

## BAR EXAMINATION: A VERB, NOT A NOUN

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### ABSTRACT

The legal profession, long steeped in tradition, is witnessing a transformative shift in the protocols for licensing new attorneys. Multiple jurisdictions are moving away from reliance on standardized testing as the sole gateway to law practice and are developing individualized (and potentially reciprocal) systems of state licensure. Ironically, the planned launch of a new standardized exam—the NextGen bar exam—appears to be a major catalyst in the transformation of state licensure pathways. This shift has the potential to realign the regulatory hierarchy in attorney admission. Such a realignment is vital to the preservation of lawyer self-governance, and it offers great promise for a more client-centered focus in legal education.

This Article examines the many new developments in attorney licensure taking place in the United States and offers an account of their advantages and limitations, including their potential for multijurisdictional practice. By deconstructing the varied new or improved ways to license new attorneys, this Article will aid state supreme courts and state examining boards that wish to explore exam alternatives. The summary processes and recommendations described offer guidance on the array of licensing measures that are available and the mechanics of their implementation.

This Article also pushes back against the normative and reductionist theory of bar examination. It applies a new legal realism lens through which to view the construct of bar examination. In so doing, it offers a multimodal roadmap to a co-regulated profession that is free of unnecessarily restrictive barriers to entry. This Article presents information that will aid law students aspiring to become licensed attorneys in determining where and through

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which modality to pursue licensure. This Article continues an important national conversation about attorney self-regulation and offers new avenues to engage members of the legal profession in their own governance.

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## INTRODUCTION

Word of a new bar exam has created considerable buzz in legal education and the legal profession. And with good reason. Scheduled to debut in 2026, the NextGen bar exam (NextGen exam) purports to bring a

major change to the way we screen new attorneys for licensure.<sup>1</sup> Lawyers are excited about the NextGen exam for three key reasons:

1. *Enhanced Relevance*: The NextGen exam aims to test legal skills and knowledge using integrated question sets that are more relevant to actual law practice.<sup>2</sup>
2. *Skills Emphasis*: By incorporating skills competencies into the test format and relying less on rule memorization, the NextGen exam is designed to provide a better measure of practice readiness.<sup>3</sup>
3. *Alignment with Legal Education*: The new exam format will influence law school curriculum to ensure that what is taught in law schools reflects the skills needed in practice.<sup>4</sup>

The general response to the NextGen exam demonstrates that even a ritual as entrenched and ubiquitous as the bar exam can, and should, be modernized. Since the announcement of its planned launch, the NextGen exam has been a feature on the agenda of virtually every law school curriculum committee and legal education conference in the United States.<sup>5</sup> It will likely continue to occupy considerable space in academic planning and course design for the foreseeable future.

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1. See Press Release, Nat'l Conf. of Bar Exam'rs, Surpass Assessment to Provide NextGen Bar Exam Delivery Platform (Jan. 30, 2024), <https://www.ncbex.org/news-resources/surpass-assessment-provides-nextgen-platform> [<https://perma.cc/XM79-FNR6>] (“The National Conference of Bar Examiners (NCBE), headquartered in Madison, Wisconsin, is a not-for-profit corporation founded in 1931.”).

2. *About the NextGen Bar Exam*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/nextgen> [<https://perma.cc/H7X8-TY55>].

3. *Id.*

4. *Id.* (“[T]he exam will reflect many of the key changes that law schools are making today, building on the successes of clinical legal education programs, alternative dispute resolution programs, and legal writing and analysis programs.”).

5. See, e.g., *2024 Annual Agenda*, NAT'L CONF. OF BAR PRESIDENTS, <https://ncbp.org/page/2024AnnualAgenda> [<https://perma.cc/9BHF-TGMC>]; Julianne Hill, *Law Schools Examine Pedagogy as NextGen Bar Exam Looms*, ABA J. (Apr. 16, 2024, 2:10 PM), <https://www.abajournal.com/web/article/law-schools-examine-pedagogy-as-nextgen-bar-exam-looms> [<https://perma.cc/ZDD7-VCRJ>]; *Arkansas Law Review Symposium to Explore Evolution of Legal Education*, UNIV. OF ARK. NEWS (Aug. 19, 2024), <https://news.uark.edu/articles/70965/arkansas-law-review-symposium-to-explore-evolution-of-legal-education>. [<https://perma.cc/543B-TUJ2>].

The goals of the NextGen exam are both lofty and well-needed. If the new exam is true to its design, it should be a marked improvement over the multiple-choice-centered, speeded, memory-style testing that the current written bar exams employ.<sup>6</sup> The new exam format holds out hope that law practice skills will be welcome additions to the legal knowledge and analytical reasoning already tested. The general response to the planned overhaul demonstrates a growing national appetite for reform in the legal profession.<sup>7</sup> The introduction of the NextGen exam also offers an opportunity for regulators to introspectively revisit their roles in attorney licensure. As states have grown path-dependent on commercialized bar exams for their ability to license new attorneys, state regulators have become almost entirely removed from the decision making and competency assessment processes.<sup>8</sup>

The promises of the NextGen exam extend far beyond its novel and improved format. The test developer's efforts to prime legal regulators to be open to the reforms promised by the NextGen exam have the fortunate coincidence of also priming them to be open to wider reaching reforms. Those wider reaching reforms, that states are now considering, can help to reduce the access to justice gap,<sup>9</sup> mitigate barriers to entry imposed along racial and demographic lines,<sup>10</sup> and reclaim aspects of regulatory discretion that have been abdicated by the judicial outsourcing of the bar exam.<sup>11</sup> Even

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6. See, e.g., Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 373–79 (2002) (discussing problems with bar exam components).

7. See, e.g., Shoshana Weissmann, *Conservative Groups Praise Washington Bar Exam Reforms Meant to Help 'Marginalized Groups'*, R STREET INST. (June 3, 2024), <https://www.rstreet.org/commentary/conservative-groups-praise-washington-bar-exam-reforms-meant-to-help-marginalized-groups/>[<https://perma.cc/D24F-8655>]; Keith W. Rizzardi, *Honor the Oath: Florida's Constitution and the Need for Bar Examiner Reform*, 52 STETSON L. REV. 1, 18 (2022) (asserting that the bar examiners' approach to mental and financial health should be reevaluated).

8. Marsha Griggs, *Outsourcing Self-Regulation*, 80 WASH. & LEE L. REV. 1807, 1858–59 (2024) [hereafter *Outsourcing Self-Regulation*].

9. See Nicci Arete, *The Bar Exam's Contribution to Systemic Inequalities in Access to Justice Around the World*, 30 WASH. INT'L L.J. 324, 341–347 (2021) (“There is extensive scholarship establishing the connection between the legal profession's accessibility and access to justice in marginalized communities.”).

10. See Cecil J. Hunt II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 781 (1996) (“To the extent that performance on the bar exam is in any way correlated to academic performance in law school, the psychic injury done to women and students of color by being isolated and silenced in the classroom reflects itself first in lower academic performance, then, predictably, in lower success rates on the bar exam.”).

11. *Outsourcing Self-Regulation*, *supra* note 8, at 1837.

before it has been finalized for use, the NextGen exam has already opened the door for other innovative state-led reforms that present opportunities to bring client representation experience into licensure assessments, which has been an elusive goal for decades.<sup>12</sup>

This Article frames the rollout of the NextGen exam as two competing, but not contradictory, developments in attorney regulation. First, the new exam is a case study for national bar reform as it harnesses the power, influence, and collaboration necessary to affect regulatory change. Second, the new exam is a partial catalyst for the myriad bar reform efforts underway across the country. This Article offers a contemplative synopsis of the many new fronts in attorney licensure that are being deployed. In doing so, it will recontextualize the use of bar examination to carry out the courts' regulatory function in attorney admission.

Part I of this Article will critically analyze the function, evolution, and semantics of bar examination in the United States. Through that analysis, I identify bar examination as a regulatory duty of the legal profession and not simply as a test that must be passed to enter law practice. I propose that bar examination is a multimodal construct that represents the public-protection aims of attorney self-governance. Through self-governance, members of the bar and judiciary must monitor their own adherence to legal and ethical standards and evaluate the competence of those seeking to enter the profession.<sup>13</sup>

Part II will explore the innovative reform efforts in states that have declined to adopt the NextGen exam in pursuit of a state-controlled examination. These states must commission their own in-house exams through self-creation or the introduction of new vendors in an industry that, for decades, remained under the control of a single supplier. Doing so will reroute the direction of attorney licensure in those states, and it will also disrupt a monopoly-controlled market that has been free from competition since its genesis. The efforts in these states offer guidance to jurisdictions that have not yet embarked upon their own tailor-made pathways for

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12. James S. Hardy, *Lowering the Bar: Why We Should Test Skills, Not Abstracts*, COLO. LAW., Nov. 2009, at 93 (“[T]he Bar exam doesn’t test the knowledge—let alone the skills—actually used in practice.”).

13. *Why Are Lawyers Self-Governing?*, LEGAL KNOWLEDGE BASE, <https://legalknowledgebase.com/why-are-lawyers-self-governing> [https://perma.cc/22RQ-D8XH] (last updated Aug. 20, 2022).

attorney licensure. Such pathways must be fully explored to see whether they also hold promise for multijurisdictional practice.

Part III examines bar reforms taking place in jurisdictions that have adopted the NextGen exam and will simultaneously implement additional pathways and/or requirements to establish minimum competency. This section will demonstrate the flexibility of the NextGen exam and challenge false inequivalencies between exam and non-exam measures of competency. Effective bar licensure screening can have multiple pathways, each of equal quality and effectiveness, which are not mutually exclusive. The developments in these states are particularly instructive because they provide roadmaps of effective co-regulation that involve the judiciary and the practicing bar in attorney admission.

Part IV of this Article will connect the new developments in attorney licensure to parallel developments in legal education and access to the legal profession. New pathways into law practice may also lead to a more representative and inclusive legal profession by removing known obstacles that are fully unrelated to practice competency. Identifying competency measures that account for socioeconomic realities is meaningful work that bar regulators and legal educators can no longer ignore.

## I. EXAMINING LAWYER COMPETENCE

The principal obligation of a self-governed profession is to ensure that each member is competent and ethical in the delivery of professional services. For self-governance to be effective, leaders of the profession must establish some threshold of acceptable competence as a qualifier for entry and then set conduct-based standards for sustained membership in the profession. In the legal profession, passing a bar examination is the threshold that fulfills the dual regulatory role of gatekeeper and public protector.<sup>14</sup> That threshold standard has been kept artificially high—principally to limit the competitive supply of lawyers.<sup>15</sup> The self-imposed

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14. Milan Markovic, *Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege*, 35 GEO. J. LEGAL ETHICS 163, 169 (2022).

15. Kyle Rozema, *How Much Does the Bar Exam Decrease the Size of the American Legal Profession?*, AM. L. & ECON. REV. (forthcoming) (manuscript at 21), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4475434](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4475434) [perma.cc/T2M4-3699] (study using data from 1984 to 2019 finding that requiring lawyers to pass the bar exam affects the size of the American legal profession and that requiring a bar exam as a precondition of entry into the legal profession decreases the size of the

high standard of passing the bar has a dual function: it serves a purely gatekeeping purpose, and it arguably functions to protect the public from not-yet-competent lawyers.<sup>16</sup>

The earliest usage of the phrase “passing the bar” did not refer to reaching or exceeding a prescribed score on a written exam. Rather, it described a privilege reserved only for attorneys who were allowed to cross or pass an actual partition or railing in the courtroom that separated the lay public from officers of the court.<sup>17</sup> The physical and demonstrative act of passing the bar was a distinguishing symbol of membership in the legal profession. Today, that distinction is symbolically reflected by the outcome of a two-day exam.<sup>18</sup> The origin of passing the bar remains symbolically connected to the current practice of bar licensure by written test.

All jurisdictions in the United States rely on some form of bar examination to protect the public from incompetent lawyers.<sup>19</sup> In most jurisdictions, the examination takes written form and has been standardized to include some combination of multiple-choice and written-answer questions.<sup>20</sup> In early years, bar examination was conducted orally using a series of random questions that may or may not have been related to legal rules or procedures. One attorney recounted his oral bar examination that took place while his examiner, former President Abraham Lincoln, was bathing. He recounted, “The whole proceeding was so unusual and queer, if not grotesque, that I was at a loss to determine whether I was really being examined at all.”<sup>21</sup> Orally administered bar examinations were heavily

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legal profession by 13.5%).

16. See Catherine Martin Christopher, *Modern Diploma Privilege: A Path Rather Than a Gate*, 107 MINN. L. REV. 2777, 2785 (2023) (“The purpose of law licensing . . . is either to ensure the minimum competence of new lawyers or, depending on your perspective, to serve a protectionist function maintaining the exclusiveness of an already-peopled (and overwhelmingly white) club.”).

17. *What Does “Bar” Stand for in the Bar Exam or Bar Association?*, SUHRE & ASSOCS. (Apr. 26, 2022), <https://www.suhrelaw.com/blog/what-does-bar-stand-for-in-the-bar-exam-or-bar-association/> [https://perma.cc/P2BZ-GA47].

18. Patrick J. Meyer, *Adding Legal Research to the Bar Exam: What Would the Exercise Look Like?*, 53 AKRON L. REV. 109, 109 (2019) (“The current form of the traditional two-day bar exam has been mostly unchanged for decades.”).

19. See, e.g., Kyle Rozema, *Does the Bar Exam Protect the Public?*, 18 J. Empirical Legal Stud. 801, 801 (2021) (identifying the main justification for occupational licensing regimes is that they are necessary to protect the public); see Joan W. Howarth, *Shaping the Bar: The Future of Attorney Licensing* 18–19 (2023).

20. See *Bar Exams*, AM. BAR ASS’N, [https://www.americanbar.org/groups/legal\\_education/resources/bar-admissions/bar-exams](https://www.americanbar.org/groups/legal_education/resources/bar-admissions/bar-exams) [https://perma.cc/F5UE-Y3PJ].

21. Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You’ll Like It*, 2000 WIS. L. REV.

criticized for being poor barriers to entry and were subsequently abolished in favor of written exams.<sup>22</sup>

Written exams have also fallen prey to harsh criticism. Yet, despite decades of literature lashing claims that the bar exam protects the public, a passing score on a standardized exam has become a recognized proxy for lawyer competence.<sup>23</sup> Notwithstanding the many meritorious critiques, whether or not the process of bar examination is a valid measure of practice competency depends on the mechanism used for examination.<sup>24</sup> It is here that I posit a reframing of the term “bar examination” to allow a more informed connection between beginning lawyer competence and the tools employed to assess that competence. Such a reframing is essential if ever we are to debunk the feigned equivalency of minimum competence for law practice and a passing score on a state bar exam.<sup>25</sup>

#### A. A Regulatory Duty, *Not* a Test

Semantically, lawyers have equated the act and professional responsibility of “bar examination” with a written “bar exam.” Bar examination includes and encompasses the standardized bar exam in use today, but the term describes far more than timed sets of multiple-choice and essay questions. Bar examination is an intangible construct. The

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645, 646 (2000) (quoting Joel Seligman, *Why the Bar Exam Should Be Abolished*, JURIS DR., Aug.–Sept 1978, at 48).

22. See JOAN W. HOWARTH, SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING 18–19 (2023).

23. Markovic, *supra* note 14, at 167 (citing *Jones v. Bd. Of Comm’rs*, 737 F.2d 996, 999 (11th Cir. 1984)) (“A state . . . adopts a rebuttable presumption of incompetence . . . [and] then essentially adopts [it] as fact as to those individuals who fail the examination.”).

24. Deborah Jones Merritt et al., *Practice-Ready Licensing*, Jan.–Feb. 2024, <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/rethinking-licensure/practice-ready-licensing/> [<https://perma.cc/F9VC-HWS2>] (offering evidence that supervised-practice programs can assess more knowledge and skills than the traditional bar exam).

25. Deborah Jones Merritt et al., *Enhancing the Validity and Fairness of Lawyer Licensing: Empirical Evidence Supporting Innovative Pathways*, 73 WASH. U. J.L. & POL’Y 96, 96 (2024) (“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.”); Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931, 934–35 (2020) (arguing that if bar exams were subject to Title VII scrutiny, they would be struck down because of their unproven validity and disparate impact on minority groups). See generally Steven Foster, *Does the Multistate Bar Exam Validly Measure Attorney Competence?*, 82 OHIO ST. L.J. ONLINE 31 (2021) (offering empirical data that licensed practicing attorneys could not earn a passing score on the Multistate Bar Exam).

construct represents an earnest desire to ensure the legal knowledge, licensure worthiness, and practice readiness of an entering lawyer. Bar examination is regulatory duty of self-governance that is not correlated to academic memory. Bar examination cannot be fully captured by two-dimensional scenarios that more closely resemble law school exams than actual law practice.

Bar examination is a multimodal peer-review mechanism to assure the public and the legal profession that new lawyers are competent to represent clients. The practice of bar examination in the United States has evolved along what may be a revolving 360-degree continuum. At shifting points in history, bar admission qualifications involved any one or more of the following thresholds: a pure gender-based standard;<sup>26</sup> apprentice-style on-the-job training;<sup>27</sup> an educational equivalency;<sup>28</sup> perfunctory oral interviews;<sup>29</sup> state-law-specific licensure exams;<sup>30</sup> or a standardized uniform exam that tests select general principles, not jurisdictional rules.<sup>31</sup>

Before there was a written bar exam, bar examination took the form of apprenticeship. There were no formal education requirements for lawyers,<sup>32</sup> and aspiring attorneys would learn their trade in law offices where they were trained by practicing lawyers.<sup>33</sup> Education soon became a proxy for practice competency. Under the legal education model for licensure, the apprenticeship model became a back door to licensure for those who did not desire or were unable to enroll in law school. As formal legal education

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26. See Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 377 (1996) (finding that any white man of good moral character could be admitted to practice); see also Daniel R. Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1195 (1995) (stating that during the 1820s and 1830s, most admissions standards disappeared or were greatly reduced to permit virtually any man to practice law); David Adler, *Supreme Court in 1873: Women Unfit to Practice Law*, WYO. HUMANS. (Oct. 9, 2022), <https://thinkwy.org/columns/supreme-court-in-1873-women-unfit-to-practice-law/> [<https://perma.cc/GV86-L9N3>] (discussing *Bradwell v. Illinois*, 83 U.S. 130 (1872)).

27. HOWARTH, *supra* note 22, at 16–17.

28. *Id.*

29. Sarah Friedman, *The History of the U.S. Bar Exam, Part I – The Law’s Gatekeeper*, LIBR. OF CONG. BLOGS (Feb. 13, 2024), <https://blogs.loc.gov/law/2024/02/the-history-of-the-u-s-bar-exam-part-i-the-laws-gatekeeper/> [[perma.cc/S6PU-4444](https://perma.cc/S6PU-4444)].

30. Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 3 (2019) [hereinafter *Building a Better Bar Exam*].

31. *Id.* at 1, 3, 14–18 (describing the format and widespread adoption of the Uniform Bar Examination).

32. HOWARTH, *supra* note 22, at 16–22.

33. *Id.*

became more common, graduation from law school alone was a sufficient marker of competence to practice law.<sup>34</sup>

That practice, known as “diploma privilege,” began in the late 1800s and continues to characterize bar admission in Wisconsin.<sup>35</sup> The Wisconsin Diploma Privilege is enacted and controlled jointly by the Wisconsin Legislature and the Wisconsin Supreme Court.<sup>36</sup> Often characterized as a “bar exam alternative,” or a “non-exam pathway,” admission by diploma privilege is unquestionably a type of co-regulatory bar examination because through it, the practicing bar and the judiciary together become active participants in the legal education and the practice readiness of graduates.<sup>37</sup>

Diploma privilege, apprenticeships, and open-admission modalities fell out of favor with legal regulators who were motivated by prejudicial notions of elitism.<sup>38</sup> As people who were not upper class, not Christian, and not white gained access to legal education, the elite majority of lawyers sought to fortify the barriers to enter the legal profession.<sup>39</sup> That fortification took the form of bar examination by written test.<sup>40</sup> After multiple iterations across jurisdictions, a written test became the normative prerequisite for attorney licensure. Through the prevalence of psychometric standardization, the written bar exam in use today is fairly uniform and highly conducive to reciprocal bar admission.<sup>41</sup> Standardization has also made the bar exam a resource-intensive, speeded test of generic legal rules.<sup>42</sup>

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34. Thomas W. Goldman, *Use of the Diploma Privilege in the United States*, 10 TULSA L. J. 36, 40–41 (1974) (“[I]n the 1870’s, the law schools became influential with the legislatures and the courts and were elevated to a level equal to or higher than other methods of legal training, and thus the diploma privilege became firmly implanted in the system of legal education.”).

35. Moran, *supra* note 21, at 645–46; Claudia Angelos et al., *Diploma Privilege and the Constitution*, 73 SMU L. REV. F. 168, 170 (2020).

36. Moran, *supra* note 21, at 654.

37. *Id.*; see also *New Practice Pathways: A Conversation with the Willamette Law Dean on Licensure Reform in Oregon*, THE PRACTICE, Jan.–Feb. 2024, <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/rethinking-licensure/new-practice-pathways/> [<https://perma.cc/B364-ZNPY>].

38. HOWARTH, *supra* note 22, at 18.

39. See, e.g., Scott Devito et al., *Onerous Disabilities and Burdens: An Empirical Study of the Bar Examination’s Disparate Impact on Applicants from Communities of Color*, 43 PACE L. REV. 205, 214–215 (2023); HOWARTH, *supra* note 22, at 26.

40. HOWARTH, *supra* note 22, at 30.

41. Suzanne Darrow-Kleinhaus, “*Portability of the UBE: Where Is It When You Need It and Do You Need It at All?*”, 37 TOURO L. REV. 665, 671 (2021).

42. Moran, *supra* note 21, at 650 (quoting a letter from Phillip G. Schoner, “[The bar exam] necessarily emphasizes memory at the expense of reasoning and this is true no matter how conscious an effort is made to avoid such an emphasis.”); see also Natalie Anne Knowlton, *The Time Bandit: The Treasure of Time that the Bar Exam Takes From Us*, MEDIUM (Jul. 26, 2021),

Since its inception, the construct of bar examination has always included diploma privilege and any other pathway to licensure that is supervised by the state's highest court or the court's designated agents—regardless of whether that pathway utilizes a written test.<sup>43</sup> In that vein, the recent re-emergence of non-exam pathways, or so-called “alternative pathways,” is fully in line with the construct of bar examination as it was originally conceived. Because bar examination by written test has become so prevalent in the legal profession, we have come to commonly refer to non-exam pathways to licensure as “bar alternatives.” When we frame our self-regulatory duties in a way that is constrained or defined by a singular exam, we minimize the true role of self-regulation. Dean Brian Gallini offered a well-thought reminder of the importance of semantics:

I have started to push back heavily against the [use of the term] ‘alternative,’ though I admit I used that term at the outset. What I’ve learned through hundreds of hours of conversation on this topic is that the use of that word [alternative] . . . makes it look like it’s something less than the current bar exam.<sup>44</sup>

No profession is more attuned to the importance of word choice than the legal profession. The words we use to describe the bar admission process matter; they are not mere technicalities. The terminology we employ to discuss the licensure mechanisms in place and proposed reforms thereto can aid us in getting to the very heart of the thin line between standardized bar

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<https://medium.com/@natalalleycat/the-time-bandit-1c913cdfffd> [<https://perma.cc/5VG3-DLGM>]. Multiple commercial bar prep companies offer tips, tools, and guidance for the voluminous information that must be memorized for the bar exam. See, e.g., Mark Livingston, *The Bar Exam is Coming! How to Memorize It All*, BAR EXAM TOOLBOX (Jul. 10, 2019), <https://barexamtoolbox.com/the-bar-exam-is-coming-how-to-memorize-it-all/> [<https://perma.cc/K2ZC-YU69>]; 7 *Highly Effective Memorization Techniques for the Bar Exam*, THEMIS BAR REV., [https://www.themisbar.com/themis-blog/7\\_highly\\_effective\\_memorization\\_techniques\\_for\\_the\\_bar\\_exam](https://www.themisbar.com/themis-blog/7_highly_effective_memorization_techniques_for_the_bar_exam) [<https://perma.cc/MGX7-Z8Y8>]; *Bar Exam Memorization Tips*, JD ADVISING, <https://jdadvising.com/bar-exam-memorization-tips/> [<https://perma.cc/5AWP-23G8>].

43. Christopher, *supra* note 16, at 2780 (“Historically, lawyers in the United States have been licensed by a variety of methods, including apprenticeship, diploma privilege, oral examination, written examination, and no examination at all.”).

44. *New Practice Pathways: A Conversation with the Willamette Law Dean on Licensure Reform in Oregon*, THE PRACTICE, Jan.–Feb. 2024, <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/rethinking-licensure/new-practice-pathways/> [<https://perma.cc/B364-ZNPY>].

examination and the many other (and often better) ways to evaluate practice competency.

### *B. Bar Exam Hegemony*

Written bar exams, as we know them, have become a mainstay for state supreme courts tasked with regulating admission to the bar. The ubiquitous influence of the bar exam is felt by all who seek to enter the legal profession.<sup>45</sup> The bar exam has become so central to the entry into law practice that seven states still offer bar admission to applicants who have not graduated from law school or received any formal legal education if the applicant manages to pass the state's bar exam.<sup>46</sup> The fact that regulators of the legal profession in those seven states place greater value on the bar exam as a measure of practice readiness than on legal education, reflects an alarming divide between legal practitioners and legal educators. Recent developments in bar licensure may serve to narrow that divide.

These new developments in bar licensure are significant because, historically, courts have been resolute in their refusal to break ties with the established mode of testing for any other pathway.<sup>47</sup> Even during the height of the COVID pandemic, when health and safety regulations limited the ability to administer a written bar exam in large group assemblies, states remained devout to the written exam.<sup>48</sup> Despite the availability of multiple licensure options and the massive outpouring of support for those options, bar regulators continued to resist non-exam pathways.<sup>49</sup>

Such resistance was encouraged, if not led, by the National Conference of Bar Examiners (NCBE).<sup>50</sup> The NCBE is a not-for-profit corporation that

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45. Hansen, *supra* note 26, at 1191.

46. The states are California, Maine, New York, Vermont, Virginia, Washington, and West Virginia. David Merson, *Can You Take the Bar Exam Without Going to Law School?*, JURIS EDUC. (Oct. 18, 2024), <https://www.juriseducation.com/blog/can-you-take-the-bar-exam-without-going-to-law-school> [<https://perma.cc/B58J-WRZ9>] (updated Dec. 31, 2024).

47. Marsha Griggs, *An Epic Fail*, 64 HOWARD L. J. 1, 50 (2020) [hereinafter *An Epic Fail*].

48. *Id.* at 41–42 (“Why were examiners willing to expose applicants to the risk of death rather than make any modification to the method or modality of bar examination? What is it about the bar exam and those who champion it, that not even a deadly global contagion would deter its administration?”).

49. *Id.* at 47–50.

50. NAT'L CONF. OF BAR EXAM'RS, BAR ADMISSIONS DURING THE COVID-19 PANDEMIC: EVALUATING OPTIONS FOR THE CLASS OF 2020, at 4 (2020) (“It is not necessary to take the extreme step

produces and licenses the multistate exams for attorney licensure used in all U.S. jurisdictions.<sup>51</sup> During the period of health and safety restrictions imposed by the COVID pandemic, jurisdictions were faced with a great push to temporarily re-enact diploma privilege or supervised practice pathways to licensure.<sup>52</sup> In response, the NCBE issued an organizational policy paper disavowing the diploma privilege as a recommended option.<sup>53</sup> Most jurisdictions followed the NCBE recommendation and declined to pursue any licensure pathway that did not involve a standardized bar exam.<sup>54</sup> A noted irony of the NCBE's committed stance against diploma privilege is that the organization has been led, for the last twenty years, by attorneys who were admitted by diploma privilege.<sup>55</sup>

Reflecting on the problems related to bar examination in 2020 and 2021, and the jurisdictional responses thereto, provides important insight into the power dynamics of attorney regulation that might otherwise go unnoticed. The thumbprint of the NCBE appears anywhere attorneys are licensed to practice law. Even experienced attorneys seeking permanent or temporary admission in a different jurisdiction must rely on NCBE score reporting services to transfer their "portable" scores within the UBE compact states.<sup>56</sup> An attorney with more than four years of practice experience may be required to retake the NCBE's Multistate Professional Responsibility Exam

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of diploma privilege and the risk of diminishing public protection in order to solve the challenges brought on by the pandemic.").

51. *About NCBE*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/about> [<https://perma.cc/5UP3-LPPL>].

52. *An Epic Fail*, *supra* note 47, at 5–7, 31–36.

53. *About NCBE*, *supra* note 51.

54. The NCBE ultimately "allowed" states to administer an online version of the written bar exam. *See, e.g., An Epic Fail*, *supra* note 47, at 10; *see also* Karen Sloan, *Remote Bar Exam Offered in October as Plan B Amid COVID-19*, LAW.COM (June 1, 2020, 5:46 PM), <https://www.law.com/2020/06/01/online-bar-exam-offered-in-october-as-plan-b-amid-covid-19/> [<https://perma.cc/NT4W-TF5L>].

55. Karen Sloan, *New Bar Exam Leader Looks to the Future of the Test*, THE LEGAL INTELLIGENCER (Sept. 7, 2017, 01:11 AM), <https://www.law.com/thelegalintelligencer/almID/1202797426585/> [[perma.cc/5CGL-U6GD](https://perma.cc/5CGL-U6GD)] (see full archived article with Bloomberg Law at <https://perma.cc/3SCE-5LBY>) ("[Former NCBE President] Erica Moeser joined the bar through Wisconsin's diploma privilege program and never took the bar. [Judith Gundersen, current NCBE President] graduated from the University of Wisconsin Law School. [When asked,] Did you take the bar? [Gundersen responded,] I didn't take a bar exam. I was born here. I went to school here. I never practiced outside of Wisconsin, so I never needed to. I suppose if I were my 25-year-old self and I could see where I was right now, I'd say, 'Hmmm, Judy, maybe you should take a bar exam just for street cred 30 years from now.'").

56. *Building a Better Bar Exam*, *supra* note 30, at 43–46.

(MPRE) to be admitted.<sup>57</sup> While some scholars have described the NCBE's role in attorney licensure as problematic, overreaching, or improper, others laude its psychometric expertise, transferrable exam scores, and ostensible one-and-done exam design. Regardless of one's opinion of the NCBE's placement in the regulatory landscape, state supreme courts are not likely to make a move toward or away from a new exam without deferring to the guidance of the NCBE.

### C. Serendipity in Ubiquity

The NCBE has been a monopoly supplier of bar exam questions and bar exam scoring services since the 1970s<sup>58</sup> and has become a central figure in attorney licensure.<sup>59</sup> The NCBE gained dominance in the regulatory landscape through its widely adopted Uniform Bar Exam (UBE or "uniform exam").<sup>60</sup> The NCBE's organizational quest is to produce a single bar exam to be uniformly administered in all U.S. jurisdictions.<sup>61</sup> As such, the NCBE should not be expected to generate an appetite for bar reform. Yet serendipitously, the NCBE's supersized role in attorney regulation has fueled some of the bar reforms we are now witnessing—including the entity's own plans to reform or replace the UBE with the NextGen exam.<sup>62</sup>

After having amassed broad subscription to its uniform exam that has been adopted in forty-one jurisdictions,<sup>63</sup> the NCBE announced that it would

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57. The MPRE is developed, licensed, and controlled by the NCBE. See *Multistate Professional Responsibility Examination*, NAT'L CONF. OF BAR EXAM'RS, [www.ncbex.org/exams/mpre](http://www.ncbex.org/exams/mpre) [<https://perma.cc/PE3Y-7FCM>].

58. *Building a Better Bar Exam*, *supra* note 30, at 1846–47; see also Diane F. Bosse, *A Uniform Bar Examination: The Journey from Idea to Tipping Point*, BAR EXAM'R, Sept. 2016, at 19.

59. *Outsourcing Self-Regulation*, *supra* note 8, at 1831.

60. See generally *Building a Better Bar Exam*, *supra* note 30.

61. Douglas R. Ripkey & Joanne Kane, *Assessment Challenges in Creating the Uniform Bar Examination: Politics, Practicality, and Psychometrics*, in *ASSESSING COMPETENCE IN PROFESSIONAL PERFORMANCE ACROSS DISCIPLINES AND PROFESSIONS* 427, 429 (Paul F. Wimmers & Marcia Mentkowski eds., 2016).

62. *Outsourcing Self-Regulation*, *supra* note 8, at 1868 ("The NCBE's supersized role in the licensure landscape has forged a seismic shift in law school accreditation, law school curricula, the academic freedom of law school faculty, and the diversity of the legal profession.").

63. *Uniform Bar Exam*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/ube> [<https://perma.cc/R2DC-WSCF>].

sunset the UBE and offer the NextGen bar exam in its place.<sup>64</sup> Of significance, the UBE is the combination of three separate multistate exams—each of which is produced and controlled by the NCBE.<sup>65</sup> During the lifespan of the UBE, states were able to make a wholesale adoption of the UBE or elect to adopt any one or more of its component parts. All but one of the states that have not adopted the UBE still use one or more of the NCBE’s subcomponent multistate exams.<sup>66</sup>

The NextGen exam, in contrast to the UBE, does not consist of severable subcomponent exams. So, states that are not already using the UBE are put to an election to either adopt the NextGen exam in its entirety or find a suitable replacement sourced by an untested provider.<sup>67</sup> Likewise, states that have adopted the UBE must determine whether they wish to make the move to the NextGen exam, and if so, how.

For the last half century, states have relied heavily on at least one NCBE exam: the Multistate Bar Exam (MBE).<sup>68</sup> The MBE consists of 200 multiple-choice questions testing eight doctrinal areas. The MBE is the anchor for both the UBE and state hybrid bar exams, because all other content (e.g., essay and performance test) scores are scaled to the psychometrically manipulatable MBE.<sup>69</sup> The symbiosis is capturing. The

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64. Press Release, Nat’l Conf. of Bar Exam’rs, NCBE Announces NextGen Exam Structure, Sunset of Current Bar Exam (Aug. 28, 2023), <https://www.ncbex.org/news-resources/ncbe-announces-nextgen-exam-structure-sunset-current-bar-exam> [<https://perma.cc/XUT4-B4Z5>].

65. The UBE combines the Multistate Bar Exam (MBE) (a test of 200 multiple-choice questions covering seven doctrinal subject areas); the Multistate Essay Exam (MEE) (six essay questions that test any combination of fifteen subject areas); and the Multistate Performance Test (MPT) (two problem-based questions that require examinees to analyze a condensed closed universe of case law or statutes and draft a responsive document under time constraints). See *NCBE Exams*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams> [<https://perma.cc/65M4-5NKV>].

66. See *Louisiana*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/jurisdictions/LA> [<https://perma.cc/J4GH-EJK6>] (Louisiana does not use the MBE, the MEE, or the MPT as bar exam components).

67. *Uniform Bar Exam*, *supra* note 63 (“Jurisdictions may elect to adopt the NextGen bar exam starting in July 2026. The July 2027 bar exam will be the last for which the current NCBE-developed bar exam components will be administered.”).

68. The MBE was introduced to states in 1972. It consists of 200 multiple-choice questions testing: civil procedure, constitutional law, contracts, criminal law, criminal procedure, evidence, real property, and torts. NCBE Announces NextGen Exam Structure, Sunset of Current Bar Exam, *supra* note 64.

69. See, e.g., Joan W. Howarth, *The Case for a Uniform Cut Score*, 42 J. LEGAL PRO. 69, 71 (2017); Nachman N. Gutowski, *STOP THE COUNT; The Historically Discriminatory Nature of the Bar Exam Requires Adjustments in How Bar Passage Rates Are Reported, If at All*, 21 SEATTLE J. SOC. JUST. 589, 634–636 (2023). See generally Scott Johns, *Testing the Testers: The National Conference of Bar Examiner’s LSAT Claim and a Roller Coaster Bar Exam Ride*, 35 MISS. COLL. L. REV. 436 (2017);

NCBE's principal revenue source is the states that license its bar exam products; and the states have made the NCBE their sole supplier of bar exam products. When the MBE is no longer available, states must either commit to wholesale adoption of the NextGen exam, forego multiple-choice testing, or identify a new provider of multiple-choice questions (in a market where there has been no competition). Confronting this difficult reality, two non-UBE states, Florida<sup>70</sup> and Georgia,<sup>71</sup> have already announced their adoption of the NextGen exam. Although some experts say the NextGen exam is not inevitable,<sup>72</sup> the fact that states have become dependent upon the NCBE for exam content will make it difficult and costly for a maverick state to develop its own bar exam.<sup>73</sup>

## II. INNOVATIVE REFORMS

The cost and scarce commercial supply of prefabricated bar exam questions will deter some states from developing independent licensure pathways, but not others. Three states—Louisiana, New Hampshire, and Wisconsin—already have well-established licensure systems that provide for bar admission without any written test content from the NCBE. Louisiana is the lone civil law jurisdiction in the United States, and it uses only state-generated content in its bar exam.<sup>74</sup>

New Hampshire and Wisconsin, in contrast, have dual tracks for admitting new attorneys. One track entails admission by written bar exam. The other track deems a diploma from an in-state law school sufficient for

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Gary S. Rosin, *Unpacking the Bar: Of Cut Scores, Competence and Crucibles*, 32 J. LEGAL PRO. 67 (2008).

70. Karen Sloan, *Florida Becomes the Largest State to Adopt Overhauled Bar Exam*, REUTERS (July 18, 2024, 12:00 PM), <https://www.reuters.com/legal/government/florida-becomes-largest-state-adopt-overhauled-bar-exam-2024-07-18/> [<https://perma.cc/6J9N-PPUA>].

71. Legal Newswire, *Georgia Adopts NextGen Bar Exam Beginning July 2028*, LEGAL NEWSLINE (Jul. 31, 2024), <https://legalnewswire.com/stories/662276293-georgia-adopts-nextgen-bar-exam-beginning-july-2028> [<https://perma.cc/L2TF-Z3FU>].

72. NACHMAN N. GUTOWSKI ET AL., QUESTIONING THE INEVITABILITY OF THE NEXTGEN BAR EXAMINATION (2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4905722](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4905722) [<https://perma.cc/9GKN-MWQ3>].

73. With the wholesale adoption of the UBE, each jurisdiction moved away from the practice of creating its own bar exam and allowed the NCBE to make key determinations about competency to practice law—determinations that should be reserved to the courts. See *Outsourcing Self-Regulation*, *supra* note 8, at 1858.

74. Louisiana still requires attorney applicants to take and pass MPRE. *Louisiana*, *supra* note 66.

bar admission. The New Hampshire diploma sufficiency track is available to a limited numbers of graduates who successfully complete the competitive Daniel Webster Scholars Program that was adopted in 2006.<sup>75</sup> This innovative program provides a different pathway to legal licensure, focusing on practical experience and skills-based learning rather than solely on traditional bar exams.

The Wisconsin Supreme Court offers bar admission to graduates of the state's two law schools without any competitive program, but the curricula in Wisconsin law schools is proscribed by its supreme court and Board of Law Examiners.<sup>76</sup> Practices in these states will likely remain unaffected by the NextGen exam, but they serve as verifiable sources that states are fully capable of licensing attorneys without reliance on the NCBE.

#### *A. Testing Competence Without NextGen*

Put to an election of subscribing to the all-or-nothing NextGen exam, or developing their own method for bar examination, California, Nevada, and Utah seem to have accepted the challenge. California, Nevada, and Utah have each made plans to develop an in-state system of licensure examination that will not rely on any content from the NCBE.<sup>77</sup> The developments in these states are examples of reform efforts that retain a written test requirement but expand the universe of vendors to produce test content. Since the introduction of the MBE in 1972, the NCBE has had no market competitor in the production of multiple-choice questions and bar exam grading services.<sup>78</sup> The debuts of the California and Nevada

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75. N.H. SUP. CT. R. 42 (XII); *see also* Anne F. Zirkin & John Burwell Garvey, *New Hampshire's Daniel Webster Scholar Honors Program: Placing Law School Graduates Ahead of the Curve*, THE BAR EXAM'R, Sept. 2015, at 16, <https://thebarexaminer.ncbex.org/article/september-2015/new-hampshires-daniel-webster-scholar-honors-program-placing-law-school-graduates-ahead-of-the-curve/> [perma.cc/PN29-BSUP].

76. WISC. SUP. CT. R. 40.

77. *See About the Multistate Professional Responsibility Exam (MPRE)*, BARBRI, <https://www.barbri.com/resources/about-the-multistate-professional-responsibility-exam-mpre> [https://perma.cc/QD4J-T2JC] ("The Multistate Professional Responsibility Exam (or MPRE), is one of the requirements for bar admission in every U.S. state and jurisdiction except Wisconsin and Puerto Rico.").

78. *See* Julianne Hill, *Is the National Conference of Bar Examiners Losing Power?*, ABA J. (Aug. 13, 2024, 9:35 AM), <https://www.abajournal.com/web/article/is-the-ncbe-losing-power> [https://perma.cc/GJT8-FSSN]; Brian L. Frye, *The NCBE is a Joke. Give "Judge Judy" the Boot*, JURIST NEWS (Aug. 5, 2020, 9:47 PM), <https://www.jurist.org/commentary/2020/08/brian-frye-ncbe-judith->

commissioned exams, will mark them as the first two jurisdictions to ever discontinue use of an NCBE test product after having adopted it. To understand the significance of these planned departures, one must also understand how heavily dependent state bar examiners have become on the NCBE. That deep dependence challenges the states' ability to independently license attorneys.<sup>79</sup>

### i. California

Until February 2025, the California bar exam consisted of the MBE and California state law essays and performance tests.<sup>80</sup> California, like other non-UBE states, had long relied on the NCBE for the multiple-choice portion of its exam while providing its own state law essays questions and its own state-law-based performance test.<sup>81</sup> In California, the state Supreme Court and the State Bar jointly regulate attorneys. In 2021, the joint regulators formed a Commission on the Future of the Bar Exam to make recommendations on whether and what changes to the California Bar Exam should be made.<sup>82</sup> The Commission was charged with making recommendations concerning whether to adopt alternative or additional testing or tools to ensure minimum competence to practice law.<sup>83</sup> The Commission's final report, submitted in April 2023, recommended that the state continue to offer a written bar exam to assess minimum competence but develop its own exam rather than relying upon content develop by

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gundersen/ [https://perma.cc/TC4G-UA78] ("For decades, the NCBE has benefited from a . . . virtual monopoly over most state bar exams."); *Outsourcing Self-Regulation*, *supra* note 8, at 1831, 1847 ("In the case of the bar exam, there is no competitive bidding because the NCBE is an absolute monopoly. The NCBE has no competitors in the business of creating, licensing, selling, and grading bar exams, which means that, in the limited market for bar exams, the NCBE holds a 100 percent share.").

79. Alexa Cibellis, Note, *Taking Back the Bar: The Need for State Legislation Directed at Addressing the Disparate Impact of the Bar Exam and Holding the NCBE Accountable*, 52 HOFSTRA L. REV. 445, 456–58 (2024); *see also* *Outsourcing Self-Regulation*, *supra* note 8, at 1858.

80. *Scope of the California Bar Examination*, THE STATE BAR OF CAL., <https://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/California-Bar-Examination-Scope> [https://perma.cc/5MUS-333L].

81. *Id.*

82. *Blue Ribbon Commission on the Future of the Bar Exam*, THE STATE BAR OF CAL., <https://www.calbar.ca.gov/About-Us/Who-We-Are/Archived-Committees/Blue-Ribbon-Commission> [https://perma.cc/3L8P-LUN5].

83. *Id.*

NCBE.<sup>84</sup> Persuaded by the Commission's recommendation and subsequent approval from the California Supreme Court, the State Bar of California moved forward with plans for an independently sourced bar exam.<sup>85</sup>

California's willingness to declare independence from NCBE test products may be as much a cost containment measure as an act of regulatory autonomy. In 2024, the State Bar of California projected an almost \$24 million deficit for fiscal year 2025.<sup>86</sup> Approximately \$7.5 million of the State Bar budget is spent annually on bar exam related expenses.<sup>87</sup> While that number represents less than two percent of the State Bar's total budgeted revenue, bar admission is an area where cost savings can be realized by making changes to its bar examination process.<sup>88</sup> Desperate to mitigate looming insolvency, California opted to administer its bar exam remotely.<sup>89</sup> A remotely administered bar exam could save the state as much as \$3.8 million per year,<sup>90</sup> spent on large in-person testing sites. Because the NCBE prohibits remote administration of the MBE, California would have to find a new source of multiple-choice questions to carry out the Commission's recommendations. And that it did.

In August 2024, the State Bar of California announced that it has contracted with a private vendor to create multiple-choice questions for its in-state bar exam.<sup>91</sup> The vendor, Kaplan Exam Services, is an affiliate of

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84. STATE BAR OF CAL., BLUE RIBBON COMMISSION ON THE FUTURE OF THE BAR EXAM, REPORT AND RECOMMENDATIONS (2023), <https://www.calbar.ca.gov/Portals/0/documents/reports/BRC-Report-and-Recommendations.pdf> [perma.cc/4KSQ-CU37].

85. Julianne Hill, *California Supreme Court Approves State's Kaplan-created Bar Exam*, ABA J. (Oct. 24, 2024, 9:34 AM), <https://www.abajournal.com/web/article/court-approves-californias-kaplan-created-bar-exam#:~:text=Updated%3A%20The%20State%20Bar%20of,move%20forward%20in%20February%202025> [https://perma.cc/EZ7R-CDDU].

86. THE STATE BAR OF CAL., 2024 ADOPTED BUDGET REPORT 53 (2024), <https://www.calbar.ca.gov/Portals/0/documents/reports/2024-State-Bar-Adopted-Budget.pdf> [perma.cc/B3C7-3G7S] (projecting General Fund deficit of \$23,828,200 for fiscal year 2025).

87. *Id.* at 25 (finding that \$7,591,000 was spent on exam related expenses in fiscal year 2024).

88. *Id.* at 22–25.

89. Paul Burch, *California Bar Raises Dues to Stave Off Insolvency*, TENN. BAR ASS'N L. BLOG (Feb. 27, 2024), <https://www.tba.org/?pg=LawBlog&blAction=showEntry&blogEntry=103804> [https://perma.cc/EZ6P-W2QD].

90. Karen Sloan, *California Finalizes Deal to Give its Own Bar Exam*, REUTERS (Aug. 14, 2024, 1:27 PM), <https://www.reuters.com/legal/government/california-finalizes-deal-give-its-own-bar-exam-2024-08-14/> [https://perma.cc/DPU7-25G5].

91. *State Bar, Kaplan, Sign Five-Year California Bar Exam Development Contract*, THE STATE BAR OF CAL. (Aug. 13, 2024), <https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-kaplan-sign-five-year-california-bar-exam-development-contract> [https://perma.cc/8KLF-RU7K].

Kaplan Test Prep and Kaplan Bar Review.<sup>92</sup> The Kaplan companies are well-known in the standardized test preparation industry, but the agreement with the State Bar of California will mark the company's first foray into delivering actual bar exam content in the United States. Kaplan is the developer of the Solicitors Qualifying Exam that has been in use in England and Wales since 2021.<sup>93</sup>

The California-Kaplan agreement will allow the state to maintain the same structure and content of its bar exam, while offering the cost-containing benefit of remote administration. The California-Kaplan agreement will also introduce not-before-seen market competition into the United States bar exam industry. Although market competition is generally viewed as a political-economic good, the NCBE offered a less than warm welcome to its competitor-apparent. In the spring of 2024, shortly after the State Bar of California publicly announced its planned partnership with Kaplan, the NCBE sent a demand letter "reminding" Kaplan that MBE questions are the intellectual property of the NCBE and that Kaplan should not use any MBE questions "as or to create multiple choice questions for any jurisdiction."<sup>94</sup>

With approximately 16,000 bar takers each year, California's advancement in attorney licensure (if sustained) will certainly result in a loss of revenue stream for the NCBE.<sup>95</sup> However, if California's rugged bar exam independence is unsuccessful, it could further solidify the NCBE's monopoly chokehold on bar examination in the United States. In February 2025, less than ten days before the launch of its homegrown remote exam,

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92. Kaplan, Inc., through its subsidiaries, provides preparation services for more than 100 standardized tests that range from collegiate aptitude testing to professional licensure exams. This includes the: American College Testing (ACT), Graduate Management Admission Test (GMAT), Graduate Record Examinations (GRE), Preliminary Scholastic Aptitude Test (PSAT), Scholastic Aptitude Test (SAT); Medical College Admission Test (MCAT), National Council Licensure Examination (NCLEX), United States Medical Licensing Examination (USMLE); the Law School Admissions Test (LSAT) and the bar exam. *About Kaplan*, KAPLAN, <https://kaplan.com/about> [perma.cc/G8DM-ASTG].

93. The Solicitors Qualifying Examination (SQE) is a new standardized assessment for aspiring solicitors in England and Wales, developed by Kaplan in collaboration with the Solicitors Regulation Authority. The SQE aims to ensure consistent and high standards across the legal profession. *Solicitors Qualifying Examination (SQE)*, SOLIC. REGUL. AUTH. (May 2024), <https://www.sra.org.uk/become-solicitor/sqe/> [https://perma.cc/G8H4-3PMP].

94. E-mail from Kenneth E. Kraus, Corp. Couns., Nat'l Conf. of Bar Exam'rs, to Brian Carlidge, Sr. Vice President, Kaplan N. Am., LLC (May 14, 2024) (on file with author).

95. *Examinations*, THE STATE BAR OF CAL., <https://www.calbar.ca.gov/Admissions/Examinations> [https://perma.cc/9QKF-G5S5].

the State Bar of California faced an embarrassing hiccup and offered to refund the bar exam fees of all 5,600 registered bar applicants.<sup>96</sup> That hiccup paled in comparison to disastrous rollout of the exam just days later that resulted in lawsuits filed against the online test administrator.<sup>97</sup> The long-term viability of the California exam—good or bad—will have an impact on NCBE’s pocketbook and the use of written or electronic examinations by the rest of the country.

California is a state with a high number of bar takers and a notoriously low bar exam pass rate. In seeking to address the latter, California had previously considered two provisional pathways to measure minimum competence. The first of the two pathways was created for bar applicants who were unable to take an in-person bar exam during the peak of the COVID pandemic. The State Bar Board of Trustees approved a plan that provided those applicants with a temporary license to practice law pending successful completion of the California Bar Exam.<sup>98</sup> The temporary license was valid through the earlier of December 2022 or the date the applicant passed the California Bar Exam.<sup>99</sup> Subsequently, the State Bar proposed a portfolio bar exam for those applicants who had not taken or passed the bar. Under this portfolio proposal, applicants would pilot test a portfolio licensing system. However, in October 2024, the California Supreme Court rejected the portfolio proposal.<sup>100</sup>

The second of the two pathways was implemented in 2021 in response to California’s decision to lower its cut score.<sup>101</sup> Through this measure, a

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96. Karen Sloan, *Amid Calif Bar Exam Disarray, Refund Offered to 5,600 Test Takers*, REUTERS (Feb. 14, 2025, 1:36 PM), [https://www.reuters.com/legal/government/amid-calif-bar-exam-disarray-refund-offered-5600-test-takers-2025-02-14/?fbclid=IwY2xjawIfnj5leHRuA2FlbQIxMQABHXF9L5yDx6fRyc8snej2OVy25uS64t\\_SgwmjMqSpxB6ya-yUoBICyrqZ8g\\_aem\\_tRaUfasU0d8ku0TudBaguQ](https://www.reuters.com/legal/government/amid-calif-bar-exam-disarray-refund-offered-5600-test-takers-2025-02-14/?fbclid=IwY2xjawIfnj5leHRuA2FlbQIxMQABHXF9L5yDx6fRyc8snej2OVy25uS64t_SgwmjMqSpxB6ya-yUoBICyrqZ8g_aem_tRaUfasU0d8ku0TudBaguQ) [https://perma.cc/S5CP-RY5H].

97. Julianne Hill, *California bar hunts for who leaked bar questions, applicants sue test administrator*, ABA J. (Feb. 28, 2025, 11:30 AM), <https://www.abajournal.com/web/article/cali-bar-hunts-for-who-leaked-bar-questions-applicants-sue-test-administrator> [https://perma.cc/2U3K-VJFR].

98. Sam Skolnik, *California Bar OKs Temporary Law Licenses in Place of Bar Exam*, BLOOMBERG L. (Sept. 24, 2020, 5:54 PM), [https://www.bloomberglaw.com/bloomberglawnews/business-and-practice/X2IBST7S000000?bna\\_news\\_filter=business-and-practice#jcite](https://www.bloomberglaw.com/bloomberglawnews/business-and-practice/X2IBST7S000000?bna_news_filter=business-and-practice#jcite) [https://perma.cc/4EV8-YHRA].

99. *Provisionally Licensed Lawyers*, THE STATE BAR OF CAL., <https://www.calbar.ca.gov/Admissions/Special-Admissions/Provisionally-Licensed-Lawyers> [https://perma.cc/4KCY-P78K].

100. Order Concerning Recommendations of the Blue Ribbon Commission on the Future of the Bar Exam and the Alternate Pathway Working Group, Admin. Order 2024-10-10-01 (Cal. Sup. Ct. Oct. 10, 2024).

101. *Cut Scores*, LAW. LICENSING RES., <https://lawyerlicensingresources.org/cut-scores>

select pool of bar applicants were permitted to demonstrate their competence through a period of supervised practice under a licensed attorney.<sup>102</sup> The applicant pool consisted of California bar takers who earned a score that was not passing under the standards in place at the time they took the bar exam, but whose score met or exceeded the subsequently lowered cut score that is now in place.<sup>103</sup>

The provisional licensure candidates could be admitted to the California Bar after completing 300 hours of supervised practice and obtaining a positive recommendation from their supervising attorney(s).<sup>104</sup> The California provisional license pathway utilized a combination of a written exam score and supervised practice to determine minimum competence. The program was unique in that it limited eligibility to candidates who had (retroactively) demonstrated proficiency on the written bar exam, based on subsequently lowered cut scores. At least one empirical survey has been published on the participants of the provisional licensure program.<sup>105</sup>

## ii. Nevada

The Nevada Board of Law Examiners has also proposed a licensure exam that will not rely on any NCBE content. But unlike the California plan, Nevada's proposal is not based on the design and content of its current bar exam. The Nevada Supreme Court has approved, in substance, an exam structure that will dramatically overhaul the bar exam currently in use.<sup>106</sup> The Nevada plan also has the potential to be used by other states which

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[<https://perma.cc/9V8B-GKED>] (“Psychometricians call an exam’s passing score its ‘cut score.’ The score draws a line (or ‘cut’) between candidates who pass the exam and those who fail.”)

102. *Id.* “After the California Supreme Court lowered the passing score for the state’s written exam from 1440 through 1390, it offered provisional licenses to candidates who had failed the exam during the previous five years but met the new passing score during that time.” *Jurisdictions*, LAW LICENSING RES., <https://lawyerlicensingresources.org/jurisdictions> [<https://perma.cc/MT5F-WYSE>].

103. *See* CAL. SUP. CT. R. 9.49.1.

104. *Provisionally Licensed Lawyers*, *supra* note 98.

105. Deborah Jones Merritt et al., *Practice-Ready Licensing: Unlocking Benefits for Employers, Candidates, and Clients*, THE PRACTICE, Jan.–Feb. 2024, <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/rethinking-licensure/practice-ready-licensing/> [[perma.cc/TD6Y-6RAD](https://perma.cc/TD6Y-6RAD)]. *See generally* Merritt et al., *supra* note 25.

106. Laura Bagby, *Nevada Supreme Court Approves Plan to Proceed with Developing Alternative Attorney Licensing Pathway in State*, 2CIVILITY (Sept. 23, 2024), <https://www.2civility.org/nevada-supreme-court-approves-plan-to-proceed-with-developing-alternative-attorney-licensing-pathway-in-state/> [<https://perma.cc/SUT7-XQFK>].

would foster a pathway for multijurisdictional practice that has not previously been a feature of any state-created bar exam.

The Nevada Supreme Court created two task forces to review and make recommendations concerning law school certification and the supervised practice component of the Nevada proposal.<sup>107</sup> Although the task forces' recommendations have not been publicly shared, Nevada is presumably considering the following aspects of its new licensure plan that if adopted would:

1. Retain its character and fitness inquiries for all candidates;
2. Require all candidates to earn a passing score on the MPRE;
3. Require all candidates to demonstrate foundational knowledge of core subjects;
4. Require all candidates to pass a test consisting of exercises like those on the Multistate Performance Test; and
5. Require all candidates to undergo a period of supervised practice either during law school or after graduation.<sup>108</sup>

These considerations are exactly what should be expected from a state's high court as it contemplates and fulfills its regulatory function, yet this Nevada effort is somehow groundbreaking. The privatization of bar examination and the overreliance on commercial outsourcing has made even the most basic judicial regulatory inquiry revolutionary.

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107. Order Establishing Commission to Study the Administration of the Bar Examination and Licensing of Attorneys, ADKT No. 594 (Nev. Mar. 9, 2022).

108. David Faigman & Richard Trachok, *The Nevada Bar Exam Study: Findings*, NEVADA LAW., July 2023, at 30–31, [https://nvbar.org/wp-content/uploads/NevadaLawyer\\_July2023\\_News-Bar-Exam-Study-Findings.pdf](https://nvbar.org/wp-content/uploads/NevadaLawyer_July2023_News-Bar-Exam-Study-Findings.pdf) [https://perma.cc/2D2C-Z4ER].

The laudable efforts in Nevada have culminated in a proposal for a Comprehensive Licensing Examination (“Nevada CLE” or “comprehensive exam”) that will be comprised of three distinct and severable components.<sup>109</sup>

Table 1: Nevada Comprehensive Licensing Examination

<b>Component</b>	<b>Scope</b>	<b>Format</b>
Foundational Knowledge Exam	20 foundational concepts in each of 8 subject matter areas: civil procedure, constitutional law, contracts, criminal law, criminal procedure, evidence, property, and torts.	100 multiple-choice questions.
Lawyering Performance Examination	Law practice simulation questions that require candidates to perform tasks such as writing memos or demand letters.	The Nevada exam will contain 3 performance tests with 2 hours allotted to compete each one. Each performance test contains a file with relevant information and a closed universe library of legal authority.
Supervised Practice or Self-Directed Learning and Reflection	Candidates engage in supervised practice that include client interaction.	40–60 hours required for supervised practice which may take place during law school or after graduation.

Nevada’s comprehensive exam has several innovative features that distinguish it from the NextGen exam and its predecessors. First, the exam components will be offered at multiple times during the year, eliminating the costly career delays of the current twice-per-year bar exam

109. Richard Trachok, *The Nevada Plan – Nevada’s Comprehensive Licensing Examination*, STATE BAR OF NEV., <https://nvbar.org/the-nevada-plan-nevadas-comprehensive-licensing-examination/> [<https://perma.cc/8XQY-BSPR>].

administration. The timing of the bar exam is no less important than the content of the exam. Giving candidates the flexibility to take the written exam components at different times reduces the stress and fatigue of bar preparation and allows them to test while still in law school when the tested subject matter is more recent in memory.<sup>110</sup>

The Foundational Knowledge Law Exam (Foundational exam) will be offered four times annually. Bar applicants will be eligible to take the Foundational exam after completing forty-two credit hours in the required J.D. program.<sup>111</sup> Because the Foundational exam will focus on core concepts, or foundational legal principals, it will not require extensive memorization of random nuanced exceptions. As such, it will alleviate the burden of paying for cost-prohibitive commercial bar review programs or the need to forego income while studying for the exam.<sup>112</sup> The Lawyering Performance Exam will be offered twice annually. And similar to the current multistate exams, it will be available only to applicants after law school graduation.<sup>113</sup>

The truly pioneering aspect of the Nevada comprehensive exam is that it will be the first modern licensure proposal in the United States to require *all* candidates for bar admission to engage in some form of supervised practice and interact with clients before they can become licensed.<sup>114</sup> Candidates will be able to meet the supervised practice component through law school clinics, externships, or post-graduation supervised employment.<sup>115</sup> Even more evidence that this is a well-thought plan, candidates who are unable to meet the requirement in the aforementioned ways can be assigned to legal aid organizations. Legal aid attorneys will supervise candidates who lack other opportunities for supervision. This programmatic aspect of Nevada's comprehensive exam serves the needs of aspiring attorneys and can also increase services to indigent clients.

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110. See *Building a Better Bar Exam*, *supra* note 30, at 61–64.

111. See Trachok, *supra* note 109.

112. Joan Howarth, *Improve the Diversity of the Profession by Addressing the Costs of Becoming a Lawyer*, LSSSE BLOG (Aug. 23, 2024), <https://lssse.indiana.edu/blog/improve-the-diversity-of-the-profession-by-addressing-the-costs-of-becoming-a-lawyer/> [<https://perma.cc/4MGA-KB7X>].

113. Trachok, *supra* note 109 (“The performance exam would be an in-person, one-day exam offered shortly after conclusion of the spring and fall law school semesters.”).

114. See *id.*

115. *Id.*

Professor Joan Howarth has been unapologetic in her claim that no new attorney should become licensed without first having had actual client representation experience.<sup>116</sup> It appears that the Nevada Supreme Court would agree. Canada and most European countries require some form of apprenticeship or practicum before granting a law license,<sup>117</sup> but the United States has remained fairly dogmatic that a written exam consisting primarily of multiple-choice questions is a sufficient evaluator of one's practice competency. Nevada's inclusion of a supervised practice requirement reflects a growing recognition of the value of hands-on legal experience in attorney licensure. By mandating real-world supervised practice before licensure, Nevada's bar exam reform directly addresses critiques that traditional written exams fail to measure key competencies like client interaction and case management—skills critical to legal practice but difficult to assess through a written exam.<sup>118</sup>

Unlike the Nevada proposal for bar examination that requires both a written bar exam and a period of supervised practice, some states have developed a plan for bar examination that relies on a period of supervised practice without the addition of a written exam. These plans expose themselves to the often harsh rhetoric of opponents to bar reform and non-bar exam pathways who predictably invoke comparison to the medical profession, the aviation industry, and other professional licensure paths. Pushes for lawyer diploma privilege or bar exam alternatives have been met with quips that one would not want to be treated by a doctor, or flown by a pilot, who had not taken a licensure exam. In fact, the campaign for adoption of a uniform bar exam was influenced by comparisons to the uniform medical licensure exams.<sup>119</sup>

The irony of that rhetoric is that medical doctors and pilots must engage in some form of supervised practice as a precondition to licensure. Doctors complete multi-year internships and residencies before becoming fully licensed to practice medicine.<sup>120</sup> Similarly, pilots must engage in a set

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116. HOWARTH, *supra* note 22, at 117.

117. Curcio, *supra* note 6, at 398–400.

118. Carol L. Chomsky et al., *A Merritt-orious Path for Lawyer Licensing*, 82 OHIO ST. L.J. 883, 906 (2021).

119. Susan M. Case, *The Uniform Bar Examination: What's In It For Me?*, BAR EXAM'R, Feb. 2010, at 50, 52.

120. *What is a Medical Resident and How Long is Residency?*, MED. UNIV. OF AM.'S (Sept. 11, 2024), <https://www.mua.edu/blog/what-is-a-medical-resident-and-how-long-is-the-residency>

number of hours of flight simulation before (and after) licensure and must demonstrate competency by actually flying an aircraft, not just taking a standardized exam.<sup>121</sup> The legal profession is light years behind other nations and other disciplines in terms of developing competency measures that are designed to accurately measure practice proficiency and provide the necessary degree of public protection.

### iii. Utah

The Utah Supreme Court has become known for its willingness to pair innovation with bar admission policies. In 2020, Utah became the first state to allow applicants an opportunity to bypass the bar exam when the COVID pandemic threatened the administration of the traditional bar exam.<sup>122</sup> Subsequently, the Utah Supreme Court appointed a Bar Admissions Working Group to examine whether the current, single path to licensure was the *only*, or the even the *best*, way to assure that those admitted to practice have the requisite skill to practice law. The Working Group found that there were better measures of practice competency than the uniform exam currently in use in Utah.<sup>123</sup>

The Working Group was comprised of law faculty, law school deans, practicing attorneys, and a state supreme court justice.<sup>124</sup> The Working Group's composition is crucial to its effectiveness. A group charged with evaluating the current system of bar examination and to propose improvements that will be better measures of minimum competence *should* require the input of stakeholders from legal education, the bench, and the bar. The Working Group proposed a new exam to be used as the bar licensure assessment in Utah. The new exam was conceived based on the findings of the most extensive qualitative study ever done on minimum

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[<https://perma.cc/8WQF-KTJW>].

121. 14 C.F.R. § 61 (2024) (federal certification requirements for pilots and flight instructors).

122. Order for Temporary Amendments to Bar Admission Procedures During COVID-19 Outbreak (Utah Apr. 2020), <http://www.utcourts.gov/utc/rules-comment/wp-content/uploads/sites/31/2020/04/04.09.20-PROPOSED-ORDER-re-Bar-Waiver-final.pdf> [<https://perma.cc/ES9C-33SS>].

123. UTAH BAR ADMISSIONS WORKING GRP., FINAL REPORT 41 (2023), <https://iaals.du.edu/sites/default/files/documents/publications/ut-bar-admissions-wg-final-report.pdf> [<https://perma.cc/QA2V-DTU9>].

124. *Id.*

competence for attorneys in the United States.<sup>125</sup> That study identified twelve building blocks of minimum competence. They are:

1. The ability to act professionally and in accordance with the rules of professional conduct;
2. An understanding of legal processes and sources of law;
3. An understanding of threshold concepts in many subjects;
4. The ability to interpret legal materials;
5. The ability to interact effectively with clients;
6. The ability to identify legal issues;
7. The ability to conduct research;
8. The ability to communicate as a lawyer;
9. The ability to see the “big picture” of client matters;
10. The ability to manage a law-related workload responsibly;
11. The ability to cope with the stresses of legal practice; and
12. The ability to pursue self-directed learning.<sup>126</sup>

If adopted, the proposed new bar exam in Utah will require applicants to demonstrate reasonable proficiency in each of the twelve foundational building blocks. Under the proposal, candidates must complete a selection of designated doctrinal and legal writing courses in law school; complete six credits of experiential work during law school; pass the MPRE; pass a written exam consisting of a three-hour performance test focused on a single client problem; complete 240 hours of postgraduate supervised practice that includes fifty hours of pro bono service, forty hours of legal research, and

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125. DEBORAH JONES MERRITT & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE 3 (2020).

126. *Id.*

twenty hours of client-facing work; complete six hours of training in well-being; attend a training session focused on self-directed learning; and complete a survey reporting their experiences with the pathway.<sup>127</sup>

In an article in the Utah Bar Journal, Professor Catherine Bramble acknowledges that the NextGen exam was an (unintentional) conduit for the conception of the proposed Utah exam. She states:

Reactions from jurisdictions to the NextGen Bar Exam have been mixed. Some have expressed concern that the new exam will be too easy while others are concerned that the new exam will not be a big enough departure to fix the current exam's shortcomings. However, with the current bar exam slated to be discontinued in 2027, jurisdictions relying solely on the NCBE for their licensure procedures will be required to administer the NextGen Bar Exam beginning July of 2027.<sup>128</sup>

The developments in Nevada and Utah offer examples of innovation and co-regulation where members of the bar play a role in the training and professional identity formation of new attorneys. By engaging with the members of the state bar and the state's law schools, seeking public input, and being transparent throughout the process, the supreme courts in these states are safeguarding the public through a careful co-orchestrated and co-regulated process.

### *B. Testing Competence Using NextGen*

Rejecting the NextGen exam is not the sole causeway to forge an independent pathway to bar admission. By no means are independent pathways and the NextGen exam mutually exclusive. As the Arizona Supreme Court demonstrates, states can choose to adopt the NextGen exam and still apply self-regulatory or co-regulatory principles by adding state law components to the written bar exam or by creating a system of tiered admission based on exam scores. Both of which are enhancements that can

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127. Catherine Bramble, *Finding a Better Way: An Alternative Path to Attorney Licensure in Utah*, UTAH BAR J., Nov.–Dec. 2023, at 12; see also UTAH BAR ADMISSIONS WORKING GRP., *supra* note 122, 42–44.

128. Bramble, *supra* note 127, at 13 (citations omitted).

be put into place in jurisdictions that will use the NextGen exam pathway.

Bar reforms are not limited to the test format, test content, or test developer. Changes to scoring methodologies or to the passing score are also significant reforms when they are put in place to mitigate unnecessary or discriminatory barriers.<sup>129</sup> In 2024, the Arizona Supreme Court announced its adoption of the NextGen exam effective July 2027.<sup>130</sup> Shortly thereafter, the court demonstrated its own propensity for innovation by announcing the newly launched Arizona Lawyer Apprentice Program.<sup>131</sup> The apprentice program is a first of its kind alternative to the traditional route to law licensure in Arizona.<sup>132</sup> An apprentice can be admitted to practice to serve in an area deemed a “legal desert” or certain areas of public service with a lower bar exam score than is required for bar admission through the standard bar examination.<sup>133</sup> The apprentice pathway was designed to address the shortage of lawyers practicing in rural segments of the state, government, and public interest practice.<sup>134</sup>

Graduates of any ABA-accredited law school are eligible to participate in the program.<sup>135</sup> Participants must meet all additional requirements for admission to practice law in Arizona, including a character and fitness assessment.<sup>136</sup> After a participant secures qualifying employment in rural Arizona or a public law practice, they must commit to working in one of those positions for a minimum of two years.<sup>137</sup> During the two-year period, participants practice law under the supervision of a licensed Arizona

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129. See, e.g., Joan W. Howarth, *The Case for a Uniform Cut Score*, 42 J. LEGAL PRO. 69, 73 (2017); *California’s High Bar Exam Cut Score is Failing Communities of Color*, IMPACT FUND, <https://www.impactfund.org/california-cut-score> [<https://perma.cc/65HA-9JTL>]; Gutowski, *supra* note 69, at 634–36. See generally Gary S. Rosin, *Unpacking the Bar: Of Cut Scores, Competence and Crucibles*, 32 J. LEGAL PRO. 67 (2008).

130. News Release, Ariz. Sup. Ct. Admin. Off. of the Cts., Arizona Supreme Court to Adopt NextGen Bar Examination in 2027 (Dec. 5, 2023), [https://www.azcourts.gov/Portals/26/NewsRelease\\_AZ\\_NextGenAdoption.pdf](https://www.azcourts.gov/Portals/26/NewsRelease_AZ_NextGenAdoption.pdf) [<https://perma.cc/G37Q-K7KT>].

131. *Arizona Lawyer Apprentice Program*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/cld/Arizona-Lawyer-Apprentice-Program> [<https://perma.cc/C3UP-E68P>].

132. *Id.*

133. A score ranging from 260–269 on the UBE (if administered after July 1, 2023) will qualify a person for licensure under the Arizona Apprentice Program. *Id.* For admission to the bar based on a UBE score, Arizona requires a score of 270 or above. *UBE Minimum Scores*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/ube/ube-minimum-scores> [[perma.cc/769B-JX2H](https://perma.cc/769B-JX2H)].

134. *Arizona Lawyer Apprentice Program*, *supra* note 131.

135. *UBE Minimum Scores*, *supra* note 133.

136. *Id.*

137. *Id.*

attorney with the amount of supervision decreasing according to a graduated schedule.<sup>138</sup>

While I highlight developments in Arizona, any jurisdiction could impose new or additional licensure standards that operate concurrently with its administration of the NextGen exam. The NextGen exam is, in theory, designed to make room for jurisdiction-specific content. The NCBE has intentionally made the NextGen testing window nine hours, which is three hours shorter than the twelve-hour UBE testing window. The NextGen exam will be administered in three three-hour blocks, leaving states who wish to administer a state-law component in that (now available) three-hour block to do so.<sup>139</sup> Jurisdictions using the UBE cannot add any state-specific content to the exam or extend the two-day testing window.<sup>140</sup> This is another way in which the NextGen bar exam is a positive reform of its predecessor uniform exam. The comparatively shorter length of the NextGen exam is an alluring benefit that creates a window for meaningful state involvement in the bar examination process. The NextGen exam, therefore, demonstrates the NCBE's willingness to reform the nation's principal licensing tool in the categories of exam length, exam depth, and exam width. The reforms are welcome measures, but they are not all encompassing.

### III. MULTIMODAL SELF-GOVERNANCE

Meaningful licensure reform encompasses far more than changing or eliminating the bar exam. Licensure reform is a systemic enhancement that involves a critical review of the current system, input from a wide array of stakeholders, and a collaborative effort to create a measure that identifies and assesses minimal competence. Licensure reform does not singularly

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138. Establishing a Lawyer Apprentice Program to Serve the Public in Rural Arizona and Through Public Law Firms, Admin. Order No. 2024-148 (Ariz. July 17, 2024), [https://www.azcourts.gov/Portals/22/admorder/Orders24/2024-148.pdf?ver=vgMAzqIBW4\\_v1kqPmvvF6Q%3d%3d](https://www.azcourts.gov/Portals/22/admorder/Orders24/2024-148.pdf?ver=vgMAzqIBW4_v1kqPmvvF6Q%3d%3d) [https://perma.cc/BLT7-76Q2].

139. See Marilyn J. Wellington, *The Next Generation of the Bar Exam: Quarterly Update*, THE BAR EXAM'R, Fall 2023, at 32, <https://thebarexaminer.ncbex.org/article/fall-2023/the-next-generation-of-the-bar-exam-quarterly-update-fall23/> [https://perma.cc/3BK8-DANZ]. The NextGen exam is a nine-hour exam, reflecting a three-hour (or one half of a testing day) reduction from the twelve-hour UBE. *Id.* The NCBE prohibited states from incorporating any state law assessment into the UBE. *Id.* That prohibition has been lifted for states who adopt the NextGen exam. *Id.*

140. See *Building a Better Bar Exam*, *supra* note 30, at 30 (“The uniform exam demands homogeneity and requires an adopting state to administer, without deviation, three of the multistate exams.”).

target the bar exam or the organizations that promote it—it is a fulfillment of our obligation to seek improvement in the law and access to the legal system by helping the profession to “regulate itself in the public interest.”<sup>141</sup>

That obligation inures as much to reforming systems that are harmful or ineffective as it does to defending systems that are essential to public protection and the quality of justice. Some states will move quickly from one NCBE product to the next. Others will invest resources to explore other or additional options. Like most things associated with judicial authority, the deliberation is almost always more instructive than the final decision. Through a meaningfully deliberative process, state supreme courts can connect multiple stakeholders to reach consensus on effective ways to ensure that new attorneys are licensed in a manner that will protect the public. Such a deliberative consensus is the cornerstone of attorney coregulation. While the court has the ultimate authority in attorney licensure, members of the practicing bar are charged with the supervision (and indirect regulation) of their fellow attorneys.

#### *A. Supervised and Curricular Pathways*

Requiring supervised practice as a prerequisite for licensing attorneys, rather than relying solely on a bar exam, offers numerous benefits that can significantly enhance lawyer competencies and improve outcomes for clients. Supervised practice allows aspiring attorneys to gain hands-on experience in real-world settings, fostering the development of practical skills that are essential for effective legal representation.<sup>142</sup>

This hands-on learning approach enables new lawyers to navigate complex legal scenarios, engage in client interactions, and understand courtroom dynamics under the guidance of seasoned practitioners. Such mentorship can also promote a deeper understanding of ethical considerations and professional responsibility, which are often difficult to assess in a standardized written exam format. Additionally, supervised practice can help bridge the gap between theoretical knowledge and practical application, ensuring that attorneys are not only knowledgeable about the law but are also adept at applying it in diverse situations.

An effective supervised practice pathway can enhance the quality of

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141. MODEL RULES OF PRO. CONDUCT Preamble 6 (AM. BAR ASS'N 2020).

142. Chomsky et al., *supra* note 118, at 906.

legal services, promote greater client satisfaction, and contribute to a more competent and ethically grounded legal community.<sup>143</sup> Supervised practice models encourage a more collaborative and peer-supportive entry into the profession, which may reduce the isolation often felt by beginning attorneys—often referred to as “baby lawyers.” The type of mentorship that goes hand in hand with apprenticeship and supervised practice pathways can be designed to support and level the playing field for groups who are heavily underrepresented in practice.<sup>144</sup> Such a design can help identify and cultivate diverse talents within a variety of legal practice areas. An apprentice-style program requirement allocates the responsibility of competency assessment to legal educators, bar examiners, and law practitioners. The latter is often disconnected from the bar admission process.

Collaboration is essential in this process. State bar leaders and practitioners should and must be involved in decisions about attorney admission. Under the current UBE-dominated system, the practicing bar plays almost no role in the licensure process. It is important to recognize that those who actually practice law, and who supervise and interact with newly admitted lawyers, have informed perspectives on the knowledge and skills that are essential for those new to the profession. Only through that informed perspective can we identify an assessment tool that will measure that knowledge and skill.

Several jurisdictions have welcomed such an informed perspective and have allowed themselves to consider the needs of prospective clients who are traditionally underserved by the legal profession. Those considerations have fueled reforms that are both client-centered and long overdue. The emergent reforms are not limited to changing the bar exam as a static test, but they extend more broadly to the mechanics of attorney licensure. The range of reform spans from changing the score needed to pass the bar exam to replacing multiple-choice questions with simulated or supervised practice.

Oregon and Washington have both adopted the NextGen exam but have also created optional supervised practice pathways to licensure that embrace

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143. Meribah Rose and Chris Maylea, *The Case for Implementing Legal Clinical Supervision Within Legal Practice, and Recommendations for Best Practice*, 32 GRIFFITH L. REV. 259, 263–69 (2023).

144. Chomsky et al., *supra* note 118, at 905–09.

a co-regulatory model for attorney licensure that bypasses the standardized bar exam. Under the co-regulatory models in these Pacific Northwestern states, the practicing bar, legal educators, and the judiciary share the responsibility of assessing new attorney competence.

### i. Oregon

After creating a Licensure Pathway Development Committee that included law faculty, practicing attorneys, judges, and members of the NCBE senior staff, the Oregon Supreme Court accepted the Committee's recommendation to implement a Supervised Practice Portfolio Exam (SPPE).<sup>145</sup> The court's acceptance followed a period of extensive public comment on whether law school graduates should be permitted to elect a period of practice under intense supervision as an alternative to taking a standardized bar exam.

The SPPE is a client-based competency assessment designed to evaluate practical legal skills. Applicants under this licensure pathway must have an approved attorney-employer to supervise their work during the portfolio period. Once accepted, candidates compile a portfolio of sample work product that demonstrates their experience and competence during their supervised practice period. The portfolios may include briefs, client communications, case management strategies, research memos, mediation position papers, arbitration documents, court pleadings, or more. Confidential client information will be redacted, and an attestation from the supervising attorney seeks to ensure that the work-product sufficiently represents the applicant's efforts.<sup>146</sup>

Trained graders review the quality of the work contained in the portfolios to assess the applicant's ability to apply legal rules, to resolve disputes, and to communicate with the court, clients, and other attorneys effectively. Examiners use scaled rubrics to uniformly grade portfolios containing a variety of documents from a wide range of practice areas. Upon

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145. The Licensure Pathway Development Committee was originally named the "Alternatives to the Bar Exam Task Force," but the name was changed because they thought the use of the term "alternatives" made the current bar exam seem like the preferred choice. *See Licensure Pathway Development Committee*, OR. STATE BAR, <https://lpdc.osbar.org/> [<https://perma.cc/B2KF-BFBE>].

146. *See generally* RULES FOR OR. SUPERVISED PRAC. PORTFOLIO EXAM. (SPPE R.'S) (OR. STATE BAR 2024), [https://www.osbar.org/\\_docs/rulesregs/SPPERules.pdf](https://www.osbar.org/_docs/rulesregs/SPPERules.pdf) [<https://perma.cc/43XZ-HM7J>].

successful completion of the portfolio exam, a candidate is licensed to practice law in Oregon without restrictions. The portfolio exam offers more flexibility than the NextGen exam that is administered only in February and July, because the SPPE allows rolling admission. One limitation of the SPPE is that it does not offer a transferable portfolio score. Score portability is an attractive feature of the UBE, and presumably it will remain a feature of the NextGen exam as well.<sup>147</sup> Current lack of transferability does not necessarily preclude a route to multijurisdictional practice through this pathway. If other states adopt programs similar to the Oregon SPPE, the portfolio scores may become transferable in the future.<sup>148</sup>

The Oregon SPPE has transcended from aspirational to actualized. The SPPE pathway began accepting applicants in May 2024. The Oregon Board of Law Examiners has already approved dozens of employers who have committed to supervising applicants. The public employers include legal aid and public interest organizations, public defender offices, and other government agencies. The private employers include large and small law firms and Nike Corporation, Oregon's largest employer.<sup>149</sup>

## ii. Washington

The State of Washington's plans for a supervised practice pathway closely parallel the developments in Oregon. One of Washington's principal distinctions may be that its bar reform considerations extended to the Character and Fitness assessment. For purposes of evaluating available options, the Washington Supreme Court empaneled a Bar Licensure Task Force.<sup>150</sup> The charge of the task force was to evaluate and assess the efficacy of the state's bar licensure requirements and to evaluate whether the Washington Supreme Court should consider alternatives to the state's

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147. *FAQs About Bar Admissions: Answering Questions About: Transferring UBE Score Between Jurisdictions*, THE BAR EXAM'R, Winter 2024, at 31–33, <https://thebarexaminer.ncbex.org/article/winter-2023-2024/faqs-about-bar-admissions/> [<https://perma.cc/34GP-GCVE>].

148. OR. STATE BAR ADMISSIONS DEP'T, SUPERVISED PRACTICE PORTFOLIO EXAMINATION (SSPE), SUPERVISING ATTORNEY AND EMPLOYER FAQ 7 (2024), [https://www.osbar.org/\\_docs/sppe/SPPEsupervisingAttorneyandEmployerFAQ.pdf](https://www.osbar.org/_docs/sppe/SPPEsupervisingAttorneyandEmployerFAQ.pdf) [<https://perma.cc/U3K2-YHD8>] (at "Portability and Reciprocity").

149. *Jurisdictions*, LAW. LICENSING RES., <https://lawyerlicensingresources.org/jurisdictions> [<https://perma.cc/6PD2-J85A>].

150. *Wash. Bar Licensure Task Force*, WASH. CTS., [https://www.courts.wa.gov/appellate\\_trial\\_courts/SupremeCourt/?fa=supremecourt.LicensureTaskForce](https://www.courts.wa.gov/appellate_trial_courts/SupremeCourt/?fa=supremecourt.LicensureTaskForce) [<https://perma.cc/58DB-XQ2G>].

current licensure requirements and to analyze those potential alternatives.<sup>151</sup>

The Task Force recommendations were twofold. With regard to the assessment of minimum competence to be admitted to practice, the Task Force made the following recommendations to the Washington Supreme Court:<sup>152</sup>

1. Continue offering a written bar exam and adopt the NextGen bar exam when it is ready.
2. Create an apprenticeship program that will allow law school graduates to demonstrate their competence by practicing for six months under a licensed attorney and completing prescribed coursework.
3. Create a law school experiential pathway to licensure that will allow students to demonstrate competence by taking experiential courses, completing 500 hours of work as a licensed legal intern, and submitting a portfolio of work product to the Washington Board of Law Examiners for review.
4. Create standardized materials for prospective lawyers who pursue the Washington State Law Clerk Program (rather than attending law school), so that these candidates have an opportunity to demonstrate their competence without taking the written bar exam.
5. Investigate and implement assessments that will identify the strengths and growth areas of lawyers throughout their careers.

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151. *Id.*

152. *See Jurisdictions, supra* note 148. The summary of the Washington State Bar Licensure Task Force recommendations appears verbatim on the Lawyer Licensing Resources website. *Id.* The website is managed and maintained by Professor Deborah Merritt. *See also* WASH. STATE BAR LICENSURE TASK FORCE, A PROPOSAL FOR THE FUTURE OF WA STATE BAR ADMISSIONS UPDATED FOLLOWING PUBLIC COMMENT 12 (2024), <https://www.courts.wa.gov/content/publicUpload/Washington%20Bar%20Licensure%20Task%20Force/A%20Proposal%20for%20the%20Future%20of%20WA%20State%20Bar%20Admissions%20Updated%20Following%20Public%20Comment%20022824.pdf> [<https://perma.cc/5UU4-MZ2M>].

6. Allow out of state attorneys to be eligible for admission by motion after one year of practice.
7. Reduce the cut score on the written bar exam from 270 to 266.

Separately, the Task Force's Subcommittee on Ethics and Character & Fitness recommended changes to the process for determining the character and fitness of a candidate.<sup>153</sup> The character and fitness process can be the most vague and arbitrary component of the licensure process. All jurisdictions, regardless of their method of licensure require a satisfactory character and fitness determination for bar admission, but almost none of them offer any transparency regarding the process for assessing "character" and determining "fitness." The process certainly plays a role in maintaining the homogeneity of the profession.

The subcommittee recommended that the court implement a conditional admission process that would allow applicants with a unique or correctable character and fitness issue to gain conditional entry until the issue is resolved.<sup>154</sup> The subcommittee also suggested that the court expand the timeline of the character and fitness inquiry.<sup>155</sup> Some of the other recommended changes to the Washington Admission and Practice Rules (APR) that identify factors to be considered when determining character include:

- Eliminate consideration of "Neglect of Financial Responsibilities" under APR 21(a)(7).
- Revise and/or weight aggravating and mitigating factors under APR 21(b).
- Eliminate "Sufficiency of Punishment" under APR 21(b)(9)(iii).

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153. See generally BRENT WILLIAMS-RUTH, WASH. STATE BAR LICENSURE TASK FORCE SUBCOMMITTEE ON ETHICS/CHARACTER FITNESS REPORT AND RECOMMENDATIONS (2023), <https://www.courts.wa.gov/content/publicUpload/Washington%20Bar%20Licensure%20Task%20Force/Washington%20Character%20and%20Fitness%20Rules%20and%20Process%20%20Analysis%20%20Proposed%20Changes%20101123.pdf> [https://perma.cc/PX3K-XX2A].

154. *Jurisdictions*, supra note 148 (additional examples listed in source).

155. *Id.*

- Lower the burden of proof under APR 24.1(c).<sup>156</sup>

As of the 2024 supreme court adoption of multiple licensure pathways, the state of Washington now has the most exhaustive range of options for bar licensure candidates.<sup>157</sup> Like Arizona and California, Washington has lowered its cut score, but in Washington the score drop is not connected to any secondary route to bar admission. Like a near majority of states, Washington has also adopted the NextGen exam. Like Oregon, Washington will have paved a supervised practice pathway to bar admission; but Washington will have taken the additional step of creating a curricular pathway to licensure. In a quite remarkable display of inclusivity, Washington hopes to allow attorney who are otherwise eligible for licensure through the state's Law Clerk Program, to also have the option to undergo bar examination by written test or by supervised practice.<sup>158</sup> Washington is also one of the few states to expressly address multijurisdictional practice (reciprocal admission) in its recommendation.<sup>159</sup>

### *B. Curricular Pathways*

Both Oregon and Washington have preliminary court approval to pursue curricular pathways to bar admission, but no definitive plans for this pathway have been announced. Other states like California and Minnesota have considered, or are considering, curricular pathways but, as of the publication of this Article, the Daniel Webster Scholars program and the Wisconsin Diploma Privilege are the only active curricular vehicles to bar licensure.

Curricular pathways to bar licensure, like the Wisconsin Diploma Privilege, will be fairly unique to the demands of a particular state and may present unwelcome limitations on multistate practice. A primary reason for the demand for standardization and uniformity in bar examination is the increasing mobility of legal practitioners and the demands of a globalized

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156. *Id.*

157. Press Release, Wash. Cts., Supreme Court Approves Alternative Pathways to Lawyer Licensure in Washington State (Mar. 15, 2024), <https://www.courts.wa.gov/newsinfo/?fa=newsinfo.internetdetail&newsid=50389#:~:text=The%20Washington%20Supreme%20Court%20today,to%20earn%20a%20law%20license> [https://perma.cc/N7MT-S2EG].

158. See Merson, *supra* note 46. Washington permits bar applicants who did not attend law school to be admitted to practice if they complete the Law Clerk Program and pass the state bar exam. *Id.*

159. See WASH. STATE BAR LICENSURE TASK FORCE, *supra* note 152, at 12.

economy that necessitated a framework that allows for multijurisdictional practice. Balancing the complex interplay between state authority and the need for lawyers to practice across multiple jurisdictions is important to, but not the sole predictor of, the success of any non-exam licensure protocol.

### C. Multijurisdictional Practice

As the legal profession continues to evolve, the question of bar exam uniformity versus state-specific requirements will remain pertinent. As some states contemplate a return to bar examination protocols that reflect local laws and practice needs, the resulting diversity of assessments across the country should not impede multijurisdictional practice. Such pathways can absolutely coexist with a uniform bar exam, despite the role that proponents of multijurisdictional practice played in the mass adoption of the UBE.<sup>160</sup> It must first be acknowledged that exam uniformity and score portability are not a full spectrum panacea to combat the restrictions on the unauthorized practice of law that prohibit an attorney who has passed one bar exam from practicing in another jurisdiction without admission.<sup>161</sup> Large scale use of a uniform exam has only limited impact on expanding multistate practice. Among the very real limitations: 1) score portability is very costly to the applicants;<sup>162</sup> 2) portable scores expire quickly and likely before a lawyer will face a need to move to or expand their practice to another state;<sup>163</sup> and 3) some states do not offer reciprocity and refuse to

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160. *Building a Better Bar Exam*, *supra* note 30, at 17–18 (“Capitalizing on the voiced frustrations of experienced attorneys who were caught in the slow tide of state rules for reciprocity and admission by motion, the . . . uniform exam took flight.”). *But see* Michael J. Thomas, *The American Lawyer’s Next Hurdle: The State-Based Bar Examination System*, 24 J. LEGAL PRO. 235, 240–41 (2000) (“[T]he practice of insular state by state and position of bar examinations testing essentially national law is at best an anachronism, and at worst a serious impediment to the growing, national legal markets and the ability of lawyers to freely and fairly move within that market.”).

161. *See* MODEL RULES OF PRO. CONDUCT r. 5.5(b) (AM. BAR ASS’N 2019).

“A lawyer who is not admitted to practice in this jurisdiction shall not: (1) . . . establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.”

*Id.*

162. *Building a Better Bar Exam*, *supra* note 30, at 44 (“The fees to transfer one’s UBE score, ranging from \$1200 to \$1600, often equal or exceed the costs of taking the bar exam in the transferring state.”).

163. *Id.* (“Depending on the jurisdiction, UBE scores may be transferred for a period of up to two

admit lateral attorneys based on a portable UBE score.<sup>164</sup>

For attorneys admitted via the uniform exam, online resources and continuing legal education may aid with the jurisdiction rule knowledge gap. States can provide online courses or continuing legal education (CLE) requirements focused on local laws for attorneys seeking to practice in their jurisdiction. The NextGen exam is expected to allow states to utilize an exam that will produce a transferrable score and still test state law distinctions.<sup>165</sup> These features should help already-licensed attorneys by providing for career mobility without the need to retake a full bar exam. The American Bar Association (ABA) has developed guidelines that encourage states to adopt rules facilitating multijurisdictional practice.<sup>166</sup> By standardizing these rules, states can promote a more seamless integration of legal practices across borders.

While the NextGen exam will continue conversations about a convenient pathway to multistate bar admission through score portability, states have always had the power to provide for multistate practice. States can establish reciprocity agreements that allow attorneys licensed in one jurisdiction to practice in another without having to take a separate bar exam. Such agreements can foster a collaborative legal environment while acknowledging the unique competencies required in different states. States can continue to offer limited practice licenses or temporary admission for out-of-state attorneys, enabling them to work on specific cases or for certain clients without undergoing the full bar exam process.<sup>167</sup> This approach allows experienced attorneys to serve clients effectively while respecting state-specific requirements and without being unduly tethered to the type of bar examination utilized in the jurisdiction.

In sum, the existence of diverse state bar admission pathways does not preclude avenues to multistate practice. Instead, these varied pathways open the door to innovative solutions that can harmonize state-specific

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to five years.”).

164. California and Florida do not accept UBE scores and do not offer reciprocity. Texas began accepting UBE scores in 2022, but still does not offer reciprocity. *Id.*

165. *Uniform Bar Examination*, NAT’L CONF. BAR EXAM’RS, <https://www.ncbex.org/exams/ube/ube-score-portability> [https://perma.cc/XPZ2-AD4X].

166. *Commission on Multijurisdictional Practice*, AM. BAR ASS’N, [https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/commission-on-multijurisdictional-practice/mjp\\_comm\\_summ/?login](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission-on-multijurisdictional-practice/mjp_comm_summ/?login) [https://perma.cc/5WBB-7KD5] (revised Apr. 12, 2002).

167. See MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 1 (AM. BAR ASS’N 2019).

requirements with the realities of a mobile legal profession. By adopting the NextGen exam, entering into reciprocity agreements, and/or implementing limited practice licenses, states can create pathways that allow attorneys to serve clients across jurisdictions while maintaining the integrity of local legal standards. As the legal profession continues to adapt to the demands of a globalized world, embracing both the uniqueness of individualized state bar examination and the necessity for multijurisdictional practice will be crucial for fostering a dynamic and responsive legal system.

#### IV. INSPIRATION FROM LEGAL EDUCATION REFORMS

The transformations underway in the legal profession are not limited to the bar exam. Every step along the path to bar admission has undergone major shifts in the last decade. The law school admission process, the delivery of legal education, the character and fitness requirements for admission to the bar, and the licensure assessment tool used to gauge competency have progressed from a series in a static rite of passage, into steps along a pathway to client-centered practice. Only through a multilayered analysis can we effectively explore the new developments that are reshaping attorney admission. A crucial component of that analysis must consider both the impetus for change and the seedbed of the resistance confronting it.

##### *A. Moving Away from Test Dependence*

The legal profession has become dependent upon standardized testing as a gateway into legal education and the practice of law. Weening ourselves from that dependence is an uphill battle. ABA accreditation standards require law schools to use an admissions test to serve as a valid and reliable predictor of an applicant's ability to succeed in law school.<sup>168</sup> For almost forever, the Law School Admission Test (LSAT) has served as that valid and reliable predictor. However, the LSAT no longer stands alone as the sole entrance exam into law school following a 2021 decision by the American Bar Association's Council on Legal Education and Admissions

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<sup>168</sup>. STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCH. Standard 503 (AM. BAR ASS'N 2024).

to the Bar (ABA Council).<sup>169</sup> The ABA Council now permits law schools to rely interchangeably on LSAT scores or Graduate Record Exam (GRE) scores.<sup>170</sup> The ABA Council also grants waivers<sup>171</sup> to schools who want to use JD-Next, which steps away from the standardized exam model.<sup>172</sup>

Broadened standards for entry into law school, like this decision from the ABA Council, provide an exemplar of regulatory admissions standards that are not bounded by a single test from a single producer that should be a useful parallel for those engaged in the work of bar exam reform. But reform of entrance exam requirements has been successfully deployed only in limited circumstances—typically circumstances that involve a replacement or substitute exam. To illustrate this point, consider the ABA Council’s 2023 proposal for a test-optional admission standard. Law school leaders and various interest groups met the proposal with exercised resistance, and the proposal was ultimately dropped.<sup>173</sup> Lawyers and standardized test makers are embroiled in a codependent circuitous relationship that makes reform difficult. Law-related test makers have built their entire industry in reliance upon their unchallenged monopoly of providing admission test products and services to law schools and bar examiners based on their claim to offer valid predictors of law school success and law practice competency.<sup>174</sup> Those claims of validity remain unsubstantiated.<sup>175</sup>

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169. Stephanie Francis Ward, *Starting Now, the GRE Can Replace the LSAT in Law School Admissions*, ABA J. (Nov. 30, 2021, 1:50 PM), <https://www.abajournal.com/news/article/starting-now-the-gre-can-replace-the-lsat-in-law-school-admissions/> [<https://perma.cc/KN4T-RHVG>].

170. The development of the GRE has stronger footing in more evidenced based assessments that account for diverse students and backgrounds. See *Who We Are*, ETS, <https://www.ets.org/about/who.html> [<https://perma.cc/RBH5-EYFG>] (“It was this very notion that brought members of the American Council on Education, the Carnegie Foundation for the Advancement of Teaching and the College Entrance Examination Board together to form ETS in 1947. They felt that an independent, nonprofit organization devoted to educational research and assessment could expand opportunities for learners of all income and social status levels through more informed, objective methods for evaluation.”).

171. Julianne Hill, *5 More Law Schools Now Approved to Use JD-Next for Admissions*, ABA J. (June 14, 2024, 12:15 PM), <https://www.abajournal.com/web/article/five-more-law-schools-approved-to-use-jd-next-for-admissions> [<https://perma.cc/J92T-T6X4>].

172. *Discover JD-Next*, ASPEN PUBL’G, <https://aspenspublishing.com/pages/discover-jd-next-program> [<https://perma.cc/AXT3-VHZL>].

173. *Council Pauses Move to Make Pre-Admissions Test Optional*, AM. BAR ASS’N (May 22, 2023), <https://www.americanbar.org/news/abanews/aba-news-archives/2023/05/council-pauses-pre-admissions-test-optional/> [<https://perma.cc/N5E3-W38B>].

174. HOWARTH, *supra* note 22, at 42.

175. HOWARTH, *supra* note 22, at 5–9, 56–57, 59–65.

Sidestepping questions of validity, test makers and a majority of standardized bar exam proponents will hyper-fixate on the reliability of the exam.<sup>176</sup> Unfortunately, standardized exams used for law school and bar admission have been so statistically reliable that they have become a systematically efficient funnel of economic and societal privilege. Diversity need not be the goal of test makers, but the consistent outcomes of measurable demographic exclusion must no longer be ignored.

Both recognizing new or different tests that will satisfy the ABA standard, and presenting a test-optional standard, introduce competition into a market that previously has had none. From a market share perspective, it is to be expected that introducing competition into the regulatory admissions test industry would be met with resistance from the monopoly holder. The LSAT has maintained a previously unchallenged foothold on law school admissions. The Law School Admissions Council (LSAC),<sup>177</sup> the LSAT developer, has vocally opposed admissions-test-optional proposals.<sup>178</sup> Even so, the former CEO of the LSAC acknowledged that “looking for multiple ways to find candidates who can succeed in law school is in everyone’s best interest.”<sup>179</sup> We need not look any further than the standards for law school admission to see direct parallels to the evolution of the use of required testing as a standard for entry, the source of its opposition, and the compelling public policy reasons for change.

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176. *Id.* at 5; see also Catherine Martin Christopher, *Assessing Experiential Education in Law Schools: Toward a Modern Diploma Privilege*, 93 MISS. L. J. 1137, 1159 (2024).

177. The LSAC is a not-for-profit organization that provides products and services that support candidates and schools throughout the law school admission process. See *About the Law School Admission Council (LSAC)*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/about> [https://perma.cc/4AZP-DRSY].

178. *Council Pauses Move to Make Pre-Admissions Test Optional*, *supra* note 172 (“The Law School Admission Council, which administers the most popular pre-admissions test, the LSAT, has vigorously opposed elimination of the test requirement.”); Lily Knezevich & Stephen W. Luebke, *Important Findings on Test-Optional Admissions*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/lsat/promoting-access-equity/test-optional-findings> [https://perma.cc/NKM9-2FHD].

179. Julianne Hill, *Tests Into and Out of Law Schools – What’s Changing and Why*, LEGAL REBELS (Aug. 14, 2024, 8:49 AM), <https://www.abajournal.com/legalrebels/article/rebels-podcast-episode-103> [https://perma.cc/M2R4-L43W] (Legal Rebels Podcast interview with Kelley Testy and associated article).

### *B. Flexible Modalities*

Another transformative development in legal education occurred when the ABA Council eased restrictions on the mode of delivery of legal education. In 2023, the regulator increased the proportionate number of credit hours that may be earned through distance education. Law students at ABA approved schools may now earn up to 50% of their required degree credits online, including first-year core courses.<sup>180</sup> Delivering instruction outside of the brick-and-mortar walls of the classroom can make legal education more accessible to non-traditional students who have competing demands on their time and availability.<sup>181</sup> The “non-traditional” classification extends to first-generation college graduates, students who enter law school after some years in the workforce, students with caregiving duties, non-white students, neurodiverse students, students who balance law school while working full-time jobs, and more. Developments that expand access to legal education are important because the pipeline to a more diverse and balanced profession begins with law school admission. The recent changes to accreditation standards bring law schools in line with the distance education limits set by the United States Department of Education and the general edicts of 21st century technology.<sup>182</sup> Bar examination stands in great need of similar technological modernization. States pursuing remote exam administrations may have taken clues from expanding educational regulatory standards.

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180. Karen Sloan, *Law Students Can Take 50% of Classes Online, with ABA Rule Change*, REUTERS (May 12, 2023, 1:24 PM), <https://www.reuters.com/legal/government/law-students-can-take-50-classes-online-with-aba-rule-change-2023-05-12/> [<https://perma.cc/X68R-P7DJ>].

181. James Leipold, *Access to Legal Education Expanded Through Increased Distance Learning*, LSAC BLOG (Aug. 17, 2023), <https://www.lsac.org/blog/access-legal-education-expanded-through-increased-distance-learning> [[perma.cc/J82C-TQ7T](https://perma.cc/J82C-TQ7T)] (“The option to learn online opens access to students, particularly those who may be balancing other obligations like family and work, who do not have ready access to transportation, or who may live in areas that are far from their desired law school.”); Antonia Alice Badway Miceli, *From a Distance: Providing Online Academic Support and Bar Exam Preparation to Law Students and Alumni During the COVID-19 Pandemic*, 65 ST. LOUIS U. L.J. 585, 601–06 (2021).

182. See Sloan, *supra* note 180.

### C. Character and Fitness Inquiries

There has also been positive change happening in the character and fitness determinations. A precondition to bar admission in every state is the character and fitness investigation.<sup>183</sup> The investigative process is expansive and cumbersome for the applicant. The investigation is intended to identify issues that could impede an applicant's responsible and competent practice of law. Very little information is off limits in the character and fitness assessment. Bar examiners routinely inquire into an applicant's academic, employment, financial, residential, marital, credit, and criminal history.<sup>184</sup> They do so, claiming that the information sought could bear some relationship to an applicant's trustworthiness to competently engage with clients, the court, and opposing counsel. Routinely, those inquiries have included questions about mental health diagnoses and medications.<sup>185</sup>

In a growing number of jurisdictions, questions requiring disclosure about mental health and medications have been altered or removed from the character and fitness assessment.<sup>186</sup> This positive shift will remove a disincentive to seek mental healthcare.<sup>187</sup> It can also help to remove stigma associated with mental health diagnoses. Perhaps most importantly, the recent trend to eliminate questions about mental health may serve to remove barriers to bar admission that have nothing to do with competence, diligence, or fitness.<sup>188</sup>

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183. Timothy Dinan, *Bar Application Character And Fitness Background Check – Part 1*, NAT'L JURIST (Mar. 22, 2018, 9:47 AM), <https://nationaljurist.com/national-jurist-magazine/bar-application-character-and-fitness-background-check-part-1/> [<https://perma.cc/KN7S-PVF5>].

184. David Jaffe & Janet Stearns, *Conduct Yourself Accordingly: Amending Bar Character and Fitness Questions to Promote Lawyer Well-Being*, 26 PRO. LAW. 3, 3 (2020), [https://www.americanbar.org/groups/professional\\_responsibility/publications/professional\\_lawyer/26/2/conduct-yourself-accordingly-amending-bar-character-and-fitness-questions-promote-lawyer-wellbeing](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/26/2/conduct-yourself-accordingly-amending-bar-character-and-fitness-questions-promote-lawyer-wellbeing) [<https://perma.cc/82YZ-MCXY>].

185. See generally Colin M. Black, *The Rise and Fall of the Mental Health Inquiry for Bar Admission*, 50 CAP. U. L. REV. 537 (2022).

186. *Id.*

187. Jaffe & Stearns, *supra* note 184, at 4 (“The current perception among law students is that an applicant who receives treatment for a mental health issue and then discloses this treatment on the bar application will create a delay or denial of admission. As a result, the law student who perceives needing help will not seek it when it is most needed.”).

188. *Id.* (“Provided that bar applicants can perform the essential elements and duties of a lawyer with competence and diligence, overbroad or outdated character and fitness questions should not stand in the way of their admission.”).

Each of these developments has moved the legal profession forward. Each development required the collaborative input of multiple stakeholders and each represents a decisive break from regulatory tradition in attorney admission. These regulatory changes have occurred primarily or have been most pronounced within the last five years. Many were prompted or influenced by the effects of the COVID pandemic. They each serve to enhance public protection and access to justice, and none has caused the legal profession to collapse. Yet inexplicably, progressive changes to the licensure assessment tool, a.k.a. “the bar exam,” that undergo the same degree of collaborative input from stakeholders, the same decisive deliberation by regulators, and the same likelihood of enhancing public protection and access to justice are often met with distrust and dogged resistance.<sup>189</sup>

Entry into the legal profession should not be preconditioned upon wealth, social complexion, or race. Yet, for reasons absolutely unconnected to intellect or competency, bar passage data shows disparate outcomes for non-white applicants.<sup>190</sup> Legal scholars and law school faculty and administrators who work with unsuccessful bar applicants routinely identify socioeconomic forces that account for the disparate outcomes.<sup>191</sup> These bar pass discrepancies along socioeconomic and racial lines have been met with heads-buried-in-the-sand from the test makers and the bar examiners.<sup>192</sup> Like a scripted chorus from a psychometric hymnal, test makers are quick to respond that disparate outcomes reflect social inequities and not the test instrument itself.<sup>193</sup> It is unknown whether the NextGen exam will improve or exacerbate these disparate results. Breaking away from overreliance on standardized testing and making optional pathways available are important

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189. See, e.g., Daniel D. Quick, *Wither Law School and the Bar Exam?*, MICH. BAR J., July 2024, <https://www.michbar.org/journal/Details/Wither-law-school-and-the-bar-exam?ArticleID=4912> [<https://perma.cc/65YC-GMR7>]; Think Like an Attorney, “*Abolish the Bar Exam! Whaat?*”, YOUTUBE (Oct. 5, 2021), <https://www.youtube.com/watch?v=MiCT0DMcO40> [<https://perma.cc/JJ29-K9KP>]; Lloyd A. Karmer, *From My Perspective: Why a Bar Exam?*, BENCH & BAR J., Nov. 2021, <https://www.isba.org/sections/bench/newsletter/2021/11/frommyperspectivewhyabarexam> [<https://perma.cc/5AAM-59GA>].

190. DeShun Harris, *Do Black Lawyers Matter to the Legal Profession?: Applying an Antiracism Paradigm to Eliminate Barriers to Licensure for Future Black Lawyers*, 31 U. FLA. J.L. & PUB. POL’Y 59, 69–71, 79 (2020).

191. See Devito et al., *supra* note 39, at 244–50.

192. See, e.g., Scott Devito et al., *Examining the Bar Exam: An Empirical Analysis of Racial Bias in the Uniform Bar Examination*, 55 U. MICH. J.L. REFORM 597, 617–28 (2022).

193. See Ripkey & Kane, *supra* note 61, at 432.

next steps to mitigate disparate impact.

#### *D. Mitigating Disparate Impact*

Diversity and representation remain important despite current executive and legislative efforts by states that seem to be attempting to leapfrog over each other to outlaw diversity in education and employment.<sup>194</sup> Growing movement towards reducing the financial burden of legal education, with initiatives like loan forgiveness programs and expanded access to affordable legal education, are first steps. Identifying ways to make client service and practice skills the heart of any competency assessment can reduce the financial and opportunity costs of becoming an attorney. Together, these changes reflect a broader effort to make the legal profession more accessible and inclusive.

The development of multiple pathways into the legal profession diversifies the way that people can become lawyers and, more importantly, those pathways will lead to greater diversity in the people who become lawyers.<sup>195</sup> When those who rely on attorneys and judges for a voice in the justice system can see themselves in the profession, access to justice should seem less elusive to those who have been traditionally underserved.<sup>196</sup>

Supervised practice, conditional licensure, and curricular pathways are examples of transformed protocols for attorney licensure reflect evolving generational attitudes about professional competency and an increased

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194. See Char Adams & Nigel Chiwaya, *Map: See Which States Have Introduced or Passed Anti-DEI Bills*, NBC NEWS (Mar. 2, 2024, 6:00 AM), <https://www.nbcnews.com/data-graphics/anti-dei-bills-states-republican-lawmakers-map-rcna140756> [<https://perma.cc/5WLT-MZB4>]; Candace McDuffie, *A Shocking List of All of the States That Have Come for DEI*, THE ROOT (Mar. 30, 2024), <https://www.theroot.com/a-list-of-states-that-have-banned-limited-and-attacked-1851360019> [<https://perma.cc/B8X4-7GC5>].

195. See Carla D. Pratt, *Radical Reformation: Diverse Pathways to Attorney Licensure Will Yield a More Diverse Profession*, 23 RUTGERS RACE & L. REV. 177, 208 (2021); Eura Chang, *Barring Entry to the Legal Profession: How the Law Condone Willful Blindness to the Bar Exam's Racially Disparate Impacts*, 106 MINN. L. REV. 1017, 1023 (2021).

196. See HOWARTH, *supra* note 22, at 12–13; see also Oday Yousif, Jr., *The Bar Exam is Stained with Inequality and Racism. It Needs to be Abolished.*, SAN DIEGO UNION-TRIB. (Dec. 7, 2020, 8:45 PM), <https://www.sandiegouniontribune.com/2020/12/07/the-bar-exam-is-stained-with-inequality-and-racism-it-needs-to-be-abolished/> [<https://perma.cc/V2WZ-EF9Y>] (“In California, 68 percent of all attorneys are [w]hite, but [w]hite residents are only 41 percent of California’s population. Meanwhile, Latinos make up 7 percent of all of California’s lawyers but 35 percent of the state’s population. And California attorneys are only 4 percent Black and 13 percent Asian despite those groups making up a larger percentage of the population.”).

appetite for judicial innovation. As with all forward-looking developments, new regulatory protocols will present challenges for the legal profession and the state supreme courts who seek to implement them—the greatest of which might be limited resources and systemic resistance to change.

### CONCLUSION

New regulatory developments are sorely needed if the legal profession is to inch its way into the 21st century, yet not all are met with the same welcome. As a self-governed profession, we must ask why this is. The legal profession can only progress from the bar reform proposal stage to the implementation phase if we ask the important, albeit difficult, questions.

First, we must inquire about, and be able to isolate, the impetus for change. Understanding what motivates change in the profession may also better equip reform proponents to respond to opposition. Many of the bar reform initiatives arose in connection with the COVID pandemic. As the health crisis abates, we must be willing to explore whether the legal profession's appetite for change can be stirred by something other than a need to react in crisis.

Second, we must identify the breaking point, if one exists, where resistance to change will be outweighed by the motivation for it. Traditionally, bar admission has received the least attention in the regulation of attorneys.<sup>197</sup> Our courts and the public are generally more focused on the disciplinary aspects of attorney regulation than on bar admission.<sup>198</sup> Knowing whether that disinterest defaults into resistance to bar form is crucial strategic information.

The rich array of alternatives that are being developed is a forward step in the reassertion of the profession's responsibility to assess practitioner competence. We need multiple pathways into the legal profession. State overreliance on the bar exam in attorney regulation, has created a path dependent relationship between standardized test developers and state supreme courts.<sup>199</sup> That dependence has imbued the NCBE with regulatory

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197. See *Outsourcing Self-Regulation*, *supra* note 8, at 1810, 1835.

198. See *id.* at 1815–1818.

199. Path dependence refers to a sensitive dependence on initial conditions, design, or product selection that has an irreversible influence on the ultimate allocation of resources. See S. J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 J. L. ECON. & ORG. 205, 205–206 (1995).

authority that is outside the conceptual boundaries of judicial oversight in a self-regulated profession.<sup>200</sup> It is beneficially ironic that the NCBE has enmeshed itself in a reform of its own commercially distributed bar exam. Time will tell whether that irony is serendipitous or ubiquitous. I remain hopeful that the NextGen exam will be a better competency measure than its predecessor and that bar examiners will continue to recognize a more expansive conception of bar examination in the fulfillment of our professional responsibilities.

As more licensure avenues emerge, we must thoughtfully engage those who default to a narrative of resistance. The more a proposed change bucks against deeply rooted institutional traditions, the more resistance it will face. The proposed changes to bar examination do not make the process of becoming a lawyer easier, they make it more important. Aspiring lawyers should be less afraid of failing the bar exam and more concerned with being ready to practice law. New developments in the regulation of attorney admission have presented opportunities for collaborative reform with the potential to narrow the vast access to justice gap, if only we allow. Any impediments to this progress will be self-induced.

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200. See *Outsourcing Self-Regulation*, *supra* note 8, at 1832.