

# Alternative Pathways for Licensing Lawyers

Materials for AALS Gathering:

*Clinicians and Licensing*

## Assessing Minimum Competence: Alternatives to the Traditional Bar Examination

March 27, 2024

Several states have created—or are exploring the development of—bar examinations that differ from the standard written assessment. New Hampshire has a well-established pathway that allows students to collect portfolios of work product while engaged in supervised practice and simulations during law school. Bar examiners then assess those portfolios to determine whether the students have demonstrated minimum competence. Oregon has a small program, designed to remediate problems that arose during the February 2022 Oregon bar exam, that allows candidates to assemble portfolios of work product during post-graduate supervised practice. As in New Hampshire, bar examiners assess those portfolios to determine the candidate's competence.

Oregon's Supreme Court recently adopted a similar "Supervised Practice Portfolio Examination" as an option for all candidates in that state. Applicants to the Oregon bar will be able to elect that pathway starting in May 2024. Oregon is also developing an "Oregon Experiential Education Portfolio Exam" that would allow students at Oregon law schools to choose to demonstrate their competence by pursuing an experiential curriculum and submitting portfolios of work product to bar examiners.

When California lowered its bar exam cut score, the state's Supreme Court allowed exam takers who had failed the exam within the last five years—but achieved the new cut score—to demonstrate their competence by completing 300 hours of supervised practice under provisional licenses. That court is now considering creation of a pilot "Portfolio Bar Examination" that would allow other candidates to earn licenses by engaging in postgraduate supervised practice and submitting portfolios of work product to bar examiners for review. California's Committee of Bar Examiners and the State Bar's Board of Trustees have endorsed that proposal.

The Minnesota Supreme Court recently ordered creation of an implementation committee to develop a curricular-based pathway for assessing minimum competence. The committee is also authorized to explore development of a post-graduate supervised-practice pathway like the one in Oregon.

The Washington Supreme Court has "adopted in concept" recommendations for three different licensing paths rooted in experiential education or supervised workplace practice. An implementation committee will develop proposed rules governing these programs and submit them to the court for approval.

A group appointed by the Utah Supreme Court has proposed a more distinctive alternative to the traditional bar exam. Under that proposal, candidates would complete a mix of law school coursework, supervised practice (including 50 hours of pro bono work), a written performance test, and training modules focused on well-being and self-directed learning.

South Dakota is also considering a novel approach to licensing. At the Supreme Court's direction, the Board of Bar Examiners and Knudson School of Law (at the University of South

Dakota) are collaborating to develop a “streamlined pathway” for public interest lawyers to demonstrate their competence through a mix of required law school classes and qualifying externships. To start, this pathway would be open to just 10 students at Knudson and the participants would have to commit to working in public service for at least two years after graduation.

Task forces in Georgia, Massachusetts, and New York have expressed interest in licensing options like those described above, but less information is available about developments in those states.

All the above pathways would be options for candidates; the states described above plan to maintain a more traditional bar examination in addition to those pathways. The Nevada Supreme Court is considering a different approach: a three-part Comprehensive Licensing Examination required of all candidates. That exam would include: (1) a Foundational Law Exam, consisting of 100 multiple-choice questions testing knowledge of basic concepts in the seven subject areas currently tested on the Multistate Bar Exam (MBE); (2) a Lawyering Performance Exam, consisting of three 2-hour performance tests; and (3) a Supervised Practice requirement entailing 40-60 hours of supervised practice serving a pro bono client.

Nevada’s Foundational Law Exam would be administered four times a year at test centers, and candidates could take that exam while still enrolled in law school. The Lawyering Performance Exam would be administered twice a year; candidates would take that exam after graduation. The Supervised Practice requirement could be satisfied during law school (through qualifying clinics or externships) or after graduation with a variety of organizations. The Nevada Legal Aid Center of Southern Nevada will provide opportunities for candidates who are unable to find them elsewhere.

Further background about all the licensing initiatives noted here, as well as about supervised-practice programs adopted during the pandemic (Utah and the District of Columbia), is available at <https://lawyerlicensingresources.org/jurisdictions>, a website maintained by the Collaboratory on Legal Education and Licensing for Practice.

TO: Dean Niedwiecki

FROM: Working Group on Experiential Curricular Pathway to Bar Licensing

DATE: April 28, 2023

In January 2023, in response to the Minnesota Board of Law Examiner's competency study of the Minnesota bar licensing process, a working group of interested faculty and staff members formed at Mitchell Hamline to study the feasibility and desirability of developing an experiential curricular pathway. At that time, the Board of Law Examiners had issued a preliminary report suggesting an interest in developing a pilot program for a curricular pathway, and the Mitchell Hamline working group was focused on how Mitchell Hamline could develop such a pilot program within our curriculum.

The Mitchell Hamline working group included faculty members with teaching experience in both doctrinal and skills courses, including clinics, externships, and legal writing; staff members from our instructional design team with expertise in the development of rubrics to assess learning outcomes; and faculty and staff persons with leadership in career and professional development, lawyer formation, and in student affairs.

The group has met every other week since the end of January 2023. Beginning in February, our meetings also included two national experts on bar licensure, Joan Howarth and Deborah Merritt, who served as consultants to our group. We have reviewed materials from the Daniel Webster Scholars program in New Hampshire and examples of portfolio materials from the ongoing work in Oregon, which has already implemented a limited supervised practice pathway to bar licensure; has published a more permanent version of that program for public comment; and is developing a complementary curricular pathway to licensure.

In March, the Board of Law Examiners published recommendations from its competency study, including the recommendation that an implementation committee be formed with representatives from all three Minnesota law schools to further explore the development of an experiential curricular pathway. We support this recommendation, and it has shifted the focus of our working group to how we could memorialize and share some of the knowledge and general recommendations gained from our preliminary internal discussions in a way that might usefully frame some of the issues that an implementation committee would face.

We believe that an experiential curricular pathway would be both feasible and desirable as an alternative to the bar exam if developed in accordance with the following principles, which have emerged from our preliminary discussions:

- A curricular pathway should provide a genuine alternative to the bar examination by measuring the skills and competencies needed for entry-level practice.

- A curricular pathway should be based on bar examiners’ independent assessment of a portfolio of student work completed in already-existing experiential courses rather than requiring law schools to develop a sequence of new courses.
- A curricular pathway should address racial, ethnic, and gender disparities in bar licensing as if required by law.<sup>1</sup>
- Portfolio materials should be appropriately redacted to permit anonymous assessment of applicants’ work.
- Applicants should satisfactorily complete appropriate experiential and doctrinal coursework in law school.
- A pilot program should initially be limited in size and provide opportunities for interim feedback for applicants on their portfolio materials.

This report addresses these points and identifies additional issues that would need to be resolved in the development of a curricular pathway, including: (1) the skills and competencies to be assessed in an experiential curricular pathway; (2) what a portfolio of materials might include; (3) what curricular requirements should be required in addition to the portfolio; and (4) the kinds of infrastructural and student support that would be needed in a pilot project.

### **Skills and competencies**

The first step in developing an experiential curricular pathway would be to identify the skills and competencies that would be assessed to determine entry-level competence for law practice. The identification of these skills and competencies is important in establishing the validity and reliability of a licensing system based on portfolio review.<sup>2</sup>

The validity of an assessment method is defined by how closely the assessment criteria measure the skills and competencies that candidates should possess to competently practice law. The traditional bar licensing system requires applicants to demonstrate knowledge of substantive law through a test format that requires memorization of a diverse body of legal standards and performance under time pressure. Critiques of traditional bar examination licensing have noted that competent law practice differs from this assessment method in several ways. Rather than relying on memorized content of general knowledge under time pressure, law practice requires careful and thorough legal research of focused questions based on the law of a specific jurisdiction. Moreover, some skills required in entry-level practice go untested in a bar examination format, such as legal research and client management, advising, and counseling skills. These critiques go to the validity of the traditional bar examination format.

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<sup>1</sup> We draw this criterion from the “twelve guiding principles” for licensing in Joan W. Howarth, Shaping the Bar, Chapter 11, which is attached as an appendix. Although the racially disparate outcomes produced by traditional bar testing have survived Title VII scrutiny on grounds that they are not employment tests, Howarth argues that bar licensing systems apply rigorous self-scrutiny to the persistently disparate results produced by high-stakes testing.

<sup>2</sup> We are indebted to Deborah Merritt for her analysis of validity, reliability, and fairness in portfolio review assessments in an article that is forthcoming for publication in the Minnesota Law Review, which is attached as an appendix.

Because a portfolio review process would be based on assessing applicant work produced under conditions that more closely resemble entry-level law practice, it holds out the promise of producing a high level of validity. To validate the specific skills and competencies necessary for entry-level practice, an implementation committee would benefit from reviewing the work that has been conducted by the National Conference of Bar Examiners in their practice analyses and by the Institute for the Advancement of the American Legal System (IAALS) in their study and report, *Building a Better Bar*. The NCBE analysis was based on a nationwide survey of practicing lawyers, while the IAALS study drew on focus groups with newly licensed lawyers and supervisors. The two studies offer complementary insights into the kinds of tasks required in entry-level practice and provide an important baseline for entry-level competence.

As a result of the NCBE's validity analysis, the NCBE is in the process of revising the bar examination materials it produces and supplies to states. The NextGen bar examination will focus less on memorization and more on integration of legal knowledge and skills. Although these changes are welcome, the NextGen bar examination will still be a high-stakes test offered in a time-pressured setting, a format that has been shown to produce racially disparate outcomes. A licensing system based on the review of portfolio materials would move the assessment of entry level competence even closer to the aims of the NextGen bar examination by integrating knowledge and skills while avoiding the pitfalls that are likely to persist in any regime based solely on high-stakes testing.

In addition to being valid, an assessment method needs to be reliable. The reliability of an assessment method is its ability to produce the same results each time it is used. In a portfolio-based assessment, reliability can be achieved through assessment of the same underlying skills and competencies across numerous items in a portfolio and by different examiners who calibrate their assessments. Each piece of work in an applicant's portfolio would also need to be evaluated using standardized rubrics.

As an example of how this might be achieved, we reviewed Oregon's supervised practice rubrics for assessing minimum competencies in two types of practice-based written materials, client encounters, and negotiations, which we have included as an appendix. We think it would be feasible to create similar materials for a pilot project in Minnesota. At Mitchell Hamline, we have the benefit of an experienced instructional design department with expertise in developing rubrics that measure learning outcomes and align assessments of student work with course-level outcomes. Should an implementation committee be formed to develop materials for a pilot program, Mitchell Hamline would be well-positioned to assist in that effort.

## **Portfolio materials**

In our discussions, we considered what kind of work might be included in a portfolio, and we share our thoughts from these preliminary discussions.

Portfolio contents: To help standardize the evaluation of portfolio materials and to ensure that applicants can demonstrate a range of entry-level lawyering competencies, the implementation

committee will need to develop a content list for portfolio materials. We were impressed with the portfolio materials that are being developed for the supervised practice pathway in Oregon, and several features of those materials could be easily transferred to work produced by students while in law school. For example, the Oregon supervised practice portfolio requirements include:

- 8 pieces of written work that address a substantive legal matter and provide a prediction, recommendation, or conclusion;
- 2 client interviews or counseling sessions that are assessed by a supervisor; and
- 2 negotiations assessed by a supervisor.

This list of Oregon materials from the supervised practice pathway recognizes that an applicant's work product will occur in a particular legal setting that might be limited in the type of work that can be produced. Applicants in a curricular pathway, however, would have the opportunity to take law school courses that expose them to a broader range of experiences and produce a wider variety of types of work, such as:

- An example of persuasive advocacy (e.g. briefs, motions, petitions, oral arguments)
- An example of objective analysis (e.g. memos, letters/emails to clients)
- An example of transactional drafting (e.g. contracts, leases, or other documents with the force of law)

Work product from real-practice settings: In a curricular pathway, applicants would have the opportunity to submit coursework based on simulated practice assignments from legal writing courses, competitions, trial advocacy courses, or other courses like client counseling or negotiation. To demonstrate entry-level competence, however, applicant portfolios should include at least some material produced in a real practice setting, such as a clinic or an externship. Simulated problems created for classroom teaching or intermural competition are valuable for developing and demonstrating skills, but they are often constructed in simplified ways. To demonstrate entry-level competence, applicants should also demonstrate their ability to address the needs, interests, and values of an actual client in the context of the law of a particular jurisdiction.

We considered whether it might be possible for applicants to submit portfolio materials produced from non-curricular sources, such as part-time jobs, work as research assistants, or volunteer opportunities with the Minnesota Justice Foundation. We recommend that, at least in the pilot period, the source of real practice work product should be experiential coursework. The ABA has specific standards defining what counts as experiential coursework, which require that experiential courses “integrate doctrine, theory, skills, and legal ethics and engage students in performance of one or more . . . professional skills.”<sup>3</sup> These standards also require direct supervision of student work by a faculty member or externship supervisor, opportunities for feedback on student performance, and opportunities for reflection. Because Minnesota does not

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<sup>3</sup> ABA Standards for the Accreditation of Law Schools, Standard 304(a)(1).

yet have a program for recruiting and training supervisors in a supervised practice pathway, the pilot program would benefit from using the existing framework for supervision and feedback in the ABA standards.

We also discussed the client confidentiality issues of including materials from real practice settings. In the Oregon supervised practice materials, this protection is accomplished through client consent, redaction, and conflict checking to ensure that bar examiners have not been involved in the matter from which portfolio materials are submitted.

Contextualizing the work product: To properly evaluate portfolio materials, bar examiners should be able to understand the materials in the context in which they were produced. This can be accomplished by requiring that portfolios include contextual materials, such as an overview memorandum addressing the applicant's learning plan; a description of the applicant's coursework and experiential learning experiences; and where/how the applicant's materials demonstrate each of the entry level skills or competencies specified in the pathway.

Each example of work in the portfolio might also include a cover memo explaining the context in which it was produced, and the steps taken in producing it. For example, cover memos in the Oregon supervised practice materials include questions to provide context for practice-based work product, such as:

- What is the purpose of this work product? How does it fit within your overall strategy for the matter?
- List 3-5 legal rules, principles, or practices that you needed to know to complete this work product. Then note how you acquired knowledge of each rule, principle, or practice.
- How did you acquire the factual information you needed to complete this work product?
- Did you rely on a sample or template to create this work product? If so, why did you choose that sample or template? What challenges did you face in adapting the sample or template to your project?

Portfolio materials might also include supervisor evaluations of the work, which can be used both to authenticate that the work product was completed by the applicant and to attest that it demonstrates accurate legal analysis. Portfolio materials might also include reflective memos written by the applicant, particularly for portfolio materials like client interviews, client consultations, and negotiations.

Redaction to permit anonymous assessment: When we first began discussing what a portfolio might include, we considered including materials such as law school transcripts, a resume, and recordings demonstrating the applicant's skills, such as recorded direct or cross-examinations or oral arguments. However, to ensure fairness in the bar admission process, we became mindful of the ways in which the identities of the applicants would need to be protected. We discussed how this might be accomplished through redaction of work product materials to remove identifying



information; transcription of oral work product; and law school certification that curricular requirements had been met.

### **Curricular requirements**

In addition to the portfolio of work product demonstrating skills and competencies, a curricular pathway should include some basic distribution requirements in the applicants' coursework that ensure that the applicant has successfully completed experiential and doctrinal courses of an appropriate range and depth.

Experiential coursework: To demonstrate depth of experiential learning, one of our national experts has recommended that a curricular pathway should include at least 15 credits of experiential coursework, 6 of which would involve direct client work in clinics or externships.<sup>4</sup> Fifteen credits is roughly the equivalent of one semester of law school, and would represent approximately 675 hours of experiential coursework, 270 hours of which would be earned through direct client work in supervised practice settings of clinics or externships. Current ABA standards require that all law school graduates take at least 6 experiential credits, which can be earned through any combination of simulation courses, clinics, or externships.<sup>5</sup> This pathway would more than double that baseline requirement.

The requirement of fifteen experiential credits is consistent with the requirement that applicants in Oregon's supervised practice pathway complete 675 hours of supervised practice and the curricular requirements in the Daniel Webster Scholars program. The Daniel Webster Scholars program is based on a specialized track of simulation courses that cover trial advocacy, transactional drafting, negotiations, and client counseling, which the Daniel Webster scholars complete over the course of two years in law school. In addition to these simulation courses, the program requires six credits of a clinic residency.

Although the Daniel Webster Scholars program has demonstrated success,<sup>6</sup> we would not recommend creating a similarly specialized track of coursework for Minnesota applicants on a curricular pathway. The Daniel Webster Scholars program was created in 2005 at a time when the ABA experiential education requirements were lower and when law schools offered fewer experiential courses. Each law school in Minnesota already offers a robust menu of experiential courses to its students. It would be unduly burdensome for each law school in Minnesota to create a specialized track of classes for applicants rather than permitting applicants to utilize already-existing curricular opportunities to meet an experiential education requirement.

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<sup>4</sup> Joan Howarth, Shaping the Bar, Chapter 13.

<sup>5</sup> Mitchell Hamline currently meets this requirement through two 3-credit courses: Advocacy (which teaches basic advocacy skills) and either Transactions & Settlements or Negotiation (each of which teaches basic problem-solving skills).

<sup>6</sup> The IAALS conducted a study showing that Daniel Webster Scholars outperformed lawyers who had been licensed through a bar exam. Their study is published in a monograph entitled Ahead of the Curve: Turning Law Students into Lawyers.

We considered whether an experiential education requirement—particularly the requirement of direct client experience in clinics or externships—might create a barrier to our part-time students, who often combine law school with full-time jobs. To complete 6 credits of clinics or externships, applicants would need to invest a total of 270 hours of time in supervised practice.<sup>7</sup> Our experience in developing clinic and externship opportunities for part-time students in our blended program indicates that many part-time students are able to find the flexibility in their schedules to complete experiential coursework despite the other demands on their time. Moreover, because studying for the bar examination also requires a significant investment of hours during a relatively short period of time,<sup>8</sup> part-time students may appreciate the option to invest the time in experiential coursework and supervised practice that could be spread over multiple semesters and summers rather than concentrated in a comparatively limited span of time for bar review.

Doctrinal coursework: In creating the NextGen bar examination, the National Conference of Bar Examiners has refined the scope of its bar-tested content, cutting back on bar-tested doctrine and expanding its testing of foundational skills. A portfolio assessment method would be consistent with the integrated format adopted by the NextGen bar examination of testing foundational knowledge within the context of demonstrating foundational skills. However, a curricular pathway could also include certification that applicants successfully complete coursework in defined areas of foundational knowledge.<sup>9</sup>

Most of the foundational knowledge content tested on the bar examination is covered in required first-year courses in law school, and students must successfully complete them to advance in their legal studies. For example, in their first year of law school, Mitchell Hamline students complete required courses in criminal law, torts, civil procedure, contracts, property, and constitutional law.<sup>10</sup> A curricular pathway could include a requirement that students complete a slightly longer list of required courses that track all the areas of foundational knowledge tested on the bar examination. For example, to complete coursework that covers the newly designed doctrinal content scope, Mitchell Hamline students would need to take three 3-credit courses beyond what is currently required for graduation: Evidence, Constitutional Criminal Procedure, and Business Associations.<sup>11</sup>

We discussed what it would mean to “successfully complete” required doctrinal coursework. For example, to remain in good academic standing, Mitchell Hamline students must maintain a 2.2

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<sup>7</sup> Consistent with ABA standards for in-class and out-of-class time per credit, Mitchell Hamline requires students in clinics and externships to log 45 hours for each academic credit.

<sup>8</sup> Most bar preparation programs suggest 500-600 hours of study over the course of two months.

<sup>9</sup> The NextGen bar examination has designated eight subject matter areas as foundational knowledge: business associations and relationships; civil procedure; constitutional law; contracts; criminal law and constitutional protections of accused persons; evidence, real property, and torts.

<sup>10</sup> Part-time students complete these courses over the first three semesters of law school.

<sup>11</sup> Depending on content coverage in our two constitutional law courses, students might also need to take Administrative Law.

GPA, which is between a C and C+ average. To demonstrate minimum competence, it seems appropriate to require that level of performance in the courses designated as foundational content scope courses. We discussed whether students should be required to earn at least a C or C+ in each of the classes on the list. However, we noted that this might preclude students who have a difficult time during their first year of law school but are subsequently able to gain and maintain good standing in law school. Many of our students are the first generation in their family to graduate from college, and it sometimes takes time for them to understand and adjust to the expectations of law school. As noted above, success in bar-style assessments requires skills of memorization and performance under time pressure that do not correlate well with entry level law practice. We would not want an unduly high standard of performance on law school exams, which also test memorization and performance under time pressure, to hinder applicants' ability to pursue a pathway to licensure that is designed to provide an alternative measure of entry level competence. And, as members of our working group noted, not even the bar examination requires an applicant to demonstrate minimum competence in each doctrinal area of law; it scores applicants based on their overall performance across multiple subjects.<sup>12</sup>

As discussed above, we are mindful of the need for anonymous review of applicant materials, which would preclude the use of law school transcripts to authenticate successful completion of specified coursework. An implementation committee, however, could define uniform standards for required experiential and doctrinal coursework so that a law school could certify that applicants had met the standards through the curriculum offered at their law school.

### **Infrastructural and student support**

We recognize that a pilot program for a curricular pathway will be a learning experience for the law schools and for the Board of Law Examiners. Even a thoughtful and comprehensive planning process is unlikely to anticipate every issue that will arise in the process of implementation. We therefore recommend that the initial applicant pool be limited in size and that there be systems developed to facilitate regular communication between the law school and the Board of Law Examiners.

Within the law school, we recommend that a person be designated as the liaison or coordinator of the licensing pathway. Our current bar passage support includes academic advising about coursework, student affairs counseling about character and fitness review, and bar passage tutoring and support. We anticipate that an additional type of academic advising will be necessary to support students' choices about what experiential courses to take so that they will produce the work product necessary for a strong portfolio. We also anticipate that support will be needed to assist students in compiling and appropriately redacting their portfolio materials.

From the Board of Law Examiners, we recommend that a system be developed for interim review of portfolio materials so that students can be properly advised about the appropriateness of the

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<sup>12</sup> For example, an applicant can pass the bar by scoring well overall, even if their score on questions testing a particular subject—like civil procedure—fell below minimum competence.

materials they are including in the portfolio. We note that interim review is part of the process in both the Daniel Webster Scholars program and the supervised practice pathway in Oregon.

Although adopting an experiential curricular bar licensing pathway will impose some costs on both participating law schools and the Board of Law Examiners, we believe that those costs will be relatively modest, especially if an experiential curricular pathway can be built on the basis of existing experiential courses. The current licensing system is expensive for students, who pay for bar preparation courses and forego income while studying for the bar exam. Investing modest sums in an alternative pathway can help to align licensing with entry-level practice, ease the financial burdens on law students, and make the legal profession more inclusive.

## **Conclusion**

We thank you for the opportunity to study the possibility of an alternative experiential curricular bar licensing pathway in Minnesota. We have learned a lot through this process, and we look forward to continuing to work on implementation if approved in Minnesota.

### Working Group on Experiential Curricular Pathway to Bar Licensing

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