

MBLE Comprehensive Study of the Bar Examination
Recommendations of Working Group 3: Supervised Practice
May 31, 2022

For the reasons discussed below, Working Group 3 recommends that the Minnesota Supreme Court approve development of a Minnesota Supervised Practice Pathway (MSPP) as an option for applicants who choose to follow such a pathway for licensing. For applicants who choose to follow this pathway, the MSPP would replace the bar examination as a method of demonstrating minimum competence to practice law. Applicants would still be reviewed for compliance with the character and fitness requirements for licensing and would be required to take and pass the Multistate Professional Responsibility Examination.

In this report, we describe the reasons for adopting the MSPP and outline the requirements and considerations for such a pathway. The implementation of the MSPP will require additional work to further define the pathway, and we recommend the formation of an implementation committee to create the pathway and draft any amendments required for the Rules for Admission. We recognize that full authorization of the MSPP would be made only after specific plans for the MSPP are created and reviewed.

I. Executive Summary

As charged by the Minnesota Board of Law Examiners (MBLE), Working Group 3 reviewed the possibility of adopting a pathway for licensing based on supervised legal practice work conducted after, or primarily after, graduation from law school. We reviewed supervised practice models in Canada and Utah and the recommendations adopted and plans being developed in Oregon. We also reviewed the experience of New Hampshire, which has a model of licensing based on review of portfolios created during supervised practical experience during law school. Two overarching principles guided our considerations: consumer protection (licensing only those who demonstrate minimum competence) and equity in the licensing process.

As a result of our research and discussions, the Working Group recommends the Court approve development of a Minnesota Supervised Practice Pathway (MSPP) for licensing. Graduates seeking licensing under the MSPP would complete lawyering tasks under the supervision of a licensed attorney for a specified number of hours of practice and would submit documentation of those tasks and a portfolio of work samples to the MBLE. The MBLE would review the documentation and portfolio at least once during the MSPP practice period to ensure adequate progress and again upon final submission to evaluate whether the applicant has demonstrated minimum competence to operate as a licensed attorney.

The MSPP would be one option for each applicant to choose. Applicants could instead

choose to take the Minnesota bar examination, which provides the advantage of attaining a portable exam score that can be used to satisfy exam requirements for licensure in 35 additional jurisdictions. The MSPP would not immediately result in a license that could be transferred to another jurisdiction, although the MSPP could be the basis for a portable license if other states that are developing supervised practice pathways agree to offer reciprocity for licenses obtained under similar programs.

Under either pathway, applicants would have to satisfy the other components of licensing established in Minnesota, including graduating from an ABA-accredited law school or other approved educational path, passing a character and fitness review, and passing the Multistate Professional Responsibility Examination (MPRE). Other pathways, including a possible curricular pathway recommended by Working Group 2 and the current process of obtaining a license based on years of practice in another jurisdiction, would be available.

The MBLE controls the admission of applicants through grading and standard-setting for the Minnesota Bar Examination, and the MBLE would also control admission under the proposed MSPP. This control would be accomplished by having the MBLE (a) supervise applicants' compliance with the eligibility requirements for selecting the MSPP, (b) approve, train, and oversee volunteer attorneys to supervise applicants seeking licensing through the MSPP, and (c) review submitted documentation and representative work samples to ensure the applicant meets minimum competency requirements. MBLE review of an applicant's submission will constitute an "examination of the applicant" under the current Minnesota Rules for Admission. The submitted documentation and portfolio will provide sufficient material for the MBLE to measure the applicant's skills and abilities against the minimum competency standard. Indeed, unlike the current bar examination or the revised NCBE Next Gen Bar Examination, the MSPP will require applicants to perform work under realistic law practice conditions, so it will provide a better measure of some aspects of minimum competency.

The MSPP will rely heavily on volunteer support from the Minnesota legal community to provide the guided supervision and feedback contemplated as part of the pathway. The benefits to the legal community from the MSPP and the commitment of the legal community to advancing access to justice and to creating a more diverse legal profession will motivate licensed attorneys to offer that volunteer support. In particular, members of Minnesota's affinity bar associations¹ have expressed interest in serving as volunteer supervisors in the MSPP to help improve representation of Black, Indigenous, and other attorneys of color in a profession where communities of color have historically been underrepresented. To supplement the pool that would otherwise be available, the Working Group recommends that the Supreme Court and the MBLE develop incentives to encourage participation, including offering CLE credit for

¹ Minnesota's affinity bar associations include the Hmong American Bar Association, the Minnesota American Indian Bar Association, the Minnesota Asian Pacific Bar Association, the Minnesota Association for Black Lawyers, the Minnesota Black Women Lawyers Network, the Minnesota Hispanic Bar Association, the Korean American Bar Association of Minnesota, and the Minnesota Lavender Bar Association. For more information, see <https://diversityinpractice.org/affinity-bars/>.

performing supervision and giving public recognition to supervising attorneys for contributing to the MSPP.

The Working Group recognizes that reviewing applicants' eligibility for the MSPP and applicants' portfolios will create significant additional work for the staff and members of the MBLE and a likely need to enlist the participation of additional compensated graders. In addition, development or adoption of new technology may be necessary to support the submission and review of applicants' documentation and portfolios. The resources for the additional expense could be provided in part through higher fees for applicants choosing this pathway, representing the higher administrative costs associated with the MSPP over administering the bar examination. In structuring fees, however, it is important to avoid discouraging applicants from choosing this pathway and to ensure that each applicant has the practical ability to choose any of the pathways to licensing for which the applicant is eligible. Although those who choose licensing under the MSPP may save some expenses associated with taking a bar examination, the burden of supporting this form of licensing should not be placed on the applicants choosing this path. All methods of licensing are for the benefit of the profession as well as the public and should be supported primarily through sources other than the applicants themselves. Alternative sources of support for the increased administrative work should be explored, including using funds from annual attorney licensing fees, currently used to support the MBLE and the Lawyers Professional Responsibility Board.

This remainder of this report discusses the Guiding Principles for the Working Group (Section II), the material reviewed by the Working Group (Section III), the rationale for developing additional pathways to licensing (Section IV), the recommendation to explore and seek to establish the MSPP (Section V), and the specific recommendations of the Working Group for an MSPP (Section VI).

II. Guiding Principles

In determining whether to recommend a supervised practice pathway for licensing, Working Group 3 was guided by the following considerations, as outlined in the charge to the working groups.

- The licensing process should protect the public by ensuring applicants to the practice of law demonstrate they have minimum competence to practice law prior to licensure. In particular, the licensing process should evaluate applicants' ability to satisfy the Essential Eligibility Requirements under Rule 5A of the Rules for Admission to the Bar, including:
 - an understanding of threshold knowledge in core subjects;
 - an understanding of legal processes and sources of law;
 - an ability to reason, recall complex factual information, and integrate that information with complex legal theories;
 - the ability to determine the importance of the information to the overall

- client matter;
 - the ability to communicate with a high degree of clarity and organization;
 - the ability to interact effectively with clients; and
 - the ability to conduct legal research.
- The licensing process should ensure equal access to the practice of law and work to eliminate inequitable barriers to the practice of law on the basis of socio-economic status, race, gender, disability status, etc. and account for diversity in the age, race, ethnicity, gender, geographic location, and practices of applicants and the clients who rely on Minnesota lawyers for their legal needs.
- The recommendations should take into account lawyer well-being and the feasibility of implementing the recommendations.
- The standards should be reliable in order to achieve meaningful, objective, and consistent results.

In addition to the Essential Eligibility Requirements, the Working Group also considered the Building Blocks of Minimum Competence identified by the Institute for the Advancement of the American Legal System ("IAALS"). IAALS is "a national, independent research center dedicated to facilitating continuous improvement and advancing excellence in the American legal system."² In October 2020, IAALS published the result of a two-year research study of minimum competency. Through the study, which included conducting 50 focus groups with practicing attorneys (5 of those groups in Minnesota), IAALS identified the following core competencies (called "the twelve building blocks of competency"):³

- The ability to act professionally and in accordance with the rules of professional conduct
- An understanding of legal processes and sources of law
- An understanding of threshold concepts in many subjects
- The ability to interpret legal materials
- The ability to interact effectively with clients
- The ability to identify legal issues
- The ability to conduct research
- The ability to communicate as a lawyer

² See *About IAALS*, IAALS.DU, <https://iaals.du.edu/about>.

³ See DEBORAH JONES MERRITT & LOGAN CORNETT, BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE (Dec.2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf (providing additional information about the study and a further explanation of each competency).

- The ability to see the "big picture" of client matters
- The ability to manage a law-related workload responsibly
- The ability to cope with the stresses of legal practice
- The ability to pursue self-directed learning.

To ensure adequate consumer protection, any pathway to licensing should adequately assess applicants for an identified set of core competencies, drawn from the Essential Eligibility Requirements in Rule 5A and the core competencies identified by IAALS. A list of competencies combining the two would be an effective starting point for establishing alternative licensing methods.

III. Summary of Working Group Meetings

The Working Group held seven meetings to gather information and discuss the issues raised by adopting a supervised practice pathway to licensure. In addition to meetings held among Working Group members to discuss the issues, the following meetings were held:

- On March 8, 2022, the Working Group met with Kendra Matthews, member of the Oregon Task Force that studied alternatives to the bar exam and recommended to the Oregon Supreme Court adoption of curricular and supervised practice pathways for licensure. The recommendation of the Task Force was approved by the Oregon Supreme Court and an implementation committee (the Licensing Pathways Development Committee) was established.
- On March 22, 2022, the Working Group met with Professor Deborah Merritt, co-author of the IAALS study described above. On behalf of IAALS, Professor Merritt is also working with NCBE and members of the Oregon implementation team to develop tools to use in implementing the curricular and supervised practice pathways for Oregon. Professor Merritt provided information on the following aspects of establishing assessment for a supervised practice pathway:
 - Guidelines for a licensing system based on supervised practice
 - Assuring fairness in licensing through supervised practice
 - Examples of a form that could be used for supervisors to provide feedback to applicants they are supervising
- On April 26, 2022, members of the Working Group met with Catherine Bramble and Louisa Heiny, who are serving on the Utah committee that is preparing a recommendation for the Utah Supreme Court to implement a supervised practice pathway. The committee is building on Utah's experience with a supervised practice pathway established temporarily in 2020 to respond to the challenges of administering the bar exam during the pandemic.
- On April 27, 2022, members of the Working Group met with Melinda Gehris, a New

Hampshire bar examiner, to discuss her experience evaluating portfolios to license students who participate in the Daniel Webster Scholars Honors Program, a curricular path to licensure in New Hampshire.

IV. Limitations of the Current Bar Examination

The bar exam as currently written and administered in Minnesota⁴ provides an inadequate measure of minimum competence, making it both worthwhile and important to develop additional pathways to licensure. The bar exam tests only a few of the competences identified above (understanding legal processes and sources of law, understanding basic concepts of legal doctrine and applying them to new fact situations, interpreting legal materials, identifying legal issues, and communicating—in written form—as a lawyer). It does not test other critical aspects of lawyering competence (e.g., conducting research, interacting effectively with clients, acting professionally, seeing the “big picture” of matters and determining the importance of the information to the overall client matter, managing a law-related workload, coping with the stresses of law practice, and pursuing self-directed learning). In effect, it tests the ability of applicants to take the test, not the ability to practice law.

The insufficiencies of the bar examination have been identified by many scholars⁵ and confirmed by the National Conference of Bar Examiners’ own studies.⁶ The test relies heavily on memorization of many detailed legal rules and application of those legal rules in contexts divorced from how they would be used in law practice. As the IAALS study documented, new lawyers do not rely on memory; they research the law.⁷ More experienced lawyers may remember details about legal rules within their expertise, but even experienced lawyers typically review those rules to ensure accurate recall. Current bar exams also rely heavily on multiple choice questions, which does not mirror problem-solving in practice. In addition, bar exam questions are based on statements of facts written by the bar examiners, but that does not reflect how clients present legal problems or how lawyers go about answering those problems. Lawyers learn the facts through client and witness interviews, and then raise claims through creating narratives based on those

⁴ Minnesota has adopted for its examination the Uniform Bar Examination, which is provided by the National Conference of Bar Examiners.

⁵ See, e.g., Carol L. Chomsky, Andrea A. Curcio & Eileen Kaufman, A Merit-orientated Path for Lawyer Licensing, 82 Ohio St. L.J. 883, 885-886 (2021); Deborah Jones Merritt, Validity, Competence, and the Bar Exam, Am. Ass’n of L. Schs. News (2017), <http://www.aals.org/about/publications/newsletters/aals-news-spring-2017/faculty-perspectives/> [citing to a 2012 NCBE job analysis which revealed gaps in minimum competence skills measured]; Kristin Booth Glen, Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession, 23 Pace L. Rev. 343, 378-79 (2003); see also State Bar of Cal., The Practice of Law in California: Findings from the California Attorney Practice Analysis and Implications for the California Bar Exam 2 (May 2020), <https://www.calbar.ca.gov/Portals/0/documents/reports/2020/California-Attorney-Practice-Analysis-Working-Group-Report.pdf> (identifying a range of skills necessary to new lawyer competencies, many of which are not tested by the existing exam).

⁶Nat’l Conf. of Bar Exam’rs, Final Report of the Testing Task Force 6-13 (Apr. 2021), <https://nextgenbarexam.ncbex.org/reports/final-report-of-the-ttf>Final Report of the Testing Task Force; see also Deborah Jones Merritt & Logan Cornett, Inst. for the Advancement of the Am. Legal Sys., Building a Better Bar 5 (discussing two NCBE job analysis surveys).

⁷*Id.* at 24–25 (discussing why memorization is the antithesis of the lawyering skills that should be assessed).

interviews. Asking for “answers” to formulated scenarios fails to test what lawyers actually do and therefore fails to effectively assess minimum competence.⁸

Moreover, the exams measure a variable unrelated to law practice: test-taking speed.⁹ The multiple choice portion of the UBE provides examinees with an average of only 1.8 minutes to answer each of 200 multiple choice questions—a test design that does not allow any time for thoughtfully digesting a legal problem and thinking through an analysis, but instead requires weeks of practicing rapid-fire multiple choice test-taking in order to learn the skill of answering a kind of question never faced in law practice, and to do so based on snap judgments instead of thoughtful inquiry.¹⁰ The UBE essay exam allows 30 minutes for each essay,¹¹ an unrealistic time frame for any lawyer to evaluate a scenario and write a coherent and thoughtful analysis. The performance test portion of the UBE allows 90 minutes to read the case packet and write an answer to the problem posed, a pace not representative of law practice.¹² If speediness were an important characteristic of lawyering, having a speeded exam would be sensible, but that is not the case. Lawyers work under time pressures, of course, but their time constraints are not at all like the pressures of the bar exam. In fact, the notion that memorization and speediness might be useful in resolving client matters in practice conflicts with the standards of diligence and competence that are the foundation of our professional and ethical obligations as lawyers.

The problems with the bar exam are compounded by the fact that the test-makers provide only general statements of the subject areas that will be tested, not complete statements of the principles of law themselves. This leaves test-takers uncertain about exactly what law they must learn and therefore dependent on purchasing extensive outlines developed by commercial test preparation companies, detailing the law that those companies predict will be tested.

Bar exams also have a long history of disparate outcomes based on gender, race, and economic status, unrelated to the competence and quality of the examinees. Bar examinations were first adopted as part of a strategy to exclude people then considered undesirable, by race, by ethnicity, and by socioeconomic class.¹³ Statistically, in jurisdictions where data is available, the percentage of BIPOC (Black, Indigenous, People of Color) applicants who pass the exams is persistently and consistently lower than for White applicants.¹⁴ These disparities have appeared in

⁸*See id.* at 64.

⁹*See, e.g.,* Andrea A. Curcio, Carol L. Chomsky & Eileen Kaufman, Testing, Diversity, and Merit: A Reply to Dan Subotnik and Others, 9 U. Mass L Rev. 206, 235.

¹⁰*See id.* at 236–38 (illustrating, in a step-by-step manner, the thought processes examinees must go through to answer a bar exam multiple choice question).

¹¹*Multistate Essay Exam*, Nat'l Conf. of Bar Exam'rs, <https://www.ncbex.org/exams/mee/>].

¹²Curcio, Chomsky & Kaufman, *Testing, Diversity, & Merit*, *supra* note 9, at 226–27.

¹³*See, e.g.,* Joan Howarth, Shaping the Bar: The Future of Attorney Licensing (2022); Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America 64–66, 127–28 (1976); R. Scott Baker, *The Paradoxes of Desegregation: Race, Class, and Education, 1935-1975*, 109 Am. J. Educ. 320, 328 (2001); George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. Legal Educ. 103, 104, 113 (2003).

¹⁴*See, Joan W. Howarth, The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 Geo. J. Legal Ethics 931, 952-55 (2020)

multiple bar exam administrations at least since the early 1990s.¹⁵ In 2020, 66% of Black law school graduates passed the bar exam on their first try, as contrasted to 76% for Latinx candidates and 88% of White candidates.¹⁶ The disparity only got worse in 2021.¹⁷ These results are reinforced by a study by the AccessLex Institute confirming that bar exam results are largely a function of the applicants' resources.¹⁸ Those most likely to pass are candidates who have the resources to study full-time for two months after graduation, purchase expensive bar preparation courses and materials, and not be distracted by family obligations.¹⁹ These results are linked to the stark racial disparities produced by the bar exam, since candidates of color have been less likely to have the financial resources necessary for bar exam success.²⁰ Stereotype threat – the impact on performance caused by concern of reinforcing stereotypes of ability linked to one's identity – may intersect with other aspects of the exam, including speediness, to exacerbate the challenges for BIPOC applicants.²¹

The NextGen bar examination being developed by the National Conference of Bar Examiners will respond to some of the concerns that are raised here.²² The NCBE has said it will test fewer subjects, that it will distinguish between legal rules that applicants need to know and those that applicants need only be familiar with, and that it will incorporate testing on the applicants'

¹⁵Numerous studies have detailed disparities. *See, e.g.*, Linda F. Wightman & Henry Ramsey, Jr., Law Sch. Admission Council, LSAC Nat'l Longitudinal Bar Passage Study, at viii (1998), <https://lawschooltransparency.com/reform/projects/investigations/2015/documents/NLBPS.pdf> (showing, inter alia, eventual pass rates of 77.6% for Black candidates and 96.7% for White candidates); Nat'l Connf. of Bar Exam'rs, Impact of Adoption of the Uniform Bar Examination in New York 166 tbl.4.2.24 (2019), <https://www.nybarexam.org/UBEReport/NY%20UBE%20Adoption%20Part%202%20Study.pdf> (finding that Black candidates passed at 68.5% and White candidates passed at 90.1%); *California Bar Examination Statistics*, ST. BAR CAL., <https://www.calbar.ca.gov/admissions/law-school-regulation/exam-statistics> (through clickable links, showing similar disparities from 2009–2018 across multiple racial and ethnic categories every year). Many states do not collect data on race and ethnicity, but the consistent pattern of disparate outcomes across test administrations makes it likely the same results would be found in each state.

¹⁶Am. Bar Ass'n, Summary Bar Pass Data: Race, Ethnicity, and Gender 2020 AND 2021 BAR PASSAGE QUESTIONNAIRE 1 (2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/stastat/20210621-bpq-national-summary-data-race-ethnicity-gender.pdf.

¹⁷ Karen Sloan, The Racial Gap in Bar Exam Pass Rates Got Worse in 2021, <https://www.reuters.com/legal/legalindustry/racial-gap-bar-exam-pass-rates-got-worse-2021-2022-05-02/#:~:text=graduates%20who%20took%20the%20bar,to%20ABA%20figures%20released%20Monday>.

¹⁸AccessLex Inst., Analyzing First-Time Bar Exam Passage on the UBE in New York State 5–6 (May 2021), <https://www.accesslex.org/NYBOLE>.

¹⁹*Id.* at 11, 15, 49.

²⁰Deborah Jones Merritt, Carol Chomsky, Claudia Angelos & Joan Howarth, *Racial Disparities in Bar Exam Results—Causes and Remedies*, BLOOMBERG L. (July 20, 2021), <https://news.bloomberglaw.com/ip-law/racial-disparities-in-bar-exam-results-causes-and-remedies>.

²¹*Id.* That effect would not be surprising because working memory is a key component of successful test-taking. Jared Cooney Horvath & Jason M. Lodge, *What Causes Mind Blanks During Exams?*, *Conversation* (Oct. 25, 2016), <https://theconversation.com/what-causes-mind-blanks-during-exams-67380>. Stereotype threat affects working memory. Toni Schmader & Michael Johns, *Converging Evidence That Stereotype Threat Reduces Working Memory Capacity*, 85 *J. Personality & So. Psych.* 440, 451 (2003); Belle Derks, Michael Inzlicht & Sonia Kang, *The Neuroscience of Stigma and Stereotype Threat*, 11 *Grp. Processes & Intergroup Rels.* 163, 164 (2008).

²² See <https://nextgenbarexam.ncbex.org/>

knowledge of more legal skills.²³ It is possible that the NCBE will provide a detailed listing of the legal rules that applicants should know, making preparation for the exam more focused. If those changes are implemented effectively, the NextGen bar examination – projected to be available in 2026 – will likely be an improvement as a tool for assessing minimum competence. But it will still not assess a number of the critical skills for minimum competence (e.g., interacting directly with clients, conducting rather than knowing about how to do research, coping with the stresses of law practice, managing a law-related workload, communicating orally) and when it focuses on skills, the test will necessarily focus on knowledge about the skills rather than performing them in actual practice. It will likely continue to test through multiple-choice questions at least in part, a particularly problematic way to test lawyering competence. It is also unclear whether the test will remain speeded, and whether it will continue to have disparate outcomes as a high-stakes exam. Even if the NCBE goals for the NextGen bar examination are attained—and that remains to be seen, as the development process continues—a written exam is still not a complete test of competence, and is in any event only one way of demonstrating competence. The Working Group believes that the MSPP should be developed as an option that a candidate for licensing may choose for presenting evidence of competence.

V. Recommendation of the Working Group

Based on our research, consultation, and discussions, the Working Group concludes that consumers can be protected and equity served by offering applicants multiple pathways to licensing, including a Minnesota Supervised Practice Pathway (MSPP). Much work needs to be done to create and operate such a pathway, but work being done in other states (notably Oregon and Utah) demonstrates the possibility of establishing a workable, fair, and equitable system that will allow applicants to demonstrate competence more fully than is possible using the current bar exam and more fully than is likely using the yet-to-be-fully-developed NextGen bar exam. The Working Group recommends that an implementation committee be established to develop a plan for offering the MSPP. Such a plan would include specification of:

- the eligibility requirements to apply for the MSPP to licensing;
- the minimum competencies that would need to be established for licensing;
- the number of hours of supervised practice required for licensing;
- the nature of lawyering tasks that would be eligible to be counted as supervised practice hours, and whether some of those hours could be performed in supervised settings in law school;
- the requirements for practicing lawyers to become supervising attorneys in the MSPP;
- the nature of the training required of supervisors in the program;
- the nature of the portfolio that applicants would assemble to document and

²³ The NCBE lists legal research, legal writing, issue spotting and analysis, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, and client relationship and management as skills to be included in the NextGen exam.

- demonstrate minimum competence;
- how applicant portfolios would be assessed for licensing, including rubrics to be used for assessment to ensure consistency and reliability;
- how oversight would be conducted to ensure that applicants are achieving adequate progress and supervisors are performing their responsibilities effectively and fairly.

In the next section, the report addresses further the rationale for creating the MSPP and offers preliminary judgments and recommendations about the implementation considerations listed above.

VI. Creating a Supervised Practice Pathway

The Working Group recommends the Minnesota Supreme Court direct the MBLE to create a viable and equitable Minnesota Supervised Practice Pathway (MSPP) to licensing based on the outline presented here and the additional specifications developed through an implementation committee. Section A below expands on the rationale for creating such a pathway. Section B offers a more detailed discussion of implementation considerations, including those listed above. Section C addresses an assortment of other considerations relevant to the creation of a successful MSPP.

A. Rationale for a Supervised Practice Pathway

A supervised practice pathway will respond to the problems with the current reliance on a knowledge-oriented and speed-based examination, whether that is the current UBE or the envisioned NextGen bar examination. As discussed above, that kind of examination necessarily focuses primarily on what applicants *know* rather than what they can *do*. Even if adjusted to include questions about attorney skills, the examination will be limited to what applicants know about the required skills and whether they can restate that knowledge quickly, rather than testing their actual skills.

In contrast, an experiential pathway, whether grounded in supervised work in law school or supervised work after graduation, provides the opportunity to evaluate applicants' actual performance of the skills that attorneys use in practice. Professions such as medicine and architecture have long required demonstration of skills, and the legal profession would benefit from incorporating a demonstration of skills in attorney licensing. A supervised practice pathway will protect the consumers of legal services by ensuring that the newly licensed attorney has gained meaningful practical experience designed to ensure the person has met the competency requirements set forth in Rule 5 and in the IAALS Building Blocks. During the period before the applicant's licensing, the public will be protected by having a licensed, practicing lawyer supervising the applicant's work prior to their admission to the practicing bar.

A supervised practice pathway is also better designed to establish competencies that matter most in protecting client interests. A recent study documents that there is no relationship between attaining a higher score on the bar examination and the number of complaints, formal charges, or

disciplinary actions taken against attorneys in the jurisdictions reviewed.²⁴ Most complaints against and discipline of lawyers result from lapses such as lack of diligence, inadequate communication, and mishandling of client funds,²⁵ all of which will be better addressed in the supervised practice pathway than in a bar examination.

The MSPP model we propose would require applicants to establish their minimum competence by engaging in a specified number of hours of supervised legal practice and submitting to the Minnesota Board of Law Examiners both documentation of the activities in which the applicant engaged and a portfolio of non-privileged work-product created during the applicant's supervised practice. A bar examiner would then review the submitted documentation and certify that the applicant has demonstrated minimum competence. The bar examiners would evaluate the applicant's portfolio based on a rubric that connects the applicant's work to a listing of required competencies and the activities, skills, and knowledge that evidence those competencies.

In proposing the MSPP, the Working Group considered the experience of Canada, which has long employed an "articling" program providing for an apprenticeship before admission, and Utah, which adopted a supervised practice program for 2020 as an emergency measure during the pandemic and is currently preparing a proposal for a more permanent supervised practice pathway. We also considered the report of the Oregon Alternatives to the Bar Exam Task Force, which recommended adoption of a supervised practice pathway that was approved by the Oregon Supreme Court, and the experience from New Hampshire, where bar examiners have been licensing based on review of portfolios created as part of the Daniel Webster Scholars Honors Program.²⁶ We believe that those programs demonstrate that a supervised practice pathway can be successful and offer models for designing such a pathway. Our confidence is bolstered by the belief that one of the most effective ways to train new practitioners to provide competent representation is through practical experience.

²⁴ Mitchel Winick, Victor Quintanilla, Sam Erman, Christina Chong-Nakatsuchi, and Michael Frisby, *Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards*, AccessLex Institute Research Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793272. See also Milan Makovic, *Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3789235 (forthcoming in *Georgetown Journal of Legal Ethics*) (comparing disciplinary data from bar examination states with data from Wisconsin and demonstrating that the bar examination requirement has no effect on attorney misconduct).

²⁵ See Leslie Levin, Christine Zozula, and Peter Siegelman, *A Study of the Relationship between Bar Admissions Data and Subsequent Lawyer Discipline* (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2258164). The study reported that attorneys most often received discipline for failing to communicate with clients (20.0%), lack of diligence (17.93%), and failure to safeguard client property (11.26%). Only 4.14% of disciplinary sanctions related to "competence"—and even some of those cases may have reflected incompetence in areas that are not tested by the bar exam. See Deborah J. Merritt, *Bar Exam Scores and Attorney Discipline*, at Law School Cafe, blog post at <https://www.lawschoolcafe.org/2017/06/03/bar-exam-scores-and-lawyer-discipline/>

²⁶ We note that the California Blue Ribbon Commission of the State Bar of California is also considering recommending creation of curricular and supervised practice pathways to licensing. While there is no currently operating program in California, their ongoing work may provide additional models for consideration as the MSPP is developed.

The Working Group recommends that Minnesota design its own program, rather than adopt the existing models from Canada or Utah, in order to ensure satisfaction of our identified minimum competencies. Developing a Minnesota program will also provide the opportunity to engage with constituencies in the state to ensure the MSPP is accepted by the profession and the public as an appropriate pathway to licensing and that the ultimate plan responds to the needs and perspectives of those constituencies.

In this report, we outline aspects we believe should be part of a Minnesota Supervised Practice Pathway based on the information we have reviewed and discussed. To provide context for the recommended Minnesota Supervised Practice Pathway, we provide here some comments on the models reviewed from other jurisdictions. We also note that Oregon is taking steps to design a supervised practice pathway with the assistance of IAALS and NCBE, and the Oregon plan may serve as a particularly helpful model for Minnesota.

In Canada, law school graduates must complete a 9 to 12-month period of apprenticeship referred to as "articling." Some provinces include a formal practice-orientated educational program that must be completed during the articling year. Applicants also must complete some type of "barrister" or "solicitor" exam that occurs during the articling period that is administered by the relevant licensing authority. The Working Group is not recommending an articling model for Minnesota because a lengthy apprenticeship of the type required in Canada appears to create barriers that keep some people who are qualified to practice law from being admitted. One significant barrier is the availability of meaningful, paid articling positions and who gets selected for those positions, making it easier for those with resources and those with connections to the legal community to find positions. An apprenticeship of this type also creates opportunities for employers to abuse their position of authority over the applicant, since the applicant is dependent on the employer's approval for an extended period of time. The Working Group believes that the proposed design of the MSPP will avoid or limit those problems. The Working Group also concluded that a well-designed supervised practice program should make it unnecessary to also require an examination.

In 2020, Utah adopted a modified-diploma privilege/supervised practice program in recognition of the difficulties created by the pandemic.²⁷ The pool of applicants was limited to those who had not previously sat for any bar examination and who had graduated from an ABA-accredited law school with a bar examination passage rate of 86% or greater (the pass rate satisfied by both Utah law schools). Applicants were eligible for admission to practice after 360 hours of supervised practice. Utah created rules regarding the kind of work that could be done to qualify²⁸ and the state pre-approved several pro bono programs as qualified to provide supervised practice. The rules established to implement the Utah Supreme Court order can serve

²⁷ See UTAH STATE BAR DIPLOMA PRIVILEGE RESOURCES, <https://utahdiplomaprivilegeorg.wordpress.com/> (last visited April 25, 2022).

²⁸ See <https://utahdiplomaprivilegeorg.files.wordpress.com/2020/04/signed-2020.04.21-bar-waiver-order-final-1.pdf>

as a partial model for establishing the specifics of the MSPP. The Working Group recommends against adopting the restricted eligibility adopted by Utah in the emergency conditions of 2020. A well-designed supervised practice pathway should be available to any applicant who chooses it, and there is no reason to connect eligibility to the bar exam pass rate of the applicant's school rather than to the performance of the particular applicant in the program. We note, too, that Utah is currently drafting a proposal to adopt a more permanent version of a modified-diploma privilege/supervised practice program, and the proposal will recommend participation without the restrictions adopted in 2020.

Oregon does not yet have an operating supervised practice pathway, but the Oregon Supreme Court has approved development of both a curricular pathway and a supervised practice pathway similar to the one recommended by this Working Group. Professor Merritt, the Institute for the Advancement of the American Legal System, and the NCBE are working together to develop structures and processes for a supervised practice pathway, with the assistance of psychometricians to ensure the processes will produce valid and reliable results. The implementation committee should monitor developments in Oregon to learn from their approach.

B. Implementation Considerations

Creating the MSPP will require an implementation period to allow development of the structure for supervised practice and the training of supervisors and bar examiners to ensure they can carry out their responsibilities effectively and equitably. This portion of the report outlines aspects of the MSPP that should be addressed by an implementation committee. Subsection 1 considers candidate eligibility for the MSPP. Subsection 2 discusses the requirements to serve as a supervising attorney in the MSPP. Subsection 3 discusses the time requirements for the supervised practice work. Subsection 4 discusses the nature of the supervised practice work to be done by the applicant. Subsection 5 discusses the required documentation of the applicant's supervised work. Subsection 6 discusses how to evaluate candidates seeking admission to licensure pursuant to the MSPP. Finally, subsection 7 outlines additional considerations for the proposed MSPP process.

As noted earlier, the MSPP should be structured and implemented to ensure not only validity (licensing those with minimum competence) but fairness and equity in licensing. That means designing the system so that it does not place undue burdens on non-traditional law students, does not solely benefit law graduates with pre-existing connections in the field, identifies and trains volunteer supervisors to mentor applicants and recognize their own implicit bias, crafts a fair and unbiased rubric system to review applicants' portfolios, and avoids any stigma in the legal community or among potential clients for applicants who gain licensure through this (or any) model of licensing. These considerations should continue to be central to the work of an implementation committee.

The implementation period will also allow drafting and adoption of changes necessary in the Rules of Admission to accommodate the MSPP. The Working Group does not believe a

change in state law is required. Minn.Stat. 481.01 delegates to the supreme court the responsibility to “by rule . . . prescribe the qualifications of all applicants for admission to practice law in this state” and charges the Board of Law Examiners “with the examination of all applicants for admission to practice law” with examinations to be held “[a]t least two times a year.”²⁹ The statute does not specify what form the “examination” must take. If, as recommended here, the MSPP includes evaluation by the Board of Law Examiners of applicant portfolios demonstrating minimum competence, that should satisfy the requirement of “examination” of applicants.

1. Eligibility

The MSPP offers an option that would substitute for a single component of admission: sitting for and passing the Minnesota bar examination. The Working Group recommends that the universe of people who are deemed qualified applicants for admission via the MSPP should mirror (but not expand or contract) the universe of people who are deemed qualified to sit for the Minnesota bar exam. Those qualifications are set out in Rule for Admission 4A.³⁰ The MBE would establish the specific rules governing application for the MSPP, but the Working Group believes it is important that the rules provide for the following:

- The applicant need not seek admission via the MSPP immediately upon graduation from law

²⁹ M.S.A. 481.01: “The supreme court shall, by rule from time to time, prescribe the qualifications of all applicants for admission to practice law in this state, and shall appoint a Board of Law Examiners, which shall be charged with the administration of the rules and with the examination of all applicants for admission to practice law. . . . At least two times a year the board shall hold examinations and report the result of them, with its recommendations, to the supreme court. Upon consideration of the report, the supreme court shall enter an order in the case of each person examined, directing the board to reject or to issue to the person a certificate of admission to practice.”

³⁰ RULE 4. GENERAL REQUIREMENTS FOR ADMISSION

A. Eligibility for Admission. The applicant has the burden to prove eligibility for admission by providing satisfactory evidence of the following:

- (1) Age of at least 18 years;
- (2) Good character and fitness as defined by these Rules;
- (3) One of the following:
 - (a) Graduation with a J.D. or LL.B. degree from a law school that is provisionally or fully approved by the American Bar Association;
 - (b) (i) a bachelor’s degree from an institution that is accredited by an agency recognized by the United States Department of Education or foreign equivalent;
 - (ii) a J.D. degree or equivalent from a law school attended following completion of undergraduate studies;
 - (iii) the applicant has been licensed to practice law in any state or territory of the United States or the District of Columbia in 60 of the previous 84 months; and
 - (iv) the applicant has been engaged, as principal occupation, in the practice of law for 60 of the previous 84 months in one or more of the activities listed in Rule 7A(1)(c); or
 - (c) the applicant has been licensed to practice law in any state or territory of the United States or the District of Columbia for at least 10 years.
- (4) Passing score on the written examination under Rule 6 or qualification under Rules 7A, 7B, 7C, 8, 9, or 10. An applicant eligible under Rule 4A(3)(b) but not under Rule 4A(3)(a) or 4A(3)(c) must provide satisfactory evidence of a passing score on the written examination under Rule 6 and is not eligible for admission under Rules 7A, 7B, 7C, 8, 9, or 10;
- (5) A scaled score of 85 or higher on the Multistate Professional Responsibility Examination (MPRE); and
- (6) Not currently suspended or disbarred from the practice of law in another jurisdiction or any foreign jurisdiction.

school, although the rules may require application within a stated period after law school graduation if the graduate has not practiced law in the interim. That time limitation ensures that the skills and knowledge acquired in law school are still remembered sufficiently at the time of supervised practice so that the applicant has the required base of knowledge.

- The applicant should not be restricted to applying for admission solely via the MSPP. The implementation committee should address how fees should be structured if a person seeks admission via both the bar examination and the MSPP at the same time or sequentially.
- Prior failure of a bar examination should have no impact on a person's ability to seek admission via the MSPP. The MSPP should be considered a fully effective means of establishing minimum competence, so failing to pass a previously administered bar examination should have no impact on an applicant's eligibility. Similarly, failure to satisfy the MSPP should typically have no impact on a person's ability to seek admission through the bar examination or other pathway, because failure to satisfy the MSPP may mean only that the applicant has not at that time demonstrated minimum competence. If a failure to satisfy the MSPP is instead related to ethical concerns or behavior that undermines confidence in the ability of the applicant to perform adequately as a lawyer, those concerns could be documented and flagged for consideration upon a subsequent application.
- An applicant whose portfolio is considered inadequate when first submitted should be able to apply again for licensing under the MSPP by submitting a new or updated portfolio.
- There should be no artificial "cap" on how many people can apply for admission via the MSPP at any one time. Because each applicant must identify a qualified supervising attorney, it is expected that the number of applicants will be limited, especially in the first years of the program, but the MBE should prepare to evaluate for licensing all applicants who choose this route.
- At least initially, there is unlikely to be infrastructure within the MBE to formally assist an otherwise qualified applicant to locate a qualified supervising attorney. As demonstrated in Utah, it may be possible to develop a set of pro bono supervised practice opportunities that can be made available to all applicants, which will also expand the availability of legal services. While the goal is to have most supervised practice work be paid, not unpaid, providing pro bono opportunities will be a helpful aspect of the MSPP. As the MSPP program develops, the MBE should explore whether it can help increase the pool of supervisors and offer additional assistance in matching applicants to supervisors.

2. Requirements for Supervising Attorneys

The requirements for being a supervising attorney should include the following:

- An active Minnesota license.
- A specified number of years of experience as a licensed attorney, with a specified number of those years being engaged in practice in Minnesota. The number of years of experience for supervisors should be determined by the implementation committee. The requirement is meant to ensure the supervisor has sufficient experience to provide effective feedback and guidance to an applicant and sufficient connection to practice in Minnesota to provide guidance on Minnesota law and practice. Based on requirements established in other jurisdictions, the Working Group suggests five years of experience, with two of them in Minnesota.
- No record of public discipline during the supervising attorney’s career in any jurisdiction and no record of private admonition in the three years prior to applying to become a supervising attorney. The Working Group considers the three-year-window on private admonitions to be sufficient because private admonitions occur only in matters that are considered “isolated and non-serious.” An isolated instance of a non-serious violation should not be a permanent bar to being a supervisor. Supervisor applicants should be required to disclose any private admonitions they have received (which would otherwise be confidential and therefore not known to the MBL) and those charged with certifying supervisors may determine if the particular private admonition warrants denial of the application.
- Completion of any training requirements set out by the implementation committee. Such training must include training in equity and inclusion comparable to the Intercultural Development Inventory.

The Working Group makes the following recommendations with respect to the recruiting and supervision of supervising attorneys in the MSPP:

- The implementation committee should establish an application process for attorneys to be certified as supervising attorneys. The certification process should be completed before the attorney supervises any practice activities under the MSPP.
- Consistent with the practice in other programs or plans allowing supervised practice for licensing, the Working Group recommends that the MSPP allow the certified supervising attorney to delegate to another licensed attorney (even one who does not meet all of the other requirements for serving as a supervising attorney) the obligation of directly supervising an applicant's daily activities. For example, a partner in a firm may be the supervising attorney, while a third-year associate is, on a daily basis, working directly with the applicant. With appropriate rules in place, the Working Group believes that the use of such intermediate supervisors is appropriate. The Utah model of supervision contemplates a “hub and spoke” model, by which a single qualified supervisor acts as the “hub”--having

the primary responsibility to work with the applicant to plan a set of experiences that will demonstrate minimum competence across the range of competencies—with other attorneys acting as the “spokes” of the wheel, supervising and providing feedback on a series of individual practice experiences. That is an appropriate model to follow and will result in applicants receiving supervision and feedback from multiple sources, a valuable experience for the applicant.

- The implementation committee should consider whether an exception to the active license requirement should be made for judges acting as supervisors who might otherwise not meet the requirement of maintaining an active license as outlined above. The resolution of this issue likely turns on the specific activities that will qualify as supervised practice hours, a point left unresolved by the Working Group at this stage. If the final implementation rules include as qualifying activities work for a judge, then the Working Group believes it is also appropriate to create an exception to the supervising attorney requirements for judges.
- There should be no limit on the number of qualified supervised attorneys an applicant may have. An applicant need not do supervised practice hours in a single employment or volunteer setting. The applicant will thus not be beholden to a single supervising attorney to accomplish the work needed for admission, which will help limit the possibility of having a supervisor abuse its position of authority over the applicant, a concern repeatedly expressed in our discussions. Allowing multiple supervisors will also make it more possible for applicants to find placements where they can do qualified supervised practice work.
- To better ensure an adequate pool of qualified volunteers, the Working Group recommends that the Supreme Court and the MBE develop incentives to encourage qualified volunteers to participate, including offering CLE credit for supervising work and giving public recognition of supervisors for contributing to the MSPP. It may also be appropriate to allow attorneys to indicate in their advertising and public credentials that they (or some of their practice members) are certified supervising attorneys for the MSPP. As noted earlier in this report, Working Group believes that the benefits to the legal community from the MSPP and the commitment of the legal community to advancing access to justice and to creating a more diverse legal profession will motivate licensed attorneys, including those from Minnesota’s affinity bars, to offer that volunteer support.

3. Supervised Practice Hours

The Working Group has not specified the number of qualified hours that an applicant should work under supervision to qualify for admission under the MSPP. We note that Utah required 360 hours in their emergency supervised practice rule but the Utah Task Force will be recommending 240 hours as the appropriate measure for their more permanent supervised

practice rule. The Oregon Task Force recommended completion of 1000 to 1500 hours of supervised practice in approved qualified activities, but their implementation committee is considering a reduction of that amount.

The number of hours required is only one aspect of demonstrating competence, because applicants would have to submit documentation of competency established in the activities. The critical question is not how many hours of practice are necessary to attain competence, but how many hours of practice will likely result in work product that shows satisfaction of the range of competencies required. While it is impossible at this stage to know what that number will be, the Working Group believes that a requirement in the range of 240 to 360 hours for the MSPP would be desirable, along with a specification of the range and type of activities required and review of the resulting portfolio. If an applicant is able to demonstrate the required competencies, failing to meet an unreasonably high threshold with respect to hours completed should not stand in the way of licensing.

No matter how many supervised hours are required, the Working Group believes that specification in hours is preferable to specifying the requirement in weeks or months of practice. Using hours as the metric will make it more possible for applicants to find supervising attorneys and to complete the requirements of the MSPP. Applicants may find it difficult to locate an attorney who is willing to provide supervision for the entire set of supervised practice activities or one placement where the applicant can spend a specified number of full-time weeks or months. There may be practitioners who could provide meaningful supervision for a shorter term or for a particular project and there may also be meaningful supervised pro bono opportunities that an applicant could participate in. All of these opportunities would be more available if the hour's requirement can be satisfied in hour or partial-hour increments rather than in weeks or months.

The Working Group recommends that the required hours be completed within a year of approval of the MSPP application so that the work is done in a concentrated-enough fashion to warrant a conclusion that the portfolio demonstrates current minimum competence.

The Working Group agreed that the rules should allow a limited portion of the qualifying hours to be earned during law school (perhaps 20%). Allowing hours to be earned during law school can tap into the well-developed faculty-supervised experiential programs in law schools. An applicant who has engaged in experiential work during law school is especially well situated to begin supervised practice work after graduation, and the additional practice experience should be recognized as counting towards the demonstration of minimum competence.

If a curricular pathway is established along with the MSPP, it will be especially appropriate to permit documented law school hours to partially satisfy the MSPP. Our recommendation to limit the number of law school hours that can be counted for the MSPP acknowledges that hours performed during law school are especially focused on learning in

addition to “doing” the skills, and the focus of the MSPP should be on documented work conducted after graduation.

We note, too, that if supervision by a Minnesota licensed attorney is a requirement, even with respect to law school experiential hours, applicants who attended law school outside Minnesota may not be able to count experiential hours towards the MSPP. If the implementation committee concludes that law school experiential hours should always be eligible to count for the MSPP, then the implementation committee may propose an exception to the state licensing requirements for supervisors in the case of hours done in a faculty-supervised experiential course.

4. Supervised Practice Activities

The Working Group believes that the list of qualifying supervised lawyering activities should be focused on activities that tangibly relate to developing the applicant's legal competence as detailed in the essential eligibility requirements in Rule 5 and the Building Blocks identified by IAALS. The implementation committee may identify possible qualifying activities for each aspect of minimum competence, and those activities could be listed on an online “dashboard” for use by both applicants and supervisors. Qualifying activities would likely fit within the following general areas:

- All activities related to the direct representation of clients;
- Advising businesses and their employees;
- Developing or implementing policies and practices for nonprofit organizations or government agencies;
- Meeting with the supervising attorney or other attorneys on case matters, professional development or ethical matters;
- CLE courses and other professional trainings or workshops as would be typical of an attorney in that area of practice (but with a limitation on the number of CLE hours that qualify);
- Activities related to practice management, including maintenance of client trust accounts;
- Activities related to acquiring and demonstrating proficiency in relevant law-related technology.

In Section 5 of this report, we offer further recommendations on identifying lawyering tasks to be performed in the MSPP and how those might be connected with the minimum competencies

to be assessed. The Working Group also makes the following recommendations regarding the MSPP supervised practice activities:

- Administrative, ministerial and purely paralegal activities should not qualify, or a cap should be placed on the number of hours that can be earned while engaged in those activities, but time spent in supervising the work of paralegals and other non-lawyers should qualify, as such supervision is an important aspect of maintaining a law practice.
- The implementation committee should consider whether to count, or limit eligibility of, activities such as document review that, while often important to client service, may have limited professional growth potential.
- The implementation committee should consider whether to include as qualifying activities work for judges typically undertaken by judicial law clerks. The work of law clerks typically includes substantial research and writing, as well as close review and evaluation of the work of attorneys, all of which would help establish minimum competency. As long as the MSPP includes a requirement that the applicant demonstrate a full range of competencies, including work connected with client representation, the Working Group recommends that law clerk work qualify for inclusion. As noted above, if this activity is included, an exception to the requirement that the supervising attorney have an active Minnesota license might be necessary for judges.
- The implementation committee should consider how the MSPP will interact with Minnesota's rules on student practice during law school and the rules on licensing in Minnesota of experienced attorneys from other jurisdictions.
- While supervised practice hours can be completed in appropriate pro bono or low bono settings, this program is not intended to provide admitted members of the Bar with free or low-cost labor from applicants seeking to complete qualified work. Applicants employed by or in the offices of supervising attorneys can and should be paid a reasonable wage for their work. This is a reasonable expectation because, like the work of very junior attorneys, law students, and graduates awaiting bar exam results, much of the work of the MSPP applicant will be billable to clients (assuming that practice is properly disclosed in client retainer agreements) or would be performed by other compensated employees.

5. Documenting Supervised Activities

The Working Group recommends that the implementation committee establish a process for documenting qualifying activities. The process may include a form asking the applicant to identify which of the identified minimum competencies are reflected in the activity and to describe briefly (in a sentence or two) how the applicant engaged with the identified competencies. The supervisor might be asked to review and approve the form and provide brief

feedback on the applicant’s performance. Professor Merritt provided a sample of such a form in conjunction with her presentation to the Working Group. As noted earlier, Professor Merritt, IAALS, and NCBE are working with the Oregon Licensing Pathways Development Committee to establish a supervised practice pathway; the forms and processes recommended in Oregon may be helpful sources for creating similar processes in Minnesota. It is recommended that the implementation committee explore the availability of technological tools to facilitate the submission of all such documentation.

The Working Group recommends that the implementation committee develop a non-exclusive list of tasks that lawyers may engage in, and that list may be used by applicants and supervisors to document activities performed. A list will be helpful in allowing applicants and supervisors to plan, identify, and document tasks undertaken, perhaps in a dashboard that allows easy navigation. The list should be non-exclusive, however, to permit flexibility in identifying tasks undertaken that are not on the published list. In developing a task list, the implementation committee might draw from the 179 lawyering tasks identified in the NCBE Testing Task Force survey³¹ and the 117 lawyering tasks identified in the California Practice Analysis (CAPA).³²

As an example of what might be developed, CAPA identifies four “areas of responsibility” for lawyers (Establishing and Maintaining Relationships, Practice Management and Administration, Factual and Legal Analysis, and Resolutions) and then identifies subcategories within those areas of responsibilities and lawyering tasks within those subcategories. In the category of “Establishing and Maintaining Relationships,” CAPA lists the following:

Establishing the client relationship

1. Identify the client(s)
2. Assess potential conflicts of interest
3. Manage conflicts throughout representation
4. Determine the client’s goals and expectations
5. Evaluate competence to represent the client’s interests
6. Manage referrals to and from other attorneys
7. Define the scope of the attorney-client relationship
8. Explain the client’s obligations and responsibilities
9. Manage third-party involvement in representation of the client(s)
10. Document the engagement (e.g., engagement letter, arbitration agreement, fee agreement, conflict waiver)
11. Document the decision to decline representation

³¹ See <https://nextgenbarexam.ncbex.org/reports/phase-2-report/#1583773966800-92d6f957-a5d4>

³² The list of competencies, tasks, legal topics, and subtopics can be found on pages 26-30; the report may be accessed at <https://www.calbar.ca.gov/Portals/0/documents/reports/2020/California-Attorney-Practice-Analysis-Working-Group-Report.pdf> at pages 26-30

Maintaining the client relationship

1. Update the client(s) through the matter
2. Respond to client inquiries
3. Resolve disputes with clients
4. Document termination of the representation

Communicating with others

1. Determine disclosure or notice obligations
2. Determine confidentiality obligations
3. Communicate with opposing counsel or parties
4. Communicate with other interested persons (e.g., media, regulatory bodies, insurers)
5. Manage communications with other interested persons (e.g., media, regulatory bodies, insurers)
6. Communicate with witnesses, consultants, or experts
7. Manage communications with witnesses, consultants, or experts

In addition to identifying lawyering tasks, as illustrated above, the implementation committee would identify the specific set of competencies that must be demonstrated, using Rule 5A and the IAALS building blocks as a guide. For example, the minimum competencies could be defined as:

- (1) Acting professionally and in accordance with the rules of professional conduct, including being honest and candid with clients, lawyers, courts, the Board, and others;
- (2) Conducting research effectively;
- (3) Understanding legal processes, sources of law, and threshold concepts in a range of relevant practice areas;
- (4) Interacting effectively with clients;
- (5) Interpreting legal materials, identifying legal issues, and performing legal reasoning;
- (6) Recalling factual information and integrating that information with complex legal theories;
- (7) Communicating with clients, lawyers, courts, and others with organization and clarity;
- (8) Seeing the “big picture” of client matters and using good judgment on behalf of clients;
- (9) Coping with the stresses of legal practice, including complying with deadlines and time constraints, managing a professional workload responsibly, and using good judgment in conducting one’s professional business;
- (10) Avoiding acts that exhibit disregard for the rights or welfare of others;
- (11) Acting diligently and reliably in fulfilling one’s obligations to clients, lawyers, courts, and others;
- (12) Using honesty and good judgment in financial dealings on behalf of oneself, clients,

- and others; and
(13) Learning from experience and pursuing self-directed learning.

When documenting supervised practice hours, applicants and supervisors could specify and briefly describe a task, the time spent in the task, and its connection to one or more of the competencies listed. The supervisor might add a brief evaluation of whether in the supervisor's view the applicant demonstrated competence or mastery or was still learning the identified skills to be acquired.

The processes that are developed to allow documentation of supervised practice hours must allow for effective tracking of the activities undertaken and the connected competencies and must also be an easily used system that will not unduly burden the applicant or supervisor with time consuming tasks not necessary for assessing minimum competence. The examples and description given here are a preliminary set of sample tasks and competencies offered to make the possibilities for shaping the MSPP more concrete, but are not meant as specifications for the program. As noted earlier, Oregon is developing a plan for a supervised practice pathway, advised by the researchers at IAALS and the psychometricians at NCBE, and the Minnesota implementation committee can draw on the expertise developed in that implementation effort to create a workable, effective, equitable, valid, and reliable supervised practice pathway for Minnesota.

6. Evaluation of Participants Seeking Admission via the MSPP

In recommending the MSPP, the Working Group relies on the fact that applicants to the MSPP who have graduated from an ABA-accredited law school will have passed courses totaling at least 83 credit hours and will have received training and instruction during law school in areas of lawyering knowledge and skills that are critical to ensuring attorney competence. These areas include training that prepares law graduates to be effective, ethical, and responsible members of the legal profession, instills knowledge and understanding of substantive and procedural law, and provides critical skills training through coursework and simulated or experiential opportunities.

In particular, the American Bar Association (ABA) requires that all law students in an ABA-accredited law school take and pass (1) courses totaling at least 83 credit hours, (2) experiential courses totaling at least 6 credit hours, (3) at least two faculty-supervised writing courses, and (4) a course in professional responsibility. The ABA also requires that students are provided at least two opportunities to learn about bias, cross-cultural competency, and racism related to law practice.³³ The law schools are required to establish learning outcomes that include achieving

³³ ABA Standard 301, 302, and 303 for Programs of Legal Education, Standards and Rules of Procedure for Approval of Law Schools 2020-2021, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf. The requirement in Standard 303(c) for education on bias, cross-cultural competency and racism was added recently and became effective in February 2022. *See*

competency in outcomes that parallel a number of the competencies required for admission to the bar as described in Rule 5A and the IAALS building blocks. Although graduating from law school under these requirements does not by itself establish minimum competence to be licensed, the MSPP supervised practice component of licensing would be built upon the foundations established by the ABA requirements.

With that as a base, the review of the MSPP applicant's documentation and portfolio should provide sufficient evidence that the applicant has demonstrated minimum competence sufficient to be licensed. The implementation committee should develop rules on the range of tasks that applicants will be required to include in their work to ensure that the applicant will show minimum competence across a range of lawyer responsibilities. The implementation committee or the examiners themselves should develop a rubric for portfolio review, which will help the examiners or graders be consistent and reliable in their evaluations. The rubric would also be shared with applicants and supervisors so they would know the basis on which the submitted materials will be judged. Rubrics that have been developed for review of law school clinical work and that are being developed in other jurisdictions can be used as models in the implementation process in Minnesota.

The documentation and work product should be submitted at least once during the MSPP period so that the MBLE can confirm that the applicant is making appropriate progress in performing activities and collecting the work product necessary to demonstrate minimum competency for admission. The final portfolio would be submitted at the end of the MSPP period.

The portfolio review regulations will also have to lay out the procedures to be used if the MBLE is concerned at any point that the work product submitted fails to meet minimum competency requirements. As noted earlier, if an applicant submits a portfolio for review and it is judged insufficient to demonstrate minimum competence, that should not preclude the applicant from resubmitting a portfolio for review, as long as all activities submitted are eligible as MSPP hours.

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

7. Other Considerations

- The MSPP pathway to admission will not include any formal assistance by the MBLE to applicants looking for supervising attorneys, but the implementation committee should establish a mechanism for outreach to attorneys who may be willing and able to provide

supervision. In creating the MSPP, the implementation committee or the MBLÉ should establish a list of attorneys who have expressed a willingness to supervise if someone working with them seeks licensing through the MSPP. As described earlier in this report, in 2020, Utah established connections with a set of supervisors in pro bono settings who were willing to provide supervision to attorneys volunteering within their programs. We encourage the implementation committee to take similar steps to identify supervisors for pro bono work that may be done by applicants. At the same time, we recognize that many recent graduates will have neither the time nor resources to permit them to engage in pro bono lawyering during their first year of practice, so we have not included an expectation that pro bono activities be included in the qualifying supervised activities.

- The Working Group recommends that both supervisors and applicants be surveyed at least annually about their experience in the program as a part of the MBLÉ oversight of the program, as a way of identifying concerns about supervisor performance, and to collect feedback to help improve the program. The Working Group also recommends that implementation of the MSPP include a process for supervisors and applicants to contact a designated individual to seek support and assistance if the supervisor or applicant has concerns about the work or supervision occurring in the MSPP. To protect confidentiality and the integrity of the MSPP process, it seems advisable to have different individuals assigned to deal with supervisor and applicant concerns.
- The Working Group is not recommending that applicants be required to take specific courses or experiential learning opportunities during law school. Any such requirements would mean that students would not have the desired flexibility to choose the MSPP at any point in their journey to licensing and would thus limit an opportunity that should be available to all who seek licensing.
- The Working Group is not recommending that applicants be required to achieve or maintain a certain academic standing while in law school or upon graduation to be eligible to participate in the MSPP. Academic standing varies among students for many reasons, many of which are not related to the applicant's ability to successfully practice law. If the applicant successfully completes the requirements of their law school's *Juris Doctor* Program and the law school confers a J.D. degree on the graduate, the Working Group recommends that the graduate have the opportunity to seek licensing through the MSPP.
- The Working Group is not recommending a requirement that applicants take an exam in addition to the MSPP activities and certification. The Working Group believes that a supervised practice pathway will stand on its own as an effective demonstration of minimum competence and should be a distinct and separate pathway to licensing.
- Because other states are working to develop their own systems of supervised practice that may be comparable in organization and effect to the contemplated MSPP, the Working

Group recommends that the implementation committee consider ways to provide reciprocity for work done under similar programs in another state, including the possibility of crediting for MSPP hours that were performed in another state or to approve another state's experiential licensing as demonstrating minimum competence for Minnesota licensing.

- We also note that several other states (notably Utah³⁴ and Oregon³⁵) have mandatory new attorney mentoring programs that may be helpful to draw upon in designing a supervised practice program, since the oversight by the supervising attorney is in some ways similar to the feedback that mentors are expected to give to new attorneys in those programs.

VII. Conclusion

The Working Group believes that there is substantial evidence to support offering multiple pathways to attorney licensure, as long as each maintains rigor of evaluation, ensures that new lawyers enter the profession with the knowledge and skills that they need to serve clients, and establishes equitable access to the legal profession. The MSPP would meet this call.

The Working Group believes that the MSPP, on its own, will ensure public protection and minimum competency for licensing new lawyers in Minnesota. If additional pathways are considered as the result of the work undertaken in this MBLÉ comprehensive study of the bar examination, the Working Group recommends that the Minnesota Supreme Court and the MBLÉ consider areas of overlap and how aspects of those pathways might be combined to produce more effective expansion of licensing opportunities.

For the reasons discussed above, the Working Group respectfully requests adoption of the Minnesota Supervised Practice Pathway model as a pathway to licensing. The Working Group urges the formation of an implementation committee to operationalize the recommendations included here and to draft the implementing Rules for Admission.

Submitted by members of Working Group 3:

Co-chairs:

Carol Chomsky, University of Minnesota Law School

Megan Miller, Winthrop and Weinstine, P.A.

Members:

Patricia Beety, League of MN Cities

Anjie Flowers, Anoka-Hennepin School District

Leanne Fuith, Mitchell Hamline School of Law

Monica Gould, University of St. Thomas School of Law

³⁴ See <https://nltp.xinspire.com/content/overview>.

³⁵ See <https://www.osbar.org/nlmp>,

John Koneck, Fredrikson & Byron
Dana Mitchell, Ramsey County
Jennifer Peterson, Office of Lawyers' Professional Responsibility
Scott Swanson, University of St. Thomas School of Law (retired)
Lori Thompson, White Earth Tribal Court
Bruce Williams, The Law Office of Bruce R. Williams
Julian Zebot, Maslon LLP