need to sit for the full exam?

On April 6, 2022, following the clarification from the Court about the anticipated scope of recommendations should the BRC recommend that California develop its own exam, the BRC rejected the idea of adopting the National Conference of Bar Examiner's re-engineered Uniform Bar Examination (the NextGen bar examination). Factors that contributed to this decision included the potential for remote-testing and for open-book exams, which were options that would not be available on the NextGen bar exam, and the opportunity to be thoughtful and use available data to identify an exam format, question types, and delivery options consistent with the adopted mission statement of the BRC. In addition, the opportunity for innovation appeared to appeal to the BRC as well.

Members of the public questioned the idea of a "California-specific" exam during the public comment period. There was confusion as to whether the Blue Ribbon Commission meant to exclude federal law on the exam entirely. When the group met to analyze the major themes from public comment, a clarifying motion was made to address this question. The intention of the group was never to forgo testing on federal law, rather, to develop the exam in California without using nationally developed content.

> **RECOMMENDATION**: The Blue Ribbon Commission recommends that the future California-developed bar exam will continue to cover legal theories and principles of general application, which would include federal law applicable throughout the United States and that, for certain subject areas such as Civil Procedure and Evidence, California law and rules may also be applicable.

Following discussions about whether the list of subject matters identified by CAPA was complete, the BRC's recommendation was that the exam test the KSAs previously recommended by the CAPA Working Group. The specific language of the motion adopted on by the BRC on April 6, 2022, was as follows:

RECOMMENDATION: In pursuing the use of a California-specific exam reflecting CAPA recommendations, it is recommended that the following eight legal topics be adopted for a new bar exam content outline[33]:

- Administrative Law and Procedure;
- Civil Procedure;
- Constitutional Law;
- Contracts;
- Criminal Law and Procedure;
- Evidence;
- Real Property; and
- Torts.

When the report returned from the 30-day public comment period, the BRC reviewed the extensive comments related to what topics the CAPA working group, and ultimately the BRC recommended be included or excluded in the next iteration of the bar exam. At the April 26, 2023 meeting after taking into consideration the public comment, the group concluded that, even if future attorneys in California cover ethics and professional responsibility on other exams and courses, the exclusion of this topic on the future California bar exam was unwise given the topic's weight and import in the profession. Thus, this additional motion was made:

> **RECOMMENDATION**: The Blue Ribbon Commission recommends keeping the current scope for the subject area, Professional Responsibility (California Rules of Professional Conduct, relevant sections of the California Business and Professions Code, and leading federal and state case law on the subject in addition to the ABA Model Rules of Professional Conduct and ABA Model Code of Professional Responsibility), on the future California bar exam.

> **RECOMMENDATION:** It is further recommended that CAPA's recommendations on skills be incorporated in the new exam:
> Drafting and Writing;
> Research and Investigation;

[33] Time was dedicated to discussing the possibility of reevaluating some of the areas that were not included in CAPA's recommended knowledge areas, in particular, whether business associations should be added. One member argued that knowledge of this subject matter was essential to the practice of law today, and that there was sufficient survey data to support including it as a bar exam topic. Members of the CAPA working group who also served on the BRC explained the rigor applied in finalizing the list of recommendations, such as criticality (the degree of harm—legal, financial, psychological, or emotional—that may result for clients and the general public if an attorney is not proficient in a specific area), frequency with which an attorney would be expected to performed the work activity or apply the legal topics in their practice, and the point in legal careers at which attorneys were first expected to perform that competency. The commission strongly supported adopting the knowledge areas as recommended by the CAPA Working Group. The BRC also spent time discussing whether negotiation, remedies, and dispute resolution should be included as skills to be tested on a future bar exam, despite not being included within the CAPA recommendations. After considerable debate, the BRC voted to include negotiation and dispute resolution as skills to be incorporated on the new bar exam.

Issue-spotting and Fact-gathering;
Counsel/Advice;
Litigation;
Communication and Client Relationship; and
Negotiation and Dispute Resolution.

RECOMMENDATION: It is recommended that in developing the exam, there should be a significantly increased focus on assessment of skills along with the application of knowledge and performance of associated skills for entry-level practice, de-emphasizing the need for memorization of doctrinal law. The precise weight of content knowledge versus skills should be determined after the development of the exam. The commission further recommends transparency on topics and rules to be tested, including the extent to which candidates are expected to recall such topics and rules or possess familiarity with such topics and rules.

In light of the fact that the members of the commission felt they lacked the expertise to make specific recommendations about the design of the exam that are psychometrically sound, satisfy testing standards, and the commission's mission statement, the commission made an additional motion, not addressing a specific question posed by the Supreme Court but instead reflecting a set of overarching principles:

RECOMMENDATION: If the Supreme Court adopts the Blue Ribbon Commission's recommendation to develop a California-specific exam, the State Bar of California, in consultation with subject matter experts in exam development and other specialists, shall be tasked to design an exam. The design shall be consistent with the guiding principles adopted by the Blue Ribbon Commission, including crafting an exam that is fair, equitable, and minimizes disparate performance impacts based on race, gender, ethnicity, disability, or other immutable characteristics.

The Supreme Court's final question on whether attorneys from other jurisdictions need to sit for the full exam is addressed in the following section.

RECIPROCITY, COMITY, AND PORTABILITY: CAN I USE MY PASSING BAR EXAM SCORE FOR ADMISSION TO THE BAR OF ANOTHER STATE; CAN I BE ADMITTED TO PRACTICE IN CALIFORNIA BASED ON MY PASSING SCORE IN ANOTHER STATE?

The charge of the BRC included developing recommendations about what the requirements should be for licensing attorneys from other U.S. jurisdictions or other countries. The BRC initially focused on this issue in the context of a bar exam alternative, and whether such an alternative could be an option for attorney applicants from other jurisdictions or for foreign-educated applicants.

As the BRC's conversations evolved and as it became clear that it would not reach consensus on an exam-alternative pathway, the BRC refocused the question on whether attorneys licensed in other jurisdictions should be obligated to sit for the bar exam to be licensed in California.

PORTABILITY

In jurisdictions that administer the Uniform Bar Examination, portability allows applicants to transfer their scores from one jurisdiction to another. Portability refers to the ability of examinees who take an exam, such as the UBE, to transfer that score to another jurisdiction to seek admission there. The concept of portability relies on the fact that the same exam is being administered in all participating jurisdictions. Jurisdictions that allow portability via the UBE require that the applicant meet the minimum pass score of that jurisdiction. All UBE jurisdictions establish a maximum age of transferred score, varying between 25 months and five years, with 36 months (or three years) being the most common policy across the states. In some jurisdictions, applicants must also satisfy jurisdiction-specific exam requirements in addition to having a passing score. Because the BRC voted to recommend a California-specific exam versus implementing the NextGen bar exam, portability is likely not an option for California.

RECIPROCITY (ALSO REFERRED TO AS ADMISSION ON MOTION)

Jurisdictions with reciprocity allow those licensed in one state to become licensed in another state without sitting for a bar exam. As the name implies, reciprocity requires that both states offer the same privileges to one another's attorneys. Today, in approximately 20 states, licensed attorneys are not required to sit for the exam and can be "admitted on motion." As described above, most states that offer reciprocity limit that reciprocity strictly to attorneys graduating from ABA law schools. Only a handful of states offer reciprocity to non-ABA law school graduates. California does not have reciprocal agreements with any other jurisdictions. California requires that all attorneys seeking licensure in the state sit for the California bar exam (at least the one-day exam).[34]

One of the complicating factors with reciprocity in California is that nearly all jurisdictions in the U.S. and its territories require applicants for licensure to have a Juris Doctor (JD) from an ABA-approved law school; graduates from California-accredited and registered law schools are not eligible to sit for the bar exam in these jurisdictions. Most states will not recognize the state's non-ABA graduates.

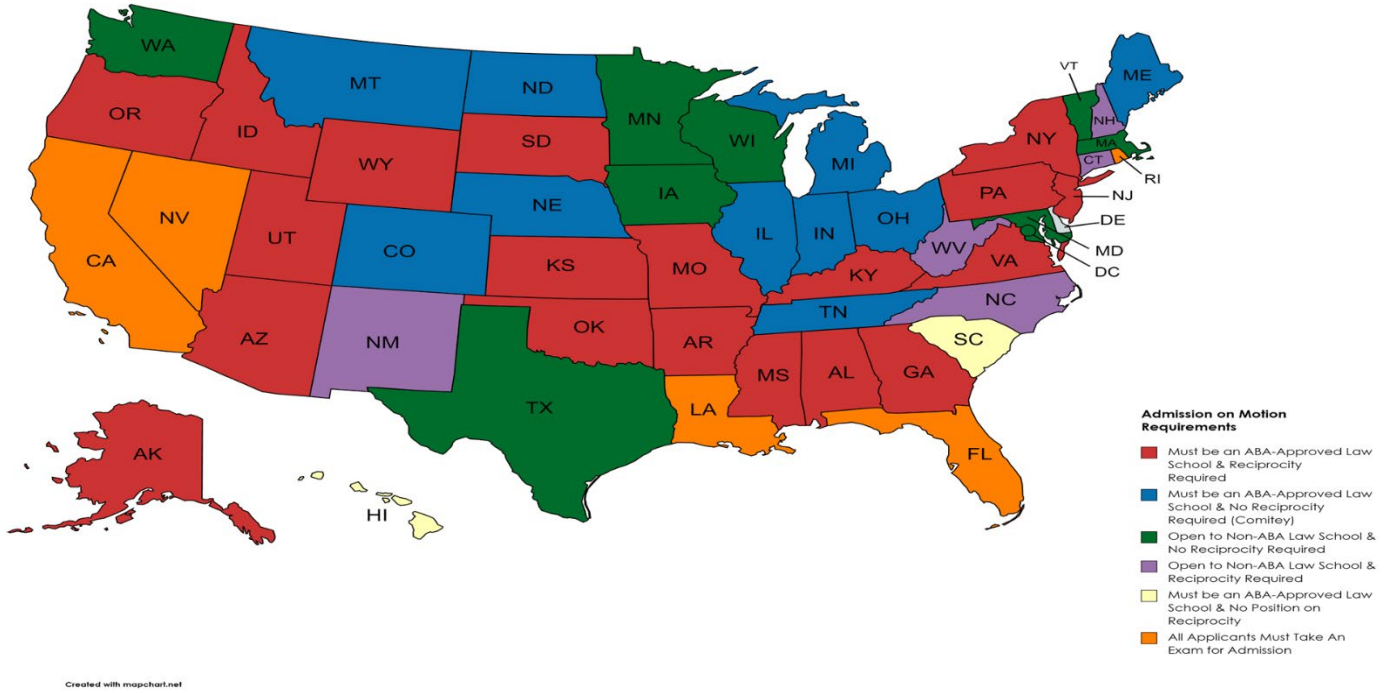
COMITY

Comity is largely the same as reciprocity, but it is one-way. Approximately 16 states permit attorney applicants the ability to be admitted on motion, despite the fact that the jurisdiction the attorney applicant comes from does not offer that privilege to attorneys licensed in their state. There are 10 states that allow admission on motion for attorney applicants who are graduates of ABA-approved law schools (in blue below). There are nine states that allow attorney applicants the ability to be admitted on motion even if they are graduates from other than ABA-approved law schools (in green below).

---

[34] Business and Professions Code § 6062 imposes a four-year practice requirement for out-of-state attorneys to be able to take the (one-day) Attorney's exam, rather than sitting for the (two-day) General Bar exam.

The map below identifies current comity or reciprocity policies around the country:



RECOMMENDATIONS

In ways that are unlike many, if any, other states, California offers opportunities to both traditional and nontraditional students to qualify for admission to the bar. California allows applicants with a JD from law schools that are not accredited by the ABA to sit for the California bar exam. Applicants with JDs from law schools accredited by the State Bar of California[35] or registered with the State Bar[36] are not permitted to sit for the bar examination in most bar jurisdictions in the country.

Additionally, California is one of the few jurisdictions, along with Vermont, Washington, and Virginia, that allow law office study as a method for meeting the legal education requirements to qualify to sit for the bar exam. Law Office Study candidates who pass the bar and become licensed in California do not meet the educational requirements to sit for the bar examination in other states, nor to be admitted on motion.

While the BRC was generally of the view that attorneys licensed in other states should not be required to take the California bar exam to be licensed, no consensus could be reached on how they should have to demonstrate high standards of ethical and competent practice. The most likely approach would be to require a set number of years of practice without disciplinary action

[35] There are currently 17 California Accredited Law Schools operating in California.
[36] There are currently 13 unaccredited, registered law schools in California.

by their licensing jurisdictions. The BRC did not believe it was in a position to identify the "right" number of years, however. Bar applicants are tested on ethical practice through the Multistate Professional Responsibility Exam (MPRE). However, requiring licensed attorneys to take this exam may not be appropriate, given their years of practice. Although the BRC initially struggled with the implications of any policy choice on law school graduates from non-ABA law schools in California, consensus was achieved on the following recommendation before the draft report went out for public comment:

> **RECOMMENDATION**: The Blue Ribbon Commission recommends that the Supreme Court revise the requirements for licensed, out-of-state attorneys to be admitted to California without sitting for the California Bar Exam. The Blue Ribbon Commission recommends that in establishing the requirements, the Supreme Court explore the minimum number of years of recent practice in another state to establish minimum competence, along with a demonstration of ethical and competent practice.

After receiving feedback from the public, it became apparent that a decisive recommendation on comity or reciprocity, and whether to limit the privilege exclusively to graduates of ABA law schools, was strongly desired. The Blue Ribbon Commission discussed and revised its recommendation as follows:

> **RECOMMENDATION**: The Blue Ribbon Commission recommends that the Supreme Court revise the requirements for licensed, out-of-state attorneys in good standing to be admitted to California without sitting for the California Bar Exam to the extent that the licensing state provides the same privileges to California-licensed attorneys regardless of educational background and upon which a certain number of years of recent practice be required. The BRC recommends that in establishing the requirements, the Supreme Court explore the minimum number of years of recent practice in another state to establish minimum competence along with a demonstration of ethical and competent practice.

The BRC determined that additional information was needed to determine whether to make changes regarding foreign-educated applicants and foreign attorneys, who traditionally have lower exam pass rates. The BRC felt it would be important to analyze the impact of the new exam on foreign-educated applicants and foreign attorneys before making a decision. Therefore, the BRC recommended that no decision be made as to these applicants at this time.

> **RECOMMENDATION**: The Blue Ribbon Commission recommends that the Supreme Court defer the decision to modify the admissions requirements for foreign attorneys and foreign-educated applicants until the new California Bar Exam has been implemented.

BAR EXAM ALTERNATIVE

As part of its charge, the BRC was asked to consider not just what the California bar exam of the future should look like, but also whether a bar exam is the correct or only tool to determine minimum competence to practice law in California. This required an examination of what a path to licensure that is not contingent on bar exam passage could look like.

To distinguish it from the pathway to licensure that is achieved by passing a traditional bar exam, the alternative tool to determine minimum competence was initially discussed as the "nonexam pathway." However, this nomenclature turned out to be problematic in that it suggested that there would be no possibility for inclusion of an exam or any objective assessment of minimum competence in such a pathway. As a result, the term "bar exam alternative" was adopted.[37]

Shortly before to the formation of the BRC, and largely in response to the coronavirus pandemic, California had adopted a temporary supervised practice program which did not lead to licensure (the Original Provisional Licensure Program). This program allowed eligible 2020 law school graduates to practice law as provisionally licensed lawyers under the supervision of fully licensed lawyers who meet the requirements of the rule and who agree to assume professional responsibility over the work of the provisionally licensed lawyers. To become fully licensed, the provisionally licensed lawyers must take and pass a bar exam and meet all other requirements for admission. After the Supreme Court adjusted the bar exam passing score from 1440 to 1390, it authorized the expansion of that program. Effective February 24, 2021, individuals who scored between 1390 and 1439 on a bar exam administered from July 2015 to February 2020 were given an opportunity to demonstrate minimum competence through a form of supervised practice program with a pathway to licensure (the Pathway Provisional Licensure Program). Participants who provided a minimum of 300 hours of legal work and received a positive evaluation from their supervisor, could get admitted to the bar without having to pass a bar exam. This program was also temporary. In light of this in-state experiment, when it adopted the charter for the BRC, the Supreme Court expressly noted that "[t]he commission should also be mindful of any useful information that can be gleaned from California's experience with the temporary provisional licensure program to the extent it is relevant to the commission's charge." The State Bar has begun to study these two programs, However, it was only after the conclusion of the BRC meetings that the State Bar completed a survey of current and former licensees and their supervisors to get some insight into feelings about the value of the program and level of competence of the participants. This data was not presented to the BRC. Additionally, because those in the Pathway PLP were only recently admitted to the bar, complaint and discipline rates comparing those admitted to the practice of law based on an exam versus those admitted based on an exam and a supervised practice component has not yet been compiled and would likely not provide much insight. The BRC therefore relied on experiences in other programs to guide its thinking.

[37] This terminology, too, has some critics who perceive "alternative" as coded language for an easier path to licensure.

Like the exploration of bar exam format, analysis of bar exam alternatives was informed by the BRC's adopted mission statement. The BRC's consideration of a bar exam alternative was grounded in key questions, including:

- How would minimum competence be demonstrated?
- How could consistency across school types and Law Office Study programs be achieved?
- How would fairness and equity considerations be implicated as measured by questions of affordability and access?
- How would an alternative pathway scale in California?
- Would this pathway be applicable to all candidates seeking licensure?

In response to its charge, and after reflection on the research presented by Deborah Merritt about how to construct a better bar exam to test minimum competence, but moreover what the foundational building blocks for lawyer licensing are, the BRC turned to a review of alternative licensure pathways under development or in place in other U.S. and international jurisdictions. Although all the models explored were different, there were common program elements, which can be categorized as follows:

- Law School Component: which includes incorporation of required doctrinal[38] and experiential education[39] during law school to provide the necessary exposure to the knowledge, skills, and abilities required to establish minimum competence.
- Supervised Practice Component: which could occur pre- or postgraduation (or a combination thereof) to help assess minimum competence based on the practice of law in a real-world setting and not simply an educational or test environment.
- Assessment Component: which could include a portfolio of work, a capstone project from law school, exams, or other methods to enable a regulator to objectively measure minimum competence.

Generally, the existing programs reviewed by the BRC included at least two of the three components.

LAW SCHOOL COMPONENT

As part of the BRC's vetting of alternative pathways, several programs with a significant, or standalone, law school component as the basis for licensure were analyzed. The structure of this component varies significantly, from Wisconsin, which offers diploma privilege for all eligible law school graduates from in-state institutions, to the selective Daniel Webster Scholars Program

[38] Foundational, related to black letter law (black letter laws are well-established legal rules that are, at the time of teaching, not subject to reasonable dispute).
[39] Putting legal theory into practice in a real-world environment.

(DWS), which has distinct law school doctrinal and experiential requirements for participating scholars.

Daniel Webster Scholars Program, New Hampshire

The Daniel Webster Scholars Program launched in 2006 as a collaborative effort of the New Hampshire Supreme Court, the New Hampshire Board of Bar Examiners, the New Hampshire Bar Association, and the University of New Hampshire School of Law to blend legal education with legal practice. Students are selected to participate in a two-year practice-based, client-oriented, educational program that includes special courses, clinics, externships, client-interviews, and in-person, one-on-one portfolio reviews with a New Hampshire bar examiner.

Unique curricular requirements

The small cohort of DWS scholars have a different law school curriculum than their fellow UNH law school peers; scholar participants are required to take the following courses:

Table One

Courses	Credits	Semester
DWS Pretrial Advocacy	4	Fall 2L
DWS Miniseries[40]	2	Spring 2L
DWS Negotiations & Dispute Resolution Workshop	3	Spring 2L
DWS Trial Advocacy	3	Spring 2L
DWS Business Transactions	3	Fall 3L
DWS Capstone - Advanced Problem Solving and Client Counseling	2	Spring 3L

Experiential Requirements

In the clinics, scholars hone critical skills with actual client interactions under the supervision of an attorney; there are three unique clinical options: criminal, intellectual property and transaction, and international technology transfer. The externships, or legal residencies, are work placements in government agencies, law firms, judicial chambers, nonprofit organizations, or corporations. At the end of each semester, there is a portfolio assessment and interview with an assigned bar examiner.

The program is highly selective and is limited to 24 students a year, which is roughly between 10 and 20 percent of the average number of exam takers.[41] Having established their competence through these avenues, successful scholars are not required to sit for the New Hampshire Bar Exam.

Oregon

Joanna Perini-Abbott, the Chair of the Oregon State Board of Bar Examiners, discussed with the BRC the two alternative pathways to licensure under development in Oregon. The Oregon Supreme Court, following the disruption to the bar exam in 2020, charged the Oregon State Board of Bar Examiners with establishing an Exam Task Force to make recommendations for pathways to licensure that did not require a bar exam. This task force looked to other U.S. jurisdictions, Canadian jurisdictions that require extensive "articling" or practice under a supervising attorney, and the aforementioned Daniel Webster Scholar Honors Program. The task force advanced two recommended programs: an Oregon Experiential Pathway (OEP) and a postgraduation Supervised Practice Pathway (SPP). The OEP is modeled extensively on the DWS program and will include two

[40] The Miniseries are short course modules that expose 2-L students to numerous areas of practice, including family law, conflicts of law, secured transactions, and negotiable instruments.
[41] Since 2016, over the two exams administered in a year, New Hampshire averages between 125 and 280 total exam takers. See https://thebarexaminer.ncbex.org/statistics/

years of special coursework, clinics, externships, and capstone review during law school assessed by the Oregon Board of Bar Examiners. The clinics and externships requirements are similar to the DWS program; the capstone component is still under development. The SPP program begins after law school and is highlighted in the section below describing post-law school supervised practice components.

The exact curricular requirements of the OEP are still in development with the Oregon Board of Bar Examiners and Oregon's ABA law schools. However, there are three core pillars identified: (1) foundational courses beyond the first year, (2) experiential requirements, and (3) completion of a capstone project. Students would need to complete courses in each pillar to be eligible to submit their capstone project. (See Appendix C for additional information about the Oregon approach.)

Ontario, Canada

Representatives from several Canadian provinces presented on their licensing processes on several occasions. Two universities in Ontario include an "articling" or supervised practice period within the law school curriculum. The experiential training requirement is met during law school via what is called an Integrated Practice Curriculum (IPC). The Integrated Practice Curriculum includes a four-month work placement with an approved supervisor during the third year of law school.

Wisconsin

The Wisconsin Supreme Court permits graduates of ABA-accredited Wisconsin law schools (Marquette University Law School and the University of Wisconsin Law School) the ability to be licensed after graduation without taking the bar exam. Called diploma privilege, this path is open to all graduates without a modified curriculum. In order to be certified for admission to the Wisconsin Bar under diploma privilege, applicants must meet three degree requirements, all of which align with the curriculum at the two Wisconsin law schools: (1) be awarded a JD from a law school in Wisconsin fully approved by the American Bar Association; (2) satisfactorily complete the mandatory subject matter areas[42]; (3) satisfactorily complete no fewer than 60 credits in elective subject matter areas[43].

[42] Constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibilities of the legal profession, pleading and practice, real property, torts, and wills and estates.
[43] Administrative law, appellate practice and procedure, commercial transactions, conflict of laws, constitutional law, contracts, corporations, creditors' rights, criminal law and procedure, damages, domestic relations, equity, evidence, future interests, insurance, jurisdiction of courts, legislation, labor law, ethics and legal responsibilities of the profession, partnership, personal property, pleading and practice, public utilities, quasi-contracts, real property, taxation, torts, trade regulation, trusts, and wills and estates.

While 32 states and the District of Columbia had historically offered diploma privilege[44] at some point since the 1800s, only Wisconsin continues to offer this licensure option.[45] (See Appendix D for additional information about the Wisconsin approach).

POSTGRADUATION SUPERVISED PRACTICE COMPONENT

The second major component around which several bar exam alternatives are organized involves a period of practice, postgraduation, under the supervision of a licensed attorney. Programs like the Daniel Webster Scholars and Oregon's OEP discussed above include clinics and externships in their law school curricula, but there is no requirement for postgraduate supervised practice to become licensed. Similarly, the IPC approach in place in Ontario, Canada, does not include a postgraduation supervised practice period. In the various postgraduation models examined, while the hours vary, the fundamental structure of postgraduate supervised practice is fairly consistent among jurisdictions with such requirements currently in place.

Canadian Provinces

All Canadian provinces require articling. Articling refers to the provision of experiential learning as a means of preparing someone for licensure; this involves supervised practice under a qualified, licensed lawyer. In Canada, the supervisor is referred to as the Principal, and the supervised practice period ranges from six to 12 months, depending on the province.

In some provinces, this supervised practice period is paired with an educational and assessment program, the Practice Readiness Education Program (PREP)[46], which takes place concurrently. PREP is discussed in greater detail as part of the Assessment Component section below. The BRC heard directly from Alberta, British Columbia, Ontario, and Erica Green, the manager of the Canadian Centre for Professional Legal Education (CPLED), and the table below provides a high-level description of their different elements of articling and assessment.

Table Two

Province	Articling length	Principal/law student responsibilities	PREP?
Alberta	12 months	The student organizes their placement(s), and the student may opt for a single placement or multiple short assignments to satisfy the 12-month requirement. There is also a new program assisting with placing students in articling positions when they have had to exit their placement due to harassment or discrimination.	Yes

[44] California stopped granting diploma privilege in 1917.
[45] The Utah, Washington, Oregon, Louisiana, and D.C. Supreme Courts did provide pandemic-related, limited-diploma privilege to 2020 graduates of ABA law schools.
[46] Alberta, Manitoba, Nova Scotia and Saskatchewan use PREP for their assessment component.

		The Principal has to complete a certificate at the end of the placement verifying the work.	
British Columbia	Nine months minimum	The student organizes their own placement. The law society recommends they work with their law school career services. The Principal and the student submit a midterm and final report to the law society. There is no prescribed format for the reports.	No; British Columbia has its own program called the Professional Legal Training Course (PLTC). This is a full-time, in person, ten-week course emphasizing practical skills training, ethics, practice management, and practice and procedure.
Ontario	Eight months minimum, except for those in the IPC program	It is the student's responsibility to find placement, but the Law Society of Ontario offers a jobs board, and a mentorship program to candidates to help with placement. The Principal files an experiential training plan at the onset of the articling period and completes a certificate of service along with a record of experiential training at the conclusion.	No. Ontario's assessment exams are described in detail under "Assessment Component."

Oregon

In addition to the Oregon Experiential Pathway (OEP), the Oregon Exam Task Force has recommended a postgraduation Supervised Practice Pathway (SPP). The SPP will require 1,000–1,500[47] hours of supervised practice after law school graduation, under a licensed attorney, and periodic work product portfolio review. While the details of the SPP have been deferred to an implementation committee, the tenets of the recommendation are as follows: 1) this pathway will be open to applicants from law schools outside Oregon; 2) applicants will find their own supervisors; 3) supervisors must have an active Oregon license, be in practice five to seven years, with at least two of those in Oregon; 4) supervisors will be required to have certification and training; 5) the Board of Bar Examiners will review non-privileged work product for minimum competence. (See Appendix C for additional information.)

ASSESSMENT COMPONENT

The third commonality that bar exam alternative models have, or that jurisdictions are considering, is an assessment component. As noted above, there are some who assume that alternative pathways to licensure that do not include a traditional bar exam completely lack any objective assessments of minimum competence. The information discussed by the BRC belies that assumption. The BRC explored various assessment possibilities for a bar exam alternative.

[47] The required number of hours for the SPP is still under consideration, as is whether any of the hours could be completed in law school.

Presentations specifically focused on Canadian models that have a robust history of alternative pathways to licensure.

Ontario

The BRC learned about barrister and solicitor exams given by the Law Society of Ontario which are a required part of the licensure process. The licensing examinations, which can be taken at any time, post-law school, during the licensing process, consist of a multiple-choice, open-book barrister examination and a self-study, multiple-choice, open-book solicitor examination.

The barrister licensing examination assesses competencies in the following categories: Ethical and Professional Responsibilities; Knowledge of the Law (Ontario and Federal Legislation and Case Law); Establishing and Maintaining the Barrister-Client Relationship; Problem/Issue Identification, Analysis, and Assessment; Alternative Dispute Resolution; Litigation Process; and Practice Management Issues.

The solicitor licensing examination assesses competencies in the following categories: Ethical and Professional Responsibilities; Knowledge of the Law (Ontario and Federal Legislation, Case Law, Policy, Procedures, and Forms); Establishing and Maintaining the Solicitor-Client Relationship; Fulfilling the Retainer; and Practice Management Issues.

The Law Society provides candidates with online access to the necessary materials to study for the licensing examinations. Candidates are permitted to print and mark up the materials and bring them to the examination testing area. Each licensing examination is four hours and 30 minutes in length and comprises 160 multiple-choice items. The licensing examinations are broken into sections, by area of law.

The PREP delivered by the Canadian Centre for Professional Legal Education and used to determine minimum competence to be "called to the Bar" in Alberta, Manitoba, Nova Scotia, and Saskatchewan, was also discussed repeatedly by the BRC an identified as having good models from which to draw. As noted above, the program is designed to be concurrently taken during the "articling" requirement (supervised practice). The components of this program are:

- **Skills Assessment** is the first element of PREP completed by students. This element consists of a benchmarking and training platform to assess skills and provide training to improve the quality of work in Word, Excel, PowerPoint, and Adobe Acrobat.
- **Foundation Modules (roughly 110 hours, online, quizzes at the end of each module)** This first phase of PREP, the Foundation Modules, includes online modules that combine self-directed study and interactive assessments with multimedia learning to provide a foundation in all of the identified competencies.
- **Foundation Workshops (five days, in person)** In the Foundation Workshops, students and facilitators engage in person in interactive workshops that include role-playing in the areas of interviewing, negotiating, and advocacy. They participate in simulations to learn to

assess and maintain quality legal services. The focus of the workshops is on integrating knowledge and skills development in social environments, getting feedback from both peers and experienced lawyers, and applying what was learned in the Foundation Modules.

- **Virtual Law Firm (three months with a series of assignments related to each rotation)** Returning to the online environment, students put their foundational training to the test, working as lawyers in a virtual law firm, where they will manage cases in business law, criminal law, family law, and real estate. These transactions include interviewing simulated clients within a learning management system to allow assessors with practice area expertise, and practice managers to assess students' skills, knowledge, and progress as they complete each task. Students receive coaching and mentoring from a practice manager for the duration of the practice rotations.
- **Capstone** The Capstone is the final phase of PREP. It is the phase in which students must demonstrate the competencies they have acquired throughout the program. The capstone is also used to determine whether a student has reached the necessary level of competency (Entry-Level Competence) to be called to the Bar. The Capstone is a four-day, 32-hour intensive simulation. Students must demonstrate Entry-Level Competence over all the competencies in the Capstone to be successful.

BLUE RIBBON COMMISSION DELIBERATIONS

The commission discussed the bar exam alternative pathway at multiple meetings, heard from many presenters, and reviewed significant documentation. Ultimately, no motion regarding an alternative pathway—whether to conduct one, explore one, or not explore one—was able to garner sufficient votes to move forward. What follows is a discussion of the various issues the commission grappled with, and the components of a bar exam alternative pathway for which the commission had a greater affinity.

Law School Component

The BRC debated whether a bar exam alternative should begin in law school with doctrinal and experiential changes to the program of legal education, or if an alternative pathway should begin only after law school. Commissioners also discussed how California's unique mix of ABA law schools, California-accredited law schools, California-unaccredited law schools, and Law Office Study (LOS) applicants might be able to successfully participate in an alternative pathway.

The BRC developed a series of related questions over which they deliberated extensively to determine how a law school component would further the BRC's goals of fairness, equity, and accessibility:

- Would law schools offer one curriculum to all students that would be applicable to both exam and alternative pathways?
- If not, would schools opt to provide one or the other or both?

- When does the student opt in if both curricula exist at their school, and at what point do the two curricula diverge?
- Do all law school types and LOS have to offer an alternative pathway?
- Do all law school types and LOS get to offer an alternative pathway?
- Does the option to participate in the pathway get exercised by the student?
- Could law school participation be phased in?
- Could there be a cap on the number of participating students?
- Could volunteer law schools reflecting each law school type be identified to participate in a pilot?

The deliberations on the law school component focused on the overarching question–whether a bar exam alternative would begin during or post law school–but the narrower questions of student choice, school type, etc., were deferred.

Supervised Practice Component

The BRC discussed at length the idea of a supervised practice period as part of a bar exam alternative in California. In fact, for many commissioners, this topic presented the most challenging aspect of an alternative pathway. A number of fairness and equity concerns came to the fore in discussions around a California-supervised practice component, as reflected in the table below:

Table Three. BRC Adopted Guiding Principles and Supervised Practice Concerns

Guiding Principles	Concerns
• Criteria for admission to the State Bar of California should be designed to ensure protection of the public.	Would a supervised practice component be scalable in California? • Would there be enough supervisors to meet demand? • Would the State Bar have the capacity to successfully monitor the program? • Would the State Bar have the ability to conduct portfolio reviews in a timely and fair manner? • How would supervisors be monitored for consistent quality of supervision? • Would supervisors potentially abuse their power and discriminate or harass supervisees? • Would we be able to ensure appropriate compensation for supervisees?

• Fairness and equity of the examination, or examination alternative, should be an important consideration in developing the recommended approach. (Fairness and equity include, but are not limited to, cost and the mode and method of how the exam or exam alternative is delivered or made available.)	• Would privileged applicants have an easier time finding a supervisor/easier access to a supervisor? • Would applicants from lower socioeconomic backgrounds be unable to afford a lengthy supervised practice requirement? • Would the quality of supervision vary to the extent that some applicants would be more prepared for any required assessment? • Would the entire supervised practice period have to occur postgraduation? • Should the length of the supervised practice period coincide with the length of time to get bar results after completion of law school?
• Admission to the State Bar of California requires a demonstration of knowledge, skills, and abilities currently required for the entry-level practice of law, otherwise referred to as minimum competence.	How would work product in varied placements be assessed in a valid, fair, and reliable way?

The BRC's concerns were driven in part by a 2018 report from the Law Society of Ontario) that outlined challenges in the articling program, brought to light in a 2017 survey of recently placed articling candidates. (See Appendix E.) Survey results highlighted a number of issues, including the fact that 19 percent of respondents reported discriminatory comments or conduct and 17 percent reported differential treatment based on race, class, gender, disability, and national origin.[48] Additionally, 10 percent reported remuneration of less than $20,000 a year, raising concerns about equity and equal access to the program. Further, the 2018 report indicated that the demand for articling positions surpassed the number of available supervisors, again raising concerns about which students had a greater likelihood of access to the program. Other Canadian provinces reported similar issues with articling, including a representative from the Law Society of Alberta who noted to a subcommittee of the Blue Ribbon Commission that, in a 2019 survey of Alberta articling students and young lawyers, about one-third reported having experienced some form of discrimination or harassment either during the articling recruitment process or during their articling term.

The BRC received public comment on and discussed potential ways to limit, or pilot, participation in a supervised practice program to address some of the identified concerns. Claire Solot of the Legal Services Funders Network provided a suggestion to pilot a supervised practice program. The

[48] Since the 2018 report, the Law Society of Ontario has responded to these issues by creating a new policy to ensure minimum remuneration standards for all articling candidates, implement mandatory training for principals and supervisors, and has begun a process of enhanced oversight and monitoring of placements through audits.

pilot would limit the supervisory placements to IOLTA funded legal services organizations. The participants would need to be committed to [49] interest law.[50] Other suggestions for ensuring the availability of supervising lawyers included encouraging California-wide bar associations, as well as the California Lawyers Association, to work to match applicants and supervisors.

Based on the work being done to stand up an interim supervised practice program in Oregon,[51] Deborah Merritt provided the BRC with a suggested structure and sample tools for a supervised practice program: [52]

1. Identify knowledge, skills, and abilities participants will need to demonstrate (for California, covered in the CAPA report).
2. Match skills, knowledge, and abilities to courses, exercises, and client interactions.
3. Provide ongoing feedback and independent assessment by the regulator.
4. Require submission of portfolios
    a. Written work
    b. Videos of activities such as client interviews
    c. Logbooks
    d. Supervisor Assessments
    e. Learning plan
    f. Reflections
5. Have Bar examiners assess the portfolio to determine minimum competence based on evidence-based rubrics.
6. Develop training for supervisors, examiners, and other raters
7. Design with transparency in mind
8. Meet all additional licensing requirements
9. Implement periodic review

While open to hearing about suggested approaches to a supervised practice component, the commission did not gain consensus on whether such a program should be adopted, nor, if one were to be adopted, a structure, required number of hours, or potential pilot format.

Assessment Component

BRC deliberations over the assessment component for a potential alternative pathway centered on concerns of fairness, validity, and reliability.

---

[50] See Business & Professions Code sections 6210–6228.
[51] This is separate from the SPP. This program was designed to respond to an incident during the February 2022 Oregon Bar exam that created significant challenges for test takers to perform well on the exam.
[52] This material was presented to the BRC on June 9, 2022. See https://board.calbar.ca.gov/Agenda.aspx?id=16704&tid=0&show=100032994.

Based on the BRC's review of other jurisdictions' practices, four primary assessment options were identified:

Table Four

Choice A	Choice B	Choice C	Other models
Assessments are embedded in the coursework as part of an accredited pathway curriculum for all California law schools (ABA, California-accredited and registered).	A summative capstone/portfolio at the conclusion of the supervised practice period to be reviewed and scored by the regulator.	A California preparation program with online modules, in-person workshops, a simulated law firm, and an in-person capstone to be completed concurrently with the supervised practice period.	• Additional open-book assessment(s). • Mini exams. • Performance tests.

Choice A exists in the law school component, Choice B as part of the supervised practice component, Choice C was considered concurrent to supervised practice. Other models could be layered on to Choices A-C or used as standalone assessments.

Choices B and C were the most popular in BRC discussions; there was interest in adding additional, possibly open-book, tests to the capstone/portfolio choice akin to the Ontario licensure process.

Recommendations Considered

After the extensive background on bar exam alternatives, a draft framework was developed identifying seven options for possible bar exam alternative pathways, which paired different combinations of the law school curriculum, supervised practice, and assessment components. (See Appendix F.) To advance the conversation, the commission was asked to identify which of the seven options they found most promising, so that more in depth discussion about the pros and cons of those options could be occur. Commissioners were not permitted at this juncture to vote against proceeding with any of the seven options. As noted above, that option came later, and ultimately the commission was unable to move forward any recommendation to advance (or not advance) exploration of a bar exam alternative pathway.

Choosing amongst the seven, the BRC easily identified the top three alternate pathways for further consideration. (See Appendix G for all seven options considered.)

The three potential programs, reflected in Figures 1-3 below, had the following elements in common:

- Any pathway-related assessments would be designed and graded by the State Bar.
- Supervisors would be vetted and trained by the State Bar.
- Attorneys licensed through the alternate pathway would need to meet all the other requirements for licensure.

The three alternative pathway programs considered were:

Option 1:[53]

Law School

- No change to the program of legal education (no additional unit or course requirements), but the six experiential education units already required in ABA, California-accredited and California registered, unaccredited law schools designed to provide students the knowledge, skills, and abilities previously recommended by the commission as the KSAs the bar exam would test.

Supervised Practice

- A postgraduation, supervised practice period between 750–1,500 hours.

Assessment

- A summative capstone/portfolio at the conclusion of the supervised practice period to be reviewed and scored by the regulator.

Option 2:

Law School

- A bar exam alternative pathway, introduced during law school, with expanded doctrinal and experiential education requirements designed to provide students the knowledge, skills, and abilities previously recommended by the commission as the KSAs the bar exam would test. This option would increase the requirements and add a State Bar regulated curricular path (for California law schools) that would diverge at some point from the standard law school curriculum to cover additional externships, practica, simulations, and clinics.

Supervised Practice

- A postgraduation, supervised practice period between 750–1,500 hours .

Assessment

- A summative capstone/ portfolio at the conclusion of the supervised practice period.

[53] Students in unaccredited law schools must take at least six hours of practical skills training (Rule 4.240 (F)). This training can be part of a course, including an online course, or may take place in a clinic or internship.
Students in California-accredited law schools must take at least six hours of practical skills training (Accredited Rule 4.160 (D)(2)(a)) and must offer them the opportunity to take at least 15 hours of practical skills training as part of their JD course (Accredited Rule 4.160 (D)(2)(b)). This training can be part of a course, including an online course, or may take place in a clinic or internship.

Option 3:

Law School

- No change to the program of legal education (no additional unit or course requirements), but the six experiential education units already required would be modified to meet the CAPA requirements for skills and abilities.

Supervised Practice

- A postgraduation, supervised practice period between 750–1,500 hours.

Assessment

- A California "PREP" program like the one used in several Canadian provinces with online modules, in-person workshops, a simulated law firm, and an in-person capstone to be completed concurrently with the supervised practice period.

MOTIONS CONSIDERED

After narrowing down the options to three, the BRC was asked to vote on whether to continue exploring an alternative pathway. None of the following motions garnered sufficient support to move forward.

Motion: The Blue Ribbon Commission recommends to the State Bar Board of Trustees and the California Supreme Court that California explore a bar exam alternative for licensure to practice law. It is recommended that this exploration of an alternative pathway have a significantly increased focus on assessment of knowledge, skills, and abilities for entry-level practice, de-emphasizing the need for memorization of doctrinal law. The precise elements of a bar exam alternative (including eligibility and time frame to completion) should be determined in consultation with experts, including psychometricians, to ensure the pathway is valid and reliable with a standard equivalent to the bar examination.

It is further recommended that the alternative pathway shall include the following elements:

Law School

Any applicant interested in availing themselves of the alternative pathway would need to complete at least six units of experiential coursework in law school that covers CAPA's skills and abilities. However, serious consideration should be given to increasing this experiential education requirement.

Supervised Practice

- There shall be a post-law school supervised practice requirement. The exact number of hours required remains to be determined, with the goal of consistency with the exam timeline to licensure;
- Mandatory and structured supervisor training and oversight to be developed by the regulator shall be required in order to provide consistency in the supervised practice component and ensure that the supervision continues to emphasize the skills and abilities necessary for minimum competence;
- A to-be-determined percentage of supervised practice hours may occur during law school; and
- Equity, disparity, and cost issues must be taken into account.

Assessment

- Summative assessment may include a capstone/portfolio, simulated in-person assignments, and/or a written exam component.
- Scoring and grading must be valid, reliable, and conducted by the regulator.

Having failed to secure sufficient votes for passage, the commission advanced several other motions in an attempt to provide a recommendation to the Supreme Court. The motions, all of which failed to pass, were presented and considered in the following order:

> **Motion: RESOLVED**, that the Blue Ribbon Commission recommends to the State Bar Board of Trustees and the California Supreme Court that California explore a bar exam alternative for licensure to practice law. It is recommended that this exploration of an alternative pathway have a significantly increased focus on assessment of knowledge, skills and abilities for entry-level practice, de-emphasizing the need for memorization of doctrinal law. The precise elements of a bar exam alternative (including eligibility and time frame to completion) should be determined in consultation with experts, including psychometricians, to ensure the data about the pathway indicates it is valid and reliable with a standard equivalent to the bar examination. In conformity with the guiding principles of the Blue Ribbon Commission, equity, disparity, and cost issues should be considered in this exploration.

> **Motion: RESOLVED**, that the Blue Ribbon Commission recommends in addition to the previously adopted recommendations of the Blue Ribbon Commission to adopt a California-specific bar exam, the Blue Ribbon Commission recommends to the State Bar Board of Trustees and the California Supreme Court that California explore an alternative pathway to licensure, addressing the guiding principles adopted by the BRC in October 2021, that assesses the same knowledge, skills, and abilities of the revised bar exam once the exam's assessment format has been decided to ensure protection of the public.

Motion: RESOLVED, that the Blue Ribbon Commission recommends in addition to the previously adopted recommendations of the Blue Ribbon Commission to adopt a California-specific bar exam, the Blue Ribbon Commission recommends to the State Bar Board of Trustees and the California Supreme Court that California explore an alternative pathway to licensure, addressing the guiding principles adopted by the BRC in October 2021, that assesses the same knowledge, skills, and abilities of the revised bar exam to ensure protection of the public.

Motion: RESOLVED, that the Blue Ribbon Commission recommends to the State Bar Board of Trustees and the California Supreme Court that California does not adopt a bar exam alternative for licensure to practice law. It is further recommended that a bar exam alternative be revisited in the future, if necessary, after the implementation of a revised California bar exam.

A motion was also made to halt consideration of an exam alternative pathway, at least until after the new bar exam is implemented. That motion[54] failed as well.

Given that the BRC was unable to secure a majority vote on any of the motions presented, the BRC is not prepared at this time to advance a recommendation on a bar exam alternative pathway to the State Bar Board of Trustees or the California Supreme Court.

The Future of Attorney Licensure in California

The recommendations contained in this report could fundamentally alter the way applicants for admission to the bar are examined. The discussions, explorations, and recommendations for the exam pathway included ideas such as:

- Shifting the focus from one that is at least perceived to be on rote memorization to one based on skills and abilities that are more reflective of the practice;
- Consideration of different types of exam questions, including simulations of depositions or client interviews, or direct examinations;
- Exploration of more frequent testing opportunities than the current twice-yearly administration of the bar exam;
- Allowing the use of "open book" testing;
- Delivering the exam remotely;
- Addressing fairness and equity issues by keeping the exam costs reasonable;
- Developing an exam in California founded on the CAPA recommendations; and
- Departing from reliance on the NCBE would allow flexibility and independence to deliver the exam in a manner that suits our constituents and that would permit innovation when testing for minimum competence.

[54] The motion read: The Blue Ribbon Commission recommends to the State Bar Board of Trustees and the California Supreme Court that California does not adopt a non-exam pathway for licensure to practice law. It is further recommended that a bar exam alternative be considered after the implementation of a revised California bar exam.

While the BRC was able to generate a recommendation regarding the California bar exam, members remained deadlocked in relation to exploration of a bar exam alternative. The BRC was able to winnow options to consider in crafting a bar exam alternative to three, and the groundwork laid in establishing these options may be useful in the future.

DISSENTING OPINIONS

Submitted by Susan Bakhshian

I wish to dissent on the failure to recommend further exploration and adoption of exam alternatives. The Commission's failure to reach consensus on exam alternatives followed discussions that included inaccurate information, imagined fears, and blatant protectionism. No credible facts or data were offered to support categorical opposition to all exam alternatives. I encourage the California Supreme Court and the California State Bar and Board of Trustees, to establish a future commission to investigate, evaluate, and implement exam alternatives to accomplish the Court's goals, build on the work done here, and further this Commission's mission.

Submitted by David Boyd

I respectfully dissent from the Blue Ribbon Commission's recommendations that, in connection with transition to a bar examination that aligns with the results of the California Attorney Practice Analysis (CAPA) Report and increases testing of practical lawyering skills, the California Supreme Court consider only a new California-developed examination.

Although the Court may ultimately decide that California should develop its own complete exam, it was hasty and unwise, in my opinion, to recommend that NCBE's NextGen bar exam, currently in mid-stage development and scheduled for live use in July 2026, be discarded as an option in advance of the release of essential exam details that NCBE will be making this summer. These include the final content scope outline, which will include the scope of both testable knowledge and skills; the exam blueprint; sample item sets; and information on the duration and cost of the exam.

From what is already publicly known about NextGen, it seems likely to meet most of the criteria for a new bar exam deemed important by the BRC, including a distinct focus on testing the fundamental lawyering skills also endorsed in the CAPA report, and can be incorporated into a new California bar exam in much the same way as the current Multistate Bar Examination. Any suggestion that California cannot wait for NextGen's release and must instead move forward promptly with its own examination evidences unrealistic expectations about the timeline for the monumental effort of developing an examination from scratch. Ultimately, I would have recommended that the Supreme Court's consideration of a new bar exam include both alternatives – a California-only exam or a California exam including the NextGen exam – rather than peremptorily taking NextGen out of consideration.

Submitted by Alex Chan

Dissenting Opinion to the BRC Report and Recommendations by Alex Chan[55]

The BRC Report and Recommendation ("Report") correctly notes that the Commission pared down the number of possible bar exam alternatives from seven to three. But it incorrectly suggests that these remaining options are viable alternatives. Because there is no critical infrastructure in place to ensure the viability of these options and that these options do not address diversity, equity, and inclusion ("DEI"), or achieve fairness and accessibility—principles that are ingrained in our mission, I dissent.

A. A Supervised Practice Program Would Impose a Significant Financial Burden on Participants

As the Report states, the Commission considered, at length, three different options for possible bar exam alternatives, each having a different combination of program components but they all have one design element in common—a post-law school supervised practice program. This supervised practice program, however, has several fundamental flaws that have been either omitted or downplayed in the Report.

First, the Report omits to discuss the financial burden that must be borne by applicants in order to participate in the supervised practice program. As the Law Society of Ontario Paper (the "Ontario Paper") points out, the "licensing" cost for each applicant participating in the articling program is $4,710 (exclusive of taxes).[56] For the State Bar, this cost is likely much more in order to cover many administration-related expenses ranging from overhead (e.g., hiring additional staff for training supervisors) to compliance (e.g., engaging examiners or regulators for evaluating program compliance).

While the State Bar has not communicated to the BRC on whether it would ultimately bear the full cost of operating the supervised practice program (if implemented), the State Bar's current budget deficit strongly suggests shifting some, if not all, of the operating costs for the supervised practice program to the applicants. With the State Bar already drawing from its reserves to cover this year's budget shortfall, along with rising inflation and ever-growing costs to operating the State Bar (including increasing salaries to its staff to offset the soaring cost of living in California), the true cost of participation in the supervised practice program would be so overwhelming as to make the "licensing" cost in Ontario's articling program a bargain and leave many law graduates with heavy debt (that is, assuming *arguendo* they could even take on the debt).

And even if the State Bar were to increase its annual bar dues (which remains a hot button issue and is subject to legislative debate and approval) and subsidize portions of the program using this additional funding or other budget re-allocation, it is difficult to imagine a scenario in which applicants would pay nothing for their participation. For those applicants in the

---

[55] At the time of the draft publication, all opinions expressed herein were solely my own. Subsequently, at the March 24, 2023, public meeting, the Committee of Bar Examiners moved and adopted these opinions in full, and has now joined in this dissent.

[56] *Options for Lawyer Licensing*, A Consultation Paper, Law Society of Ontario, Professional Development & Competence Committee (May 24, 2018), at 12.

marginalized communities and underserved populations or who are financially strained, this financial burden, however slight, is a significant barrier to entry to the legal profession. This is surprising to no one—a 2020 survey conducted by the American Bar Association found that student loans take a more disproportionate toll on people of color, underscoring the systemic inequities that have long existed (but are often ignored) within our legal education system.[57] Another survey by the American Bar Association, conducted more recently in 2021, found the same trend—debt has consistently impacted more applicants of color in making and meeting major life milestones than their peers.[58]

B. The BRC Cannot Ignore Important Issues Surrounding Pay Inequity, Employment Abuse, Workplace Harassment, and Racial/Gender Discrimination Inherent in a Supervised Practice Program

Second, the Law Society of Ontario ("LSO") observed significant challenges in implementing its articling program, including, *inter alia*, significant inadequacies in or non-existence of renumeration, limited availability of supervising attorneys, power imbalance between applicants and supervisors, and repeated instances of sexual harassment and racial/gender discrimination. LSO observed that some employers, leveraging their positional power, either did not pay the candidates or did so minimally.[59] For example, in one survey ("Pathways Evaluation"), LSO observed that 30% of the respondents did not receive any compensation during their work placement.[60] In another survey ("Articling Survey"), 10% of the respondents reported being paid less than $20,000.[61] Similarly, LSO observed that 21% of the respondents who had completed the articling program experienced discrimination or received differential treatment based on their personal characteristics (including age, color, race, disability, and the like).[62]

At the February 28, 2023, public meeting, several Commissioners expressed strong skepticism about these surveys for being overly subjective and not data driven. But the underlying survey data was individually reported by the participants themselves, which leaves no room for gut instinct, personal opinions, or subjective interpretation.

Other Commissioners also openly questioned the reliability, integrity, and validity of these survey results because they were based on "non-U.S." or foreign data. But there is no extraterritorial limitation to employment abuse, workplace harassment, and racial/gender discrimination—here or abroad; their adverse impact on would-be participants, particularly people of color, is real. And one could even argue that in the context of DEI, Canada is the North Star and these issues would only multiply in the U.S. With many of the AM 200 law firms and Fortune 500 companies being multi-national enterprises with offices in Canada and across the globe, and program participants likely participating in the supervised practice program from

---

[57] 2020 Law School Student Loan Debt Survey Report, The American Bar Association, Young Lawyers Division, *available at* https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/2020-student-loan-survey.pdf.

[58] Student Debt: The Holistic Impact on Today's Young Lawyer-Selected Findings from the 2021 American Bar Association (ABA) Young Lawyers Division Student Loan Survey, *available at* https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/2021-student-loan-survey.pdf.

[59] *Ontario Paper* at 10-11.

[60] *Id.*

[61] *Id.*

[62] *Id*.

anywhere in the world, the *Ontario* survey results are just as valid, practical, and meaningful to the BRC—they help the BRC assess the program's predictable outcomes, determine its likelihood of success, and identify areas of improvement at the outset.

Suffice to say, in order to advance equality and remedy inequality—principles that we all agree to adhere to and abide by, we must commit to understanding, not undermining, those factors that contribute to or compound inequities in our legal profession, directly or indirectly, domestically or internationally.

C. Scaling Remains a Critical Issue

The elephant in the room, which is seen but unacknowledged in the Report, is scaling. Every year, California consistently outnumbers many other states in the size of its applicant pool. Yet, some Commissioners, particularly those advocating for a non-bar exam alternative, have persistently drawn a parallel universe between California and those states that have implemented some form of an alternative, including New Hampshire, Oregon, and Wisconsin. Their view is a logical one: "If they can do it, why not us?" But those states operate their bar exam alternatives within a small (if not much smaller) population, which allows for such alternatives to be executed, delivered, and maintained under tightly regulated conditions to ensure optimal success.

For example, in New Hampshire, there is only one law school (University of New Hampshire Franklin Pierce School of Law) and each cohort of the school's Daniel Webster Scholar's program is limited to no more than 24 students a year.[63] In Oregon, there are three law schools (University of Oregon, Lewis & Clark College, and Willamette University College of Law) and the July 2022 bar exam was administered to only 400 applicants.[64] Similarly, Wisconsin only has two law schools: Marquette University Law School and University of Wisconsin Law School. In 2021, the Wisconsin Board of Examiners received only 438 applications for admission by diploma privilege.[65]

None of these numbers, individually or collectively, could be fairly interpreted as closely matching the massive scale in California. As of the date of this writing, California comprises 18 ABA-accredited law schools, 23 California-accredited law schools, and 14 unaccredited law schools for a combined total of 55 law schools.[66] In July 2022, the California bar exam was administered to more than 7,500 applicants—a number that is exponentially greater than the pool of applicants in New Hampshire, Oregon, and Wisconsin.[67] One thus cannot simply mimic or "copy and paste" a program tailored for a smaller pool or state and expect to achieve similar success in California because the demand (and expense) for resources to launch and sustain a state-wide program is far higher and more challenging in California than in any other state.

Admittedly, the legal world is a business world and, in the world of operating a sustainable business, premature scaling is often the leading cause of company failures. Premature scaling occurs when a business expands faster than its capability to handle growth. When a company

---

[63] *See* Report at 26.

[64] *See* Oregon Bar Examination - July 2022, *available at* https://www.osbar.org/admissions/examresults_july2022.htm.

[65] 2021 Annual Report, Wisconsin Board of Bar Examiners, *available at* https://www.wicourts.gov/courts/offices/docs/bbe21.pdf.

[66] Law Schools, The State Bar of California, *available at* https://www.calbar.ca.gov/Admissions/Law-School-Regulation/Law-Schools#correspondence.

[67] California Bar Examination Statistics (July 2022), The State Bar of California, *available at* https://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/July-2022-CBX-Statistics.pdf.

orients around the idea of zero to one, it takes the company out of focus, alignment, and commitment. This is why success mostly comes in stages, not in one fell swoop.

This methodology applies with equal force to the BRC: we cannot adopt a potential pathway simply by assuming, as some Commissioners have repeatedly ignored, that all California law schools, accredited and unaccredited, have the necessary human and financial resources to add a State Bar regulated curricular path to include additional externships, practica, simulations and clinics (as required under Option 2) or to modify their education to reflect CAPA requirements for skills and training (as required under Option 3). Nor can we assume that the State Bar would be allocated a state-approved budget to implement a state-wide "PREP" program with online modules, in-person workshops, and a simulated law firm (as required under Option 1). Neither can we assume that the content in a summative capstone portfolio will be an applicant's own work or that any rubric used to score the capstone portfolio is objective, equitable, and fair (under all three options).

Incorrect assumptions lie at the core of every failure. When we fail to challenge false assumptions, we risk losing it all. Bill Gates once said, "Business is a money game with a few rules and a lot of risk"—a truism when trying to scale a business. With no protection mechanism in place, these risks would mean greater suffering during an economic downturn—never-ending layoffs by firms and corporations strapped for cash (which is happening now amid slowing business demand worldwide), leaving would-be participants stranded in the midst of a program with no other alternative made available to them. For the State Bar of California, this could mean a dip in revenues (or no dip at all). For applicants, however, these risks could mean irreparable harm to their livelihoods; and for the general public, a fair day in court. These are not imagined fears but actual realities if we simply assume that California has the critical infrastructure to make a supervised practice program successful.

But failure is multifaceted, with micro- and macroeconomics serving as just one piece of a much larger puzzle. Because primary contributing factors to a program's failure can be hard to uncover, particularly in uncharted territory, the onus remains on the BRC to evaluate all risks, big or small, in any given alternative. The Court, the bar, and the public deserve to know that the alternative pathway, if there is one, is carefully designed and developed while maintaining the rigorous standards of legal education and competency for which California is widely known.

D. Limiting Participants to Legal Aid Organizations Will Not Solve Critical DEI Concerns

Some Commissioners, at the behest of legal services organizations, suggest restricting participation in the supervised practice program as if this capacity-limiting approach would alleviate or mitigate those challenges and concerns raised in the *Ontario Paper*. For example, the Report points to limiting participation by those applicants who are steadfast in pursuing their careers in public interest law or working for legal aid services or IOLTA-funded organizations.[68]

I agree that certain exceptions must be instituted for the public interest sector as one meaningful way to expand our continuing efforts to increase legal access and representation for the most vulnerable in our communities. Legal aid is so fundamental to achieving equal access to justice that priority must be considered and given to the underrepresented groups. But restricting program participants to only those interested in the public interest sector would only

[68] Report at 35.

limit exposure but otherwise not resolve (and in some instances, would even exacerbate) the fundamental DEI concerns observed in the *Ontario Paper*—many applicants in the equality-seeking populations would still face pay inequity, abuse of power, and workplace harassment and discrimination in the nonprofit world.

Those Commissioners who are strong proponents of the supervised practice program, view California as a "leader"—one that must chart a new path in the modern age without a bar exam. But as Thomas Edison put it succinctly, "a vision without execution is hallucination." Here, the supervised practice program—a "vision" with no established infrastructure in place to guarantee the maturity, or ensure the ultimate success, of its components—would only exacerbate, not lessen, the fairness, accessibility, and DEI crises that have long plagued the legal industry in California. The supervised practice program, in its empty shell, would put applicants in greater harm if these core issues are simply brushed aside and not given serious consideration.

E. An Established Infrastructure Would Potentially Pave the Way for the Supervised Practice Program to Replace the Multistate Bar Examination Portion of the California Bar Exam

Despite all the shortcomings, the supervised practice program may have a place in our not-too-distant future. With the National Conference of Bar Examiners ("NCBE") debuting the NextGen bar exam in 2026,[69] the State Bar has at least three years to build the critical infrastructure that serves as the springboard for the supervised practice program, which if successful, could *optionally* replace the Multistate Bar Examination ("MBE") portion of the California bar exam. This includes: (a) securing the necessary funding; (b) solidifying program components to address all fundamental concerns raised in the *Ontario Paper*; (c) and engaging the State Bar staff and all stakeholders to ensure proper training, timely reporting, and legal compliance.

Once a supervised practice program is in place, applicants could pursue one of two choices under this paradigm: (a) participating in the supervised practice program (in which case, their performance in the program would be weighted equally as their essays and performance tests); or (b) accepting a new grading scale focused only on the essays and performance tests (which is only natural with the MBE being phased out in 2026, unless the State Bar decides to design and develop its own multiple-choice exam). In doing so, those applicants without the necessary financial or networking resources are not disproportionally displaced or alienated and would still be treated fairly and afforded access to the same level playing field. Obviously, this example is non-limiting and there are other means by which to enhance the supervised practice program without adversely impacting fairness, accessibility, or DEI.

If and when the infrastructure for the supervised practice program is established, off the ground and beyond its infancy, more appropriate discussions can be held to consider formally replacing the California bar exam in its entirety with the supervised practice program—which, for some of the Commissioners, is the *only* option. After all, not even the best alpinist could scale and conquer Mount Everest in a day. But until then, we must not put the cart before the horse—more work needs to be done to ensure the program is viable before accepting it as an alternative. Shooting arrows in the dark (*i.e.*, implementing a program hastily without an established infrastructure), as I alluded to above, would do nothing to protect the public or serve our applicants.

---

[69] About the NextGen Bar Exam, *available at* https://nextgenbarexam.ncbex.org/.

F. The BRC Must Not Ignore All Stakeholders, Including California Bar Associations and Organizations

With no less than twenty-six (26) California bar associations questioning the integrity, reliability and objectivity of the supervised practice program (which the Report also omits),[70] the Commission (or the next court-appointed working group) should earnestly endeavor to work with legal practitioners across California and perfect the "fine points" of the program (*i.e.*, if and when the program gains judicial approval)—which the Commission regrettably has not done. These practicing attorneys will each play a key role in the supervised practice program. Without their supervision or agreement to supervise, the supervised practice program is unlikely to succeed and more likely to be dead on arrival. The Commission cannot ignore their concerns in the same way it cannot discount comments from other stakeholders, including applicants and legal aid organizations.

Finally, the Commission has not moved or voted on whether to adopt reciprocity, comity, or portability in recommending that licensed, out-of-state attorneys be admitted to California without taking the California bar exam. The Commission should endeavor to formally adopt one of these methods at the next public meeting in preparation for the final Report.[71]

I remain hopeful that the Commission can work together to improve the lives of many while resolving various design and implementation challenges inherent in a bar exam alternative.

Submitted by Jackie Gardina

Joining in this dissent: Susan Bakhshian, Natalie Rodriguez (joining only for Part I), and Mai Linh Spencer (joining only for Part I)

The final Blue-Ribbon Commission (BRC) Report adequately reflects the material presented and the outcome of the Commission's deliberations. I write separately in support of the exploration of an alternative pathway to licensure and to fully support the BRC's recommendation that the Supreme Court adopt reciprocal agreements that require other jurisdictions to provide California-licensed attorneys privileges regardless of educational background.

I. Alternative Pathway to Licensure

I write in support of the exploration of an alternative pathway to licensure. I believe that a standardized exam has limited value in determining who is prepared to enter the profession as a skilled, competent, and ethical attorney. Even if an exam is necessary to establish foundational knowledge, it is ill-suited to test on many other skills and abilities. Moreover, the legal profession and the skills and abilities necessary to competently serve clients are evolving and a licensure pathway must be flexible enough to adapt to these changes. Revising standardized exams can often take years, as is evident from the NCBE's work on the NextGen exam. The Supreme Court

[70] Letter from Ms. Ann I. Park, President of Los Angeles County Bar Association, sent on behalf of twenty-five California Bar Associations (Oct. 10, 2022); Letter from Ms. Oyango A. Snell, CEO and Executive Director of the California Lawyers Association (Oct. 11, 2022).

[71] The CBE recommends that the BRC select reciprocity to provide an equal ability for California members, attorneys and practitioners to join and be admitted to other jurisdictions' state bar.

should take this opportunity to study alternative ways to establish competence that can keep pace with changes in the profession.

A. Foundational Issues

Before outlining the reasons for my support, I will address several foundational issues. First, I want to emphasize that the resolutions offered during the BRC's discussions were limited to *exploration* of an alternative, not implementation of an alternative. Commission members who voted against exploration prevented the State from even studying and addressing the very concerns they raised.

Second, I want to note the difference between a "bar exam alternative" (Resolution 1) and an "alternative pathway to licensure" (Resolutions 2 and 3). The former suggests the absence of an exam, the latter recognizes that the alternative pathway may require a testing component to assess the breadth of knowledge required for new attorneys. The California Practice Analysis (CAPA) Working Group final report identified the knowledge, skills, and abilities (KSAs) necessary for new attorneys. Any alternative pathway must assess the bar applicants on those KSAs. Dr. Jim Henderson, who served on CAPA and the BRC, stated that a supervised pathway to practice alone may be insufficient to assess breadth of knowledge, although sufficient to assess general skills and abilities. Thus, an alternative pathway to licensure may need to include an exam or other assessment of knowledge. Questions regarding the adequate assessment of the KSAs will need to be addressed in any exploration of an alternative pathway to licensure.

Third, I want to acknowledge that California already implemented an alternative pathway to licensure when it allowed individuals who scored between 1390 and 1439 on the CBX between 2015 and 2020 to become licensed through supervised practice. In addition, the Supreme Court created a Provisional Licensure Program for 2020 law graduates that allows them to practice law under the supervision of fully licensed attorneys. The BRC heard from both the provisionally

licensed attorneys and their supervisors during our discussions. While the State Bar has begun to study the PLL program and its participants, the BRC did not have access to the data during its deliberations. The PLL data will be relevant to any exploration of an alternative pathway to licensure.

B. The Limits of Standardized Test

I am skeptical whether a two-day, high stakes exam that requires memorization of 13 subjects is an adequate measure of who is competent to practice law. I believe it is an excellent measure of who is competent at taking standardized exams, as is evident by the correlation between high LSAT scores and success on the bar examination. To put a finer point on it, according to recent studies, ChatGPT has successfully passed the bar exam and under our current regime, would be declared minimally competent to practice law. I hope we can all agree that competency to practice law goes beyond what artificial intelligence can accomplish.

But beyond my skepticism is the fact that the current California bar exam does not reflect the KSAs necessary for new attorneys. Indeed, until recently, California had never even assessed whether the content of the bar exam reflected what new attorneys did in practice. Even more astounding, California had chosen the 1440 passing score without any evidence to support that it was the score necessary to establish minimal competence. Thousands of bar applicants were failing to meet the standard of minimal competence when minimal competence in California had never been established through any studies. The California Practice Analysis Working Group (CAPA) was the first time that California had surveyed California attorneys to discover the KSAs needed by new attorneys, defined as those in their first three years of practice. Based on the findings, CAPA made several recommendations that differ in content from the current bar exam. CAPA's final report will be the foundation for any future pathway to licensure and per Supreme Court order, a job analysis study will be repeated every seven years to ensure alignment between the bar exam and the KSAs. Given that we are living in a rapidly changing knowledge economy, I would imagine that some of those KSAs may change every seven years, requiring adjustments to a licensure exam.

In addition, standardized exam cannot easily measure certain skills or concepts. For example, the National Conference of Bar Examiners' job analysis study found that legal research is the most important skill for new attorneys. Yet, it is not tested. A standardized test cannot measure negotiation skills or assess work produced for clients. The CAPA report identified another important concept that is challenging to test—an understanding of criticality. The CAPA survey asked attorneys to identify "the degree of harm (legal, financial, psychological or emotional) that may be inflicted upon clients and/or the general public if an attorney is not proficient" at a task. What the data revealed is that new attorneys fail to recognize the criticality of their work. It is not until their fourth year in practice that the criticality levels start to rise in "small but continual increments." If the licensure process is about public protection, this seems like a significant gap.

C. Building a Better Pathway to Licensure

Through the BRC, California had the opportunity to reimagine the licensure process. Unfortunately, the Commission could not come to a consensus allowing for the exploration of an alternative pathway. I hope that the Board of Trustees and the Supreme Court will take advantage of this moment. The legal profession is in flux. What lawyers need to know and what skills and abilities they need to have will change in the next several years. Using the same examination format introduced 100 years ago is inadequate to assess the competency of a 21st century attorney.

To be sure, there are many questions and concerns that need to be addressed, such as the validity, reliability, and fairness of any measure of competency, as well as concerns about equity. But these issues, and others raised during the discussions, can be vetted during the next stage in the process. Any proposals for an alternative pathway would need to be submitted for further review and approval. In the end, allowing an exploration of an alternative pathway to move forward is low risk and high reward.

II. Reciprocity

I support the recommendation that the Supreme Court revise the requirements for out-of-state attorneys to be admitted to California without sitting for the California Bar Exam. I further support the BRC recommendation that the Supreme Court require reciprocity agreements mandate that participating states admit all California licensed attorneys without regard to educational background, assuming they meet all other requirements.

As noted in the report, nearly all jurisdictions "require applicants for licensure to have JDs from ABA-approved law schools." As a result, thousands of California licensed attorneys who graduated from California accredited law schools and who have successfully passed the bar are currently ineligible to be licensed in other states. California should not implicitly or explicitly condone this exclusionary conduct.

The State Bar of California accredits eighteen law schools. The Committee of Bar Examiners recently approved new and more rigorous accreditation rules, including program and student success assessment. The schools serve a unique working adult population with student demographics often reflecting the diversity of California. Graduates of California accredited law schools become recognized community leaders, elected officials, and well-respected attorneys and judges. Yet, even after passing the California bar exam and establishing a successful practice in California, these graduates are denied the ability to practice elsewhere simply because of the school they attended.

The Supreme Court of California should support the graduates of California accredited law schools and require reciprocity agreements. Attorneys from states that recognize California licensed attorneys, regardless of educational background, are eligible to become licensed in California without sitting for the California bar exam.

Submitted by Ryan M. Harrison, Sr.

Joining in this dissent: Charles Duggan and Kristin Rosi (only to the first part regarding a bar exam alternative)

Commissioner Ryan M. Harrison, Sr.'s, Dissenting Opinion to the Draft Blue Ribbon Commission's Report and Recommendations ("Draft Report").

I dissent to the Draft Report as written because I believe it misrepresents the general consensus of the Commission, particularly with respect to the Commission's opinions regarding (1) the proposed alternative pathway to licensure program, (2) the Commission's opinion regarding civility in the practice of law, (3) the Commission's opinion regarding adopting the Next Generation Uniform Bar Exam (UBE), and (4) the Commission's consensus regarding the need for the next California Bar Exam to better reflect, and provide minimum competency testing for, the practice of law in California.

I assert my dissent as the immediate past Chair of the California State Bar's Council On Access and Fairness ("COAF"), a sub-entity of the California State Bar established through direct, focused, and purposeful legislative intervention based upon the dire need for the Bar to foster and implement programs designed to diversify the legal profession. I also assert my dissent as the immediate past president of the Wiley Manuel Bar Association of Sacramento County and a participant on the board of the California Association of Black Lawyers.

The Commission's Opinions Regarding the Alternative Pathway to Licensure

My participation in Blue Ribbon Commission ("BRC") meetings has given me the general impression that most of the members of the BRC are in stark opposition to an alternative pathway to licensure.[42]

Specific to COAF's opinions in this regard, COAF is concerned that such program will perpetuate the issues of lack of diversity in the profession COAF specifically seeks to remedy. COAF BRC representatives, Judge Kristin Rosi and I preserved our concern on the record that such a pathway program will likely only be accessible to a certain class of privileged individuals seeking alternative entry.

Additionally, I vigorously asserted that the power dynamic an attorney will have over a candidate who seeks profession entry via this alternative program will create a situation ripe for significant abuse, in particular for diverse individuals, individuals of lower socioeconomic status, those suffering from disability, and female candidates. During presentation, the BRC learned of such abuse issues demonstrable in the Canadian exemplar.

These concerns of substantial abuse and exploitation are expressed in addition to the other concerns voiced by other BRC members about ensuring programmatic quality control and oversight.

The Commission's Opinion Regarding Civility in the Practice of Law

Both the President of the California Lawyers Association ("CLA"),[43] Jeremy Evans, and I, expressed strong support for including in the revised Bar Exam a function to test civility in the practice of law. No BRC member, that I recall, voiced an objection to this idea. This idea goes beyond merely referencing civility in a mission statement. It goes to actually testing it on the exam itself.

I served on the 2022 California Judges Association ("CJA") and the CLA Joint Civility Task Force ("Task Force"). The Task Force is deeply concerned with the diminishing level of civility in the legal profession and seeks to promulgate its importance.

I am of the personal opinion that the Task Force would also appreciate a function of testing civility in the practice of law on the California Bar Exam. For example, just last week, I was violently threatened by an opposing counsel[344] during a witness deposition ("You don't know me, you better watch your back!") as she also communicated racialized "dog whistles" designed to instigate an emotional response from me while on the record. This was her strategy to throw me off my game—e.g. to be threatening and racist, nothing about that facilitates justice. For another example, only six months ago, I witnessed an opposing counsel (who was clearly intoxicated) brazenly sexually harass my mentor (a female attorney of more than 20 years' experience and equity partner of an AmLaw 100 national firm) because he knew he was afforded legal protection for secrecy in confidential settlement negotiation communications under Evidence Code section 1152.

Simply put, attorneys feel as if they have license to threaten, abuse, and sexually harass without fear of censorship or reprisal. This needs to stop immediately as it undermines confidence in the rule of law and in the legal profession. Lawyers are the guardians of democracy, and democracy can only survive through the currency of credibility. Incivility in the profession constitutes an insidious threat to the credibility of our national concept of liberty proffered through democratic and legal integrity. Given our current state of political affairs, widespread faith in democracy is waning and it is the prerogative of us, the officers of court, to fortify resiliency in our national concept and restore to it the meaning it rightly deserves.[45]

During the BRC meetings, staff experts opined that law school curricula and bar exam preparation material will militate to exert more significant focus on areas anticipated to be tested on the exam. The best way to promulgate the importance of maintaining civility in the profession, and to imprint this imperative upon candidates for entry for years to come, is by having some testing mechanism for civility included in the exam.

In short, the President of all California lawyers, Mr. Evans, and past COAF Chair and Task Force member, myself, among other BRC members, agree that the BRC should recommend testing concepts of civility in the California Bar Exam.

The Commission's Opinion Regarding Adopting the Next Generation Uniform Bar Exam

The BRC came out in strong opposition to the Next Gen UBE, namely because there was no actual product to consider. The National Committee of Bar Examiners served up nothing but high-flying conjecture and innuendo about what they *hope* the Next Gen UBE exam will look like. There was no material information presented for the BRC to consider. The BRC is not supportive of the Next Gen UBE.

Personally, I am supportive of an alternative to the MBE that does not contain dynamic subject stimulus questions that change with each question presented; but rather asks multiple questions pursuant to one, longer set stimulus fact pattern. My recommendation is that the Bar Exam present questions designed to tease out knowledge of law that resemble the types of test questions in the Reading Comprehension section of the Law School Admissions Test (LSAT). Of course, these questions would not test reading comprehension, they would test well settled legal principles. But the issue of having to mentally shift gears and reset one's frame of mind to an entirely new conceptual fact pattern for each and every question will be abated, as it creates unnecessary and unreasonable mental exhaustion not reflective of current practice of law.

The MBE, as it is currently delivered, is an unnecessary litmus test that borderlines on hazing a candidate for Bar admission.

The Commission's Consensus Regarding the Need for the Bar Exam to Better Reflect, And Provide Minimum Competency Testing for, California Law Practice

The California Attorney Practices Analysis Report's ("CAPA Analysis") ultimate conclusion was mentioned repeatedly during the BRC's deliberations in multiple meetings, if not all of them. The singular conclusory statement repeated *ad nauseum* was ***a better job must be done in gauging "alignment between the content of the Bar Exam and the practice of law in California."*** (Emphasis added.)

It is my belief, as a litigator and trial attorney, that the Bar Exam is far more difficult than actual law practice. In this sense, I cannot stress enough that if the Bar Exam is made to "better align

with the practice of law" the functional impact of that alignment is that the test will become easier to pass and more candidates, especially diverse candidates, will successfully enter the profession.[46] To this end, any final Bar Exam product that does not accomplish this result ought to be considered an utter failure.

In commitment to the rule of law and confidence in the legal profession.

Submitted by Judge Glen Reiser (Ret.)

Joining in this dissent: Susan Bakhshian, Natalie Rodriguez, and Mai Linh Spencer

The Report and Recommendation as drafted is an accurate reflection of the work of the Committee, the information received, and the conclusions of Committee members, including failures to reach consensus.

From my perspective, the one area of nearly universal agreement was the need to refocus California law practice admission upon the practice itself: managing a law office, interviewing a client, distilling material information, researching solutions, applying ethics, advising clients on prospective outcomes, recommending measured and appropriate action or inaction, and, if necessary, negotiating and/or litigating resolution. Memory and recitation of black letter law should, first and foremost, be the responsibility of the law schools, not the State Bar Examination or the practice of law.

The thornier question was whether assessing those skills compelled an "all in", make it or break it, high pressure two-day exam, or whether the skill sets to practice law competently as an entry-level in California lawyer could equally or perhaps better be assessed through actually performing the required skills under the close supervision of an experienced practitioner, similar to a resident physician in a medical program.

The psychometricians on the Committee assured that such a "supervised practice" alternative could be formulated and gauged for competence; a number of the Committee members were nevertheless opposed in both principle and practice to a supervisory non-exam alternative.

My view is that a pilot program in the public interest law sector should be formulated to "beta test" a law practice-focused, work product-centric, alternative approach to law practice admission, based upon intensive, verified supervisory standards and objective psychometric data.

With respect to interstate comity, requiring a proven attorney, who has successfully and ethically practiced in another jurisdiction for an established number of years, to sit for a new bar examination, seems incongruous. California should set practice and professional standards which would allow more fluid interstate mobility.

Submitted by Mai Linh Spencer

Joining in this dissent: Susian Bakhshian, Judge Glen Reiser (Ret.)

High-stakes, standardized bar examinations have been shown to disadvantage people of color nationally[72] and in California. 77.5% of White first-time takers passed the July 2022 CA bar exam, while only 40.5% of Black such takers passed. Latinx and API first-time takers fared better but, at 51.5% and 58.9% respectively, still passed at much lower rates than their White counterparts. I find these statistics unacceptable and therefore support pursuing an alternative pathway to licensure. Until we implement more effective, less discriminatory methods to test for minimum competence to practice law, our profession will continue to be a poor reflection of our diverse state.[73]

A guiding principle of this Commission has been to "minimize disparate performance impacts based on race, gender, ethnicity, or other immutable characteristics." Research points to two causes for such disparate impacts: the exorbitant cost[74] of preparing for the bar exam and stereotype threat.[75] Providing the option of a non-exam pathway to licensure would mitigate both and ultimately diversify our profession.

The Commission could not have been more closely divided on the issue of whether to recommend an alternative licensing path: one proposal to recommend exploring such an alternative failed by only one vote; multiple recommendations to ***halt*** exploration of an alternative failed. This Report documents the tremendous time and effort the Commission (in particular, the Exam Alternative Subcommittee) spent learning about and considering a wide range of possible non-exam options, none of which are perfect but all of which have – on balance – succeeded. The Commission's failure to come to consensus either for or against

---

[72] In 2021, nationally, 61% of Black first-time takers passed the bar exam, while 85% of White first-time takers passed. 72% of Latinx and 79% of API first-time takers passed. ABA's SUMMARY BAR PASS DATA: RACE, ETHNICITY, AND GENDER 2021 and 2022 Bar Passage Questionnaire available at www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2022/2022-bpq-national-summary-data-race-ethnicity-gender-fin.pdf.

[73] According the State Bar's 2022 Report Card on the Diversity of California's Legal Profession, White people make up 39% percent of CA's population but are 66% of the state's attorneys. Latinx people are 36% of the population but only 6% of licensed attorneys. African Americans make up 6% of the population but only 3% of attorneys.

[74] One law school advises its students to "plan on putting aside about $5,800, not including living expenses."

[75] According to the NIH, "[s]tereotype threat significantly undermines the standardized test performance of women and African-Americans." https://diversity.nih.gov/sociocultural-factors/stereotype-threat.

exploring an exam alternative should not be understood as the Commission's rejection of that option.

Revising the current CA bar examination as this Commission recommends may mitigate current racial disparities, but it is not enough. As a practitioner of 25 years and a clinical and doctrinal law professor, I urge the Board of Trustees and the California Supreme Court to create a pilot program that that is psychometrically sound, that is valid and reliable with a standard equivalent to the revised bar examination, and that prioritizes equity.

APPENDICES[76]

[76] Appendices include items referenced in this report. Slide decks and reference material that were made available during BRC meetings can be found attached to the meeting agendas on the State Bar website.

Appendix A: Commission Charter

ATTACHMENT A

Blue Ribbon Commission on the Future of the Bar Examination: Proposed Charter and Composition

Purpose

In 2018, the Board of Trustees of the State Bar of California created the California Attorney Practice Analysis (CAPA) Working Group to convene specialists in the field of psychometrics and practice analysis to document the current practice of law in California, and more specifically to understand the knowledge, skills, and abilities needed by entry level attorneys in California to practice law ethically and competently. The study collected data on attorney practices along two principle dimensions: what attorneys do as reflected in daily tasks and what knowledge attorneys use to perform those tasks. The results provided information necessary to evaluate the link between the California Bar Examination's content and current legal practice, and created a blueprint—an outline of content coverage across legal topics and job responsibilities—for the future selection of bar exam topics and question items. The CAPA Working Group evaluated the findings, applied their professional judgment, and recommended that the bar exam test eight legal topics and six skills. The CAPA Working Group concluded its work in 2020 with a report to the Board of Trustees. Their work coincided with a national practice analysis conducted by the National Conference of Bar Examiners (NCBE) whose forthcoming final report will include recommendations regarding content and format of the Uniform Bar Exam (UBE).

To evaluate the recommendations raised by the CAPA Working Group as well as additional policy questions regarding the bar exam's format and pass score, following consultation with the Supreme Court, the Board of Trustees directed staff to establish a joint Supreme Court/State Bar Blue Ribbon Commission on the Future of the California Bar Exam.

Commission Charter

The Joint Supreme Court/State Bar Blue Ribbon Commission on the Future of the California Bar Exam is charged with developing recommendations concerning whether and what changes to make to the California Bar Exam, and whether to adopt additional testing or tools to ensure minimum competence to practice law. In so doing, the commission will review the results of the California Attorney Practice Analysis and the CAPA Working Group's recommendations; the results of the 2020 National Conference of Bar Examiners practice analysis and its recommendations for the Uniform Bar Exam (UBE) content and format; and the results of additional recent studies on the California Bar Exam conducted the State Bar, including data

examining the pass rates of applicants of color. While its work will be grounded in these studies' empirical findings, the commission shall explore other issues to ensure that the exam is an effective tool for determining whether applicants are prepared to practice law ethically and competently at a level appropriate for an entry-level attorney.

In particular, the commission will develop recommendations for the California Supreme Court and the State Bar of California regarding:

1. Whether there is sufficient alignment in the knowledge, skills, and abilities to be tested by the UBE with the knowledge, skills, and abilities required of entry level California attorneys to argue in favor of its adoption by California.
2. If adoption of the UBE is recommended, whether there should be supplementary content and skills tested or trained on to meet specific California needs, and if so, modalities for that testing or training.
3. Revisions to the California Bar Exam if the UBE is not recommended for adoption, addressing:
    - **Legal topics and skills to be tested:** The commission will recommend legal topics and skills to be tested on the bar exam and also provide specifications for supplementary testing or training for topics not recommended for inclusion on the exam itself.
    - **Testing format:** In light of the legal topics and skills to be tested, the Commission will determine the testing format and design of the exam.
    - **Passing score:** The commission will review the appropriateness of the current bar exam pass line and whether it should be changed.

Commission Composition

Nominations for the Blue Ribbon Commission will be appointed by the Supreme Court. Members will be drawn from the following categories of stakeholders:

- Former members of the CAPA Working Group (2)
- Committee of Bar Examiners (2)
- NCBE Testing Task Force (1)
- Council on Access and Fairness (2)
- California Lawyers Association (2, at least one whom shall be a lawyer who took the bar exam within the past 3 years)
- Law School Deans (2)
- Judges (active or retired) (2)
- California Department of Consumer Affairs (1)
- Current State Bar Board of Trustees (1)
- National expert on examination development or grading (1)

Members will reflect the state's demographic and geographic diversity and diversity in attorney practice sector and settings.

Appendix B: Commission Mission Statement

Guiding Principles / Mission Statement

(Revised Following Input at the September 1, 2021 Meeting of the Blue Ribbon Commission)

In carrying out its charge to develop recommendations concerning whether and what changes to make to the California Bar Exam, and whether to adopt alternatives or additional testing tools to ensure minimum competence to practice law, the Blue Ribbon Commission on the Future of the California Bar Exam is guided by the following principles:

- Admission to the State Bar of California requires a demonstration of knowledge, skills, and abilities currently required for the entry-level practice of law, otherwise referred to as minimum competence.
- Admission to the State Bar of California requires minimum competence in professional ethics and professional responsibility.
- Criteria for admission to the State Bar of California should be designed to ensure protection of the public.
- The recommended examination, or examination alternative, should be evidence-based.
- Fairness and equity of the examination, or examination alternative, should be an important consideration in developing the recommended approach. Fairness and equity include but are not limited to cost and the mode and method of how the exam or exam alternative is delivered or made available.
- The recommended examination, or examination alternative, should minimize disparate performance impacts based on race, gender, ethnicity, or other immutable characteristics.

In adopting these guiding principles, the Blue Ribbon Commission does not intend to outline all characteristics which are important to set the foundation for the successful practice of law and the protection of the public. Nonetheless, the Blue Ribbon Commission is committed to promoting the highest standards of integrity, civility, and professionalism in the legal profession, and its members will also be guided by these more general objectives.

October 7, 2021

Appendix C: Oregon Task Force

OREGON STATE BOARD OF BAR EXAMINERS

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

June 18, 2021

Oregon State Board of Bar Examiners
16037 SW Upper Boones Ferry Road
Tigard, Oregon 97224

Re: Recommendation of the Alternatives to the Bar Exam Task Force

Dear Board Members:

For the reasons discussed below, the Alternatives to the Exam Task Force respectfully requests immediate adoption of the Oregon Experiential Pathway and the Supervised Practice Pathway models as alternatives to the bar exam. The Task Force further requests that the Court order the formation of implementation committees to draft the implementing Rules for Admission.

I. Executive Summary

As charged by the Oregon Supreme Court, the Alternatives to the Exam Task Force ("the Task Force") assessed alternatives to the bar examination as pathways to attorney licensure. We studied alternative models including (1) supervised practice as it exists in Canada, (2) the emergency models from Utah and Washington D.C., (3) diploma privilege as it exists in Wisconsin, and (4) a curriculum-based experiential learning model in place at the University of New Hampshire. The Task Force researched each model, spoke to constituents in the jurisdictions where these models are in place, and consulted with stakeholders in Oregon. Two principles guided our mission: consumer protection and equity. With these considerations in mind, the Task Force also considered how to improve the models currently employed in other jurisdictions.

As a result of our research, the Task Force recommends the Court adopt two alternative pathways to admission: an experiential learning pathway (Oregon Experiential Pathway or OEP) and a supervised practice pathway (SPP). The OEP is a curriculum-based model with a focus on experiential coursework during an applicant's last two years of law school culminating in a capstone portfolio

submitted to the Oregon State Bar Board of Bar Examiners (BBX) to measure minimum competence. By contrast, the SPP is a post-graduation model where applicants work directly under a licensed attorney for 1000-1500 hours of practice and submit a portfolio of work samples to the BBX to measure minimum competence. These pathways are "alternatives" to an applicant sitting for and passing the Uniform Bar Examination (UBE) and are not proposed as replacements for that pathway to admission. The Task Force recommends that Oregon continue to offer passage of the UBE as a pathway to admission. Continuing to offer the UBE will provide law graduates who chose to take the exam with a portable exam score that can be used to apply for licensure in 35 additional jurisdictions.

Currently, there are several components to admission in addition to sitting for and passing the bar examination, including graduating from an ABA accredited law school, passing a character and fitness review, and passing the Multistate Professional Responsibility Examination (MPRE).[1] The proposed alternative pathways are intended to offer only an alternative to a single component of admission: sitting for and passing the Uniform Bar Examination (UBE). The other components of admission would remain unchanged by the adoption of these alternative pathways.

Additionally, while the UBE is coordinated by the National Conference of Bar Examiners, the BBX currently maintains oversight over that aspect of bar admission by recommending a passing score to the Court and grading the Multistate Essay Examination and the Multistate Performance Examination. Accordingly, the Task Force sought to ensure that the BBX also maintains oversight over the two proposed alternative pathways. This is accomplished in two ways: (1) the BBX will be responsible for supervising applicants' compliance with the rules applicable to their chosen pathway and for documenting completion of the requirements; and (2) the BBX will review of representative work samples to ensure the applicant meets minimum competence requirements (referred to for each pathway as an "Exam Alternative Portfolio" or EAP).

An applicant's EAP will provide sufficient material to measure the applicant's skills and abilities against the minimum competence standard and offer examination of work performed under realistic law practice conditions. Therefore, the BBX's review of an applicant's EAP under either alternative pathway should

---

[1] *See Supreme Court of the State of Oregon Rules for Admission of Attorneys*, OSBAR.ORG (Jan. 1, 2021), https://www.osbar.org/_docs/rulesregs/admissions.pdf.

constitute an "examination of the applicant" and avoids the need for legislative changes to ORS 9.220.[2] Both alternative pathways, however, will require new rules for admission to be drafted to operationalize the recommendation of the Task Force.

Both of these alternative pathways will rely heavily on volunteer support from the Oregon legal community. But even with ample volunteer support, they will create significant additional work for the admissions staff of the OSB. It is likely that if the Court approves these alternatives, the admissions department will require additional staff or technology upgrades. Due to the increased work for the OSB, the Court will need to consider, following the implementation phase when cost increases are more certain, whether applicants applying for admission through these pathways would pay an increased application fee. We believe any increased admissions cost would be far outweighed by the value the applicants receive from being able to start practice immediately upon graduation and in savings from not needing to prepare for the bar exam.

This report reviews the considerations of the Task Force (Section II), the recommendations of the Task Force (Section III), an in depth look at the two recommended pathways (Sections IV and V).

II. Considerations of the Task Force: Consumer Protection and Equity

In considering alternative pathways to licensure, the Task Force asked two questions: (1) Will this model provide adequate consumer protection by ensuring applicants to the practice of law demonstrate the minimum competence to practice law prior to licensure; and (2) Will this model increase accessibility to and equity in the profession by removing unnecessary barriers to entry.

---

[2] "An applicant for admission as attorney must apply to the Supreme Court and show that the applicant . . . (3) Has the requisite learning and ability, which must be shown by the examination of the applicant, but the judges or under their direction." OR. REV. STAT. § 9.220(3) (2021).

In considering the first guiding question, the Task Force looked to the Oregon Essential Eligibility Requirements (RFA 1.25), adopted by the Court in 2019.[3]

The Task force also considered the Building Blocks of Minimum Competence identified by the Institute for the Advancement of the American Legal System ("IAALS"). IAALS is "a national, independent research center dedicated to facilitating continuous improvement and advancing excellence in the American legal system."[4] In October 2020, IAALS published the result of a two-year

---

[3] RFA 1.25 provides:

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

[4] *See About IAALS*, IAALS.DU, https://iaals.du.edu/about (last visited June 16, 2021).

research study of the building blocks of minimum competence to practice law.[5] Through the study, including an academic review and 50 focus groups with practicing attorneys, IAALS identified the following core competencies:

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

To ensure adequate consumer protection, any alternative to the current examination must adequately assess applicants against the Essential Eligibility Requirements in RFA 1.25 and the 12 core competencies identified by IAALS.

The Task Force also sought to remove unnecessary barriers to attorney licensing and ensure that all applicants had a fair opportunity to demonstrate their competence to practice law. As such, the Task Force wanted to ensure that the alternatives it proposed did not further perpetuate or exacerbate already existing disparities in the profession. Similarly, the Task Force wanted to ensure that the proposed alternatives did not introduce new sources of disparities. Some of the questions that arose were: whether curriculum requirements in the OEP would place undue burdens on non-traditional law students and how to mitigate such effects; how to ensure the SPP model does not solely benefit law graduates with pre-existing connections in the field; how to craft a fair and unbiased rubric system to review applicants' EAPs; and how to mitigate any stigma in the legal

---

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

community for applicants who gain licensure through an alternative model. In considering these factors, the Task Force concluded that no single model could completely address these concerns. These issues are addressed in more depth in Sections III, IV, and V.

III. Recommendation of the Task Force

The Task Force unanimously concluded that consumers can be protected and equity served by offering applicants alternatives to the traditional bar exam. The success other jurisdictions have had using pathways other than the bar examination confirms this conclusion. The Task Force found that the different pathways it explored could be crafted in a manner that ensured minimum competency standards were met. Each pathway, however, had its own advantages and drawbacks in terms of equity and access issues. The Task Force believes providing two alternative methods of proving competence will capture the advantages and avoid some of the drawbacks of the single methods adopted in other jurisdictions. For example, having the OEP model available to applicants reduces the concern that only applicants with connections to the Oregon legal market will be able to access an alternative licensure method, which would be the case if the SPP was the only model. On the flip side, having the SPP model as an option provides an alternative path to licensure for graduates who, for various reasons, could not commit to a course of experiential learning in law school or who come from out-of-state law schools. Thus, for the reasons discussed in Sections IV and V the Task Force recommends the Court adopt *both* the Oregon Experiential Pathway and the Supervised Practice Pathway.[6]

---

[6] The Task Force unanimously voted to recommend the Oregon Experiential Pathway. One task force member voted against recommending the Supervised Practice Pathway until the parameters of the program were further defined. The remaining members voted to recommend the Court adopt the SPP with further details of the program to be determined by an implementation task force.

The Task Force also considered a third alternative: true "diploma privilege" as offered in Wisconsin to graduates of University of Wisconsin or Marquette University. Under the Wisconsin model students of in-state law schools are admitted to the state bar upon completion of a prescribed curriculum of predominantly doctrinal courses and passage of the MPRE and a character and fitness review. The subcommittee that studied the Wisconsin model recommended adoption of the model but with an increased focused on experiential learning and an additional course in practice skills. With these changes, the proposed model became very similar to the model being proposed by the OEP. The subcommittee that crafted the OEP also recommended a

Each of the models proposed below will require an implementation period to allow for drafting and implementation of the Rules of Admission. The Task Force does not, however, believe a change in state law is required. Because both alternative pathways require EAPs to be submitted to and assessed by the BBX, applicants are still required to demonstrate their "requisite learning and ability . . . by the examination of the applicant" as required by ORS 9.220. Additionally, it does not appear that either proposed model will raise the same dormant commerce clause concerns that the Wisconsin model has raised. The SPP model is open to all applicants regardless of whether they attended an in-state or out-of-state law school. The OEP is primarily focused on in-state law schools because of the partnership between the BBX and the law schools that is required to implement the program. But if an out-of-state law school believed it would have sufficient applicants in Oregon to build a curriculum that met the requirements of the OEP, the BBX would entertain applications from out-of-state schools to participate in the program. Thus, Oregon would not be discriminating against out-of-state applicants.

IV. Oregon Experiential Pathway

The Task Force unanimously recommends immediate adoption of a two-year curriculum-based experiential pathway to licensure. This Part addresses, in separate subsections, the rationale supporting that recommendation. Section A discusses the importance and value of creating an experiential pathway. Section B describes, in more tangible terms, the benefit of an experiential pathway to licensure. Section C considers the potential drawbacks of such a pathway. Finally, Section D outlines the framework for implementation.

A. Introduction

The Task Force unanimously recommends immediate adoption of a two-year curriculum-based experiential pathway to licensure, which, as noted above, we propose calling the Oregon Experiential Pathway. Applicants applying for admission through the OEP would complete a set curriculum during law school,

---

change to the New Hampshire model that made it more similar to the Wisconsin model: rather than being an avenue to only a select few students each year, the program would be open to all interested applicants. As the two curriculum-based models largely began to merge to have a focus on experiential learning open to all students, the Task Force voted to recommend only the OEP as the curriculum-based model recommended to the Court.

culminating in a capstone portfolio or examination assessed by the BBX—an EAP. The OEP would focus on assessing competence in skills including legal research and writing, issue spotting, legal analysis, argument development, understanding of the law, attention to detail, written and oral advocacy, and teamwork—directly addressing the competencies in RFA 1.25 and the IAALS Building Blocks. The OEP will provide the means for new lawyers to develop skills faster, to serve clients well, and to provide legal employers with a cohort of practice-ready law school graduates. Assessment of those skills would occur while a student was still in law school through a handful of key mechanisms: (1) incorporation of formative feedback from professors throughout the program, (2) intensive self-reflection by participants, and (3) summative feedback and assessment provided by a dedicated bar examiner at the end of each semester throughout the program.

At the core of the OEP is recognition of the value of experiential learning. The experiential focus reinforces the curricular changes that have already begun at each of the Oregon schools. More specifically, law schools across the country are in a period of transformation—moving from traditional doctrinal-focused courses to an innovative and experiential legal education. Although this trend toward implementation of experiential learning in law schools has been happening for quite some time, in 2015, the ABA, for the first time, mandated that every law student complete at least six credit hours of experiential learning prior to graduation.

Historically, students have satisfied experiential learning requirements through law clinics and externships. However, in their 2015 reforms, the ABA also introduced simulation courses as a third and new way to meet this experiential learning requirement. These still relatively new ABA standards around experiential learning have already fostered innovation and growth in law clinics, externships, and simulation courses at law schools across the country. Establishment of the OEP not only incorporates that trend but affirms its importance.

The OEP would focus students on completion of certain practice-based benchmarks, including, for instance, the creation of documents (transactional and litigation-focused), simulated client interviews, depositions, and trial practice. Further illustrations might include students negotiating for actual clients or representing them in court proceedings. Those experiences could be supplemented by student exploration of ethical issues in the context of simulated exercises, in addition to engaging legal reasoning and analysis, issue spotting, and problem-solving skills. Ideally, the OEP would also cultivate students' practice management

skills, including how to address time constraints and appropriately manage deadlines. The OEP might do so by incorporating exercises built around the use of fee agreements, engagement letters, time keeping, billing, and the use of associated technology.

Collectively, the OEP model would prepare students to be admitted to practice. Accordingly, and upon successful completion of the program, students would be admitted to practice following graduation, passage of the MPRE, and clearance of character and fitness requirements.

B. Benefits of the OEP

The Task Force believes there are manifold benefits to the OEP. Most importantly, adoption of the OEP would continue the transformation of both legal education and bar admission while providing an alternative and durable pathway to licensure that works to address any gap between legal education and law practice. At the local level, this experiential pathway would help address Oregon's well-documented access-to-justice gap at a time of demographic transition in the bar.

Moreover, rather than measuring a narrowly-defined type of "minimum competency," the OEP would measure a candidate's ability to perform fundamental types of legal work. Program graduates would be practice-ready, having demonstrated the competencies needed to provide effective and responsible legal services. OEP graduates will have received robust formative and summative feedback, thereby giving them the confidence and experience necessary to effectively spot substantive legal issues, gather relevant information, craft a compelling written product, advance a client's position through oral argument and negotiation, and at a general level, serve clients professionally and competently.

We also believe that the OEP can serve as a durable recruiting strategy for Oregon law schools and the bar more generally. This program could be another way to attract diverse students to study, stay, and practice in the state. Offering an experience-focused pathway for practice allows law schools to consider a more holistic approach to admissions with less focus on standardized test scores and more emphasis on life experiences. And as discussed above, adoption of an experiential pathway to licensure will incentivize law schools to innovate in the curriculum rather than simply offer the same set of bar courses that have remained static, despite dramatic changes in the substance of modern legal practice.

We already have evidence of the benefits of adopting an experiential model. In New Hampshire, their sole law school runs the Daniel Webster Scholar Honors Program ("DWS") where students hone their skills in both simulated and real settings—counseling clients, working with practicing lawyers, taking depositions, appearing before judges, negotiating, mediating, and drafting business documents—while creating portfolios of written and oral work for bar examiners to assess every semester. Through completion of an experiential capstone project, successful DWS participants pass a variant of the New Hampshire Bar exam during their last two years of law school and are sworn into the New Hampshire bar the day before graduation.

Focus groups of stakeholders report that DWS graduates are "a step ahead of new law school graduates." They also report that the feedback DWS participants receive, coupled with personal reflection, encouraged continual improvement and proved invaluable with respect to fundamental skill development. DWS graduates gain practical skills, confidence, and a cohort community.

The DWS approach also successfully meets students' expectations for practice readiness. From the student perspective, DWS students benefit from regular feedback gleaned from a career practitioner which provides a different perspective from that offered by a professor. This structure also provides additional support for students as they evaluate career options. Students engage in interviews with confidence knowing that they have firsthand experience with the language, projects, and expectations of practice.

DWS graduates are immediately employable because they are admitted to the bar following graduation and clearance of character and fitness. Employers appreciate that predictability and report not needing to invest as much in training and mentoring. They also know that these candidates are dedicated to practicing in the state, and they can hire with the confidence of knowing graduates have a portfolio of experience from which to draw when working with real clients.

C. Drawbacks of the OEP

The Task Force discerns few, if any, meaningful drawbacks of the OEP model. However, there are three that are worth mentioning and acknowledging. First, depending on its construction and implementation, maintenance of the OEP could prove to be resource intensive. Investments would need to be made by the bar, law schools, and the broader legal community to make the program successful.

This is particularly important as the Task Force is recommending that the OEP is broadly accessible to Oregon law students rather than limiting it in the same manner as the DWS program. Second, a defined OEP curriculum may necessarily limit some student choices, although the curriculum proposed below seeks to address that concern. Third, the program will likely only be open to applicants who attend an in-state law school. While the BBX would entertain applications for partnerships with out-of-state schools, it is unlikely that an out-of-state school would craft such a resource intensive program for a few students who may wish practice in Oregon. This drawback is addressed by having a second alternative pathway open to all out-of-state applicants who would otherwise qualify to sit for the Oregon bar exam.

D. Implementation

The Task Force requests immediate adoption of the OEP with a charge to the Oregon law schools to prepare a curricular path for alternative licensure for the class of 2024 and a charge to the BBX to develop an assessment plan for such applicants. In doing so, we offer the following general recommendations, followed by a set of specific recommendations.

1. <u>General recommendations</u>

First, following adoption, the Supreme Court and OSB should set broad standards for the program and provide the law schools with flexibility to implement the OEP based on their respective curricular capacity. As discussed more fully below, certain baseline classes might be required (e.g., Evidence, Criminal Procedure, Business Transactions, etc.), but schools should have some discretion to design a program that otherwise meets the standards. We recommend that law schools adopt programs that include a curriculum broader and deeper than just litigation and business transactions; doing so via requirements like Indian law, family law, or civil rights law may help to attract a diverse group of students.

Second, we recommend charging an OEP Implementation Task Force with (a) drafting appropriate licensure admission rules, and (b) creating rubrics that will guide completion of a graduate's capstone project.

Finally, we recommend expressly encouraging holistic admission practices including admitting law students on more than an evaluation of LSAT/GPA in order to ensure reliance on more inclusive criteria, such as work experience, life experience, and/or overcoming personal challenges. Law schools will inherently be

encouraged to do so if they have the confidence that all first-year students can apply for the OEP program. Accordingly, we recommend making clear that the OEP will be open to all students in the spring of 1L year (rather than limiting participation to those pre-selected for the program).

2. Specific recommendations

The Task Force anticipates that law schools would need at least the entirety of the 21-22 academic year to implement the program. We are hopeful that the OEP could be available beginning in the fall of the 2022 to the class of 2024 who would have the opportunity to opt into the OEP at the end of the first year of study. We imagine law schools would use the 21-22 academic year to implement the following curriculum, comprising three core pillars: (1) foundational courses beyond the first year, (2) experiential requirements, and (3) completion of a capstone project. Students would need to complete courses listed from each pillar to be eligible to submit their capstone project. We further imagine a division in workflow where Oregon's law schools would be responsible for implementation of the OEP curriculum while BBX would be responsible for assessing the graduate's capstone.[7] With those introductory comments in mind, the Task Force recommends that the implementation committee in consultation with the three law schools create curriculum and experiential requirements that satisfy the OEP requirements. We would expect any law school applying to participate in the OEP to provide a proposed curricular path that meets the objectives of the OEP.

The Task Force provides the following as an example of curriculum that would provide an applicant the opportunity to experience the knowledge, skills, and clinical activities supportive of a successful OEP program:

Foundational Courses Beyond the Required First Year Courses: (range: ~20-24 credits, noting that credits assigned by the law schools for completing these courses can vary)

- Successful completion of the following foundational upper-level courses:
  - Professional Responsibility (2-3)
  - Evidence (3-4)

[7] -The implementation committee must determine who will assess whether the work produced in an applicant's EAP meets or exceeds the minimum competence standard. The Task Force recommends that it be volunteer experienced attorneys.

- Two of the following:
  - state/ local law (2-3),
  - constitutional or statutory interpretation (2-3), or
  - administrative law or processes (2-3).

- Take 3 of the following:
  - Criminal Procedure (3),
  - Business Associations (3),
  - Family Law (3),
  - Trusts & Estates (3),
  - Personal Income Tax (3).

- Successful completion of a graduate writing requirement (2-3 credits) that complies with ABA Standard 303(a)(2).

Experiential Requirements (15 credits)

- Successful completion of no fewer than 9 credits of closely supervised clinical work or simulation coursework.
- Successful completion of up to 6 credits of externship work.

EAP Capstone Requirement (for development by the OEP Implementation Task Force during AY21-23)

- To be developed in partnership with BBX. We could imagine, for instance, the creation of performance tests using case files and a limited universe of materials. We could alternatively imagine creation of a capstone project that relies on a rubric generated by the OEP Implementation Task Force. The rubric could serve as a curricular planning tool for students and, in doing so, could permit development of EAPs that students could begin during the fall of their second year. That rubric should consider the building blocks of minimum skills competence alongside ABA learning outcomes.

The requirements in this curriculum, including the first-year, total between 65-69 credits, although most of those requirements allow considerable choice among subject areas. Since ABA accreditation standards require at least 83 credits of academic work to secure a J.D., the course requirements in this example permit at least 14 credits (i.e., a full semester) of completely elective courses. The system,

in other words, structures the JD program while still allowing considerable student choice.

V. Supervised Practice Pathway

Apart from adopting the OEP, the Task Force also recommends adoption of a Supervised Practice Pathway. Part V, in Section A, addresses the rationale for creating such a pathway. Section B then offers a more detailed discussion of implementation considerations. Finally, in Section C, Part V addresses an assortment of other considerations relevant to the creation of a successful Supervised Practice Pathway.

A. Rationale for a Supervised Practice Pathway

The Task Force also recommends adoption of a supervised practice pathway to licensure, which we propose calling the Supervised Practice Pathway ("SPP"). The SPP model has applicants establish their minimum competence by (a) engaging in 1000 to 1500 hours of supervised legal practice (the specific set of hours to be determined by an implementation committee), and (b) submitting to the BBX an EAP of non-privileged work-product done during the applicant's supervised practice to assure that the applicant is developing the skills necessary for admission.

In crafting this recommended pathway, the Task Force seriously considered two jurisdictions that have employed a supervised practice path to admission: Canada, which has long employed an "articling" program, and Utah, which adopted a modified diploma-privilege/supervised practice program for 2020. We believe that the success of the programs in both jurisdictions demonstrate that the goal of protecting the consumer can be met through a supervised practice pathway. As discussed in the OEP section, our confidence is bolstered by the knowledge that one of the most effective ways to train new practitioners to provide competent representation is through practical experience.

Rather than recommending a wholesale adoption of the Utah or Canada program, the Task Force recommends that Oregon should craft its own model. The recommended model pulls not only from lessons learned in both of those jurisdictions but also from the New Hampshire DWS program and the BBX's experience in grading applicants' work on the Multistate Performance Exam (MPE). We believe that the recommended SPP provides a meaningful alternative pathway to law graduates interested in becoming admitted in Oregon while still

protecting the consumer. Indeed, the consumer is assured that a licensed, practicing lawyer is supervising the applicant's work prior to their admission to the Bar, and that a newly admitted lawyer who has taken this pathway was only admitted after gaining meaningful practical experience designed to ensure the person met the competency requirements set forth in RFA 1.25 and the IAALS Building Blocks.

To understand the recommended SPP, we provide a very brief overview of the programs we reviewed and what the Task Force took from those programs. To practice law in a Canada, one must complete a post-law school apprenticeship referred to as "articling." Generally, each province requires a 9-to-12-month articling term, which is accompanied by some type of "barrister" or "solicitor" exams that occur during the articling period and are administered by the relevant licensing authority. Some programs also include a formal practice orientated educational program that must be completed during the articling year.

While the Task Force feels confident that people who are admitted through these articling programs meet the requirements of minimum competence, we also recognize that some of the strictures of a 9-to-12-month apprenticeship create unfair barriers that keep others—people who are qualified to practice law—from being admitted. One significant barrier is the availability of meaningful, paid articling positions and who gets selected for those positions. The Task Force is hopeful that because the Oregon SPP will not be the only pathway for admission, this problem of access will be somewhat alleviated. Whether this is a significant issue is, however, something that the Court and the BBX should be careful to periodically review as the program is implemented.

The Task Force believes that two other points of emphasis can help alleviate equity concerns of a supervised practice pathway without compromising the development of an applicant's legal skills. First, we believe that the program should explicitly authorize applicants to have more than one qualified supervising attorney. Second, although the Task Force is recommending that the Court leave the precise number of hours required for admission through this pathway to an implementation committee, we believe the Court should expressly direct the committee to set the requirement in terms of hours contemporaneously measured and documented in six-minute increments rather than as a term of months to be documented only upon completion of the program or even monthly intervals. This assures that an applicant is not beholden to a single supervising attorney to accomplish the work needed for admission.

Measuring experience in hours rather than months is important for numerous reasons. First, it may be difficult for an applicant to find a supervised attorney who is willing to provide supervision for the entire period, but there may be practitioners who could provide meaningful supervision for a shorter term or for a particular project. Second, there may be meaningful pro bono opportunities that an applicant could participate in (while receiving the appropriate supervision) that would not be available if the applicant were tied to a single supervisor or a metric like "months." Finally, it is an unfortunate reality that any type of apprenticeship, regardless of the profession, creates a potential for exploitation because the apprentice does not want to suffer a set-back in training by leaving an otherwise untenable situation; we believe that the two suggestions we have made help to alleviate at least some of that concern. Finally, the Task Force believes that so long as the work being done fits within the program's requirements for the development of legal skills and the attorney providing the supervision is qualified to do so, these two provisions will not create any consumer protection concerns.

Additionally, most Canadian provinces do still employ exams (albeit not "bar exams" as we know them here in the United States) as part of their articling programs. The Task Force believes that because the SPP is going to serve as an alternative to sitting for and passing a bar examination, a better alternative to gauging the success of the supervised practice would be to implement a "portfolio" review by the BBX—an EAP. As discussed above, the New Hampshire DWS, participants create portfolios of legal work-product that is submitted to bar examiners for their review and assessment. As this Court knows, one component of the UBE is the Multistate Performance Test, which is designed to test applicant's practical legal skills, rather than substantive legal knowledge, by requiring examinees to complete an ordinary practice skill (e.g., drafting a memorandum to a supervising attorney, or a persuasive memorandum or brief). BBX members and Court-approved "co-graders" have become adept at grading the MPT. We believe that an EAP requirement could be crafted as part of the SPP that would assure that the completion of the required hours of supervised practice is operating to develop the applicant's legal skills and that the applicant is competent to practice law.

In addition to reviewing Canada's program, the Task Force also looked at Utah's 2020 modified-diploma privilege/supervised practice program.[8] The Utah

[8] *See* UTAH STATE BAR DIPLOMA PRIVILEGE RESOURCES, https://utahdiplomaprivilegeorg.wordpress.com/ (last visited June 16, 2021).

program was adopted by the Utah Supreme Court in recognition of the difficulties created by the pandemic. Applicants were eligible for admission to practice after only 360-hours of supervised practice, but the pool of applicants were limited (as relevant to this discussion) to those who had not previously sat for any bar examination and who had graduated from an ABA-accredited law school with a Bar Examination passage rate of 86% or greater.

Utah has created detailed rules regarding what is required by a supervised attorney in this context to both ensure the protection of the consumer and the development of the applicant's legal skills. It has created detailed rules regarding the legal activities that qualify in the program and the Task Force believes those activities appropriately target developing an applicant's legal competence, while protecting the consumer. In sum, the Task Force believes that Utah's program has developed a great deal of the "infrastructure" necessary to implement a SPP here in Oregon.

However, because of the circumstances under which it was adopted, the Utah program attempted to ensure minimum competence standards were met not through supervised practice hours alone, but also by restrictions that were tied to success in bar examinations (either one's individual success or one's school's historical success). Because one reason for developing this alternative pathway is the recognition of some of the institutional inequities of bar examinations, the Task Force believes that it is inappropriate to tie this pathway to any type of bar exam metric. Rather, we believe that the assurance of appropriate competence can be accomplished in two other ways: (a) increasing the hours required by the program from 360 to somewhere between 1000 and 1500 hours; and (b) employing an EAP requirement.

One advantage of the SPP is that it is available to graduates of any qualified law school, whether that school is in Oregon or another jurisdiction.[9] Moreover, the SPP would not be limited to either new graduates or those who have never taken and failed a bar examination; instead, if one were qualified under Rule for Admission 3.05 to sit for the Oregon bar exam, one would be qualified to apply for admission through the SPP. Additionally, the Task Force believes that, once approved, the rules and infrastructure required to adopt the SPP could be crafted relatively quickly. It is likely such a program could be available to graduates in the class of 2022. Finally, we believe that this pathway fully meets the Court's

[9] *See* RFA 3.05(1).

obligation to ensure that an applicant meets minimum competence requirements before admission while creating a meaningful alternative pathway for those for whom the bar exam is a less than desirable option.

In sum, the Task Force recommends that the Supreme Court adopt—as an alternative to the bar examination and not a replacement for it—a supervised practice pathway to admission. Although the details of this pathway, including the specific licensure admission rules, should be carefully crafted by an implementation committee, the Task Force outlines several parameters for the program below.

B. Implementation Considerations

This Section addresses considerations relevant to implementation of the SPP. Subsection 1 first considers a candidate's eligibility for the SPP. Subsection 2 then discusses the requirements to serve as a supervising attorney in the SPP. Subsection 3 then proposes a set number of required supervised practice hours. Subsection 4 offers guidance on what constitutes eligible supervised practice activities. Finally, Subsection 5 discusses how to evaluate candidates seeking admission to licensure pursuant to the SPP.

1. Eligibility

The SPP offers an alternative to a single component of admission: sitting for and passing the UBE. Neither avenue for admission should be considered better or worse than the other. Accordingly, the Task Force recommends that the universe of people who are deemed qualified applicants for admission via the SPP should mirror (but not expand or contract) the universe of people who are deemed qualified to sit for the Oregon bar exam. Those qualifications are set out in Rule for Admission 3.05; accordingly, the Task Force will not set them out in further detail here.[10]

The Task Force believes it is important to explicitly note the following:

[10] We note that RFA 3.05(4), which involves being able to sit for an exam prior to graduation from law school under specified limited circumstances necessarily does not, for obvious reasons, apply to SPP applicants.

- One need not seek admission via the SPP immediately upon becoming a qualified applicant;[11]

- One need not only seek admission via the SPP. The implementation committee should be sure to address how fees should be structured if a person seeks admission via both the bar examination and the SPP at the same time or sequentially;

- Prior failure of a bar examination has no impact on a person's ability to seek admission via the SPP; [12] and

- There is no "cap" on how many people can apply for admission via the SPP at any one time, but the Task Force notes that, at least initially, there is unlikely to be infrastructure within the BBX or, more broadly, the OSB, to formally assist an otherwise qualified applicant locate a qualified supervising attorney. As the SPP program develops, the BBX and the OSB should explore whether it can develop more formal ways to offer such assistance.

2. Supervising Attorney Requirements

A supervising attorney must have:

- An active Oregon license;

- 5-7 years' experience[13] as a licensed attorney with two of those years being engaged in practice in Oregon;

---

[11] For example, most applicants will become eligible to apply for admission under RFA 3.05(1), which provides that the applicant—in addition to being at least 18 years of age at the time of admission—has graduated from an ABA accredited law school. Just as an applicant is not required to seek admission by applying to sit for the bar examination immediately upon graduation from that law school, an applicant is not required to seek admission via SPP immediately upon graduation from law school.

[12] *See* RFA 3.05.

[13] Years of experience for supervisors should be determined by the implementation committee, perhaps with different requirements for different practice areas.

- No record of public discipline; and

- Completed any training requirements *and* formally agree to serve as a supervising attorney *before* the attorney supervises any practice activities. There are several workable models available for an implementation committee to consider for supervising attorney certification and training. Regardless of the model ultimately recommended by the implementation committee, however, the Task Force thought an appropriate guiding principle would be that no hours could be earned unless the supervising attorney was formally qualified and aware *at the time the hours were being earned* that the applicant was documenting them as supervised practice hours. (There can be no "*nunc pro tunc*" certification of hours.)

Most supervised attorney programs involve recognition that a supervising attorney will often delegate to another licensed attorney (even one who does not meet all of the other requirements for serving as a supervising attorney) the obligation of directly supervising an SPP applicant's daily activities. (For example, a partner in a firm may be the supervising attorney, while a "3rd year" associate is, on a daily basis, working directly with the SPP applicant). With appropriate rules in place, the Task Force thought that the use of such intermediate supervisors was appropriate.

The Task Force notes that the implementation committee must also determine whether an exception to the active license requirement should be made for federal judges acting as supervisors.[14] The resolution of this issue likely turns on the specific activities that the implementation committee recommends qualify as supervised practice hours, a point left unresolved by the Task Force. If the final implementation rules include as qualifying activities work for a judge, then the Task Force believes it is also appropriate to create an exception to the supervising attorney requirements for federal judges.

There is no limit on the number of qualified supervised attorneys an applicant may have.

---

[14] Oregon state court judges are required to maintain active Oregon licenses; federal judges are not required to do so.

3. Supervised Practice Hours

The Task Force believes that an applicant seeking to be admitted via SPP needs to complete 1000 to 1500 hours of supervised practice in approved qualified activities, the equivalent of 9-12 months of full-time practice. The activity should be completed employing six-minute increments and contemporaneously kept time records that are approved/certified by the supervising attorney. Those hours must be completed within a set window of time.

A majority of the Task Force agreed that the rules should be drafted in a manner that made it possible for some portion of the qualifying hours to be earned during law school. However, there were three points that the Task Force believed were worthy of additional reflection by an implementation committee. First, the Task Force agreed that if this was permitted, there should be a cap on how many hours can be earned while in law school. (For example, 200 hours of a 1000-hour requirement might be permitted.) Second, the activity must qualify for credit in all other respects. In other words, the supervising attorney must be certified as a supervised attorney before the work is completed; and the activity must be for a qualifying activity, etc. One complicating factor is that the Task Force recommended that only attorneys with active Oregon licenses could supervise practice; the Task Force was aware when it did so that this may limit the ability of people attending law school outside of Oregon to earn supervised practice hours during the school year. Ultimately, the Task Force considered the requirement of supervision by an active Oregon lawyer sufficiently important to justify that decision; the implementation committee, in consultation with the Court and other stakeholders, may reach a different conclusion. Third, there should be a cap on how long the hours used in law school can be used by an applicant. For instance, the rules may provide that the hours can only be used if a person seeks admission via the SPP within a specified period after graduation.

Collectively, the salient theme of the Task Force's timing recommendations is that, while the Task Force believes that it is important for there to be flexibility built into the process for those applicants who are not able to simply secure a position with a single employer and complete 1000 to 1500 hours of supervised practice in 9-to-12-months after graduating from law school, we also believe that consumer protection dictates that the supervised practice hours occur within a reasonably condensed period of time to ensure that the lessons that are learned through repetition and consistent exposure to concepts are not lost to time. We

appreciate, however, that there are numerous models for how those interests might be appropriately balanced.

4. Supervised Practice Activities and Payment

The Task Force believes that the list of qualifying activities should be focused on activities that tangibly relate to developing the applicant's legal competence as detailed in the essential eligibility requirements in RFA 1.25 and the Building Blocks identified by IAALS. Qualifying activities (whether paid, unpaid, pro bono, or low bono) would likely include, but not be limited to:

- All activities related to the direct representation of clients;
- Advising businesses and their employees;
- Developing or implementing policies and practices for nonprofit organizations or government agencies;
- Meeting with the Supervising Attorney or attorneys on case matters, professional development or ethical matters;
- CLE courses and other professional trainings or workshops as would be typical of an attorney in that area of practice (but with a limitation on the number of CLE hours that qualify).

The Task Force recommends that administrative, ministerial and purely paralegal activities be deemed to not qualify or that a cap be placed on the number of hours that can be earned while engaged in those activities.

The Task Force further recommends that the implementation committee carefully consider whether to set explicit policies on activities such as "document review" that, while important to a client and in practice, may have limited professional growth components.

We also recommend that the implementation committee discuss with practitioners and other stakeholders whether to include as qualifying activities "the assistance and counsel to judges." As noted above, if this activity is included, an exception to the requirement that the supervising attorney have an active Oregon license should be carved out for federal judges.

Two important points of reference for the implementation committee would be the "Law Student Appearance Program," contained in the Rules for Admission, and the New Lawyer Mentoring Program. While admission via the SPP is not intended to replace either of these programs, the implementation committee will want to consider how they interact and whether amendments to those programs would be required for them all to work with each other properly.

While supervised practice hours can be completed in appropriate pro bono or low bono settings, it should be made explicit that this program is not intended to provide admitted members of the Bar, whether those members are solo practitioners, members of small firms or large firms, with free or low-cost labor. Applicants working for supervising attorneys can and should be paid a reasonable wage for their work. Moreover, it is likely that—assuming a practitioner properly accounts for the practice in client retainer agreements—much of the work of a SPP applicant will be of a nature that it could be properly billed to clients.

5. Evaluation of Participants Seeking Admission Via the SPP

The Task Force offers three core recommendations to guide further consideration about how to evaluate applicants applying for licensure through the SPP:

- Documentation of Supervised Practice Activities. Procedures should be implemented to ensure that every aspect of an SPP applicant's participation in the program is appropriately documented with the BBX. For example, there should be clear procedures for registering a qualified supervising attorney, and a clear procedure for documenting hours worked, etc.

- EAP Review and Certification. The Task Force recommends that the implementation committee also craft an EAP requirement, modeled somewhat after New Hampshire's DWS program, that calls upon an SPP applicant to submit non-privileged written work product to the BBX at regular intervals throughout the SPP period so that the BBX can ensure that, before the applicant is recommended for admission, the BBX has seen work product by the applicant that demonstrates minimum competency for admission. The EAP review regulations will have to carefully layout what process is due (and what procedure will be used) if the BBX is concerned at any point that the work product submitted fails to meet minimum competency requirements.

- BBX Oversight. The BBX will remain responsible for admission recommendations to the Court.[15] A favorable recommendation in this context will effectively certify that the applicant has completed the ordinary prerequisites to admission (graduation requirements, passing the MPRE, payment of fees, passing character and fitness evaluation), met all of the practical requirements of the SPP, and that the applicant's EAP demonstrates minimum competence.

C. Other Considerations

Although there would be a great deal of work to be done, the Task Force believes that it is possible to craft the regulations and procedures necessary to establish a meaningful version of the SPP by the summer of 2022. Whether such a program could be launched by that time will depend on whether the infrastructure required by those regulations is immediately available and the resolution of the outstanding questions noted through Section V of this Report and in the Report of the Supervised Practice Pathway subcommittee to the Task Force. Once those questions are resolved and proposed procedures drafted, the Court will be in a position to either order the immediate implementation of the program or to direct the BBX to work on securing the resources needed to permit its implementation.

Also, as previously noted, the SPP pathway to admission will not include any formal assistance by the OSB or BBX to applicants looking for supervising attorneys. Nor, very likely, will the OSB or BBX be able to develop meaningful partnerships with non-profits or other organizations through which applicants might be able to engage in meaningful practice development activities while simultaneously providing important assistance to underserved communities. However, we hope that as the program becomes more robust the OSB and the BBX will be able to play a greater role in both of those areas.

---

[15] Like the OEP program, this will require a great deal of volunteerism on the part of bar membership. The program requires many experienced lawyers who wish to train a new apprentice, and other experienced lawyers to assess whether the EAP of the apprentice meets or exceeds the minimum competence standard.

VI. Conclusion

The Task Force believes that there is substantial evidence to support offering alternative pathways to licensure that maintain and enhance rigor, while ensuring that new lawyers enter the profession with the knowledge and skills that they need to serve clients. Both the OEP and the SPP meet this call. For the reasons discussed above, the Alternatives to the Exam Task Force respectfully requests immediate adoption of the Oregon Experiential Pathway and the Supervised Practice Pathway models as alternatives to the bar exam. The Task Force further requests that the Court order the formation of implementation committees to draft the implementing Rules for Admission.

Sincerely

Joanna Perini-Abbott
Chair, Alternatives to the Exam Task Force
Oregon State Board of Bar Examiners

OREGON STATE BOARD OF BAR EXAMINERS

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

June 23, 2021

Chair, Joanna Perini-Abbott
Oregon State Board of Bar Examiners
16037 SW Upper Boones Ferry Road
Tigard, OR 97224

Re: Standard Setting Task Force Pass Score Recommendation for the Oregon State Bar Examination

Dear Board of Bar Examiners:

On September 14, 2020, Chief Justice Walters asked the Board of Bar Examiners (BBX) for its views as to the appropriate passing score on the UBE for Bar admission in Oregon. To provide depth to its analysis, the BBX established a 2021 Standard Setting Task Force (SSTF or Task Force), which was comprised of members and representatives of the court, BBX, Oregon law school deans, and Oregon State Bar staff. This SSTF met four times via remote meetings and reviewed several articles, reports, documents and data worksheets to encourage robust policy discussions around standard setting in the legal field.

2017 Task Force

Oregon became a Uniform Bar Exam (UBE) state in 2017, the same year an initial "Cut Score Task Force" was established to make a recommendation on Oregon's previous, non-UBE, pass score. That task force reviewed recent trends in Oregon's pass rates and the pass scores of other jurisdictions to recommend lowering the pass score from 284 to 274, which the BBX in turn recommended to the Supreme Court. The BBX also noted that, since the establishment of the New Lawyer Mentoring Program (NLMP), passing the bar examination was not the only rite of passage for new members. The NLMP provides hands-on, one-on-one learning opportunities for new members to acquire necessary skills and become

familiar with procedures and practices not addressed by the bar examination, whatever the pass score. The court approved that pass score change, resulting in a current cut score of 274 (with an exception of a lower, court-approved score (266) applied to the July and fall 2020 exams conducted during the pandemic).

2021 Task Force

The BBX determined that it would like a more scientific approach to be taken in this year's recommendation to the Oregon Supreme Court. The BBX, therefore, requested that the services of a psychometrician be engaged; one with expertise in conducting standard setting exercises for the bar exam in other jurisdictions.

The Oregon State Bar hired ACS Ventures to conduct the standard setting exercises that provided insight to the Task Force on pass scores. Many policy considerations go into the final pass score level, but it is generally recommended that it begin with a study by practitioners in the state bar who have familiarity with the work product in the legal marketplace and can spot the minimum level of competence that is acceptable, using the Rules for Admission's "essential eligibility requirements" as a framework for assessing minimum competence (see generally RFA 1.25).

The study was conducted on May 17 & 18, 2021, and consisted of panels of practitioners reviewing answers from a recent bar exam and determining if the answers meet the minimum level of competence. The panel was made up of lawyers from three categories: 1) lawyers who work in mid-to-large firms that oversee the work of associates who are new to the practice of law; 2) young lawyers who are new to the practice of law; and 3) lawyers who have a solo practice or work in small-firms with less than five lawyers (firms with no associates).

The completed psychometrician's report is attached to this letter for reference as Exhibit 1.

Recommendation

The 2021 Task Force was asked to review the current pass score, provide feedback, and make any appropriate recommendations. We relied heavily on the

psychometrician's report in our conclusion that a score between 268 and 273 falls within an acceptable passing score range. The Task Force found support for this range because at least two-thirds of the panelists within the psychometrician's study found that these scores represented the minimum competence standard. However, there was consensus to recommend a pass score of 270 based on a variety of factors, including consumer protection, the UBE pass scores of other Western States, the need for more Oregon lawyers, and issues surrounding equity and access to justice. Lowering the score from 274 to 270 would have resulted in a 3.8% increase in bar passage for those who took the bar exam in July 2019 (73.3% passage rate increased to a 77.1% passage rate).

The following documents were reviewed and relied upon by the SSTF in reviewing the previously mentioned policy considerations and making its recommendation and are provided as attachments to this letter:

- Psychometrician's report (Exhibit 1)
- 2017 California Standard Setting Exercise (Exhibit 2)
- Article—Need for Standards in Profession (Exhibit 3)
- Article—Standard Setting for High Stakes Professional Exams (Exhibit 4)
- California Supreme Court Lowering Score Based on 2017 Study (Exhibit 5)
- California Cut Score Simulation Analysis (Exhibit 6)
- Article—New York Study of the UBE (Exhibit 7)
- Oregon Membership versus Population spreadsheet (Exhibit 8)
- Legal Needs Executive Summary (Exhibit 9)
- Western UBE Bar Passage Scores (Exhibit 10)

Supplemental Information

A bar exam pass score is intended to represent the numerical definition of the minimum level of competence. However, given the number of complex factors that affect assessing competence through the bar exam, it is impossible to establish a pass score that will provide a fool-proof separation between those who rise to the level of the minimally competent and those who do not. The nature of the exam and the assessment of its answers lead to occasional false positives and false negatives.

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

While false positives and negatives might be statistical anomalies, the life-altering impact they have on applicants who fail the bar exam or on legal consumers harmed by a lawyer who is not minimally competent should be addressed in the setting of the standard. There are many reasons and theories about the existence of false positives and negatives, but they are generally believed to result from at least one of the following factors:

1. Issues related to the questions asked on a particular exam;
2. Issues with the testing environment for a particular exam;
3. Events that occurred in an examinee's life temporally close to a bar exam;
4. Access to adequate exam preparation materials and study environments;
5. Sufficient resources and time to adequately prepare for an exam;
6. The questions presented on a particular exam perfectly match an unqualified examinees knowledge; and
7. Cheating on the bar exam.

While the National Conference of Bar Examiners and the BBX regularly look at ways to remediate the effects of the above referenced factors, no institution has found a solution that completely eliminates the possibility of false positives or negatives. However, changes in the pass score are generally believed to have a direct impact on the chances of false positives or negatives occurring on a bar exam. The lowering of a pass score is generally believed to increase the possibility of a false positive, while also lowering the possibility of a false negative. The inverse is true if a pass score is raised.

While the pass score ultimately represents a standard of competence, that score also represents decisions made on certain policy issues or the weight given to

those policy issues, and the standard setting body's tolerance for false positives or false negatives. While the Task Force reviewed many policy issues and factors in reaching its decision, the following list represents the issues and factors deemed most influential for this recommendation (materials found to be persuasive on these issues and factors are referenced after each issue and/or factor):

1. Protection of the general public from the actions of lawyers who are not minimally competent and the role standards play in this protection (See Exhibits 2, 3, 4);
2. Disparities in bar exam outcomes between examines from the dominant culture population and various non-dominant culture populations (See Exhibits 5, 6, 7);
3. The need to increase the total number of active bar members to address access to justice issues created by Oregon's growing general population (See Exhibits 8 and 9);
4. A lack of available legal services in certain non-dominant cultures and populations, and the lack of bar members from these same cultures and populations (See Exhibit 9); and
5. Standard setting decisions made by other Western UBE states in establishing their pass score (See Exhibit 10).

The results of the May panel study provided the Task Force with keen insight into how the term "minimum competence" is actually applied in the current Oregon legal marketplace, and the bar exam scores that are considered a good reflection of this definition. While the current 274 pass score was viewed as a good representation of at least minimum competence, many lower scores were viewed as substantially achieving this standard as well. Due to concerns about the previously mentioned policy issues, and a lower tolerance for false negatives brought on by the panel study, the Task Force reached a consensus that the pass score should be lowered.

Given the number of issues and factors that may influence the Court's decision on the pass score, the Task Force unanimously agreed that a range of pass scores should be recommended to the Court. Additionally, it was agreed that a singular pass score should, if possible, be selected within that range to represent a score that all Task Force members believe adequately addresses the concerns of risk tolerance that are embedded within the "minimum competence" definition while

simultaneously making important progress on issues of equity and access to justice that are addressed, in part, by a reduced score.

While two-thirds of the panelists in the psychometrician's study supported an argument that 268 should be viewed within the minimum competence standard, some Task Force members thought that this number would present too high of a tolerance for false positives on the bar exam; thus, no consensus could be reached in recommending this as a singular score. However, it was unanimously agreed that 268 would be a good representation for the bottom of the recommended range, because the Court may not have the same risk concerns or may place more emphasis on competing considerations. As there was consensus that the pass score should be lowered, 273 is recommended as the peak of the range because 273 was the top result of two-thirds of the "pass" results within the psychometrician's study. With consensus achieved on the range of 268 to 273, all members of the Task Force agreed that 270 is the score that may come closest to balancing the ideals of the minimum standard, as well as achieving consistency with other Western states, while still adequately addressing the concerns of members on various policy issues and risk tolerances.

Task Force Members

The Task Force included the following voting members:
Chair, Caroline Wong (BBX Member)
Cassandra McLeod-Skinner (BBX Member)
Michael Slauson (BBX Member)
Helen Hierschbiel (CEO of Oregon State Bar)
Dean John Parry (Lewis and Clark Law School)
Dean Megan McAlpin (University of Oregon Law School)
Dean Jeffrey Dobbins (Willamette University School of Law)
Justice Meagan Flynn (Oregon Supreme Court)

Liaisons to the Task Force included the following:
Lisa Norris-Lampe (Appellate Legal Counsel, Oregon Supreme Court)
J.B. Kim (Diversity & Inclusion Director, Oregon State Bar)
Troy Wood (Regulatory Counsel, Oregon State Bar)

Conclusion

Based on the foregoing, the voting members of the Task Force make the following three recommendation to the Oregon Supreme Court related to the Oregon Bar Exam pass score: 1) that the pass score should be lowered from its current level of 274; 2) that the pass score should probably be lowered to a score within the range of 268 to 273; and 3) that the score that possibly best reflects the competing interests that go into a pass score decision is 270.

Sincerely,

Caroline Wong
Chair, 2021 Standard Setting Task Force
Oregon State Board of Bar Examiners

Exhibit 1

ACS VENTURES

BRIDGING THEORY & PRACTICE

Cut Score Review for the Oregon Bar Exam

Final Report

June 11, 2021

Submitted By:
Andrew Wiley, Ph.D.
Office: 917.885.0858
awiley@acsventures.com

Contents

Executive Summary

As part of the review and maintenance of the Oregon Bar Exam, the Oregon State Bar contracted with ACS Ventures, LLC (ACS) to complete a review and evaluation of the current exam cut score. To conduct this review, ACS managed and facilitated a 2-day workshop with a committee of current Oregon based lawyers that focused on a review of exam candidates' performance on the Bar Exam and whether their performance was consistent with the professional experience and expectations of the committee members.

The purpose of this study was to complete a review of the current cut score used to make Pass/Fail judgment for candidates on the Bar exam. The meeting was designed to enlist a committee subject matter experts (SMEs) to serve as reviewers of candidate performance on the Oregon Bar Exam and to evaluate whether candidate performance was consistent with their professional expectations and experience with lawyers practicing in the state of Oregon.

Prior to the workshop, the Oregon Bar shared de-identified candidate score data for the June 2019 test administration of the Oregon Bar. Using this data, ACS identified a sample of candidate responses that would be used during the workshop. The candidate responses were classified into two waves of eight candidate samples each. The first wave was designed to provide a somewhat broad range of scores, while the second was designed to be slightly more focused, based upon the feedback provided during the first wave.

During the workshop, the committee members discussed their knowledge and expectations for candidates who should pass the bar examination. They also reviewed the general scoring rules for all sections of the Oregon Bar exam. The committee members then proceeded with a review of a single candidate in which they reviewed the candidates' response to all MEE and all MPT prompts on the test. After reviewing the responses, each committee members provided a holistic Pass/Fail judgment for the candidate. After all committee members completed this work, the group held a group discussion focused on the specific characteristics of the response and how they arrived at their specific rating. Once this was completed, the committee members independently completed their ratings of the remaining seven candidates in the Wave 1 sample.

After completing their initial ratings, the committee members discussed each of the sample candidates. After the discussion, the committee members were given the opportunity to update their ratings for each of the candidates. After completing this second round of ratings, panelists followed an identical process in reviewing the second set of eight candidate samples. As with the first wave, panelists completed an independent review, followed by group discussion, followed by an opportunity to update their ratings. Based upon the review of both the first and second wave of candidate samples, a few key findings can be observed:

- There was consistent agreement among the committee members that candidate that were reviewed and had scored at or above the current cut score demonstrated performance that was consistent with a Pass designation.
- There was consistent agreement that candidates dramatically lower than the current cut score (i.e. < 265) did *not* demonstrate performance that was consistent with a Pass designation.
- Candidates with test scores slightly lower than the current cut score (i.e. 268-273) had fairly strong support that their performance was consistent with performance that was consistent with a Pass designation. However, the support was not as consistent with those at higher score points.

Overall, the committee members appeared to feel comfortable with the process that was followed and seem to fully understand the task and data that was provided to them. This information can be utilized by the Oregon Bar as it considers options for modifying or keeping the current cut score as is.

Introduction and Overview

As part of the review and maintenance of the Oregon Bar Exam, the Oregon State Bar contracted with ACS Ventures, LLC (ACS) to complete a review and evaluation of the current exam cut score. To conduct this review, ACS managed and facilitated a 2-day workshop with a committee of current Oregon based lawyers that focused on a review of exam candidates' performance on the Bar exam and whether their performance was consistent with the professional experience and expectations of the committee members.

The purpose of licensure examinations like the Oregon Bar exam is to distinguish competent candidates from those that could do harm to the public. This examination purpose is distinguished from other types of exams in that licensure exams are not designed to evaluate training programs, evaluate mastery of content, predict success in professional practice, or ensure employability. Although other stakeholders may attempt to use scores from the examination for one or more of these purposes, it is important to clearly state what inferences the test scores are designed to support or not. Therefore, the cut score review was designed to focus expert judgments about the level of performance that aligns with minimal competence.

Assessment Design

The Oregon Bar Exam is built on multiple components intended to measure the breadth and depth of content needed by entry level attorneys who are minimally competent. All candidates complete all components of the Multistate Bar Exam (MBE), which includes 200 multiple-choice questions (MBE), six essay questions (MEE), and two performance tasks (MPT)[1]. The combined score for the examination weights the MBE at 50% and the constructed response components at 50% with the MEE weighted at 30% and the MPT weighted at 20%. A decision about passing or failing is based on the performance of applicants on the entire examination and not any single component. This means that an applicant's total score on the examination is evaluated relative to the passing score to determine pass/fail status.

Study Purpose and Validity Framework

The purpose of this study was to complete a review of the current cut score that distinguished the performance characteristics of someone who was minimally competent from someone who was not competent. To complete this review, Dr. Andrew Wiley and Ms. Kelley Wheeler from ACS facilitated a virtual workshop on May 17-18, 2021. The meeting was designed to enlist subject matter experts (SMEs) to serve as reviewers of candidate performance on the Oregon Bar exam and to evaluate whether candidate performance was consistent with their professional expectations and experience with lawyers practicing in the state of Oregon.

To evaluate the cut score review, Kane's (2001) framework for evaluating standard setting activities was used. Within this framework, Kane suggests three sources of evidence should be considered in the validation process: procedural, internal, and external. When evaluating procedural evidence, practitioners generally look to panelist selection and qualification, the choice of methodology, the application of the methodology, and the panelists' perspectives about the implementation of the methodology as some of the primary sources. The

[1] The performance task is designed to measure skills associated with the entry level practice of law (e.g., legal analysis, reasoning, written communication) separate from the domain specific application of these skills to specific subject areas as are measured in the essay questions.

internal evidence for standard setting is often evaluated by examining the consistency of panelists' ratings and the convergence of the recommendations. Sources of external evidence of validity for similar studies include impact data to inform the reasonableness of the recommended cut scores.

This report describes the sources of validity evidence that were collected and reports the results of the review. The State Bar is receiving this report as part of their initial review of the passing score to assist in the overall review of the Oregon Bar Exam. Based upon this report as well as additional information, the Oregon State Bar may elect to adopt a policy recommendation for an updated cut score, that will then be provided to the Oregon Supreme Court for final decision-making. These results would serve as a starting point for a final passing score to be established for use with the Oregon Bar Exam.

Procedures

The cut score review followed a process consistent with the Analytic Judgment Method for setting a cut score (AJM; Plake & Hambleton, 2001)[2]. The AJM approach is characterized as a test-based method (Hambleton & Pitoniak, 2006) that focuses on the relationship between item difficulty and examinee performance on the test. It is appropriate for tests that use constructed response items like the essay questions and performance task that are part of the written part of the Oregon Bar Exam (see Buckendahl & Davis-Becker, 2012).

Panelists

A total of 15 panelists participated in the workshop[3]. The panelists were licensed attorneys with an average of 13 years of experience in the field. Panelists were recruited by task force members to represent a range of stakeholder groups. These groups were defined as Recently Licensed Professionals (panelists with less than five years of experience), Management Level Professionals (panelists with ten or more years of experience who review associate work as a regular part of their practice), and Small Firm or Solo Practitioners (panelists with six or more years of experience who work in firms of three or fewer licensed attorneys). Note that some panelists were associated with multiple roles. Some of the experienced attorneys also served as part-time adjunct faculty members at law schools, but all maintained a full-time law practice. In listing their employment type in the table below, we have documented the primary role indicated by panelists. A summary of the panelists' qualifications is shown in Table 1.

In addition to the panelists, a representative from the Oregon State Bar also attended portions of the workshop. The representative did provide clarification and further explanation on some Bar exam related inquiries from panelists, but the representative did not participate in discussions regarding candidate performance and did not provide any recommendations as part of the process. All panelists signed

---

[2] Within the psychometric literature, there are multiple methods for a formal process of evaluating a test and developing a cut score recommendation. The purpose of this workshop was to review the cut score; but *not* to provide a formal recommendation; therefore the methodology did not follow the exact processes, but was consistent with the overall AJM methods.

[3] Members of the Standard Setting Task Force were assigned the task of nominating licensed Oregon lawyers for the standard setting panel. Members were asked to nominate practitioners who hold themselves to the highest professional standards, care about the public image of the profession, and have a genuine concern for protecting the legal consumer from incompetent representation. The panelist recommendations were then reviewed on their merits by the entire Standard Setting Task Force, who selected participants to represent diverse backgrounds with respect to experience, practice areas, size of firms, geographic location, gender, and race/ethnicity.

confidentiality and nondisclosure agreements that permitted them to discuss the standard setting activities and processes outside the workshop, but that they would not be able to discuss the specific definition of the minimally competent candidate or any of the preliminary results that they may have heard or observed during the study.

Table 1. Summary of panelist demographic characteristics.

Years of Practice	
5 years or less	40%
6 to 11 years	27%
More than 10 years	33%
Primary Employment Type	
Large-firm	40%
Small-firm	20%
Solo practice	27%
District Attorney	7%
Other Government	7%

Practice Areas	
Business Formation/Advisement	33%
Civil Litigation	53%
Contracts/Transactional	60%
Criminal Law	7%
Domestic Relations	7%
Employment Law	20%
General Practitioner	13%
Personal Injury	13%
Probate/Estate Planning	13%
Real Estate Transactions/Litigation	20%
Regulatory Compliance	7%
Workers Compensation	7%

Demographic Data:

Gender:	
Female	53%
Male	47%
Non-binary	0%
Trans	0%
Race/Ethnicity:	
White/Non-hispanic	73%
BIPOC	27%

Location of Practice:	
Portland Metro	60%
Oregon Coast	13%
Southern Valley	13%
Central Oregon	7%
Eastern Oregon	7%

Candidate selection

Prior to the workshop, the Oregon Bar shared de-identified candidate score data for the June 2019 test administration of the Oregon Bar. Using this data, ACS identified a sample of candidate responses that would be used during the workshop. To focus the activities of the committee, candidate responses were selected that were reasonably close to the current cut score. When candidate samples were identified, the entire set of candidate responses were selected and reviewed.

The candidate responses were classified into two waves of eight candidate samples each. The first wave was designed to provide a somewhat broad range of scores, while the second was designed to be slightly more focused, based upon the feedback provided during the first wave. Prior to the workshop, a greater number of candidate samples were identified and prepared. Because of this, the second wave could include more candidates who had scored somewhat close to where the committee felt comfortable and could avoid candidate responses that were dramatically different than where the committee was focused.
All candidate responses were prepared with the entire candidate response included in a single PDF file. The PDF file was secured on the ACS SharePoint site with access provided to the panelists on the first morning of the workshop. Access to the SharePoint was discontinued at the conclusion of the workshop. All candidate responses were completely de-identified so that the name and information regarding the candidate could not be determined.

Workshop Activities

The Oregon Bar Exam cut score review meeting was conducted virtually on May 17-18, 2021, using the ACS Zoom platform. Prior to the meeting, participants were informed that they would be engaging in tasks that would result in a review of the current cut score and that they would be reviewing samples of candidate performance from a previous Oregon Bar test administration. They were also provided descriptions of the six MEE prompts and the two MPT prompts that were administered in June of 2019 and that would be reviewed during the workshop. Along with the prompts, panelists were also provided information on the scoring of each of the MEE and MPT prompts. The cut score review consisted of orientation and training, discussion of the minimally competent candidate, the review of samples of candidate performance, and group discussion. Andrew Wiley, Ph.D., served as the facilitator for the meeting along with Ms. Kelley Wheeler. Workshop orientation materials are provided in Appendix A.

Orientation

The meeting commenced on May 17th with Dr. Wiley providing a general orientation for all panelists that included the goals of the meeting. Additionally, Mr. Troy Wood, Regulatory Counsel for the Oregon State Bar provided additional information for how the information gathered during this workshop would be used by the Oregon State Bar in their review of the current cut score. In addition, a generic scoring guide/rubric was shared with the panelists to provide a framework for how essay questions and the performance task would be scored. The different areas of the scoring criteria were a) Issue spotting, b) Identifying elements of applicable law, c) Analysis and application of law to fact pattern, d) Formulating conclusions based on analysis, and e) Justification for conclusions. Each essay question and performance task had a unique scoring guide/rubric for the respective question that was based upon this generic structure.

Part of the orientation was a discussion around the expectations for someone who is a minimally competent lawyer and therefore should be capable of passing the exam. An initial proposal for a definition of minimal

competence was presented to the committee. The initial definition focused on four essential traits for a minimally competent candidate (MCC), more specifically:

> A minimally competent applicant will be able to demonstrate the following at a level that shows meaningful knowledge, skill and legal reasoning ability, but will likely provide incomplete responses that contain some errors of both fact and judgment:
>
> (1) Rudimentary knowledge of a range of legal rules and principles in a number of fields in which many practitioners come into contact. May need assistance to identify all elements or dimensions of these rules.
>
> (2) Ability to distinguish relevant from irrelevant information when assessing a particular situation in light of a given legal rule, and identify what additional information would be helpful in making the assessment.
>
> (3) Ability to explain the application of a legal rule or rules to a particular set of facts. An applicant may be minimally competent even if s/he may over or under-explain these applications, or miss some dimensions of the relationship between fact and law.
>
> (4) Formulate and communicate basic legal conclusions and recommendations in light of the law and available facts.

Additionally, the facilitator guided the panel through a process where panelists further discussed the MCC by answering the following questions:

- What knowledge, skills, and abilities are representative of the work of the MCC?
- What knowledge, skills, and abilities would be easier for the MCC?
- What knowledge, skills, and abilities would be more difficult for the MCC?

The results of this discussion and the illustrative characteristics of MCC performance for each of the subject areas that were included in this study are included as an embedded document in Appendix B.

Initial rating

After the review of the MCC, the panelists proceeded to complete their review of the first sample candidate. The panelists were instructed that they were to review the first candidate's response to all six MEE prompts and both MPT prompts and make an overall holistic judgment on whether they believed the candidate had demonstrated sufficient knowledge and skills to be considered a passing candidate. Each panelist independently reviewed the performance of the first candidate and completed the holistic Pass/Fail judgment. Once all panelists completed their review, the group was reconvened to allow for a group discussion of the panelists' judgments. This discussion included what features from specific prompts they believed supported their Pass/Fail decision, the candidate's consistency of performance across the prompts, and the particular strengths and weaknesses of the candidate response.

After completing the group discussion of the first candidate, the committee members proceeded to independently review the MEE and MPT responses for an additional seven candidates. This work was completed independently and offline. Upon completing their review and ratings, the ratings were submitted

to Dr. Wiley and Ms. Wheeler so they could be summarized. The independent review of the candidates completed the activities for Day 1 of the workshop.

Discussion of the Wave 1 candidate samples

At the beginning of Day 2, Dr. Wiley facilitated a discussion of the candidate samples from Wave 1. During the discussion, the committee members discussed the strengths and weaknesses of each candidate, the features of the responses that impacted their holistic Pass/Fail judgments, and consistency of the response across the six MEE prompts and the two MPT prompts.

After this discussion, the committee members were provided information on the overall score of each the candidates they had reviewed. Using this information, further discussion was facilitated across the panel focused on whether the assigned scores were consistent with the committee members ratings and whether any panelists appeared to have a notably different score than what was expected. Finally, after all group review was completed, the committee members were provided an opportunity to update their initial Pass/Fail judgments. These updated ratings were submitted to Dr. Wiley and Ms. Wheeler via email.

Review of Wave 2 candidate sample and discussion

Based upon the initial recommendation of the committee members, a second wave of candidate responses was identified by Dr. Wiley and Ms. Wheeler. This second wave was designed to be somewhat more focused on the score points that the committee members appeared to be most interested in discussing. As with the 1st wave of candidate responses, all responses were grouped into PDF files and placed on the ACS SharePoint site. Access to the site was sent to the panelists as the discussion of the first round was reaching its conclusion.

The committee members completed an independent review of the eight candidate samples and submitted their judgments to Dr. Wiley and Ms. Wheeler. After all committee members had completed their independent judgments, the group reconvened on Zoom and Dr. Wiley facilitated a discussion of their judgments and the candidate samples. As with the Wave 1 sample, the discussion focused on the strengths and weaknesses of each candidate, the features of the responses that impacted their holistic Pass/Fail judgments, and consistency of the response across the six MEE prompts and the two MPT prompts. After this discussion the score information for each candidate was also provided to support additional discussion.

Analysis and Results

For each of the candidate samples that were reviewed, the percentage of committee members who supplied a judgment of Pass was calculated. The percentage of committee members that assigned a Pass judgment to each of the Wave 1 candidate responses is reported in Table 2 below. As can be seen in the table, there was 100% agreement in their ratings for both the highest and the lowest scored sample, with all committee members assigning a Pass to the candidate with a score of 278, and no committee members assigning a Pass to the candidate who scored at 264. There also appeared to be strong agreement for the candidate who scored at 267, with only 13.3% of the committee members assigning a Pass. Between the scores of 268 and 275, there were less agreement amongst the committee members, with as few as 46.7% of committee members indicating the candidate should pass and up to 86.7% of committee members indicating another candidate should pass. Most interestingly, the committee members did not necessarily follow the same pattern as the scores assigned to the candidate, with some of the lower scored responses (score of 270 passed by 86.7% of committee members) receiving higher overall judgments from the committee members.

Table 2: Percentage of committee members assigning a Pass judgment to each candidate response in Wave 1[4]

Cand. ID	Total Score	% Pass
1.1	264	0.0%
1.2	267	13.3%
1.3	268	46.7%
1.4	270	86.7%
1.5	271	53.3%
1.6	274	86.7%
1.7	275	66.7%
1.8	278	100.0%

Table 3 provides the same information but for the second wave of candidate samples that the committee members reviewed. Interestingly, the ratings provided by the committee members appear to present a pattern that is more consistent with the scores assigned to the candidates. For the Wave 2 candidates, there was strong agreement amongst the committee members that the lower scoring candidate responses should not receive a Pass rating. Alternatively, for those at the higher end, starting at a score of 268, a high percentage of committee members indicated that they believed the candidate response should pass, and that number increased as responses close to the current cut score were reviewed (i.e., 86.7% of committee members said the response at a score of 274 should pass).

Table 3: Percentage of committee members assigning a Pass judgment to each candidate response in Wave 2[5]

ID	Score	%
2.1	260	20.0%
2.2	264	6.7%
2.3	265	26.7%
2.4	268	66.7%
2.5	271	66.7%
2.6	273	66.7%
2.7	274	86.7%
2.8	275	80.0%

[4] The data in Table 2 is based upon the 2nd round of ratings provided by the committee members. For reference, the initial first round is summarized and provided in Appendix C.

[5] The data in Table 3 is based upon the 2nd round of ratings provided by the committee members. For reference, the initial first round is summarized and provided in Appendix C.

Process Evaluation Results

Panelists completed a series of evaluations during the study that included both multiple-choice questions and open-ended prompts. The responses to the questions are included in Table 4 and the comments provided are included in Appendix C. For all questions, higher ratings indicate the panelists had more comfort or confidence in the process and/or outcomes of the workshop.

Table 4: Evaluation results for the cut score review workshop

	Median	1 - Lower	2	3	4 - Higher
1. Success of Training					
A. Orientation to the workshop	3	0	2	7	4
B. Overview of the exam	3	0	0	8	5
C. Discussion of the PLD	3	0	0	10	3
D. Training with the MEE	3	0	1	8	4
E. Training with the MPT	3	0	0	9	4
2. Confidence defining the Minimally Competent Candidate	3	0	0	11	2
3. Time allocated to Minimally Competent Candidate	3	0	0	12	1
4. Confidence discussing the MEE	3	0	0	8	5
5. Time allocated to the MEE	3	1	1	8	3
6. Confidence discussing the MPT	3	0	0	8	5
7. Time allocated to the MPT	3	0	1	9	3
8. Overall success of the workshop	3	0	0	9	4
9. Overall organization of the workshop	3	0	0	9	4

Collectively, the results of the panelists' evaluation suggest generally positive perception of the activities for the workshop, their ratings, and the outcomes. The ratings were slightly lower for some of the questions related the time allocated for the tasks, which are likely a reflection of the challenge of the task and the requirements to complete a review of multiple candidates in a tight time window.

Evaluating the Cut Score Recommendations

To evaluate the workshop, we applied Kane's (1994; 2001) framework for validating standard setting activities. Because Kane's framework is focused on standard setting, or determining a cut score, the framework is not directly applicable, but the framework can provide some useful information to consider. Within this framework, Kane suggested three sources of evidence that should be considered in the validation process: procedural, internal, and external. Threats to validity that were observed in these areas should inform policymakers' judgments regarding the usefulness of the panelists' recommendations and the validity of the interpretation. Evidence within each of these areas that was observed in this study is discussed here.

Procedural

When evaluating procedural evidence, practitioners generally look to panelist selection and qualifications, the choice of methodology, the application of the methodology, and the panelists' perspectives about the implementation of the methodology as some of the primary sources. For this study, the panel that was recruited and selected by the Supreme Court represented a wide range of stakeholders: newer and more experienced attorneys and representatives from legal education who collectively included diverse professional experiences and backgrounds. The choice of methodology was appropriate given the constructed response aspects of the essay questions and performance task. Panelists' perspectives on the process were collected and the evaluation responses were very positive.

Internal

The internal evidence for standard setting is often evaluated by examining the consistency of panelists' ratings and the convergence of the recommendations. Traditionally, this would be evaluated using the consistency of the recommended cut scores. In our workshop, we did see more consistency with the ratings as we moved from Wave 1 to Wave 2. In Wave 2, we observed more agreements amongst the committee members, indicating the group started to reach a consensus on behavior indicative of passing performance.

External

Traditionally, external evidence is some of the most difficult evidence to collect. In some scenarios, the passing rate that would be observed given a recommended cut score can be compared to other measures to determine if they are consistent with these other observed measures. For this workshop, the current passing score and pass rate in Oregon can be reviewed and compared with other neighboring states.

Table 5 presents the historic passing rates for Oregon along with a comparison to the neighboring states of Oregon. As can be seen, the pass rate of first-time test takers as well as the total group of test takers was the highest for the state of Oregon in 2017 to 2019.

Table 5: Historical pass rates for the July test administration of multiple state bar exams

	2015		2016		2017		2018		2019	
	1st-time	All	1st-time	All	1st-time	All	1st-time	All	1st-time	All
OR	68%	(60%)	62%	(58%)	84%	(79%)	78%	(73%)	84%	(75%)
CA	60%	(47%)	56%	(43%)	62%	(50%)	55%	(41%)	64%	(50%)
ID	NA	(69%)	NA	(73%)	NA	(76%)	NA	(66%)	NA	(64%)
NV	NA	NA	NA	(51%)	NA	(66%)	NA	(57%)	NA	(61%)
WA	81%	(76%)	76%	(70%)	76%	(72%)	75%	(69%)	76%	(68%)

Cut score considerations

As the Oregon Bar reviews the results of this workshop, a number of critical considerations can be factored into this process. First, it is important to note that the workshop conducted in May was *not* designed to provide a single cut score recommendation for the Oregon bar. Bar Exam pass scores typically represent an outcome that was derived from reviews, studies, research, analysis and debate on at least some of the subject matters included in the following non-exclusive list: 1) the minimum professional standard; 2) psychometric studies; 3) the consumer protection role that bar admissions plays for the profession; 4) statistics related to malpractice and attorney discipline for newer lawyers vs. established practitioners; 5) regulatory requirements that assist newer lawyers in the practice of law and offer consumer protection; 6) causality between current lawyer populations and access to justice for underserved populations; 7) expanding diversity and inclusion within the profession; and 8) the strengths and weaknesses of the current bar exam in assessing whether a person is minimally competent. Given the complexity that these issues can have on the ultimate pass score decision, our review was designed to evaluate if the panelists generally agreed with the current Pass/Fail designation assigned to current candidates of the Oregon Bar. After the panel found the current pass score represented competent candidate performance, the committee was then asked to review candidate samples below the cut score to identify the lowest score that a super-majority of panel members believed represented minimum professional competence.

In general, there was strong support from the committee members for all of the candidates reviewed that received a Pass designation on the current Bar exam. Every passing candidate was considered by a minimum of 66.7% of the committee members as an appropriate Pass, with most of the candidates supported by approximately 80 to 86% percent of committee members. In addition, candidates who scored slightly lower (e.g., scores between 268 and 273) had fairly strong support as well. However, it was not as consistent with one candidate only supported by 47% of the committee members and another only supported by 53% of committee members. Candidates who scored at the lower end of the observed scores (e.g., scores between 260 and 263) generally had a fairly small percentage of committee members who thought they should pass the exam.

To further aid in the considerations of the Oregon Bar, the performance of candidates on the July 2019 exam was reviewed and the hypothetical pass rate that would be observed across multiple score points was calculated. Table 6 shows the pass rate that would have been observed across multiple hypothetical pass rates. It should be noted that the pass rates are based on the total group, not first-time takers.

Table 6: Hypothetical pass rates for the July 2019 on multiple possible cut points

Score	264	265	266	267	268	269	270	271	272	273	274
Projected 2019 Pass Rate	82.6%	81.2%	80.4%	79.6%	78.7%	77.7%	77.1%	76.6%	75.2%	74.7%	73.3%

An additional factor warrants consideration as part of the policy deliberation. Specifically, the consideration of policy tolerance for different types of classification errors. Because we know that there is measurement error with any test score, **when applying a passing score to make an important decision about an individual, it is important to consider the risk of each type of error**. A Type I error represents an individual who passes an examination, but whose true abilities are below the cut score. These types of classification errors are considered false positives. Conversely, a Type II error represents an individual who does not pass an

examination, but whose true abilities are above the passing score. These types of classification errors are known as false negatives. Both types of errors are theoretical in nature because we cannot know which test takers in the distribution around the passing score may be false positives or false negatives.

A policy body can articulate its rationale for supporting adoption of the group's recommendation or adjusting the recommendation in such a way that minimizes one type of misclassification. The policy rationale for licensure examination programs is based primarily on deliberation of the risk of each type of error. For example, many licensure and certification examinations in healthcare fields have a greater policy tolerance for Type II errors than Type I errors with the rationale that the public is at greater risk for adverse consequences from an unqualified candidate who passes (i.e., Type I error) than a qualified one who fails (i.e., Type II error).

References

Buckendahl, C., Ferdous, A., & Gerrow, J. (2010). Recommending cut scores with a subset of items: An empirical illustration. *Practical Assessment, Research & Evaluation, 15*(6). Available online: http://pareonline.net/getvn.asp?v=15&n=6.

Buckendahl, C. W. & Davis-Becker, S. (2012). Setting passing standards for credentialing programs. In G. J. Cizek (Ed.), *Setting performance standards: Foundations, methods, and innovations* (2nd ed., pp. 485-502). New York, NY: Routledge.

Egan, K. L., Schneider, M. C., & Ferrara, S. (2012). Performance level descriptors: History, practice and a proposed framework. In G. J. Cizek (Ed.), Setting performance standards: Foundations, method, and innovations (2nd ed., pp. 79-106). New York, NY: Routledge.

Hambleton, R. K., & Pitoniak, M. J. (2006). Setting performance standards. In R. L. Brennan (Ed.), *Educational measurement* (4th ed., pp. 433–470). Westport, CT: American Council on Education and Praeger.

Kane, M. (1994). Validating the performance standards associated with passing scores. *Review of Educational Research, 64* (3), 425-461.

Kane, M. T. (2001). So much remains the same: Conception and status of validation in setting standards. In G. J. Cizek (Ed.), *Setting performance standards: Concepts, methods, and perspectives* (pp. 53-88). Mahwah, NJ: Erlbaum.

Plake, B. S. & Hambleton, R. K. (2001). The analytic judgment method for setting standards on complex, large-scale assessments. In G. J. Cizek (Ed.), *Setting performance standards: Concepts, methods, and perspectives* (pp. 283-312). Mahwah, NJ: Erlbaum.

Appendix A – Standard Setting Materials

Training Slides

OR Bar Workshop Orientation 12May20

Workshop evaluation

OR Bar Cut Score Review Evaluation 12

Appendix B – Standard Setting Information and Data

Definition of Minimally Competent Candidate (MCC)

Excel file with Raw Wave 1 committee ratings

OR Bar Analysis
Wave 1 Raw 11June2

Excel file with Raw Wave 1 committee ratings

OR Bar Analysis
Wave 2 Raw 11June2

Appendix C Candidate classification summary for Round 1 ratings

Table C.1: Percentage of committee members assigning a Pass judgment to each candidate response in Wave 1, Round 1

Cand. ID	Total Score	% Pass
1.1	264	13.3%
1.2	267	33.3%
1.3	268	60.0%
1.4	270	66.7%
1.5	271	53.3%
1.6	274	86.7%
1.7	275	46.7%
1.8	278	100.0%

Table C.2: Percentage of committee members assigning a Pass judgment to each candidate response in Wave 2, Round 1

Cand. ID	Total Score	% Pass
2.1	260	40.0%
2.2	264	0.0%
2.3	265	26.7%
2.4	268	66.7%
2.5	271	66.7%
2.6	273	53.3%
2.7	274	80.0%
2.8	275	80.0%

Appendix D – Evaluation Comments

Each panelist completed an evaluation of the standard setting process that included several open-ended response questions. The responses provided to each are included below.

Please provide any comments about the discussion of the Minimally Competent Candidate (MCC) that would be helpful in planning future workshops:

- Thought what we did was just about right.
- I think I just needed a little more training on how to grade the exams. Other than that it was great!
- A lot more work than I had originally thought there would be, but if I had known I don't know if I would have agreed to participate. Overall, I appreciated that the presenters did value our time and input and acknowledged it, which helped a lot.
- I truly don't think you should give us the score that each applicant actually received - it absolutely skewed my thinking. I think maybe either rank them or just say whether they passed or not.
- This is not exactly responsive, but part of the problem is that I do not believe that's what the intent of the Bar Exam is, and therefore it becomes difficult to judge exams based on that as the premise. I believe the purpose of the Bar Exam may have minimal competence as one aspect, but also is in part an exercise in forcing people to work hard at memorizing a bunch of stuff, to be pain in the butt to study for because we don't want it to be easy to become an attorney. And so failing to memorize a bunch of stuff is a detriment to one's performance on the exam, and yet through the lens of an MCC, it's hard to argue that memorizing hundreds of pages of blank letter law is part of minimal competence. So there's a disconnect in the work of reviewing essays that test memorization and then evaluating whether the person has minimal competence.

Please provide any comments about the discussion of the MEE that would be helpful in planning future workshops:

- I think it would have been helpful to instruct us to read and review the scoring materials before the first meeting so I could be more prepared.
- See answer 4 above. ("I truly don't think you should give us the score that each applicant actually received - it absolutely skewed my thinking. I think maybe either rank them or just say whether they passed or not.")
- To echo earlier comments, it seemed that across the board reviewers gave greater weight to the MPT and less to the MEE, because the MEE was about memorization, while the MPT was more of a real world test. But if the MEE is part of the exam, then we need to accept that the purpose of the exam is not just about seeing if someone is ready to work on a "real world" project. We need to acknowledge that knowing black letter law is part of the requirement, and the MEE is given roughly the same (actually greater) value than the MPT and so reviewers should weigh it roughly equally.

Please provide any comments about the discussion of the MPT that would be helpful in planning future workshops:

- I think it would have been helpful to instruct us to read and review the scoring materials before the first meeting so I could be more prepared. It was provided to us, but I didn't realize it would benefit me to read it in advance. I didn't know that I would have to actually apply it like we did.
- See answer 4 above ("I truly don't think you should give us the score that each applicant actually received - it absolutely skewed my thinking. I think maybe either rank them or just say whether they passed or not.")

Please provide any comments about the workshop activities that would be helpful in planning future workshops:

- Good first round, I think it can be improved upon but good start.
- Again, sorry, didn't know this question was coming, but "I truly don't think you should give us the score that each applicant actually received - it absolutely skewed my thinking. I think maybe either rank them or just say whether they passed or not." What you guys do is FASCINATING. I wondered how this would work and when I figured it out, I felt a click in my head. Great stuff. Thanks for helping us have a strong Bar.
- I found the time to review all the exams to be way too compressed. It was every bit a time crunch as a rush project for a client, to the point where I was forced to skim over aspects of certain ones. So I would suggest that either there is more time between passing out the materials and returning feedback reviews, or fewer of them (even one fewer in each batch would have made me feel much more comfortable about the review time).
- It was as organized as it needed to be. Some informality was an welcome part of the experience. Don't take the fact that I put "Organized" instead of "Very Organized" as a criticism.

Exhibit 2

ACS VENTURES

BRIDGING THEORY & PRACTICE

Conducting a Standard Setting Study for the California Bar Exam

Final Report

July 28, 2017

Submitted By:
Chad W. Buckendahl, Ph.D.
Office: 702-586-7386
cbuckendahl@acsventures.com

Contents

Executive Summary

The California State Bar conducted a standard setting workshop[1] May 15-17, 2017 to evaluate the passing score for the California Bar Exam. The results from this workshop serve as an important source of evidence for informing the final policy decision on what, if any, changes to make in the current required passing score. The workshop involved gathering judgments from panelists through the application of a standardized process for recommending passing scores and then calculating a recommendation for a passing score.

The standard setting workshop applied a modification of the Analytic Judgment Method (AJM; Plake & Hambleton, 2001). This method entails asking panelists to classify illustrative responses into defined categories (e.g., not competent, competent, highly competent). The selection of the AJM for the California Bar Examination reflected consideration of the characteristics of the exam as well as requirements of the standard setting method itself. The AJM was designed for examinations that use constructed response questions (i.e. narrative written answers) that are designed to measure multiple traits. The responses produced by applicants on the essay questions and performance task are examples of constructed response questions for which the AJM is applicable.[2]

The methodology involved identifying exemplars of applicant performance that span the observed score scale for the examination. The exemplar performances were good representations of the respective score point such that the underlying score was not in question. The rating task for the panelists was to first broadly classify each exemplar into two or more categories (e.g., not competent, competent, highly competent). Once this broad classification was completed, panelists then refined those judgments by identifying the papers close to the target threshold (i.e., minimally competent). This meant that the panelists identified the best of the not competent exemplars and the worst of the competent exemplars that they had initially classified. The process was repeated for each essay question and performance task with the results summed across questions to form an individual panelist's recommendation.

To calculate the recommended cut score for a given question for a panelist, the underlying scores for the exemplars identified by a respective panelist were averaged (i.e., mean, median) across the group. These calculations were summed across the questions with each essay question being equally weighted and the performance task counting for twice as much as an individual essay question to model the operational scoring that will occur beginning with the July 2017 administration.

Following these judgments, we calculated the recommended score and associated passing rate when considering the written part of the examination. However, we needed to know what score on the total exam corresponded to this same pass rate. To answer this question, another step was needed to transform these

---

[1] Standard setting is the phase of examination development and validation that involves the systematic application of policy to the scores and decisions on an examination. Conducting these studies to establish passing scores is expected by the *Standards for Educational and Psychological Testing* (AERA, APA, & NCME, 2014).

[2] Alternative methods that rely on panelists' judgments of candidate work include Paper Selection and Body of Work (see Hambleton & Pitoniak, 2006, for additional details on these and a discussion of the categories of standard setting methods).

judgments to the score scale on the full-length examination. After creating distributions of individual recommendations for the written part of the examination, to estimate the score for the full-length examination we applied an equipercentile linking approach to find the score that yielded the same percent passing as was determined on just the written component of the examination that panelists evaluated. Equipercentile involves finding the equivalent percentile rank within one distribution of scores and transforming to another score distribution to retain the same impact from one examination to another or in this instance, from a part of the examination on which panelists made judgments to the full examination.

The **standard setting meeting results and evaluation feedback generally supported the validity of the panel's recommended passing score for use with the California Bar Examination**. Results from the study were analyzed to create a range of recommended passing scores. However, additional policy factors may be considered when establishing the passing score. One of these factors may include the recommended passing score and impact relative to the historical passing score and impact. The panel's median recommended passing score of 1439 converged with the program's existing passing score while the mean recommended passing score of 1451 was higher.

Additional factors that could be considered in determining the appropriate cut score for California might include the passing rates from other states that have similarly large numbers of bar applicants sitting for the examination. However, the interpretation of these results and the comparability are mitigated by the different eligibility policies among these jurisdictions and **California's more inclusive policies** as to who may sit for the exam [3]along with the downward trend in bar examination performance across the country, particularly over the last few years. In some instances, the gap passing the bar exam between California's applicants and other states has closed and in others, the gap observed in 2007 has remained essentially constant as the trend declined on a similar slope.

An additional factor warrants consideration as part of the policy deliberation. Specifically, the consideration of policy tolerance for different types of classification errors is relevant. Because we know that there is measurement error with any test score, **when applying a passing score to make an important decision about an individual, it is important to consider the risk of each type of error**. A *Type I* error represents an individual who passes an examination, but whose true abilities are below the cut score. These types of classification errors are considered false positives. Conversely, a *Type II* error represents an individual who does not pass an examination, but whose true abilities are above the passing score. These types of classification errors are known as false negatives. Both types of errors are theoretical in nature because we cannot know which test takers in the distribution around the passing score may be false positives or false negatives.

A policy body can articulate its rationale for supporting adoption of the group's recommendation or adjusting the recommendation in such a way that minimizes one type of misclassification. The policy rationale for licensure examination programs is based primarily on deliberation of the risk of each type of error. For

---

[3] California has a uniquely inclusive policy as to who may be eligible to take the Bar Exam. Not only those who have graduated from schools nationally accredited by the American Bar Association, but applicants from California accredited and unaccredited law schools are also allowed to take the exam, as well as those who have 'read law.' This sets California apart from virtually all other jurisdictions.

example, many licensure and certification examinations in healthcare fields have a greater policy tolerance for *Type II* errors than *Type I* errors with the rationale that the public is at greater risk for adverse consequences from an unqualified candidate who passes (i.e., *Type I* error) than a qualified one who fails (i.e., *Type II* error).

In applying the rationale, if the policy decision is that there is a greater tolerance for *Type I* errors, then the decision would be to accept the recommendation of the panel (i.e., 144) or adopt a value that is one to two standard errors below the recommendation (i.e., 139 to 141). Conversely, if the policy decision is that there is a greater tolerance for *Type II* errors, then the decision would be to accept the recommendation of the panel (i.e., 144) or adopt a value that is one to two standard errors above the recommendation (i.e., 148 to 150). Because standard setting is an integration of policy and psychometrics, the final determination will be policy driven, but supported by the data collected in this workshop and this study more broadly.

Introduction and Overview

The purpose of licensure examinations like the California Bar Exam[4] is to distinguish competent candidates from those that could do harm to the public. This examination purpose is distinguished from other types of exams in that licensure exams are not designed to evaluate training programs, evaluate mastery of content, predict success in professional practice, or ensure employability. Although other stakeholders may attempt to use scores from the examination for one or more of these purposes, it is important to clearly state what inferences the test scores are designed to support or not. Therefore, the standard setting process was designed in a way to focus expert judgments about the level of performance that aligns with minimal competence.

Assessment Design

The California Bar Exam is built on multiple components intended to measure the breadth and depth of content needed by entry level attorneys who are minimally competent. These components are the Multistate Bar Exam (MBE), five essay questions, and a performance task[5]. Beginning with the July 2017 examination, the combined score for the examination weights the MBE at 50% and the constructed response components at 50% with the performance task being weighted as twice as much as an essay question.[6] A decision about passing or failing is based on the compensatory performance of applicants on the examination and not any single component. This means that an applicant's total score on the examination is evaluated relative to the passing score to determine pass/fail status. The applicant does not need to separately "pass" the MBE and the constructed response questions.

Study Purpose and Validity Framework

The purpose of this study was to recommend a passing score that distinguished the performance characteristics of someone who was minimally competent from someone who was not competent. To establish a recommended passing score, Dr. Chad Buckendahl of ACS Ventures, LLC (ACS) facilitated a standard setting meeting for The State Bar of California on May 15-17, 2017 in San Francisco, CA. The purpose of the meeting was to enlist subject matter experts (SMEs) to serve as panelists and recommend cut scores that designate the targeted level of minimally competent performance.

---

[4] Note that the California Department of Consumer Affairs is responsible for managing the licensure process for many professions and consults with many others. As such, a representative from the Department was asked to serve as an external reviewer for this study.

[5] The performance task is designed to measure skills associated with the entry level practice of law (e.g., legal analysis, reasoning, written communication) separate from the domain specific application of these skills to specific subject areas as are measured in the essay questions.

[6] Prior to the July 2017 exam, MBE accounted for 35% of the exam, with the constructed response components weighted 65% of the total. Previously, constructed responses consisted of six essay and two performance task questions. While the papers used in the workshop were originally administered according to the old format, in anticipation of the new cut score potentially applied to exams from July 2017 based on the new format, the five essay and one performance test questions were used in the workshop to conform with the new exam structure.

To evaluate the cut score recommendations that were generated from this study, Kane's (2001) framework for evaluating standard setting activities was used. Within this framework, Kane suggests three sources of evidence should be considered in the validation process: procedural, internal, and external. When evaluating procedural evidence, practitioners generally look to panelist selection and qualification, the choice of methodology, the application of the methodology, and the panelists' perspectives about the implementation of the methodology as some of the primary sources. The internal evidence for standard setting is often evaluated by examining the consistency of panelists' ratings and the convergence of the recommendations. Sources of external evidence of validity for similar studies include impact data to inform the reasonableness of the recommended cut scores.

This report describes the sources of validity evidence that were collected and reports the study's passing score recommendations. The California Bar is receiving these recommended passing score within ranges of standard error to contribute to discussions about developing a policy recommendation that will then be provided to the California Supreme Court for final decision-making. These results would serve as a starting point for a final passing score to be established for use with the California Bar Exam.

Procedures

The standard setting study used a modified version of the Analytic Judgment Method (AJM; Plake & Hambleton, 2001). The AJM approach is characterized as a test based method (Hambleton & Pitoniak, 2006) that focuses on the relationship between item difficulty and examinee performance on the test. It is appropriate for tests that use constructed response items like the essay questions and performance task that are part of the written part of the California Bar Exam (see Buckendahl & Davis-Becker, 2012). The primary modification for the study was to reduce the number of applicants' performances that panelists reviewed from 50 to 30 given the score scale for each essay question and the performance task.

Panelists and Observers

A total of 20 panelists participated in the workshop[7]. The panelists were licensed attorneys with an average of 14 years of experience in the field. Panelists were recruited to represent a range of stakeholder groups. These groups were defined as Recently Licensed Professionals (panelists with less than five years of experience), Experienced Professionals (panelists with ten or more years of experience), and Faculty/Educator (panelists who are employed at a college or university). Note that some panelists were associated with multiple roles. Some of the experienced attorneys also served as adjunct faculty members at law schools. In listing their employment type in the table below, we have documented the primary role indicated by panelists. A summary of the panelists' qualifications is shown in Table 1.

In addition to the panelists, there were also observers who attended the in-person standard setting workshop. These included an external evaluator with expertise in standard setting, a representative from the California Department of Consumer Affairs, representatives from California Law Schools, a representative from the Committee on Bar Examinations, and staff from the California Bar Examination. Observers were instructed

[7] Nominations to participate on the standard setting panel were submitted to the Supreme Court who selected participants to represent diverse backgrounds with respect to experience, practice areas, size of firms, geographic location, gender, and race/ethnicity.

during the orientation of the meeting that they were not to intervene or discuss the standard setting activities with the panelists. All panelists and observers signed confidentiality and nondisclosure agreements that permitted them to discuss the standard setting activities and processes outside the workshop, but that they would not be able to discuss the specific definition of the minimally competent candidate or any of the preliminary results that they may have heard or observed during the study. External evaluators and observers were included in the process to promote the transparency of the standard setting and to critically evaluate the fidelity of the process by which a passing score would be recommended.

Table 1. Summary of panelist demographic characteristics.

Race/Ethnicity	Freq.	Percent
Asian	3	15.0
Asian/White	1	5.0
Black	4	20.0
Hispanic	2	10.0
White	10	50.0
Total	20	100.0

Gender	Freq.	Percent
Female	9	45.0
Male	11	55.0
Total	20	100.0

Years of Practice	Freq.	Percent
5 Years or Less	10	50.0
>=10	10	50.0
Total	20	100.0

Nominating Entity	Freq.	Percent
ABA Law Schools	3	15.0
Assembly Judiciary Comm.	1	5.0
Board of Trustees	2	10.0
BOT - CBE*	1	5.0
BOT - COAF*	8	40.0
BOT - CYLA*	2	10.0
CALS Law Schools	1	5.0
Governor	1	5.0
Senior Grader	1	5.0
Total	20	100.0

* Committee of Bar Examiners; Council on Access and Fairness; California Young Lawyers Association.

Primary Employment Type	Freq.	Percent
Academic	2	10.0
Court	1	5.0
District Attorney	1	5.0
Large Firm	4	20.0
Non Profit	3	15.0
Other Govt.	3	15.0
Public Defender	1	5.0
Small Firm	3	15.0
Solo Practice	2	10.0
Total	20	100.0

Practice Areas	Freq.	%
Business	12	17%
Personal Injury	6	9%
Appellate	5	7%
Criminal	5	7%
Labor Relations	4	6%

Juvenile Delinquency	3	4%
Probate	3	4%
Real Estate	3	4%
Antitrust	2	3%
Disability Rights	2	3%
Employment	2	3%
Environmental Law	2	3%
Family	2	3%
Insurance Coverage	2	3%
Intellectual Property	2	3%
Administrative Law	1	1%
Civil Rights	1	1%
Contract Indemnity Litigation	1	1%
Education	1	1%
Elder Abuse	1	1%
General Commercial Litigation	1	1%
Government Transparency	1	1%
Immigration	1	1%
Legal Malpractice	1	1%
Mass Tort	1	1%
Nonprofit Law	1	1%
Policy Advocacy	1	1%
Product Liability	1	1%
Public Interest	1	1%
Total	69	100%

Method

Numerous standard setting methods are used to recommend passing scores on credentialing[8] exams (Hambleton & Pitoniak, 2006). The selection of the Analytical Judgment Method (AJM; Plake & Hambleton, 2001) for the California Bar Exam reflected consideration of the characteristics of the exam as well as requirements of the standard setting method itself. The AJM was designed for examinations that use constructed response questions that are designed to measure multiple traits. The responses produced by the applicants on the essay questions and performance task of the California Bar Exam are examples of constructed response questions where the AJM is applicable.

The methodology first involves identifying exemplars of applicant performance that span the observed score scale for the examination. The exemplar performances should be good representations of the respective score point such that the underlying score should not be in question. Plake and Hambleton (2001) suggested using

[8] Credentialing is an inclusive term that is used to refer to licensure, certification, registration, and certificate programs.

50 exemplars to ensure that there was sufficient representation of the score scale. Once these exemplars have been identified, they should be randomly ordered and coded to de-identify the score for the standard setting panelists. The goal is to have the panelists focus on the interpretation of the performance level descriptor of minimum competency and not the score of the paper.

The rating task for the panelists is to then broadly classify each exemplar into two or more categories (e.g., not competent, competent, highly competent). Once this broad classification is completed, panelists are asked to then refine those judgments by identifying the papers close to one or more thresholds. For example, if the target threshold is minimum competency, then panelists would identify the best of the not competent exemplars and the worst of the competent exemplars. To calculate the recommended cut score for a given question, the underlying scores for these exemplars are averaged (i.e., mean, median) to determine a value for this question. The process is then repeated for each essay question and performance task with the results summed across questions to form an individual panelist's recommendation.

In the operationalization of this method for this study, two modifications of the methodology were used. First, rather than having 50 exemplars for each question, panelists evaluated 30 exemplars for each question. This modification was applied primarily due to the width of the effective scale. Meaning, although the theoretical score scale for each essay question spans from 0-100, the effective score scale only ranges from approximately 45-90 and is limited to increments of 5 points. This reduces the number of potential scale score points and thereby reduces the number exemplars necessary for each score point to illustrate the range. The second modification of the process involved sharing with the panelists a generic scoring guide/rubric as opposed to specific ones for each question. This was done to avoid potentially biasing the panelists in their judgments and to focus on the common structure of how the constructed response questions were scored.

In the rating task, panelists were asked to review examples of performance and categorize each example as either characteristic of *not competent*, *competent*, or *highly competent* performance. Even though the only target threshold level was *minimally competent*, the use of *highly competent* as a loosely defined category was meant to filter out exemplars that would not be considered in the refined judgments. Following the broad classification, these initial classifications were then refined to identify the papers that best represented the transition point from not competent to competent (i.e., minimally competent). Once these papers were identified by the panelists (i.e., the two best not competent exemplars and the two worst competent exemplars), the actual scores that these exemplars received during the actual, original grading process were used to calculate the average values of the panelists' recommendations for each question and then summed across questions.

Workshop Activities

The California Bar Exam standard setting meeting was conducted May 15-17, 2017 in San Francisco, CA. Prior to the meeting, participants were informed that they would be engaging in tasks that would result in a recommendation for a passing score for the examination. The standard setting procedures consisted of orientation and training, operational standard setting activities for each essay/performance task, and successive evaluations to gather panelists' opinions of the process. Chad Buckendahl, Ph.D., served as the facilitator for the meeting. Workshop orientation materials are provided in Appendix B.

Orientation

The meeting commenced on May 15th with Dr. Buckendahl providing a general orientation for all panelists that included the goals of the meeting, an overview of the Analytical Judgment Method and its application, and specific instructions for panel activities. Additionally, the opening orientation described how cut scores would ultimately be determined through recommendations to the California State Bar. In addition, a generic scoring guide/rubric was shared with the panelists to provide a framework for how essay questions and the performance task would be scored. The different areas of the scoring criteria were a) Issue spotting, b) Identifying elements of applicable law, c) Analysis and application of law to fact pattern, d) Formulating conclusions based on analysis, and e) Justification for conclusions. Each essay question and performance task had a unique scoring guide/rubric for the respective question, but followed this generic structure.

Part of the orientation was a discussion around the expectations for someone who is a minimally competent lawyer and therefore should be capable of passing the exam. The process for defining minimum competency is policy driven and started with a draft definition produced by the California Bar. Feedback was solicited from law school deans, the Supreme Court of California, and the workshop facilitator for substance and style.

Based on the input from multiple stakeholder groups and relying on best practice as suggested by Egan et al. (2012), the California Bar provided the following description of minimally competent candidate (MCC).

> A minimally competent applicant will be able to demonstrate the following at a level that shows meaningful knowledge, skill and legal reasoning ability, but will likely provide incomplete responses that contain some errors of both fact and judgment:
>
> (1) Rudimentary knowledge of a range of legal rules and principles in a number of fields in which many practitioners come into contact. May need assistance to identify all elements or dimensions of these rules.
>
> (2) Ability to distinguish relevant from irrelevant information when assessing a particular situation in light of a given legal rule, and identify what additional information would be helpful in making the assessment.
>
> (3) Ability to explain the application of a legal rule or rules to a particular set of facts. An applicant may be minimally competent even if s/he may over or under-explain these applications, or miss some dimensions of the relationship between fact and law.
>
> (4) Formulate and communicate basic legal conclusions and recommendations in light of the law and available facts.

Additionally, the facilitator guided the panel through a process where panelists further discussed the MCC by answering the following questions:

- What knowledge, skills, and abilities are representative of the work of the MCC?
- What knowledge, skills, and abilities would be easier for the MCC?
- What knowledge, skills, and abilities would be more difficult for the MCC?

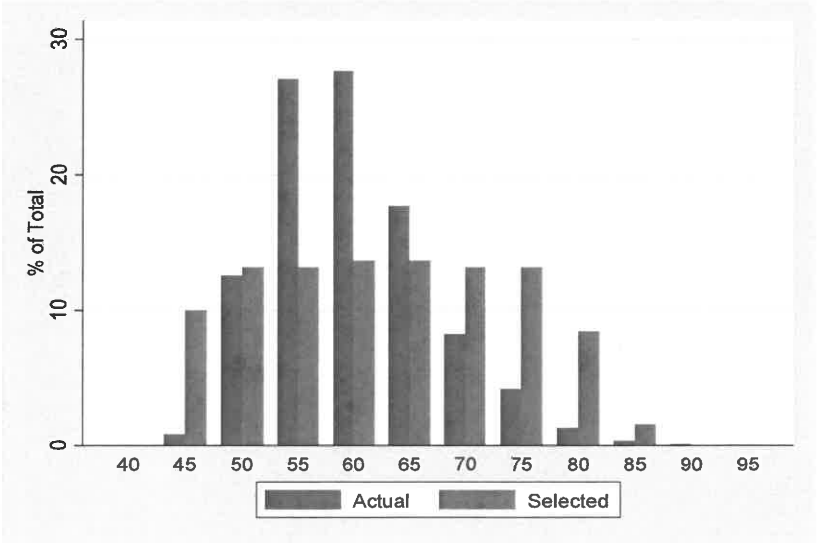
The results of this discussion and the illustrative characteristics of MCC performance for each of the subject areas that were included in this study are included as an embedded document in Appendix C.

Training/Practice with the Method

Panelists also engaged in specific training regarding the AJM. This involved a discussion about the initial task of broadly classifying exemplars into one of three categories – not competent, competent, or highly competent – and using the performance level descriptor (PLD) of the MCC to guide those judgments. In addition, prior to the operational ratings, panelists were given an opportunity to practice with the methodology. The practice activity replicated the operational judgments with two exceptions: a) panelists were only given 10 exemplars distributed across the score scale to review and b) panelists only identified one exemplar that represented the best not competent and the worst competent. Panelists then discussed their selections and the reasoning for why their judgments reflected the upper and lower bound of the expected performance of the MCC.

Written Exam Score Distributions - Actual and Sample Selected for Workshop

	Actual		Selected	
Score	Freq.	%	Freq.	%
40	29	*0.1*	0	*0.0*
45	436	*0.8*	19	*10.0*
50	6,669	*12.6*	25	*13.2*
55	14,354	*27.1*	25	*13.2*
60	14,678	*27.7*	26	*13.7*
65	9,383	*17.7*	26	*13.7*
70	4,365	*8.2*	25	*13.2*
75	2,206	*4.2*	25	*13.2*
80	689	*1.3*	16	*8.4*
85	178	*0.3*	3	*1.6*
90	33	*0.1*	0	*0.0*
95	3	*0.0*	0	*0.0*
Total	53,023	*100.0*	190	*100.0*



Operational Standard Setting Judgments

After completing the training activities panelists began their ratings by independently classifying the 30 exemplars that were selected for the first question. The 30 exemplars for each question were selected to approximate a uniform distribution (i.e., about the same number of exemplars across the range of observed scores). Figure 1 below shows the distribution of scores for the written section of the examination along with the distribution of exemplars that were selected for this study.

Figure 1. Distribution of observed scores and selected exemplars for the written section of the California Bar Examination from July 2016.

For the study, these exemplars were then randomly ordered and only identified with a code that represented the score that the exemplar received during the grading process in 2016. Panelists were not told the scores on the exemplars to maintain their focus on the content rather than an intuitive perception of a given score. After panelists made their initial, broad classification, they identified the ***two best not competent exemplars*** and the ***two worst competent exemplars*** from their initial classifications. The selection of these specific exemplars is used to estimate the types of performance that would be demonstrated by a MCC. Panelists used a predeveloped rating form to indicate the codes on the exemplars that aligned with these instructions.

To convert the panelists' ratings into numerical values to then calculate the recommendations, the first step was to use a look up table to determine the underlying score associated with a given exemplar code. This was done for each question and each panelist. The conversion of the exemplar codes into the scores that each exemplar received permitted the summation of the values, calculation of averages (i.e., mean, median) across panelists.

After completing their ratings on the first question, the facilitator led a discussion of the rationale for why they selected the exemplars that they did. This process of discussion occurred as a full group and was intended to reinforce the methodology and the need to use the definition of minimum competency to inform the judgments about exemplar classification. Following this discussion, the judgment process was replicated for each of the subsequent essay questions and the performance task with an exception that a group discussion did not occur after each question. For logistics purposes, the remaining four essay questions were evaluated by half the group as a split panel. Following their ratings on the essay questions, the full panel then replicated the judgment process for the performance task. After completing key phases in the process (e.g., orientation/training, operational rating) panelists completed a written evaluation form of the process.

Analysis and Results

Following the design of the process, each panelist reviewed 3 essay questions (1 as a full group and then 2 as part of their subgroup) and the performance task. For each, panelists were asked to select four borderline papers that represented the best non-competent responses (2) and the best competent responses (2). After the study, the scores for each of the selected borderline papers were identified and used to determine the level of performance expected for candidates at this level.

To calculate the recommended passing score on the examination from the panelists' judgments, the individual recommendations for each panelist were summed across the questions with each essay question being equally weighted and the performance task counting for twice as much as an individual essay question to model the operational scoring that will occur beginning with the July 2017 administration. Because some essay questions were evaluated by half the group per the design, mean and median replacement were used to estimate the individual recommendations. Mean and median replacement are missing data techniques that are used to approximate the missing values when panelists do not make direct judgments.

The strategy first calculates the mean or median for the available data and then replaces the missing values with the calculated values. This approach retained the recommended values across questions for the panelists while permitting calculations of the standard error of the mean and standard error of the median. The standard error is an estimate of the variability of the panelists' recommendations adjusted for the sample size

of the group. These values provide additional information for interpreting the results of the panelists' recommendations.

Following these judgments, we calculated the recommended score and associated passing rate when considering the written part of the examination. However, we needed to know what score on the total exam corresponded to this same pass rate. To answer this question, another step was needed to transform these judgments to the score scale on the full-length examination. After creating distributions of individual recommendations for the written part of the examination, to estimate the score for the full-length examination we applied an equipercentile linking approach to find the score that yielded the same percent passing as was determined on just the written component of the examination that panelists evaluated.

This methodology is characterized as equipercentile because the goal is to find the equivalent percentile rank within one distribution of scores and transform it over to another score distribution to retain the same impact from one examination to another or in this instance, from a part of the examination on which panelists made judgments to the full examination. This linking occurred applying the weight that 50% of the total score would be contributed by each component – written and MBE.

There are two important assumptions when applying equipercentile linking. First, we assume that the same or a randomly equivalent group of candidates are used to create the two score distributions. Second, we assume that the examinations are sufficiently correlated to support the interpretation. In this application, the same candidate scores were used from the written part to the full-length examination. In addition, the correlation between the written scores and the total score (of which the written scores are a part) was 0.97 suggesting a strong relationship between the distributions to support applying an equipercentile linking approach.

The summary results are presented in Table 2. The panel's recommended mean and median with the associated standard errors are included along with the impact and combined score associated with the recommendation, along with a +/- 2 standard error of mean or median. Individual ratings for each essay question, the performance task, and the summary calculations are included in Appendix C and have been de-identified to preserve anonymity of individual panelists. The summary results of these analyses are shown here in Table 2.

Table 2. Summary results with range of recommendations on written and combined score scales with impact (i.e., pass rate).

	Written Score - Mean	Combined Score – Mean (pass rate)	Written Score – Median	Combined Score – Median (pass rate)
-2 $SE_{Mean/Median}$	419	1414 (53%)	414	1388 (60%)
-1 $SE_{Mean/Median}$	424	1436 (47%)	419	1414 (53%)
Recommended score ($SE_{Mean/Median}$)	428 (4.47)	1451 (43%)	425 (5.60)	1439 (45%)
+1 $SE_{Mean/Median}$	432	1480 (36%)	431	1477 (37%)
+2 $SE_{Mean/Median}$	437	1504 (31%)	436	1504 (31%)

Panelists' Recommendations

Interpreting the results of the panelists' recommendations involves a combination of sources of evidence and related factors. The results shown in this section represent one of those sources, specifically, the ratings provided by subject matter experts on exemplars of performance from the California Bar Examination. Additional discussion of empirical and related policy considerations is provided in the *Evaluating the Cut Score Recommendations* section below.

The goal in analyzing the results of the panelists' judgments was to best represent the recommendation from the group. There are different ways this could have been done, each involving a measure of central tendency (e.g., mean, median). The mean calculation is the arithmetic average that most people are familiar with, however, it may not be the best representation of the group's recommendation when the distribution is skewed. For smaller samples or when extreme scores are observed in a distribution, the mean may be higher or lower than the group would have otherwise intended. In these instances, the median is calculated at the point where half the recommendations are above the value and half the recommendations are below the value to balance the effects of an extreme or outlier recommendation. When the mean and median do not converge, it is generally recommended that the median be used as the better representation of the central tendency of the observed score distribution. This approach is analogous to the data that are often shared with respect to housing prices in cities where a median is used to offset the effects of outliers on upper and lower end of the distribution.

Although the values calculated for the panelists were close, the mean and median recommendations did not converge. Therefore, the median likely serves as a better indicator of central tendency of the recommendation of the panelists. The median recommended cut score for the written portion of the exam based on all panelists' judgments was 423.75 and was rounded to the nearest observable score of 425 on a theoretical scale that ranges from 0 to 700 (i.e., 100 points for each essay question, 200 points for the performance task). To then determine how this recommendation would be interpreted with respect to a pass/fail decision, we evaluated the impact on a cumulative percent distribution using only the written component performance by applicants who took the July 2016 California Bar Examination.

To evaluate the impact of this recommendation, we found the location in the cumulative percent distribution of the written scores that corresponded with this value (i.e., 425). This value resulted in an overall impact of 46% pass and 54% fail based on the applicants who took the July 2016 California Bar Examination. To then determine the score on the full examination that corresponded to this impact, we then used an equipercentile linking approach to find the value on the combined score that corresponded to the same impact (i.e., 46% pass and 54% fail), and the corresponding value in the distribution yielded a score of 1439. The same process was followed in evaluating the mean score that was calculated for the group.

When collecting data from a sample, it is important to acknowledge that the results are an estimate. For example, when public opinion polls are conducted to gather perceptions about a given topic (e.g., upcoming elections, customer satisfaction), the results are reported in conjunction with methodology, sample size, and margin of error to illustrate that there is a level of uncertainty in the estimate. In selecting a representative sample of panelists for this study, we similarly collected data that resulted in a distribution of judgments from which we could calculate an estimate of the recommendation of the group.

Because the mean and median were calculated from a distribution of scores, it is also appropriate to estimate the variability in those recommendations to produce a range within which policymakers may consider the panel's recommendation. This range was calculated using the standard error of the mean and median. The standard error is an estimate of the standard deviation (i.e., variability) of the sampling distribution. To calculate the standard error of the median (SE_{median}), the standard error of the mean is first calculated and can then be approximated by multiplying that value by the square root of pi (i.e., 3.14159. . .) divided by two which produces a slightly wider range than the standard error of the mean. Though technical in nature, the Standard Error of the Median can also be interpreted conceptually as the margin of error in the judgments provided by the panel.

Given a median recommendation of 425 on the written section with a SE_{median} of 5.60, the range of recommended passing scores on the written score scale would be 414 to 436 which translates to a range of 1388 to 1504 on the combined score scale. This range would correspond to the interpretative scale of 139 to 150. If the mean recommendation range was used, it would correspond to a 1414 to 1504 which on the interpretive scale would be 141 to 150.

Process Evaluation Results

Panelists completed a series of evaluations during the study that included both multiple-choice questions and open-ended prompts. The responses to the questions are included in Table 3 and the comments provided are included in Appendix D. With the exception of Question 2 that was rated on a 3-point scale (1 = not enough, 2 = about right, 3 = too much), ratings closer to 4.0 can be interpreted as more positive perceptions of the question (e.g., success of training, confidence in ratings, appropriate time) versus values closer to 1.0 which suggest perceptions that are more negative with respect to these questions.

Table 3. Written Process Evaluation Summary Results

	Median	1 - Lower	2	3	4 - Higher
1. Success of Training					
Orientation to the workshop	4	0	0	9	11
Overview of the exam	3	0	0	12	8
Discussion of the PLD	4	0	1	5	14
Training on the methodology	3.5	0	2	8	10
2. Time allocation to Training	2	4	16	0	N/A
3. Confidence moving from Practice to Operational	3	1	1	15	3
4. Time allocated to Practice	3	1	6	10	3
6. Confidence in Day 1 recommendations	3	1	2	11	6
7. Time allocated to Day 1 recommendations	2	5	6	9	0
9. Confidence in Day 2 recommendations	3	0	1	11	6
10. Time allocated to Day 2 recommendations	3	1	3	8	6
12. Confidence in Day 3 recommendations	4	0	0	5	15
13. Time allocated to Day 3 recommendations	3	2	1	8	9
14. Overall success of the workshop	3	0	1	12	7
15. Overall organization of the workshop	4	0	0	7	13

Collectively, the results of the panelists' evaluation suggested generally positive perception of the activities for the workshop, their ratings, and the outcomes. The ratings regarding the time allocation were generally lower which can be attributed to the intensity of the task and the amount of work. Future studies may benefit from an additional day or two to permit more reasonable workload for the panelists.

Evaluating the Cut Score Recommendations

To evaluate the passing score recommendations that were generated from this study, we applied Kane's (1994; 2001) framework for validating standard setting activities. Within this framework, Kane suggested three sources of evidence that should be considered in the validation process: procedural, internal, and external. Threats to validity that were observed in these areas should inform policymakers' judgments regarding the usefulness of the panelists' recommendations and the validity of the interpretation. Evidence within each of these areas that was observed in this study is discussed here.

Procedural

When evaluating procedural evidence, practitioners generally look to panelist selection and qualifications, the choice of methodology, the application of the methodology, and the panelists' perspectives about the implementation of the methodology as some of the primary sources. For this study, the panel that was recruited and selected by the Supreme Court represented a wide range of stakeholders: newer and more experienced attorneys and representatives from legal education who collectively included diverse professional experiences and backgrounds. The choice of methodology was appropriate given the constructed response aspects of the essay questions and performance task. Panelists' perspectives on the process were collected and the evaluation responses were very positive.

Internal

The internal evidence for standard setting is often evaluated by examining the consistency of panelists' ratings and the convergence of the recommendations. The standard error of the median on which the recommendation was based (5.60) was reasonable given the theoretical range of the scale (0-700) for the written component of the examination. This means that most panelists' individual recommendations were within about six raw score points of the median recommended value. Even considering the effective range of the scale (approximately 280-630), the deviation of scores across panelists did not vary widely. Similar variation was also observed for the mean recommendation. These observations suggest that panelists were generally in agreement regarding the expectations of which applicant responses were characteristic of the Minimally Competent Candidate.

External

Although external evidence is difficult to collect, some sources were available for this study that will be useful for policy makers in their consideration of the recommendations of the group. The use of impact data from applicants in California from the July 2016 examination can be used as one source of evidence to inform the reasonableness of the recommended passing score. In addition, the application of the recommendation to scores from other exams (e.g., February 2016, February 2017, July 2017) would also be useful to evaluate the potential range of impact. **This would be particularly valuable given the different ability distributions of applicants who take the examination in February versus July**. In addition, consideration of first time test takers versus repeat test takers is another potential factor because applicants who are repeating the exam do not represent the full range of abilities.

A limitation of the study was the inability to include items from the MBE as part of the judgmental process. Although it would have been a desired part of the standard setting design, the MBE was not made available to California for inclusion in the study. In using half of the examination for the study, we can make a reasonable approximation of a recommendation for the full examination (see, for example, Buckendahl, Ferdous, &

Gerrow, 2010). The correlation between the written and MBE scores is approximately 0.72 suggesting moderate to strong correlation, but with some unique variance contributed by each component of the examination.

In addition, passing scores on bar examinations from other states can also be used to inform the final policy. However, the use of data from other states should be done with caution for multiple factors. First, it is unclear whether other states have conducted formal standard setting study activities, so to evaluate comparability based solely on the passing standard may not support California's definition of minimum competency. Second, California has different eligibility criteria than other states that will have an impact on the ability distribution of the population of applicants. Specifically, California has a more inclusive eligibility policy than most jurisdictions with respect to the legal education requirements. Third, each jurisdiction may have a different definition of minimum competency as to how it is applied to their examination. These can contribute to different policy decisions.

To illustrate how California passing score compares with other, larger population jurisdictions, Table 4 is shown here for comparison purposes. The overall test taker passing rates are shown from 2007 to 2016 to illustrate the current rate, but also the trend in performance over time.

Table 4. Overall passing rates in selected states and nationally from 2007-2016.[9]

Jurisdiction	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
California	49%	54%	49%	49%	51%	51%	51%	47%	44%	40%
Florida	66%	71%	68%	69%	72%	71%	70%	65%	59%	54%
Illinois	82%	85%	84%	84%	83%	81%	82%	79%	74%	69%
New York	64%	69%	65%	65%	64%	61%	64%	60%	56%	57%
Texas	76%	78%	78%	76%	80%	75%	80%	70%	65%	66%
National Average	67%	71%	68%	68%	69%	67%	68%	64%	59%	58%

Note that across jurisdictions and for the nation, there has been a consistent, downward trend in overall passing rates beginning in 2014. Similar trends were observed for first-time test takers.[6] With passing scores for jurisdictions being held constant through policy and statistical equating, the changing variables of ability within the candidate population in terms of law school admissions, matriculation, as well as any influence on curriculum and instruction have likely contributed to this observed pattern. These data reinforce the caution of not simply relying on current passing scores used in other jurisdictions.

[9] Data for Table 4 were obtained NCBE 2016 Statistics document (pp. 17-20) and represent the combined pass rate for a given year across the February and July administrations. This report can be accessed: http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F205.

Determining a Final Passing Score

The **standard setting meeting results and evaluation feedback generally support the validity of the panel's recommended passing score for use with the California Bar Examination**. Results from the study were analyzed to create a range of recommended passing scores. However, additional policy factors may be considered when establishing the passing score. One of these factors may include the recommended passing score and impact relative to the historical passing score and impact. The panel's median recommended passing score of 1439 (effectively 144 on the interpretative scale) converged with the program's existing passing score with the mean recommended passing score being slightly higher.

Factors that could be considered include the passing rates from other states that have similarly large numbers of bar applicants sitting for the examination. However, the interpretation of these results and the comparability are mitigated by the different eligibility policies among these jurisdictions and **California's more inclusive policies** along with the downward trend in bar examination performance across the country, particularly over the last few years. In some instances, the gap between California's applicants and other states has closed and in others, the gap observed in 2007 has remained essentially constant as the trend declined on a similar slope.

An additional factor warrants consideration as part of the policy deliberation. Specifically, the consideration of policy tolerance for different types of classification errors. Because we know that there is measurement error with any test score, **when applying a passing score to make an important decision about an individual, it is important to consider the risk of each type of error**. A Type I error represents an individual who passes an examination, but whose true abilities are below the cut score. These types of classification errors are considered false positives. Conversely, a Type II error represents an individual who does not pass an examination, but whose true abilities are above the passing score. These types of classification errors are known as false negatives. Both types of errors are theoretical in nature because we cannot know which test takers in the distribution around the passing score may be false positives or false negatives.

A policy body can articulate its rationale for supporting adoption of the group's recommendation or adjusting the recommendation in such a way that minimizes one type of misclassification. The policy rationale for licensure examination programs is based primarily on deliberation of the risk of each type of error. For example, many licensure and certification examinations in healthcare fields have a greater policy tolerance for Type II errors than Type I errors with the rationale that the public is at greater risk for adverse consequences from an unqualified candidate who passes (i.e., Type I error) than a qualified one who fails (i.e., Type II error).

In applying the rationale, if the policy decision is that there is a greater tolerance for Type I errors, then the decision would be to accept the recommendation of the panel (i.e., 144) or adopt a value that is one to two standard errors below the recommendation (i.e., 139 to 141). Conversely, if the policy decision is that there is a greater tolerance for Type II errors, then the decision would be to accept the recommendation of the panel (i.e., 144) or adopt a value that is one to two standard errors above the recommendation (i.e., 148 to 150). Because standard setting is an integration of policy and psychometrics, the final determination will be policy driven, but supported by the data collected within this workshop and for this study more broadly.

References

Buckendahl, C., Ferdous, A., & Gerrow, J. (2010). Recommending cut scores with a subset of items: An empirical illustration. *Practical Assessment, Research & Evaluation, 15*(6). Available online: http://pareonline.net/getvn.asp?v=15&n=6.

Buckendahl, C. W. & Davis-Becker, S. (2012). Setting passing standards for credentialing programs. In G. J. Cizek (Ed.), *Setting performance standards: Foundations, methods, and innovations* (2nd ed., pp. 485-502). New York, NY: Routledge.

Egan, K. L., Schneider, M. C., & Ferrara, S. (2012). Performance level descriptors: History, practice and a proposed framework. In G. J. Cizek (Ed.), Setting performance standards: Foundations, method, and innovations (2nd ed., pp. 79-106). New York, NY: Routledge.

Hambleton, R. K., & Pitoniak, M. J. (2006). Setting performance standards. In R. L. Brennan (Ed.), *Educational measurement* (4th ed., pp. 433–470). Westport, CT: American Council on Education and Praeger.

Kane, M. (1994). Validating the performance standards associated with passing scores. *Review of Educational Research, 64* (3), 425-461.

Kane, M. T. (2001). So much remains the same: Conception and status of validation in setting standards. In G. J. Cizek (Ed.), *Setting performance standards: Concepts, methods, and perspectives* (pp. 53-88). Mahwah, NJ: Erlbaum.

Plake, B. S. & Hambleton, R. K. (2001). The analytic judgment method for setting standards on complex, large-scale assessments. In G. J. Cizek (Ed.), *Setting performance standards: Concepts, methods, and perspectives* (pp. 283-312). Mahwah, NJ: Erlbaum.

Appendix A – Panelist Information

Standard setting panelists.xlsx

Appendix B – Standard Setting Materials

The nomination form for panelists and documentation used in the standard setting are included below.

State Bar Standard Setting Study Nomin

Agenda

Training

Evaluations

Appendix C – Standard Setting Data

PLD Discussion for Minimally Competen

California Bar Standard Setting Da

Appendix D – Evaluation Comments

Each panelist completed an evaluation of the standard setting process that included several open-ended response questions. The responses provided to each are included below.

Day 1 – Training

- Lots of reading
- More time could easily be spent on the practice rating, but I doubt that it would make a difference in the outcome.
- Dr. Buckendahl trained us very effectively. He is engaging, clear, and attentive. I have confidence in him and the process. Good work!
- Perhaps it was the result of the lively discussions we were having, but a little more time for practice would have been ideal as I felt I was a bit rushed.
- More background information before initiating the process would be helpful
- Perhaps additional time spent as a group discussing not the themes/genres of knowledge for each subject, but on what it means to read an essay and decide whether a discussion of the theme is sufficient to communicate minimal competency.
- Not convinced this methodology is valid. Many of us clearly do not know some applicable law and these conclusions may therefore determine that incompetent answers amounting to malpractice are nevertheless passing/competent.
- Great and important discussion about minimal competencies on each exam answer discussed.
- It would have been helpful at the top to have a broader discussion about why the study is being done, what the Bar is hoping to learn, and how the individuals (participants) were selected.
- Would be helpful if watchers could be talking outside [the] room instead of in during review of essays.
- [Related to confidence rating] - only because some of my ratings were different from the majority. Otherwise, very confident.
- [Related to time rating] - Had to rush in order to have time for lunch.
- I think a broader discussion at the outset before the practice/identification of key issues would have been helpful. We all seemed to struggle with our own lack of knowledge and addressing that more up front may have helped us move along more efficiently.

Day 1 – Standard Setting

- I would have liked to know ahead of time that I would be "grading" 40 essays when I came in.
- I did not finish and felt rushed. More time for first question.
- Snacks for end of day grading would help :) I feel like I'm in a groove now and understand the concept of what I'm doing, but 30 tests to read is a lot at the end of a long day. Grateful we can finish in the a.m.!
- More time please
- I'm still not completely certain that I understand how we are qualified to do this without answers. It seems like this could have the overall effect of making it easier to pass?

- Although a lot of folks complained that we didn't "know enough" of subject matter, after reading 30 tests, yes we are - it became easier to spot the competent from the not competent. Perhaps this could be talked about at the outset to avoid this needless discussion altogether.
- I am concerned that an unprepared attorney, without the benefit of experience, studying, or a rubric, is not a good indicator of a minimally competent attorney. We all have an ethical duty to become competent. New lawyers/3 Ls do that by preparing for the exam. A more seasoned lawyer does that by refreshing recall of old material or by resort[ing] to practice guides. Having neither the benefit of studying nor outside sources, at least some of us may be grading with lack of minimum adequate knowledge. By studying for the exam, test-takers are becoming competent and gaining that minimal competency. Practicing professionals who become specialized may lose/atrophy that competence in certain field, which needs to be refreshed by CLG and other sources. So these scores may be of limited utility.
- It's too much. Too many questions to review.
- No changes
- Got 24/30 done [on the first day]

Day 2 – Standard Setting

- It was very difficult to read 60 essays in one day
- The discussion about where certain papers fall on the spectrum is helpful to let us know we are on the right track.
- We need breaks to stretch our bodies and we need to go outside, so our brains can get fresh air.
- It might be helpful to have some kind of "correct" sample answer to avoid having to go back and re-score or re-read for lack of knowing "the correct answer."
- I do NOT like being tricked into grading/reading 130 frigging essays! We should have been told that this is what the project was.
- Snacks were a great addition to the day.
- Thanks for the afternoon snacks!
- We did not follow the agenda which indicated we should build an "outline" for the "question." Instead, on Day 1, we outlined subject areas. There will not be consistency among the group. This was clear this AM when there was no agreement regarding Question 1. Each of the 30 essays was marked as the best no-pass or worst pass by at least one person. We should have outlined as a group.
- After initial "calibration" session on Day 1; and with more time, I feel confident about my ability to apply the PLDs to these essays.
- No changes

Day 3 – Standard Setting and Overall Evaluation

- This no doubt took a lot of work, so thank you to all staff and State Bar folks!
- The early activities and group discussion were helpful in allowing me to orient and direct what I ought to be doing for my recommendations. Perhaps a few more panelists to ease the burden would be helpful for the future!
- No changes

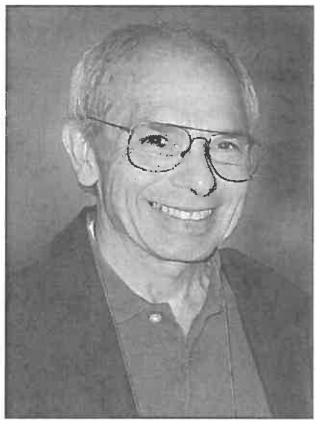
- I really found the time available to review the subject-matter answers to be very challenging. Trying to discriminate among those last four papers and a few on either side of them was difficult. An idea: have readers make their 3 initial stacks and identify not more than x (10?) papers that fall closer to the borderline. Do that for all answers. Then have readers spend last session choosing the "two and two" all at once.
- I'm not entirely sure I understand how what feels like an arbitrary process by 20 graders/panelists results in a less arbitrary cut score. Perhaps some additional information or process would be helpful.
- Although providing a scoring rubric would make categorization more consistent, it would do so in view of the thoughts of the author and not of the 20 panelists. Having no rubric was tough, but appropriate.
- Breaks between assignments
- Work with Dr. Buckendahl again. He was very careful, clear, and engaging. Well done!
- The performance test, unlike subject matter knowledge tests (essays) is much more amenable to this sort of standard setting. While, as with essays, we did not outline/rubric/calibrate, that is less necessary because of closed universe and the skills being tested.
- Overall, I think this process made sense. I was troubled that at least one of the panelists had clear familiarity with the existing exam and process and a clear knowledge of "right" answers as currently graded. I'm not sure everyone had a clear understanding of "minimally competent attorney" so we may have had different standards in mind.
- I'd like to be included in next steps or discussions. Other than just more grading/reading essays.
- I had a hard time with the time limit to review each answer. I am not clear if I was being too thorough, or I missed the lesson on how to move through answers at a quicker pace.

Exhibit 3

The Testing Column

Standards? We Don't Need No Stinking Standards!

by Mark A. Albanese, Ph.D.



Imagine . . . a world of people who all have outstanding innate academic and real-world talents and who all receive the best education possible, and where opportunity and jobs are plentiful in all occupations. Anyone who wants to go to law school can go to law school and will graduate with honors. There is no need for licensing tests, because all law school graduates are so far above average that they can't even see average, it is so far below them; and all law school graduates go on to become Supreme Court justices . . . .

The reality is that not everyone has the innate academic and real-world talents to succeed in a profession like law, even if they have a burning desire to be a lawyer. Given that the numbers of students applying to law school are at lows not seen since the 1970s, and that there are now far more law schools than there were back then, academic standards for admission and graduation at some law schools do not signify what they may have in the past. Although bar passage has been generally declining for over a decade, it started to cascade downward in July 2014. In response to the declining passing rate, law school deans in many jurisdictions have called for jurisdictions to consider re-evaluating their passing standards; and two large jurisdictions, Texas and California, have formally begun to do so. Clearly, incompetent lawyers can have disastrous consequences for their clients. In this environment, the bar admissions process is the last line of defense against incompetent lawyers being allowed to practice.

But that is not the only perspective. An opposing view comes from graduating law students who have put in years of study and have often paid massive amounts of money for obtaining their law degrees. If they cannot practice law, their dreams of becoming a lawyer will be crushed, many will have no way to make a living sufficient to repay their educational debt, and the debt load may be a lifelong millstone. The only thing that keeps them from attaining their dream and avoiding this scenario is the bar admissions process.

So, a lot is riding on the process of admission to the bar, and what makes or breaks that process is the standard set for passage of the bar examination—the minimum score that determines passage. (There is, of course, also a character and fitness component that must be satisfied, in most cases before the bar examination.) Depending on the jurisdiction, the bar exam can take two to three days, beginning with essays and performance tests and, in some cases, jurisdiction-specific multiple-choice tests, and ending with the Multistate Bar Examination (MBE) on the last Wednesday of the month (February or July).[1] The jurisdiction generates a score from the written component answers and combines the score in some form with the scaled score generated from the MBE to produce the score used to determine the pass/fail result on the bar examination. On the MBE scale,

where scores can range from 0 to 200, passing scaled scores range from 129 to 145 across jurisdictions.

With the continuing decline in performance on the bar examination for the past few years, many jurisdictions have questioned whether their passing standards are set at the appropriate level. The purpose of this article is to provide information on several approaches that have been used to set standards on high-stakes licensing examinations and to highlight some of the challenges that exist in arriving at standards that ensure the protection of the public and are fair to law school graduates.

Standard-Setting Methods

The methods of setting standards all employ judgments on the part of a group of knowledgeable experts. The selection of these individuals is crucial to the credibility of the standards that result. The experts should be respected, and anyone questioning the credibility of the standard-setting process should, upon viewing the credentials of the experts, conclude that the experts are appropriate for the assignment. Depending upon the standard-setting approach used, the standard-setting panel may be required to make judgments about exam content, examinees, or task requirements. Those on the panel should also be free from any conflicts of interest, such as setting standards for students they have taught.

The approaches that have been used can be grouped into three types: arbitrary standard setting, test-centered methods, and examinee-centered methods.[2]

Arbitrary Standard Setting

The arbitrary method of standard setting is probably the most common approach and involves setting standards without systematically examining either the task requirements or samples of examinee performance. Susan M. Case, Ph.D., cites the BOGSAT approach (the acronym standing for Bunch of Guys Sitting at a Table).[3] The problem with arbitrary standards is that they are not easily defended, which might make them acceptable for low-stakes decisions like grades in a single course, but makes them ill-suited for making high-stakes decisions like bar passage. If no one currently involved with bar admissions in a jurisdiction has any idea of how that jurisdiction's standard was set, it should be reevaluated through a process other than the arbitrary method.

Test-Centered Methods

Psychometricians have been developing methods of setting defensible standards since at least the middle of the 20th century. The early methods were primarily test-centered, and it could be said that the operating principle undergirding these methods is that a standard would be more defensible than an arbitrary standard if the experts actually examined the test in terms of expectations of how the minimally competent examinee would perform.

Nedelsky Method

The earliest method in the psychometric literature is the Nedelsky method, named after its originator, Leo Nedelsky. It derived a standard, also known as a minimum pass level or MPL, for multiple-choice items by having the experts determine which of the incorrect answers the minimally competent examinee would be able to eliminate for any given multiple-choice item, assuming that the examinee would then guess among the remaining answers. For instance, if an item had four answer options and experts estimated that a minimally competent examinee could eliminate two of them, the MPL would be 1/2 (or 50%) since the examinee would be guessing between the correct answer and the remaining incorrect answer. The Nedelsky method was obviously limited to multiple-choice items.

Angoff Method

The Angoff method was subsequently developed by William Angoff with an eye toward broader applications. It or one of its variants has been applicable to almost any type of item, score, or task. This versatility is one of the factors that probably has motivated the Angoff method's use in many professional settings, such as medical licensure.[4] The Angoff approach has the experts first define characteristics of the minimally competent examinee. With a clear picture of what this minimally competent individual can do imprinted on their minds, the experts review the task at hand and give their estimate of the likelihood of this minimally competent individual being successful on the task. Because experts sometimes find it difficult to give an estimate of the likelihood of an individual being successful on a task, it is often reframed as how many of a group of 100 minimally competent examinees the expert would expect to be successful on this task.

M. Friedman Ben-David adapted the Angoff approach to use with a performance exam where examinees rotate between different stations and where, at each, they must demonstrate a specific skill or set of skills, and are often graded by a point system as they demonstrate aspects of the skill(s).[5] The adaptation of the Angoff method was made by having the experts determine the number of scoring points an individual borderline candidate would receive in order to pass the station. If an essay question (or performance test) is substituted for the skill(s) to be demonstrated at the station, the approach has direct applicability to the bar examination.

Examinee-Centered Methods

There are a number of methods that focus on the performance of examinees. The two most commonly encountered approaches are the Contrasting Groups method and the Bookmark method (although the Bookmark method has forms that are strictly test-centered). A third method with different application is the Hofstee method.

Contrasting Groups Method

There are variations of the Contrasting Groups method, but Michael T. Kane, Ph.D., describes this method in general as having experts determine if examinees have the knowledge, skills, and judgment needed to practice, based upon a sample of their performance; categorizing examinees into two groups (i.e., those who have met the requirements and those who have not); and then selecting a passing score that differentiates between the two groups as well as possible.[6]

Bookmark Method

The Bookmark method involves making judgments about either the tasks or the performance of examinees on a task, but it requires actual data. The easiest case for illustration purposes is for multiple-choice test performance. Items would be ordered from easiest to hardest (based upon actual data), and the experts would start with the easiest item and stop when they reach the point where they think a minimally competent examinee would have a specified probability of answering the item correctly (e.g., 50%). The difficulty of the item at this point would become the standard.

An alternative for performance-based assessments would be to order a sample of performances (e.g., essays) according to the grade awarded from lowest to highest. Experts would start at the lowest-graded performance and work their way up through the higher-graded performances until reaching the point where they find the first performance that a minimally competent examinee would have the specified probability of reaching. The grade of that performance would then be the passing standard.

In practice, the ordering of items/performances is not perfect, and one needs to have experts go up for a few more items/performances to be certain that some of the higher-graded ones were consistent with the stopping point and that where they stopped initially was not at an item/performance out of order. The challenge with the Bookmark method is to get the ordering of the items/performances before the standard-setting session, since it generally requires actual data to make the ordering.

Hofstee Method

The Hofstee method of standard setting does not make assessments of performance at the individual item level but requires experts to give their impressions of what the minimum and maximum failure rates should be for the exam, as well as what the minimum and maximum percent correct scores should be. These minimum and maximum failure rates and percent correct scores are averaged across experts and projected onto the actual score distribution to derive a passing score. Because it operates at the overall test level, it can be combined with other standard-setting methods as a cross-check. In fact, having experts go through the standard-setting process with, say, the Angoff method can be a good training approach for experts before they apply the Hofstee method.

Challenges

Generally, the methods used to derive standards seem relatively straightforward conceptually. However, the devil is in the details. Ronald K. Hambleton, Ph.D., provides the following 11 steps for setting performance standards on educational assessments, which can be applied to any of the standard-setting methods discussed.

1. Choose a panel (large, and representative of the stakeholders).
2. Choose one of the standard-setting methods, and prepare training materials and finalize the meeting agenda.
3. Prepare descriptions of the performance categories (e.g., basic, proficient, and advanced [or, in the case of the bar exam, fail and pass]).
4. Train panelists to use the method (including practice in providing ratings).
5. Compile item ratings and/or other rating data from the panelists (e.g., panelists specify expected performance of examinees at the borderlines of the performance categories).
6. Conduct a panel discussion; consider actual performance data (e.g., item difficulty values, item characteristic curves, item discrimination values, distractor analysis) and descriptive statistics of the panelists' ratings. Provide feedback on interpanelist and intrapanelist consistency.
7. Compile item ratings a second time that could be followed by more discussion, feedback, and so on.
8. Compile panelist ratings and obtain the performance standards.
9. Present consequences data to the panel (e.g., passing rate).
10. Revise, if necessary, and finalize the performance standards, and conduct a panelist evaluation of the process itself and their level of confidence in the resulting standards.
11. Compile validity evidence and technical documentation.[7]

Each of these 11 steps also seems relatively straightforward. However, as I said earlier, the devil is in the details. Taking the first step, "Choose a panel (large, and representative of the stakeholders)," here are some of the devilish details to think about. Who are the stakeholders? Are there some stakeholders who must actually be on the panel as opposed to

simply being represented? How many experts are needed? (There is large and then there is LARGE.) It has been recommended in the psychometric literature that 15 to 20 experts be used in setting the standard for a high-stakes examination like the bar examination. Choosing and recruiting experts is no small challenge. Representing a stakeholder group is not enough. What background and experiences does an expert need to be credible with not only the stakeholder group but the public at large? Serving on a standard-setting panel is a major time commitment. Are the experts willing to serve, and are they available to do so when needed? Setting standards is a very important task, and it requires careful thought at each step. Enlisting assistance from someone who has experience with the standard-setting process will help avoid major problems.

So, you might have noticed that the title of this article is really a double negative that translates into "Standards? We do need standards!" Whether they stink or not will depend upon how they are set.

References

Academy of Medical Royal Colleges, Guidance for Standard Setting: A Framework for High Stakes Postgraduate Competency-Based Examinations (October 2015), *available at* https://www.aomrc.org.uk/wp-content/uploads/2016/05/Standard_setting_framework_postgrad_exams_1015.pdf (accessed May 2, 2017).

John J. Bowers, Ph.D., and Russelyn Roby Shindoll, "A Comparison of the Angoff, Beuk, and Hofstee Methods for Setting a Passing Score," ACT Research Report Series No. 89-2, May 1989, *available at* https://forms.act.org/research/researchers/reports/pdf/ACT_RR89-2.pdf (accessed May 2, 2017).

S.M. Downing, A. Tekian, and R. Yudkowsky, "Procedures for Establishing Defensible Absolute Passing Scores on Performance Examinations in Health Professions Education," 18(1) *Teaching and Learning in Medicine* (Winter 2006) 50–57.

S.L. Fowell, R. Fewtrell, and P.J. McLaughlin, "Estimating the Minimum Number of Judges Required for Test-Centred Standard Setting on Written Assessments. Do Discussion and Iteration Have an Influence?" 13(1) *Advances in Health Sciences Education: Theory and Practice* (March 2008) 11–24.

W.K.B. Hofstee, "The Case for Compromise in Educational Selection and Grading," in *On Educational Testing* 109–127 (S.B. Anderson and J.S. Helmick eds., Jossey-Bass 1983).

National Board of Osteopathic Medical Examiners, Standard Setting, The Approach to Standard Setting, http://www.nbome.org/standardsetting_app.asp.

M.R. Raymond and J.B. Reid, "Who Made Thee a Judge? Selecting and Training Participants for Standards on Complex Performance Assessments," in *Setting Performance Standards: Concepts, Methods, and Perspectives* 119–157 (G.J. Cizek ed., Lawrence Erlbaum Associates 2001).

Notes

1. For the July 2017 and February 2018 bar examinations, Massachusetts will continue to administer its 10 essay questions on the Thursday following the administration of the Multistate Bar Examination. Effective with the July 2018 bar examination, Massachusetts will administer the Uniform Bar Examination, which ends with the MBE on Wednesday.
2. Michael T. Kane, Ph.D., "Standard Setting for Licensure Examinations," 70(4) *The Bar Examiner* (November 2001) 6–9.
3. Susan M. Case, Ph.D., "The Testing Column: Sometimes BOGSAT Is Just Not Good Enough," 81(3) *The Bar Examiner* (September 2012) 31–33.
4. R.J. Nungester, G.F. Dillon, D.B. Swanson, N.A. Orr, and R.D. Powell, "Standard-Setting Plans for the NBME Comprehensive Part I and Part II Examinations," 66(8) *Academic Medicine* (August 1991) 429–33.
5. M. Friedman Ben-David, "AMEE Guide No. 18: Standard Setting in Student Assessment," 22(2) *Medical Teacher* (2000) 120–130.
6. Kane, *supra* note 2.
7. Ronald K. Hambleton, "Setting Performance Standards on Educational Assessments and Criteria for Evaluating the Process," Laboratory of Psychometric and Evaluative Research Report No. 377, School of Education, University of Massachusetts, Amherst, MA, *available at* http://www.nciea.org/publications/SetStandards_Hambleton99.pdf (accessed May 2, 2017).

Mark A. Albanese, Ph.D., is the Director of Testing and Research for the National Conference of Bar Examiners.

Exhibit 4

The Bar Examiner
The bar admissions information source

Standard Setting 101: Background and Basics for the Bar Admissions Community

Fall 2018 (Vol. 87, No. 3)

This article originally appeared in *The Bar Examiner* print edition, Fall 2018 (Vol. 87, No. 3), pp 9–17.

By Michael T. Kane, Ph.D., and Joanne Kane, Ph.D.

Licensure examinations such as the bar exam are high-stakes tests. A high-stakes test is defined by the *Standards for Educational and Psychological Testing* as "a test used to provide results that have important,

direct consequences for individuals, programs, or institutions involved in the testing."[1] In the definition provided in the *Standards*, the focus is on the exam taker and, as perhaps in our case, the exam administrator. However, we argue that the bar exam and many other professional licensure examinations should also be considered high-stakes from the perspective of the public; professional licenses are designed to protect the public from individuals seeking to practice who lack the requisite knowledge, skills, and abilities to adequately do so. Members of the public are counting on professional licenses to help ensure that a practitioner they would employ is at least minimally ready for practice.

The process of establishing a passing score is commonly referred to as *standard setting*. Standard setting in the licensure examination context is designed to address the basic policy question of how high an examinee's score must be for the examinee to pass the examination.

Establishing a passing score on such a high-stakes test is a critical component of ensuring the testing program's public protection function. There are costs to both individuals and the public associated with setting the bar too low or too high. If the bar is set too low, members of the public may be harmed through ineffective legal representation or actual malpractice. The public will have less confidence in members of the profession, and as a result, "consumer uncertainty" will increase. On the other hand, if the bar is set too high, would-be lawyers who would be able to competently represent clients will be inappropriately prevented from doing so. Individual examinees seeking to enter the profession, serve the public, and repay their student loans will suffer, and members of the public could be harmed by having their access to justice unduly limited via increased direct costs of representation or through increased caseloads for individual lawyers.

The process of establishing a passing score is commonly referred to as *standard setting*. Standard setting in the licensure examination context is designed to address the basic policy question of how high an examinee's score must be for the examinee to pass the examination. This standard represents the basic level of competence expected for entry-level practice. This article discusses the concept of standard

setting, how standards facilitate the process of making licensure decisions, and a few of the methods used to set standards in high-stakes contexts.

Why Do We Have Standards?

The adoption of a passing score for a licensure examination such as the bar exam changes what could be subjective decisions into objective or even mechanical ones and thereby promotes fairness and transparency. The process is highly efficient, reliable, and replicable. Determining whether an examinee passes or fails based on one clear criterion—his or her scaled score in relation to the passing score—is fast, unambiguous, and automatic.

In licensure decisions, the *decision rule*—in our case, the rule that is applied to make pass/fail determinations—typically specifies that if an examinee's scaled score is at or above the passing score, the examinee passes the test, and if the examinee's scaled score is below the passing score, the examinee fails the test.[2] This simple decision rule can easily be applied across examinees more or less automatically; no human judgment need come into play in the application of the rule. Of course, plenty of human judgment comes into play in the broader decision context in terms of identifying the requisite knowledge, skills, and abilities to be measured; designing the measurement instrument itself (i.e., the exam and its components); scoring the written components of the exam; and setting the passing score in the first place. But once the passing score is set and the scoring is completed, it is a simple matter to apply the decision rule.

To the extent that the standard of performance represented by the passing score is accepted, decisions based on that standard tend to be accepted by relevant stakeholders. The application of a clear standard has been described as a way of making a decision without appearing to decide.[3] It is hard to imagine a legitimate challenge, from the perspective of fairness, to the simple process of comparing a score to a passing score.

Are Standards Arbitrary?

Passing scores do not exist until some group develops them. Standards are *set* rather than "found" or estimated. The question, therefore, is not whether a passing score is "accurate" but rather whether the passing score, as set, achieves its purpose at an acceptable cost. Setting the passing standard is, in essence, a balancing act whereby policymakers weigh the benefits and costs of choosing a particular standard; the goal is to avoid setting the standard too high or too low.

Given a set of scores on a test, an increase in the passing score will generally decrease the pass rate, and a decrease in the passing score will generally increase the pass rate.[4] Even modest changes in the passing

score can yield substantial changes in pass rates, and these changes can vary substantially across groups (e.g., race/ethnicity, gender).

> Passing scores do not exist until some group develops them. Standards are *set* rather than "found" or estimated. The question, therefore, is not whether a passing score is "accurate" but rather whether the passing score, as set, achieves its purpose at an acceptable cost.

In 1978, a prominent researcher, Gene Glass, suggested that the results of educational standard setting tend to be arbitrary.[5] In response, a number of researchers acknowledged that standards are inherently judgmental but argued that they need not be arbitrary in the sense of being unjustified or capricious.[6] Further, context matters—the extent to which arbitrariness is a problem depends on how much it interferes with the intended use of the standard and, perhaps, the kind and degree of severity of unintended consequences.

Whenever a continuous variable is cut, the position of the cut can seem arbitrary. For example, the current maximum gross monthly income limit for SNAP (Supplemental Nutrition Assistance Program) recipients is $1,307.[7] Surely someone who earns $1,308, or $1,307.01, is effectively as food insecure as someone who earns $1,306.99. A penny or two—or even a dollar or two—one way or the other will not meaningfully influence a person's ability to provide for him- or herself and/or others. And yet, for a federal program serving millions[8] of Americans to be efficiently run and for benefits to be distributed in consistent ways, clear guidelines must exist. Which is to say, policies must be set.

Adopting a passing score for a licensure examination is, essentially, adopting a policy. Changes in policies can have dramatic effects. Changes to the SNAP income limits in either direction would affect millions of people and families.

On a "lighter" note, on June 17, 1998, the National Institutes of Health adopted new cut scores for the body mass index (BMI), a measure of percentage body fat based on a person's weight and height

measurements.[9] As a result, almost 30 million Americans were "suddenly" reclassified as clinically overweight, and several million were reclassified as clinically obese.

The inherent arbitrariness associated with standard setting needs to be controlled by providing support for the particular standard chosen. The 1998 changes to the BMI cut scores were developed judgmentally by a committee, but they were supported by clinical research, and the general locations of the cut scores were, therefore, far from unjustified or capricious.

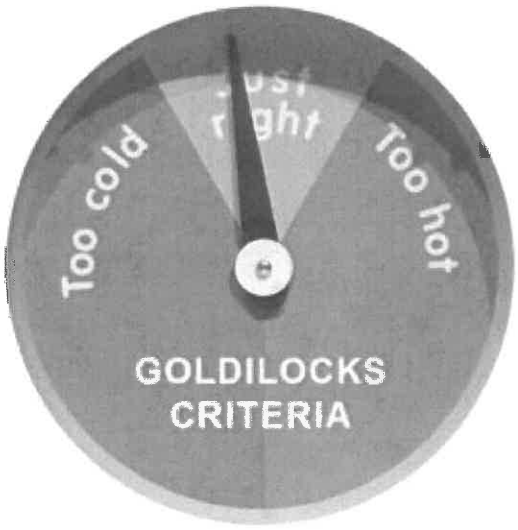
To be considered acceptable (that is, to be defensible and comport with best practices in the measurement field), standards must meet certain criteria:

They must be developed using generally accepted procedures based on relevant data.[10]

They must be at an appropriate level or, at the very least, not at an obviously inappropriate level.

They must be applied consistently over individuals and occasions.

In a paper titled "Justifying the Passing Scores for Licensure and Certification Tests," this author (Michael Kane), along with the two co-authors of the paper, proposed what they called the "Goldilocks Criteria" for evaluating passing scores and the standard-setting methods used to generate them:



The ideal performance standard is one that provides the public with substantial protection from incompetent practitioners and simultaneously is fair to the candidate and does not unduly restrict the supply of practitioners. We want the passing score to be neither too high nor too low, but at least approximately, just right.[11]

The standard should be high enough to provide assurance that new practitioners have certain competencies but not so high as to have serious negative consequences.

A Look at Standard Setting in Other High-Stakes Contexts

In thinking about standard setting for test scores, it can be useful to consider how standards are set in other high-stakes contexts. The organizations that develop pharmaceutical standards and other health-related standards generally rely on empirical research relating input variables to various outcomes. To develop these standards, they may use dosage-response curves, which represent the empirical relationship between an input (e.g., the dosage of a medication) and an outcome (e.g., the response in terms of pain reduction). A variety of key stakeholders, including patients, doctors, and health organizations, would agree that the dosage should be high enough to achieve the intended outcome (e.g., control of pain) but not so high as to cause unnecessary side effects or unintended consequences.

Dosage-response curves, like those shown in Figures 1 through 3, can be used to suggest or to check on the general location for a standard dosage. As illustrated in Figure 1, for low dosages, the response may be very limited, and the response may not increase much as the dosage increases, until it gets into a critical range where the effect increases fairly quickly as a function of the dosage. For higher dosages, the response often levels off, or plateaus. In order to achieve a high response, the dosage should be at or near the high end of the critical range. Going beyond the critical range does not add much to the expected response, and using higher dosages may lead to toxic side effects or could be costly (in terms of actual dollars and/or the ability to treat as many patients as possible) if the medication is expensive to produce or in short supply. For the dosage-response curve shown in Figure 1, a dosage of about 30 or a little higher (e.g., 31 or 32) would seem to be an optimal choice in terms of achieving the intended response without the unnecessary risks that might be associated with higher dosages.

Most dosage-response curves are not as sharp as the curve in Figure 1. For the dosage-response curve shown in Figure 2, 30 may again be a reasonable candidate for the standard dosage, but the range of acceptable values—that is, the dosage values yielding a reasonable response, without unnecessarily risking significant side effects—is much wider as compared to the clear-cut case shown in Figure 1, where no response is obtained at all until the dosage approaches 30 and where the response plateaus slightly above 30. In Figure 2, the range of acceptable values for the dosage extends from about 30 to about 40, or even further. For Figure 3, a dosage of 30 could be a reasonable choice for the standard, perhaps, but the range of plausible choices is much wider than in the curves shown in Figures 1 and 2.

Figure 1: Dosage-Response Curve—an "Easy" Case

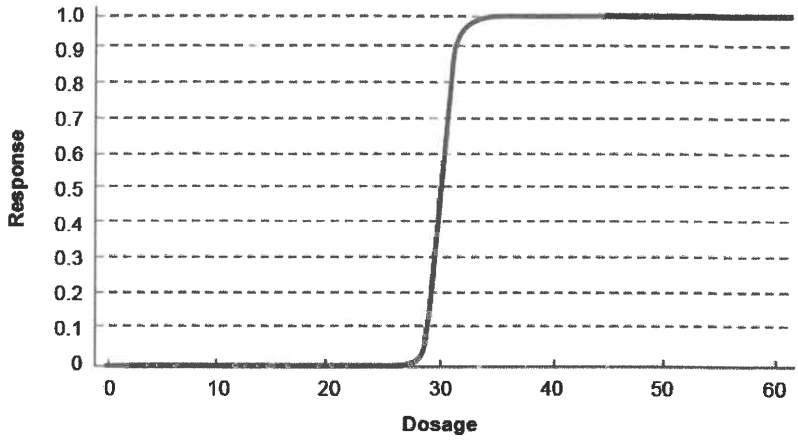


Figure 2: Dosage-Response Curve—an "Intermediate" Case

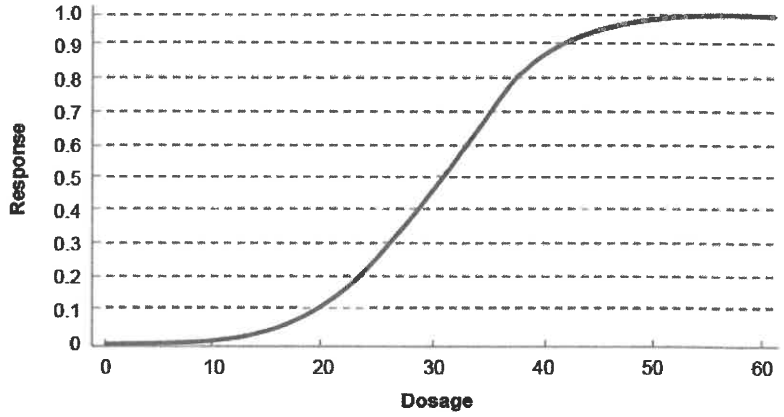
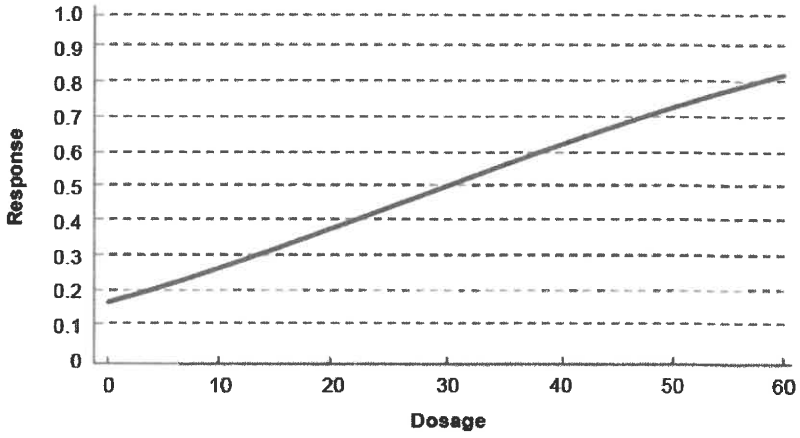


Figure 3: Dosage-Response Curve—a "Hard" Case



Dosage-response curves can be helpful in the standard-setting process, but they do not fully resolve the question of what the ideal standard would be. Note that even in the seemingly clearest of possible cases (Figure 1), it is not actually fully clear where the dosage should be set: Would the most appropriate dosage be 31 or 32, where the patient is getting most of the response? Or would a more appropriate dosage be closer to 35 or even 40, where it would be essentially certain that the patient will get the full response? The decision should depend on additional factors (e.g., potential side effects and direct and indirect costs) not reflected in the dosage-response curve.

Without additional information, the standard dosage can seem—and in fact can be—arbitrary. Figure 2 shows an intermediate case where the strength of response increases more gradually over a wider range of dosage levels, making it potentially more challenging to pinpoint an optimal dosage. And Figure 3 illustrates a case that barely hints at an optimal dosage. Additional considerations and constraints would be needed to determine the ideal dosage. The issue is one of balancing positive and negative consequences.

The use of dosage-response curves to set or evaluate standards involves the use of relevant empirical relationships to put bounds on the standard, followed by a judgment about where to put the standard within that range. The empirical results provide support for the general location of the standard (i.e., the critical range), but not for any single precise value within the range in most cases.

Unfortunately, although standards are often discussed as if there is an easy case akin to the one shown in Figure 1, high-stakes examinations usually present an ambiguous case more similar to the one shown in Figure 3. Thus, the standard-setting process will by necessity involve a substantial degree of human judgment. However, this human judgment need not be capricious; by involving individuals with relevant expertise, and by including a group of such individuals rather than relying on a single individual's opinion, a reasonable standard can be set. As with dosage decisions, the goal in setting a passing score in the licensing context should be to achieve the desired outcome without introducing serious negative consequences. This generally involves trade-offs.

Standard Setting for High-Stakes Examinations

In high-stakes examinations, standards are typically set using judgmental standard setting—that is, relying on the judgments of individuals with relevant expertise to determine the appropriate standard. As applied to testing, judgmental standard-setting procedures involve the use of a group of professionals (e.g., experienced practitioners, judges, and bar examiners) to recommend a passing score on some score scale to represent a certain level of performance: the *performance standard*. For licensure tests such as the bar exam, the performance standard is the basic level of competence expected of new practitioners. The goal

is to identify a passing score that reflects the performance standard and provides a reasonable basis for pass/fail decisions.

For licensure tests such as the bar exam, the performance standard is the basic level of competence expected of new practitioners. The goal is to identify a passing score that reflects the performance standard and provides a reasonable basis for pass/fail decisions.

A number of empirical methods have been developed for setting standards on tests.[12] Generally, the methods require panels of raters to conceptualize a minimally passing performance standard. The raters then use the performance standard to evaluate (i.e., rate) either examinee performances or test tasks (or both). That is, a group of experts could look at a sample of questions and say, "a minimally competent professional should be able to get at least half of these correct." Or a group of experts could make a judgment about a particular examinee—they could read an essay written by the examinee, for instance, and make a direct judgment about whether or not the examinee is minimally competent. There are also techniques for combining the two types of judgment—judgments about whether the questions are appropriately difficult and how many a minimally competent examinee should be able to answer, combined with judgments about the particular performances of individual examinees. The resulting data can be used to yield both a suggested passing score and/or a range of scores within which the suggested passing score would be considered reasonable.[13]

The results of a judgmental standard setting are not usually reported as curves (like Figure 2), but they could be presented and used in this way (based on the suggested passing score and the range of scores within which the suggested passing score might fall). The data available in judgmental standard setting are typically more limited than in the pharmaceutical case and are based on judgment rather than empirical clinical studies, but the data can be put into essentially the same mathematical form.

Judgmental standard-setting procedures may be evaluated according to several criteria:

One evaluative criterion might be procedural fairness or its cousin, methodological appropriateness: were the procedures used in the standard-setting exercise reasonable, thorough, and transparent?

Another criterion would be some sort of reliability measure or evaluation of internal consistency: are the data consistent across tasks, panels, and raters within panels?

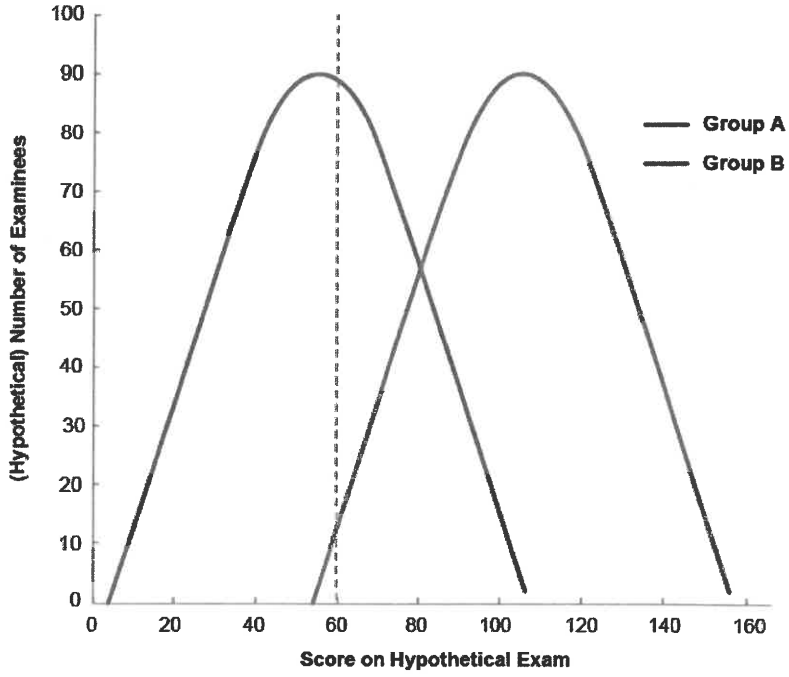
Finally, the procedure could be evaluated based on external criteria: are the results consistent with those of other studies using the same or different methods? Are the results consistent with those of historical trends and/or with a general sense of what would be reasonable? If not, is the rationale for the difference known and accepted?

Potential negative consequences can be particularly relevant in setting upper bounds for the passing score. For example, the location of a passing score can have a major impact on pass rates across demographic groups.[14] If there are two groups of test takers with different score distributions, and if the passing score is near the middle of the score distribution for the lower-scoring group (which is not uncommon) but in the lower tail of the distribution for the higher-scoring group, even a modest increase in the passing score can substantially increase the failure rate for the lower-scoring group while not having much impact on the higher-scoring group.

As a last example of the consequences and trade-offs associated with setting a particular standard, let's consider a hypothetical examination. Imagine that two groups have different score distributions on the test. Groups of interest often include race/ethnicity and gender but could include any groups significant in the social context. Further imagine that the set passing score is near the middle of the score distribution for one of the groups (i.e., about half of the examinees achieved a score at or above the set passing score) but in the lower tail of the score distribution for the other group (i.e., the majority of the examinees achieved a score at or above the passing score).

This basic hypothetical scenario is illustrated in Figure 4, where the set passing score of 60 is near the middle of the score distribution for Group A but in the lower tail of the score distribution for Group B. Moving the passing score down from 60 to 50 would have a larger effect on Group A—which has a very high number of examinees whose scores fell between 50 and 60 and who would now pass the exam—than on Group B—which has very few examinees whose scores fell between 50 and 60. In this example, the impact of the change in passing score would not be equal across groups. There are direct and indirect consequences of any given passing score for an array of stakeholder groups, including the public, and for individuals.

Figure 4: Hypothetical Examination Example



Concluding Remarks

There is no generally agreed-upon single best method for conducting a standard-setting study for a high-stakes licensure examination. That said, it can be useful to explore what other licensure organizations have done in setting their standards, what other jurisdictions have done, and what the *Standards for Educational and Psychological Testing* recommend. In addition, the methods typically used in health-care standard setting (e.g., dosage-response curves) may provide a useful model for talking about standard setting in general. The health-care approach makes extensive use of empirical research and also tries to strike a balance between competing goals.

As mentioned at the beginning of this article, standard setting in the licensure examination context is designed to address the basic policy question of how high an examinee's score must be for the examinee to pass the examination. Although empirical data should play a central role in standard setting, ultimately standards are *set*, not "found" or estimated. Thus, standards are not evaluated in terms of their accuracy per se but rather in terms of whether they support the goals of the program without introducing unacceptable and unintended consequences. In the context of the bar examination, the passing score should be high enough to protect the public, but not so high as to be unduly limiting to those seeking to enter the profession.

Editor's Note: This article is partially based on Dr. Michael T. Kane's presentation, "Standard Setting for Licensure Examinations," at the 2018 NCBE Annual Bar Admissions Conference held on April 19–22, 2018, in Philadelphia, Pennsylvania.

Notes

1. American Educational Research Association, American Psychological Association, and National Council on Measurement in Education, *Standards for Educational and Psychological Testing* 214 (American Educational Research Association 2014).*(Go back)*

2. M.T. Kane, B.E. Clauser & J. Kane, "A Validation Framework for Credentialing Tests," in *Testing in the Professions: Credentialing Policies and Practice* (Eds. S. Davis-Becker and C.W. Buckendahl, National Council on Measurement and Education 2017).*(Go back)*

3. T. Porter, *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life* 8 (Princeton University Press 1995).*(Go back)*

4. This might seem like an obvious point, but we note that the impact in terms of pass rate will depend on both what the underlying distributions of scores look like and where the passing score falls within the distribution.*(Go back)*

5. G.V. Glass, "Standards and Criteria," 15(4) *Journal of Educational Measurement* (Winter 1978) 237–261.*(Go back)*

6. R. Hambleton & M. Pitoniak, "Setting Performance Standards," in *Educational Measurement* 433–470 (Ed. R.L. Brennan, American Council on Education and Praeger Publishers 4th ed. 2006).*(Go back)*

7. United States Department of Agriculture Food and Nutrition Service, Supplemental Nutrition Assistance Program (SNAP), https://www.fns.usda.gov/snap/eligibility#What%20are%20the%20SNAP%20income%20limits? (last visited Sep. 14, 2018).*(Go back)*

8. United States Department of Agriculture Food and Nutrition Service, Supplemental Nutrition Assistance Program (SNAP), https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap (last visited Sep. 14, 2018). *(Go back)*

9. L. Shapiro, "Fat, Fatter: But Who's Counting?," *Newsweek*, June 15, 1998, at 55.*(Go back)*

10. For a recent review of some such standard-setting procedures, *see* M. Albanese, "The Testing Column: Standards? We Don't Need No Stinking Standards!," 86(2) *The Bar Examiner* (June 2017) 36–40.*(Go back)*

11. M. Kane, T. Crooks & A. Cohen, "Justifying the Passing Scores for Licensure and Certification Tests." Paper presented at the annual meeting of the American Educational Research Association, Chicago, March 1997, p. 8.*(Go back)*

12. *See* Albanese, *supra* note 10, which goes into some detail on a few of these empirical methods that have been developed for setting standards on tests.*(Go back)*

13. For additional detail on standard-setting methods, *see* B.E. Clauser, M.J. Margolis & S. Case, "Testing for Licensure and Certification in the Professions," in *Educational Measurement* 701–731 (Ed. R.L. Brennan, American Council on Education and Praeger Publishers 4th ed. 2006); Hambleton & Pitoniak, *supra* note 6; M. Kane, "Standard Setting for Licensure Examinations," 70(4) *The Bar Examiner* (November 2001) 6–9; M. Kane, "Practice-Based Standard Setting," 71(3) *The Bar Examiner* (August 2002) 14–24; M. Kane, "Conducting Examinee-Centered Standard-Setting Studies Based on Standards of Practice," 71(4) *The Bar Examiner* (November 2002) 6–13; or M.J. Zieky, M. Perie & S.A. Livingston, *Cutscores: A Manual for Setting Standards of Performance on Educational and Occupational Tests* (Educational Testing Service 2008).*(Go back)*

14. A. Mroch, M. Kane, D. Ripkey & S. Case, "Impact of the Increase in the Passing Score on the New York Bar Examination: February 2006 Bar Examination." Report prepared for the New York Board of Law Examiners by the National Conference of Bar Examiners, June 19, 2007.*(Go back)*

Michael T. Kane, Ph.D., is the holder of the Samuel J. Messick Chair in Test Validity at Educational Testing Service (ETS). He was Director of Research for the National Conference of Bar Examiners from 2001 to 2009. From 1991 to 2001, he was a professor in the School of Education at the University of Wisconsin–Madison, where he taught measurement theory and practice. Prior to that, Kane served as vice president for research and development and as a senior research scientist at American College Testing (ACT), where he supervised large-scale validity studies of licensure examinations. Kane holds an M.S. in statistics and a Ph.D. in education from Stanford University.

Joanne Kane, Ph.D., is the Associate Director of Testing for the National Conference of Bar Examiners.

Contact us to request a pdf file of the original article as it appeared in the print edition.

Exhibit 5

Supreme Court of California

JORGE E. NAVARRETE
CLERK AND EXECUTIVE OFFICER
OF THE SUPREME COURT

EARL WARREN BUILDING
350 McALLISTER STREET
SAN FRANCISCO, CA 94102
(415) 865-7000

July 16, 2020

SENT VIA USPS AND EMAIL

Alan K. Steinbrecher, Chair
State Bar of California, Board of Trustees
180 Howard Street
San Francisco, CA 94105
asteinbrecher@steinbrecherspan.com

RE: California Bar Exam

Dear Mr. Steinbrecher,

The changing circumstances surrounding the ongoing COVID-19 pandemic in California, and throughout the country, have had an unprecedented impact on professional licensure testing for graduates seeking admission to many professions, including not only law, but medicine, nursing, architecture, and engineering. The court understands that many law school graduates are being substantially affected by the resulting disruption. Some graduates have lost job offers. Many are about to lose health insurance, cannot find a job to pay bills, or are in fear of deportation if they cannot enter the bar in time to retain job offers. Many more have student loan payments that become due in mid-November, but without a law license and the ability to work, they fear going into default.

With these considerations in mind, the court has sought the safest, most humane and practical options for licensing law graduates by encouraging and working with the State Bar to pursue the option of administering the California Bar Examination online as a remote test, to avoid the need for, and dangers posed by, mass in-person testing. The court also directed the State Bar to engage in focused conversations with the National Conference of Bar Examiners (NCBE) to address the ability to administer an online version of the multiple-choice Multistate Bar Examination.

Our sister states also struggle with similar issues. Many have recently canceled in-person testing plans and have increasingly turned to online solutions. Although a few less populous states have been able to accommodate a diploma privilege that grants entry for all of the graduates of their states' constituent American Bar Association (ABA)-accredited law schools, the law schools in California, unlike in other states, represent a diverse array of ABA-accredited, California-accredited, and California-registered schools. If California were to adopt diploma-privilege criteria used by other states, graduates of nearly four dozen California law schools would not meet those criteria and would be excluded.

With these considerations in mind, the court seeks a path that ensures the fair and equal treatment of all graduates, regardless of law school accreditation status, while also ensuring that protections remain in place for consumers of legal services.

After considering all letters, comments, the actions of other states, discussions with the NCBE, consultations with the informal state bar workgroup on the status of the bar exam, and having given careful thought to the expressed needs of bar applicants, the court directs the State Bar as follows:

The September 9-10 administration is cancelled. Joining at least 15 other jurisdictions that have, to date, taken similar measures, the State Bar is directed to make the necessary arrangements for the online remote administration of the bar examination on October 5-6, 2020, and extend registration for this exam through July 24, 2020. The State Bar has worked diligently on measures for the successful deployment of the exam online. Based on that work and current information, the court has determined that an online exam can be administered and delivered without the need for an examinee to have a high-speed or constant internet connection. The court asks that the State Bar clearly explain the necessary system requirements and other details concerning the circumstances of an online exam in a "Frequently Asked Questions" guide.

The court strongly encourages law schools to assist those graduates who lack internet access at home, or who have home environments not amenable to two days of uninterrupted examination, by employing the same and similar measures, including the use of school facilities and equipment, that schools have utilized to allow students to complete the Spring 2020 semester.

In consideration of the fact that California is one of two states with the highest pass score for its minimum competency exam, and based on findings from recently completed bar examination studies as well as data from ongoing studies, the court directs the State Bar to modify the pass score for the California Bar Examination to allow for a minimum passing score of 1390, which is approximately two standard errors below the median recommended cut score of 1439 from the 2017 Standard Setting Study. This modified minimum passing score is effective for the administration of the bar examination on October 5-6, 2020, and will be applied prospectively to future administrations of the California Bar Examination (irrespective of whether the exam is administered online in the future). The court will consider any further changes pending recommendations offered by the forthcoming Blue-Ribbon Commission on the Future of the California Bar Examination.

The court recognizes that postponement of the bar examination may impact employment prospects, delay incomes, and otherwise impair the livelihoods of persons who recently have graduated from law school. Moreover, the court recognizes 2020 graduates may not be in a position to study and prepare for a fall bar 2020 examination. Therefore, in order to mitigate these hardships faced by graduates while fulfilling the responsibility to protect the public by ensuring that persons engaged in the practice of law are minimally competent to do so, the court directs the State Bar to implement, as soon as possible, a temporary supervised provisional licensure program — a limited license to practice specified areas of law under the supervision of a licensed attorney.

This program will be made available for all 2020 graduates of law schools based in California or those 2020 graduates of law schools outside California who are permitted to sit for the California Bar Examination under Business and Professions Code sections 6060 and 6061. More information will be forthcoming regarding this program, and the State Bar will issue a

"Frequently Asked Questions" guide concerning the details. At a minimum, this provisional licensure program shall remain in effect until at least June 1, 2022 to permit 2020 graduates maximum flexibility. This timeframe will afford the 2020 graduates several opportunities to take the exam of their choosing through February 2022 and await the exam results. In addition, in order to expedite relief and pursuant to the court's inherent authority over the admission of attorneys into the practice of law, the State Bar should afford a public comment period of at least 15 days for any proposed supervised provisional licensure program rules. (*In re Attorney Discipline System* (1998) 19 Cal.4th 582; Cal. Rules of Court, Rule 9.3.)

With the exception of postponing the October 2020 First-Year Law Students' Examination to November 2020 or any amendments to the rules governing the number of times an examinee can sit for that exam, this letter supersedes the court's prior April 27, 2020 letter.

Sincerely,

JORGE E. NAVARRETE
Clerk and
Executive Officer of the Supreme Court

cc: Donna Hershkowitz

Exhibit 6

The State Bar *of California*

Simulation of the Impact of Different Bar Exam Cut Scores on Bar Passage, by Gender, Race/Ethnicity, and Law School Type

Office of Research and Institutional Accountability

March 18, 2020

The State Bar of California compiled historical California Bar Exam data and conducted a simulation analysis following discussions about the potential impact of different cut scores on test takers' pass rates by gender, race/ethnicity, and law school type. The tables presented in this report show the number of exam takers who would have passed the bar exam if the cut score had been 1300, 1330, 1350, and 1390.[1] The tables also show how the pass rate changes and the difference in the number of exams taken as the simulated cut score changes. The simulations presented in this report should not be construed to imply any position of the State Bar regarding the propriety of the current cut score, or any of the hypothetical cut scores evaluated. The issue was previously addressed in the standard setting study conducted in 2017.[2]

DATA AND METHODS

The simulations are based on archival data on results from 21 bar exams administered over a span of 11 years, from February 2009 to February 2019. The data allows tracking of the bar exam results for more than 85,000 examinees, who collectively took more than 140,000 exams. Table 1 shows summary statistics on the total number of exams under consideration by gender, race/ethnicity, and law school type.

[1] The specific hypothetical cut scores included were selected by a law school dean who spearheaded the production of this simulation.

[2] See Final Report on the 2017 California Bar Exam Studies: https://www.calbar.ca.gov/Portals/0/documents/reports/2017-Final-Bar-Exam-Report.pdf

Table 1. Number of Bar Examinees and Exams Taken from February 2009 to February 2019, by Race/Ethnicity, Gender, and Law School Type

	Unique Examinees	Exams Taken
Total	85,727	143,198
Gender		
Male	43,787	73,289
Female	41,386	69,082
No Response	554	827
Race Ethnicity		
Asian	18,510	32,728
Latino	9,166	17,944
African American	4,417	9,841
White	48,917	75,633
Other	1,384	2,558
No Response	3,333	4,494
Law School Type		
CA ABA Approved	42,922	63,912
Out-of-State ABA	15,587	24,732
CA Accredited	5,173	14,714
CA Unaccredited	2,221	6,447
US Attorneys	13,849	19,739
Other	5,975	13,654

To illustrate how the simulation results are calculated, Table 2 presents the experience of a hypothetical examinee. The examinee took the exam four times over three years, achieving a range of scores from 1289 at the lowest to 1395 at the highest. With the current cut score of 1440, the examinee did not pass the exam and stopped trying after the fourth attempt. Under all four hypothetical cut scores, however, they were able to pass the exam, although they would not have passed until the fourth attempt if the cut score were 1390. When they passed the exam under a hypothetical cut score, *subsequent attempts in the data are removed from the calculation* for that particular scenario. Thus, under the scenarios of 1300 and 1330, the number of exams taken for this person would be calculated as two; under the scenario of 1350, the number of exams taken would be counted as three.

Table 2. An Example of Simulated Exam Outcomes for a Repeat Examinee

		Hypothetical Cut Scores				*Current Cut Score*
Exams Taken	Total Score	1300	1330	1350	1390	1440
February 2009	1289	F	F	F	F	F
July 2009	1335	P	P	F	F	F
July 2010	1360	-	-	P	F	F
February 2011	1395	-	-	-	P	F

Note: P = pass, F = fail

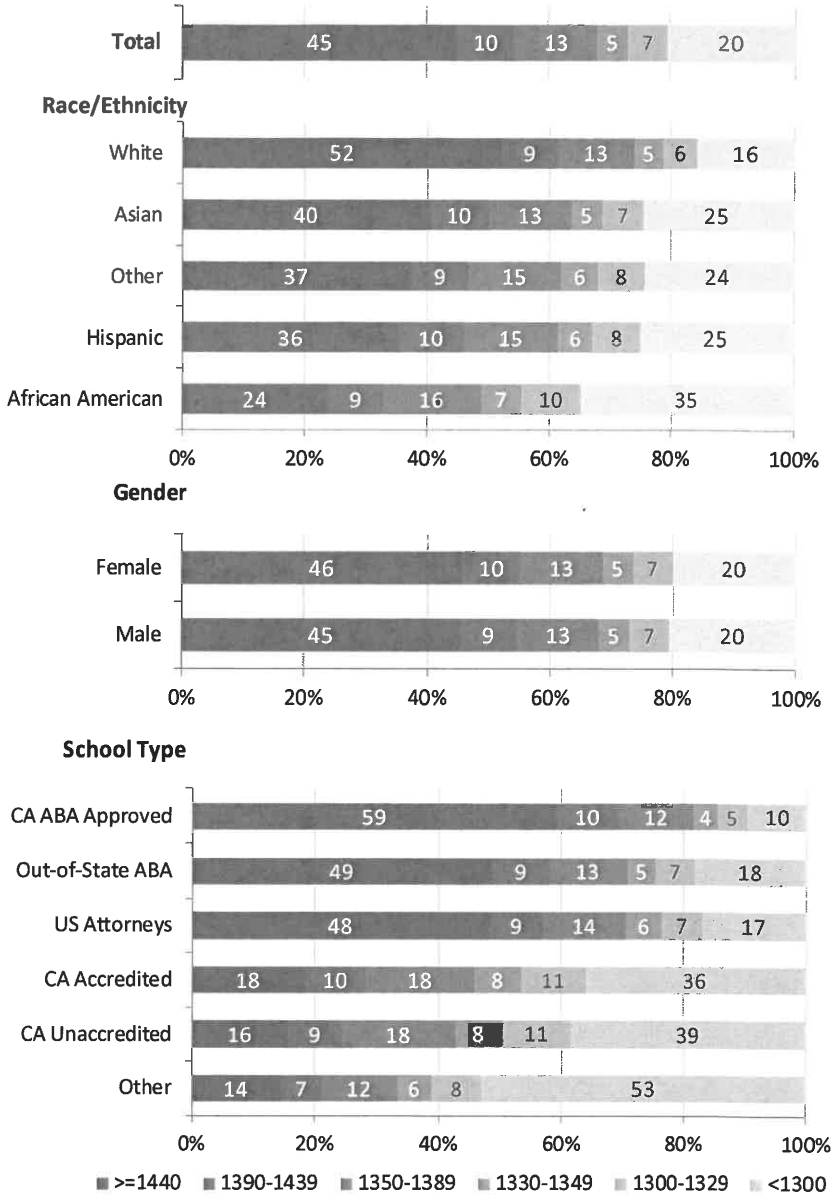
SIMULATION RESULTS

The simulation exercise produces three sets of results under each hypothetical cut score: (1) impact on the number of examinees passing the exam; (2) impact on the pass rate; and (3) impact on the number of exams taken in aggregate.

The impacts of the several cut score hypotheticals are different for various subgroups, reflecting the variation of actual bar exam performance for each subgroup. In general, a group with a higher bar pass rate under the current cut score of 1440 would see a smaller impact from a lower cut score, compared to a group with a lower bar pass rate.

As background information to assist in interpreting the simulations, Figure 1 shows the distribution of bar exam scores at different ranges for all exams included in this exercise. Note that, under the current cut score of 1440, 59 percent of examinees graduating from a California ABA law school passed the bar exam, compared to 18 percent of examinees who graduated from a California-accredited law school. In simulating the impact from lowering the cut score to 1390, Table 3 shows that examinees graduating from ABA law schools would see a 4 percent increase in the number of examinees passing the bar exam, compared to a 14 percent increase for examinees graduating from California-accredited law schools. The difference reflects the larger base of ABA law school graduates passing the bar exam under the current cut score compared to California-accredited law schools. More subgroup comparisons of the simulation results can be viewed in a separate Excel file.

Figure 1. Distribution of Bar Exam Performance: All Exams from February 2009 to February 2019, by Race/Ethnicity, Gender, and Law School Type



Impact on the Number of Examinees Passing the Exam

Table 3 contains the results of the simulation's impact on the number of examinees passing the bar exam. The first column, labeled "Current at 1440," shows the number of examinees covered in this analysis who actually passed the bar exam. The next four columns calculate the number of examinees who would have passed the exam under each of the hypothetical lower cut scores. The additional examinees passing the exam are shown in the following four columns. Increases in examinees passing the exam, in percentage terms relative to the actual passers, are

shown in the last four columns. At 1390, for example, the table shows that 3,741 more examinees would have passed the exam, a total gain of 5.8 percent.

Impact on Pass Rate

Table 4 shows the pass rate and how it changes under the different scenarios. As with Table 3, the column "Current at 1440" shows actual data to use as the point of comparison. The 45 percent shown in the first row of the first column of Table 4 represents the 65,025 examinees who passed the bar exam out of all exams taken (143,198, shown in Table 5). At the hypothetical cut score of 1390, the pass rate would have been 53 percent, which represents an increase of 8 percentage points, shown in the last column.

Impact on the Number of Exams Taken

The first column in Table 5 shows the actual number of exams taken over the period covered in this analysis. As shown in Table 2, the number of exams taken would decrease as examinees passed the exam with fewer attempts. At a hypothetical cut score of 1390, the table shows that a total of 128,702 exams would have been taken. Compared to the actual count of 143,198, it represents a decrease of nearly 15,000 exams taken, a reduction of approximately 10 percent, as shown in the last column.

Data for Intersectional Analyses

The simulation results presented in Tables 3 to 5 are limited by the three subgroup categories in which comparisons cannot be made across subgroup intersections, such as between white and African American females from ABA or California-accredited law schools. An Excel file is provided with this report to make possible these types of dynamic, multidimensional comparisons.

Table 3. Simulation of Bar Exam Outcomes: Impact on Number of Examinees Passing the Exam

		Simulated Number of Examinees Passing Exam				Number of Additional Examinees Passing Exam				Percent Increase in Examinees Passing Exam			
	Current at 1440	1300	1330	1350	1390	1300	1330	1350	1390	1300	1330	1350	1390
Total	65,025	77,913	75,570	73,740	68,766	12,888	10,545	8,715	3,741	20%	16%	13%	6%
Race/Ethnicity													
Asian	13,229	16,159	15,603	15,190	14,109	2,930	2,374	1,961	880	22%	18%	15%	7%
African American	2,345	3,499	3,257	3,098	2,639	1,154	912	753	294	49%	39%	32%	13%
Latino	6,377	8,086	7,756	7,539	6,878	1,709	1,379	1,162	501	27%	22%	18%	8%
White	39,400	45,839	44,734	43,786	41,283	6,439	5,334	4,386	1,883	16%	14%	11%	5%
Other	954	1,219	1,178	1,132	1,027	265	224	178	73	28%	23%	19%	8%
No Response	2,720	3,111	3,042	2,995	2,830	391	322	275	110	14%	12%	10%	4%
Gender													
Male	33,214	39,797	38,635	37,675	35,134	6,583	5,421	4,461	1,920	20%	16%	13%	6%
Female	31,464	37,666	36,502	35,648	33,263	6,202	5,038	4,184	1,799	20%	16%	13%	6%
No Response	347	450	433	417	369	103	86	70	22	30%	25%	20%	6%
Law School Type													
CA ABA Approved	37,729	41,680	41,105	40,630	39,097	3,951	3,376	2,901	1,368	10%	9%	8%	4%
Out-of-State ABA	12,033	14,419	13,970	13,652	12,735	2,386	1,937	1,619	702	20%	16%	13%	6%
CA Accredited	2,705	4,157	3,869	3,628	3,082	1,452	1,164	923	377	54%	43%	34%	14%
CA Unaccredited	1,008	1,711	1,561	1,467	1,191	703	553	459	183	70%	55%	46%	18%
US Attorneys	9,573	12,498	11,954	11,490	10,334	2,925	2,381	1,917	761	31%	25%	20%	8%
Other	1,977	3,448	3,111	2,873	2,327	1,471	1,134	896	350	74%	57%	45%	18%

Table 4. Simulation of Bar Exam Outcomes: Impact on Pass Rate

		Simulated Exam Pass Rate				Percentage Point Increase in Pass Rate			
	Current at 1440	1300	1330	1350	1390	1300	1330	1350	1390
Total	45%	77%	70%	66%	53%	31	25	20	8
Race/Ethnicity									
Asian	40%	70%	64%	59%	48%	30	24	19	8
African American	24%	56%	47%	42%	30%	33	24	18	6
Latino	36%	69%	61%	56%	43%	34	26	21	8
White	52%	83%	77%	73%	60%	31	25	21	8
Other	37%	71%	64%	58%	45%	34	26	20	7
No Response	61%	86%	81%	78%	68%	25	20	17	7
Gender									
Male	45%	77%	70%	65%	53%	31	25	20	8
Female	46%	77%	70%	66%	54%	31	25	20	8
No Response	42%	67%	63%	59%	47%	25	21	17	5
Total	45%	77%	70%	66%	53%	31	25	20	8
Law School Type									
CA ABA Approved	59%	90%	85%	81%	69%	31	26	22	10
Out-of-State ABA	49%	80%	73%	68%	57%	31	24	20	8
CA Accredited	18%	51%	42%	36%	24%	32	23	17	6
CA Unaccredited	16%	47%	38%	33%	21%	32	22	17	6
US Attorneys	48%	82%	76%	70%	56%	34	27	21	8
Other	14%	34%	29%	25%	18%	20	14	11	4

Table 5. Simulation of Bar Exam Outcomes: Impact on Exams Taken

	Current	Simulated Number of Exam Takers				Reduction in the Number of Exams Taken				Percent Decrease of Exams Taken			
	at 1440	1300	1330	1350	1390	1300	1330	1350	1390	1300	1330	1350	1390
Total	143,198	101,374	107,414	112,429	128,702	41,824	35,784	30,769	14,496	29%	25%	21%	10%
Race/Ethnicity													
Asian	32,728	22,974	24,377	25,572	29,281	9,754	8,351	7,156	3,447	30%	26%	22%	11%
African American	9,841	6,209	6,859	7,356	8,781	3,632	2,982	2,485	1,060	37%	30%	25%	11%
Latino	17,944	11,705	12,657	13,403	15,874	6,239	5,287	4,541	2,070	35%	29%	25%	12%
White	75,633	55,133	57,915	60,293	68,273	20,500	17,718	15,340	7,360	27%	23%	20%	10%
Other	2,558	1,721	1,849	1,963	2,302	837	709	595	256	33%	28%	23%	10%
No Response	4,494	3,632	3,757	3,842	4,191	862	737	652	303	19%	16%	15%	7%
Gender													
Male	73,289	51,810	54,915	57,535	65,866	21,479	18,374	15,754	7,423	29%	25%	21%	10%
Female	69,082	48,891	51,810	54,186	62,050	20,191	17,272	14,896	7,032	29%	25%	22%	10%
No Response	827	673	689	708	786	154	138	119	41	19%	17%	14%	5%
Law School Type													
CA ABA Approved	63,912	46,237	48,272	50,099	56,796	17,675	15,640	13,813	7,116	28%	24%	22%	11%
Out-of-State ABA	24,732	18,074	19,154	19,946	22,463	6,658	5,578	4,786	2,269	27%	23%	19%	9%
CA Accredited	14,714	8,197	9,300	10,143	12,792	6,517	5,414	4,571	1,922	44%	37%	31%	13%
CA Unaccredited	6,447	3,620	4,097	4,436	5,599	2,827	2,350	2,011	848	44%	36%	31%	13%
US Attorneys	19,739	15,185	15,833	16,494	18,338	4,554	3,906	3,245	1,401	23%	20%	16%	7%
Other	13,654	10,061	10,758	11,311	12,714	3,593	2,896	2,343	940	26%	21%	17%	7%

Exhibit 7

The Bar Examiner
The bar admissions information source

The Testing Column: Did UBE Adoption in New York Have an Impact on Bar Exam Performance?

Winter 2019-2020 (Vol. 88, No. 4)

This article originally appeared in *The Bar Examiner* print edition, Winter 2019-2020 (Vol. 88, No. 4), pp 34–42.

Highlights of a Study Directed by the New York State Court of Appeals

By Andrew A. Mroch, PhD, and Mark A. Albanese, PhD

In adopting the Uniform Bar Examination (UBE), the New York State Court of Appeals directed the New York State Board of Law Examiners (NYSBLE) to study the impact of the change to the UBE on candidate bar exam performance. The NYSBLE requested assistance from NCBE in conducting the study, which NCBE provided as part of its service mission as a not-for-profit corporation.

The study covered the two bar exam administrations immediately before UBE adoption (July 2015 and February 2016) and continued through the July 2017 administration, resulting in one February administration post-UBE adoption (February 2017) and two July administrations post-UBE adoption (July 2016 and July 2017). In addition to the overall impact of UBE adoption, the study addressed potential differential effects by gender and race/ethnicity.

The New York State Court of Appeals released the study results in a publicly available report on August 20, 2019, providing a rich trove of information on the background characteristics and performance of candidates taking the bar exam in New York between July 2015 and July 2017.[1]

This article briefly highlights several findings of the report relative to what happened before and after UBE adoption in New York regarding three topics:

1. bar examination performance
2. candidate background characteristics: pre-law-school undergraduate grade point average (UGPA), Law School Admission Test (LSAT) score, and law school grade point average (LGPA)
3. the relationships between candidate bar exam performance and their background characteristics (UGPA, LSAT score, and LGPA)[2]

What Data Were Used for the Study?

Two samples of New York bar exam data were analyzed.

> **Domestic-educated NYSBLE sample:** The first sample, referred to as the *domestic-educated NYSBLE sample*, included candidates who had received a JD degree from an American Bar Association–approved law school in the United States.[3]
>
> **School-based sample:** The second sample, referred to as the *school-based sample*, was a subset of the domestic-educated NYSBLE sample and included candidates for whom law schools throughout the United States provided their UGPAs, LSAT scores, and LGPAs. To facilitate a meaningful analysis, only those candidates whose law schools provided such data for at least 25 candidates were included in the school-based sample.

The LGPAs provided by law schools used various systems. The most common was the 4-point system corresponding to A = 4, B = 3, and so on, but some schools used a 100-point system and an assortment of other approaches. In order to appropriately analyze LGPAs from different schools, LGPAs were scaled in two ways to ensure comparability: (1) to range from 1 to 4 (resulting in the *4-point LGPA*) and (2) to account for school-level differences in selectivity[4] (resulting in the *index-based LGPA*). All analyses that included LGPAs were conducted separately using each method of scaling LGPAs.

Table 1 shows the numbers and percentages of candidates included in the two samples at each bar exam administration. Compared to the total number of domestic-educated candidates in the NYSBLE sample, the percentages of candidates represented by the school-based sample were relatively low for the

February exams (22.8% and 30.5%) and for July 2015 (27.7%) compared to July 2016 (62.0%) and July 2017 (55.4%).

In addition to having a relatively small percentage of candidates represented in the school-based sample, the February results were sufficiently unstable that they were excluded from this summary. For July, there were differences in the percentage of candidates represented across years, but the numbers were sufficiently large that the school-based sample was still useful for studying candidates across July exams.

Bar examination scores also required adjustments in order to enable appropriate comparisons. Scores on the prior New York bar exam were on a 1,000-point scale but were converted in this study to the 400-point UBE scale to facilitate comparisons across exams. (See sidebar)

Table 1. Numbers and percentages of candidates in the New York UBE study samples

New York UBE study sample	February 2016 administration	February 2017 administration	July 2015 administration	July 2016 administration	July 2017 administratior
Domestic-educated NYSBLE sample–%	100.0%	100.0%	100.0%	100.0%	100.0%
Domestic-educated NYSBLE sample–(n)	(2,346)	(2,370)	**(7,513)**	**(7,292)**	**(6,776)**
School-based sample–%	22.8%	30.5%	27.7%	62.0%	55.4%
School-based sample–(n)	(534)	(723)	**(2,084)**	**(4,520)**	**(3,753)**

The data used for the results presented in this article are indicated in bold.

The New York Bar Exam, Pre- and Post-UBE

The UBE consists of

> the Multistate Bar Examination (MBE), weighted 50% of the total score, and
>
> a written component consisting of six Multistate Essay Examination (MEE) questions, weighted 30% of the total score, and two Multistate Performance Test (MPT) questions, weighted 20% of the total score.

Scores on the UBE are on a 400-point scale. A passing score in New York on the 400-point UBE scale is a score of at least 266.

The New York bar exam prior to UBE adoption consisted of

> the MBE, weighted 40% of the total score,
>
> a written component consisting of five New York–developed essay questions, weighted 40% of the total score, and one MPT question, weighted 10% of the total score, and
>
> 50 New York–developed multiple-choice questions, weighted 10% of the total score.

Prior to adoption of the UBE, the passing score was 665 on a 1,000-point scale. This passing score corresponds to a 266 on the 400-point UBE scale.

What Were the Results of the Study?

Bar Exam Performance

Figures 1 and 2 show bar exam performance and pass rates across the period of the study.

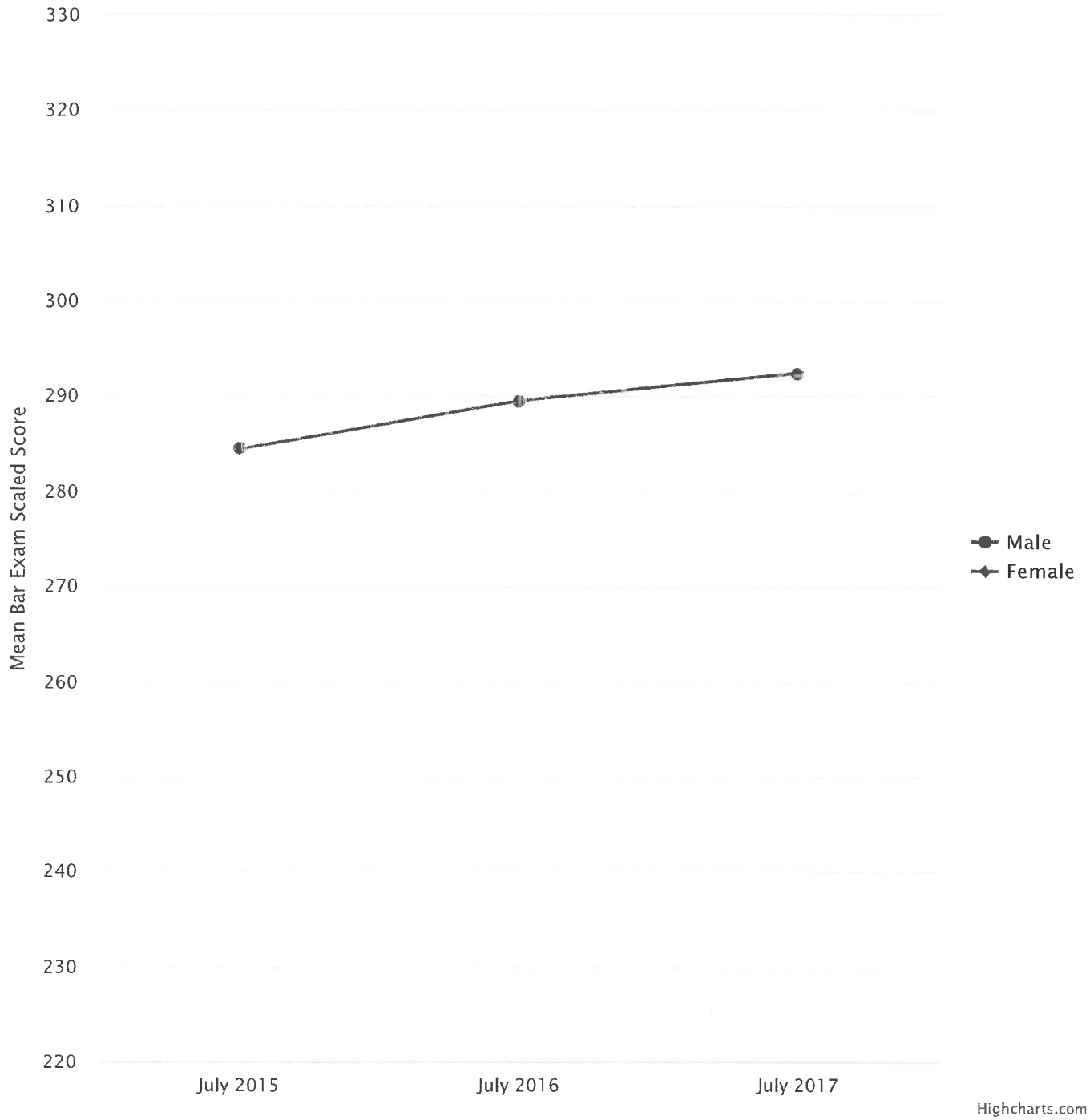
> Between July 2015 and July 2017, before and after UBE adoption in July 2016, bar exam performance and pass rates in New York increased, on average. For example, the pass rate for domestic-educated candidates in the NYSBLE sample was 72.5% in July 2015, 75.1% in July 2016, and 78.0% in July 2017 (Figure 2a).[5]
>
> Males tended to score slightly higher than females, on average, across Julys, with the difference between males and females in the domestic-educated NYSBLE sample widening slightly in July 2016 upon UBE adoption before narrowing in July 2017 (Figure 1a).
>
> Similar patterns of bar exam performance and pass rates were observed for the school-based sample (Figures 1b and 2b).

Candidates grouped by race/ethnicity showed similar differences in bar exam performance and pass rates across July exams. Bar exam performance and pass rates tended to increase for each group, particularly when comparing July 2015 to July 2017 (see Figures 1c and 1d for bar exam performance for both sample groups; see Figures 2c and 2d for pass rates for both groups). An exception was that the Black/African American group had mean bar exam scores that increased slightly and pass rates that decreased slightly between July 2015 and July 2016[6] and mean bar exam scores and pass rates that subsequently increased between July 2016 and July 2017, more than the other groups.

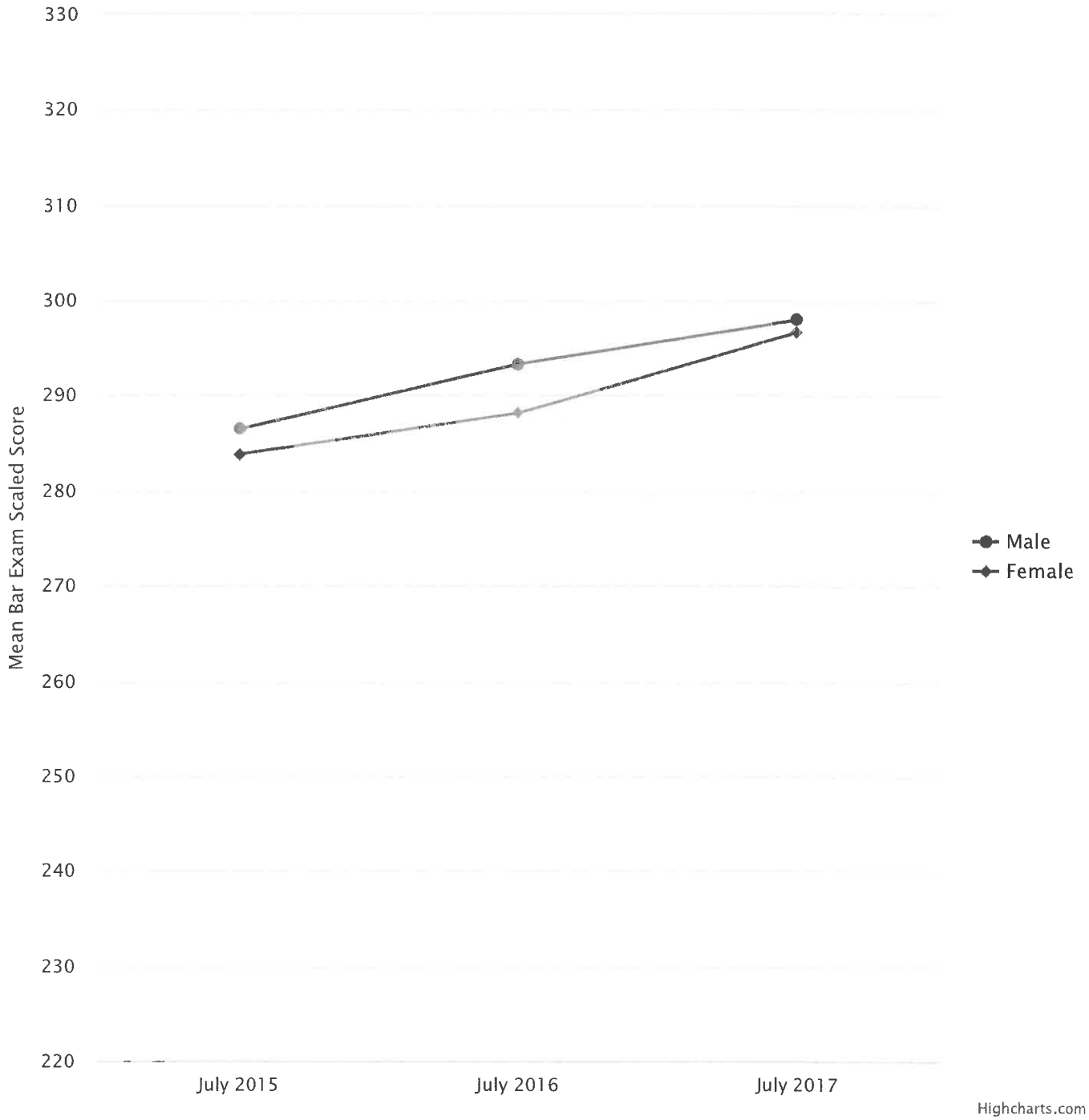
Because the composition and characteristics of candidates taking the bar exam may change across years, more information is needed to determine the extent to which the overall improvement in average performance on the bar exam in New York was due to the UBE versus other factors. This is where studying additional information, such as candidate background characteristics like UGPA, LSAT score, and LGPA, can help to better contextualize changes in bar exam performance and put them in perspective.

Figure 1. Mean bar exam scaled scores by gender and race/ethnicity for domestic-educated NYSBLE sample and school-based sample, July administrations, 2015-2017

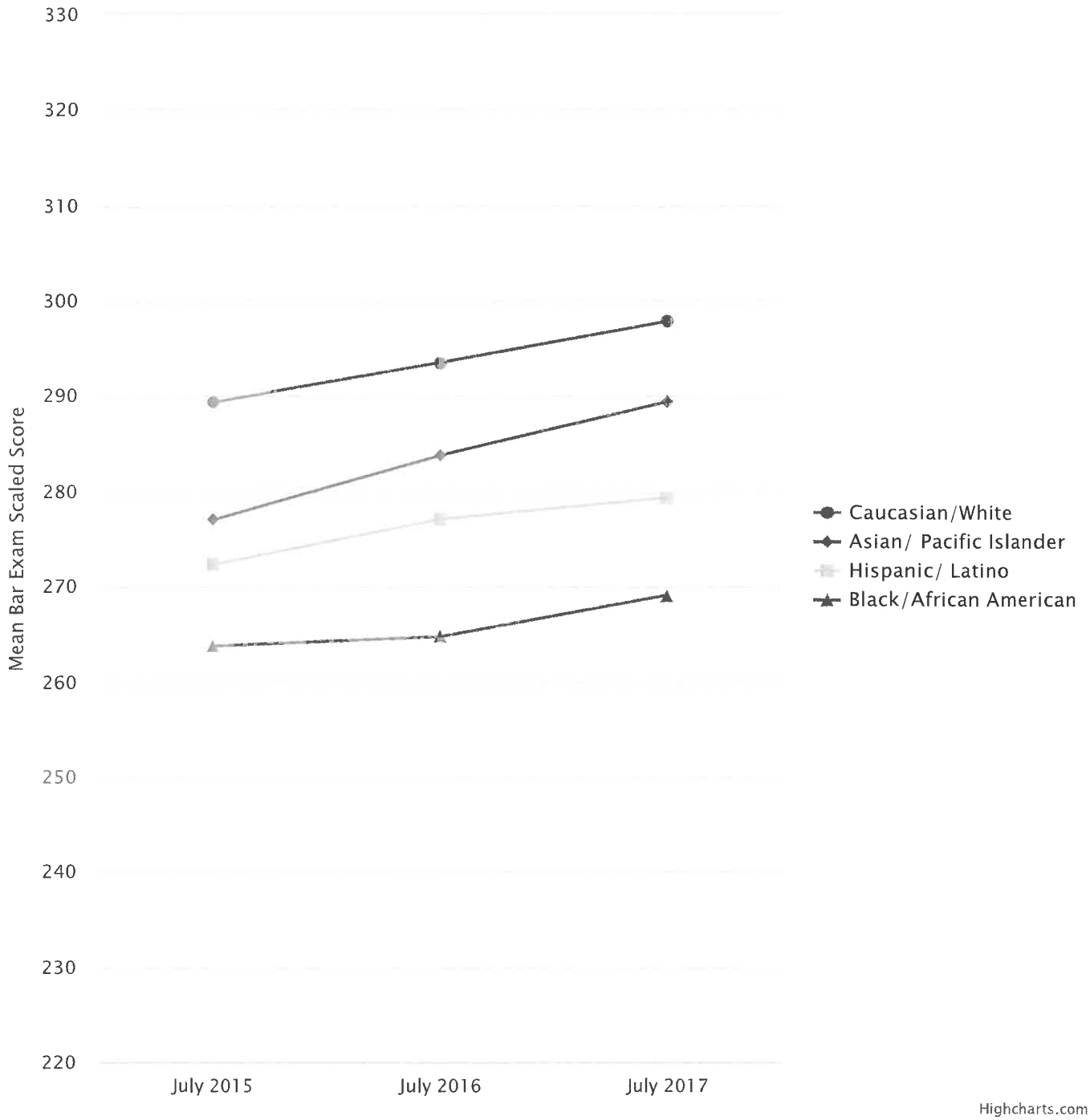
(1a) Domestic-educated NYSBLE sample



(1b) School-based sample



(1c) Domestic-educated NYSBLE sample



(1d) School-based sample

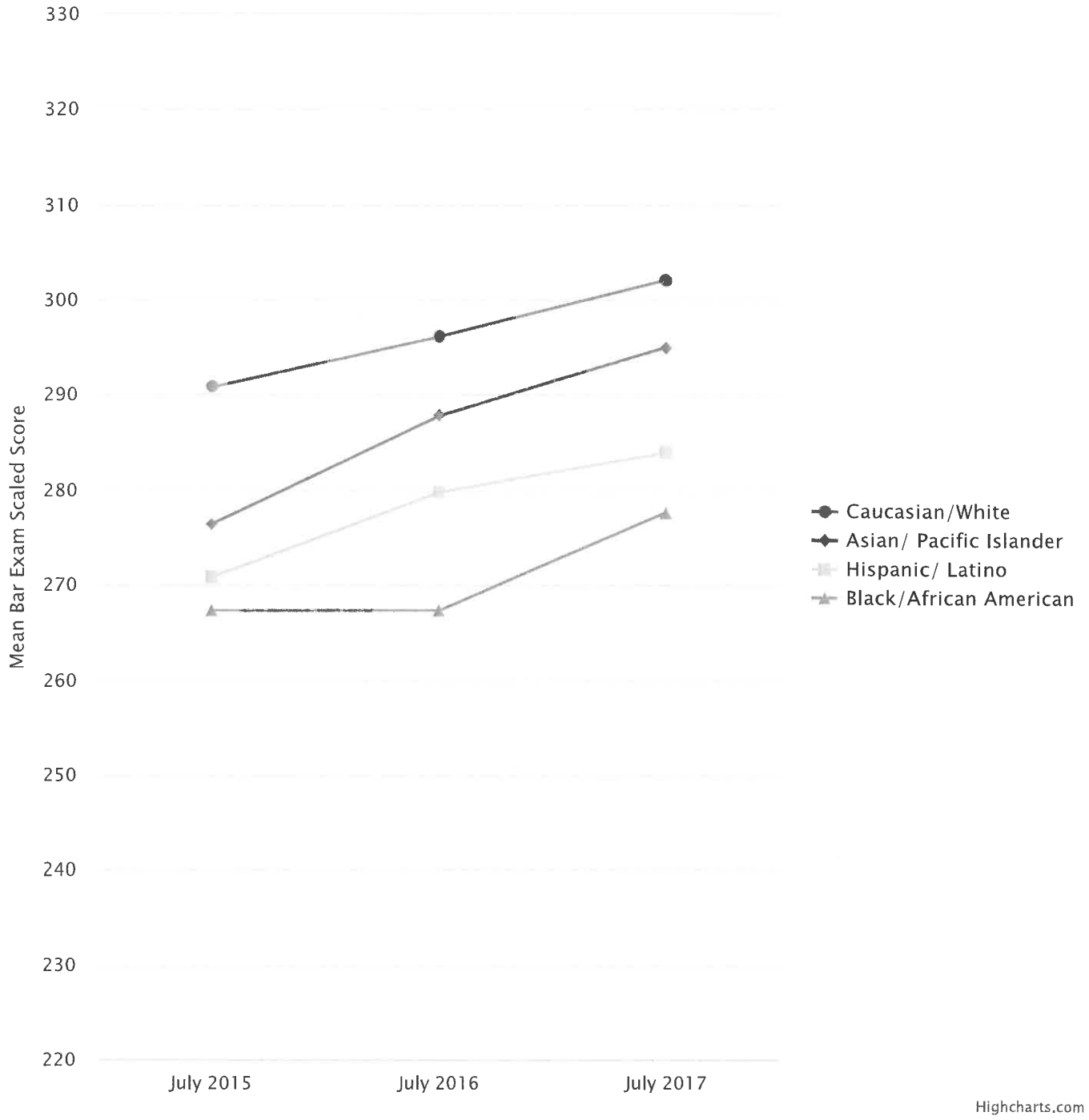
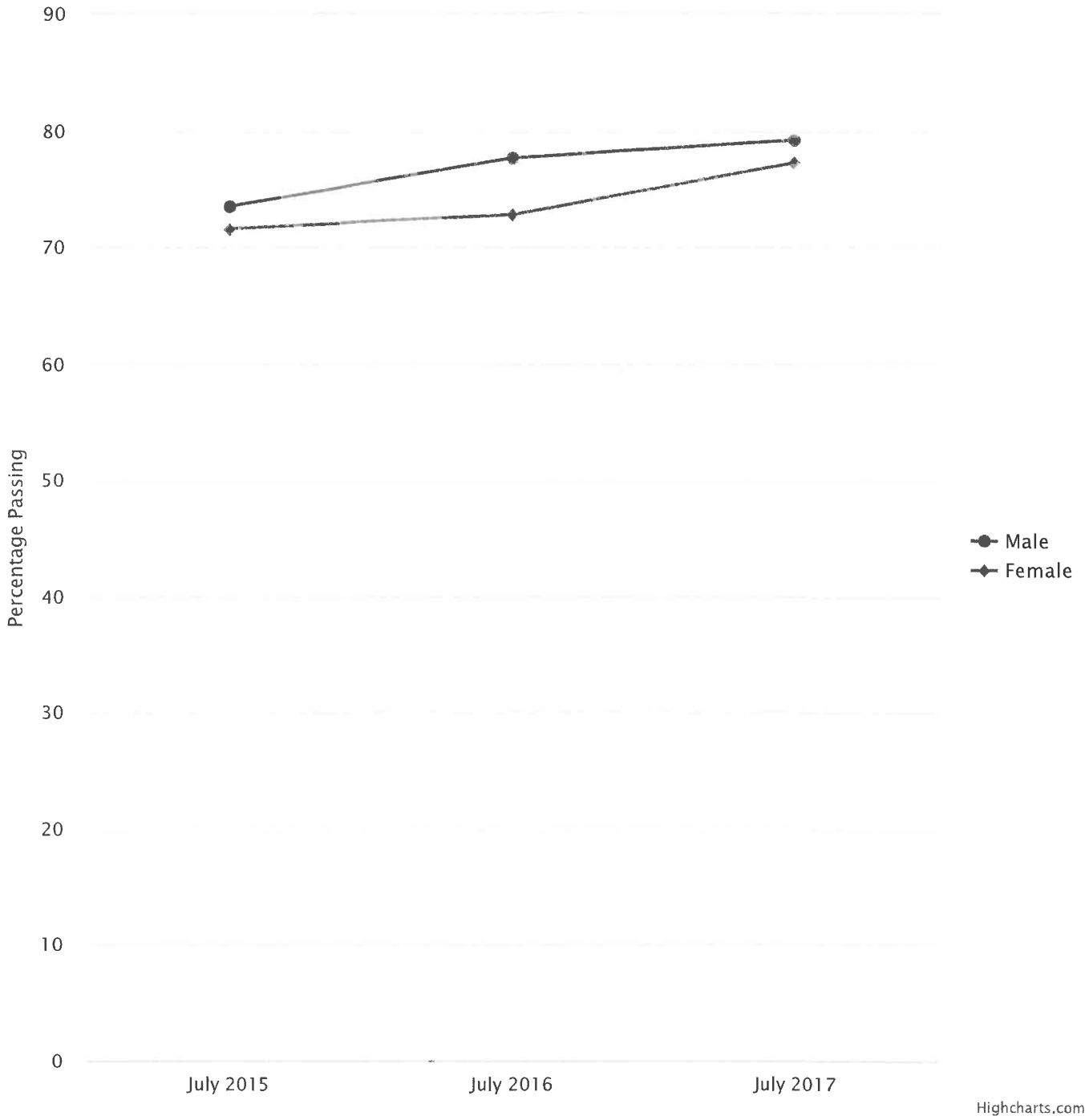
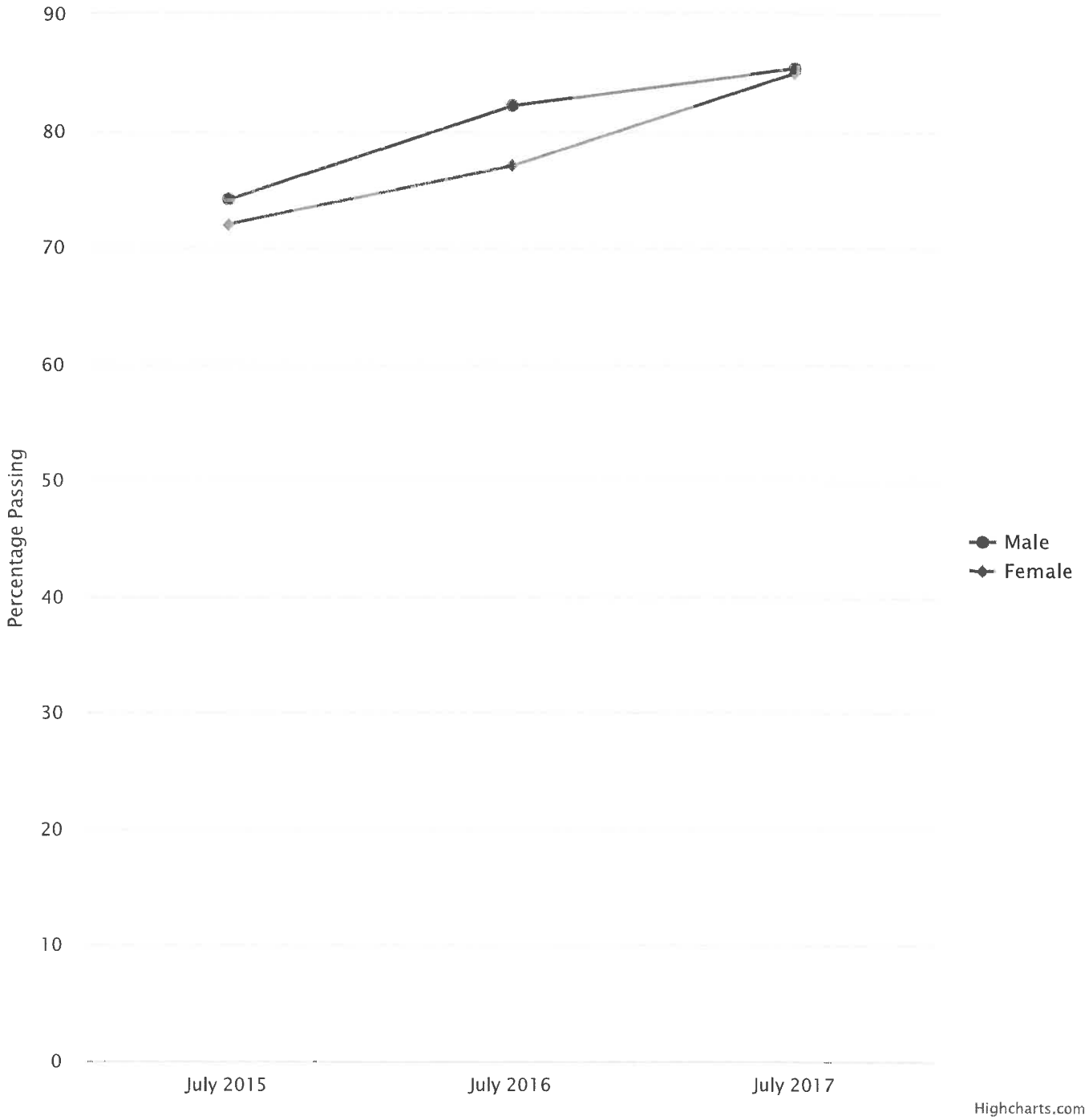


Figure 2. Pass rates by gender and race/ethnicity for domestic-educated NYSBLE sample and school-based sample, July administrations, 2015-2017

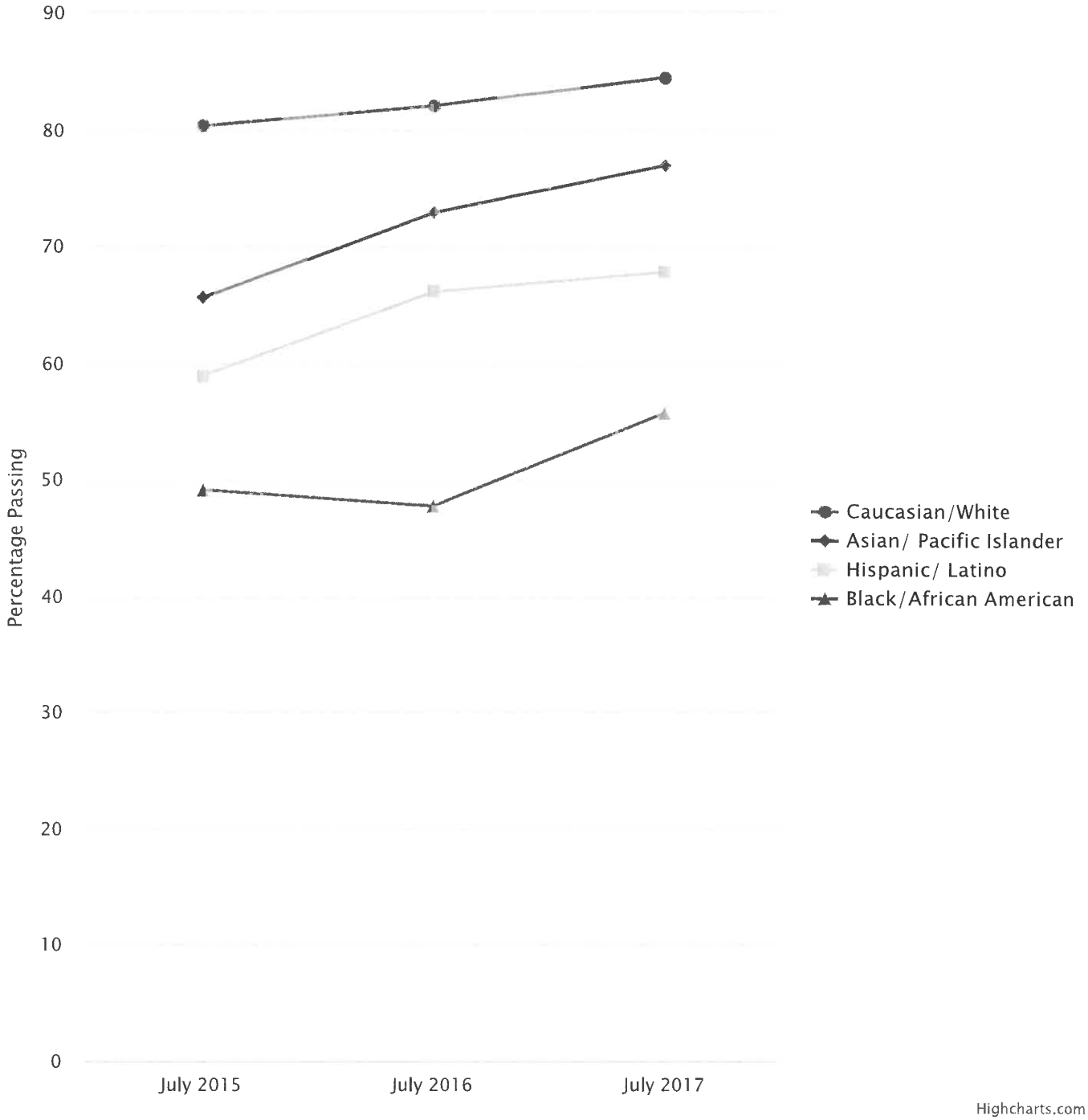
(2a) Domestic-educated NYSBLE sample



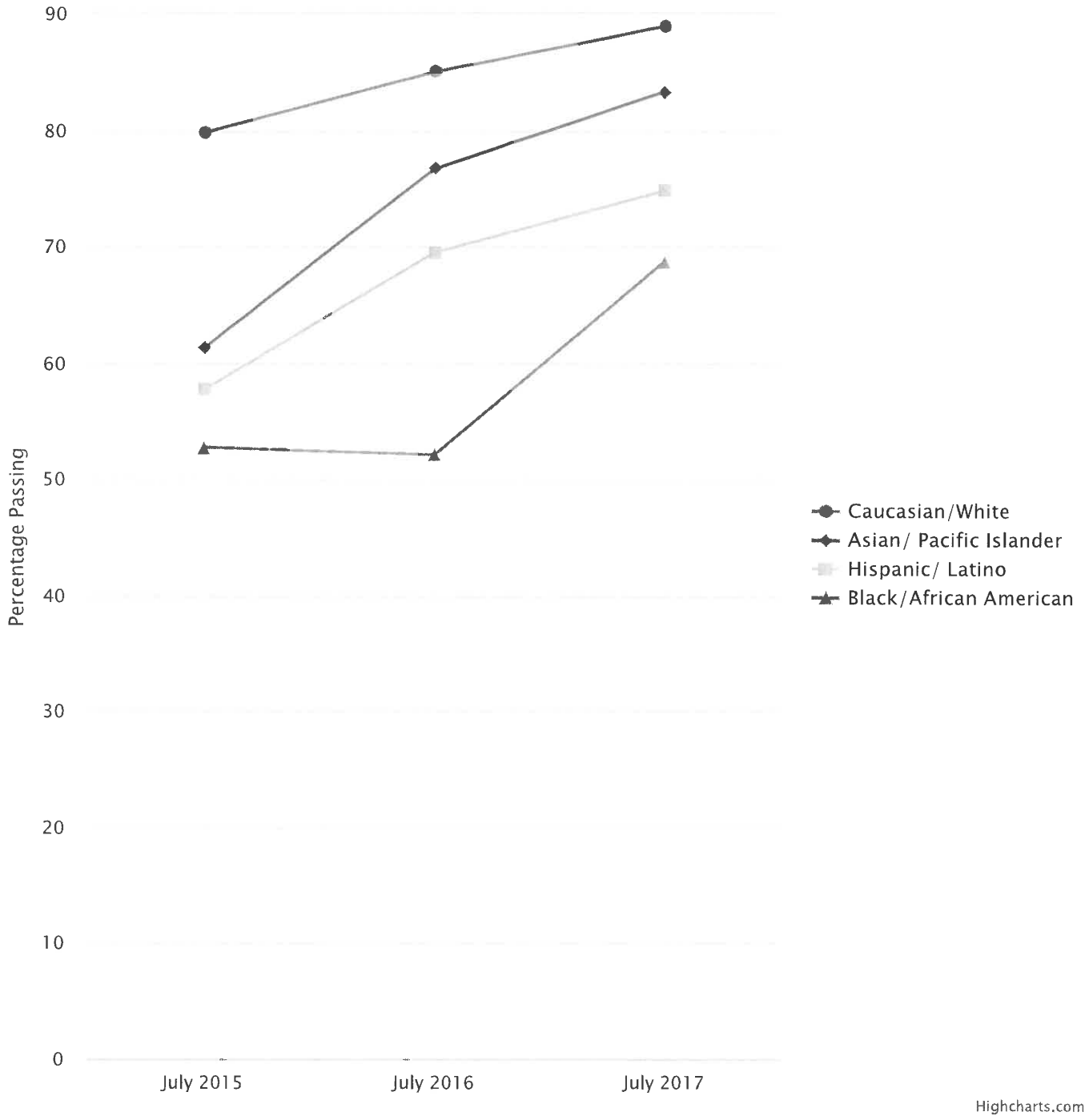
(2b) School-based sample



(2c) Domestic-educated NYSBLE sample



(2d) School-based sample



Candidate Background Characteristics

Findings of the study on candidate background characteristics by gender are shown in Figure 3:

Of the three candidate background characteristics studied (UGPAs, LSAT scores, and LGPAs), UGPAs and LGPAs tended to remain constant or increase across the three July exams for both females and males (Figures 3a, 3e, and 3g).

Mean LSAT scores decreased slightly between July 2015 and July 2016 before increasing in July 2017 (Figure 3c).

Average values for background characteristics tended to differ by gender. Females tended to have higher mean UGPAs than males for groups taking each bar exam (Figure 3a).

This pattern was reversed for LSAT scores (Figure 3c) and both the 4-point and index-based LGPAs (Figures 3e and 3g), where males tended to have higher means than females.

Differences between males and females decreased between July 2015 and July 2017 for each background characteristic (Figures 3a, 3c, 3e, and 3g).

Findings of the study on candidate background characteristics by race/ethnicity are also shown in Figure 3:

Average values for candidate background characteristics tended to differ according to candidates' race/ethnicity (Figures 3b, 3d, 3f, and 3h).

Each background characteristic between July 2015 and July 2016 tended to remain constant or increase for Asian/Pacific Islander, Black/African American, and Hispanic/Latino groups (although it can be seen in Figure 3f that the mean 4-point LGPA did dip slightly for the Black/African American group in July 2016 compared to July 2015).

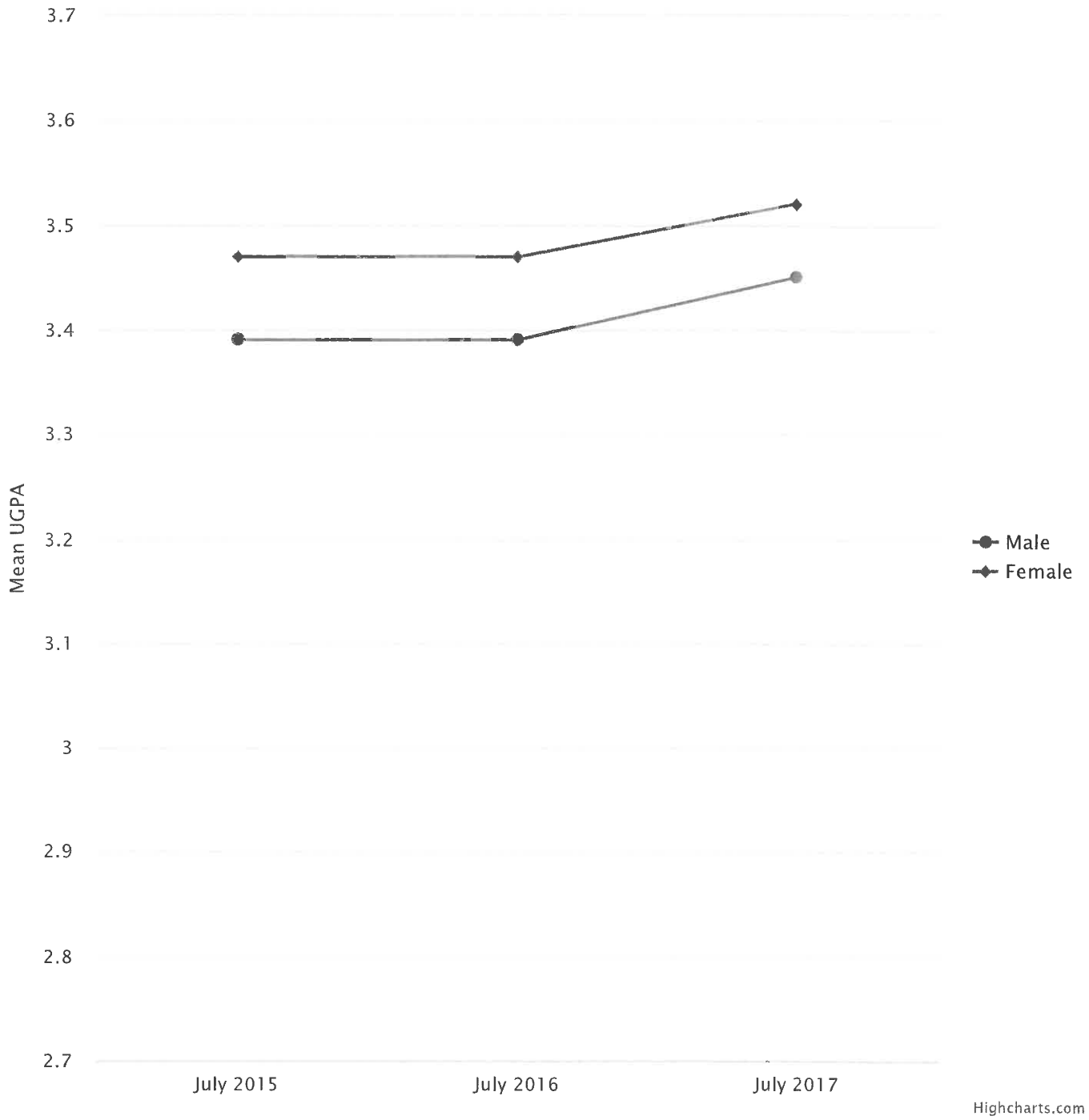
For the Caucasian/White group, each background characteristic between July 2015 and July 2016 tended to remain constant or decrease.

In July 2017, mean background characteristics tended to increase for each group, with the exception of the Hispanic/Latino group, which had similar mean UGPAs (Figure 3b) and lower mean 4-point LGPAs in July 2017 (Figure 3f) compared to July 2016.

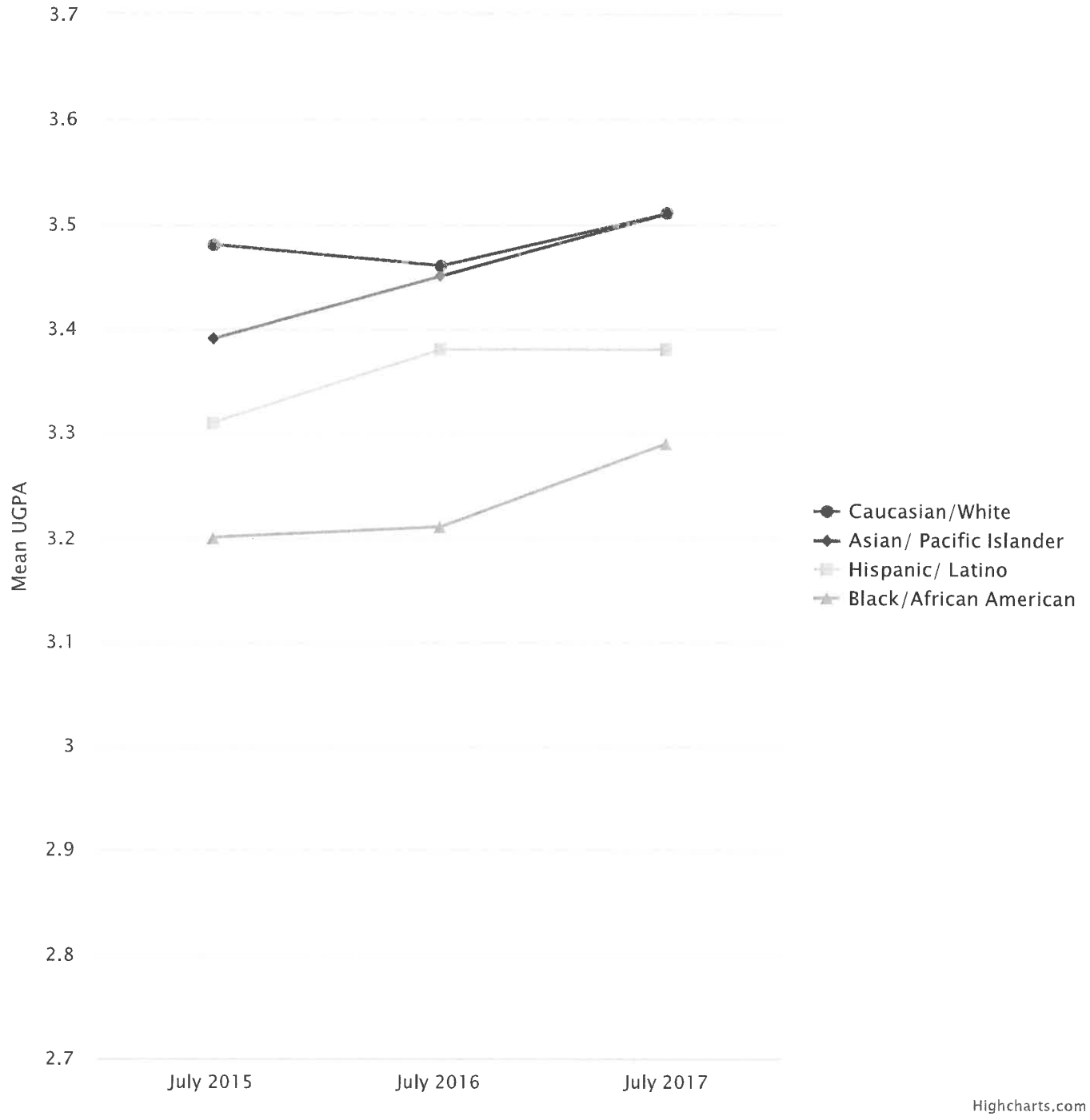
The pattern of mean UGPAs, LSAT scores, and LGPAs was generally consistent with the average performance on the bar exam between July 2015 and July 2017, where performance tended to increase.

Figure 3. Mean UGPA, LSAT score, and LGPA (4-point and index-based) by gender and race/ethnicity, July administrations, 2015-2017

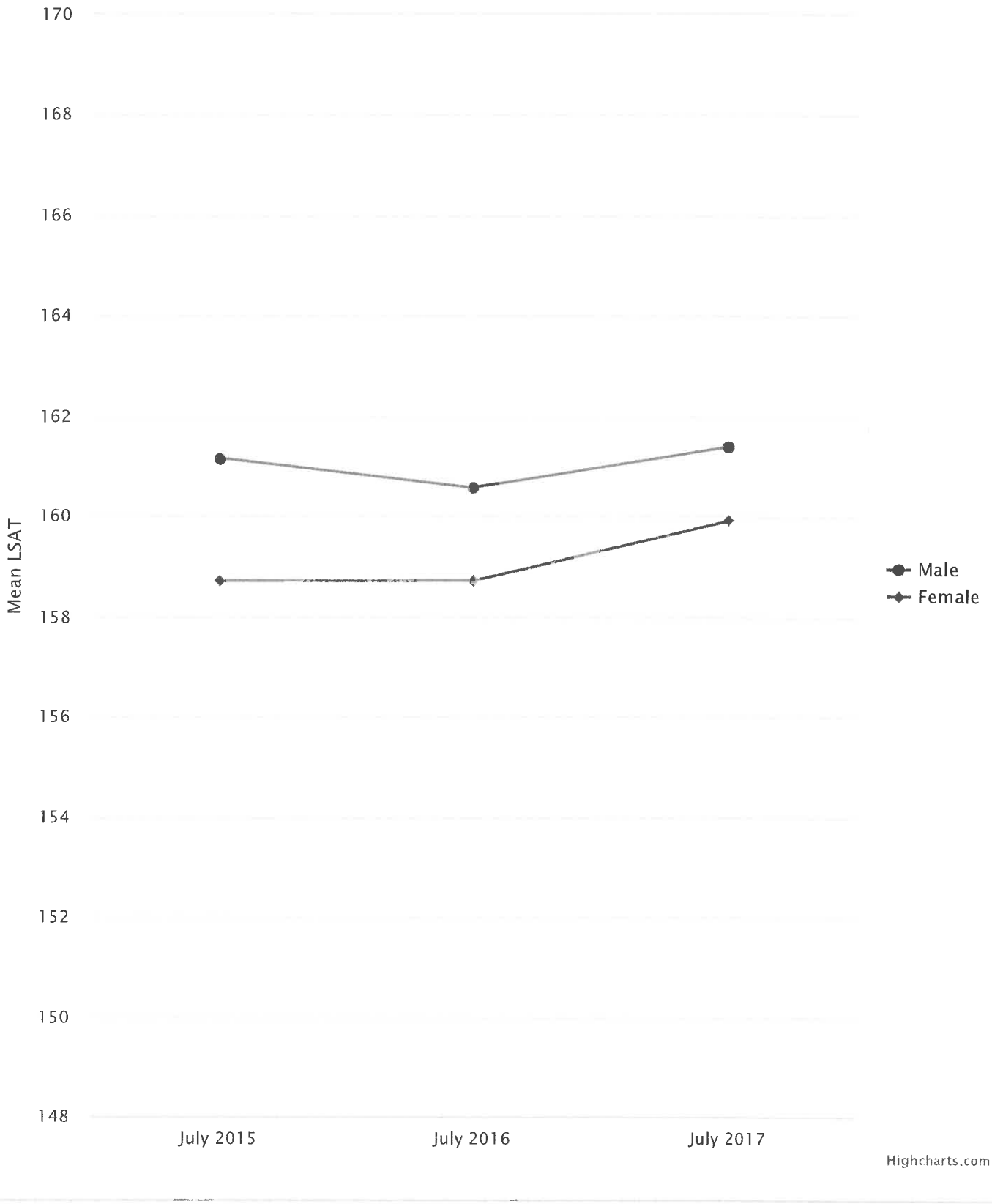
(3a)


3.7
3.6
3.5
3.4
3.3
3.2
3.1
3
2.9
2.8
2.7
Mean UGPA
July 2015
July 2016
July 2017
Male
Female
Highcharts.com

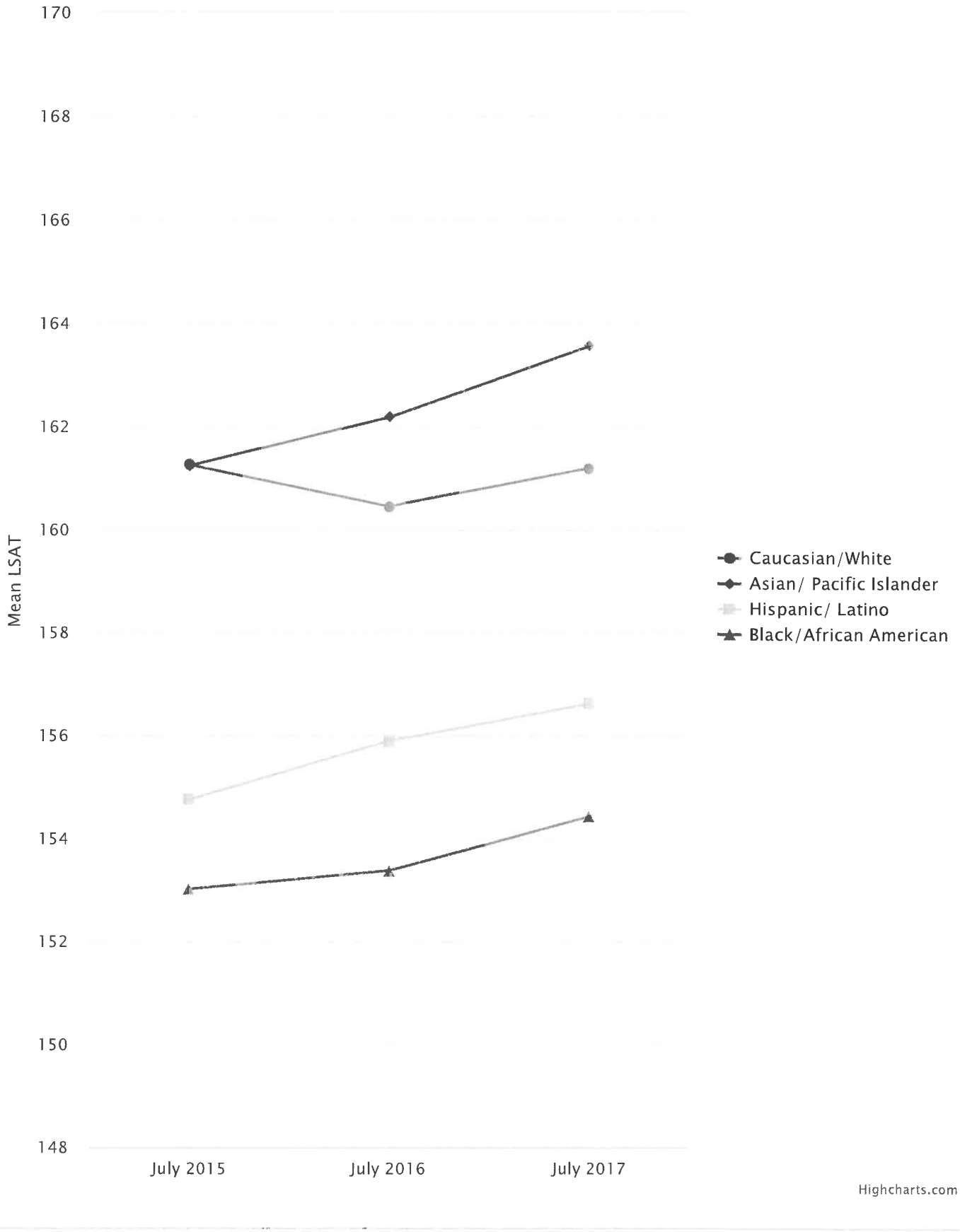
(3b)


3.7
3.6
3.5
3.4
3.3
3.2
3.1
3
2.9
2.8
2.7
Mean UGPA
July 2015
July 2016
July 2017
Caucasian/White
Asian/ Pacific Islander
Hispanic/ Latino
Black/African American
Highcharts.com

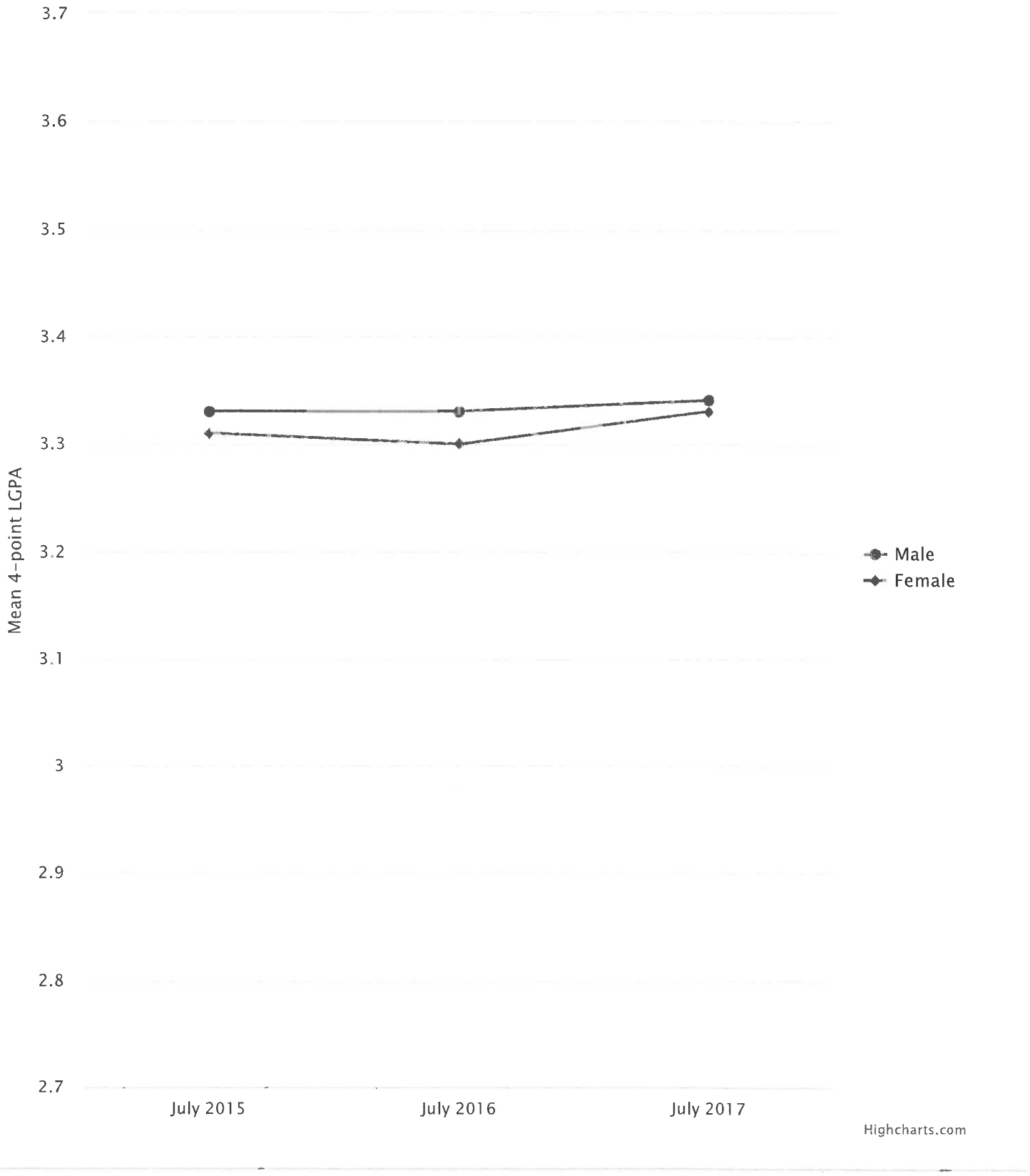
(3c)


170
168
166
164
162
160
158
156
154
152
150
148
Mean LSAT
July 2015
July 2016
July 2017
Male
Female
Highcharts.com

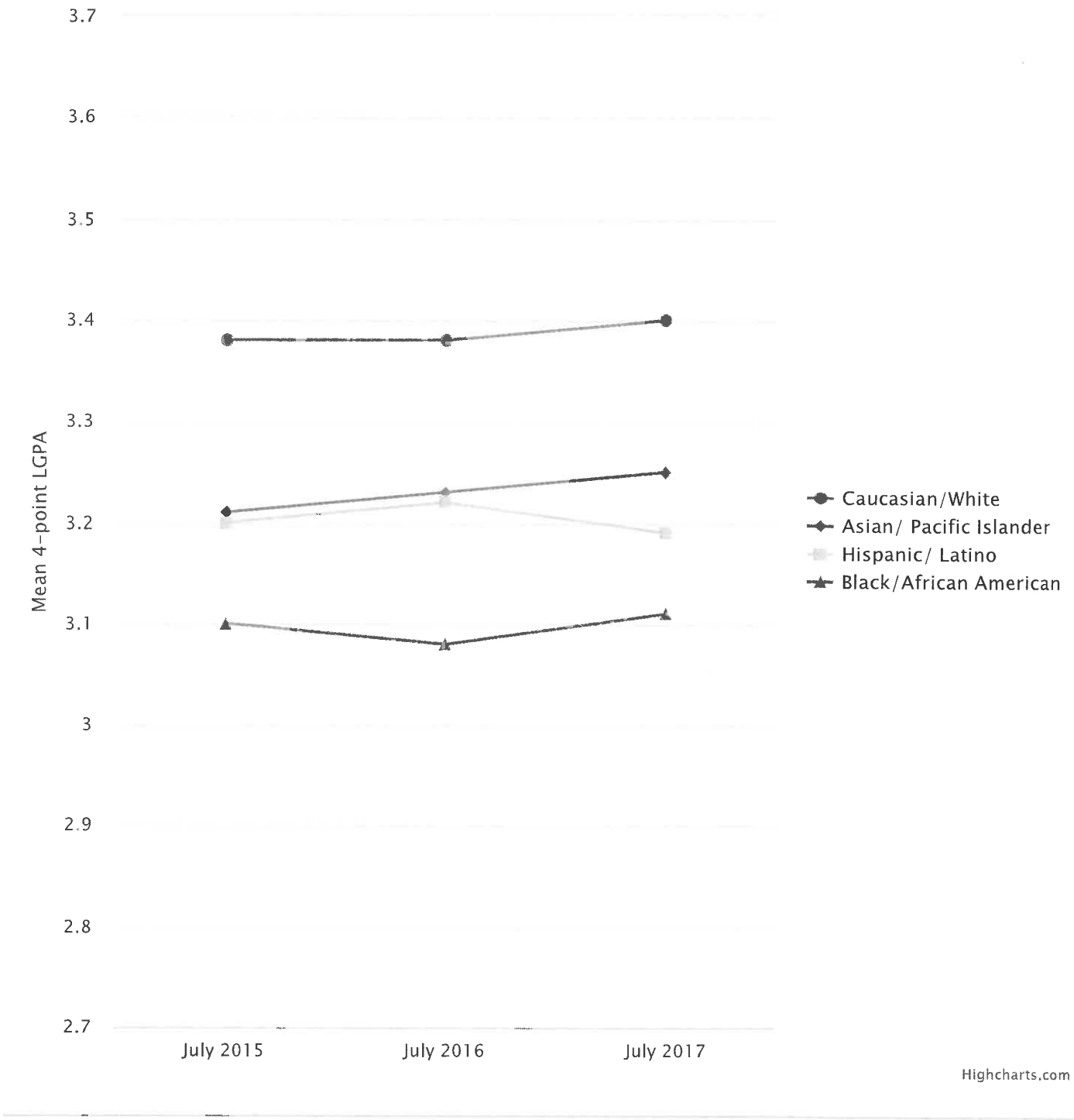
(3d)


170
168
166
164
162
160
158
156
154
152
150
148
Mean LSAT
July 2015
July 2016
July 2017
Caucasian/White
Asian/ Pacific Islander
Hispanic/ Latino
Black/African American
Highcharts.com

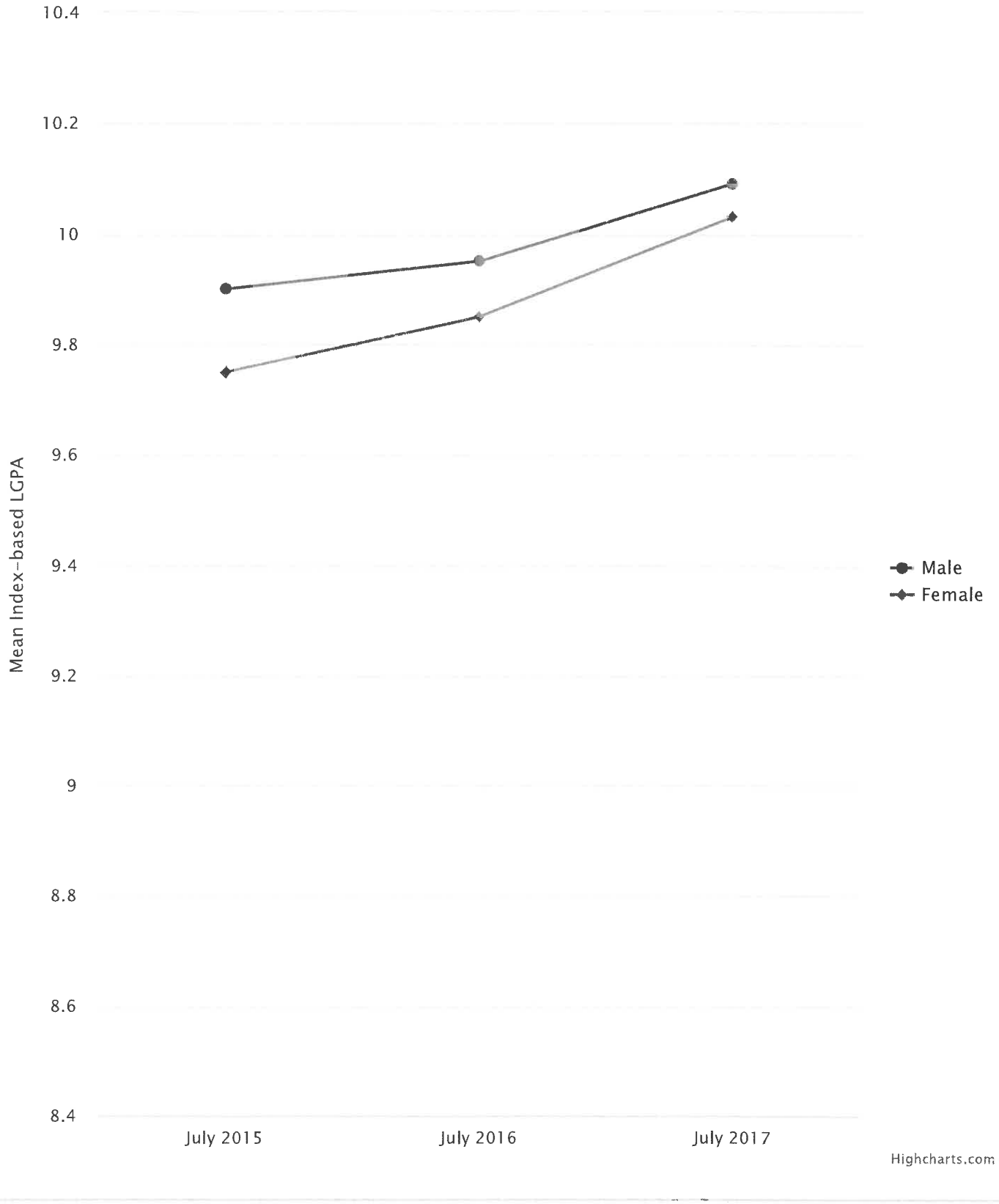
(3e)


3.7
3.6
3.5
3.4
3.3
3.2
3.1
3
2.9
2.8
2.7
Mean 4-point LGPA
July 2015
July 2016
July 2017
Male
Female
Highcharts.com

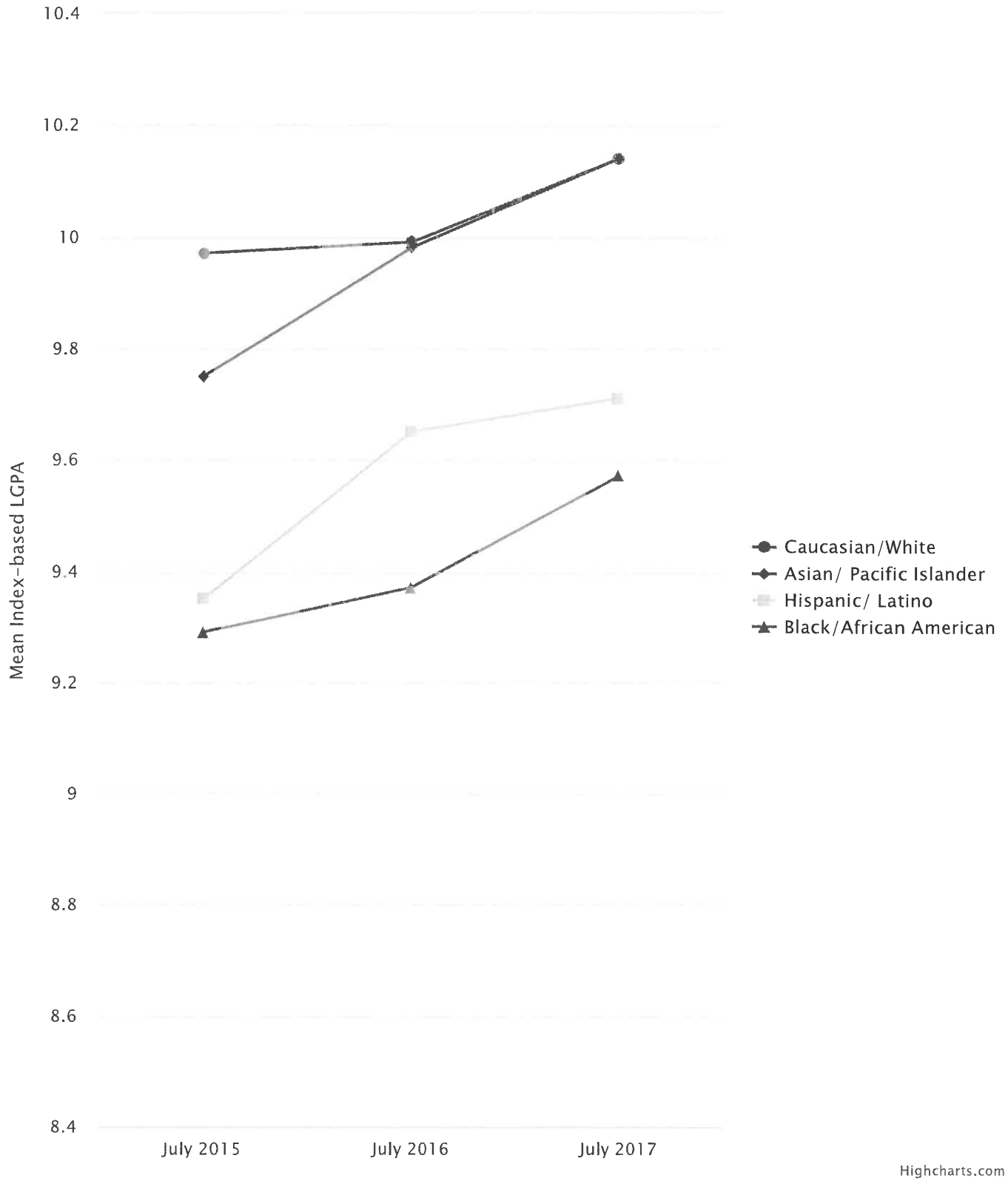
(3f)


3.7
3.6
3.5
3.4
3.3
3.2
3.1
3
2.9
2.8
2.7
Mean 4-point LGPA
July 2015
July 2016
July 2017
Caucasian/White
Asian/ Pacific Islander
Hispanic/ Latino
Black/African American
Highcharts.com

(3g)


10.4
10.2
10
9.8
9.6
9.4
9.2
9
8.8
8.6
8.4
Mean Index-based LGPA
July 2015
July 2016
July 2017
Male
Female
Highcharts.com

(3h)



The Relationship Between Bar Exam Performance and Candidate Background Characteristics

UGPA, LSAT score, 4-point LGPA, and index-based LGPA each had a relatively strong, statistically significant positive relationship with bar exam score, where a positive relationship indicates that an

increase in background characteristic is associated with an increase in bar exam score. UGPA had the weakest relationship with bar exam score, and index-based LGPA had the strongest relationship, followed by LSAT score and then 4-point LGPA. Each relationship would be considered moderately strong to strong.[7]

One way of illustrating the relationship between the background characteristics and bar exam performance is to show how candidates at different levels of background characteristics performed on the bar exam. Figure 4 shows mean bar exam scores for candidates grouped by the three background characteristics (UGPA, LSAT score, or LGPA). For example, Figure 4a plots mean bar exam scores for candidates with UGPAs below 2.50 on the far left, then candidates with UGPAs between 2.50 and 2.69, and so on. Candidates with UGPAs below 2.50 had mean bar exam scaled scores between 254 and 267 depending on the year, and candidates with UGPAs above 3.89 (far right) had mean bar exam scaled scores between 303 and 316. Mean bar exam scaled scores increased as UGPAs increased from left to right across the figure, showing a moderately strong positive relationship.

Mean bar exam scaled scores also increased as LSAT scores and LGPAs increased (Figures 4b, 4c, and 4d). Another way of summarizing the positive relationships in these figures is that they illustrate that candidates with lower UGPAs, LSAT scores, or LGPAs tended to score lower on the bar exam, and those with higher UGPAs, LSAT scores, or LGPAs tended to score higher. The upward shift in the three lines corresponding to the three different years of scores indicates that as the years progressed, bar exam scores increased.

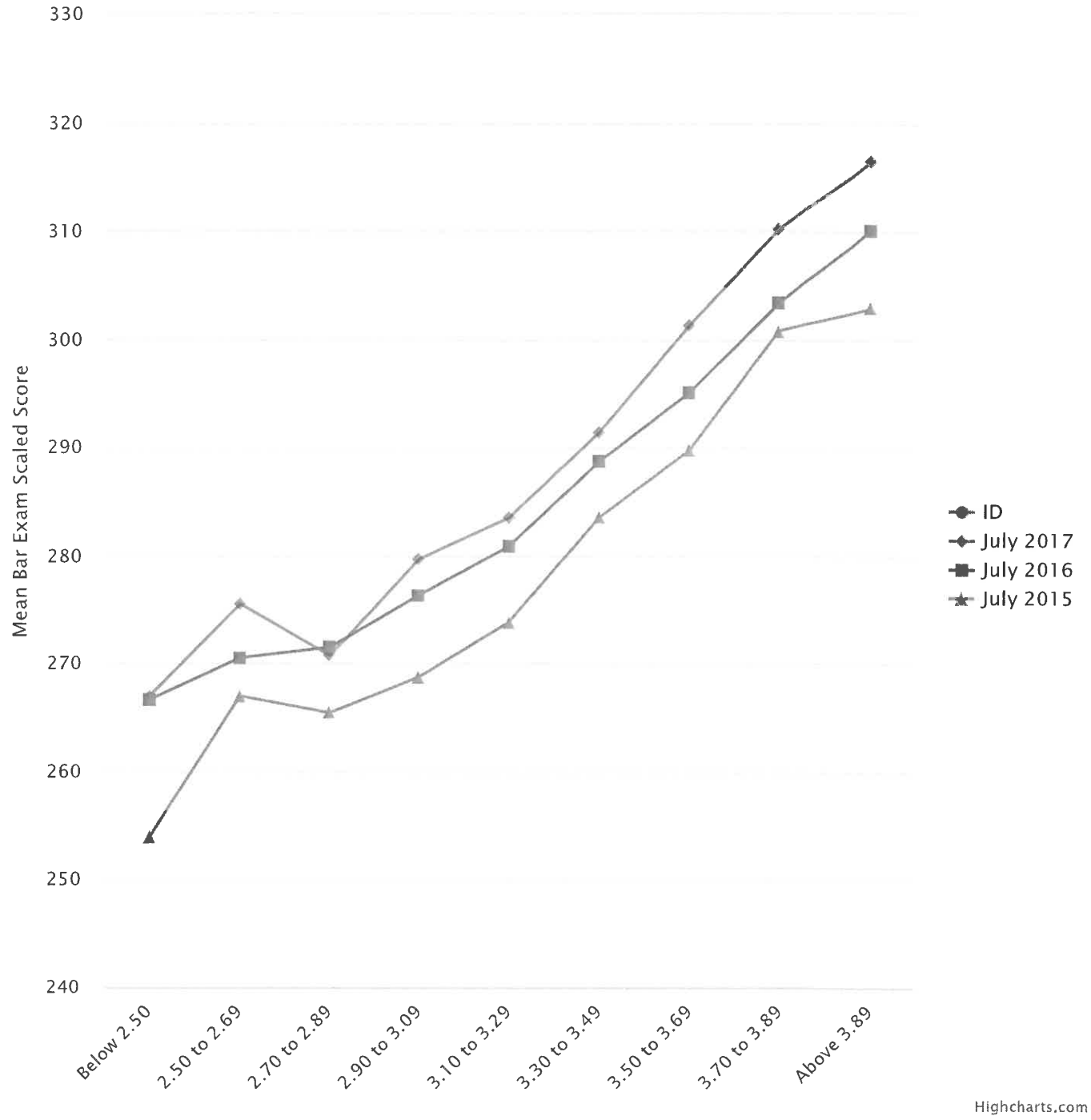
This study illustrated that for a bar exam like the one in New York, which already used the MBE and one MPT question on its exam prior to UBE adoption, the effects of UBE adoption were at most small and likely positive.

Figure 4 also illustrates that the differences in lines relating the candidate background characteristics and bar exam scores across the three years were relatively similar for the three background variables shown in 4a, 4b, and 4c. What is notable is that the differences in the lines almost disappeared in 4d, which relates index-based LGPAs to bar exam scores. The index-based LGPAs can be considered LGPAs adjusted

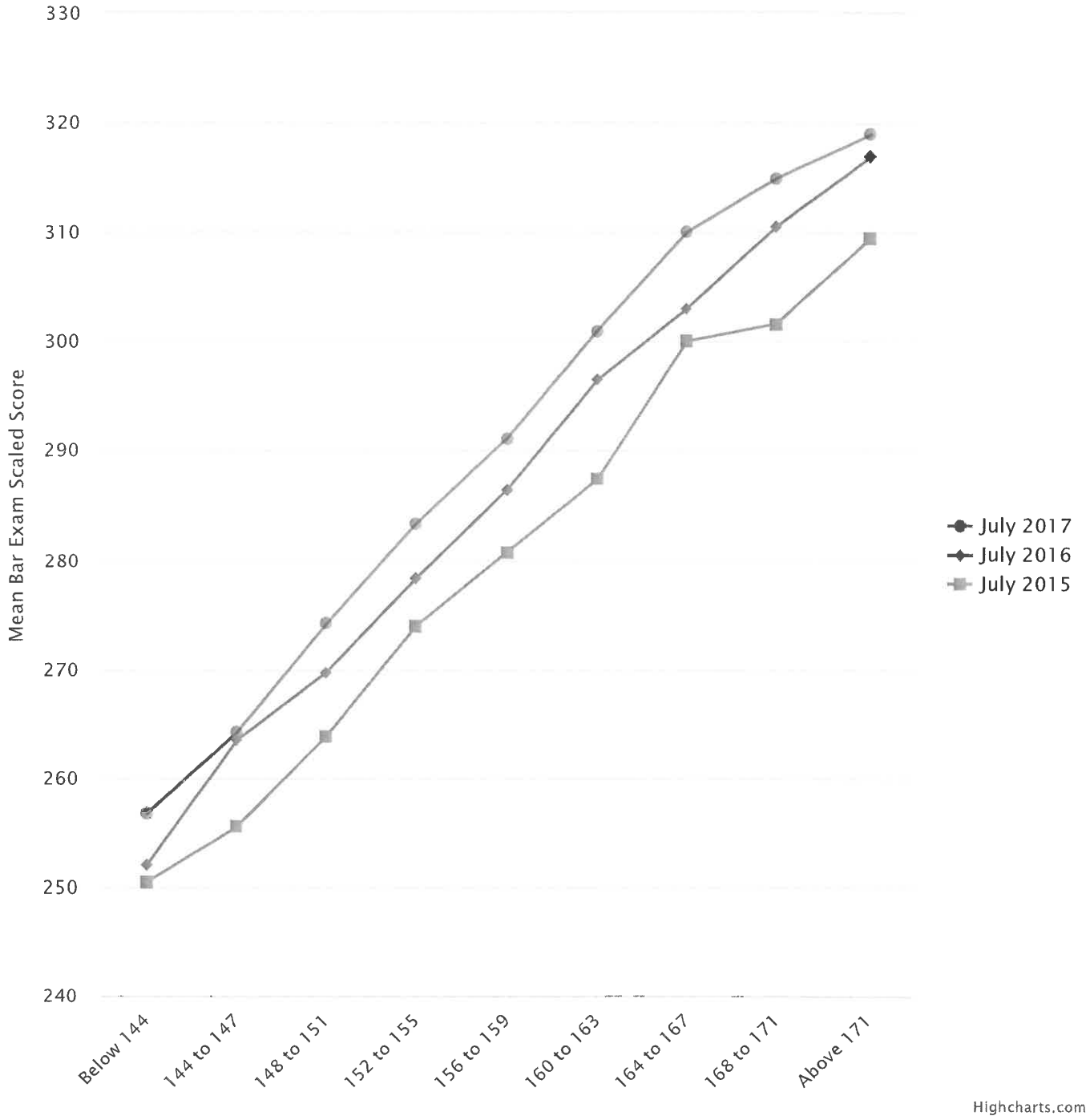
for differences in law-school-level UGPAs and LSAT scores. Thus, the increase in mean bar exam scores across the three years noted earlier and seen in the upward shift in the lines across the three years in figures 4a, 4b, and 4c was mostly removed when using index-based LGPAs. The lines are particularly close for the bar exam score of 266 where New York sets its passing score. The full report and appendices provide additional analyses that further reinforce that most of the increases observed in average bar exam scores across the three years could be accounted for by a combination of UGPAs, LSAT scores, and LGPAs. In other words, improvement in the UGPAs and LSAT scores of candidates on entry to law school and their subsequent performance in law school (LGPAs) accounted for most of the improvement in bar exam scores across the three July exams.

Figure 4. Correlations between mean UGPA, LSAT score, and LGPA (4-point and index-based) and mean bar exam scaled score, July administrations, 2015-2017

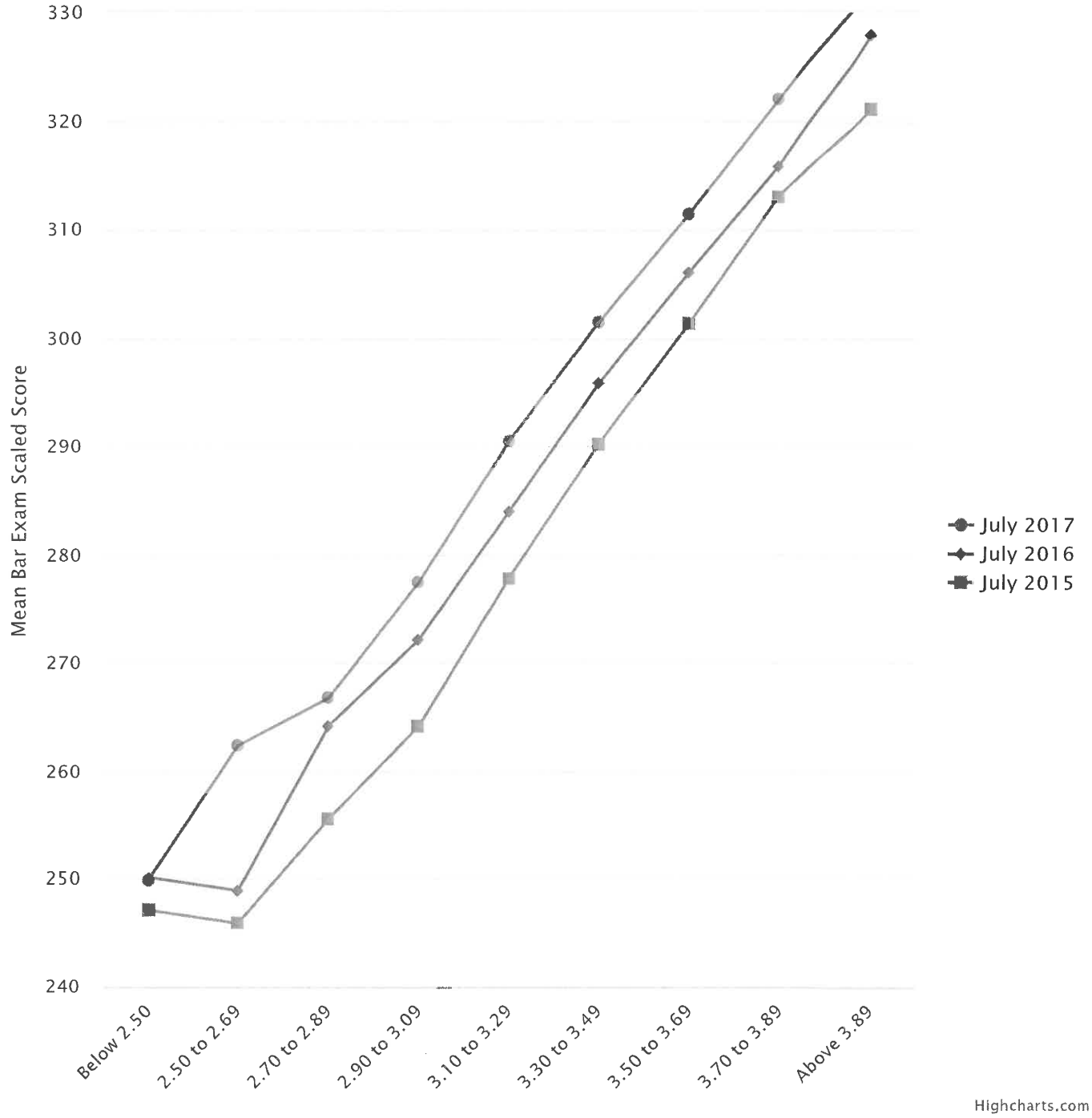
(4a)


330
320
310
300
290
280
270
260
250
240
Mean Bar Exam Scaled Score
Below 2.50
2.50 to 2.69
2.70 to 2.89
2.90 to 3.09
3.10 to 3.29
3.30 to 3.49
3.50 to 3.69
3.70 to 3.89
Above 3.89
ID
July 2017
July 2016
July 2015
Highcharts.com

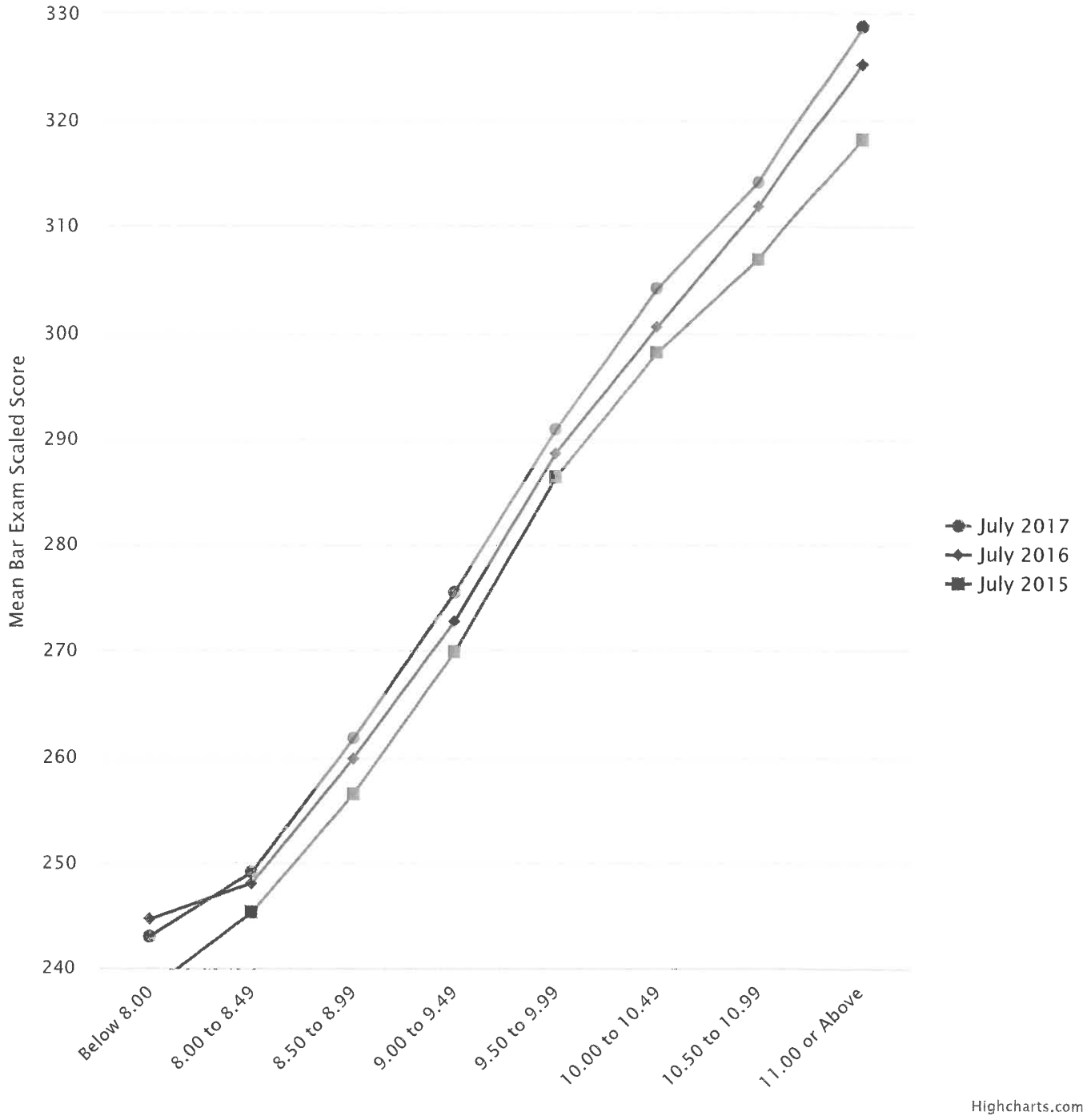
(4b)


330
320
310
300
290
280
270
260
250
240
Mean Bar Exam Scaled Score
Below 144
144 to 147
148 to 151
152 to 155
156 to 159
160 to 163
164 to 167
168 to 171
Above 171
July 2017
July 2016
July 2015
Highcharts.com

(4c)


330
320
310
300
290
280
270
260
250
240
Mean Bar Exam Scaled Score
Below 2.50
2.50 to 2.69
2.70 to 2.89
2.90 to 3.09
3.10 to 3.29
3.30 to 3.49
3.50 to 3.69
3.70 to 3.89
Above 3.89
July 2017
July 2016
July 2015
Highcharts.com

(4d)



Conclusions

Mean bar exam scores and pass rates on the bar exam in New York increased, on average, after UBE adoption, and the improvement in performance was explained in large part by improvements in the UGPAs, LSAT scores, and LGPAs of candidates taking the New York bar exam. The improvement in bar exam performance in New York after UBE adoption was likely not attributable to the UBE. In addition, the UBE did not have sustained or adverse effects on candidates in New York compared to the prior bar exam. Differences in pass rates and average bar exam scores on the UBE observed across groups defined by gender and race/ethnicity were also observed prior to UBE adoption in New York.

This article provides only a glimpse of the results from the study that NCBE conducted for the NYSBLE. The full report addresses the topics described here in more detail and addresses other topics, including the performance of repeat test takers who did not pass the bar exam on their first attempt and MBE performance in New York compared to all other jurisdictions. This study illustrated that for a bar exam like the one in New York, which already used the MBE and one MPT question on its exam prior to UBE adoption, the effects of UBE adoption were at most small and likely positive.

Notes

1. The press release, Executive Summary, full report, and appendices are available on the New York State Board of Law Examiners' website: Impact of Adoption of the Uniform Bar Examination in New York, https://www.nybarexam.org/UBEReport.html. *(Go back)*
2. Results for each topic were further analyzed by gender and race/ethnicity. For a more complete description of the data and extensive analysis of the samples of data, see the full report and associated appendices at https://www.nybarexam.org/UBEReport.html. *(Go back)*
3. In New York, roughly 30% of candidates in July and 40% of candidates in February received their legal education outside the United States. *(Go back)*
4. School-level UGPAs and LSAT scores were used to adjust LGPAs such that index-based LGPAs as a group from a more selective school (based on UGPAs and LSATs at that school) would be higher than index-based LGPAs from a less selective school (based on UGPAs and LSATs at that school). Otherwise put, if two candidates from different law schools have the same LGPA, the candidate from the more selective school would generally have the higher index-based LGPA. (The index referred to is one that was computed for this scaling process based on each candidate's LSAT score and UGPA.) Index-based LGPAs were placed on a scale that ranged from roughly 1 to 15 with most values typically near 10 and a range typically falling between roughly 7 and 13. *(Go back)*
5. Average bar exam scores were 283.04 in July 2015, 286.85 in July 2016, and 290.98 in July 2017. *(Go back)*
6. The increase in mean bar exam score but decrease in pass rate may seem counterintuitive but has to do with shifts in the distributions of scores between July 2015 and July 2016 for the Black/African American group. (See Figure 4.2.29, Distributions of July Bar Exam Scores, Black/African American Candidates, New York State Board of Law Examiners Sample, on page 150 of the full report.) *(Go back)*
7. Correlations between UGPAs and bar exam scaled scores were 0.46, 0.40, and 0.45 in July 2015, 2016, and 2017, respectively. The corresponding correlations between LSAT scores and bar exam scores were 0.56, 0.57, and 0.57. The 4-point LGPA correlations were 0.65, 0.61, and 0.61, while the index-based LGPA correlations were 0.76, 0.75, and 0.75. (See Table 3.7.1, Correlations among UGPA, LSAT Scores, LGPA, MBE, Written Scores and Bar Exam Scores, School-Based Sample, on page 109 of the full report for additional details.) *(Go back)*

Andew A. Mroch, PhD, is Senior Research Psychometrician for the National Conference of Bar Examiners.

Mark A. Albanese, PhD, is the Director of Testing and Research for the National Conference of Bar Examiners.

Contact us to request a pdf file of the original article as it appeared in the print edition.

Exhibit 8

Membership Type Count as of	12/31/2010	12/31/2011	12/31/2012	12/31/2013	12/30/2014	12/31/2015
Start of year	14,254	14,607	14,711	14,876	14,893	14,888
End of year	14,607	14,711	14,876	14,893	14,888	14,784
Net gain (loss)	353	104	165	17	-5	-104
% gain or loss	2.42%	0.71%	1.11%	0.11%	-0.03%	-0.70%
State % increase (loss) in pop	0.53%	0.53%	0.84%	1.05%	1.23%	1.49%
total lawyers needed for pop	14,330	14,684	14,835	15,032	15,076	15,110
lawyers above (below) need	277	27	41	-139	-188	-326

Membership Type Count as of	12/31/2016	12/31/2017	12/31/2018	12/31/2019	12/31/2020	5/3/2021
Start of year	14,784	14,851	14,802	14,802	14,903	14,622
End of year	14,851	14,802	14,802	14,903	14,622	
Net gain (loss)	67	-49	0	101	-281	
% gain or loss	0.45%	-0.33%	0.00%	0.68%	-1.92%	
State % increase (loss) in pop	1.52%	1.24%	0.92%	0.68%	0.38%	0.68%
total lawyers needed for pop	15,009	15,035	14,938	14,903	14,960	
lawyers above (below) need	-158	-233	-136	0	-338	-1,172

Exhibit 9

There is a great need for civil legal services for low and moderate income people in Oregon that is not adequately met by the existing legal services delivery network.

EXECUTIVE SUMMARY

This report, commissioned by the Oregon State Bar, examines the civil legal needs of low and moderate income Oregonians. The survey was also sponsored by the Oregon Judicial Department and the Office of Governor John Kitzhaber, M.D. The primary source of data used in this study is a legal needs survey of 1,011 low and moderate income persons conducted with the assistance of Portland State University throughout Oregon during the fall and winter of 1999-2000. Additional information was provided by judges, lawyers, social service workers, community leaders and legal services providers through focus groups, interviews and surveys.

Summary of Findings from Judges, Lawyers, Social and Legal Services Providers

- There is a great need for civil legal services for low and moderate income people in Oregon that is not adequately met by the existing legal services delivery network.

- More services are needed in the area of family law, particularly in child custody and domestic violence cases. Part of that need can be met by providing advice and other limited services short of full representation. Court representation is needed in cases where the opposing party is represented or there is an imbalance of power.

- Housing advocacy to increase the quantity and quality of housing for low income people, reduce the incidence of unlawful discrimination, enforce the residential landlord tenant act and provide sufficient self-help information to assert defenses in eviction actions is a priority need that is insufficiently unmet.

- Employment law issues such as collection of wages, wrongful discharge, discrimination, and unsafe working conditions are an important emerging area of unmet legal need.

- The unmet need for services is not limited to the foregoing substantive areas, but includes a wide range of other issues discussed in this report.

- There is a need to provide targeted services to particular client groups who often encounter unique substantive legal issues or face special barriers to access to the legal system, such as the disabled, the elderly, farm workers, immigrants, Native Americans, the non-English speaking, and youth.

- There is a significant unmet need for outreach, community education and access to easily used, high-quality self-help materials.

- A full range of legal assistance should be available to low and moderate income Oregonians, including community education, outreach, advice, transactional assistance, direct representation of individuals in court, multi-party and class litigation, lobbying and administrative advocacy. These services should be available to all, without regard to legal status or remote geographical location.

Summary of Findings: Oregon Legal Needs Survey of Low and Moderate Income Oregonians

- The highest needs for legal assistance arise in housing, public services, family, employment and consumer cases.

- Other areas of high need for particular population groups include elder abuse, education, farm worker statutory, and immigration issues.

- Lower income people obtain legal assistance for their problems less than 20% of the time. 9.6% of all cases are handled by legal aid attorneys, 4.3% are handled by the private bar on a *pro bono* or reduced fee basis, and 3.8% are handled for full fees.

- Particular population groups examined in the study have unique legal needs that often require specialized services or approaches.

People obtaining representation have a much more favorable view of the legal system and are satisfied with the outcome of the case 75% of the time when represented by a legal services lawyer.

- Most people who experience a legal need and don't obtain representation feel very negatively about the legal system and about 75% are dissatisfied with the outcome of the case.

- People obtaining representation have a much more favorable view of the legal system and are satisfied with the outcome of the case 75% of the time when represented by a legal services lawyer.

- Lack of legal information, ignorance of resources and remedies, unavailability of convenient services and fear of retaliation are the most significant factors causing lower income Oregonians not to seek legal representation when they have a legal problem.

Capacity of Existing Services to Meet Needs of the Low and Moderate Income

A network of existing resources currently addresses the civil legal needs of low and moderate income Oregonians. Legal services are provided at no cost by basic and specialized legal services entities. Private lawyers also provide free, or *pro bono*, services through a range of programs, and assist with low cost representation through the Modest Means Program of the Oregon State Bar. Unrepresented litigants are assisted by court staff, social and educational institutions, the Oregon State Bar's Tel-Law program, libraries and the legal services programs. Agencies of the state assist with resolution of some legal problems of lower income Oregonians.

Six legal services programs comprise the basic legal services network in the state, Legal Aid Services of Oregon (LASO)(12 field offices); Oregon Law Center (OLC)(four field offices); Center for Nonprofit Legal Services (Medford); Marion-Polk Legal Aid Services (MPLAS); Lane County Legal Aid Services (LCLAS); and Lane County Law and Advocacy Center. Among the field offices are three that serve special populations, the LASO Native American Program and the Farm Worker Programs of LASO and OLC. Farm worker attorneys from both programs also work at office sites throughout the state.

Among the specialized providers in the nonprofit legal services network are the Oregon Advocacy Center, St. Andrew Legal Clinic, St. Matthew Legal Clinic, Juvenile Rights Project, Immigration Counseling Service, Catholic Charities Immigration Program, Lutheran Family Services, SOAR, Jewish Family Services, Law School Clinics, and the Fair Housing Council of Oregon.

This system is augmented by the efforts of private lawyers working on a *pro bono* or reduced fee basis through the Modest Means Program of the Oregon State Bar. Staff of the Oregon Judicial Department play a key role in assisting unrepresented parties through formal courthouse facilitator programs, conciliation services and other informal help. The Attorney General, through the Division of Child Support, and the county district attorneys assist in establishing paternity and in collecting and modifying child support obligations. The Justice Department also works effectively on consumer fraud issues. The Bureau of Labor and Industries enforces wage and discrimination laws.

Key Findings Regarding Existing Services

- The current legal services delivery system cannot meet the critical legal needs of lower income Oregonians without additional funding.

- The current legal services delivery system is meeting the legal needs of low income people in 53,650 (or 17.8%) of the 301,944 cases a year that require a lawyer's assistance. The unmet need is estimated to be about 250,000 cases a year.

Exhibit 10

MINIMUM SCORES

Minimum Passing UBE Score by Jurisdiction

This map shows UBE jurisdictions in orange and lists the minimum passing score for each jurisdiction. The same information is displayed in tabular format below the map. **Note that North Carolina, Oregon, and Washington temporarily lowered their minimum passing scores for the July 2020 exam to 268, 266, and 266, respectively, due to the COVID-19 pandemic. Visit July 2020 Bar Exam: Jurisdiction Information (/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/) for more information. North Carolina's lowered minimum passing score also applies to the February 2021 exam; Washington's lowered minimum passing score also applies to the February and July 2021 exams.**

Minimum Passing UBE Score*	Jurisdiction

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

Since jurisdiction rules and policies change, you are strongly advised to consult the jurisdiction's bar admission agency (http://www.ncbex.org/exams/ube/) directly for the most current information.

**The minimum passing score in Pennsylvania has not yet been determined.*

Appendix D: Diploma Privilege, Wisconsin

Wisconsin's Diploma Privilege

Jacquelynn B. Rothstein
Executive Director & General Counsel
Wisconsin Board of Bar Examiners

Overview

- History of DP
- Review WI Supreme Court Rules
- How DP operates in WI
- Statistics/Advantages
- DP and attorney discipline
- Litigation
- Reciprocity
- Final thoughts
- Questions

HISTORY

- The diploma privilege is not a Wisconsin invention
- Since 1842, 32 states and the District of Columbia have granted the diploma privilege
- As late as 1977, 5 states retained the privilege
- WI is the last one standing
- But in 2020 Utah offered a temporary hybrid

Three Primary Forms of the Diploma Privilege

- Universal (Diploma from any U.S. law school)
- Statewide (Graduate of any school within the state)
- State law school (Graduate of the in-state law schools only)

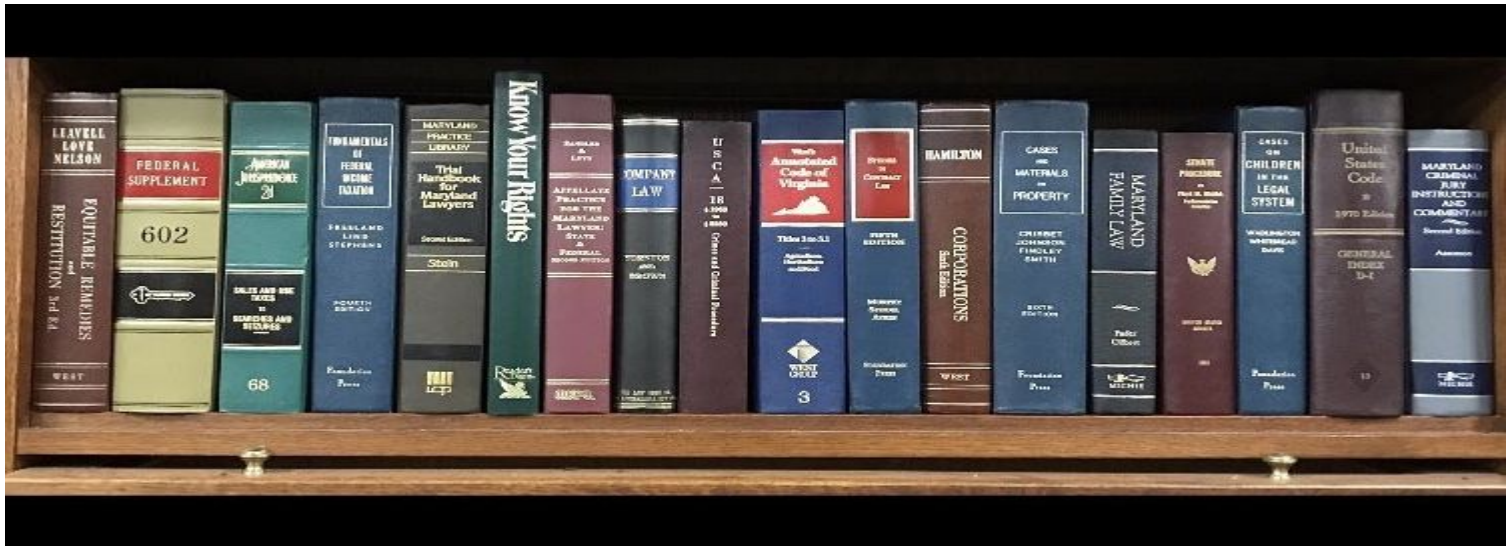
- Beginning in 1971, the WI Diploma Privilege took a stricter turn with the adoption of the “30 credit” rule and its companion “60 credit” rule.
- Students who attend either Marquette University Law School or the University of Wisconsin Law School must take and complete not less than 84 semester credits.
- Of those 60 credits, 30 must be in 10 designated subject areas.

Wisconsin Supreme Court Rules

SCR 40.03 (2) (a):
Not less than 60 semester credits must be earned in mandatory and elective subject areas

SCR 40.03 (2) (b): Not less than 30 of the 60 semester credits must be earned in 10 subject areas

SCR 40.03
The Ten Topics Include:



- Constitutional law
- Contracts
- Criminal Law & Procedure
- Evidence
- Jurisdiction of Courts
- Ethics & Legal Responsibilities of the Legal Profession
- Pleading and Practice
- Real Property
- Torts
- Wills & Estates

How does the Wisconsin Diploma Privilege actually work?

MARQUETTE UNIVERSITY
LAW SCHOOL

UNIVERSITY of WISCONSIN
LAW SCHOOL

- May graduates may apply for admission beginning in October of the year preceding their graduation
- Students must file an application, an authorization and release, and the application fee
- A character and fitness investigation is conducted for all applicants
- Graduation from a Wisconsin law school does not automatically guarantee admission

Statistics and Advantages of the WI Diploma Privilege

Over the past five years:

- 51% were admitted via Diploma Privilege
- 19% were admitted via the WI Bar Exam
- 30% were admitted via Proof of Practice (on Motion)

Advantages:

- No bar exam---lower cost to students
- Graduates tend to stay in state
- WI law schools tend to be more involved in local and statewide legal communities
- Fosters a close relationship between the judiciary, bar, and the law schools

Other Issues?

- No differences noted between DP admittees and those who took the WI bar exam in terms of disciplinary matters
- Far more issues attributable to other matters such as business acumen, interpersonal skills, financial pressures, AODA, mental health, etc.
- Competency as a factor in public disciplinary decisions is extremely low (approximately less than 1%)

Wiesmueller Decision

- In 2007, Christopher L. Wiesmueller, a student at Oklahoma City University School of Law, filed a Section 1983 claim against the WI BBE and the WI Supreme Court
- Wiesemuller asserted that WI's diploma privilege discriminated against interstate commerce because it afforded a DP in lieu of a bar exam only to individuals who graduated from WI law schools
- Although the case went before the 7th Circuit twice, Wiesemueller ultimately settled the suit with in March of 2010

STRICT -VS- FLEXIBLE

STRICT: Identical requirements or an agreement between jurisdictions

FLEXIBLE: Sufficient practice experience to enable admission

Conundrum: Is passage of a bar exam required?

Final thoughts about DP

"As someone who has graded the WI bar exam, I can tell you that an essay that will pass for bar exam purposes would fail if submitted to a UW Law School course."

"I am much more likely to fail a WI law student because I know that there is no bar exam to do the job for me."

"Bar exams force students into those classes covered by the examination, none of which are skills oriented. Thus bar exams work to make students less prepared for practice by emphasizing bar exam subjects in place of clinical skills."

ANY QUESTIONS?

Thank You!


30th State
WISCONSIN
est May 29, 1848
America's Dairyland
brats!
cheese curds
cherry picking
STATE FLOWER
Violet
Badger
swiss cheese
ANIMAL
Point Light
Sugar Maple
corn
TREE
craft breweries
STATE FISH
Muskellunge

Appendix E: Ontario--Options for Lawyer Licensing

Options for Lawyer Licensing

A Consultation Paper

Dialogue on Licensing

Dialogue sur l'accès à la profession

LET RIGHT PREVAIL

Law Society of Ontario | Barreau de l'Ontario

May 24, 2018

Law Society of Ontario
Professional Development & Competence Committee

Peter Wardle (Chair)
Jacqueline Horvat (Vice-Chair)
Anne Vespry (Vice-Chair)
Jack Braithwaite
Christopher Bredt
Dianne Corbiere
Teresa Donnelly
Howard Goldblatt
Joseph Groia
Michelle Haigh
Barbara Murchie
Andrew Spurgeon
Catherine Strosberg
Sidney Troister

TABLE OF CONTENTS

1. INTRODUCTION

Lawyer licensing is an integral part of the mandate of the Law Society of Ontario (LSO) Under its mandate the LSO must regulate the profession in the public interest and ensure that lawyers meet standards of learning, professional competence, and professional conduct. In November 2016, Convocation (the governing body of the LSO) asked the Professional Development & Competence Committee (Committee) to develop long-term recommendations for the licensing process. To this end, the Committee developed this paper to serve as the basis for consultation with the professions and the public on appropriate pathways to licensure.

Currently, licensing candidates are required to pass both the barrister and solicitor licensing examinations and to complete a transitional training requirement focused on teaching candidates the necessary skills, knowledge and tasks for the legal profession. Currently, two main pathways satisfy the LSO's transitional training requirements to become a lawyer – articling and the Law Practice Program (LPP), or Programme de pratique du droit (PPD).

This consultation paper sets out four possible options for consideration. Each of the options maintains the requirement to pass both the barrister and solicitor licensing examinations. Two of the options involve retaining the two current transitional training pathways, with enhancements, while two options involve making significant changes. The Committee welcomes feedback from the professions on these options, as well as other related issues. The Committee has included questions at the end of this paper intended to assist participants, although all comments are welcome.

Written comments are welcome until October 26, 2018 and may be submitted to the LSO at www.lsodialogue.ca. The submissions received will inform the Committee's recommendations to Convocation regarding the lawyer licensing process in early 2019.

2. EXECUTIVE SUMMARY

The Committee's consideration of licensing options is taking place at a time of profound disruption and transformation of the legal profession. Globalization has dramatically increased the pool of licensing candidates, while technological advances and outsourcing have reduced the need for articling students to perform routine legal tasks.[1]

[1] The implementation of technology is replacing lawyers in situations in which routine or predictable matters can be resolved without a lawyer. See Canadian Bar Association, Futures: Transforming the Delivery of Legal Services in Canada, August 2014, online at https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Futures-Final-eng.pdf, p. 19.

In the past decade, the number of licensing candidates has increased by 70 percent but the supply of articling positions has not kept pace. A permanent shortage of articling positions now exists. Candidate education is more varied. Over the past five years, approximately 30% of new registrants into the licensing process have been internationally-trained applicants. Law school debt levels for some candidates have escalated as well, putting increased pressure on graduates to obtain remunerative training positions. These factors can intensify the power imbalance between candidates and their employers, leading to instances of harassment, discrimination and exploitation, where candidates work for nominal or no pay. Moreover, the increasing demand for articling positions has led to marginal placements, where candidates do not receive proper training and instruction.

The LSO has attempted to mitigate the impact of articling shortages by approving the Law Practice Program/Programme de pratique du droit as an alternative pathway to licensing. However, the limited number of participants in each program suggests that these programs may not be an entirely appropriate complement to articling. At the same time, human rights and fairness legislation and the LSO's deepening commitment to equity, diversity and inclusion all impose obligations to ensure that the licensing process is fair to all candidates.

In the face of an evolving landscape and increasing pressures on the licensing process, the Committee determined that the professions and the public should be consulted about the options listed below, including the possibility of changes to the transitional training requirement of the licensing process. In each of these options the current barrister and solicitor examinations would be maintained as a requirement for licensure. The Committee is seeking feedback on the following options:

Option 1: Current Model: The current two transitional training pathways would be retained, taking into account the fact that the current model is continuously adjusted to accommodate new developments.

Option 2: Current Model with Enhancements: The current two transitional training pathways would be retained, with enhancements. These enhancements include a requirement that candidates be paid at the statutory minimum wage, audits and greater oversight of articling and work placements. Candidates would be required to pass the barrister and solicitor licensing examinations as a prerequisite to transitional training and then pass a new skills examination in order to become licensed.

Option 3: Examination-Based Licensing: Candidates would be licensed after they first complete the barrister and solicitor licensing examinations and then the new skills examination. Transitional training, such as the requirement to complete articling or the LPP/PPD, would be eliminated as a requirement of licensure. The management of regulatory risk would shift to post-call and depend on the career path of the new licensee. Candidates who choose not to practise law and licensees

practising in a workplace of six or more lawyers would not be subject to any additional requirements. Licensees practising as sole practitioners or in a firm with fewer than six lawyers would also be required to complete a new practice essentials course and would be subject to audit within their first few years of practice.

Option 4: LPP for all Candidates: All licensing candidates would be required to complete the training course component of the LPP/PPD, without the work placement component. Candidates would also be required to successfully complete the Barrister and Solicitor examinations and the new Skills Examination.

Options 1 and 2 are based on maintaining both the articling program and the LPP/PPD. Option 3 eliminates the requirement that licensees complete transitional training as part of licensure, and Option 4 requires the completion of the LPP/PPD for all candidates. Options 2, 3 and 4 involve a new, mandatory Skills Examination. In addition, Options 2 and 4 require candidates to pass the licensing examinations before moving onto the next phase of the licensing process.

The Committee asks respondents in this consultation to consider the proposed four options in accordance with the evaluative principles described below. The licensing process should:

i.) ensure that each candidate has achieved the goals of transitional training;
ii.) provide candidates with an opportunity to meet required standards of professional competence;
iii.) be derived in a fair and defensible manner;
iv.) be consistent; and
v.) be designed to take into consideration the cost of each option to licensing candidates, and to the profession as a whole.

3. BACKGROUND

Licensure is official recognition that an individual is qualified to practice as a lawyer and is competent to do so. Licensing requirements are critical to the public interest, and to the reputation of the legal profession. The proper functioning of the profession, and its continued ability to self-regulate, are premised on ensuring that those who enter it are qualified to meet appropriate standards of professional competence and do not pose a risk to the public. This responsibility is clearly stated in s. 4.1(a) of the *Law Society Act* which provides that it is a function of the LSO to ensure that "all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide".

The current lawyer licensing process includes the following mandatory components:

A. Articling OR
B. The Law Practice Program (LPP) or Programme de pratique du droit (PPD), including a work placement OR
C. The Integrated Practice Curriculum (IPC) AND
D. Barrister and Solicitor Examinations.[2]

While the LSO's articling program has undergone some adjustments over time, its fundamentals have been in place over forty years. Currently, the articling program requires a candidate to work for 10 months under the supervision of an approved articling principal.[3]

In an effort to address concerns about transitional training while ensuring entry-level competencies, the LSO has made significant changes to the licensing process in recent years. In 2012, Convocation established a pilot project to incorporate a second pathway to licensing beginning in the 2014-2015 licensing year.[4] Following a request for proposal process, Ryerson University was selected to provide the English language program and the University of Ottawa was selected to provide the French language program. The LPP/PPD programs consist of a 17-week training course followed by a four-month work placement.

In 2013, the LSO approved the IPC as a pathway to licensing. This program is available only at Lakehead University's Bora Laskin Faculty of Law. Students are able to fulfill the experiential training component of the licensing process through practical course work and a 15-week practice placement embedded in their third year of law school.

Since 2006, candidates have been required to write barrister and solicitor licensing examinations to test competencies required for entry-level practice. The examinations are multiple-choice, open-book examinations. Each examination is seven hours long.

As part of its review of the licensing process, the LSO conducted the Dialogue on Licensing (DOL) between April and June 2017 to provide an opportunity for input from the legal community regarding the challenges and opportunities of lawyer licensing. Reference materials were made available to participants prior to each session at a

---

[2] In addition, each applicant for a licence under the Act is required to be of good character. See *Law Society Act*, R.S.O. 1990, c. L.8, s. 27(3), online at https://www.ontario.ca/laws/statute/90l08.

[3] Articling principals are required to meet certain eligibility criteria and to ensure that they have been approved by the LSO in advance of the commencement of the articling placement. See "Apply to serve as an Articling principal", online at http://www.lso.ca/licensingprocess.aspx?id=2147498211#Apply_to_Serve_as_Articling_Principal.

[4] Articling Task Force Final Report, October 25, 2012, *Pathways to the Profession: A Roadmap for the Reform of Lawyer Licensing in Ontario*, online at http://lso.ca/articling-task-force/. The pilot project was originally intended to last for three years, to be extended for an additional two years if the LSO determined that there was insufficient evidence to properly evaluate the pilot project after three years.

dedicated website.[5] Further information regarding the DOL is provided in **Tab 3.1.1.1** to this paper.

Despite recent changes to the licensing process, challenges continue. These issues are described below.

4. CHALLENGES WITH THE LICENSING PROCESS

A. Supply of Articling Positions

While the majority of candidates fulfill their transitional training requirements through the articling program, there is an abiding concern that the articling program is not sustainable in the current environment, where an increasing number of candidates, educated domestically and internationally, seek articling positions in Ontario.

In the current articling pathway, candidates are responsible for finding their own articling placement.[6] There is a gap between the demand for articling positions and the available opportunities. Only 10 percent of Ontario law firms currently provide articling placements. The number of graduates from Ontario law programs rose by 60% between 2007 and 2012 due to new programs and growth in the number of available spots in existing programs. The number of new law graduates approached 2500 in 2012, an increase of 1000 from 2007. [7]

Globalization has had an impact on the number of candidates. Over the past five years, approximately 30% of new registrants into the licensing process have been internationally-trained applicants who have completed the equivalency process through the National Committee on Accreditation (NCA) of the Federation of Law Societies of Canada. There has been a 250% increase in the number of applicants to the NCA over the past decade. The NCA issued over 900 Certificates of Qualification in 2016 compared to approximately 200 issued in 2006. Of the top source countries for NCA applicants seeking licensure in Ontario, 60% of NCA applicants are Canadians who have obtained their legal education abroad and are returning to Ontario for licensure.[8]

According to the LSO's data, at any given time, there are 200-500 candidates who are actively searching for articling positions. Since the commencement of the Pathways Pilot Project, there continue to be between 200-300 candidates who have not been

---

[5] These materials may be viewed at http://lsodialogue.ca/. The Committee provided an information report to Convocation in February 2017 describing this initiative.

[6] The LSO offers several programs to assist candidates in their search for a position. The Registry, the Biographical Paragraphs Program and the Mentorship Program are described at https://www.lsuc.on.ca/licensingprocess.aspx?id=2147498112.

[7] Dialogue on Licensing, Topic 2 Reference Materials: Market Dynamics and the Lawyer Profession, p. 23, online at www.lsodialogue.ca.

[8] Dialogue on Licensing, Topic 1 Reference Materials: Licensing Process Statistics, p.22, online at www.lsodialogue.ca.

successful in their search for an articling position by August or September each year, which is the usual start date for most articling positions. Many of the candidates who experience difficulties finding a position following graduation will ultimately obtain articling positions later on in their three-year licensing term, but may end up working in an area that does not align with their career interests or location preference, or does not meet their expectations for remuneration. These candidates may accordingly be delayed in their call to the bar and may not be licensed at the same time as their cohort.

There is evidence to suggest that candidates from equality-seeking groups face barriers in obtaining articling positions. For example, two fifths of racialized licensees who participated in a survey conducted as part of the LSO's Challenges Faced by Racialized Licensees Working Group reported that their ethic/racial identity was the most serious barrier they faced in entering the profession.[9] Almost half of racialized licensees "strongly" or "somewhat" agreed that they had struggled to find an articling position.[10]

Convocation has issued a number of reports over the years examining the issue of articling shortages. [11] Previous efforts by the LSO to engage encourage more law firms to provide articling placements have resulted in only nominal increases in the number of positions.

B. Viability of the LPP/PPD

The establishment of the LPP/PPD was intended to address the discrepancy between the demand for articling positions and available opportunities. When the LSO established the program, it was estimated that there would be approximately 400 candidates who would enroll in the LPP each year. [12] This estimate was based on the number of candidates who were without an articling position at the usual starting date (August or September) at the time. Enrollment in the program has been more modest than was anticipated. The table on the following page summarizes available LSO data regarding the number of candidates completing the LPP and PPD programs during four licensing years.

---

[9] Stratcom Strategic Communications, Challenges Faced by Racialized Licensees: Final Report, Law Society of Upper Canada, March 11, 2014, p. VI, online at http://www.stratcom.ca/wp-content/uploads/manual/Racialized-Licensees_Full-Report.pdf.

[10] Developing Strategies for Change: Addressing Challenges Faced by Racialized Licensees, Consultation Paper, 2014, online at http://www.lsuc.on.ca/uploadedFiles/Equity_and_Diversity/Members/Challenges_for_Racialized_Licensees/racialized-licensees-consultation-paper.pdf, p. 17.

[11] 1972 Report of the Special Committee on Legal Education (the MacKinnon Report); the 1990 Proposals for Articling Reform (the Epstein Report); the 2005 Report of the Task Force on Employment Opportunities for Articling Students, the Licensing and Accreditation Task Force Report (2008), and the Articling Task Force Report (2012).

[12] Professional Development and Competence Committee Report to Convocation, September 22, 2016, online at http://www.lso.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2016/Convocation-September-2016-Professional-Development-and-Competence-Committee-Report.pdf, paragraph 61.

Enrollment Information for the LPP/PPD

Program	2014-15 LPP/PPD Enrollment	2015-16 LPP/PPD Enrollment	2016-17 LPP/PPD Enrollment	2017-2018 LPP/PPD Enrollment
Ryerson (English)	221	219	232	206
Ottawa (French)	17	11	21	12
Total	238	230	253	218

The PPD has had an average of 15 candidates each year.

These lower than anticipated enrollment numbers give rise to the inference that the programs may not be seen by candidates as an appropriate alternative for transitional training. As part of the introduction of the Pathways Pilot Project, Convocation approved the establishment of a formal evaluation framework of the two transitional training programs. According to the 2017 Pathways Evaluation, which analyzed data from candidates, articling principals, and LPP work placement supervisors "the LPP/PPD is still made up mostly of candidates who did not choose the LPP/PPD as their first choice for transitional, experiential training". [13]

Some participants surveyed as part of this study referred to the fact that articling is perceived as a more traditional pathway and offers a longer period of paid employment. Other comments related to concerns about the perceived stigma of the LPP, and the possibility that candidates would be perceived as "second tier" when searching for a position post-licensure. The 2017 Pathways Evaluation suggests that these perceptions may be on the decline and that candidates are generally very satisfied with the training.[14]

C. Fairness in Remuneration

Some candidates are under additional pressure to find paid articling positions because they have high student debts. For the 2017-2018 academic year, tuition at Ontario law schools ranged from $18,723.27 at Lakehead University to $36,440.36 at the University

[13] See the 2017 Pathways Evaluation Interim Results: Years One to Three (July 31, 2017), prepared by Dr. A. Sidiq Ali, Senior Evaluation Consultant (2017 Pathways Evaluation), online at http://lsodialogue.ca. Thirty-eight percent of respondents to a survey in 2014-15 conducted as part of the evaluation indicated that the LPP/PPD was their first choice for experiential training. During the second year of the program, this percentage dropped to 27% but had increased to 40% in 2016-2017 (see p. 165). It is also important to note that LPP candidates, once called to the Bar, are succeeding in obtaining employment. Within six months of being called to the bar, 75 percent of LPP candidates in the 2014-2015 licensing year were working full-time in law. Eighty percent of candidates in the 2015-16 licensing year were working full-time in law within six months of their call to the bar. See the 2017 Pathways Evaluation, p. 24.

[14] Ibid., p. 5.

of Toronto. The impact of students' law school debts on their ability to pay their licensing fees was a persistent theme during the 2017 DOL.[15] As part of its submission to the DOL, the Law Students Society of Ontario conducted a survey of students regarding their debt. Eighty-five percent of respondents indicated that their debt was at least $40,000 or more. [16]

That some articling positions entail inadequate remuneration was addressed in a survey conducted by the LSO in 2017. As part of its review of the licensing process, the LSO commissioned the Articling Experience Survey (Articling Survey) from Dr. Sidiq Ali, Senior Evaluation Consultant of Research & Evaluation Consulting (Articling Survey), to gather better information about a broad range of issues relating to the quality and effectiveness of articling placements. The Articling Survey was aimed at lawyers who had articled in 2014-2015 or 2015-2016, and at those candidates in the process of completing their articles at the time of the survey (2016-2017 licensing year). The LSO released the results of this survey on January 25, 2018. The survey provides insights into a number of challenges, including remuneration.

The Articling Survey indicated that some candidates are poorly paid or not paid, suggesting that some employers are taking advantage of the opportunity to employ law school graduates for free, or for minimal compensation, given the need of these graduates to fulfil their transitional training requirement. Ten percent of articling candidates who responded to the survey and who had completed articling were paid less than $20,000 during their articling term. Candidates who were not paid at all are included in this group (four percent did not receive any pay). Of those who responded to the survey who were articling at the time the survey was conducted, 10 percent were receiving a salary of less than $20,000, and three percent were not paid at all.[17]

Inadequate or non-existent remuneration are also significant factors in LPP work placements. This 2017 Pathways Evaluation demonstrated that approximately 30 percent of LPP candidates have been unpaid during their work placement. [18] Moreover, in comparison with articling candidates, LPP candidates were least likely to be satisfied by the remuneration they received during their work placement (in 2015-2016, 35 percent of LPP candidates said that they were "least satisfied" about their pay; this percentage had declined somewhat in 2016-2017, when 25 percent of LPP candidates indicated that they were "least satisfied" with their salaries).[19]

---

[15] See for example the submission from the Law Student Society of Ontario, Topic 5: Law Student Debt, online at www.lsodialogue.ca.
[16] Ibid.
[17] Summary of Articling Experience Survey Results, Prepared by Dr. A. Sidiq Ali, Senior Evaluation Consultant, (Articling Survey) online at http://www.lawsocietygazette.ca/wp-content/uploads/2018/01/Summary-of-Articling-Experience-Survey-Results.pdf, pp. 15 and 33. Dr Ali notes that the survey cannot be considered to be statistically reliable or representative of the targeted population given that the total response rate for the survey was 28.1%. See p. 6.
[18] 2017 Pathways Evaluation, *supra* note 13, p. 129.
[19] Ibid., p. 128.

Lack of remuneration has been less of an issue in the PPD. During the first year of the program, 88% of PPD work placements were paid. During the second year, all of the work placements were paid. In 2016-2017, 81% of the work placements were paid. Overall, the program was able to offer paid placements to all candidates, although not always in candidates' preferred sector or location. [20]

D. Fairness and Power Imbalance

The power imbalance inherent in articling can lead to abuses. The Articling Survey revealed that some candidates are subject to sexual harassment, as well as racial and gender discrimination:

- 18 percent of respondents who were currently articling had faced comments or conduct related to personal characteristics (age, ancestry, colour, race, citizenship, ethnic origin, place of origin, creed, disability, family status, marital status, gender identity, gender expression, sex and/or sexual orientation) that was unwelcome and 16 percent felt that they had received differential or unequal treatment due to personal characteristics.[21]

- 21 percent of respondents who had completed articling indicated that they had faced comments or conduct relating to personal characteristics that were unwelcome and 17 percent felt that they had received different or unequal treatment relating to personal characteristics. [22]

The LSO has adopted a number of measures in response to the Articling Survey, which are described later in this report at page 20. The LSO does not currently have similar data for associates to allow it to determine if these statistics continue in the early years of practice. However, the question remains: does this inherent power imbalance support the suggestion that articling should be replaced by a new licensing system?

E. Consistency in Transitional Training

The nature of the articling experience depends on the individual circumstances of the candidate and the Articling principal, and therefore consistent exposure to competencies can be an issue.

The Articling Survey also indicates that transitional training may provide inconsistent outcomes. In the survey of respondents who were articling at the time the survey was conducted, over 85% said that at least 50% of the work they had completed during their articling term enabled them to develop legal skills. However, 14% of respondents said that less than half of the work helped them to develop their legal skills.[23] The Pathways

[20] Programme de pratique du droit, Data collected about the Programme de Pratique du droit for the Evaluation of Pathways: Years One to Three, Pathways to the Profession Pilot Project (2014-2015 to 2016-2017), Ibid., p. 22.
[21] Articling Survey, *supra* note 17, p. 38.
[22] Ibid., p. 20.
[23] Ibid., p. 68.

Evaluation data similarly indicates that articling provides varying levels of exposure to the experiential training competencies.

The exposure of candidates to different competencies varies between articling and the LPP, as well as within each pathway. Articling candidates receive the most regular exposure to fact investigation and legal research as well as to file and practice management. They are least likely to have been exposed to transactional/advisory matters, advocacy, and negotiation.[24] In contrast, LPP/PPD candidates were more likely to report "tremendous" to "ample" growth in file and practice management skills and the use of law firm/legal practice management systems.[25]

5. OTHER RELEVANT CONSIDERATIONS IN LAWYER LICENSING

A. Licensing Costs

Currently, LSO licensing fees, excluding HST, are $4710. A large proportion of LPP/PPD participants in the 2017 Pathways Evaluation commented on the cost of the licensing process (76 percent in 2014-2015, 75 percent in 2015-2016 and 63 percent in 2016-2017).[26]

B. Career Pathways of New Lawyers

The range of career paths followed by lawyers is increasingly diverse. As of April 2017, there were 50,673 lawyer members of the LSO.[27] Forty percent of these lawyers were not actively practicing law. Further, of the 34,000 lawyers who were practicing, approximately 10,000 or 30% were performing roles in government, education, businesses and other settings where they may not directly advise the public.[28]

Correspondingly, new lawyers have a similar career trajectory. Of lawyers called to the Bar between 2013 and 2017, approximately 30% are practising in settings where they may not directly advise the public (government or in-house environments and other sectors; some newly-called lawyers are not practising at all).

This diversity raises the following question: should the licensing process recognize diversity of career paths?

---

[24] 2017 Pathways Evaluation, *supra* note 13, pp. 49 and 51.
[25] Ibid., p. 62.
[26] Ibid., p. 129.
[27] The source for this statistic is LSO licensee data.
[28] See Dialogue on Licensing Reference Materials, Topic 2: Market Dynamics and the Lawyer Profession, p. 40, online at www.lsodialogue.ca.

C. Licensing Requirements to Respond to Regulatory Risk

Given increasing licensing costs and divergent career paths, there is an argument that training and licensing should focus on areas of greatest regulatory risk.

It is more important than ever that new lawyers choosing to practise law possess practice management and client service skills. Although the LPP/PPD training course specifically addresses practice and client management as part of its curriculum, the information available to the Committee, both through the DOL as well as through various studies reviewing the two pathways, suggest that articling may not consistently provide candidates with training in these areas.

6. EVALUATIVE PRINCIPLES

The LSO has a statutory duty to act in the public interest and to ensure that the licensing process ensures entry-level competence. For the purposes of this consultation, the Committee recommends that each licensing option should be evaluated in relation to the extent to which it satisfies the following principles:

a.) the five goals of transitional training, described below;
b.) the LSO's statutory responsibility to ensure that newly-licensed lawyers are competent to practice law;
c.) the need to ensure fairness in the licensing process;
d.) consistency for candidates in their transitional training experience, irrespective of the nature of their transitional training experience (articling or the LPP/PPD); and
e.) cost considerations, both for the candidates themselves as well as to the profession.

The evaluation of each option based on the evaluative principles should take into account the challenges and contextual factors outlined earlier in this report. These principles are explained below.

Evaluative Principle 1 - Transitional Training

Transitional training requirements are based on the premise that the licensing process must include transition-to-practice training in order for the LSO to fulfil its competence mandate.[29] In previous reports, the Committee has articulated the following five goals of transitional training:

1. application of defined practice and problem-solving skills through contextual or experiential learning;
2. consideration of practice management issues, including the business of law;
3. application of ethical and professionalism principles in professional, practical and transactional contexts;

[29] Articling Task Force Final Report, October 25, 2012, *supra* note 4, paragraph 12.

4. socialization from student to practitioner; and
5. introduction to systemic mentoring.[30]

Evaluative Principle 2 - Competence

Section 4.1(a) of the *Law Society Act* provides that it is a function of the LSO to ensure that "all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide".[31]

In the medical context, professional competence has been described as "the habitual and judicious use of communication, knowledge, technical skills, clinical reasoning, emotions, values, and reflection in daily practice for the benefit of the individual and the community being served". As noted by Professor Amy Salyzyn of the University of Ottawa, the phrase "legal reasoning" could be substituted for "clinical reasoning" in this definition.[32]

"Competencies" are a set of defined requirements that individuals are required to possess. Competencies include skills, knowledge, and abilities. They are acquired through academic and experiential learning.

Academic Learning

The Federation of Law Societies of Canada (FLSC) National Requirement specifies the required competencies that graduates must have attained through a law school program in order to be considered for LSO licensing, both in Ontario and elsewhere in Canada. In order to obtain FLSC accreditation, Canadian law schools are required to ensure that their students demonstrate competencies in three core areas: skills, ethics and professionalism, and substantive legal knowledge. The National Requirement is summarized in an appendix at **Tab 3.1.1.2** of this paper.

For internationally-educated applicants, the NCA determines whether the applicant's knowledge and understanding is equivalent to that of a Canadian law graduate. The NCA assessment normally requires an applicant to demonstrate competency in specific subjects, either through successfully completing an examination or attending a Canadian law school to successfully complete certain courses. Further details are provided at **Tab 3.1.1.3**.

---

[30] See, for example, the Law Society of Upper Canada Articling Task Force Consultation Report, December 9, 2011, pp. 5-6, online at http://lso.ca/articling-task-force/. The goals of transitional training are also described in the Articling Task Force Final Report.

[31] *Law Society Act*, R.S.O. 1990, c. L.8, online at https://www.ontario.ca/laws/statute/90l08.

[32] Amy Salyzyn, "From Colleague to Cop to Coach: Contemporary Regulation of Lawyer Competence", University of Ottawa Common Law Section Working Paper Series, November 2016, p. 4, online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2858332, The definition of competence in the medical setting is discussed in Ronald Epstein and Edward Hundert, "Defining and Assessing Professional Competence" (2002) 287(2) JAMA: The Journal of the American Medical Association 226.

NCA Assessments require applicants to demonstrate competence by completing examinations or courses in the following core common law subjects:

Canadian Administrative Law;
Canadian Constitutional Law;
Canadian Criminal Law;
Foundations of Canadian Law; and
Canadian Professional Responsibility.

While the areas listed above are mandatory, applicants may also be required to demonstrate competence in other core common law subjects (contracts, torts, and property law). [33] In some cases, if an applicant's law degree took less than three years to complete, the applicant may be asked to demonstrate competency in other subject areas.

The National Requirement includes three "skills competencies" (problem-solving, legal research, and oral and written legal communications). The NCA does not currently formally assess applicants' acquisition of these skills. Instead, it relies in part on candidate performance in the NCA examinations.[34]

Candidates are responsible for preparing for the NCA examinations on their own, and for obtaining their own course material. Some Canadian law schools offer support courses or programs for NCA subjects. The examinations are fact-based, open book, and take three hours to complete. [35] The NCA is currently exploring a move to a competency-based assessment system.[36] A recent Program Review recommended that additional steps be taken to strengthen current NCA assessment and marking, and to improve the defensibility of the NCA examinations.[37]

Testing of Competencies Through LSO Licensing Examinations

All candidates registered in the licensing process for lawyers are required to successfully complete both the barrister licensing examination and the solicitor licensing examination to become licensed to practice law.

Lawyer candidates are required to demonstrate proficiency in respect of competencies that reflect the minimum requirements of both barristers and solicitors entering the profession in the seven areas of law that are most frequently practised.[38] The current

[33] See https://flsc.ca/national-committee-on-accreditation-nca/faqs/
[34] Cambridge Professional Development, Program Review on the National Committee on Accreditation for the Federation of Law Societies of Canada, May 29, 2017, online at https://flsc.ca/wp-content/uploads/2014/10/NCA-Program-Review-Report-FINAL-May-31-2017-GenDistRED.docx.pdf, (NCA Program Review), p. 24.
[35] For further information, see "Completing NCA exams", online at https://flsc.ca/national-committee-on-accreditation-nca/meeting-the-assigned-requirements/completing-nca-exams/.
[36] Federation of Law Societies of Canada, "About the NCA", online at https://flsc.ca/national-committee-on-accreditation-nca/about-the-nca/.
[37] NCA Program Review, pp. 44-45.
[38] See http://lsuc.on.ca/BarristerCompetencies/ and http://www.lsuc.on.ca/SolicitorCompetencies/.

barrister and solicitor examinations provide a means of testing candidates' abilities in core knowledge, application and critical thinking competencies, irrespective of their educational background.

Candidates may attempt each examination up to three times, and are permitted a fourth attempt in exceptional circumstances.[39] Currently, candidates are permitted to write the examinations at any point during a three year licensing term. Further details regarding the examinations are provided at **TAB 3.1.1.4**.

The LSO's licensing examinations are internationally-recognized as high-quality, psychometrically-defensible professional qualification assessments.[40]

The Committee does not propose any changes to the requirement that all licensing candidates be required to pass both the Barrister and Solicitor examinations as a requirement for licensure.

Experiential Training Competencies

The LSO has also established experiential training competencies that reflect the necessary skills, knowledge and tasks for the legal profession. These competencies are based on the FLSC's National Entry to Practice Competency Profile and have been further developed and validated by the profession. The experiential training competencies are the basis of the articling program and the LPP/PPD programs and consist of the following: ethics and professional responsibility, interviewing, fact investigation and legal research, drafting and legal writing, planning and advising, file and practice management, negotiation, advocacy, and transactional/advisory matters. [41] The assessment of candidates' acquisition of competencies during the articling program and LPP/PPD has been independently reviewed by the Pathways Evaluations and the Articling Survey and are described in greater detail in an appendix to this report as **TAB 3.1.1.5**.

Evaluative Principle 3 - Fairness

Licensing processes, including transitional training for professional occupations must be derived in a valid and defensible manner. Fairness legislation (Fair Access to Regulated

[39] Information regarding Lawyer Licensing Outcomes in Ontario is available as part of the DOL Reference Materials. See the Topic 3 Reference Materials (Licensing Examinations: Assessment of Entry-Level Competence), www.lsodialogue.ca.

[40] See, for example, an article written by three U.S. law professors (Kaufman, Curcio, and Chomsky), "A Better Bar Exam – Look to Upper Canada?" (July 25, 2017, online at https://www.lawschoolcafe.org/2017/07/25/a-better-bar-exam-look-to-upper-canada/).

[41] DOL Topic 4 Reference Materials, Transitional Training, p. 28, "Experiential Training Competencies for Candidates", online at https://lsodialogue.ca/wp-content/uploads/2017/03/DoL_Topic4_Reference_Materials_EN.pdf.

Professions and Compulsory Trades Act[42]) and human rights laws require that licensing (registration) practices are consistent with the following objectives:

1. fairness;
2. objectivity;
3. transparency; and
4. accountability.

As part of the Fairness Commissioner's oversight of the LSO's licensing process, the LSO submits annual reports and participates in extensive assessment activities regarding its registration practices to demonstrate fulfillment of the general and specific duties enumerated in the legislation.[43]

Evaluative Principle 4 - Consistency

In order for a mandatory transitional training requirement to be defensible, there must be some degree of uniformity in the nature of the experience for each candidate. Consistency is integral to the ability of the regulator to assure the public that new licensees have achieved entry-level competence. The degree of consistency may be measured by assessing the extent to which all candidates have been exposed to the necessary competencies and experiences, irrespective of the pathway to licensing that they choose or the transitional training opportunity that they hold.

Evaluative Principle 5 - Cost

Currently, each candidate pays a licensing fee of $4710 (plus HST) which includes a $2800 experiential training fee for the articling program or the LPP/PPD. Convocation has determined that all candidates should pay the same licensing fee, irrespective of pathway. Each year, Ontario lawyers contribute $1,000,000 towards the costs of the licensing process to offset the costs resulting from the introduction of the LPP/PPD (each lawyer contributes between $25 and $27 towards the cost of the program). The introduction of the LPP/PPD in 2014-2015 increased licensing costs incurred by candidates from $2910 per candidate to $5210 per candidate, which was offset by the $1,000,000 contribution from lawyer members, resulting in a final fee increase to $4710.

Since the licensing process operates on a cost recovery basis which entails that candidates bear the cost of the licensure, with contributions from the profession, the Committee is of the view that each option should be evaluated with a view to the estimated financial impact.

[42] *Fair Access to Regulated Professions and Compulsory Trades Act*, 2006, S.O. 2006, c. 31, s. 6, online at https://www.ontario.ca/laws/statute/06f31#BK7.
[43] The 2016 OFC report regarding the LSO's registration practices may be accessed at http://www.fairnesscommissioner.ca/index_en.php?page=professions/law_society_of_upper_canada.

7. OPTIONS

The Committee seeks feedback from the profession about whether or not the transitional training requirement should be altered, and, if so, how. This consultation takes the form of proposing four options for licensure, including the existing program.

The four options can be broadly described as follows:

Option 1: Current Model
Option 2: Current Model with Enhancements
Option 3: Examination-Based Licensing
Option 4: LPP for All Candidates

Options 1 and 2 are based on maintaining both the articling program and the LPP/PPD. Option 3 eliminates the requirement that licensing candidates complete transitional training.

Option 4 requires the completion of the LPP/PPD for all candidates without the work placement component. Options 2, 3 and 4 involve a new mandatory skills examination. In addition, Options 2 and 4 require candidates to pass the licensing examinations before moving onto the next phase of the licensing process.

Option 1: Current Model

Overview

The first option is the current model of licensure, including multiple pathways for transitional training. The primary components are:

A. Articling OR
B. LPP/PPD, including a work placement OR
C. Integrated Practice Curriculum
D. Barrister and Solicitor Examinations

Evaluative Principles Analysis - Option 1

Transitional Training

The 2017 Pathways Evaluation reviewed data from surveys conducted in 2014-2015, 2015-2016 and 2016-2017 and concluded that both articling and the LPP/PPD achieve the goals of transitional training in a manner consistent with the objectives of licensing (fairness, objectivity, transparency and accountability).[44]

[44] 2017 Pathways Evaluation, *supra* note 13, p. 6. Of the 1455 licensing candidates in 2014-2015, 44% responded to the survey conducted as part of this study. In 2015-16, participation was similar (44% of 1392 candidates). During

The evaluation concluded that both the articling program and the LPP/PPD provide candidates with an opportunity to apply defined practice and problem-solving skills through contextual or experiential learning, which is the first goal of transitional training. Candidates also have an opportunity to consider practice management issues, including the business of law, although LPP/PPD candidates are more consistently exposed to this second goal of transitional training given the specific emphasis on this topic during the LPP and PPD training courses.

Candidates in both pathways also have an opportunity to apply ethical and professionalism principles in professional, practical and transactional contexts (the third goal of transitional training). Both pathways provide an opportunity for candidates to experience socialization from student to practitioner and address the fourth component (the LPP and PPD training courses and the work placement itself offers this opportunity). Finally, articling principals and LPP/PPD mentors provide candidates with an introduction to systemic mentoring, which is the fifth goal of transitional training.

Options 1, 2 and 4, which contemplate retaining a mandatory transitional training requirement, are consistent with the practices of regulated professions in most jurisdictions around the world. Options 1 and 2 are also responsive to the views expressed by in-person participants during the DOL. Forty-one percent of respondents polled during a discussion group organized to discuss transitional training indicated that work placements during licensing, including work placements during law school, were the best option to ensure entry-level competence of new lawyers. An equal percentage selected a practical training course during licensing. Only one percent of participants indicated that transitional training should not be part of the licensing process.[45]

Competence

Data reviewed by the Committee suggests that both of the current transitional training options assist candidates to achieve the required standard of competence. The 2017 Pathways Evaluation, which included data from both candidates and articling principals, concluded that the articling pathway offers candidates an opportunity to develop their skills and competencies, particularly in relation to fact investigation and legal research, and file and practice management. [46]

---

the third year of the evaluation (2016-2017), only 25% of 1411 articling candidates responded to the survey. A survey was also sent to articling principals. The response rate from articling principals was also low (39% of principals in 2014-15, 29% in 2015-16, and 17% in 2016-17). The Pathways Evaluation also included a survey sent to practising new lawyers who articled in 2014-15 and 2015-16. Participation by newly-licensed lawyers was low (30% during the first year and 10% in the second). Dr. Ali suggests that the low participation rates in the Pathways Evaluation may be related to the fact that the Articling Survey had been conducted shortly before this study began. The findings regarding acquisition of competencies for articling candidates are at pp. 48-49 of the 2017 Pathways Evaluation. The study suggests that the findings should be treated with some caution, given the low response rate to the survey.

[45] Dialogue on Licensing, Topic 4: Transitional Training, Discussion Group Summary Report, online at www.lsodialogue.ca, p. 8.

[46] 2017 Pathways Evaluation, *supra* note 13, p. 49.

The 2017 Pathways Evaluation also shows that both the LPP and the PPD assist candidates in achieving the competence required for licensure. Dr. Ali observes that most LPP candidates are meeting the competency development expectations on all of their assessments, and a considerable proportion of candidates are "exceeding" or "exceeding/meeting" the expectations on all assessments. [47] Available data also indicates that the majority of PPD candidates reported "ample" to "tremendous" growth in all of the skills competencies areas. [48]

The Articling Survey also suggests that four-fifths of respondents thought that at least 50 percent of the work they had completed during their placement enabled them to further develop their legal skills.[49]

The Articling Survey also revealed that the mean satisfaction rating for candidates currently articling with respect to the work they had performed during articling was 3.69 on a scale of 0 ("highly dissatisfied") to 5 ("highly satisfied"). Of those who had completed their articles, the average response was 3.62.[50] When asked to rate their level of satisfaction with respect to the quality of learning during their articling placement, respondents who had completed their articles provided an average rating of 3.72 on a scale of 0 to 5. Respondents who were articling at the time reported an average satisfaction rating of 3.52.[51]

Fairness

Articling

The results of the Articling Survey suggest that some candidates continue to experience discrimination and harassment based on irrelevant personal characteristics during their articling experience. The LSO takes these matters very seriously. Discrimination and harassment have no place in the legal professions or in the licensing process.

A series of measures have been adopted by the LSO in response to the Articling Survey, including:

i.) engaging with law firms and legal departments in a variety of settings to share best practices to address issues regarding harassment and discrimination, including examining how best to establish mechanisms for articling candidates, lawyers, and paralegals to confidentially report instances of harassment and discrimination;

[47] Ibid., pp. 71-73.
[48] Programme de pratique du droit, *supra* note 20, pp. 10-11.
[49] Articling Survey, *supra* note 17, p. 16 (respondents who had completed articling) and p. 35 (currently articling).
[50] Ibid., pp. 36 and 17.
[51] Ibid., pp. 36 and 18.

ii.) raising awareness of LSO services and supports to assist people experiencing harassment and discrimination, including the Discrimination and Harassment Counsel and the Member Assistance Program;[52]

iii.) reviewing and amending the *Rules of Professional Conduct* (in particular Section 6.3 - Sexual Harassment - and Section 6.3.1 - Discrimination) to ensure that the *Rules* are up-to-date and reflect the latest statutory changes and case-law developments.

An additional mitigating factor to be considered in evaluating the fairness of the articling program is that discrimination and harassment are specifically prohibited under the *Rules of Professional Conduct*. Articling candidates experiencing these issues have access to assistance from the Discrimination and Harassment Counsel Program, the Articling Office and the Member Assistance Program.

With respect to barriers to licensing faced by racialized articling candidates seeking a position, the LSO has adopted various measures recommended by the Challenges Faced by Racialized Licensees Report to raise awareness in the profession as a whole about the need to eliminate unconscious bias and to ensure fairness and equity during the hiring process. The report requires that a licensee representative of a legal workplace of at least 10 licensees develop, implement and maintain a human rights/diversity policy addressing the need for fair recruitment, among other issues. Licensees will also be required to complete Continuing Professional Development hours focused on equality, diversity, and inclusion.

LPP/PPD

According to the 2017 Pathways Evaluation, the composition of candidates in the LPP/PPD is more diverse than the articling population. The existence of the LPP/PPD as an alternative to articling supports fairness by ensuring access to the profession for all candidates, including those who have faced barriers to obtaining articles for a variety of reasons. Approximately half of the candidates in the LPP are internationally educated (the largest proportion of candidates received their law degrees in the U.K., the U.S., and Australia).[53] Half of the internationally-educated candidates are Canadians.[54]

In contrast, since the establishment of the program, none of the PPD candidates to date has been internationally-educated. The vast majority are University of Ottawa graduates, as no other Ontario law school offers a common-law degree in French. Compared to the articling program, both the LPP and the PPD have a greater proportional representation of candidates who are racialized, are francophone, indicate

[52] Discrimination and Harassment Counsel, online at http://www.lsuc.on.ca/discrimination-harassment-counsel/. Member Assistance Program, online at http://www.myassistplan.com/.
[53] 2017 Pathways Evaluation, *supra* note 13, pp. 4, 95 and 97.
[54] Ryerson University, 2016-2017 LPP Final Report to the Law Society of Upper Canada, May 15, 2017, p. 2.

that they have a disability, or are over 40.[55] The following table compares the percentage of racialized candidates in each pathway.

Percentage of Racialized Candidates by Pathway – Based on Voluntary Self-Identification Data

Pathway	Year 1 2014-2015	Year 2 2015-2016	Year 3 2016-2017	Year 4 2017-2018
Articling	21%	18%	17%	22%
LPP/PPD	33%	32%	30%	36%

Another measure of fairness is the extent to which the licensing program, including the two pathways, responds to the needs of French-speaking licensing candidates. The LSO's French Language Services Policy provides that the LSO is committed to offering lawyer and paralegal licensing in French, including resources and examinations of equal quality in French and English and the option to receive the Call to the Bar certificate in either French or English.[56]

The PPD is seen to have a unique role in addressing the current access to justice crisis for members of the public who seek legal services in French in Ontario.[57] The PPD work placement offers candidates the opportunity to experience a francophone work environment during the 17-week training component of the program. As a result, the PPD currently plays a special role in Ontario's legal services landscape.

The program is based on the recognition of linguistic dualism, and takes into account the particular needs and realities of the Franco-Ontarian community, particularly with respect to access to justice.[58] Almost all of the PPD candidates surveyed in the 2017 Pathways Evaluation indicated that as a result of their participation in the program, they had become aware of the unique needs and characteristics of the Franco-Ontarian legal community.[59]

Participants in the DOL (both individuals as well as legal stakeholder groups) emphasized the importance of the PPD in ensuring that lawyers of the future are equipped to serve francophone clients.[60]

A significant number of PPD candidates are graduates of the University of Ottawa's National (civil and common law) Program. Because common law courses are not

[55] 2017 Pathways Evaluation, *supra* note 13, p. 4.
[56] Law Society of Upper Canada French Language Services Policy, January 2015, online at http://www.lsuc.on.ca/providing-services-french/.
[57] Letter from Allan Rock, "Linguistic Dualism and the Programme de pratique du droit", March 7, 2018, www.lsodialogue.ca.
[58] Ibid.
[59] 2017 Pathways Evaluation, *supra* note 13, p. 153.
[60] See submission of Ronald F. Caza to the DOL, July 28, 2017, online at www.lsodialogue.ca.

offered until the fourth year of the program, these candidates are not in a position to apply for a transitional training position until their final year. The PPD offers these candidates an opportunity to be licensed in Ontario.[61]

Remuneration in Articling and the LPP/PPD

There are inherent differences between the two pathways with respect to pay. While articling candidates are paid for a 10-month placement (subject to the issues regarding unpaid and poorly paid placements referred to earlier), LPP/PPD candidates are paid only for the four-month work placement. Further, as noted above, thirty percent of LPP candidates are not paid at all during their work placement. In 2016-2017, 19% of the LPP work placements were unpaid.

Consistency

Articling

The articling experience is dependent on the circumstances of the principal employing the candidate. In some cases, candidates may not receive any exposure to certain competencies because of the nature of the practice and the relationship between the principal and the candidate.

The 2017 Pathways Evaluation suggests that articling does not provide a consistent exposure to all of the LSO experiential competencies, which reflect the skills, knowledge, and tasks that are necessary for entry into the profession. During the past three years, articling candidates have received the most regular exposure to fact investigation and legal research as well as to file and practice management. Articling candidates were least likely to have been exposed to transactional/advisory matters, advocacy, and negotiation.[62]

The Articling Survey and comments received during the DOL also suggest that there are an increasing number of marginal placements that are not delivering appropriate transitional training. Fourteen percent of respondents who were articling at the time of the Articling Survey indicated that less than half of the work they completed enabled them to further develop their legal skills.[63] Twenty percent of respondents who had completed their articles at the time of their participation in the survey had the same observation.[64]

Unpaid and poorly paid articles, as well as unpaid LPP work placements (30% of positions are unpaid, despite Ryerson's best efforts) contribute to a lack of consistency between the pathways.

---

[61] Alain Roussy, Le Programme de pratique du droit à mi-parcours: une étude empirique", Revue de droit de l'Université d'Ottawa, 48:1 (2017) 79, p. 59.
[62] 2017 Pathways Evaluation, *supra* note 13, pp. 49 and 51.
[63] Articling Experience Survey Results, *supra* note 17, p. 35.
[64] Ibid., p. 17.

LPP/PPD

Because of their structure and design, the LPP and PPD training courses offer a more consistent learning opportunity than does articling. Both training courses provide a systematic approach involving scenarios and tasks developed by lawyers with expertise in various areas of law. This training helps ensure practice readiness by providing candidates with an opportunity to perform entry-level lawyer tasks and activities during both the training course and the work placement component of the program, as well as formative and summative assessment in relation to the required competencies. Because of this structure, each candidate can be assured of reasonably consistent legal training.

Cost

Option 1, if implemented, would not have any additional cost implications for candidates who would continue to pay the same licensing fee of $4710 (plus HST), subject to necessary increases for inflation over time, and assuming an annual member contribution to the licensing process.

Option 2: Current Model with Enhancements

Overview

Option 2 has the same basic elements as Option 1 with enhancements to address inadequate placements, including a new requirement that all candidates would have to receive at least the statutory minimum wage during transitional training wherever possible. In addition, Option 2 would involve a new mandatory skills examination to measure the achievement of the required standard of competence. Option 2 would involve completion of the following components in the order listed:

A. Barrister and solicitor examinations, with successful completion required as a prerequisite to the commencement of transitional training;
B. Articling or LPP/PPD, with enhancements; and
C. New skills examination, with successful completion required before licensure.

Barrister and Solicitor Examinations

Option 2 would maintain the content and focus of the barrister and solicitor examinations. However, it would require these examinations to be successfully completed prior to the transitional training phase. These examinations test competencies that candidates are expected to have acquired while in law school; success in these examinations is necessary to ensure that candidates are ready for a practice environment. The LSO will offer two opportunities for candidates to pass the examinations before beginning their articles or the LPP/PPD. Candidates who are not successful in the examinations will be required to defer transitional training. Only

candidates able to pass the examinations will be able to occupy valuable transitional training positions.

Articling, LPP/PPD with enhancements

The proposed enhancements to the articling and work placement processes are:

1. additional measurement and monitoring to ensure that all placements meet the basic goals and objectives of transitional training;
2. random audits to confirm that placements are meeting transitional training goals;
3. a new requirement regarding remuneration of licensing candidates at the statutory minimum wage prior to approval of the articling or LPP/PPD work placement; wherever possible; and
4. the elimination of marginal placements.

Skills Examination

At the conclusion of their articling or work placement, all candidates would be required to complete a new examination to test their lawyering skills (skills examination). The skills examination could consist of written tasks, such as writing an opinion letter or memorandum, drafting an affidavit or short pleading, providing an analysis of the application of the *Rules of Professional Conduct* to a particular situation, or identifying proposed solutions to an urgent issue or question.

Evaluative Principles Analysis – Option 2

Transitional Training

Because Option 2 would involve retaining both the articling and LPP/PPD pathway, it would ensure that licensing candidates meet the goals of transitional training. The analysis of the five goals of transitional training under Option 1 should be reviewed when evaluating this option.

Competence

Option 2 requires candidates to successfully complete the barrister and solicitor examinations before transitional training begins. As noted above, this requirement would mean that only those who have attained the required competencies in law school will enter the transitional training phase.

As set out under Option 1, the evidence indicates that articling and the LPP enable candidates to acquire the necessary skills and competencies. Option 2 proposes a new mandatory skills examination before licensure to objectively evaluate this learning process. Although the licensing process currently requires candidates to demonstrate that they have acquired certain experiential training competencies during the transitional training phase, the evaluation is conducted by individual articling principals

and LPP training course and work placement assessors. The skills examination would ensure that all candidates would be subject to a common evaluation and required to demonstrate the same competencies before they are licensed.

Option 2 would include additional LSO monitoring and random audits of articling placements to ensure that they meet the goals and objectives of transitional training. These measures would respond to some of the concerns expressed by some respondents to the Articling Survey about the extent to which their articling experiences enabled them to develop their legal skills.

Fairness

The concerns noted earlier in relation to Option 1 about whether candidates from equality-seeking groups have equal access to articling positions would also apply to Option 2. Some of these concerns are currently being addressed through the LSO's equality, diversity and inclusion initiatives, and as a result of its response to the Articling Survey. The analysis under Option 1 regarding the role played by LPP/PPD in ensuring fairness in the licensing process would also apply to Option 2. The continuation of the PPD would ensure that the licensing system continues to (i) respond to the needs of French-speaking licensing candidates, and (ii) ensure that future lawyers are able to meet the public's need for competent and ethical legal services in French.

Requiring all candidates to successfully complete the Barrister and Solicitor examinations before beginning their transitional training may address some of the issues regarding the perception that the LPP/PPD is a "second-tier" pathway to licensing, since only candidates who demonstrate that they have acquired the necessary competencies in law school would be permitted to enter transitional training.

The new requirement that all licensing candidates receive the statutory minimum wage would address the lack of fairness with respect to pay, as follows:

i.) Unpaid or poorly paid articles would no longer be permitted, which would address the exploitative nature of such arrangements and ensure a minimum standard of payment, irrespective of the nature of their placement.

ii.) The discrepancies between the percentage of unpaid articling positions (3%) and unpaid LPP work placements (30%) would be eliminated.

Consistency

As discussed above, the requirement that all candidates pass the barrister and solicitor examinations before beginning transitional training ensures consistency among all candidates by requiring them to demonstrate that they have acquired certain competencies.

Further, the addition of LSO audits of articling and other enhancements proposed as part of Option 2 may not eliminate the issue of the inconsistent quality of articles, but will reduce the number of poor quality or marginal articling positions and ensure a more consistent experience among all candidates.

Cost

The proposed new quality assurance protocols (audits and additional measurement and monitoring) for all placements could result in a fee increase of approximately between $125 and $175 per candidate. The estimated cost of a final skills examination would depend on the type of examination to be implemented. A written skills examination, described earlier, could result in a cost of between $1600 and $2000 per candidate. These additional costs would be added to the current licensing fee which is $4710 per candidate. The total cost, per candidate, of Option 2 would likely be in the range of $7000 (plus HST).

Option 3: Examination-Based Licensing

Overview

Based on an analysis of regulatory risk to the public, and mindful of the sustainability of the current universal transitional training requirement, Option 3 is based on the premise that there is a need for profound change in the current licensing system. If implemented, Option 3 would involve the removal of the pre-licensure transitional training requirement for all. The acquisition of competencies would be measured through the successful completion of three examinations as the precondition to licensure (the current barrister and solicitor examinations and the new Skills Examination).

Option 3 shifts the management of regulatory risk to the post-call career path of the new licensee. Option 3 would involve completion of the following components in the order listed:

A. Barrister and solicitor examinations, with the same content as described in Option 1 and successful completion required as a condition of licensure;
B. Skills examination, with the content as described in Option 2 and successful completion required as a condition of licensure;
C. Licensure, with post-call regulatory requirements dependent on the lawyer's employment situation. A Sole Practice Essentials Course would be required for lawyers entering into sole practice or practice with five or fewer lawyers.

Candidates would be licensed to practise after they successfully completed the three examinations described above. The LSO's focus would shift to post-call oversight. The requirements are described below:

i. *Non-Practising Licensees*: Candidates who choose not to provide legal services directly to members of the public would be licensed after the examinations and would be in a non-practising membership category. As noted earlier, currently, 30 percent of newly-licensed lawyers fall into this category. Should non-practising licensees decide to practice law at some later date, they would be required to satisfy the conditions described in paragraphs ii or iii below.

ii. *Licensees Practising in a Workplace of Six or More Lawyers*: Candidates who obtain employment as lawyers in a workplace of six or more lawyers would be licensed after the examinations with no post-call requirements. This option assumes that the transitional training for these new lawyers would be provided by their workplaces, and acknowledges that students have experiential learning opportunities in law school.

iii. *Licensees Practising in a Sole or Small Firm Practice with Five or Fewer Lawyers*: Candidates would be licensed after the examinations and required to complete a Practice Essentials Course specifically designed for sole practitioners and members of small firms within 12-18 months of the candidate choosing this category of practice. The course could include 30 hours of online e-course content and five in-person days.

Practice Essentials Course

Subjects to be covered in this course include client service and communication, financial and practice management, and the business of running a law or legal services practice. Optional modules could be added onto the course that would focus on particular areas of practice (real estate, estates and trusts, family law, criminal law, civil litigation, and corporate-commercial law). [65] Newly licensed lawyers entering sole or small firm practice may also be subject to audit within their first few years of practice.

The practice essentials course could be a requirement for licensees who move from a workplace of six or more lawyers to a sole or small firm practice at any point in their careers.

Risk Analysis - Option 3

Option 3 has been designed to ensure that the resources allocated by the LSO to the licensing system are directed towards the areas of greatest risk.

The LSO's data demonstrates that sole practitioners continue to receive a significantly higher number and proportion of complaints while licensees practising in larger firms continue to receive a significantly fewer number and proportion of complaints.[66] As at

[65] The Practice Essentials Course could also be adapted for paralegal licensing candidates.
[66] "Larger firm" refers to lawyers practising in firms with more than 26 licensees. Law Society of Upper Canada Professional Regulation Division End-of-Year Report (31 December 2016), online at

December 31, 2016, sole practitioners constituted 35% of all lawyers in private practice, yet, this group received 51% of all complaints against lawyers in private practice in 2016. Further, lawyers practising in two-licensee firms (9% of all lawyers in private practice) received significantly more complaints (13% of all complaints received against lawyers in private practice in 2016).[67]

In 2016, the highest proportion of complaints made to the LSO about lawyers (47%) involved service issues. Service issues include failure to report to a client, failure to follow client instructions, lack of communication with a client, failure to preserve client property, failure to serve a client, failure to supervise staff, failure to account to a client, failure to pay financial obligations, breach of confidentiality, and withdrawal of services.[68]

The Practice Essentials Course would emphasize client service and communication, financial and practice management, and the business of running a law or legal services practice.

Seventy-five percent of law firms in Ontario are one lawyer firms. However, relatively few articling positions are available in these settings (in 2016-2017, 16.8% of available articling placements were in sole practice or in firms of between 2-5 lawyers).[69] Most of the available placements are in larger metropolitan areas and are offered by medium and large firms where candidates are not routinely exposed to the business of law and the realities of running a law practice. As a result, the majority of current available transitional training opportunities may not prepare candidates for the challenges of small firm or sole practice.

Given market realities, Option 3 focuses on regulatory risk in settings in which lawyers do not have access to colleagues and other practice supports. LSO resources would be directed to proactively addressing risk issues in a different way, by requiring lawyers in higher risk practices to take the Practice Essentials Course. Option 3 would not direct resources to an unnecessary transitional training infrastructure for candidates who choose not to practice law and do not pose a risk to the public.

Other factors taken into consideration by Option 3 include

(i) the role played by law firms in training new lawyers; and

---

https://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2017/Convocation-May2017-Professional-Regulation-Committee-Report.pdf, p. 10.

[67] Ibid., pp. 62-63.

[68] Service issues are described in the Professional Regulation Division Report to Convocation May 2017 (Analysis of Complaints Received in the Professional Regulation Division in 2016), p. 22. Also see the Professional Regulation Division End of Year Report (31 December 2016), p. 23, online at http://www.lso.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2017/Convocation-May2017-Professional-Regulation-Committee-Report.pdf.

[69] 2017 Pathways Evaluation, *supra* note 13, p. 124 ("Settings for Articling Placements (Years One through Three)".

(ii) the establishment of mentoring initiatives in the profession, described in greater detail below.

LSO Initiatives

In January 2016, LSO Convocation approved the creation and funding of a new law practice coaching and advisory network for lawyers and paralegals, one of the goals of which was to "provide coherent and systematic opportunities for the enhancement of competence".[70] The LSO Coach and Advisor Network was launched in November 2016. Since inception, 150 lawyers and paralegals have volunteered for the program and have responded to over 500 requests from individuals seeking opportunities to meet with a coach or advisor.[71] Many legal organizations have also established mentoring initiatives. [72] The LSO's Practice Management Helpline also assists lawyers with situations raising ethical questions.

Role of Law Schools

The proposed new skills examination, common to Options 2, 3 and 4 could function as an incentive to law schools to ensure that their curricula sufficiently prepare graduates for this practical examination. Further, with the removal of articling, students may pressure law schools to provide more experiential training opportunities.

Evaluative Principles Analysis – Option 3

Transitional Training

Option 3 recognizes that candidates who do not provide legal services to the public do not require transitional training in the traditional sense. It also takes into consideration that candidates who begin their careers in a workplace of six or more lawyers will have greater access to supervised training and mentoring in those settings.

For lawyers in sole or small firm practices of five or fewer licensees, the Practice Essentials Course would systematically address the first three transitional training goals (application of practice and problem-solving skills through contextual or experiential learning, consideration of practice management issues, including the business of law,

[70] Mentoring and Advisory Services Proposal Task Force Report to Convocation, January 2016, online at https://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation-january-2016-mentoring.pdf.

[71] Current statistics regarding the use of Coach and Advisor Network is available in the Professional Development & Competence Committee Report to Convocation, February 2018, online at https://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2018/2018-Feb-Convocation-Professional-Development-Competence-Committee-Report.pdf.

[72] Further information regarding the OBA Mentorship Program is available at https://www.oba.org/Professional-Development-Resources/Mentorship. Further information about the Advocates' Society mentorship initiative is available at http://www.advocates.ca/TAS/Community_Events/Mentoring/TAS/Community_Events/Mentoring.aspx?hkey=b0e04c98-eabb-495e-b345-dc9a2cc95ea1.

and application of ethical and professionalism principles). In fact, the course could be more effective in addressing these goals than articling in many cases. Not all work environments offer candidates exposure to client services and communication, financial and practice management, and the business of running a law or legal services practice, which would be covered in the course.

The final two transitional training goals are socialization from student to practitioner and the introduction to systemic mentoring. While candidates who complete the Practice Essentials Course may experience some of these benefits through their participation in the course, they would not have had as lengthy a period of supervised work pre-licensure. That said, Option 3 takes into consideration that, compared to previous generations of law students, today's law students have greater access to opportunities to provide legal services as a result of a wide variety of experiential learning opportunities currently available in law school.[73] Further, as noted above, both the LSO and other legal organizations offer a variety of mentoring programs that may offer opportunities for socialization from student to practitioner. While the goals of transitional training can be achieved in law school to some extent, they can also be achieved post-call in a practising environment where lawyers have access to more experienced members of the profession.

Competence

Option 3 addresses competence by requiring candidates to be tested through the barrister and solicitor examinations and the skills examination. Further, individuals practising on their own or in small firms would benefit from additional focus on the business of running a law practice through the Practice Essentials Course. Further, all Canadian law schools must demonstrate that their curricula requires students to demonstrate competencies in three core areas (skills, ethics and professionalism, and substantive legal knowledge).[74] As part of the NCA process, the credentials of internationally-trained lawyers are evaluated in accordance with the competencies and standards in the FLSC National Requirement.[75]

Option 3 also takes into consideration the mentoring initiatives undertaken by both the LSO and legal organizations, described above, that are designed to enhance competence.

[73] Information provided as part of the DOL (current as of March 2017) indicates that eleven Canadian law schools offer experiential training opportunities including legal clinics, clerkships, internships, and mediation practicums, which may or may not be for academic credit. All Canadian law schools offer non-credit or volunteer learning opportunities. See www.lsodialogue.ca. In September 2012, Osgoode Hall Law school became the first Canadian law school to introduce an experiential education requirement as part of its curriculum.

[74] See the National Requirement of the Federation of Law Societies of Canada. "Canadian Law School Curricula: Minimum Competencies and Skills Attained at a Canadian Law School", www.lsodialogue.ca.

[75] The factors considered by the National Committee on Accreditation are set out at **Tab 3.1.1.3**.

Fairness

Option 3 ensures that all licensing candidates have an equal opportunity to be licensed. Market conditions with respect to the supply of paid articling or LPP positions would no longer determine access to transitional training as a mandatory component of the licensing process. Option 3 would eliminate concerns about the "two tiered" nature of the two transitional training pathways. That said, not all candidates have identical access to transitional training opportunities in law school, with the result that some may be in a better position than others to be successful on the mandatory skills examination. However, as noted earlier, Option 3 may encourage law schools to recognize the need to ensure that all law graduates would be able to demonstrate the competencies that would be tested in the Skills Examination by ensuring that these competencies are offered as part of the law school curriculum, either through more experiential training opportunities or otherwise.

Option 3, if implemented, would need to be carefully designed to ensure that the licensing system continues to meet the needs of French-speaking candidates, and to ensure that the public has access to competent French-speaking lawyers. The Practice Essentials Course could be offered in French and English, incorporating much of the content of the current PPD, including the emphasis on lawyers' ethical obligations to ensure that clients are aware of their language rights as set out in the *Rules of Professional Conduct*. Mentors from the francophone bar could be involved in the delivery of the course as instructors.

The cost of the proposed course could be a burden for some new lawyers. It could be argued that the imposition of an additional requirement on only one category of licensee is unfair. Through this consultation, the Committee hopes to receive recommendations to minimize this burden.

Option 3 reduces the prospect of a power imbalance because licensing would no longer be contingent upon transitional training. That said, it is important to note that some power imbalances may still exist in legal workplaces.

Option 3, if implemented, would establish a completely new licensing system. As a result, not all of the impacts of Option 3 and steps to mitigate these impacts can be currently identified. For example, some argue that transitional training plays a key role in assisting candidates to enter the legal services marketplace. Option 3 could have impacts on equality-seeking groups and international law graduates that may need to be further considered. Further, depending on the nature of a candidate's law school exposure to experiential training, it may be challenging for some candidates to be successful in the skills examination. Some private providers may emerge in the marketplace offering courses to prepare candidates to fulfil this requirement.

Consistency

Option 3 would address the concerns about uneven articling experiences and inconsistencies regarding the acquisition of competencies between the two licensing pathways. All candidates would be required to complete the same summative examinations, irrespective of their chosen career path. The Practice Essentials Course would provide a consistent means of ensuring that lawyers entering sole practice or small firms have been exposed to, and are able to demonstrate, the same competencies necessary for the practice of law, including those competencies relating to the business of law.

Cost

Assuming 600 newly licensed participants in the Practice Essentials Course annually, the estimated per candidate cost of the course could be in the range of $2200-$2500. Costs would vary if the course were extended to include all licensees who enter the sole or small practice category regardless of the date of licensure. This estimate assumes approximately 30 hours of online e-course content and five in-person days. Only candidates who choose to practise in this sector would be required to pay for the course, in addition to the current licensing fee.

All candidates would have to pay for the skills examination (as noted above, the new examination would likely cost between $1600 and $2000 per candidate).

In Option 3 fees would vary depending on the category of practice, as follows:

i.) Non-Practising Lawyers – would continue to pay the current licensing fees, less the cost of the transitional training requirement, as well as the new Skills Examination fee (the total licensing cost for this category would be approximately $4200 plus HST);
ii.) Lawyers Entering Workplaces of Six or More – would continue to pay the current licensing fee, less the cost of the transitional training requirement, in addition to the new skills examination (approximately $4200 plus HST);
iii.) Lawyers Entering Sole Practice or Small Firms would be required to pay the current licensing fee, less the cost of the transitional training requirement, plus the new skills examination fee, and the Practice Essentials Course fee (to be taken at some point during the first 12-18 months of practice) for a total of approximately $6,400-$6700, plus HST.

Option 4: LPP/PPD for All Candidates

Overview

Like Option 3, Option 4 assumes the need for significant change in the current LSO licensing requirements, given the need to ensure that the current paradigm is responsive to the changing nature of the legal services marketplace. Option 4 also

takes into consideration available data regarding the LPP/PPD and its effectiveness in ensuring a consistent exposure to competencies necessary for the practice of law.

Option 4 would require all licensing candidates to complete the LPP/PPD training course. The LPP could be offered at different sites and at different times throughout the year. Recognizing the ongoing challenges in providing paid work placements to all LPP/PPD candidates in their chosen areas, the LPP/PPD work placement would be removed. As is the case with Options 2 and 3, candidates would also be required to complete the three examinations described above.

The primary components of Option 4 listed in order of completion, are:

A. Barrister and solicitor examinations, as described in Option 1, with successful completion required before commencement of transitional training;
B. LPP/PPD, without work placements; and
C. Skills examination, as described in Option 2, with successful completion required before licensure.

Evaluative Principles Analysis – Option 4

Transitional Training

Option 4 satisfies all of the transitional training requirements. The LPP/PPD 17-week training course was specifically designed to train candidates in the experiential training competencies and to support their ability to fulfill the LSO's transitional training goals. The first transitional training goal (application of defined practice and problem-solving skills through contextual or experiential learning) is satisfied by the LPP/PPD 17-week course. The web-based and in-person learning modules, requiring candidates to complete specific tasks on files, ensure that candidates have an opportunity develop practice and problem-solving skills through contextual or experiential training.

The second transitional training goal is consideration of practice management issues, including the business of law. The LPP/PPD course curriculum includes content relating to practice and client management, and tests candidates' skills in these areas. By requiring all candidates to complete the LPP/PPD, all candidates would meet this transitional training requirement.

The third transitional training goal – application of ethical and professionalism principles in professional, practical and transaction contexts, and the fifth – introduction to systemic mentoring - are also satisfied by the LPP/PPD training course. The course ensures that candidates regularly meet with a mentor who reviews case file work and discusses ethics and professionalism and practice and client management issues with the candidates. The virtual or simulated law firm concept, as well as the three-week in person session that is part of the LPP, offers candidates an opportunity to experience socialization from candidate to practitioner (the fourth transitional training goal).

Competence

Mandatory completion of the LPP/PPD course would satisfy the competency criterion by providing a more consistent approach to the acquisition of competencies than does articling, which is more dependent on the specific practice of the articling principal. The LPP/PPD course is designed to provide candidates with transitional training in the most common practice areas.

Further, as is the case with Options 2 and 3, the requirement that candidates successfully complete the barrister and solicitor examinations before licensure will assist in ensuring that candidates have mastered the competencies taught in law school. The skills examination will also ensure the practice readiness of all candidates. Candidates would also be better-prepared for the new skills examination having completed the LPP/PPD training course, given the design of the course which simulates the experience of working in a law firm.

Fairness

Option 4 would ensure a single pathway to licensing, eliminating any lingering concerns about the "two tiered" nature of the current system. It addresses the following fairness issues described earlier:

1. the removal of articling would address concerns about differential access to articling by candidates from equality-seeking groups and in particular racialized candidates;
2. concerns about discrimination and harassment during articling would be addressed, since articling would be eliminated;
3. unpaid and poorly paid articling positions would no longer exist; and
4. unpaid LPP work placements would no longer be a concern.

Consideration could be given to redesigning the PPD course to ensure that candidates are made aware of the employment opportunities in the French-speaking legal services sector and have occasion to network with French-speaking lawyers currently serving the public in this sector.

Consistency

Option 4 would provide consistent transitional training to all for the reasons enumerated earlier under Options 1 and 2. The LPP/PPD training courses are inherently consistent due to their structure and design.

Cost

It is estimated that implementation of LPP/PPD for all candidates could result in an experiential training fee of approximately $10,000-$12,000 per candidate as a result of the significant infrastructure and education provider expenses that would be incurred to

support a mandatory course for over 2000 candidates annually. The estimated experiential training fee of approximately $10,000 to $12,000 per candidate could be reduced if law schools were to offer a form of the LPP/PPD as part of their curriculum that met the LSO's transitional training requirements.

Another advantage of this approach might be that candidates would be able to obtain assistance from the Ontario Student Assistance Program (OSAP) while they complete their transitional training, since it would be offered as part of their law school studies. Currently, unpaid articling candidates and candidates completing the LPP/PPD training course are not able to obtain financial assistance from OSAP during this period.

Assuming the additional costs of the new skills examination described above, and including the costs of the Barrister and Solicitor licensing examinations, Option 4 could result in a total licensing fee of $13,500 to $15,500 (plus HST) per candidate.

8. CONCLUDING POINTS

Questions for Consideration

The following questions may assist those responding to this consultation paper.

1. Which option most effectively addresses the five goals of transitional training?

2. Which option most effectively ensures that new lawyers have entry-level competencies?

3. Which option is most effectively addresses fairness in the licensing process?

4. Which option is the most effectively addresses consistency in the licensing process?

5. Should successful completion of the Barrister and Solicitor Examinations be a prerequisite to commencing transitional training? Why? If not, why not?

6. Should the licensing process include the proposed new Skills Examination? Why? It not, why not?

7. In your view, what additional measures would be required to ensure that licensing candidates are adequately prepared for the proposed skills examination?

8. Should transitional training be a mandatory component of the LSO licensing process? If so, why? If not, why not?

9. Should the LSO focus its training requirements post-licensure as proposed in Option 3? Why?

10. What other factors should be considered in weighing the various options?

Orderly Transition

Any changes to the transitional training pathways or licensing examinations approved by Convocation following this consultation would require a transition period to ensure an appropriate length of time to implement any new policies and procedures.

THE DIALOGUE ON LICENSING

As part of its review of the licensing process, the LSO conducted the Dialogue on Licensing (DOL) between April and June 2017 to provide an opportunity for input from the legal community regarding the challenges and opportunities of lawyer licensing. Reference materials were made available to participants prior to each session at a dedicated website.[1] The DOL involved 15 in-person discussions at seven Ontario cities regarding the following topics:

i. the need for change with respect to lawyer licensing;
ii. market dynamics and the lawyer profession;
iii. licensing examinations and the assessment of entry-level competence; and
iv. transitional training.

The sessions were facilitated by an independent facilitator. Over 300 lawyers, licensing candidates, law students and other organizations participated in the sessions and 44 written submissions were received by the LSO. Thirty-three legal organizations and associations were represented.[2]

The comments made during the in-person sessions and written submissions were similar and identified the following challenges:

i. law students were concerned about the significant debt they had incurred to complete their legal education;
ii. in addition to law student debt, some respondents commented on the high cost of becoming a lawyer, given Law Society licensing fees;
iii. others suggested that the Law Society consider making changes to the licensing examinations to emphasize practical skills;
iv. some were of the view that articling should be replaced by a standardized training course for all candidates, or LPP for all;
v. some respondents were in favour of maintaining articling as their firms are able to offer candidates an excellent learning experience;
vi. others indicated that articling should be retained, but should become more standardized to address the unevenness of candidates' experiences;
vii. some suggested that the practice of law is increasingly diverse and fragmented, with the result that there should no longer be one path to prepare candidates to become ethical and competent lawyers.
viii. Some respondents described the experience of some candidates with unpaid articling positions who were sometimes asked to perform tasks entirely unrelated to the development of legal skills;

---

[1] https://lsodialogue.ca/. The Committee provided an information report to Convocation in February 2017 describing this initiative.

[2] The organizations represented during the 15 DOL in-person sessions are listed in the summary reports available on at www.lsodialogue.ca. The session regarding licensing examinations was webcast.

ix. others described situations in which unpaid articling candidates were expected to cover disbursements incurred on behalf of their employer's client out of pocket; and
x. some participants indicated that in their view unpaid articles are exploitative, and should not be condoned. All articling candidates should receive the statutory minimum wage. [3]

[3] The following Discussion Group Summary Reports are available online: Topic 1: The Need for Change; Topic 2: Market Dynamics and the Lawyer Profession; Topic 3: Licensing Examinations: Assessment of Entry-level Competence and Topic 4: Transitional Training. The written submissions are available on at www.lsodialogue.ca. Summaries of the meetings are available at https://lsodialogue.ca/updates/.

THE NATIONAL REQUIREMENT TAB 3.1.1.2

The three major categories of competencies to be taught by law schools in the Federation of Law Societies of Canada National Requirement are

Skills

a.) problem-solving;
b.) legal research;
c.) oral and written legal communication.

Ethics and Professionalism

Candidates must demonstrate an awareness and understanding of the ethical requirements for law practice in Canada and ability to identify and address ethical dilemmas in a legal context.

Substantive Legal Knowledge

a.) Foundations of Law;
b.) Public Law of Canada; and
c.) Private Law principles.[1]

[1] Federation of Law Societies of Canada National Requirement, https://flsc.ca/wp-content/uploads/2018/01/National-Requirement-Jan-2018-FIN.pdf.

FACTORS CONSIDERED BY THE NATIONAL COMMITTEE ON ACCREDITATION

The NCA assessment is intended to determine whether an applicant's knowledge and understanding is equivalent to that of a Canadian law graduate. It considers a number of factors listed below:

(i) the type of legal system where the education was acquired (e.g. common or civil law);
(ii) the length and nature of the education program;
(iii) the subject areas studied;
(iv) academic performance in respect of the core subject areas required by the NCA, as well as overall academic performance;
(v) whether the legal education program is recognized by the local regulatory authority governing admission to the practice of law in that jurisdiction;
(vi) whether the program was full-time, part-time, in-person, or offered by distance learning;
(vii) the length of time since the applicant completed their degree;
(viii) professional legal experience and qualifications; and
(ix) the nature and length of the applicant's professional legal experience.

The NCA Assessment Policy complies with the FLSC National Requirement for Canadian Common Law Programs.[1]

[1] NCA, "How We Assess Your File", and "NCA Policies and Guidelines", online at https://flsc.ca/national-committee-on-accreditation-nca/applying-to-the-nca/how-we-assess-your-file/ and https://flsc.ca/national-committee-on-accreditation-nca/nca-resources/policies-and-guidelines/.

TESTING OF COMPETENCIES THROUGH LSO LICENSING EXAMINATIONS

All candidates registered in the licensing process for lawyers are required to successfully complete both the Barrister Licensing Examination and the Solicitor Licensing Examination to become licensed to practice law. The examinations are multiple choice, open book examinations. Each examination is seven hours long.

The competencies that are tested as part of the examinations are those required for entry-level practice. Lawyer candidates are required to demonstrate proficiency in respect of competencies that reflect the minimum requirements of both barristers and solicitors entering the profession in the seven areas of law that are most frequently practised.[1]

The current Barrister and Solicitor Examinations provide a means of testing candidates' abilities in core knowledge, application and critical thinking competencies, irrespective of their educational background.

The Barrister Examination assesses competencies necessary to the practice of civil litigation, family law, public law, and criminal law while the Solicitor Examination requires candidates to demonstrate required competencies in real estate law, business law and estates and trusts law. Both examinations assess competencies in ethics, professional responsibility and practice management.

Candidates may attempt each examination up to three times, and are permitted a fourth attempt in exceptional circumstances.[2] Currently, candidates are permitted to write the examinations at any point during a three year licensing term.

The Law Society of Ontario's licensing examinations are internationally-recognized as high-quality, psychometrically-defensible professional qualification assessments.[3]

The Committee does not propose any changes to the requirement that all licensing candidates be required to pass both the Barrister and Solicitor examinations as a requirement for licensure.

---

[1] See http://lsuc.on.ca/BarristerCompetencies/ and http://www.lsuc.on.ca/SolicitorCompetencies/.

[2] Information regarding Lawyer Licensing Outcomes in Ontario is available as part of the DOL Reference Materials. See the Topic 3 Reference Materials (Licensing Examinations: Assessment of Entry-Level Competence), www.lsodialogue.ca.

[3] See, for example, an article written by three U.S. law professors (Kaufman, Curcio, and Chomsky), "A Better Bar Exam – Look to Upper Canada?" (July 25, 2017, online at https://www.lawschoolcafe.org/2017/07/25/a-better-bar-exam-look-to-upper-canada/).

LSO TRANSITIONAL TRAINING PATHWAYS

Articling Program

Articling provides an opportunity for candidates to achieve the experiential training competencies required by the LSO for licensure. In 2012, in response to concerns about the uneven nature of the articling experience raised during the Articling Task Force consultations, the LSO enhanced the reporting and candidate evaluation requirements for the articling program, reinstating and expanding reporting requirements withdrawn in 2008.

As a result of these changes, both candidates and principals report to the LSO regarding the candidate's experience and levels of achievement in relation to the experiential training competencies. Articling principals are required to file an Experiential Training Plan at the outset of the articling placement to provide a level of assurance that training will meet the required competencies. Principals are required to report on candidate exposure to all of the experiential training competencies and to assess the performance of the candidates with respect to specific skills and tasks, and to file the Record of Experiential Training in the articling program with the LSO within ten business days of the end of the articling placement. [1]

Candidates are required to demonstrate their skill level by completing specific tasks during the articling placement.[2] Candidates file a final Record of Experiential Training in the articling program within ten business days of the end of the placement.

LPP Training Course

The design and delivery of the 17 week training course ensures that candidates are exposed to required lawyer competencies, based on the Federation of Law Societies National Entry to Practice Competency Profile. The LPP replicates the experience of working in a law firm by creating a virtual law firm. It uses interactive web-based modules and digital simulation tools to develop necessary skills by requiring candidates to complete tasks on files developed by subject matter experts, who are leading Ontario practitioners in their fields. Candidates are required to interview clients, conduct research, draft documents, letters and agreements, develop an approach to the file, conduct negotiations, argue motions, conduct examinations and cross-examinations, and manage a law practice.

---

[1] Law Society of Ontario, "Articling Program" ("Articling Placement Requirements"), online at https://www.lsuc.on.ca/articling/.

[2] The tasks are interviewing a client, drafting a legal opinion, representing a client in an appearance or through some form of Alternative Dispute Resolution or settlement process, demonstrating professional conduct, and using legal firm/legal practice management systems. See Law Society of Ontario, Experiential Training Competencies for Candidates, online at www.lsodialogue.ca.

Candidates have regular meetings with mentors who are knowledgeable practising lawyers with at least 15 years' experience. Mentors are rotated mid-way through the training course so that firms have the benefit of different perspectives and experiences. Mentors act as "supervising lawyers" for the virtual law firm by meeting with the entire firm once a week and with the individual candidates every two weeks. They discuss matters raised by the files developed for the program, including specific professionalism and ethics and practice and client management matters with candidates. Candidates connect with mentors, each other, subject matter experts and their clients through web conferencing and other online platforms.

The LPP training course also includes a three-week in-person session at Ryerson. During this time, candidates have an opportunity to meet one another and members of the profession, and engage in intensive training opportunities, including a Trial Advocacy Training Program. The LPP assesses candidates' skills with respect to the LSO competencies described earlier in this paper. These include professionalism and ethics; analysis; research, communications, practice management and client management.

LPP Work Placement

The second phase of the LPP/PPD involves a four month work placement, which is designed to provide candidates with the opportunity to further develop relevant competencies and skills in the context of a practical legal workplace experience.

Candidates may apply to positions advertised by the Ryerson Work Placement Office. The largest proportion of work placements have been in small firms (29 percent in 2014-2015, 31 percent in 2015-2016, and 22 percent in 2016-2017). Corporate commercial law (11%), real estate (9%), civil litigation – plaintiff (8%), civil litigation – defendant (8%), and wills, estates and trusts law (8%) were the most common areas of practice in both LPP work placements. Other settings have included non-governmental organizations, the Crown's office, government or public agencies, positions with in-house counsel departments, and legal clinics.[3] Sixty-five percent of the LPP work placements were in Toronto during the first three years of the program.

PPD Training Course

The PPD four month intensive course also simulates a law firm work environment, through an in-person format. Each candidate has access to a work station in an office on the University of Ottawa campus with a filing cabinet, a letterbox, wireless Internet, and printers. As is the case with the LPP, candidates are assessed with respect to the ability to perform all of the tasks in the FLSC National Competency Profile for Lawyers. Each candidate is matched with a lawyer who acts as their mentor for the duration of the program.[4]

[3] 2017 Pathways Evaluation Interim Results: Years One to Three, Law Society of Upper Canada Pathways to the Profession Pilot Project (2015-2015 to 2016-2017), 31 July 2017, p. 120.
[4] Rapport Annuel 2016-2017 Programme de Pratique du Droit de L »Université d'Ottawa, pp. 8-10.

In addition to the mentorship program, several supervising lawyers moderate discussion groups every other week with candidates to discuss their progress and to provide them with more individualized feedback on legal drafting, practice management, and file management. The discussion groups also provide an opportunity to discuss ethical and professionalism issues. One example of the program's emphasis on practice management included the opportunity to develop and present business cases to assess the viability of opening satellite firms in smaller cities with a significant francophone population.[5]

Work Placement - PPD

PPD candidates also complete a four month work placement. In 2016-2017, 57% of work placements were in government or in a public agency. The remaining candidates were employed in legal clinics, in-house legal departments, unions, non-profit organizations, small firms, or in the offices of sole practitioners.[6] The vast majority of PPD placements were in Eastern Ontario (84% in 2014-2015, 91% in 2015-2016 and 90% in 2016-2017).[7]

[5] Ibid., p. 19.
[6] Programme de pratique du droit, Data collected about the Programme de pratique du droit for the Evaluation of Pathways : Years One to Three, p. 22.
[7] Ibid..

Appendix F: Draft Nonexam Framework

DRAFT FRAMEWORK FOR DISCUSSION

Commission motion from March 2, 2022: ***Continue to develop an alternative, non-exam pathway, reflecting the CAPA recommendations.***

BLUE RIBBON COMMISSION GUIDING PRINCIPLES

- Admission to the State Bar of California requires a demonstration of knowledge, skills, and abilities currently required for the entry-level practice of law, otherwise referred to as minimum competence.
- Admission to the State Bar of California requires minimum competence in professional ethics and professional responsibility.
- Criteria for admission to the State Bar of California should be designed to ensure protection of the public.
- The recommended examination, or examination alternative, should be evidence-based.
- Fairness and equity of the examination, or examination alternative, should be an important consideration in developing the recommended approach. Fairness and equity include but are not limited to cost and the mode and method of how the exam or exam alternative is delivered or made available.
- The recommended examination, or examination alternative, should minimize disparate performance impacts based on race, gender, ethnicity, or other immutable characteristics.

NONEXAM PATHWAY BEGINS IN LAW SCHOOLS

- Combination of doctrinal and experiential learning
- Regulated pathway curriculum based on CAPA recommendations
- Law school implementation to include options for:
  -experiential education
  -clinics
  -practica
  -simulations
- Work product review by independent regulator or other assessment at dedicated intervals during the pathway

POST LAW SCHOOL REQUIREMENT

- Supervised practice
  -equivalent time to licensure as an individual that takes and passes the bar exam (5-8 months)
- Centralized or decentralized administration of supervised practice program components
  -Matching of supervisors and supervisees (responsibility of law schools? Of regulator? Of students, with support from law schools, CLA, local, regional, and affinity bars, LAAC)
  -Eligibility and training of supervisors (regulator)
  -Requirements for elements supervision must include (regulator)

ASSESSMENTS

- Parallel to, or as part of, supervised practice the applicant completes a CA PREP course involving online modules, potential in-person simulations and mini exams covering CAPA recommendations

OR

- CA Performance Test(s)

Appendix G: Options for Nonexam Pathways

NON-EXAM PATHWAY

options for consideration

Blue Ribbon Commission

ALL OPTIONS

Pathway-related assessments are designed and graded by State Bar

For the options that include supervised practice, supervisors are vetted and trained by State Bar

Minimum of 6 units of experiential training required in law school regardless of whether or not participating in pathway--anything modified or increased would be for pathway-participants only

Attorneys licensed through the non-exam pathway will meet all the other requirements for licensure in B&P §6060 (including a positive moral character determination)

OPTION A

LAW SCHOOL REQUIREMENTS

Status quo program of legal education

6 units experiential: modified to reflect CAPA (skills and abilities)

SUPERVISED PRACTICE

750-1,500 hours post law school

ASSESSMENT

Summative capstone/portfolio at the conclusion of supervised practice hours

Licensed between 6-12 months after graduation

OPTION B

LAW SCHOOL REQUIREMENTS

Non-Exam pathway introduced during law school with expanded doctrinal and experiential education requirements modified to reflect CAPA (skills and abilities)

SUPERVISED PRACTICE

750-1,500 hours post law school

ASSESSMENT

Summative capstone/portfolio at the end of the supervised practice hours

Licensed 6-12 months after graduation

OPTION C

LAW SCHOOL REQUIREMENTS

Status quo program of legal education (no modification of the existing experiential education requirement)

SUPERVISED PRACTICE

750-1,500 hours post law school

ASSESSMENT

Summative capstone/portfolio after supervised practice hours

Licensed 6-12 months after graduation

OPTION D

LAW SCHOOL REQUIREMENTS

Non-Exam pathway introduced during law school with expanded doctrinal and experiential education requirements modified to reflect CAPA (skills and abilities)

ASSESSMENT

Summative capstone/portfolio (handed in immediately post law school)

Licensed 4-6 months after graduation

OPTION E

LAW SCHOOL REQUIREMENTS

Status quo program of legal education (no modification of the existing experiential education requirement)

SUPERVISED PRACTICE

750-1,500 hours post law school

ASSESSMENT

Practice Readiness Education Program (online modules, in-person workshops, simulated law firm, in-person capstone) to be completed concurrently with supervised practice period

Licensed 6-12 months after graduation

OPTION F

LAW SCHOOL REQUIREMENTS

Status quo program of legal education

6 units experiential: modified to reflect CAPA (skills and abilities)

ASSESSMENT

Practice Readiness Education Program (online modules, in-person workshops, simulated law firm, in-person capstone)

Licensed 4-6 months after graduation

OPTION G

LAW SCHOOL REQUIREMENTS

Status quo program of legal education

6 units experiential: modified to reflect CAPA (skills and abilities)

SUPERVISED PRACTICE

750-1,500 hours post law school

ASSESSMENT

2 Performance Tests (same timing as the bar exam)

Licensed 5-10 months after graduation

OUTSTANDING QUESTIONS

Is the non-exam pathway open to all law school types?

What is the process for State Bar certification of curriculum (any doctrinal and/or experiential requirements)?

Is there a non-exam pathway for:

- Out-of-state law school applicants?
- Out-of-state attorney applicants?
- Foreign JD/educated?

Options for phasing in pathway?