

ENHANCING THE VALIDITY AND FAIRNESS OF LAWYER  
LICENSING: EMPIRICAL EVIDENCE SUPPORTING  
INNOVATIVE PATHWAYS

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ABSTRACT

A two-day written bar exam cannot test a prospective lawyer's ability to counsel clients, investigate facts, research novel issues, negotiate with adversaries, or perform other essential tasks. The conventional exam has also become a test of resources, favoring candidates who can afford to buy commercial prep courses and devote 8-10 weeks to full-time study. Cognizant of these flaws, several states have adopted—or begun exploring—other approaches to licensing. Oregon has already implemented a small program that allows some law graduates to demonstrate their competence by practicing under the supervision of a licensed attorney and compiling portfolios of work product from that supervised practice. Candidates submit those portfolios, which include materials related to client counseling and negotiation, to bar examiners for independent assessment. Starting in May 2024, the Oregon program will be available to more graduates. Other states are exploring similar approaches.

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This article provides the first empirical evidence that supervised practice offers a valid, feasible, and fair context for evaluating prospective lawyers' competence. Oregon's current program is too small to assess empirically, but two related programs in California offer a rich dataset about the potential for assessing prospective lawyers' competence through supervised practice. Our analyses, which draw upon qualitative and quantitative data from more than four thousand law graduates and licensed lawyers in California, demonstrate that: (1) Licensing programs rooted in supervised practice allow states to assess a broader range of lawyering skills and doctrinal knowledge than can be assessed on a two-day, written exam. (2) Candidates readily find supervisors, and both parties reap many benefits from the program. (3) Supervised practice is fully accessible to first-generation candidates, candidates of color, women, and candidates who live with disabilities. In fact, women of color, men of color, and white women were significantly more likely than white men to take advantage of California's supervised practice options. (4) Supervised practice licensing paths can expand access to justice by increasing the number of lawyers who work for legal services providers and in rural parts of a state.

Licensing paths rooted in supervise practice, in sum, are valid, feasible, and fair pathways that can protect the public better than a two-day written exam, make our profession more inclusive, and expand access to justice.

## INTRODUCTION

Scholars have written for decades about the bar exam's disparate impact on test-takers of color, examinees with disabilities, and candidates from low-income households.<sup>1</sup> At the same time, a growing chorus of stakeholders has criticized the bar exam for its weak validity: the exam does not effectively test the knowledge and skills that new lawyers most need to

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1. See e.g., JOAN W. HOWARTH, SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING 7–9 (2023) (discussing studies demonstrating long-standing racial disparities); ACCESSLEX INSTITUTE, ANALYZING FIRST-TIME BAR EXAM PASSAGE ON THE UBE IN NEW YORK STATE 16, 39 (2021), [accesslex.org/NYBOLE](https://perma.cc/27Q8-JV3R) [https://perma.cc/27Q8-JV3R] (discussing how income and needing to work impact bar passage); Wendy F. Hensel, *The Disability Dilemma: A Skeptical Bench & Bar*, 69 U. PITT. L. REV. 638, 642–43, 650 (2008) (discussing obstacles to bar admission among candidates with disabilities).

represent clients competently.<sup>2</sup> Why does our profession maintain a licensing path that is both inequitable and lacking validity? Until recently, the answer has been that there is no better way to measure minimum competence: stakeholders have worried that other approaches would admit unqualified candidates, lack reliability, cost too much, or even increase the inequities in our licensing system.<sup>3</sup>

A few states, however, have started questioning that traditional wisdom and exploring more promising pathways to licensure. One state already licenses candidates based on their work in a structured experiential curriculum, and at least four other states are considering that option.<sup>4</sup> Other states have created or are considering licensing paths that would grant licenses after law school graduates demonstrate their competence while practicing under supervision.<sup>5</sup> Advocates of these pathways urge that they measure more competencies than a written exam, and that they may reduce the bias in our profession's licensing process.<sup>6</sup> Skeptics argue that these pathways will be difficult to implement, fail to identify incompetent candidates, and increase bias.<sup>7</sup>

In this article, we present the first empirical data bearing on the validity, feasibility, and fairness of novel licensing paths. That data, drawn from California's Provisional Licensure Program, cannot answer all questions about new licensing formats. The data, however, provides substantial

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2. See *infra* Part I.B.

3. See, e.g., NAT'L CONF. OF BAR EXAM'RS, BAR ADMISSIONS DURING THE COVID-19 PANDEMIC: EVALUATING OPTIONS FOR THE CLASS OF 2020 3–7 (2020), [https://thebarexaminer.ncbe.org/wp-content/uploads/Bar-Admissions-During-the-COVID-19-Pandemic\\_NCBE-white-paper.pdf](https://thebarexaminer.ncbe.org/wp-content/uploads/Bar-Admissions-During-the-COVID-19-Pandemic_NCBE-white-paper.pdf) [<https://perma.cc/UTC5-XRDS>] [hereinafter NCBE BAR ADMISSIONS DURING COVID-19].

4. See *infra* Part I.C.

5. See *infra* Part I.C.

6. HOWARTH, *supra* note 1, at 110–17 (discussing benefits of requiring clinical residencies during or after law school); Deborah Jones Merritt, *Client-Centered Legal Education and Licensing*, 107 MINN. L. REV. 2729, 2753–58, 2763–77 (2023) (discussing increased validity and fairness of alternative licensing paths).

7. See, e.g., THE STATE BAR OF CAL., BLUE RIBBON COMM'N ON THE FUTURE OF THE BAR EXAM: REP. AND RECOMMENDATIONS (2023), <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000030806.pdf#page=6> [<https://perma.cc/N9KK-L6KG>] [hereinafter BLUE RIBBON COMM'N REPORT] (dissenting opinion of Alex Chan) (expressing concerns about the feasibility and inclusiveness of non-exam pathways); *id.* (dissenting opinion of Ryan M. Harrison, Sr.) (equity concerns); Jane Becker & Lorie King, *Is Passing the California Bar Exam necessary for admittance to the Bar?*, SANTA CRUZ CNTY. BAR ASS'N (Aug. 9, 2022), <https://www.santacruzbar.org/pass-california-bar-exam-necessary-for-admittance/> [<https://perma.cc/DEJ2-HFGV>] (feasibility and failure to identify incompetent candidates).

evidence that innovative formats can offer a valid measure of lawyering competence, are feasible, will improve equity in bar admissions, and will help diversify the legal profession. While our database does not provide information about reliability, our findings complement other research exploring the reliability of novel assessment methods.<sup>8</sup>

Based on our findings and related research, we urge jurisdictions to explore emerging methods of assessing prospective lawyers' competence and to establish pilot projects for that purpose. It is time to adopt rigorous licensing methods that better protect the public and make our profession more inclusive. We lay the groundwork for this argument in Section I, outlining the principles that guide responsible licensing, identifying the bar exam's flaws, describing alternative assessment methods used or contemplated by several jurisdictions, and listing our research questions. Section II explains our dataset, and Section III outlines our findings. Section IV discusses the impact of those findings for policymakers seeking a valid, feasible, and fair way to license prospective lawyers; notes limitations on our study; and suggests future research questions.

## I. BACKGROUND

### *A. Principles for Licensing*

Professional licensing systems attempt to protect the public from incompetent or unethical practitioners.<sup>9</sup> In this article, we focus on assessments designed to measure the former attribute, competence. Attempts to predict a candidate's potential for unethical behavior raise many troubling questions<sup>10</sup> but are beyond the scope of our discussion. For professions that wish to measure competence, psychometric principles

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8. See *infra* note 247 and accompanying text.

9. See, e.g., Brian E. Clauser, Melissa J. Margolis & Susan M. Case, *Testing for Licensure and Certification in the Professions*, in NAT'L COUNCIL ON MEASUREMENT IN EDUC. & AM. COUNCIL ON EDUC., EDUCATIONAL MEASUREMENT 701, 701-02 (Robert L. Brennan ed., 4th ed., 2006); NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/> (last visited October 12, 2023) ("The mission of the National Conference of Bar Examiners is to promote fairness, integrity, and best practices in admission to the legal profession for the benefit and protection of the public."). For a discussion of the ways in which the rhetoric of public protection has masked intentional barriers to the profession, see HOWARTH, *supra* note 1, at 3, 28, 121.

10. For a discussion of problems with the current character and fitness process and proposed solutions to those problems, see HOWARTH, *supra* note 1, at 79-98.

establish four requirements: the assessments must be valid, reliable, fair, and feasible.<sup>11</sup>

### i. Validity

Assessments are not inherently valid or invalid. Instead, validity depends upon the purpose for which an assessment is used. An assessment is valid when it offers a useful measure of the characteristic or trait that it claims to measure.<sup>12</sup> For example, a bathroom scale offers a valid measure of weight but not of competence to practice law. When licensing lawyers, regulators describe the necessary characteristic as possession of the knowledge and skills needed to perform as a “minimally competent” lawyer.<sup>13</sup> This threshold sounds worryingly low, but it signals the fact that we expect all lawyers to hone their knowledge and skills over time, developing more expertise as they practice. One way to understand the “minimally competent” threshold is to think of it as *the knowledge and skills needed to ensure that lawyers will not harm clients while continuing to develop their expertise*.

To establish the validity of a licensing process, therefore, regulators must identify essential competencies and then develop methods to measure them. This process poses numerous challenges. Professionals value excellence, so they may set the licensing threshold unrealistically high. They may also disagree about the specific knowledge and skills that new lawyers need to succeed. Most important, there are few (if any) independent measures of competence among licensed professionals. As a result, it is difficult to determine whether a licensing assessment adequately predicts competence. We can test the validity of a bathroom scale by assessing its performance with standardized weights, but there is no standardized unit of attorney competence that we can use to determine the validity of a licensing

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11. AM. EDUC. RSCH. ASS'N, AM. PSYCH. ASS'N & NAT'L COUNCIL ON MEASUREMENT IN EDUC., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 11–72 (2014) [hereinafter STANDARDS FOR TESTING] (discussing validity, reliability, and fairness); John J. Norcini & Danette W. McKinley, *Assessment methods in medical education*, 23 TEACHING & TEACHER EDUC. 239, 240 (2007) (feasibility).

12. Michael T. Kane, *Validating the Interpretations and Uses of Test Scores*, 50 J. OF EDUC. MEASUREMENT 1, 3 (2013) (“Validity is not a property of the test. Rather, it is a property of the proposed interpretations and uses of the test scores.”).

13. NCBE BAR ADMISSIONS DURING COVID-19, *supra* note 3, at 6 (arguing “the current exam is a valid measure of minimum competence for entry-level practice”).

process.

Instead, psychometricians rely upon more circumstantial evidence to establish the validity of licensing systems.<sup>14</sup> The claimed validity of the current bar exam rests principally on (1) practice analyses detailing the knowledge and skills that entry-level lawyers use in practice, and (2) judgments about which of these knowledge and skills should be included on the exam, made by subject-matter experts.<sup>15</sup>

### ii. Reliability

A reliable assessment is one that produces consistent results.<sup>16</sup> A reliable scale gives the same reading, regardless of when a weight is tested or who places the weight on the scale. Measures of human competence rarely reach that level of perfect consistency. Graders who evaluate candidates' writings or other performances may apply slightly different standards. Even if a licensing body relies primarily on multiple-choice questions, the difficulty of those questions may vary over time. Perfect consistency is unlikely in licensing, but we should be reasonably confident that a candidate who passes one version of an assessment would pass another version given at a different time or graded by a different examiner.<sup>17</sup>

### iii. Fairness

Fairness in assessment means that all test-takers have “the opportunity . . . to demonstrate their standing on the [competencies] the test is intended to measure,” without the interference of irrelevant conditions or

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14. See Kane, *supra* note 12, at 8–9 (explaining the evolution of this “argument-based approach to validation”); STANDARDS FOR TESTING, *supra* note 11, at 13–19 (discussing types of validity evidence).

15. See Joanne E. Kane & Andrew A. Mroch, *Testing Basics: What You Cannot Afford Not to Know*, 86 BAR EXAM’R 32 (2017) (describing NCBE’s 2011–2012 job analysis, which was “used in concert with the opinions of subject matter experts to shape the test blueprints and subject matter outlines” for the bar exam components designed by NCBE).

16. STANDARDS FOR TESTING, *supra* note 11, at 33 (reliability “refer[s] to the consistency of scores across replications of a testing procedure”). Psychometricians also use the word “reliability” in a more technical sense, to refer to a particular method of measuring consistency. *Id.* We use the word in its more general sense.

17. Candidates themselves may change over time, as their preparation increases or their memories fade. Reliability in testing means that a candidate’s score should not vary based on the exam version they take.

characteristics.<sup>18</sup> Biases in the test or test processes related to race, gender, sexual orientation, or disability should not affect the test results. Nor should a licensing assessment require expensive preparation that some candidates struggle to afford, beyond tuition paid for attaining the relevant degree.

#### iv. Feasibility

Feasibility means that the licensing authority can administer a valid, reliable, and fair assessment without imposing unreasonable burdens on itself or candidates.<sup>19</sup> Licensing authorities, however, should not be too quick to reject new methods as lacking feasibility. When considering the feasibility of new proposals, it is important to account for all costs of the status quo. Recognizing those costs may reveal that new methods are as feasible—or even more feasible—than existing methods.<sup>20</sup>

#### B. The Bar Exam

All United States jurisdictions rely upon a written bar exam to measure the competence of at least some candidates.<sup>21</sup> Thirty-nine states and the District of Columbia administer the Uniform Bar Exam (UBE), which is created by the National Conference of Bar Examiners (NCBE).<sup>22</sup> The remaining 11 states develop their own written exams, usually incorporating portions of the UBE.<sup>23</sup>

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18. STANDARDS FOR TESTING, *supra* note 11, at 51; *see also* Liesbeth K.J. Baartman, Theo J. Bastiaens, Paul A. Kirschner, & Cees P. M. van der Vleuten, *The Wheel of Competency Assessment: Presenting Quality Criteria for Competency Assessment Programs*, 32 *STUD. IN EDUC. EVALUATION* 153, 158 (2006) (“Fairness specifies that [an assessment process] should not show bias to certain groups of learners and [should] reflect the knowledge, skills and attitudes of the competency at stake, excluding irrelevant variance.”) (citations omitted).

19. Norcini & McKinley, *supra* note 11, at 240.

20. *See* C.P.M. van der Leuten, *The Assessment of Professional Competence: Developments, Research and Practical Implications*, 1 *ADVANCES IN HEALTH SCIS. EDUC.* 41, 62 (1996) (“[P]erceived resource intensive assessment methods turn out to be feasible in practice.”).

21. Two states, New Hampshire and Wisconsin, admit some candidates based on their work at in-state law schools but require candidates from other states to pass a bar exam.

22. For a description of the UBE and states that have adopted it, *see Uniform Bar Examination*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/ube/> [<https://perma.cc/RP6A-6S3R>] (last visited July 14, 2023).

23. *See Jurisdictions*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/jurisdictions> (listing which portions of the UBE each jurisdiction uses). Louisiana is the only state that does not use any of the three components of the UBE; it uses only NCBE’s separately developed Multistate

Scholars have long questioned the exams' validity.<sup>24</sup> Although NCBE has conducted at least two practice analyses aimed at identifying the knowledge and skills that new lawyers need to serve clients,<sup>25</sup> the UBE does not align well with those analyses. NCBE's research emphasizes the importance of lawyering tasks like legal research, fact investigation, client counseling, and problem solving,<sup>26</sup> but the UBE fails to test the key skills needed to perform those tasks. Conversely, the UBE requires extensive memorization of legal rules, despite research showing that memorization of these rules is unnecessary—and even dangerous—for entry-level law practice.<sup>27</sup> The speededness of the UBE further compromises its validity.<sup>28</sup> Finally, a lack of care in setting passing scores also weakens claims about the UBE's validity.<sup>29</sup> Similar flaws affect state bar exams that use only some NCBE materials rather than the full UBE.<sup>30</sup>

A nationwide study by independent scholars further underscores the mismatch between current bar exams and entry-level law practice. That

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Professional Responsibility Exam (MPRE). *Id.*

24. See, e.g., Andrea A. Curcio, Carol L. Chomsky & Eileen Kaufman, *Testing, Diversity, and Merit: A Reply to Dan Subotnik and Others*, 9 U. MASS. L. REV. 206, 222–44 (2014); DEBORAH JONES MERRITT & LOGAN CORNETT, BUILDING A BETTER BAR 3–4 (2020); Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931, 959 & n. 169 (2020); Marsha Griggs, *An Epic Fail*, 64 HOW. L. J. 1, 39 (2020).

25. Susan M. Case, *The Testing Column: The NCBE Job Analysis: A Study of the Newly Licensed Lawyer*, 82 BAR EXAM'R 52 (2013); KELLIE R. EARLY, JOANNE KANE, MARK RAYMOND, & DANIELLE M. MOREAU, PHASE 2 REPORT: 2019 PRACTICE ANALYSIS, (NCBE 2020) <https://nextgenbarexam.ncbex.org/reports/phase-2-report/> [<https://perma.cc/V84V-2FN2>].

26. EARLY, KANE, RAYMOND, & MOREAU, *supra* note 25, at 42.

27. MERRITT & CORNETT, *supra* note 24, at 37.

28. *Id.* at 64. “Speededness” refers to “[t]he extent to which test takers’ scores depend on the rate at which work is performed as well as on the correctness of the responses.” STANDARDS FOR TESTING, *supra* note 11, at 223. Measuring speed is appropriate in some contexts, such as when assessing a typist’s competence. The bar exam, however, does not purport to measure candidates’ speed in performing legal work. The time pressure felt by many candidates is a sign that the exam is inappropriately speeded. See generally HOWARTH, *supra* note 1, at 143–45.

29. Joan W. Howarth, *The Case for a Uniform Cut Score*, 42 J. LEGAL PRO. 69 (2017).

30. Those states (California, Delaware, Florida, Nevada, and Virginia) use the UBE’s multiple-choice questions but substitute state-drafted essays and/or performance tests for those used on the UBE. See *Jurisdictions*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/jurisdictions>. These state-drafted questions follow the same format as the UBE questions: they impose strict time limits, require test-takers to memorize a large swath of doctrinal law, and omit testing of the key skills noted above.

Louisiana drafts its own exam rather than using any of the UBE components. *Id.* The Louisiana exam focuses on the state’s distinctive legal doctrine, but it embodies the same flaws that mark the UBE. Louisiana does not test the key skills noted above, it imposes strict time limits, and it forbids use of any reference materials. *The Bar Exam*, LA. SUP. CT. COMM. ON BAR ADMISSIONS, <https://www.lascba.org/info/BarExam/>.

study convened 50 focus groups of new lawyers and supervisors in 18 locations across the country to explore entry-level law practice in detail.<sup>31</sup> Analysis showed that 12 interlocking building blocks define minimum competence to practice law:

- 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<sup>32</sup>

Current bar exams test fewer than half of these competencies, despite their importance in protecting clients.<sup>33</sup>

NCBE is developing a new exam, the “NextGen” bar exam, that will attempt to address some of these deficiencies.<sup>34</sup> The exam, however, will still require significant memorization—often of common-law rules that no

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31. MERRITT & CORNETT, *supra* note 24, at 13–20.

32. *Id.* at 31.

33. *Id.* at 71.

34. NAT’L CONF. OF BAR EXAM’RS, NEXTGEN BAR EXAM OF THE FUTURE: BAR EXAM CONTENT SCOPE 1–4 (2023), [https://nextgenbarexam.ncbex.org/pdfviewer/ncbe-nextgen-content-scope-may-24-2023/\[https://perma.cc/7KU7-L9SZ\]](https://nextgenbarexam.ncbex.org/pdfviewer/ncbe-nextgen-content-scope-may-24-2023/[https://perma.cc/7KU7-L9SZ]).

longer govern client matters.<sup>35</sup> It will also fail to test legal research and other skills effectively, despite the prominence of those skills in NCBE's practice analyses.<sup>36</sup> Concerns about speededness and setting the passing score also remain.<sup>37</sup>

In contrast to these validity issues, contemporary bar exams provide relatively high reliability. The large number of multiple-choice questions, regular equating, and the scaling of essay scores to multiple-choice outcomes all contribute to consistency over time.<sup>38</sup> As NCBE acknowledges, however, "perfect consistency across graders, essays, time, and administrations is challenging and, perhaps, unrealistic."<sup>39</sup> Scholars have noted numerous flaws in the exam's reliability based on changes in its content, variations in testing conditions, relative grading of essay answers, and the process for scaling essay scores to multiple-choice ones.<sup>40</sup> Reliability is a strength of current bar exams, but it is not ironclad.

Scholars have also questioned the bar exam's fairness, noting that it sharply favors white test-takers over examinees of color.<sup>41</sup> In 2021, the most recent year for which data is available, 84.91% of white examinees passed a bar exam on their first try, compared to 60.89% of Black examinees, 71.92% of Hispanic examinees, 78.54% of Asian examinees, and 76.14% of multiracial examinees.<sup>42</sup> These gaps, ranging from six to 24 percentage

35. *Id.* at 5–38 (noting with an asterisk the doctrinal rules that must be memorized).

36. NCBE will assess negotiation and client counseling skills only through analysis of transcripts and other written exercises. *Id.* at 2. Similarly, the NextGen exam will test research skills in a truncated manner, *id.* at 3, rather than give candidates access to electronic databases and other sources to perform research.

37. HOWARTH, *supra* note 1, at 143–5 (discussing ongoing problems with speededness and standard setting).

38. Mark A. Albanese, *The Testing Column: Equating the MBE*, 84 BAR EXAM'R 29 (2015) (equating); Mark A. Albanese, *The Testing Column, Let the Games Begin: Jurisdiction-Shopping for the Shopaholics (Good Luck With That)*, 85 BAR EXAM'R, 51, 51–52 (2016) [hereinafter *Let the Games Begin*] (number of questions and scaling).

39. *Let the Games Begin*, *supra* note 38, at 51.

40. See, e.g., Deborah J. Merritt, *Equating, Scaling, and Civil Procedure*, L. SCH. CAFE (Apr. 16, 2015), <https://www.lawschoolcafe.org/2015/04/16/equating-scaling-and-civil-procedure/> [https://perma.cc/LF3U-7KKY] (changes in content); Deborah J. Merritt, *ExamSoft: New Evidence from NCBE*, L. SCH. CAFE (July 14, 2015), <https://www.lawschoolcafe.org/2015/07/14/examsoft-new-evidence-from-ncbe/> [https://perma.cc/JH9C-8MZY] (variations in testing conditions); Suzanne Darrow-Kleinhaus, *A Reply to the National Conference of Bar Examiners: More Talk, No Answers, so Keep on Shopping*, 44 OHIO N.L. REV. 173, 175–83 (2019) (relative grading and scaling).

41. HOWARTH, *supra* note 1, at 7–9; Curcio, Chomsky & Kaufman, *supra* note 24, at 271–75.

42. AM. BAR ASS'N, LEGAL EDUC. & ADMISSIONS TO THE BAR, SUMMARY BAR PASS DATA: RACE, ETHNICITY, AND GENDER 2021 AND 2022 BAR PASSAGE QUESTIONNAIRE,

points, have persisted for at least 25 years and show little sign of narrowing.<sup>43</sup>

Bar exams also favor male candidates over female ones, although the gap is smaller than the one related to race and ethnicity.<sup>44</sup> Many candidates who live with disabilities also struggle with bar exams, although statistics about their pass rates are not readily available.<sup>45</sup> Finally, the time-intensive, expensive preparation for these exams produces lower pass rates for examinees who lack financial resources or shoulder caretaking responsibilities.<sup>46</sup> All of these issues undercut the fairness of existing bar exams, a fact that is particularly troubling in light of the exam's validity issues.

Bar exams, finally, are very expensive. Test-makers must continuously produce questions, vet those questions for bias, and subject them to pre-testing.<sup>47</sup> Jurisdictions must arrange for testing venues, proctors, and other

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[https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2022/2022-bpq-national-summary-data-race-ethnicity-gender-fin.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2022/2022-bpq-national-summary-data-race-ethnicity-gender-fin.pdf) [<https://perma.cc/M55X-8YGX>] [hereinafter ABA DATA].

43. See LINDA F. WIGHTMAN & HENRY RAMSEY JR., LSAC NAT'L LONGITUDINAL BAR PASSAGE STUDY, at viii (1998), <https://lawschooltransparency.com/reform/projects/investigations/2015/documents/NLBPS.pdf> [<https://perma.cc/MWA2-WHSB>] (showing, inter alia, eventual pass rates of 77.6% for Black candidates and 96.7% for white candidates); NAT'L CONF. OF BAR EXAM'RS, IMPACT OF ADOPTION OF THE UNIFORM BAR EXAMINATION IN N.Y. at 166 tbl.4.2.24 (2019), <https://www.nybarexam.org/UBEReport/NY%20UBE%20Adoption%20Part%202%20Study.pdf> [<https://perma.cc/GFT8-MMNA>] (finding that 68.5% of Black candidates passed and 90.1% of White candidates passed); CAL. BAR EXAMINATION STAT., <https://www.calbar.ca.gov/admissions/law-school-regulation/exam-statistics> [<https://perma.cc/EV2Z-587T>] (through clickable links, showing similar disparities from 2007–2023 across multiple racial and ethnic categories every year).

44. See DEBORAH JONES MERRITT, PUBLIC COMMENT TO THE STATE BAR OF CALIFORNIA 6 (2023) (calculating a gender gap of 4.4 percentage points in California and of 2.9 percentage points nationally) (on file with authors).

45. See generally Haley Moss, *Raising the Bar on Accessibility: How the Bar Admissions Process Limits Disabled Law School Graduates*, 28 AM. U. J. GENDER SOC. POL'Y & L. 537 (2020) (describing many hardships encountered by examinees who live with disabilities).

46. ACCESSLEX INSTITUTE, *supra* note 1, at 11, 15, 38 (significant time available for bar prep study, minimal work obligations, smaller household size, and higher household income positively correlate with first-time bar passage rates).

47. For descriptions of the processes that NCBE uses to write, review, and pre-test each component of the UBE, see Alexander W. Scherr, *Drafting MPT Items: Guiding Principles and Collaboraton*, 88 BAR EXAM'R 22 (Winter 2019-2020) (performance tests); Sheldon F. Kurtz, *The Gestation of an MEE Question: A Rigorous Process*, 88 BAR EXAM'R 4, 22 (Winter 2019-2020) (essay questions); Timothy Davis, *Drafting MBE Items: A Truly Collaborative Process*, 88 BAR EXAM'R 3, 25 (Fall 2019) (multiple-choice questions).

security measures.<sup>48</sup> After administration of each exam, jurisdictions and NCBE must grade the exams, equate results, and scale essay scores.<sup>49</sup> A recent analysis shows that just one of these elements—administering the exam—costs California more than \$5,600,000 per year.<sup>50</sup>

The heaviest expenses, however, fall on examinees. In addition to paying for much of the exam development and administrative costs through fees, examinees purchase expensive bar-preparation courses and forego income while studying for the exam.<sup>51</sup> Those costs are not an inevitable by-product of licensing; they stem from the type of assessment that states have chosen to employ. Bar exams, in sum, are feasible, but it is an expensive feasibility.

### *C. New Methods of Assessing Lawyering Competence*

Methods of assessing lawyering competence have varied over the course of United States history. States have relied upon apprenticeships, oral exams, diploma privilege, and the written exam.<sup>52</sup> Too often, states have designed their methods to exclude “undesirables” from the profession.<sup>53</sup> Our current exams are rooted in those exclusionary tactics.<sup>54</sup>

Concerns about the exams’ validity, combined with this legacy of

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48. See MEETING OF THE STATE BAR OF CAL. (June 28, 2023), <https://board.calbar.ca.gov/Agenda.aspx?id=16985&tid=0&show=100035783> [<https://perma.cc/8GJS-2HWL>] (outlining costs of administering the exam).

49. See Sonja Olson, *13 Best Practices for Grading Essays and Performance Tests*, 88 BAR EXAM’R 4, 8 (Winter 2019-2020) (discussing grading process); Mark A. Albanese, *The Testing Column: Equating the MBE*, 84 BAR EXAM’R 29 (2015) (equating); Mark A. Albanese, *The Testing Column: Scaling: It’s Not Just for Fish or Mountains*, 83 BAR EXAM’R 50 (2014) (scaling).

50. MEETING OF THE STATE BAR OF CAL., *supra* note 48. California’s Committee of Bar Examiners has proposed reducing those costs by cutting administration sites and moving portions of the exam online. *Id.* Even those measures, which would inconvenience test-takers, would reduce costs just to \$3,692,100. *Id.*

51. Carsen Nies, *For More Equitable Licensure, Washington State Needs Diploma Privilege Not the Bar Exam*, 20 SEATTLE J. SOC. JUST. 287, 288 (2021); Karen Sloan, *Does the bar exam cost too much? These law pros think so*, REUTERS (Apr. 22, 2022), <https://www.reuters.com/legal/legalindustry/does-bar-exam-cost-too-much-these-law-pros-think-so-2022-04-22/> [<https://perma.cc/P7MN-CHMJ>] (when all the costs are combined, examinees can expect to spend \$2,000–\$10,000 to prepare for and take the bar exam—an amount that does not include lost income during the 6–10 weeks spent studying).

52. HOWARTH, *supra* note 1, at 15–21.

53. *Id.* at 23–30.

54. *Id.* at 29–30; Mary Szto, *Barring Diversity? The American Bar Exam as Initiation Rite and Its Eugenics Origin*, 21 CT. PUB. INT. L. J. 38, (2021).

exclusion, have prompted a generation of new approaches. In 2005, New Hampshire founded the Daniel Webster Scholars Honors Program.<sup>55</sup> Students participating in that program, which is run by the University of New Hampshire's Franklin Pierce School of Law, pursue a structured curriculum that includes clinics and other experiential coursework.<sup>56</sup> While completing that work, they assemble portfolios of writings, videos, and other materials that demonstrate their competence to practice law.<sup>57</sup> Bar examiners review the portfolios and, if they find a student minimally competent, that student may be admitted to the New Hampshire bar without taking the bar exam.<sup>58</sup> A study demonstrated that graduates using this licensing path were better prepared to represent clients than peers who took the traditional bar exam,<sup>59</sup> a fact confirmed by employers of Daniel Webster graduates.<sup>60</sup>

Several other states are exploring similar “experiential education pathways” that could substitute for the bar exam. The Oregon Supreme Court has approved such a pathway “in concept,” and a committee is working to create a more detailed plan for that pathway.<sup>61</sup> The Minnesota Board of Law Examiners has recommended that the state’s Supreme Court appoint an “Implementation Committee” to explore and develop a curricular licensing path.<sup>62</sup> Committees in Georgia and Washington state have made similar recommendations.<sup>63</sup>

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55. ALLI GERKMAN & ELENA HARMAN, AHEAD OF THE CURVE: TURNING LAW STUDENTS INTO LAWYERS: A STUDY OF THE DANIEL WEBSTER SCHOLAR HONORS PROGRAM AT THE UNIVERSITY OF NEW HAMPSHIRE SCHOOL OF LAW 5 (2015), [https://iaals.du.edu/sites/default/files/documents/publications/ahead\\_of\\_the\\_curve\\_turning\\_law\\_students\\_into\\_lawyers.pdf](https://iaals.du.edu/sites/default/files/documents/publications/ahead_of_the_curve_turning_law_students_into_lawyers.pdf) [https://perma.cc/K446-9QYJ].

56. *Id.* at 6–9. See also *Daniel Webster Scholar Honors Program*, UNIV. OF N.H. FRANKLIN PIERCE SCHOOL OF LAW, <https://law.unh.edu/academics/daniel-webster-scholar-honors-program> [https://perma.cc/3HYS-VLWL] (last visited July 14, 2023).

57. GERKMAN & HARMAN, *supra* note 55, at 11.

58. *Id.*

59. *Id.* at 17-20.

60. *Id.* at 13-14

61. See Merritt, *supra* note 6, at 2747.

62. MINN. BOARD OF LAW EXAMINERS, COMPREHENSIVE COMPETENCY STUDY: REP. AND RECOMMENDATIONS 41–42 (2023), <https://www.ble.mn.gov/wp-content/uploads/2023/06/Board-of-Law-Examiners-Report-to-Court-Comprehensive-Competency-Evaluation-June-1-2023.pdf> [https://perma.cc/LHC9-D9EE] [hereinafter MINNESOTA COMPETENCY STUDY].

63. KEITH R. BLACKWELL ET AL., PRELIMINARY REPORT OF THE GEORGIA LAWYER COMPETENCY TASK FORCE, App. A (2022), (proposing a pilot experiential pathway to licensure); WASH. ST. BAR LICENSURE TASK FORCE, A PROPOSAL FOR THE FUTURE OF WA STATE BAR ADMISSIONS WORKING DRAFT 9 (2023),

Two jurisdictions, Utah and the District of Columbia, adopted a different approach during the pandemic. Rather than relying upon work completed during law school, these jurisdictions allowed candidates to bypass the bar exam and demonstrate their competence through a period of postgraduate law practice supervised by a licensed attorney. Utah limited this option to graduates of some law schools and required them to log 360 practice hours.<sup>64</sup> The District of Columbia granted provisional licenses to specified graduates that allowed them to practice under supervision for three years.<sup>65</sup> After that time elapses, the graduates' licenses will mature into unrestricted ones.<sup>66</sup>

Oregon has also developed a postgraduate supervised-practice pathway for demonstrating competence, which it offered to candidates who failed its February 2022 bar exam. The hearing unit failed at the venue for that exam, creating inhospitable exam conditions. Rather than forcing candidates who failed that exam to retake it, Oregon has offered them provisional licenses and the opportunity to demonstrate their competence by practicing under a licensed attorney's supervision.<sup>67</sup> Although the candidates in this program demonstrate their competence in postgraduate supervised practice, rather than during law school, Oregon adopted New Hampshire's approach of requiring the candidates to create portfolios of work product that are assessed for competence by the state's bar examiners.<sup>68</sup> If the examiners deem a candidate's work minimally qualified and they complete the required number of supervised-practice hours, the candidate will receive a full license without retaking the bar exam.<sup>69</sup>

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<https://www.courts.wa.gov/content/publicUpload/Washington%20Bar%20Licensure%20Task%20Force/WBLTF%20Alternatives%20Recommendation%20%20Working%20Draft%20101123.pdf> (proposing “an experiential pathway to licensure that would allow students to graduate law school ready to practice”).

64. Order for Temporary Amendments to Bar Admission Procedures During COVID-19 Outbreak at 2–4, 8, *In re Matter of Emergency Modifications to Utah Supreme Court Rules of Professional Practice, Rules Governing Admission to the Utah State Bar* (Utah 2020), <https://images.law.com/contrib/content/uploads/documents/292/Utah-Bar-Exam-order.pdf> [<https://perma.cc/LJ53-SWG9>]. The court limited eligibility for this pathway to recent graduates of ABA-accredited law schools that recorded a 2019 first-time bar exam pass rate of 86% or higher. *Id.* at 1.

65. Order at 6, (D.C. Cir. 2020) (No. M269-20) [https://www.dccourts.gov/sites/default/files/2020-09/ORD\\_269-20.pdf](https://www.dccourts.gov/sites/default/files/2020-09/ORD_269-20.pdf) [<https://perma.cc/B8RZ-H3ND>].

66. *Id.*

67. *See* Merritt, *supra* note 6, at 2748–49 (describing the Oregon program).

68. *Id.* at 2749.

69. *Id.*

The Oregon Supreme Court recently approved a more permanent version of this program that will be available starting in May 2024.<sup>70</sup> Groups in at least two other states, California and Washington, are also exploring supervised-practice options for demonstrating minimum competence.<sup>71</sup>

California has already implemented two supervised-practice programs that underlie the data analyzed in this article. Through its Original Provisional Licensure Program, the “Original PLP,” California allowed 2020 law school graduates to practice under a licensed lawyer’s supervision while waiting to take and pass the bar exam.<sup>72</sup> That program remains in effect through December 31, 2025.<sup>73</sup> California’s other Provisional Licensure Program, the “Pathway PLP,” applies to individuals who obtained a score of 1,390 through 1,439 on any California bar exam administered between July 2015 and February 2020. Those scores fell below California’s passing score at the time the exams were taken but would satisfy the lower passing score that California adopted in spring 2020.<sup>74</sup> The state declined to apply the new score retroactively but offered recent test-

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70. See *Licensure Pathway Development Committee*, OR. STATE BAR, <https://lpdc.osbar.org/resources/> [<https://perma.cc/ZC4G-KBD6>] (last visited Nov. 18, 2023) (Oregon website displaying rules approved by the Oregon Supreme Court on Nov. 7, 2023).

71. In California, the State Bar’s Board of Trustees has recommended that the California Supreme Court approve a pilot supervised-practice pathway named the “Portfolio Bar Examination.” Karen Sloan, *Bar exam alternative proposed in California passes key hurdle*, REUTERS (Nov. 16, 2023), <https://www.reuters.com/legal/government/bar-exam-alternative-proposed-california-passes-key-hurdle-2023-11-17/>. For more details on the pilot pathway, see STATE BAR OF CALIFORNIA, PROPOSAL FOR PORTFOLIO BAR EXAM: RETURN FROM PUBLIC COMMENT AND REQUEST FOR TRANSMISSION TO THE SUPREME COURT FOR APPROVAL (Nov. 16, 2023) (on file with authors). The Washington State Bar Licensure Task Force has recommended a “Graduate Apprenticeship” program that would allow law school graduates to demonstrate their competence while working under supervision for six months after graduation. WASH. ST. BAR LICENSURE TASK FORCE, *supra* note 63, at 8-9. A working group in Minnesota also recommended development of a supervised-practice pathway, but the Minnesota Board of Law Examiners decided to explore development of an experiential education path first. MINNESOTA COMPETENCY STUDY, *supra* note 62, at 43-44.

72. See Order Re Request for Approval of Proposed Amendment to the Rules of Professional Conduct of the State Bar of California, Administrative Order 2020-01-21-01 (Cal. Oct. 22, 2020), <https://newsroom.courts.ca.gov/sites/default/files/newsroom/2020-10/Admin%20Order%202020-10-21.pdf> [<https://perma.cc/6RQF-9F3Q>] (describing the program and requirements for participation).

73. See *Provisionally Licensed Lawyers*, STATE BAR OF CAL., <https://www.calbar.ca.gov/Admissions/Special-Admissions/Provisionally-Licensed-Lawyers#:~:text=The%20original%20program%20allows%20eligible,of%20the%20provisionally%20licensed%20lawyers> [<https://perma.cc/9RYT-GFYN>] (last visited July 14, 2023).

74. See Letter from Jorge E. Navarrete, Clerk and Exec. Officer, Sup. Ct. of Cal., to Alan K. Steinbrecher, Chair, Cal. State Bar Bd. of Trs. (July 16, 2020), [https://newsroom.courts.ca.gov/sites/default/files/newsroom/document/SB\\_BOT\\_7162020\\_FINAL.pdf](https://newsroom.courts.ca.gov/sites/default/files/newsroom/document/SB_BOT_7162020_FINAL.pdf) [<https://perma.cc/V9LM-SGLS>].

takers the opportunity to demonstrate their minimum competence by completing 300 hours of supervised legal practice and obtaining a positive evaluation from their supervisor(s).<sup>75</sup>

So far, all these curricular and practice-focused licensing paths exist alongside the bar exam. Candidates in the states discussed above may still choose to demonstrate their competence by passing a written bar exam. The innovative pathways offer candidates an option, allowing them to demonstrate their competence in a different and rigorous manner.

#### *D. Research Questions*

New approaches to assessing minimum competence have generated questions about the validity, reliability, fairness, and feasibility of these methods. Substantial research in health care workplaces suggests that measurements of competence rooted in supervised practice can meet those four criteria.<sup>76</sup> A study of New Hampshire's Daniel Webster program, meanwhile, demonstrated that graduates of that program are on average more competent lawyers than those who pass the bar exam.<sup>77</sup> Additional evidence about the value of alternative licensing paths, however, is missing in the legal field.

In this article we draw upon responses to surveys that the California State Bar distributed to participants in its Original PLP and Pathway PLP, as well as to candidates who qualified for the Pathway PLP but did not participate. These programs differ from most of the supervised-practice pathways that states are currently considering: the Original Program does not substitute for the bar exam, and the Pathway Program does not include

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75. Order Re Request for Approval of Proposed Amendments to the California Rules of Court at 3, (Cal. Jan. 28, 2021) (Administrative Order 2021-01-20), <https://newsroom.courts.ca.gov/sites/default/files/newsroom/2021-01/20210128062716391.pdf> [<https://perma.cc/2WXS-PGJU>] (describing program requirements and participant eligibility).

76. See, e.g., Cees P.M. van der Vleuten & Lambert W.T. Schuwirth, *Assessing Professional Competence: From Methods to Programmes*, 39 *Med. Educ.* 309, 310–14 (2005) (reliability and validity); Nyoli Valentine, Steven Durning, Ernst Michael Shanahan, & Lambert Schuwirth, *Fairness in Human Judgment in Assessment: A Hermeneutic Literature Review and Conceptual Framework*, 26 *ADVANCES HEALTH SCIS. EDUC.* 713, 720–30 (2021) (fairness); Jennifer M. Weller, Ties Coomber, Yan Chen, & Damian J. Castanelli, *Key Dimensions of Innovations in Workplace-Based Assessment for Postgraduate Medical Education: A Scoping Review*, 127 *BR. J. ANAESTHESIA* 689, 700 (2021) (feasibility).

77. GERKMAN & HARMAN, *supra* note 55, at 13–14, 17–20.

a portfolio reviewed by independent examiners. The surveys, however, offer information that addresses these questions:

1. Can supervised practice support a valid measure of a candidate's minimum competence to practice law?
2. Is assessing competence through supervised practice fair to candidates?
3. Is supervised practice a feasible method of assessing that competence?

Our data cannot answer every facet of these questions; nor does our data address the reliability of supervised-practice systems that assess competence through independent examination of candidates' work product, a critical component of most systems.<sup>78</sup> The data, however, offers key insights into the validity, fairness, and feasibility of supervised-practice pathways that should encourage stakeholders to further explore those options.

## II. THE DATASETS

Our analyses draw upon three datasets provided by the State Bar of California. Each dataset includes demographic information about a surveyed population and survey responses from that population. In this Section, we briefly describe the survey population for each dataset, the survey method, and the response rate for each survey. We also report demographic information for the survey respondents and explore issues of response bias.

### A. Populations

The three datasets reflect three populations that the State Bar surveyed: (1) all candidates for licensure who participated in either the Original Provisional Licensure Program (Original PLP) or the Pathway Provisional Licensure Program (Pathway PLP);<sup>79</sup> (2) all supervisors who participated in

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78. For studies addressing reliability, *see infra* note 247.

79. California refers to candidates who used either PLP as "provisionally licensed lawyers" or "provisional licensees," reflecting the fact that these candidates received provisional licenses allowing

either of the PLPs; and (3) all individuals who were still eligible for the Pathway PLP in September 2022, but had not enrolled in the Pathway.<sup>80</sup> The Bar did not attempt to survey individuals who qualified for the Original PLP but did not participate.

The first population consists of 1,585 individuals: 912 who participated in the Original PLP, and 673 who participated in the Pathway PLP. The second population (supervisors) consists of 1,393 individuals. Among those supervisors, 738 participated in the Original PLP; 613 in the Pathway PLP; and 42 in both programs. The final population, those who qualified for the Pathway PLP but had not enrolled, consists of 1,154 individuals.

The State Bar database includes self-reported information about race/ethnicity and gender identity for most of the individuals in these three populations. For the first population, the database also includes self-reported sexual orientation.<sup>81</sup> Table 1 reports that demographic data for each of the three populations.<sup>82</sup>

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them to practice under supervision. We use the more general term “candidates,” to reflect the fact that these individuals were still candidates for bar admission while participating in the PLP.

80. This population omitted any individuals who originally qualified for the Pathway PLP but had retaken and passed the bar exam before September 2022.

81. The database also included some information about age and, for supervisors, practice sector. The data in those categories, however, was too incomplete to contribute to our analyses.

82. For each demographic category, the table omits participants for whom information is unavailable. Among candidates, 79 (5.0%) did not identify their race/ethnicity; 15 (1.0%) did not identify gender; and 449 (28.3%) did not identify sexual orientation. Among supervisors, 214 (15.4%) did not identify their race/ethnicity, and 157 (11.3%) did not identify gender. Among candidates who were eligible for the Pathway Program but did not participate, 47 (4.1%) did not identify their race/ethnicity, and 22 (1.9%) did not identify gender. The percentages in Table 1 include only participants who provided each type of demographic data.

Table 1: Population Demographics

	<b>Candidates Participating in Either PLP</b>	<b>Supervisors Participating in Either PLP</b>	<b>Candidates Eligible for the Pathway PLP Who Did Not Participate</b>
<b>Race/ Ethnicity<sup>83</sup></b>			
Asian	242 16.1%	137 11.6%	276 24.9%
Black	135 9.0%	65 5.5%	88 7.9%
Latino	264 17.5%	105 8.9%	124 11.2%
Other	220 14.6%	153 13.0%	37 3.4%
White	645 42.8%	719 61.0%	582 52.6%
Total	1506	1179	1107
<b>Gender</b>			
Female	877 56.2%	436 35.3%	565 49.9%
Male	674 43.2%	783 63.3%	565 49.9%
Nonbinary	10 0.6%	17 1.4%	2 0.2%
Total	1561	1236	1132
<b>Sexual Orientation</b>			
Heterosexual	1033 90.9%	NA	NA
LGBTQIA+	103 9.1%	NA	NA
Total	1136	NA	NA

83. California allows attorneys to choose among nine options for identifying their race/ethnicity. Following the practice in California's public reports, we have combined five of those options into a single "Other" category. Those five options are American Indian or Alaska Native, Middle Eastern or North African, Multiracial, Native Hawaiian or Other Pacific Islander, and Other.

### *B. Survey Design and Distribution*

The State Bar developed a survey for each of the three populations described above. The surveys of candidates and supervisors probed their experiences with the PLP and sought some additional demographic information. The third survey, addressed to individuals who were eligible for the Pathway PLP but did not participate, explored why they did not take part. A team of experts designed the survey instruments and tested them through internal pilots and focus groups with target population members.

Surveys were administered through Qualtrics. The State Bar emailed the link to population members on October 3, 2022, inviting them to respond by October 12, 2022. Initial response rates were good, but the State Bar reopened the surveys on October 21, 2022, allowing additional responses through October 28, 2022. After the survey closed, State Bar staff created deidentified databases containing the responses to each survey. Population members in each database were represented by code numbers, with all personally identifying information removed. The State Bar provided those databases to us, but we conducted all analyses independent of State Bar staff.

### *C. Response Rates and Response Bias*

About one-third of supervisors (32.0%) answered at least one survey question, and 28.6% completed the full survey. The response rate was even higher among candidates: almost half of them (47.8%) answered at least one survey question, while 41.7% completed the full survey. The response rate for the third population, individuals who were eligible for the Pathway PLP but did not participate, was similar to that of candidates who did participate: 47.2% answered at least one question, and 46.4% completed the entire survey.<sup>84</sup>

These response rates are in line with response rates for other online surveys.<sup>85</sup> Recent research, moreover, demonstrates that surveys

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84. In all three populations, a few individuals opened the survey and (in some cases) answered a single demographic question. We counted these individuals as nonrespondents.

85. See, e.g., Meng-Jia Wu, Kelly Zhao & Francisca Fils-Aime, *Response Rates of Online Surveys in Published Research: A Meta-Analysis*, 7 *COMPUTS. IN HUM. BEHAV. REPS.* Aug. 2022, 100206 at 7 (2022) (average response rate for online surveys administered to 701–2,500 participants is

administered to more than 1,000 population members achieve representative results with response rates as low as 10%.<sup>86</sup> All three of California's survey populations exceeded 1,000 members, suggesting that survey responses very likely represent experiences of the full survey populations.

#### *D. Demographics of Respondents*

Two of the California surveys sought additional demographic information about respondents. For both candidates and supervisors who participated in the PLP, the surveys gathered data on the type of organization in which they practiced. The survey of participating candidates also gathered information about whether they were first-generation college graduates and whether they identified as individuals living with disabilities. Table 2 summarizes that information.<sup>87</sup> We caution that this data reflects the demographic composition of respondents to the two surveys, not the full populations who received those surveys.

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33.4%).

86. Kevin Fosnacht, Shimon Sarraf, Elijah Howe, & Leah K. Peck, *How Important Are High Response Rates for College Surveys?*, 40 REV. HIGHER EDUC. 245, 253 (2017).

87. Among candidates, we lacked data about organization type for 91 respondents (12.0%); about first-generation status for 93 (12.3%); and about disability for 98 (12.9%). We lacked organizational data for 16 supervisors (3.6% of those respondents). Percentages in the table reflect only the pool for which we had information on that variable.

Table 2: Additional Demographics of Survey Respondents

	Candidates Participating in Either PLP	Supervisors Participating in Either PLP
<b>Practice Organization<sup>88</sup></b>		
Solo Practitioner	225 33.8%	150 34.9%
Other Law Firm	297 44.7%	178 41.4%
Corporation	36 5.4%	15 3.5%
Prosecutor	17 1.1%	3 0.7%
Public Defender	22 3.3%	7 1.6%
Judicial	5 0.8%	2 0.5%
Other Government	22 3.3%	12 7.2%
Legal Aid	74 11.1%	31 2.8%
Other Nonprofit	56 8.4%	26 6.0%
Education	18 2.7%	6 1.4%
Total	666	430
<b>First-Generation Status</b>		
First-Generation College	208 31.3%	NA
First-Generation JD	308 46.4%	NA
Parent Earned JD	148 22.3%	NA
Total	664	NA
<b>Disability</b>		
Living with a Disability	121 18.4%	NA
Not Living with a Disability	538 81.6%	NA
Total	659	NA

88. The sum of candidates working in each category exceeds the total number of candidates, and the percentages sum to more than 100%, because some candidates worked with multiple organizations.

### *E. Response Bias*

The State Bar's surveys achieved admirable response rates, but we nonetheless explored the possibility of nonresponse bias. Respondents and nonrespondents did not differ significantly by race/ethnicity or gender in any of the three survey populations. Nor did respondents and nonrespondents differ significantly by sexual orientation within the one population for which we had that information. Other demographic information, including the data in Table 2, was not available for the full survey populations.

We did find that, among both candidates and supervisors, participants in the Pathway Program were significantly more likely to respond than those in the Original Program ( $p < .001$ ).<sup>89</sup> The Pathway Program was more distinctive than the Original one; it allowed candidates who had failed the bar exam to demonstrate their competence without retaking the exam. That feature may have generated particular interest among both candidates and supervisors. Participants in the Original Program, by contrast, may have viewed it as a stopgap measure designed to accommodate bar-takers during the pandemic. Once the pandemic eased, they may have had less interest in responding to a survey about the program.

Although we detected this difference in response rates, preliminary analyses revealed that few outcomes varied significantly between Original and Pathway participants. For this reason, we combine those subgroups in most analyses. This increases the statistical power of our analyses and incorporates the diverse perspectives of participants in both programs. For the few outcomes on which the programs differed significantly, or on which the difference in response rates might have affected outcomes, we report outcomes separately.

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89. We computed all p values using SPSS version 28. To compare categorical variables, we used the chi-square test. To compare dichotomous means, we conducted independent sample t-tests. For analysis of means from multiple groups, we conducted a one-way analysis of variance (ANOVA).

### III. RESULTS

In this Section, we summarize survey results related to our three research questions addressing validity, fairness, and feasibility. We draw upon responses to all three surveys, reporting insights from (1) candidates who participated in the Original or Pathway Program; (2) supervisors who participated in either program; and (3) candidates who were eligible for the Pathway Program but did not participate.

#### *A. Validity*

Responses to California's PLP surveys cannot fully establish the validity of supervised practice as a means of assessing competence, and we do not make that claim. The Original PLP was not designed to assess competence, and the Pathway Program lacked the independent review of a candidate's work product that most proposed programs require. Evidence from the California surveys, however, offers preliminary support for the validity of assessing competence through supervised-practice programs. This evidence should encourage jurisdictions to create pilot programs for measuring competence in that manner.

We outline three types of validity evidence below. First, we examine the breadth of skills exercised by candidates during their supervised practice. Second, we discuss the doctrinal knowledge used by those candidates. These two discussions are like the content analysis that experts perform when assessing the validity of a written licensing test.<sup>90</sup> We ask, how well does this assessment method (supervised practice) sample the skills and knowledge required for entry-level law practice? Finally, we report comments from supervisors comparing the performance of candidates to newly licensed lawyers. These comments are anecdotal, but they represent the perceptions of professionals with hands-on knowledge of a supervised-practice program.

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90. See, e.g., STATE BAR OF CAL., THE PRACTICE OF LAW IN CALIFORNIA: FINDINGS FROM THE CALIFORNIA ATTORNEY PRACTICE ANALYSIS AND IMPLICATIONS FOR THE CALIFORNIA BAR EXAM, FINAL REPORT OF THE CALIFORNIA PRACTICE ANALYSIS WORKING GROUP 4 (2020) (content validation of a licensing exam requires a compilation of data about the skills and knowledge entry level lawyers need to perform competently) [hereinafter CAPA WORKING GROUP STUDY].

### i. Lawyering Skills

Practice analyses repeatedly stress the centrality of lawyering skills in establishing minimum competence.<sup>91</sup> California's survey asked candidates whether they had used any of six essential skills during their supervised practice:

- Drafting and writing
- Research and investigation
- Issue-spotting and fact investigation
- Counseling/advising
- Litigation skills
- Communicating with clients and maintaining client relationships<sup>92</sup>

Most of these skills are untested on written bar exams or tested through static fact patterns that do not replicate working with a client. In contrast, almost half of candidates (47.8%) reported using all six of these skills during their supervised practice, while more than four-fifths (85.4%) used at least four of these skills.

Some candidates offered detailed comments about the breadth of skills they utilized during their period of supervised practice. One recounted:

I have been exposed to client intake, interviewing witnesses, drafting law and motion pleadings. I have conducted extensive legal research for all cases, drafted various motions throughout the litigation process for each case, argued motions, prepared cases for both bench and jury trial, prepared and responded to discovery, participated in depositions, participated in bench and jury trials, drafted dispositive motions, and worked on appellate matters.<sup>93</sup>

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91. See *supra* notes 26–32 and accompanying text.

92. California had previously identified these skills as the ones most essential to assess in a licensing process. CAPA WORKING GROUP STUDY, *supra* note 90, at 18–19.

93. STATE BAR CAL., Provisional Licensure Program Candidate Survey, CR1811[Q12b] (on file with authors) [hereinafter Candidate Survey]. All survey comments were submitted anonymously and

Another reflected: “There is no match for the depth and breadth of experience that I’ve gained from working in legal aid, whether it’s interviewing clients and gathering facts, negotiating with opposing parties/counsel or making arguments to a judge.”<sup>94</sup>

Drafting, writing, research, and investigation were the most common skills used by candidates in their supervised practice: 94.2% engaged in drafting and writing, while 91.4% performed research or investigation. Issue-spotting, fact gathering, client communication, and maintenance of client relationships were almost as prevalent: 86.2% of candidates reported using these skills. Counseling or advising clients was somewhat less common, but more than three-quarters of candidates (76.5%) reported exercising those skills. Even the least commonly reported skill, litigation, engaged more than three-fifths (62.7%) of the candidates.

Candidates, moreover, stressed that they exercised these skills in a deeper, more realistic way than they could on a written bar exam. “The ability to issue spot with a live person by asking the right questions and having the right ‘bedside manner’” one candidate wrote, is quite different from “picking apart a written set of facts.”<sup>95</sup> Similarly, “communicating with peers (particularly, opposing counsel) in a respectful way while still zealously advocating for your client,” is a skill that is difficult to measure on a written test.<sup>96</sup> One candidate colorfully summed up this perspective by noting:

I feel passing the bar exam and working with clients are two different skills. The bar exam is to an attorney as a cadaver is to a medical doctor. The bar exam and a cadaver are dry, blunt tools to be used in school. After you graduate, you must develop patient/client skills.<sup>97</sup>

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are designated here by code numbers. The prefix “CR” indicates comments from the Candidate Survey, and the number in brackets at the end of the citation refers to the survey question that elicited the comment. Throughout the article, we have edited comments for brevity, clarity, and minor stylistic errors.

94. *Id.* CR2651[Q20].

95. *Id.* CR548[Q40].

96. *Id.*

97. *Id.* CR860[Q22].

Supervised practice, candidates agreed, offered the opportunity to demonstrate these more complex, client-focused skills.<sup>98</sup>

Supervised practice also allowed candidates to integrate the skills they needed for law practice, rather than demonstrating competence in those skills piecemeal. “I get the advantage of meeting clients,” one candidate explained, “visualizing them as real people with real problems, and then going through their case, researching to help their case, and then applying the law to the facts in court.”<sup>99</sup> Other candidates praised their ability to participate in client matters “from beginning to end.”<sup>100</sup>

Supervised practice, finally, allowed candidates to demonstrate their competence in skills beyond the six specified on the survey. In particular, candidates noted that the PLP allowed them to demonstrate their ability to manage caseloads and projects.<sup>101</sup> As malpractice claims show, the bar exam fails to filter out lawyers who lack this critical skill.<sup>102</sup> Assessing competence through supervised practice protects the public by measuring a wide range of skills – including ones that cannot be assessed on a written exam.<sup>103</sup>

A small percentage of candidates reported using only one (2.4%) or two (3.2%) lawyering skills in their placements. As we discuss further below, jurisdictions can avoid that limitation by structuring licensing paths to require demonstration of desired skills.<sup>104</sup> Overall, California’s experience demonstrates that supervised practice supports assessment of a wide range of skills essential for entry-level law practice.

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98. See also *id.* CR548[Q40] (describing the complexity of managing client expectations).

99. *Id.* CR421[Q22].

100. *Id.* CR1699[Q12b].

101. *Id.* CR880[Q22] (“balance a busy schedule”); *Id.* CR2572[Q12b] (“how to manage legal projects on a day-to-day basis”); *Id.* CR2685[Q12b] (“better manage my time”); *Id.* CR2223[Q20] (“manage a case calendar”).

102. Deborah M. Nelson, *Legal Malpractice: Don’t Be the Defendant!*, in 2013 ANNUAL AAJ-PAPERS 40 (Am. Ass’n for Just., 2013) (taking on too many cases and failing to meet deadlines are among the top causes of malpractice claims).

103. See MERRITT & CORNETT, *supra* note 24, at 71 (noting many skills that cannot be assessed through written exams).

104. See *infra* Part IV.A.i.

## ii. Doctrinal Subjects

Candidates in California's PLP exercised their lawyering skills in an extensive variety of practice areas. When asked what subject areas they drew upon or learned during their supervised practice, candidates reported an average of 5.5 subjects, with a quarter of the respondents (25.5%) reporting eight or more subjects. One-tenth of the respondents (9.6%) reported using 11 or more doctrinal subjects in their practice. Several candidates offered detailed descriptions of the range of areas in which they practiced:

- I have managed many different types of cases involving unlawful detainer/landlord-tenant, financial/elder abuse, contract disputes, consumer debt disputes and Social Security to name a few.<sup>105</sup>
- I have been able to learn two completely different areas of law - workers compensation/admin law and criminal defense.<sup>106</sup>
- I run a domestic violence clinic for Santa Monica Courthouse, and virtually for all of LA County residents. I also do housing defense and housing rights advocacy.<sup>107</sup>
- I have gained significant experience in prelitigation matters, Tax law, Estate planning, Probate, Personal injury, and other practice areas [including elder abuse, dependency, and Indian law-related issues].<sup>108</sup>

A minority of respondents reported working in just one or two subject matter areas: 6.9% of respondents listed a single subject area, while 14.0% listed two areas. At least some of these candidates, however, appear to have understated the scope of their work. Almost a dozen candidates, for example, listed "criminal law and procedure" as their sole practice subject.

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105. Candidate Survey, *supra* note 93, CR2651[Q12b].

106. *Id.* CR2251[Q12b].

107. *Id.* CR2464[Q12b].

108. *Id.* CR241[Q12b].

These candidates almost certainly used principles of evidence law regularly in their work. They might also have drawn upon foundational principles from property, torts, and contracts to inform their interpretation of some criminal statutes and negotiate plea deals. Respondents like these appear to have identified their primary practice area rather than specifying (as the survey asked) all the doctrinal subjects they drew upon in practice. After accounting for this understatement, it is reasonable to assume that all (or almost all) candidates drew upon legal principles from at least four different subject areas, while more than half exceeded that number.

These subjects included both ones that a California commission has recommended testing on its bar exam and others that are not commonly tested on those exams.<sup>109</sup> Almost all respondents (98.0%) drew upon at least one bar subject, and 31.9% used concepts from five or more bar subjects. At the same time, an overwhelming majority of respondents (89.3%) reported using at least one subject that will not appear on California's written exam, and more than a fifth (22.7%) reported drawing upon four or more subjects that are not bar subjects. Overall, respondents reported an average of 3.5 bar subjects and 2.4 non-bar ones.

Candidates, finally, noted that they learned doctrinal subjects more deeply through supervised practice than by studying for the bar exam. "There is a vast difference between learning and reading about a concept in law school," one observed, "and actually applying that concept to your own case. The actual experience of practicing law really helps you grasp, not only how certain laws and procedures work, but also their importance."<sup>110</sup> "The practical application of the law," another agreed, "is what truly changes your view and understanding of the complexity of the law itself."<sup>111</sup> These comments suggest that candidates not only were able to demonstrate their knowledge of legal doctrine through supervised practice, but that they demonstrated that knowledge in a particularly deep way.

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109. At the time the survey was designed, a California working group had recommended testing eight subjects on any written bar exam: Administrative Law and Procedure, Civil Procedure, Constitutional Law, Contracts, Criminal Law and Constitutional Protections of Accused Persons, Evidence, Real Property, and Torts. BLUE RIBBON COMM'N REPORT, *supra* note 7, at 23. The Blue Ribbon Commission subsequently added Professional Responsibility to the list of subjects that should be tested. *Id.* at 30. NCBE plans to test a similar number of subjects on the NextGen exam, although it has designated slightly different subjects. NAT'L CONF. OF BAR EXAM'RS, *supra* note 34, at 5-7.

110. Candidate Survey, *supra* note 93, CR1085[Q22].

111. *Id.* CR036[Q22]. See also *id.* CR167[Q20] ("[S]tudying contract [law] is vastly different from working on contracts at work.").

### iii. Comparisons Between the Bar Exam and Supervised Practice

The PLP survey did not ask supervisors to compare the validity of the bar exam with the validity of assessments made during supervised practice, but numerous supervisors made that comparison spontaneously. “Our [candidate],” one law firm supervisor wrote, “has been the best ‘associate’ that we have had at our firm, better than associates that have passed the bar exam.”<sup>112</sup> “My employee was exceptionally qualified,” another declared, “and was having trouble passing the bar because [] her first language was not English. She was better than at least 50% of attorney[s] practicing who have passed the bar.”<sup>113</sup>

Other supervisors elaborated on these comparisons, noting that the hands-on work done by candidates made them more competent than peers who had studied for and taken the bar exam. Supervised practice, one supervisor remarked, provided “on the job training,” experience “dealing with clients,” and “more applicable knowledge” than the bar exam requires.<sup>114</sup> As a result, the supervisor concluded, “our [PLP] attorney is better equipped to help our law firm than someone else who passed the bar exam, but has not [had] real-life experience working in a firm and directly with clients.”<sup>115</sup> Another supervisor reported that their candidate “did an equal if not better job than some young first and second year attorneys. The training she received, and her willingness to do well and take those opportunities offered, was a better indicator of her work ethic and intelligence (both factual and emotional) than a passing bar exam grade.”<sup>116</sup>

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112. STATE BAR CAL., Provisional Licensure Program Supervisor Survey, SR442[Q23] (on file with authors) [hereinafter Supervisor Survey]. “She has been working for us for over a year now,” this supervisor continued, “and in all honesty, should be considered a lawyer whether or not she passes the Bar exam. I have no hesitation in having her handle our cases[.]” *Id.* The prefix “SR” indicates comments from the Supervisor Survey, and the number in brackets at the end of the citation refers to the survey question that elicited the comment. As with comments cited from the Candidate Survey, we have edited supervisor comments for brevity, clarity, and minor stylistic errors.

113. *Id.* SR696[Q23].

114. *Id.* SR015[Q23].

115. *Id.*

116. *Id.* SR862[Q23].

### *B. Fairness*

Much discussion of alternative licensing paths focuses on the fairness of those paths. Advocates of these pathways urge that they will be more equitable, reducing the disparate impact of traditional bar exams and opening the profession to more diverse members.<sup>117</sup> Skeptics, on the other hand, suggest that members of historically disadvantaged groups may struggle to secure supervisors or suffer from biased evaluations in a licensing path tied to supervised practice.<sup>118</sup> Critics also suggest that these pathways may subject candidates to low pay, harassment, discrimination, and other abuses.<sup>119</sup>

Responses to the California surveys offer helpful insights on each of these questions. In this section we explore PLP participation rates by members of historically excluded groups; the extent to which candidates had difficulty finding supervisors; success and satisfaction rates; reported instances of harassment or discrimination; and pay for candidates.

#### i. Participation Rates

California surveyed candidates who participated in the Pathway Program, as well as individuals who were eligible for that Program but did not participate. This allowed us to determine whether individuals from some demographic groups were more likely than others to take advantage of the Pathway Program. We first created a new population, the “Pathway Pool,” that included all individuals who were eligible for the Pathway Program as of fall 2022.<sup>120</sup> The second column of Table 3 summarizes the demographic information for that Pool. As the table shows, women of color were the largest demographic group eligible for the Pathway—suggesting that this historically disadvantaged group was particularly likely to benefit from the Pathway opportunity.<sup>121</sup>

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117. HOWARTH, *supra* note 1, at 99–135.

118. BLUE RIBBON COMM’N REPORT, *supra* note 7, at 54–56.

119. *Id.*

120. This pool was somewhat smaller than the pool of individuals who were eligible for the Pathway Program when it began in early 2021. Between that time and fall 2022, some candidates retook and passed the California bar exam.

121. In this analysis and subsequent ones, we collapsed all racial/ethnic categories into two groups: white candidates and candidates of color. We included candidates who designated their

Table 3: Participation in the Pathway Program by Gender and Race/Ethnicity

	<b>Number in Pathway Pool</b>	<b>Number Participating in Pathway</b>	<b>Percentage Participating in Pathway</b>
Women of Color	503	217	43.1%
Men of Color	373	138	37.0%
White Women	408	145	35.5%
White Men	453	143	31.6%
Total	1737	643	37.0%

Equally important, as the fourth column of the table reveals, the *participation rate* for women of color was higher than that of any other demographic group. White men, conversely, registered the lowest participation rate. Participation rates for white women and men of color fell between these extremes. The differences among these four demographic groups are both statistically ( $p = .003$ ) and practically significant. Women of color, men of color, and white women were substantially more likely than white men to enroll in the Pathway Program.

We do not know why particular individuals failed to pursue the Pathway opportunity. They might not have heard about the opportunity, might have been unable to find a supervisor, might have preferred to retake the bar exam, or might have lost interest in obtaining a California law license. Whatever the reasons motivating each individual, the percentages in Table 3 suggest that the Pathway Program was particularly accessible to women of color, men of color, and white women—three demographic groups traditionally disadvantaged by the bar exam.

We cannot conduct the same analysis for individuals who chose to

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race/ethnicity as “other” in the latter group.

participate in the Original Program; we lack data on individuals who were eligible for that program but did not participate. The data we have, however, shows high participation rates among women of color, men of color, and white women. Women of color constituted a full third (33.6%) of the Original Program candidates, followed by white women (23.2%) and men of color (22.7%). Only a fifth (20.5%) of these candidates were white men. Both branches of California's PLP, therefore, were accessible to members of historically disadvantaged demographic groups.

Some candidates in those groups commented specifically on the importance of the PLP to them. "I am a first generation BIPOC law student with a disability," one wrote, and "[a]s a single parent with a disability I do not have the luxury of not earning money for months while I study for the bar."<sup>122</sup> Another candidate of color wrote: "I have gained the respect of fellow lawyers, judges, and clients from the work I do. I also got to do good work for many people in my community, have learned to zealously defend and seek justice, and fight for what is right."<sup>123</sup> And a white woman who identified herself as LGBTQIA+ shared: "I have thrived and excelled in my career, [after being] held back by some arbitrary test. Please allow this [Pathway] program or something comparable."<sup>124</sup>

## ii. Finding Supervisors

California's candidate survey asked respondents whether they had difficulty finding supervisors. As we discuss below, relatively few candidates struggled to find supervisors.<sup>125</sup> Most important for fairness concerns, any difficulty did not vary significantly by race/ethnicity ( $p = .756$ ), gender ( $p = .253$ ), the intersection of those two variables ( $p = .762$ ), disability ( $p = .410$ ), or first-generation status ( $p = .854$ ). The experience of candidates who identified as LGBTQIA+ did differ from those who identified as heterosexual ( $p = .036$ ), but the difference cut in two directions. The LGBTQIA+ candidates were significantly more likely to either report that finding a supervisor was no problem at all or that it was a great challenge; heterosexual candidates were more likely to report small or

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122. Candidate Survey, *supra* note 93, CR906[Q12b].

123. *Id.* CR1375[Q12b].

124. *Id.* CR2236[Q12b].

125. *See infra* Part III.C.i.

moderate challenges.<sup>126</sup>

When we examined the avenues that candidates used to identify supervisors, we found only two significant differences related to demographic characteristics. Candidates living with disabilities were significantly more likely than other candidates to receive help from their law school in identifying a supervisor ( $p = .038$ ), while those who identified as LGBTQIA+ were significantly more likely to obtain a supervisor by responding to an advertisement for an attorney ( $p = .003$ ). No significant differences emerged related to first-generation status, gender, race/ethnicity, or the intersection of race/ethnicity and gender.

### iii. Success and Satisfaction

A very high percentage of candidates who started the Pathway Program succeeded in obtaining their licenses through that program. By fall 2022, when the State Bar surveyed participants, 83.5% had been admitted to the bar while another 10.5% were still working towards obtaining their licenses.<sup>127</sup> Women of color, men of color, and white women were slightly more successful than white men in securing licenses, but this difference was not statistically significant ( $p = .686$ ).<sup>128</sup> Nor did success in obtaining a license differ significantly by disability ( $p = .156$ ), sexual orientation ( $p = .133$ ), or first-generation college status ( $p = .289$ ). We did not attempt to measure success in the Original Program because candidates could not secure admission through that program.<sup>129</sup>

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126. The comparisons reported in the text draw from the survey of all candidates who participated in the PLP. When we analyzed responses from candidates who were eligible for the Pathway Program but chose not to participate, we similarly found no significant differences in reported difficulty finding a supervisor based on race/ethnicity or gender. Other demographic characteristics were unavailable for those survey respondents.

127. The remaining 6.0% had been suspended or terminated from the program. Suspension or termination can stem from various causes, including the candidate's voluntary withdrawal, issuance of an adverse character determination, disciplinary action, or loss of an approved supervisor. *See* Ca. Admin. Order No. S266547 (Ca. Jan. 28, 2021), <https://newsroom.courts.ca.gov/sites/default/files/newsroom/2021-01/20210128062716391.pdf> [<https://perma.cc/GE85-YCZ6>].

128. In these four demographic groups, the percentages who gained admission to the bar were: women of color (84.3%), men of color (84.8%), white women (83.2%), and white men (81.6%).

129. *See supra* note 72 and accompanying text; *Provisionally Licensed Lawyers*, STATE BAR CAL., <https://www.calbar.ca.gov/Admissions/Special-Admissions/Provisionally-Licensed-Lawyers> (noting that “[t]o become fully licensed,” participants in the Original Program “must take and pass a bar exam”).

Within both programs, candidate satisfaction was consistent across demographic groups. Satisfaction did not differ significantly by race/ethnicity ( $p = .281$ ), gender ( $p = .441$ ), the intersection of those variables ( $p = .447$ ), sexual orientation ( $p = .165$ ), disability ( $p = .177$ ), or first-generation college status ( $p = .492$ ). It appears, therefore, that candidates from historically disadvantaged groups were as satisfied with the PLP as candidates who were not members of those groups.

Several candidates from historically disadvantaged groups commented specifically on the program's value for them. "The PLP program boosted my self-esteem," one candidate wrote. "As a formerly undocumented immigrant, queer person of color it also helped combat the imposter syndrome I experienced next to my peers. I feel valuable."<sup>130</sup> A first-generation college graduate commented:

I have learned so much [in the PLP] and I have met so many great people. The [PLP] title has made me feel proud of myself and how far I have come as the first person in my family to go to college. I have learned that I have a passion for helping our clients. This program was the best thing that has happened in my career.<sup>131</sup>

A candidate who identified as a person living with a disability summarized: "The alternative pathway to licensure substantially improved almost every aspect of life. It allowed me to rediscover a sense of purpose and dignity, and to gain additional skills, knowledge and insights that could not have otherwise been achieved without this opportunity."<sup>132</sup>

#### iv. Harassment and Discrimination

About one in ten candidate respondents (9.7%) reported experiencing some form of discrimination or harassment. The largest group of those respondents (4.4%) found the unwelcome treatment challenging to just a small extent. Smaller percentages found it challenging to a moderate (3.2%) or great (2.0%) extent. Respondents of color were significantly more likely than white respondents to report discrimination or harassment ( $p = .013$ ).

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130. Candidate Survey, *supra* note 93, CR1874[Q40].

131. *Id.* CR1769[Q40].

132. *Id.* CR1087P[12b].

Candidates living with disabilities, similarly, were significantly more likely to report these negative experiences than other candidates ( $p = .006$ ). Differences based on gender, the intersection of race and gender, sexual orientation, and first-generation status were not statistically significant.

Reports of these negative experiences are a sobering reminder that harassment and discrimination still occur in the profession—and that these burdens fall disproportionately on some groups.<sup>133</sup> Several respondents, however, noted that any discrimination or harassment they experienced in the PLP was no greater than they had encountered in other workplaces or educational settings. One Black man noted, “I initially encountered some disrespect by other attorneys, however, I encountered that same disrespect (or maybe more accurately ‘dismissiveness’) as a newly licensed bar attorney as well.”<sup>134</sup> A Black woman expressed a similar sentiment: “As a [PLP] attorney, I did not face discriminatory treatment that I did not already expect to face as a newly licensed, black, female attorney.”<sup>135</sup>

Importantly, these negative experiences did not affect outcomes in either program. Pathway candidates who experienced harassment or discrimination were just as likely as other candidates to complete the program and receive their licenses ( $p = .460$ ). Nor did those experiences correlate significantly with whether candidates were still active in the Original program ( $p = .224$ ). Candidates who reported harassment or discrimination, finally, were as satisfied with the program as candidates who avoided those challenges: The two groups reported virtually identical satisfaction levels of 4.29 and 4.30 on a 5-point scale ( $p = .912$ ). One Latina candidate who was often mistaken for a client explained how the program’s advantages overcame these negative experiences:

The [PLP] did not cause discrimination—it countered it directly by allowing me to practice while I waited for my bar results. I successfully represented several clients in immigration court with my [provisional license]. I didn’t

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133. See, e.g., JOAN C. WILLIAMS ET AL., YOU CAN’T CHANGE WHAT YOU CAN’T SEE, INTERRUPTING RACIAL AND GENDER BIAS IN THE LEGAL PROFESSION, EXECUTIVE SUMMARY, 7–10 (2018), <https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf> [<https://perma.cc/XWP7-PL73>] (summarizing ABA study results demonstrating significant racial and gender biases and sexual harassment within the legal profession).

134. Candidate Survey, *supra* note 93, CR1206[13b].

135. *Id.* CR2446[Q13b].

care that I was discriminated [against], I just wanted to be able to represent folks who were in need and do my job well.<sup>136</sup>

#### v. Pay

California's PLP rules did not require supervisors to pay candidates. Even without a mandate, however, almost all candidates in the Original Program (93.6%) received compensation. A majority of those candidates (57.8%) were paid an annual salary, while 31.7% were paid on an hourly basis. A small percentage (4.1%) were paid on some other basis, such as by the task. Just 6.4% worked without pay. We noted one demographic difference between candidates who were paid and those who worked without pay: Men were significantly more likely than women to volunteer their services.<sup>137</sup> Differences based on other demographic characteristics were not statistically significant.

To provide a common metric for hourly and annual pay, we created two compensation categories for candidates in the Original Program who received some pay: a "low compensation" category included candidates who were paid no more than \$35 per hour or \$65,000 per year. The "high compensation" category included those who earned more than those amounts. Candidates who received compensation divided almost evenly between these two categories with 51.6% falling in the lower category and 48.4% in the higher one. These categories did not vary significantly by any demographic variables.

Candidates in the low-compensation category were significantly less satisfied with their pay than those in the high-compensation category ( $p < .001$ ). Almost three-quarters of candidates in the former category (72.0%) reported that "low pay" challenged them to a great extent. Just less than half of the candidates in the other category (49.0%) recorded some dissatisfaction with their pay. Notably, however, even some candidates who received low pay praised the Original Program for allowing them to survive financially while studying for the bar exam. "[E]ven though I was paid less

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136. *Id.* CR017[Q13b].

137. Eleven percent (11.0%) of men worked without pay, compared to 3.5% of women ( $p = .006$ ). In this and other gender analyses, we excluded nonbinary candidates because their number was too small to yield meaningful results. All three of the nonbinary candidates in the Original Program, however, received pay for their work.

hourly than I would have made as a starting attorney,” one candidate commented, “it was still more than nothing, which allowed me to provide more income for myself and my family.”<sup>138</sup>

Responses from individuals who pursued the Pathway program offer less useful information. Many of those individuals had already taken full-time jobs that did not require a law license, and they could not afford to leave those jobs to complete the 300 hours of legal work required by the Pathway Program. A substantial percentage (42.0%), therefore, opted to perform those hours as part-time volunteers.<sup>139</sup> When Pathway candidates were paid, they were somewhat more likely than candidates in the Original Program to fall in the high-compensation category, but this difference was not statistically significant ( $p = .148$ ).

### C. Feasibility

To be feasible, a supervised-practice licensing path must be able to attract enough supervisors, provide adequate supervision and training to candidates, and generate sufficient benefits for supervisors and candidates so that the program is sustainable. The California data allows us to explore these aspects of feasibility, together with suggestions for easing implementation of any supervised-practice pathway.

#### i. Availability of Supervisors

Almost 1,400 lawyers stepped forward to supervise the 1,585 candidates enrolled in California’s Provisional Licensure Programs. The programs attracted these supervisors despite its novelty and with no special support or incentives for participants. This number of supervisors would accommodate more than one-quarter of the candidates seeking first-time bar admission in California each year.<sup>140</sup>

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138. Candidate Survey, *supra* note 93, CR710 [Q12b]. *See also id.* CR1883[12b] (“I was able to find a job as an attorney because I had a Provisional License and it helped me to support myself and family until I passed the Bar Exam.”).

139. *See, e.g., id.* CR1078[Q13b] (“My [Pathway] work was unpaid, as it was difficult trying to find a paid position that I could balance with my full-time job.”).

140. *See First-Time Exam Takers and Repeaters in 2022*, BAR EXAM’R, <https://thebarexaminer.ncbex.org/2022-statistics/first-time-exam-takers-and-repeaters-in-2022/> [https://perma.cc/52JR-N6ZG] (last visited July 14, 2023) (6,091 first-time takers in California in 2022).

Survey responses confirm that many candidates found supervisors with little difficulty. More than two-thirds (70.8%) indicated that finding a supervisor was not at all challenging. About a tenth (12.2%) were challenged to a small extent, and another tenth (10.0%) were challenged to a moderate extent. Only 7.0% reported that finding a supervisor was challenging to a great extent.

Candidates found their supervisors through a variety of avenues. Close to half (45.5%) were already working in their supervisor's workplace or had received an offer to work there. Another 10.3% had previously worked for the supervisor. An existing relationship, however, was far from essential. Candidates also identified supervisors through network contacts (17.3%), by contacting potential supervisors directly (15.0%), by responding to employment advertisements (9.8%), and with assistance from their law schools (5.2%).<sup>141</sup>

These percentages, of course, reflect only the experiences of those who succeeded in finding a supervisor and enrolling in the program. The survey of candidates who were eligible for California's Pathway Program but failed to enroll, however, shows that difficulty finding a supervisor was not a major roadblock to their participation. Just 6.8% of those respondents indicated that they failed to participate in the program because they had difficulty finding a supervisor. Instead, the most commonly cited reason for failing to participate was that the respondent had not heard about the opportunity. Fully 84.2% of the survey respondents identified this reason for failing to participate.<sup>142</sup>

The few candidates who did struggle to find a supervisor suggested that their task would have been easier if the program were more established. "It was hard trying to find someone who understood the program," one candidate wrote.<sup>143</sup> "Many firms were reluctant to hire me or supervise me," another agreed, "since this was a new program."<sup>144</sup> "I think if we encourage

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141. Percentages total more than 100 because some candidates reported relying upon multiple avenues.

142. The first question on the survey administered to eligible candidates who did not participate in the Pathway Program was "Why didn't you participate in the Provisional Licensure Program? Please check all that apply." Respondents were offered seven options, including the two noted in text, as well as a blank space for "other." STATE BAR CAL., Provisional Licensure Program Eligible Survey (on file with authors).

143. Candidate Survey, *supra* note 93, CR1519[Q13].

144. *Id.* CR1150[Q13b].

[provisional licensure] . . . promote it, and make it more known to other law firms and lawyers,” a third candidate summarized, employers “may be more open to it in the future because it does offer great training and learning opportunities.”<sup>145</sup>

## ii. Supervision

Previous research suggests that new lawyers in some workplaces suffer from poor supervision.<sup>146</sup> The results of the California survey, however, demonstrate that lawyers are willing to provide that supervision when required to do so. More than two-thirds of candidates (68.6%) said that they benefited from “helpful supervision and feedback” during the program to a “great extent.” Another fifth (19.3%) experienced that benefit to a “moderate extent,” and 8.8% experienced it to a “small extent.” Only 3.3% of respondents indicated that they did not benefit at all from supervision or feedback.

Candidates provided dozens of comments about the excellence of their supervision and feedback. Sample comments include:

- I received the benefit of collaborating with attorneys who otherwise would not have been accessible to me.<sup>147</sup>
- I had a wonderful mentor who taught me a lot about being a good lawyer, not just a lawyer.<sup>148</sup>
- Great mentorship with the opportunity to work on very serious criminal cases with an incredibly skilled attorney.<sup>149</sup>

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145. *Id.* CR2734[Q13b]. *See also id.* CR1262[Q40] (“It would help if the State Bar did more to establish this program and communicate about it to all licensed attorneys and encouraged them to supervise [candidates] whenever possible.”); *id.* CR1515[Q40] (“The only change I would make would be for the California Bar to provide information about the program to practicing attorneys and have them sign up. Then provide that list to potential [candidates].”).

146. MERRITT & CORNETT, *supra* note 24, at 25.

147. Candidate Survey, *supra* note 93, CR2055[Q12b].

148. *Id.* CR1314[Q12b].

149. *Id.* CR1623[Q12b].

- I am partnered up with a mentor. My mentor has an open-door policy with me. I can contact him anytime. We go over my case analysis, negotiation strategies, depositions, etc. Although I have a mentor, everyone has been very helpful in developing my skills. One senior principal works with me on writing motions for my cases and everyone is always willing to help.<sup>150</sup>

Excellent supervision, notably, occurred in all types of organizations. Candidates who worked for solo practitioners were just as likely as other candidates to praise the supervision and feedback they received ( $p = .127$ ). Nor did the perceived adequacy of supervision vary significantly between public interest organizations and other workplaces ( $p = .211$ ).<sup>151</sup>

The few negative comments about supervision pointed in different directions. One candidate complained that their supervisor “off-load[ed] attorney work” on them “but provided no training, no guidance, no additional support, no additional pay, etc.”<sup>152</sup> This candidate believed that the supervisor was taking advantage of the system to obtain low-cost legal assistance without needed supervision. A different candidate protested that, because their supervisor was unwilling to provide necessary oversight, they “only gave the type of cases that could be handled without legal training.”<sup>153</sup>

Most supervisors, however, provided helpful supervision with little or no costs to their organization. Half of all supervisors (49.4%) reported that supervising candidates imposed no costs on their organization, and another quarter (24.1%) assessed those costs as “small.” For some, these costs were small because they expected to mentor and supervise all new attorneys. As one lawyer explained, “We mentor all of our new lawyers . . . We take very seriously the idea that a senior lawyer should mentor a junior lawyer. We treated our [PLP lawyers] the same as any new lawyer.”<sup>154</sup>

Some supervisors even welcomed the opportunity to supervise. “Being able to offer guidance and support to my [candidate],” one lawyer wrote, “was personally and professionally rewarding and just made me feel good

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150. *Id.* CR972[Q13b].

151. Our “public interest” category includes candidates working for public defenders, legal aid organizations, and other nonprofit organizations.

152. Candidate Survey, *supra* note 93, CR1137[Q12b].

153. *Id.* CR1867 [Q13b].

154. Supervisor Survey, *supra* note 112, SR098[Q12b].

to be able to share knowledge and help her grow professionally.”<sup>155</sup> This supervisor noted that, as a solo practitioner, “having a [candidate] also provided a much-appreciated means to communicate and work with another person. All of that gave me something to look forward to since being an attorney, especially [ ] a solo attorney, is often difficult and stressful.”<sup>156</sup>

Some attorneys did find the burdens of supervision inconsistent with their practice structure. One supervisor noted that their firm “hardly hire[s] newly licensed bar passers,” so supervising an unlicensed attorney posed an unfamiliar challenge.<sup>157</sup> Another thought that the burdens of supervising “made the one-year period before licensure uneconomical.”<sup>158</sup> A third noted that “as a solo practitioner, [I] do not have time to do this too regularly,” although that attorney observed that the experience was “rewarding” enough that they might “do this in the future under the right circumstances.”<sup>159</sup>

### iii. Training or Mentoring

Most organizations offered candidates some training or mentoring: four-fifths of candidate respondents (79.8%) reported those benefits. Training and mentoring were significantly more common at public interest organizations than in other workplaces: 90.8% of candidates at public interest organizations reported receiving training or mentoring ( $p < .001$ ). Candidates working with solo practitioners were least likely to report receiving training or mentoring, although three-quarters of them (76.2%) reported doing so.<sup>160</sup>

Over two-thirds of candidates (69.8%) were fully satisfied with their training. One described the training as “tremendous,”<sup>161</sup> while another

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155. *Id.* SR858[Q4b].

156. *Id.*

157. *Id.* SR019[Q26].

158. *Id.* SR573[Q23]; *see also id.* SR276[Q23] (“Supervision of [the candidate] required a tremendous amount of hand holding to [the] point where it was taking away from supervisor’s ability to handle her own case load. It was hoped that the [candidate] would relieve some of the workload of the attorneys but [they] had little experience and it created more work than it was a help.”).

159. *Id.* SR844[Q25].

160. The percentages reported in this paragraph probably understate the percentage of candidates receiving training because the survey asked candidates whether they had participated in “training or mentoring programs.” Some candidates seemed to interpret that language as referring only to formal programs.

161. Candidate Survey, *supra* note 93, CR2660[Q40].

praised their “extensive training” and attendance at “multiple classes.”<sup>162</sup> Candidates particularly appreciated training that covered knowledge and skills they had not learned in law school. “The education I received on process and procedure,” one wrote, “was thorough and extremely helpful. My advisor made sure she addressed my concerns about what NOT to do in court and the right way to do things. This is what I didn’t learn in law school.”<sup>163</sup> Another noted: “Being able to work under a highly respected attorney ... provided training and experience I wouldn’t have been afforded” without the provisional licensure program. “I am a better attorney today,” this candidate concluded, “because of the [PLP] program.”<sup>164</sup>

Smaller percentages of candidates identified insufficient training as a “moderate” (8.2%) or “great” (3.5%) challenge. These candidates were significantly more likely than other candidates to work for solo practitioners ( $p = .037$ ). Even in this group, however, only 4.0% felt challenged to a great extent by the lack of training. Solo practitioners, as one candidate observed, were more likely to “provide[] general mentorship but not specific trainings geared toward new attorneys.”<sup>165</sup>

Supervisors also offered positive comments about training; most did not find that training was unduly burdensome. When asked whether candidates “needed more training than newly licensed lawyers,” three-fifths of supervisors (57.8%) responded that this was not at all a cost or challenge. One-fifth (20.4%) found this a challenge to a “small” extent, and 13.6% thought it was a “moderate” challenge. One-twelfth (8.3%) of supervisors termed the training of candidates a “great” challenge; one of them suggested that the State Bar should compensate supervisors for this expense.<sup>166</sup>

#### iv. Net Benefits for Supervisors and Organizations.

To sustain program participation by supervisors and employers, it is helpful for those groups to experience net benefits from participation. As the previous sections indicate, supervisors experienced modest burdens from supervising and training candidates. Some reported other burdens or

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162. *Id.* CR1343[Q12b].

163. *Id.* CR590[Q12b].

164. *Id.* CR2621[Q12b].

165. *Id.* CR2070[Q11b].

166. Supervisor Survey, *supra* note 112, SR203[Q10b].

costs of the program, such as paying malpractice insurance premiums for candidates or being unable to use candidates for all types of work. Survey responses, however, suggest that supervisors and employers experienced more benefits than burdens from the PLP. Table 4 compares mean scores on the six burdens and five benefits listed on the survey. Numerical scores ranged from 0 (“I did not experience this at all”) to 3 (“I experienced this to a great extent”).

Table 4: Benefits and Burdens of the Provisional Licensure Programs for Supervisors and Organizations

<b>Burdens</b>	<b>Mean Rating</b>	<b>Benefits</b>	<b>Mean Rating</b>
Candidate(s) needed more training than newly licensed lawyers	0.72	Candidate(s) allowed us to serve more clients	1.94
Candidate(s) needed more direct supervision than newly licensed lawyers	0.89	Candidate(s) allowed us to serve a different group of clients	1.06
Candidate(s) could not handle all types of work handled by newly licensed lawyers	0.86	Candidate(s) allowed us to develop a new practice area	0.75
We paid Candidate(s) the same salary and/or benefits as newly licensed lawyers, but their work was more limited	0.81	Candidate(s) added diversity to our practice team	1.69
Insurance premiums (i.e., malpractice insurance) for candidate(s) were the same as for newly licensed lawyers	0.99	Candidate(s) were particularly hard working	2.38
Candidate(s) made mistakes that newly licensed lawyers wouldn't have made	0.50		

As the table reflects, mean scores for four of the benefits exceeded scores for each of the burdens. This does not in itself mean that the benefits for supervisors exceeded the burdens; a single burden could outweigh all benefits for some individuals or organizations. The numbers, however, suggest that on average supervisors experienced benefits to a greater extent than burdens when participating in California’s PLP.

Supervisors expanded upon these ratings with detailed—and often lavish—comments about the benefits that they, their organizations, and their clients reaped from candidates in the program. In particular, supervisors praised the work ethic of their candidates. “The work product of the [candidate],” one supervisor wrote, “was superior to other ‘full’ attorneys because he would put more time and effort into preparing his cases.”<sup>167</sup> “My [candidate] was exceptional,” another supervisor agreed, “and she worked harder for me than some lawyers. She did an equal if not better job than some young first and second year attorneys.”<sup>168</sup> Three-fifths of supervisors (60.7%) experienced the benefit of hardworking candidates “to a great extent,” another fifth (22.1%) experienced it to a moderate extent, and most of the remaining supervisors (11.9%) experienced it to at least a small extent.

Supervisors also lauded the PLP for allowing them to serve more clients. Almost nine-tenths of supervisors (86.8%) experienced this benefit to some extent. One supervisor described a candidate who “stepped right up and [took] over our Unlawful Detainer practice,” which allowed the firm to handle “over 100 cases in 14 counties up and down the state.”<sup>169</sup> Another noted that “among all the other cases this [candidate] handled, we were able to take on a relatively large federal suit against a bank for consumer fraud, that we may not have had the capacity to do otherwise.”<sup>170</sup> And a supervisor at a legal aid office underscored the importance of the PLP in increasing access to justice: “[Candidates] allowed us to provide pro bono full representation to clients, whereas we would have only had the resources to

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167. *Id.* SR868[Q23].

168. *Id.* SR862[Q23]; *see also id.* SR158[Q25] (candidates are “in a transitory phase which I believe makes them work harder”).

169. *Id.* SR097[Q4b]; *see also id.* SR292[Q4b] (The PLP “allowed our law grad hire to appear in court to represent the rights of tenants being unlawfully evicted and/or locked out without waiting months and months for her bar results. This was in October 2020–Feb 2021, in the very heart of the pandemic. It was very helpful to our office to be able serve more folks who needed advocates in court.”).

170. *Id.* SR050[Q4b].

provide them with advice.”<sup>171</sup>

Expanding client service was particularly important in rural parts of the state. “The [candidates] I supervised,” one supervisor commented, “were highly competent legal advocates [who] expanded the availability of legal services in under-served portions of rural California.”<sup>172</sup> Another reflected: “It has been difficult to find new law school graduates who want to move to [our rural area]. Using [PLP candidates] was important to our firm in our defense of public education entities and nonprofit businesses.”<sup>173</sup>

In addition to providing immediate service to clients, some supervisors noted the Pathway Program’s potential to permanently expand client services by allowing poor test-takers to secure licenses through supervised practice. “Our [candidate] did terrific work for us,” one supervisor explained, “and it would’ve really been a loss to society in general if she wasn’t able to practice law just because she couldn’t pass an exam.”<sup>174</sup> Another reflected:

The [PLP] allowed an individual who was exceptionally qualified to prove her worthiness of being an attorney. My [candidate] now works in the public sector helping indigent criminal defendants. Without the [PLP], she may have been forced to find other work outside of the law and her legal talents would have been wasted.<sup>175</sup>

Finally, supervisors extolled the PLP for helping them diversify their lawyering teams. More than three-quarters of supervisors (76.5%) reported experiencing this benefit to some extent. Some candidates spoke multiple languages, allowing their organizations “to take on cases from non-English speaking clients,”<sup>176</sup> better serve existing clients, and prepare educational

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171. *Id.* SR507[Q4b].

172. *Id.* SR816[Q23].

173. *Id.* SR1138[Q23].

174. *Id.* SR1130[Q23].

175. *Id.* SR158[Q28]; *see also id.* SR454[Q28] (“I knew of two women of color from low-income backgrounds who qualified and succeed[ed] under the program. Our bar will benefit from their admission. Both had given up and moved on and otherwise would have left the profession.”); *id.* SR1078[Q28] (“The [PLP] atty I supervised benefitted greatly from the program – it has changed his life for the better. He will ably help many clients in need as a result.”); *id.* SR539[Q4b] (“I think she just had a mental block in passing the bar. She’s brilliant and capable and this program allowed her to be all that she can be.”).

176. *Id.* SR1019[Q4b].

workshops and materials for underserved communities.<sup>177</sup> Others expanded their organization’s reach because they understood the lives and perspectives of disadvantaged clients. One “Dreamer” candidate was able “to share like experiences of illegal immigration and menial labor with clients,” allowing the organization to “expand its base and encourage [] others to take up these causes.”<sup>178</sup> Another supervisor explained that their candidate “bridges our firm to new client groups because she is known in her [underserved] community as having graduated from law school and is a notable client referral source.”<sup>179</sup> The “bridge” benefited both the firm and the community. “Our firm is monetarily better off,” the supervisor wrote, “and her underserved community has greater access to much needed legal referrals.”<sup>180</sup>

In contrast to these benefits, supervisors complained about few burdens. As Table 4 reflects, the burden that supervisors found most challenging was obtaining or paying for a candidate’s malpractice insurance. Some supervisors may not have anticipated this cost, and at least one had difficulty reconciling the candidate’s work with their policy’s restrictions.<sup>181</sup> Other supervisors, however, successfully navigated the insurance issue.<sup>182</sup>

A few supervisors complained that candidates left their organization after obtaining their license, depriving the organization of a return on its training investment.<sup>183</sup> A few others objected to administrative costs such as

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177. *Id.* SR063[Q4b] (“She is also bilingual which allows us to continue to serve the Spanish Speaking community.”); *id.* SR083[Q4b] (“Our [candidate] is a fluent Spanish speaker and [through] his work, we were able to serve monolingual speaking Spanish clients and also provide workshops/clinics in Spanish. We were also able to provide interpretation/translation materials to the community based upon his language abilities.”).

178. *Id.* SR544[Q4b].

179. *Id.* SR003[Q4b].

180. *Id.* See also *id.* SR019[Q4b] (the candidate “also added diversity and allowed us to reach out to new clients that were within his network”); *id.* SR464[Q4b] (the candidate provided “[u]nique personal insight into underserved area”); SR497[Q40] (“Many of the [candidates] come from backgrounds of diversity, are bi-lingual, and serve minority communities.”).

181. *Id.* SR513[Q5b] (malpractice policy “would not allow my [candidate] to do hearings or any other work a newly licensed attorney could have done independently. So she was basically limited to a law clerk position.”).

182. See, e.g., *id.* SR413[Q5b] (insurer “indicated that as long as I reviewed everything my [candidate] did, and submitted nothing under his name, only under my name, they [would] not increase my premiums”).

183. *Id.* SR349[Q10b] (“We saw it coming but as soon as she became licensed through this program she left. Waste of our time and training to just use us as a steppingstone.”); see also *id.* SR386[Q10b] (“employee quit immediately after receiving her provisional license”).

completing weekly timesheets<sup>184</sup> or waiting for candidates to clear character and fitness reviews.<sup>185</sup> Still others suggested that, although the administrative costs of the PLP were tolerable, they would not want to undertake any heavier burdens in a permanent program.<sup>186</sup>

Even when noting burdens, finally, some respondents observed that these challenges were no greater than the costs of working with newly licensed lawyers.<sup>187</sup> And some explicitly noted that the benefits of the PLP outweighed any burdens. “This program is rare,” one supervisor wrote, “in that I cannot identify one downside as it was administered in my office.”<sup>188</sup>

#### v. Satisfaction with Candidate’s Work

Satisfaction with a candidate’s work is an important element in establishing the feasibility of a supervised-practice licensing path. Supervisors in California’s PLP reported strong satisfaction with that work. Three-fifths of supervisors (61.4%) reported that they were “very satisfied” with their candidate’s work, and another 30.3% were “satisfied.” Only 6.1% of the supervisors were “dissatisfied,” and just 2.2% were “very dissatisfied.” Translated to a four-point scale, the mean satisfaction level of supervisors was 3.51. Notably, satisfaction levels did not differ significantly between supervisors in the Original Program and those in the Pathway one ( $p = .650$ ). Supervisors of candidates who had not taken (or failed) the bar exam, therefore, were as satisfied as those who worked with candidates who achieved California’s new passing score.

Supervisors backed up these ratings with enthusiastic comments. Many compared the candidates favorably to new lawyers who had passed the bar exam:

- The [candidate] we have hired has served many more clients and done so much more efficiently and competently than many other lawyers I have hired in the past.<sup>189</sup>

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184. *Id.* SR554[Q5b].

185. *Id.* SR513[Q10b].

186. *Id.* SR015[Q27b]; *id.* SR401[Q27b]; *id.* SR862[Q27b].

187. *Id.* SR159[Q5b]; *id.* SR507[Q5b].

188. *Id.* SR711[Q25].

189. *Id.* SR866[Q25].

- In fact, I think that our [candidate], who had taken the Bar Exam multiple times [and failed], was better equipped and had more life experience than a young associate fresh out of law school.<sup>190</sup>
- As for their work product, the work product was in most cases better than what I've seen with newly licensed lawyers.<sup>191</sup>
- The [candidates] we work with have been extremely sharp and just as effective as new attorneys.<sup>192</sup>

A few supervisors did express disappointment in the work ethic or competence of the candidates working for them.<sup>193</sup> These supervisors, however, did not remain burdened by those candidates; they simply discontinued work with the candidate.<sup>194</sup>

#### vi. Willingness to Continue Supervision

The survey asked supervisors directly whether they would be willing to continue supervising candidates. A full 70.6% said that they would be willing to continue supervising their current candidate, future candidates, or both. Another 16.5% indicated that they were unsure. Just 13.0% were unwilling to continue supervising candidates.

Respondents offered numerous reasons for their willingness to continue with the program. Some reiterated the advantages to their own organizations: the program offered them a new avenue for hiring attorneys;<sup>195</sup> it allowed them to assess a candidate before making a

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190. *Id.* SR159[Q5b].

191. *Id.* SR0507[Q5b].

192. *Id.* SR843[Q23].

193. *See, e.g., id.* SR1006[Q4b].

194. *Id.* SR1006[Q3c] & [Q4b] (supervisor employed candidate for less than three months in light of repeated difficulties).

195. SR194[Q25] (“In a tight labor market, it allows us another channel to find good lawyers.”); *id.* SR083[Q25] (“It will increase the amount of candidates/applicants for our organization.”); *id.* SR706[Q25] (“I oversee a team of over 40 attorneys and am currently trying to fill 10 more attorney positions. Considering the growth in my field and my organization, I would not hesitate to hire law grads qualified to practice through the PLP.”).

permanent offer;<sup>196</sup> it allowed them to expand client services;<sup>197</sup> and it allowed them to hire competent candidates without worrying about disruptions in client service while candidates studied for the bar exam.<sup>198</sup>

Others suggested that the program was important for clients and the profession because it offered a better way to assess competence than the conventional bar exam. “By participating in the actual practice of law,” one supervisor observed, “rather than memorization techniques for three months as with the current Bar Exam setup, these new attorneys learn more, focus on what is expected of them in the profession, and can hit the ground running faster when licensed as compared to those who have just passed a test.”<sup>199</sup> “Good supervision while personally experiencing clients’ real life issues,” another concluded “creates better equipped lawyers.”<sup>200</sup>

Several supervisors, finally, stressed the importance of a non-exam licensing path for promoting diversity while maintaining high licensing standards. “I suspect that Pathways [candidates] are more likely to be in the marginalized groups that experience testing bias,” one supervisor urged, “and we need to increase diversity in the Bar. It is important that we hear and speak with many voices of California, and the Pathway Program gives a way to do that while still ensuring the Bar is filled with rigorous professionals.”<sup>201</sup> Another supervisor, after noting that Pathway candidates were as competent as newly licensed lawyers, commented:

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196. *Id.* SR015[Q25] (“We are desperate to find new lawyers. Giving them a ‘trial run’ through the [PLP] not only gives back to those trying to become lawyers, but gives us a great opportunity to find quality attorneys to help us.”).

197. *Id.* SR358[Q25] (“We would consider it for sure. We are a small organization, but could expand our services with a program like this!”).

198. *Id.* SR706[Q25] (“I would not hesitate to hire law grads qualified to practice through the PLP, if I knew it would provide a path towards licensure without requiring them to take breaks to study for and take the bar exam each February and July.”).

199. *Id.* SR159[Q25].

200. *Id.* SR1297[Q25]. *See also id.* SR858[Q25] (“[T]he bar exam has little to nothing to do with the actual practice of law. Thus, it would be great if there were other options that have more to do with the way law is actually practiced in real [ ] life.”).

201. *Id.* SR003[Q25].

We have seen that there is a greater socio-economic and racial diversity of [candidates] than of those who have passed the bar. All of this means that it would serve our organizations and our clients best to continue the program and extend it.”<sup>202</sup>

A third supervisor, finally, stressed the importance of the PLP in allowing candidates who live with disabilities to demonstrate their competence:

Our [candidate] has a physical disability that impacts her typing and computer usage. I have observed that while she finds workarounds, she has not consistently asked for accommodations to which she is entitled. I don't know whether she had the accommodations she needed during the bar exam, which I suspect would have impacted her score. This is another reason this program felt so important for equity issues.<sup>203</sup>

The much smaller number of supervisors who were unwilling to continue participating in the PLP also reported varied reasons for their decision. Some cited personal reasons, such as plans to retire.<sup>204</sup> Others found the demands of training and supervision too heavy.<sup>205</sup> And a handful voiced their sentiment that a bar exam is necessary to screen effectively for competence.<sup>206</sup>

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202. *Id.* SR843[Q23]. *See also id.* SR814[Q25] (“Our firm seeks to hire the very type of attorney who might have difficulty passing the bar, attorneys from underserved and underrepresented communities. These attorneys are often best able to relate to our clients who are typically marginalized.”); *id.* SR1322[Q25] (“It promotes equity.”).

203. *Id.* SR711[Q4b].

204. *Id.* SR737[Q26]; *id.* SR401[Q25].

205. *Id.* SR111[Q26[b]] (“It is nothing but effort.”); *id.* SR019[Q26] (“Unlikely [to continue] due to the heavy supervision needed. We hardly hire newly licensed bar passers.”).

206. *Id.* SR585[Q26] (“I doubt that we would participate, we need lawyers who can pass the bar. I don't mean to be blunt, but if you're not smart enough to pass the bar that's not good.”); *id.* SR1386[Q26] (“I can't imagine that we would support lowering the standards for admission in any way. There are already enough bad lawyers.”).

### vii. Candidate Satisfaction

Almost two-thirds of all candidates (63.1%) were very satisfied with the program, and another fifth (22.7%) were somewhat satisfied. The 14.2% who expressed dissatisfaction often focused on program characteristics that would not taint a more permanent supervised-practice pathway. Some participants in the Pathway Program, for example, believed that they should have benefited from the new cut score without having to complete hours of supervised practice.<sup>207</sup> Others perceived that the State Bar failed to publicize the PLP sufficiently and explain its structure to the full profession.<sup>208</sup> Overall, the high levels of satisfaction and limited number of complaints suggest strong ongoing demand for supervised-practice licensing paths.

### viii. Implementation

Some supervisors and candidates noted glitches that could be remedied to improve the PLP. Based on those comments, we suggest future programs could benefit from developing clear guidelines to govern the permitted scope of practice under a provisional license;<sup>209</sup> creating a dedicated, user-friendly portal for submitting timesheets and other paperwork;<sup>210</sup> publicizing the program widely to both the state bar and members of the public, so that all participants in the legal system would understand the role of PLP candidates;<sup>211</sup> appointing a program coordinator to answer questions, help participants address hurdles, and facilitate administrative aspects of the program;<sup>212</sup> helping candidates connect with potential supervisors;<sup>213</sup> clarifying the status of candidates under malpractice insurance policies;<sup>214</sup> and issuing temporary bar cards that would help candidates gain admittance to courthouses, jails, and other venues.<sup>215</sup>

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207. Candidate Survey, *supra* note 93, CR 923 [Q13b]; *id.* CR 1521 [Q13b].

208. *Id.* CR2108[Q13b]; *id.* CR2339[Q13b]; *id.* CR2514[Q13b].

209. *Id.* CR1993[Q13b]; *id.* CR1891[Q13b]; *id.* CR272[Q13b]; *id.* CR023[Q40].

210. *Id.* CR1911[Q40]; *id.* CR1774[Q40]; *id.* CR2512[Q40]; *id.* CR1636[Q40]; *id.* CR722[Q40]; *id.* CR 1847[Q40].

211. *Id.* CR2514[Q13b]; *id.* CR1599[Q13b]; *id.* CR2108[13b]; *id.* CR2339[Q13b]; *id.* CR1162[13b]; *id.* CR2047[13b].

212. *Id.* CR722[Q40].

213. *Id.* CR1329[Q40]; *id.* CR1515[Q40].

214. *See supra* notes 181–182 and accompanying text.

215. Candidate Survey, *supra* note 93, CR1940[Q40]; *id.* CR421[Q13b]; *id.* CR1725[Q13b]; *id.*

#### IV. DISCUSSION

California's survey of PLP participants offers key insights into the validity, feasibility, and fairness of assessing lawyering competence through supervised practice. We summarize those insights in this Section, with comparisons to the validity, feasibility, and fairness of contemporary bar exams. We also note limitations on the data discussed here and outline further questions for investigation.

##### *A. Validity*

The PLP data offers three types of evidence supporting the validity of supervised-practice pathways for demonstrating lawyering competence: (1) candidates used a high percentage of the lawyering skills that practice analyses have identified as essential; (2) candidates drew upon doctrinal principles from many subjects, including subjects that the bar exam does not test; and (3) supervisors spontaneously observed that supervised practice offers a better arena for testing competence than the bar exam.

##### *i. Skills*

There is little doubt that supervised-practice pathways offer more opportunities to assess critical lawyering skills than a written bar exam does. Written bar exams cannot effectively assess research skills, fact investigation, or client communication. Demonstration of research skills requires access to electronic databases and other resources, which bar examiners have been unwilling to allow.<sup>216</sup> Fact investigation and client communication are dynamic skills that are difficult to test on a timed written exam. These flaws seriously compromise the exam's validity: A lawyer who has memorized the legal principles tested on the bar exam, but does not know how to research new law, investigate facts, or communicate with clients, will cause significant harm.

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CR1599[Q13b].

216. See Joe Patrice, "New and Improved" Bar Exam Promises to Be Neither New Nor Improved, ABOVE THE LAW, <https://abovethelaw.com/2021/01/new-and-improved-bar-exam-promises-to-be-neither-new-nor-improved/> (Jan. 5, 2021) (noting that the NextGen bar exam, like the current exam, will be closed book).

In contrast, a high percentage of PLP candidates used these and other skills as a regular part of their work.<sup>217</sup> Licensing paths rooted in supervised practice would allow examiners to protect the public by assessing those critical skills. To ensure assessment of necessary skills, examiners can specify the skills that candidates must demonstrate. Oregon, for example, will require candidates to demonstrate their competency in both client encounters and negotiation.<sup>218</sup>

By incorporating these skills, supervised-practice pathways will align more closely with practice analyses than the bar exam does. This alignment supports the validity of supervised-practice systems for assessing critical competencies and protecting the public.

## ii. Doctrinal Knowledge

The PLP data offers similar assurances about the scope of doctrinal knowledge that can be assessed through supervised practice. Candidates reported drawing upon an average of 5.5 doctrinal areas in their practice, with a quarter of candidates listing eight or more subject areas.<sup>219</sup> Even candidates who focused on a particular practice area, such as criminal law or personal injury work, drew upon concepts from a range of subjects.

Candidates did not work in every subject area that they might pursue as lawyers—and a licensing system based on supervised practice could not assess their knowledge in all those areas. This, however, is also true of the bar exam: NCBE's NextGen exam will assess knowledge in a limited number of doctrinal areas, not in every area in which new lawyers might practice.<sup>220</sup>

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217. See *supra* Section III.A.1.

218. OR. STATE BAR, *Final Rules for the Oregon Supervised Practice Portfolio Examination*, r. 6.5–6.6 (2023), <https://lpdc.osbar.org/files/SPPEfinalrulesapprovedbyOregonSct11.7.23clean.pdf> [<https://perma.cc/XR4M-TG6B>] [hereinafter *Oregon SPPE Rules*]. If candidates are not able to demonstrate these skills in their supervised-practice placements, Oregon will allow them to substitute simulations. *Id.*

219. See *supra* Part III.A.2.

220. The exam will not even require candidates to demonstrate competence in all the subjects it tests. Instead, the exam's compensatory grading system will allow candidates to compensate for lack of knowledge in some areas with deeper knowledge in other areas. See NCBE TESTING TASK FORCE, OVERVIEW OF RECOMMENDATIONS FOR THE NEXT GENERATION OF THE BAR EXAMINATION 3 (2021), <https://nextgenbarexam.ncbex.org/themencode-pdf-viewer/?file=https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Next-Gen-Bar-Exam-Recommendations.pdf#zoom=auto&pagemode=none> [<https://perma.cc/GN7B-3WMW>].

The PLP surveys demonstrate just how narrowly the bar exam tests doctrinal knowledge. Almost nine-tenths of candidates reported using knowledge from subjects that are not tested on the bar exam, and more than a fifth reported practicing in *four or more* subjects that do not appear on the bar exam. On average, respondents reported using doctrine from 2.4 subjects that do not appear on the bar exam. The bar exam, in other words, does not test candidates on basic doctrine in every area in which a new lawyer might practice. Given the breadth of contemporary law practice, that would be impossible.

Instead, the bar exam seems to use a candidate's ability to recall and apply some doctrinal principles as a sign that they will be able to master and apply doctrinal knowledge in many other areas. Otherwise, we could not allow newly licensed lawyers to serve client needs in immigration, tax, social security, employment law, and dozens of other areas that are not tested on the bar exam. In law, the ability to synthesize and apply doctrinal principles in one practice area offers strong assurance that a lawyer can do the same in other practice areas.<sup>221</sup>

Supervised-practice offers a similar—and potentially superior—way to assess doctrinal knowledge. By reviewing work product drawn from different client matters, examiners can assess a candidate's ability to synthesize and apply doctrinal principles from several subject areas. Candidates, moreover, are likely to probe these subjects in more depth than test-takers do on an exam. They will also use the doctrinal rules recognized by their jurisdiction, rather than the homogenized law tested on the bar exam.<sup>222</sup> And, since candidates will handle actual client matters, examiners can be sure that candidates are working with doctrine that is relevant to entry-level practice. The bar exam relies upon surveys to predict those areas;<sup>223</sup> supervised-practice pathways test candidates' competence in the actual areas in which new lawyers practice.

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221. The Model Rules of Professional Conduct acknowledge this aspect of law practice, providing that lawyers may practice competently in unfamiliar practice areas by using “skill[s] that necessarily transcend[] any particular specialized knowledge,” and engaging in “necessary study.” MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 2 (AM. BAR ASS'N 1983).

222. Joan W. Howarth, *What Law Must Lawyers Know?*, 19 CONN. PUB. INTEREST L.J. 1, 11 (2019) (“The Uniform Bar Exam . . . test[s] only general rules. Of course, these rules memorized for the bar exam are not specific to any state, which is why critics dub the doctrine tested by the Uniform Bar Exam as ‘the law of nowhere.’”)

223. See, e.g., EARLY, KANE, RAYMOND, & MOREAU, *supra* note 24, at 8–13 (describing the survey of practicing lawyers that NCBE used to determine the content of the NextGen bar exam).

This capacity to assess doctrinal knowledge in actual practice areas further supports the validity of licensing systems rooted in supervised practice. As one group of highly regarded psychometricians wrote: “The time-honored way to find out whether a person can perform a task is to have the person try to perform the task.”<sup>224</sup> Supervised practice offers just that opportunity.

### iii. Observations from Supervisors

The validity of any professional licensing system rests heavily on the opinions of professionals who work in that field. Psychometricians can assist those professionals by conducting practice analyses, guiding deliberations, and helping them create fair and reliable systems, but the members of a profession define minimum competence in their field.<sup>225</sup> Legal educators and practitioners determine the scope of knowledge and skills tested on the bar exam, draft the questions that will be asked, and set the cut score for the exam.<sup>226</sup>

In that context, it is telling that numerous supervisors identified supervised practice as an appropriate—or even superior—way to assess minimum competence.<sup>227</sup> These supervisors had direct experience with the knowledge and skills needed to serve clients effectively. Most also worked

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224. Michael Kane, Terence Crooks & Allan Cohen, *Validating Measures of Performance*, EDUC. MEASUREMENT: ISSUES & PRAC. 5, 5 (1999).

225. See STANDARDS FOR TESTING, *supra* note 11, at 176 (“[P]anels of experts are used to specify the level of performance that should be required.”).

226. *Announcing NCBE’s Content Scope Committee*, NCBE, <https://nextgenbarexam.ncbex.org/announcing-ncbes-content-scope-committee/> [https://perma.cc/9PM5-KYLE] (last visited July 14, 2023) (listing practitioners and educators who determined the content and scope of the NextGen Bar Exam); *How Are Questions Written for NCBE’s Exams?*, 88 BAR EXAM’R 25, 25 (2019) (committee members who draft questions are “practicing attorneys, judges, and faculty members”); Michael T. Kane & Joanne Kane, *Standard Setting 101: Background and Basics for the Bar Admissions Community*, 87 BAR EXAM’R 9 (2018) (describing role of legal professionals in setting the cut score for the bar exam).

227. See, e.g., Supervisor Survey, *supra* note 112, SR 454[Q23] (“I think that performing work is a better gauge of whether a person is a competent lawyer than the bar exam.”); *id.* SR 479 [Q 23] (“I believe this hands on experience is more valuable than memorizing information for a test.”); *id.* SR 862 [Q23] (“I feel the training [the PLL] received, and their willingness to do well and take those opportunities offered, was a better indicator of their work ethic and intelligence (both factual and emotional) than a passing bar exam grade.”); *id.* SR 1160[Q23] (“I work in legal aid and much of what we do is not even covered on the bar exam. In my experience, competence on the job is a greater predictor of success in legal aid than bar passage.”).

directly with new lawyers who had passed the bar exam and those who were practicing under provisional licenses. Comments from these supervisors cannot on their own establish the validity of a licensing system, but jurisdictions should take them seriously—especially because some supervisors opined that a licensing system based on supervised practice would protect the public better than the bar exam.<sup>228</sup>

#### iv. Enhancing Validity

Evidence from California's PLP survey suggests that supervised practice offers a fruitful foundation for validly assessing minimum competence. California's programs, however, were simple ones designed for special circumstances; the Court did not attempt to create a program that would assess minimum competence with high validity. To achieve that goal, jurisdictions can build on California's foundation by creating portfolio systems in which candidates collect examples of work product that are submitted to independent examiners for evaluation. Jurisdictions can also specify types of work product to ensure that the candidates demonstrate their competence in a range of skills and knowledge areas.

Portfolio licensing systems will not be easier to pass than a bar exam. Oregon's new system, for example, will require candidates to submit eight pieces of written work, documentation of two client encounters, and documentation of two negotiations for assessment. Independent examiners must find each of those components minimally competent; strong performance on one will not compensate for poor performance on another. Candidates must also complete at least four months of supervised practice, demonstrating their knowledge, skills, work ethic, and professionalism.<sup>229</sup>

These rigorous requirements underscore another value of supervised-practice licensing paths. Although licensing systems perform a summative function, determining whether a candidate possesses minimum competence,

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228. See *supra* Section III.A.3.

229. *Oregon SPPE Rules*, *supra* note 218, at r. 6.4–6.6, 6.12, 8.3, 9.3. Workplace hours offer two assurances of competence. First, the experience ensures that the candidate has had an opportunity to demonstrate their knowledge and skills in a realistic setting, with feedback from a more experienced lawyer and an opportunity to correct mistakes. Second, a supervisor's willingness to retain a candidate during the supervised-practice period, to compensate that candidate, and to expose clients to the candidate's work suggests that the supervisor found the candidate minimally competent.

they inevitably affect the educational process.<sup>230</sup> Candidates who take the bar exam devote at least two months to memorizing doctrinal principles, analyzing multiple-choice questions, and practicing how to write essays under extremely tight time limits. The NextGen exam, while eliminating essay questions, still will require memorization of doctrinal principles, and weeks of practice on how to analyze multiple-choice questions and work under extremely tight time limits to answer questions based on static fact patterns. This preparation bears little relationship to the skills or knowledge lawyers need in practice.<sup>231</sup> Supervised practice, in contrast, requires candidates to work for many months under the direct supervision of a licensed attorney, learning the skills and knowledge they need to serve clients effectively. As one California candidate concluded, the PLP “allowed me to learn more about real law practice than any bar study program ever did.”<sup>232</sup> The formative aspects of supervised practice, along with summative assessment of candidates’ work product, are likely to protect the public more effectively than the bar exam.

### *B. Fairness*

The California PLP data is particularly reassuring about the fairness of supervised-practice licensing paths. Some stakeholders have worried that bias and “old boy networks” would block women of color, men of color, and white women from finding supervisors or succeeding in supervised-practice pathways. Just the opposite, however, was true in California’s Pathway Program. Women of color, men of color, and white women were *significantly more likely* than white men to participate in that program, and they were slightly more successful than white men in completing the program.

First-generation college graduates, individuals living with disabilities, and individuals who identified as LGBTQIA+ also succeeded in the PLP programs. We found no significant difference in success rates for these groups compared to other candidates. Nor did satisfaction ratings differ by

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230. Kane, *supra* note 12, at 52–53 (describing “strong effects” of testing programs on education and providing examples).

231. See *supra* notes 24–37 and accompanying text (discussing validity issues with the current bar exam).

232. Candidate Survey, *supra* note 93, CR1974[Q40].

race/ethnicity, gender, first-generation status, disability, or sexual orientation. Members of all groups expressed very high degrees of satisfaction with supervised practice. Indeed, respondents from historically disadvantaged groups offered eloquent comments about the importance of the supervised-practice program to them, their families, and their professional careers.

Just under ten percent of respondents reported experiencing some harassment or discrimination during their time in the PLP, but most of them reported experiencing only small or moderate challenges from this negative treatment. Those who reported discrimination or harassment, notably, were just as likely to succeed in the PLP as those who did not report that treatment. The two groups also expressed virtually identical levels of satisfaction with the program. Several offered comments noting that any discrimination or harassment they experienced was no greater than what they endured in other contexts and that the PLP, on balance, “countered”<sup>233</sup> discrimination by allowing them to establish their competence and serve clients.

Stakeholders have also worried that supervised-practice programs would force candidates to work without pay or accept low-paying positions. Almost all (93.6%) of the candidates in California’s Original Program, however, received compensation. Without more information about market rates, it is difficult to judge whether any of these positions were unfairly low paid. About half of the paid candidates, moreover, reported receiving more than \$35 per hour or \$65,000 per year. These numbers suggest that resources are available to pay candidates in supervised-practice programs.

Even if some candidates must work without pay, or with relatively low pay, their financial position may be better than that of bar-takers. Exam takers forego income for eight to ten weeks as they study for the exam, and they pay hefty fees for bar preparation courses.<sup>234</sup> They then wait another six to 12 weeks for bar results<sup>235</sup> before beginning work as a fully licensed attorney. Jurisdictions that offer candidates a choice between the exam and supervised practice allow the candidates to choose a pathway that is most

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233. *Supra* note 136 and accompanying text.

234. *See* Carsen Nies, *supra* note 51, at 288.

235. Teresa Lo, *State-By-State Guide to How Soon You’ll Receive Your Bar Exam Results*, JD JOURNAL (Dec. 19, 2016), <https://www.jdjournals.com/2016/12/19/state-by-state-guide-to-how-soon-youll-receive-your-bar-exam-results/> [https://perma.cc/3RU3-DJ2F].

financially attractive to them. This may help reduce disparities in bar licensing outcomes between those with resources and those without.<sup>236</sup>

Jurisdictions, finally, can bolster the fairness of supervised-practice pathways through careful design. Publicity and placement clearinghouses can increase access to supervisors. Training programs can address bias and discrimination. An ombudsperson can help candidates navigate harassment or other challenges. And states can require supervisors to pay wages to candidates. Even without these protections, candidates—including those from historically disadvantaged populations—overwhelmingly recorded their satisfaction with California’s PLP. By adding further protections, jurisdictions can enhance the fairness of supervised-practice pathways.

### *C. Feasibility*

Data from California’s PLP provides strong support for the feasibility of supervised-practice licensing paths. Although the PLP was novel and offered no incentives for supervisors, almost 1,400 licensed lawyers agreed to supervise the program’s candidates. A high percentage of supervisors responding to the survey (70.6%), moreover, were willing to continue that participation—and another 16.5% were uncertain but open to the possibility of further participation. These numbers suggest that a substantial number of licensed lawyers are willing to supervise candidates, and that many of them are willing to do so on an ongoing basis.

The supervisors who responded to California’s survey, furthermore, reported that the PLP produced many benefits for them and their clients. More than nine-tenths of respondents (91.7%) were satisfied with their candidate’s work, and an even higher percentage (94.7%) thought their candidate was especially hard working. This competence and work ethic allowed organizations to serve more clients: Almost nine-tenths of supervisors (86.8%) reported expanding their client base with the help of PLP candidates.

Respondents also stressed the PLP’s role in helping them diversify their practice teams. Candidates were more demographically diverse than recently licensed lawyers,<sup>237</sup> and some possessed unusual life experiences

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236. See *supra* note 46 and accompanying text (noting relationship between financial resources and bar passage).

237. See THE STATE BAR OF CAL., 2022 PROVISIONAL LICENSURE PROGRAM (PLP) SURVEY:

or training.<sup>238</sup> That diversity, supervisors reported, allowed their organizations to enhance service to existing clients, tap new client bases, and even explore new practice areas. As several supervisors wrote, this diversity benefited everyone: firms, clients, the profession, and the public.

In contrast, supervisors cited relatively few costs to their participation in the PLP. Many already provided supervision, training, and mentoring to newly licensed lawyers. That infrastructure allowed them to provide the same oversight and feedback to PLP candidates. Other potential costs, such as salaries paid to candidates or the costs of premiums for their malpractice insurance, elicited few complaints. This favorable balance of benefits and costs suggests that, once those benefits and costs become known, jurisdictions might attract even more supervisors to an ongoing program than California did to its PLP.

Survey data also suggests that supervisors provided sufficient training and supervision to protect the public while candidates demonstrated their competence. Most candidates rated their supervision and training highly, expressing particular appreciation for experiences that expanded their competence beyond what they had learned in law school. To the extent that this supervision and training exceeded the support that employers typically provide new lawyers, clients and the public benefited—not just during the period of supervised-practice, but after the candidate received a full license.

California's successful PLP thus provides strong assurances of the feasibility of attracting and retaining supervisors, supervising and training candidates, and protecting clients and the public. Survey respondents also noted minor problems that could be addressed to enhance those aspects of the program's feasibility.<sup>239</sup> A more permanent program will raise other feasibility issues that this study could not address. Some programs might impose additional obligations on supervisors, which could diminish participation rates. Jurisdictions that require independent assessment of candidate work product will have to establish standards for that assessment; retain evaluators; and develop reliable, cost-effective ways of conducting

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PRELIMINARY FINDINGS 3 (2022) (59% of candidates in the Original PLP were people of color; 56% of candidates in the Pathway PLP were people of color; and 53% of newly admitted attorneys were people of color).

238. See, e.g., Supervisor Survey, *supra* note 112, SR0003[Q4b] (fluent in multiple languages); *id.* SR0119[4b] (experience with death penalty work); *id.* SR159[4b] (experience with National Governing Body of Special Olympics).

239. See *supra* Part III.C.viii.

the assessment. Oregon's pilot program is beginning to offer insights into the feasibility of independent assessment, but more investigation is needed.

When measuring the feasibility of supervised-practice pathways, however, it is important to compare those costs to the heavy burdens imposed by the bar exam. Jurisdictions must either design their own exams or purchase them from NCBE.<sup>240</sup> NCBE's NextGen project demonstrates the extensive costs of that design: from initial exploration to administration, the process will take at least eight years.<sup>241</sup> Jurisdictions must also conduct standard-setting sessions to choose the passing score for their exam, rent venues to administer the exam, pay for security, and compensate graders.<sup>242</sup>

Candidates shoulder many of these costs through exam fees.<sup>243</sup> Candidates must also pay substantial fees for bar prep courses and forego income while preparing for the exam. When considering costs to both candidates and jurisdictions, supervised-practice pathways may be less expensive than bar exams.

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240. See Marsha Griggs, *Outsourcing Self-Regulation*, 80 WASH & LEE L. REV. (forthcoming 2024) (Manuscript at 1, 16-17, 29) (available at [https://papers.ssm.com/sol3/papers.cfm?abstract\\_id=4524181](https://papers.ssm.com/sol3/papers.cfm?abstract_id=4524181)) (noting NCBE's dominance in the market for production of bar exams and the limited options for states).

241. NAT'L CONF. OF BAR EXAM'RS, FINAL REPORT OF THE TESTING TASK FORCE, <https://nextgenbarexam.ncbex.org/reports/final-report-of-the-ttf/> [<https://perma.cc/KLF2-ACS2>] (noting that the process of researching a new exam began in 2018). The exam's projected availability date is July 2026. See *NextGen Bar Exam Content Scope and Sample Questions*, NAT'L CONF. OF BAR EXAM'RS, <https://nextgenbarexam.ncbex.org/> [<https://perma.cc/ZAV8-LHEZ>].

242. Just administering the exam currently costs California more than \$5.6 million per year. See MEETING OF THE STATE BAR OF CAL., *supra* note 48. Grading supervised-practice portfolios may be more expensive than grading bar exams, but that incremental cost is unlikely to exceed the heavy costs of designing, vetting, and administering exams.

243. See *supra* note 51 and accompanying text.

It is worth noting, finally, that California established its PLP in a state that receives more applicants for bar admission than any other state but New York.<sup>244</sup> That scale makes California's success particularly impressive and should offer encouragement to smaller jurisdictions. Coordinating supervised-practice programs should be easier in smaller jurisdictions, requiring less administrative time. Recruiting a proportionate number of supervisors may also be easier, especially if members of the profession are more tightly knit than in larger states.<sup>245</sup> California's proof of concept in a particularly large jurisdiction bodes well for programs in other jurisdictions.

#### *D. Limitations of the Current Study*

Like all social science research, this study has several limitations. All three surveys generated relatively high response rates, and we detected no demographic differences between respondents and nonrespondents, but those groups may have differed in other ways. We do not know, for example, whether respondents held more positive views of the PLP than nonrespondents. The number of responses and their positive nature, however, suggests that there is sufficient support for the validity, feasibility, and fairness of supervised-practice programs to explore those programs further.

Our results are also limited by the fact that respondents' experience with supervised practice occurred during the pandemic. On the one hand, pandemic-era experiences may offer a "worst case" view of supervised practice; lawyers were willing to take on candidates, supervise them, and offer appropriate training during a time that was otherwise challenging for the legal profession. On the other hand, it is possible that a "pandemic spirit" made supervisors more willing to help others and provide this assistance.

The structure of California's PLP, finally, imposes important limits on our findings. Candidates in California's Original Program continued to take the bar exam to demonstrate their competence, while those in the Pathway Program needed only to secure an undifferentiated "positive evaluation"

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244. See *Persons Taking and Passing the 2022 Bar Examination*, BAR EXAM'R, <https://thebarexaminer.ncbex.org/2022-statistics/persons-taking-and-passing-the-2022-bar-examination/> [https://perma.cc/YAB3-NBZV] (listing total examinees in 2022 for each jurisdiction).

245. Cf. GERKMAN & HARMAN, *supra* note 55, at 22 (noting the advantages that New Hampshire, a small state, enjoyed in creating an innovative licensing path).

from their supervisors.<sup>246</sup> Neither of those programs allowed us to assess the reliability of portfolio systems that determine competence based on independent review of candidates' work product—an important feature of the pathways that jurisdictions are currently designing. The psychometric literature offers evidence that it is possible to construct reliable assessments based on that type of work product,<sup>247</sup> but our study could not supplement those findings.

### *E. Further Questions for Investigation*

We have already identified several questions warranting further study: How will independent review of candidates' work product enhance the validity of assessing competence through supervised practice? Is that assessment feasible? Does it produce reliable results? Can work product be gathered in a way that ensures assessment of the candidate's competence and reduces concerns about cheating? And can jurisdictions bolster the fairness we observed in California's PLP with additional protections for candidates?

As jurisdictions explore supervised-practice licensing paths, they can gather data to answer additional questions: What are the success rates for candidates pursuing supervised-practice pathways? How do those success rates compare to those on the bar exam? Do success rates in either licensing process vary by race/ethnicity, gender, first-generation status, disability, or sexual orientation? If so, can we identify reasons for those differences? And perhaps most importantly, how does the performance of lawyers licensed through different pathways compare in practice? That type of study is

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246. The Pathway candidates had also achieved bar exam scores that satisfied California's new passing score. The work of those candidates, therefore, may not have been representative of the work that lower-scoring candidates would provide in the workplace. Our study, however, also included candidates in the Original Program, almost half of whom had not passed the bar exam.

247. See, e.g., Erik Driessen et al., *The Use of Qualitative Research Criteria for Portfolio Assessment as an Alternative to Reliability: Case Study*, 39 MED. EDUC. 214 (2005) (describing new approaches to calculating reliability when assessing portfolios); José Felipe Martinez, Matt Kloser, Jayashri Srinivasan, Brian Stecher, & Amanda Edelman, *Developing Situated Measures of Science Instruction Through an Innovative Electronic Portfolio App for Mobile Devices: Reliability, Validity, and Feasibility*, 82 EDUC. & PSYCH. MEASUREMENT 1180 (2022) (analyzing reliability of teaching portfolios and offering insights on increasing that reliability); Charlotte E. Rees & Charlotte E. Sheard, *The Reliability of Assessment Criteria for Undergraduate Medical Students' Communication Skills Portfolios: The Nottingham Experience*, 38 MED. EDUC. 138 (2004) (presenting evidence that discussion and negotiation between independent raters enhances reliability of portfolio assessment).

difficult to mount, but not impossible.<sup>248</sup>

Oregon's rules for a licensing path based on supervised practice require regular audits and reports related to some of these questions.<sup>249</sup> Other jurisdictions and researchers can build on those requirements to generate useful information about lawyer licensing. With careful study, we may be able to better understand both the competencies that support effective client service and the most valid, feasible, fair, and reliable ways to assess those competencies.

### CONCLUSION

For decades, criticisms about the bar exam's weak validity and racially disparate impact have been countered with claims that no viable alternatives can adequately protect the public.<sup>250</sup> This study suggests otherwise. Survey responses from more than 1,750 bar candidates and supervisors<sup>251</sup> demonstrate that supervised practice provides a solid foundation for valid, feasible, and fair assessment of lawyering competence. Indeed, our analyses signal that assessment through supervised practice may better protect the public than a written bar exam. On that score, our work agrees with the only other study comparing the competence of bar-licensed lawyers with that of lawyers assessed through an alternative system.<sup>252</sup> Most importantly, our data demonstrates that this more-protective system will mitigate—and perhaps eliminate—the racial disparities that plague our profession's licensing process.

We can no longer hide behind the conventional wisdom that we cannot do better. New licensing processes can better protect the public *and* make the legal profession more inclusive. While this study leaves some questions

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248. See, e.g., GERKMAN & HARMAN, *supra* note 55 (comparing graduates of the Daniel Webster Scholar Program with graduates who took a traditional bar exam); Jason Scott et al., *Putting the Bar Exam to the Test: An Examination of the Predictive Validity of Bar Exam Outcomes on Lawyering Effectiveness*, (AccessLex Institute, Working Paper No. 230-3, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4419062](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4419062) [https://perma.cc/288D-JGNF] (comparing bar exam scores with measures of attorney effectiveness).

249. *Oregon SPPE Rules*, *supra* note 218, at § 20.

250. See *supra* note 3 and accompanying text.

251. As noted above, see *supra* Section II.C., the response rates for all three surveys were substantial, yielding a total of 1,755 survey respondents.

252. GERKMAN & HARMAN, *supra* note 55 (comparing bar-licensed lawyers with students in New Hampshire's Daniel Webster Scholars program).

unanswered, it strongly supports exploration of alternative licensing pathways—a process that has already begun in some states. Those states, as well as others, now have data that can inform their design of new licensing paths. Those paths may finally fulfill our profession’s twin commitments to promoting high professional standards and enhancing diversity.<sup>253</sup>

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253. See *ABA Mission and Goals*, [https://www.americanbar.org/about\\_the\\_aba/aba-mission-goals/](https://www.americanbar.org/about_the_aba/aba-mission-goals/) [https://perma.cc/Q6CT-BNS9] (last visited July 14, 2023) (listing four goals, including “Improv[ing] Our Profession” through, inter alia, “Promot[ing] competence, ethical conduct and professionalism;” and “Eliminat[ing] Bias and Enhanc[ing] Diversity”).