



# The State Bar of California

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## **OPEN SESSION AGENDA ITEM 701 MAY 2023**

**DATE:** May 18, 2023

**TO:** Members, Board of Trustees

**FROM:** Audrey Ching, Admissions Director, Office of Admissions  
Amy C Nuñez, Assistant Director, Office of Admissions

**SUBJECT:** Recommendations from the Blue Ribbon Commission: Request for Adoption Following Public Comment and Transmission to the Supreme Court for Approval

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### **EXECUTIVE SUMMARY**

On July 16, 2020, the Board of Trustees approved a draft charter for a joint Supreme Court/State Bar of California Blue Ribbon Commission on the Future of the Bar Exam (BRC). The Board proposed that the commission would review the results of the California Attorney Practice Analysis (CAPA) and recommendations raised by the CAPA working group, the results of the 2020 National Conference of Bar Examiners practice analysis, and additional recent State Bar studies conducted on the bar exam, for the purpose of developing recommendations for the Board and the California Supreme Court regarding the bar exam and possible bar exam alternatives. In October 2020, the Supreme Court adopted the final charter, and in April 2021, announced the membership of the Blue Ribbon Commission. This agenda item requests that the Board (1) approve the final report and recommendations of the BRC; (2) recommend that the Supreme Court adopt the report and its recommendations; and (3) thank the members of the BRC for their work since they first began meeting in July 2021, nearly two years ago.

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### **BACKGROUND**

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 BRC was tasked with developing recommendations concerning changes to make to the California Bar Exam, and whether to adopt alternative pathways, additional testing, or tools to ensure minimum competence to practice law.

The California Supreme Court announced the appointment of the members of the Blue Ribbon Commission (BRC) on April 27, 2021, and the commission met for the first time on July 6, 2021. The BRC met both in subcommittees and as a full committee 19 times through April 2023.

Initial BRC meetings centered on orienting the commission on the current state of attorney licensing in California which involved learning about the content and format of the California bar exam; the current dependency on the National Conference of Bar Examiners' (NCBE) Multistate Bar Exam (MBE); the impact of the pass rate on diversity of the bar; and the changing demographic profiles of exam applicants. The commission reviewed 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 content and format of a Uniform Bar Exam (UBE); and the results of additional recent studies on the California Bar Exam conducted by the State Bar—including data examining the pass rates of various applicant types. The commission also heard multiple presentations from a variety of jurisdictions with alternative licensing pathways for attorneys, including various forms of supervised practice. The commission consulted with psychometricians, scholars in the legal education and licensing fields, administrators from the medical licensing industry, and the NCBE to explore potential licensing models for California.

After months of presentations, discussion, and deliberation the commission convened in February 2023 to approve the draft report, which highlighted the commission's recommendations and the information presented to the commission that led them to settle on those recommendations.

The report was circulated for a 30-day public comment period, after which the commission reconvened to explore what changes should be made to finalize the report for submission to the Board and the Supreme Court.

## **DISCUSSION**

The Board of Trustees and the California Supreme Court charged the commission to develop recommendations around two key issue areas: (1) whether California should develop its own bar examination, and if so, what should be tested on that exam; and (2) whether California should pursue alternatives to a traditional bar exam to determine minimum competence. Starting with its first meeting in July 2021, the commission explored and debated various issues around those topics to arrive at draft recommendations for the Board and the Court. The commission circulated the report for a 30-day public comment period, during which it received more than 1,400 comments from 867 commenters. At its final meeting on April 26, 2023, the commission explored key issues that were raised by the commenters and made slight modifications to their recommendations<sup>1</sup> as found in the attached report. The final report, included as Attachment A to this agenda item, incorporates the revised recommendations as

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<sup>1</sup>The agenda item highlighting issues the commission considered can be accessed [here](#). The public comment received can be accessed [here](#).

well as the information presented to the commission that contributed to their thinking on these important issues.

## **EXAM PATHWAY**

The commission analyzed criticisms of current bar exams, the NCBE's plans for its NextGen bar exam, and explored advantages and disadvantages of developing a California exam or adopting the NextGen exam. After having considered a wealth of information, and hearing from numerous experts, the commission overwhelmingly recommended:

- The development of a California exam to assess minimum competence.
  - The commission did not recommend adopting the NCBE's NextGen bar exam.
- That CAPA's recommendations on the eight legal topics to be included in the new bar exam be adopted:
  - Administrative Law and Procedure;
  - Civil Procedure;
  - Constitutional Law;
  - Contracts;
  - Criminal Law and Procedure;
  - Evidence;
  - Real Property; and
  - Torts.

After receiving a significant amount of public comment questioning the exclusion of Professional Responsibility, the commission recommended adding Professional Responsibility as a ninth topic to test subsequent to the public comment period.

- That CAPA's recommendations for the skills to be tested on the new exam be adopted:
  - Research and Investigation;
  - Issue-spotting and Fact-gathering;
  - Counsel/Advice;
  - Litigation;
  - Communication and Client Relationship; and
  - Negotiation and Dispute Resolution.

A topic that came out of the commission debates about whether the current bar exam is an effective means for determining minimum competence was whether California should liberalize its rules on admission of attorneys from other jurisdictions. Currently, California requires all applicants for admission to sit for the bar exam; attorneys licensed in other jurisdictions are not exempt from this requirement. The commission debated issues of comity (allowing out-of-state attorneys to be admitted in California without sitting for a bar exam, even if California attorneys are not treated similarly) and reciprocity (requiring mutual treatment of licensed attorneys) and the reasons for the current restrictive requirements, and generally recommended that California pursue reciprocity with other jurisdictions. However, to ensure that all California licensed attorneys are treated fairly regardless of the path to licensure chosen, the commission recommended that reciprocity must mean that all California licensed attorneys regardless of how they have met their legal education requirement (i.e., attended an American Bar

Association (ABA) accredited law school, a non-ABA law school, or participated in Law Office Study) have the opportunity to be admitted to practice in another state without sitting for the bar exam. California would treat out-of-state licensed attorneys similarly.

### **EXAM ALTERNATIVE**

The commission considered presentations from other U.S. jurisdictions as well as several Canadian jurisdictions that have adopted alternative pathways to admission that do not require a traditional bar exam. Some of these alternatives are in their formative stages, others have been in place for a considerable amount of time. The commission engaged in robust debates on the topic over the course of multiple meetings and ultimately did not have the votes to adopt a recommendation—one way or the other—about an alternative path to licensure.

### **CONCLUSION**

Staff recommends that the Board approve the BRC’s final report and recommendations and recommends that the Supreme Court adopts the report and its recommendations.

### **FISCAL/PERSONNEL IMPACT**

Developing a new California bar exam will require significant financial and staffing resources. The exam development timeline will require that the current bar exam remain in place while the new exam is being developed. Given the fact that the Office of Admissions is funded entirely by application fees, an alternative funding source for exam development will need to be explored.

The costs of exam development will be offset in the long-run by the discontinuation of the current per applicant fees paid to NCBE; in addition, the State Bar will be able to explore lower-cost exam delivery models, such as remote administration, when it ends its relationship with the NCBE.

### **AMENDMENTS TO RULES**

None

### **AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL**

None

### **STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS**

Goal 2. Protect the Public by Enhancing Access to and Inclusion in the Legal System

- a. 2. Revise admissions requirements to be more relevant to the practice of law in alignment with the recommendations of the Blue Ribbon Commission on the Future of the Bar Exam.

## **RECOMMENDATIONS**

**Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:**

**RESOLVED**, that the Board of Trustees approve the Final Report and Recommendations of the Blue Ribbon Commission; and it is

**FURTHER RESOLVED**, that the Board direct staff to transmit the Final Report and Recommendations of the Blue Ribbon Commission to the Supreme Court with a recommendation to adopt the report and its recommendations.

## **ATTACHMENT LIST**

- A.** Final Report and Recommendations of the Blue Ribbon Commission on the Future of the California Bar Exam



# The State Bar of California

ATTACHMENT A

## **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.”<sup>1</sup> 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.”<sup>2</sup> (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.

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<sup>1</sup> 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.

<sup>2</sup> [https://newsroom.courts.ca.gov/sites/default/files/newsroom/2020-10/October%2026%2C%202020\\_LTR%20SB%20BLUE%20RIBBON%20copy.pdf](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.<sup>3,4</sup>

**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.<sup>5</sup>

**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.

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<sup>3</sup> 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.

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

<sup>5</sup> 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.<sup>6</sup>

**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.<sup>7</sup>

**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.

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<sup>6</sup> The breakdown of votes by commissioner can be found here:

<https://board.calbar.ca.gov/Agenda.aspx?id=16704&tid=0&show=100032993>.

<sup>7</sup> 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.<sup>8</sup>

### **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

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<sup>8</sup> 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.<sup>9</sup>

**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.<sup>10</sup>

**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.<sup>11</sup>

**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.

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

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

<sup>11</sup> 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.<sup>12</sup>

**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.<sup>13</sup>

## 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.<sup>14</sup> 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<sup>15</sup>:

- *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*<sup>16</sup>
- *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

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

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

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

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

<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup> 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*.<sup>19</sup>

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.<sup>20</sup> 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.”<sup>21</sup>

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

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<sup>17</sup> 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>.

<sup>18</sup> 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.”

<sup>19</sup> 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>.

<sup>20</sup> This survey was conducted by the National Conference of Bar Examiners.

<sup>21</sup> 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<sup>22, 23</sup>

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

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<sup>23</sup> 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.<sup>24</sup> 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
<b>Justice Patricia Guerrero, Chair</b>	Judges
<b>Joshua Perttula, Vice-Chair</b>	State Bar Board of Trustees
<b>Susan Bakhshian</b>	Law School Deans/Faculty
<b>David Boyd</b>	NCBE Testing Task Force
<b>Alex Chan</b>	Committee of Bar Examiners
<b>Ona Dosunmu</b>	California Lawyers Association
<b>Charles Duggan</b>	California Lawyers Association/Young Lawyer
<b>Jackie Gardina</b>	CAPA Working Group
<b>Ryan M. Harrison, Sr.</b>	Council on Access and Fairness
<b>Dr. James Henderson</b>	National Expert on Examinations
<b>Esther Lin</b>	Committee of Bar Examiners
<b>Dr. Tracy Montez</b>	Department of Consumer Affairs
<b>Judge Glen Reiser (Ret.)</b>	Judges
<b>Natalie Rodriguez</b>	Law School Deans/Faculty
<b>Judge Kristin Rosi</b>	Council on Access and Fairness
<b>Emily Scivoletto</b>	CAPA Working Group
<b>Karen Silverman</b>	Expert: Exam Software, Security, and Privacy
<b>Mai Linh Spencer</b>	Law School Deans/Faculty
<b>Amy Williams</b>	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
<b>Joshua Perttula, Chair</b>	State Bar Board of Trustees
<b>Susan Bakhshian</b>	Law School Deans/Faculty

<sup>24</sup> 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>.



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

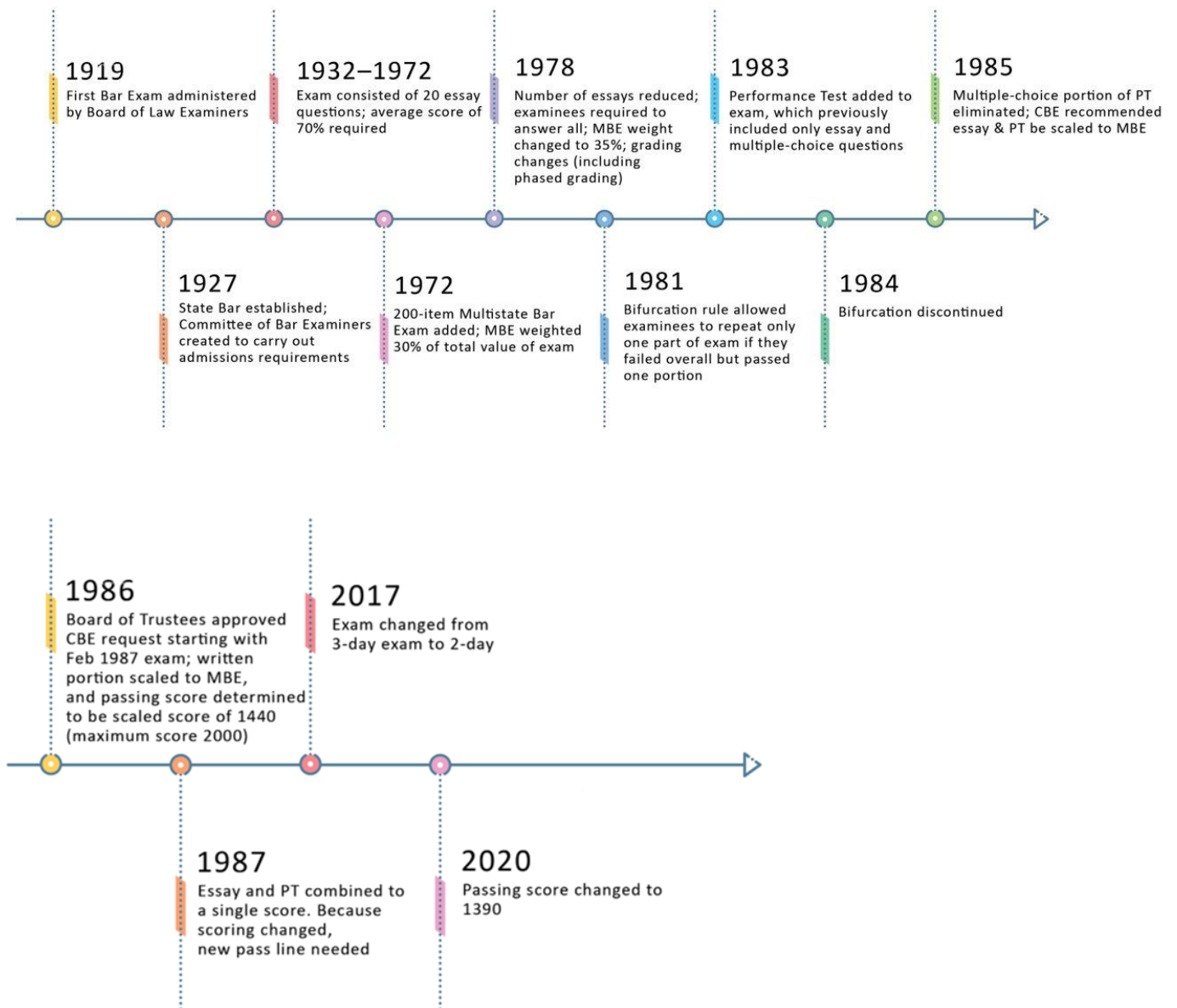
## **THE BAR EXAMINATION AS A MEASURE OF MINIMUM COMPETENCE**

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.<sup>25</sup> 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,<sup>26</sup> 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

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<sup>25</sup> 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>.

<sup>26</sup> 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).<sup>27</sup>

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

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<sup>27</sup> 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.<sup>28</sup>

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<sup>29</sup> 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).<sup>30</sup> 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,

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<sup>28</sup> 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>

<sup>29</sup> 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.

<sup>30</sup> 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.<sup>31</sup>

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.

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<sup>31</sup> 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.”<sup>32</sup> 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.

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<sup>32</sup> 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>.

## 12 Building Blocks

- 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

## 10 Recommendations

- RECOMMENDATION ONE: Written exams are not well suited to assessing all aspects of minimum competence. Where written exams are used, they should be complemented by other forms of assessment.
- RECOMMENDATION TWO: Multiple choice exams should be used sparingly, if at all.
- RECOMMENDATION THREE: Eliminate essay questions from written exams and substitute more performance tests.
- RECOMMENDATION FOUR: If jurisdictions retain essay and/or multiple choice questions, those questions should be open book.
- RECOMMENDATION FIVE: Where written exams are used, provide more time for all components.
- RECOMMENDATION SIX: Candidates for licensure should be required to complete coursework that develops their ability to interact effectively with clients.
- RECOMMENDATION SEVEN: Candidates for licensure should be required to complete coursework that develops their ability to negotiate.
- RECOMMENDATION EIGHT: Candidates for licensure should be required to complete coursework that focuses on the lawyer’s responsibility to promote and protect the quality of justice.
- RECOMMENDATION NINE: Candidates for licensure should be required to complete closely supervised clinical and/or externship work.
- RECOMMENDATION TEN: A standing working group made up of legal educators, judges, practitioners, law students, and clients should be formed to review the 12 building blocks and design an evidence-based licensing system that is valid, reliable, and fair to all candidates.

### **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<sup>33</sup>:

- 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;

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<sup>33</sup> 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 perform 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).<sup>34</sup>

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

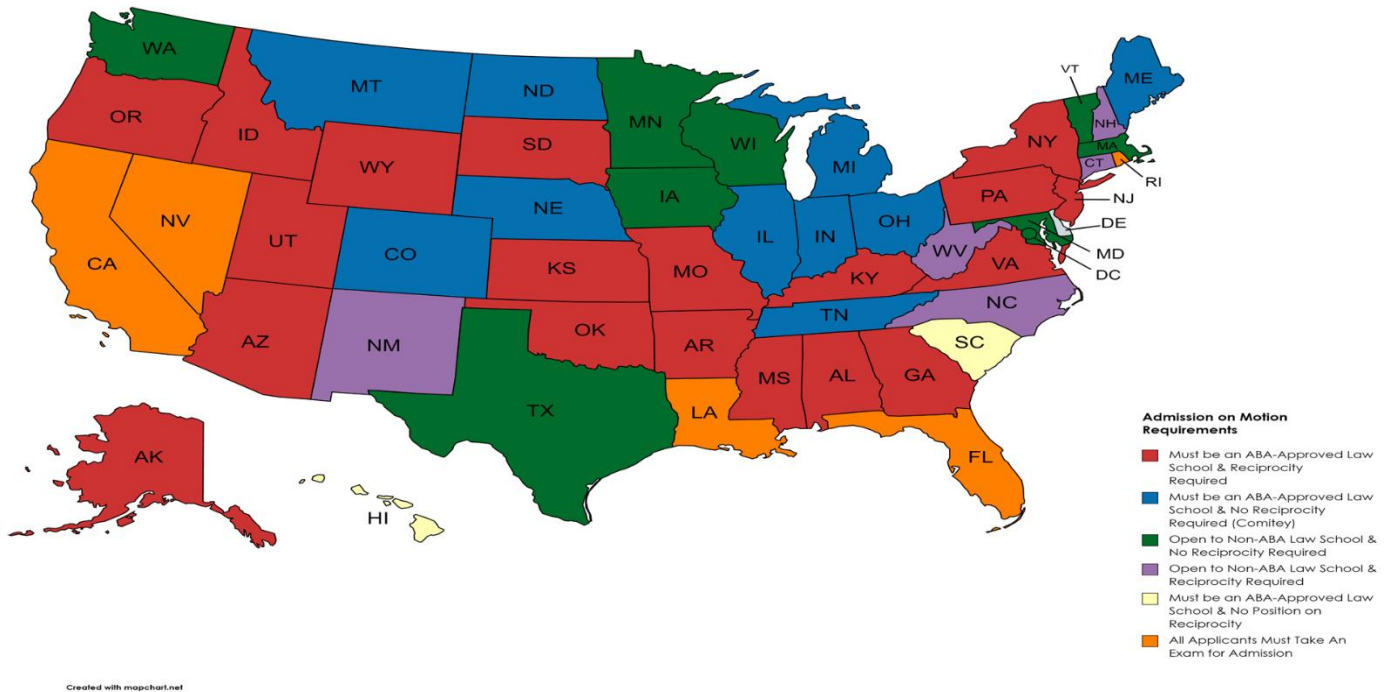
Comity is largely the same as reciprocity, but it is one-way. Approximately 16 states permit attorney applicants the ability to be admitted on motion, despite the fact that the jurisdiction the attorney applicant comes from does not offer that privilege to attorneys licensed in their state. There are 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).

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<sup>34</sup> 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<sup>35</sup> or registered with the State Bar<sup>36</sup> 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

<sup>35</sup> There are currently 17 California Accredited Law Schools operating in California.

<sup>36</sup> 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.<sup>37</sup>

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.

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<sup>37</sup> 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<sup>38</sup> and experiential education<sup>39</sup> 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

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<sup>38</sup> 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).

<sup>39</sup> 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 <sup>40</sup>	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.<sup>41</sup> 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

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<sup>40</sup> 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.

<sup>41</sup> 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<sup>42</sup>; (3) satisfactorily complete no fewer than 60 credits in elective subject matter areas<sup>43</sup>.

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<sup>42</sup> 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.

<sup>43</sup> 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<sup>44</sup> at some point since the 1800s, only Wisconsin continues to offer this licensure option.<sup>45</sup> (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)<sup>46</sup>, 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

<sup>44</sup> California stopped granting diploma privilege in 1917.

<sup>45</sup> The Utah, Washington, Oregon, Louisiana, and D.C. Supreme Courts did provide pandemic-related, limited-diploma privilege to 2020 graduates of ABA law schools.

<sup>46</sup> 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.	
<b>British Columbia</b>	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.
<b>Ontario</b>	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<sup>47</sup> 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.

<sup>47</sup> 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 and 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
<ul style="list-style-type: none"> <li>• Criteria for admission to the State Bar of California should be designed to ensure protection of the public.</li> </ul>	<p>Would a supervised practice component be scalable in California?</p> <ul style="list-style-type: none"> <li>• Would there be enough supervisors to meet demand?</li> <li>• Would the State Bar have the capacity to successfully monitor the program?</li> <li>• Would the State Bar have the ability to conduct portfolio reviews in a timely and fair manner?</li> <li>• How would supervisors be monitored for consistent quality of supervision?</li> <li>• Would supervisors potentially abuse their power and discriminate or harass supervisees?</li> <li>• Would we be able to ensure appropriate compensation for supervisees?</li> </ul>

<ul style="list-style-type: none"> <li>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.)</li> </ul>	<ul style="list-style-type: none"> <li>Would privileged applicants have an easier time finding a supervisor/easier access to a supervisor?</li> <li>Would applicants from lower socioeconomic backgrounds be unable to afford a lengthy supervised practice requirement?</li> <li>Would the quality of supervision vary to the extent that some applicants would be more prepared for any required assessment?</li> <li>Would the entire supervised practice period have to occur postgraduation?</li> <li>Should the length of the supervised practice period coincide with the length of time to get bar results after completion of law school?</li> </ul>
<ul style="list-style-type: none"> <li>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.</li> </ul>	<p>How would work product in varied placements be assessed in a valid, fair, and reliable way?</p>

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.<sup>48</sup> 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

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<sup>48</sup> 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.

[Legal Services Funders Network](#) provided a suggestion to pilot a supervised practice program. The pilot would limit the supervisory placements to IOLTA funded legal services organizations. The participants would need to be committed to <sup>49</sup> interest law.<sup>50</sup> 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,<sup>51</sup> Deborah Merritt provided the BRC with a suggested structure and sample tools for a supervised practice program:<sup>52</sup>

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.

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<sup>50</sup> See Business & Professions Code sections 6210–6228.

<sup>51</sup> 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.

<sup>52</sup> 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.	<ul style="list-style-type: none"> <li>• Additional open-book assessment(s).</li> <li>• Mini exams.</li> <li>• Performance tests.</li> </ul>

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.)

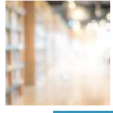
The three potential programs, reflected in Figures 1-3 below, had the following elements in common:

- 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:<sup>53</sup>



### 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.

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<sup>53</sup> 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<sup>54</sup> 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.

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<sup>54</sup> 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<sup>55</sup>

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).<sup>56</sup> 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

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<sup>55</sup> 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.

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

which applicants would pay nothing for their participation. For those applicants in the 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.<sup>57</sup> 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.<sup>58</sup>

**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 remuneration, 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.<sup>59</sup> For example, in one survey (“Pathways Evaluation”), LSO observed that 30% of the respondents did not receive any compensation during their work placement.<sup>60</sup> In another survey (“Articling Survey”), 10% of the respondents reported being paid less than \$20,000.<sup>61</sup> 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).<sup>62</sup>

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

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<sup>57</sup> 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](https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/2020-student-loan-survey.pdf).

<sup>58</sup> 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](https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/2021-student-loan-survey.pdf).

<sup>59</sup> *Ontario Paper* at 10-11.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

globe, and program participants likely participating in the supervised practice program from 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.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup>

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.<sup>66</sup> 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.<sup>67</sup> 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

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<sup>63</sup> See Report at 26.

<sup>64</sup> See Oregon Bar Examination - July 2022, available at [https://www.osbar.org/admissions/examresults\\_july2022.htm](https://www.osbar.org/admissions/examresults_july2022.htm).

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

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

<sup>67</sup> 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>.



occurs when a business expands faster than its capability to handle growth. When a company 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.<sup>68</sup>

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

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<sup>68</sup> Report at 35.

restricting program participants to only those interested in the public interest sector would only 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,<sup>69</sup> 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 disproportionately 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

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<sup>69</sup> About the NextGen Bar Exam, available at <https://nextgenbarexam.ncbex.org/>.

infrastructure), as I alluded to above, would do nothing to protect the public or serve our applicants.

#### **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),<sup>70</sup> 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.<sup>71</sup>

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

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<sup>70</sup> 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).

<sup>71</sup> 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.

often take years, as is evident from the NCBE's work on the NextGen exam. The Supreme Court 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 21<sup>st</sup> 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.<sup>42</sup>

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"),<sup>43</sup> 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<sup>344</sup> 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.<sup>45</sup>



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.<sup>46</sup> 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<sup>72</sup> 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.<sup>73</sup>

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<sup>74</sup> of preparing for the bar exam and stereotype threat.<sup>75</sup> 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

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<sup>72</sup> 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-bpg-national-summary-data-race-ethnicity-gender-fin.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2022/2022-bpg-national-summary-data-race-ethnicity-gender-fin.pdf).

<sup>73</sup> 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.

<sup>74</sup>

One law school advises its students to “plan on putting aside about \$5,800, not including living expenses.”

<sup>75</sup> 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<sup>76</sup>

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<sup>76</sup> 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

## **Appendix B: Commission Mission Statement**

## Appendix C: Oregon Task Force



## **Appendix D: Diploma Privilege, Wisconsin**

## Appendix E: Ontario--Options for Lawyer Licensing

## Appendix F: Draft Nonexam Framework

## Appendix G: Options for Nonexam Pathways