



The State Bar of California

OPEN SESSION AGENDA ITEM 702 SEPTEMBER 2023

DATE: September 21, 2023

TO: Members, Board of Trustees

FROM: Audrey Ching, Director, Office of Admissions
Donna Hershkowitz, Chief of Programs/Legislative Director

SUBJECT: Report from the Alternative Pathway Working Group: Request to Circulate for Public Comment

EXECUTIVE SUMMARY

At their May 2023 meeting, the Board of Trustees directed staff to ask former Blue Ribbon Commission (BRC) members who indicated support for a bar exam alternative to develop a proposal for this pathway to be submitted to the Board for consideration at its July or September 2023 meeting. Applicable former BRC members met and formed the Alternative Pathway Working Group; they began meeting on June 6. The group met in June, July, and August 2023 and obtained input from a series of experts to develop the proposal attached to this item. This agenda item requests Board approval to circulate this proposal for a 30-day public comment period before final Board consideration.

BACKGROUND

In October 2020, the California Supreme Court established the Joint Supreme Court/State Bar Blue Ribbon Commission on the Future of the California Bar Exam. This commission was tasked with evaluating potential changes to the California Bar Exam and exploring alternative methods for assessing minimum competence for entry into the profession.

In July 2021, the commission began its work, focusing on two main pathways to licensure: use of a traditional bar exam and an alternative pathway involving other types of objective assessments and supervised practice components. Over 17 months, the commission gathered input from various stakeholders, including other states and countries, law schools, psychometricians, and experts from different fields. In the end, the commission recommended

development of a California bar exam but was unable to achieve a consensus with regard to an alternative pathway, so made no recommendation on that topic.

In May 2023, the BRC’s final report was brought to the Board of Trustees. The Board voted to transmit the report to the Supreme Court. The Board also expressed a desire to review and discuss a specific proposal for an alternative pathway. As a result, the Board “directed staff to ask Blue Ribbon Commission members who indicated support for a bar exam alternative to develop a proposal for this pathway—drawing on the Blue Ribbon Commission guiding principles, deliberations, and materials—with input from experts and other stakeholders they identify, to be submitted to the Board for consideration at its July or September 2023 meeting.”

State Bar staff facilitated an initial meeting of the former BRC members who were proponents of an alternative pathway to convey the Board’s request and provided these members with basic information such as timelines and contacts for some of the key experts who had presented to the BRC; State Bar staff did not otherwise participate in the development of the attached report.

In August, the former BRC members that participated in this collaboration submitted a draft proposal to the former members of the BRC who were not participating in the working group and State Bar staff for feedback. Members of the working group also presented the proposal to the Council on Access and Fairness and the Committee of Bar Examiners prior to the working group’s finalization of the report as it is presented to the Board today.

DISCUSSION

The working group recommends adopting a Portfolio Bar Examination (PBE) as an alternative pathway to licensure. Candidates who choose this option would obtain provisional licenses and work under the supervision of licensed California lawyers for four to six months. During that time, they would assemble portfolios of work product that would be assessed by independent graders trained by the State Bar. Work product would be redacted to protect attorney-client privilege, supervisors would consent to submission of the work, and graders would use assessment rubrics developed through psychometrically sound practices. Candidates who achieved passing scores on their portfolios would not take the two-day bar exam but would have to fulfill all other requirements for admission to the State Bar.

Key components of the Portfolio Bar Examination:

- 1. PBE Committee:** A committee of experts should be created to make final decisions about the format of the PBE, aiming for a program that offers valid, reliable, and fair assessments of candidates. This committee can also oversee research and make recommendations for program improvement.
- 2. Candidate Eligibility:** The working group initially recommends a scaling up the program over time and including JD graduates of ABA-accredited and California-accredited law schools. It suggests gradually expanding eligibility but excluding graduates of other law schools or candidates who pursued law office study.

- 3. Curricular Requirements:** Candidates should complete law school courses in nine specified doctrinal subjects (Administrative Law and Procedure, Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Professional Responsibility, Real Property and Torts) to ensure broad exposure to legal principles and application. These courses should meet accreditation standards.
- 4. Practice Scope:** Candidates should be granted provisional licenses with authority, responsibilities, and duties similar to provisional licensees in the Provisional Licensure Program.
- 5. Supervisor Qualifications:** Supervisors should hold active California licenses and not be immediate family members of candidates to enhance fairness and public perception.
- 6. Connecting Candidates and Supervisors:** No specific matching or connecting program is proposed.
- 7. Required Supervised Practice Hours:** Candidates should complete 700-1000 hours of legal work, demonstrating competence and a range of tasks over a period of 17.5-25 weeks.
- 8. Practice Areas:** Candidates should not be limited to specific practice areas, as competence in one area is seen as indicative of potential competence in others.
- 9. Candidate Compensation:** Employers should provide compensation similar to that of recent law school graduates without full licenses.
- 10. Portfolio Contents:** The PBE requires candidates to submit various portfolio components, including essays, written work, negotiations, client encounters, and timesheets.
- 11. Independent Work Product:** Candidates must identify the sources of input and their level of involvement in their work product. Supervisors must attest to the candidate's contributions.
- 12. Development of Rubrics:** Rubrics should be developed for each portfolio component to guide examiners' assessments.
- 13. Setting a Cut Score:** A group of experts should determine the passing score for candidate portfolios.
- 14. Grading Portfolios:** Portfolios should be graded anonymously by independent examiners.
- 15. Flexibility for Candidates:** Candidates should have flexibility in their work arrangements, including part-time work and changing supervisors.
- 16. Ombudsperson:** An ombudsperson should be appointed to address concerns raised by program participants.

17. Public Records: The State Bar should not distinguish between attorneys who passed the traditional bar exam and those who passed the PBE in its public records.

18. Ongoing Study: Regular research and evaluation of the PBE should be conducted to ensure its validity, reliability, and fairness and to track the career outcomes of attorneys from different licensing paths.

The proposed pilot for this proposal would involve a group of about 100 individuals who are still participating in the original Provisional Licensure Program. These individuals would retain provisional licenses and complete an additional 700-1000 hours of legal work under the supervision of a licensed California attorney. They would then submit portfolios of their work product to a group of independent graders appointed by the State Bar.

FISCAL/PERSONNEL IMPACT

There is no fiscal impact associated with the requested action of the Board today—issuance for public comment. Staff will provide a fiscal impact analysis of the proposal itself when the item returns from public comment.

RECOMMENDATIONS

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

RESOLVED, that the Board of Trustees authorizes staff to circulate for public comment, for a period of 30 days, the Report to the Board of Trustees of the State Bar of California: Proposal for a Portfolio Bar Examination as set forth in Attachment A.

ATTACHMENT LIST

- A.** Report to the Board of Trustees of the State Bar of California: Proposal for a Portfolio Bar Examination, submitted by the Alternative Pathway Working Group

Report to the Board of Trustees
of the State Bar of California:
Proposal for a Portfolio Bar Examination

Alternative Pathway Working Group

Susan Bakhshian
Jackie Gardina
Judge Glen Reiser (Ret.)
Natalie Rodriguez
Mai Linh Spencer

September 5, 2023

Introduction

Newly licensed lawyers need to be “practice ready.” Minimally competent attorneys must be able to communicate effectively with clients; solve complex problems; and interact professionally with clients, colleagues, opposing counsel, decisionmakers, and the public. To enhance public protection by producing more practice-ready lawyers, we propose an optional licensing path that candidates may choose to demonstrate that they possess the full range of knowledge and skills needed for entry-level law practice: the Portfolio Bar Exam.

Candidates who choose the Portfolio Bar Exam would obtain provisional licenses and work under the supervision of licensed California lawyers for four to six months. During that time, the candidates would assemble portfolios of work product that would be assessed by independent graders trained by the State Bar. Work product would be redacted to protect client interests, clients would consent to submission of the work, and graders would use assessment rubrics developed through psychometrically sound practices. Candidates who achieved passing scores on their portfolios would not take the two-day bar exam but would have to fulfill all other requirements for admission to the bar.

In addition to providing a deep assessment of a candidate’s competence to practice law, the Portfolio Bar Exam offers several advantages to candidates, employers, clients, and the public. Candidates will focus on demonstrating the knowledge and skills they need to serve clients effectively, benefiting both immediate clients and future ones. Employers will benefit from the work that these candidates perform: A recent State Bar survey demonstrates that employers reap significant benefits from supervising law graduates who hold provisional licenses.

Candidates who choose this licensing path will avoid the heavy expense of preparing for the traditional bar exam—a burden that falls disproportionately on historically disadvantaged groups, including first-generation graduates, women, and candidates of color. Instead, all candidates will be compensated for their work, receiving at least the salary and benefits their employers provide to other recent law school graduates who have not yet been admitted to the bar. The Portfolio Bar Exam also follows the principles of universal design, allowing candidates with disabilities to demonstrate their competence without requesting exam accommodations.

California is in a strong position to implement this type of authentic, comprehensive assessment. The State Bar and profession have almost three years of experience with two Provisional Licensure Programs, initiatives that share some characteristics of the Portfolio Bar Exam we propose. The success of those Provisional Licensure Programs has been unprecedented, and the State Bar gathered exceptional data from participants in the programs that will inform development of the Portfolio Bar Exam. Psychometricians in California and elsewhere have developed procedures to ensure the reliability, validity, and fairness of a portfolio-based system. California, finally, can benefit from the states that have already developed guidelines for portfolio-based licensing—while taking those insights to the next level.

The Blue Ribbon Commission on the Future of the California Bar Exam, jointly established by the California Supreme Court and State Bar of California, adopted (1) a set of guiding principles to evaluate licensing approaches and (2) a statement of the knowledge and skills that should be assessed before licensing a new attorney. This report explains how a Portfolio Bar Exam aligns both with the Commission's guiding principles and with the knowledge and skills that it identified for assessment. The report also offers a blueprint for the Portfolio Bar Exam and answers logistical questions that have been raised about the proposal.

Despite our enthusiasm for a Portfolio Bar Exam, we propose moving cautiously by creating a small pilot program and evaluating the results of that program. We recommend that a new committee refine our blueprint, implement the pilot, and evaluate the results of that pilot.

Comprehensive assessment of competence protects the public and strengthens the profession. The two-day, written bar exam has a traditional place in California's licensing system, but the Portfolio Bar Exam would create an option that assesses competence more directly, fairly, comprehensively, and equitably. The practice-ready candidates licensed through that option will better protect clients and more effectively serve the public.

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I. Recommendations

The Alternative Pathway Working Group recommends that:

- (a) The California Supreme Court adopt a Portfolio Bar Examination (PBE) as a method for assessing a candidate’s minimum competence to practice law;
- (b) The Court and State Bar initiate the PBE by allowing provisional licensees who remain in the Original Provisional Licensure Program to enroll in a pilot PBE;¹ and
- (c) The State Bar appoint a PBE Committee to finalize requirements for the pilot PBE; study outcomes of the pilot program; and make recommendations regarding continuation, modification and/or extension of the PBE.

Although we recommend appointment of a PBE Committee to finalize requirements of the pilot PBE, we envision these basic elements of the assessment method:

- Candidates will obtain provisional licenses similar to those issued under California’s Provisional Licensure Program.
- With those provisional licenses, candidates will complete 700-1000 hours of legal work under the supervision of a licensed California attorney.
- Candidates will submit portfolios of their work product to a group of independent graders appointed by the State Bar. Those graders will examine anonymous work

¹ For the benefit of newly appointed Board members, here is a brief description of the Provisional Licensure Program: The program consists of two distinct branches. The first branch, known as the “Original Program,” allowed 2020 law school graduates to work with provisional licenses under the supervision of licensed attorneys while waiting to take and pass the two-day bar exam. Many of those graduates have passed the two-day exam and been admitted to practice over the last three years. As we explain in Section V, however, about 100 individuals are still enrolled in that program and offer an excellent opportunity to pilot the PBE.

The second Provisional Licensure Program, known as the “Pathway Program,” is open to individuals who scored between 1390 and 1439 inclusive on any California bar exam administered between July 2015 and February 2020. Those scores fell below California’s passing score at the time the exams were taken but would satisfy the lower passing score that California adopted in spring 2020. Candidates qualifying for the Pathway Program may demonstrate their minimum competence by completing 300 hours of supervised legal practice and obtaining a positive evaluation from their supervisor(s), rather than by retaking the two-day bar exam.

The California Supreme Court has extended both programs through December 31, 2025. See *Provisionally Licensed Lawyers*, THE STATE BAR OF CAL., <https://www.calbar.ca.gov/Admissions/Special-Admissions/Provisionally-Licensed-Lawyers>. That website provides additional information about the programs.

product, using rubrics created through the process described in Section IV of this report.

- Through that examination, the independent graders will determine whether a candidate has demonstrated minimum competence in the “legal knowledge, competency areas, and professional skills required for the entry-level practice of law and the effective, ethical representation of clients,” which is the construct statement that the California Practice Analysis (CAPA) Working Group adopted “to define the general scope of the bar exam.”²
- This determination will substitute only for a passing score on California’s current two-day bar exam or future iterations of that exam. Candidates who demonstrate their competence through the PBE must meet all other requirements for admission. These include, but are not limited to, obtaining a passing score on the Multistate Professional Responsibility Exam (MPRE), establishing good moral character, and proving compliance with any court order for child or family support.
- On its public records and websites, the State Bar will not distinguish in any way between attorneys who demonstrated their minimum competence through the current two-day bar exam (or future iterations of that exam) and those who demonstrated their competence through the PBE.

We explain each of these recommendations further in the sections that follow.

II. Background and Working Group Process

On May 19, 2023, the State Bar of California’s Board of Trustees (the Board) received the Final Report and Recommendations from the Blue Ribbon Commission on the Future of the Bar Exam (BRC). The Board directed staff to forward the Report and Recommendations “to the Supreme Court indicating the Board’s support for the recommendations.” Noting, however, that the BRC was unable to make a recommendation related to bar exam alternatives, the Board “direct[ed] staff to ask [former] Blue Ribbon Commission members who indicated support for a bar exam alternative to develop a proposal for this pathway—drawing on the Blue Ribbon Commission guiding principles, deliberations, and materials—with input from experts and other stakeholders they identify, to be submitted to the Board for consideration at its July or September 2023 meeting.”

The five of us volunteered to form a Working Group in response to the Board’s request, and we began meeting on June 6. The State Bar notified all other former BRC members on May 26 that we would be working on this report. Our group met frequently throughout the summer. In addition to drawing upon the BRC guiding principles, deliberations, and materials, we obtained input from a series of experts:

² STATE BAR OF CALIFORNIA, CALIFORNIA ATTORNEY PRACTICE ANALYSIS WORKING GROUP, THE PRACTICE OF LAW IN CALIFORNIA: FINDINGS FROM THE CALIFORNIA ATTORNEY PRACTICE ANALYSIS AND IMPLICATIONS FOR THE CALIFORNIA BAR EXAM 1 (May 11, 2020) [hereinafter CAPA REPORT].

- Dr. Elizabeth Anderson, a psychometrician who has worked with IAALS (Institute for the Advancement of the American Legal System), Southwestern Law School, and other law-related groups to design assessment systems. She currently serves on the ABA's Outcomes and Assessment Committee.
- Dr. Chad Buckendahl, a psychometrician who has worked with the California State Bar on issues related to licensing, as well as with bar examiners in several other states. Dr. Buckendahl is a founding partner of ACS Ventures, a research company that specializes in test design, development, and psychometric consulting for licensure, certification, and education programs. One of Dr. Buckendahl's primary areas of research is setting passing standards on examinations.
- Professor Joan Howarth, a legal educator who has written extensively about lawyering competence and licensing—culminating in the 2023 publication of her book, *Shaping the Bar: The Future of Attorney Licensing*, by Stanford University Press. Prof. Howarth has advised committees in several states (including California's BRC) regarding possible changes in licensing systems. Prof. Howarth serves on the Nevada Board of Bar Examiners. The Nevada Supreme Court recently appointed Prof. Howarth to two task forces exploring changes in that state's licensing process.
- Professor Deborah Merritt, another legal educator who has written extensively about lawyering competence and licensing. Prof. Merritt co-directed the 2020 study, *Building a Better Bar*, which provided new insights into minimum competence. Prof. Merritt has also consulted with numerous states about licensing (including the BRC), helped Oregon design a supervised-practice pathway, and analyzed results from a survey that the California State Bar administered to participants in its Provisional Licensure Program.

The Group also met with Dr. James Henderson, the psychometrician who developed the two California Attorney Practice Analysis (CAPA) studies. Dr. Henderson was also a member of the BRC and participated in the BRC's subcommittee on exam alternatives. Dr. Henderson helped the Working Group understand application of psychometric principles to the PBE. Dr. Henderson was not part of the Working Group and did not participate in drafting this report.

On August 7, we shared a draft of this report with State Bar staff and former members of the BRC, inviting them to offer feedback. The Council on Access and Fairness (COAF) and the Committee of Bar Examiners (CBE) also received copies and placed the proposal on their agendas for public discussion. Some of us participated in those virtual meetings to answer questions and obtain additional feedback. This final draft of the report benefits from the feedback we received from all these sources.³

California is not alone in considering alternative methods of assessing competence to practice law. At least a dozen jurisdictions in the United States and Canada have concluded that a two-day,

³ As a member of the BRC, the President of the California Lawyers Association (CLA) received a copy of the draft report. He declined to comment on the draft, stating that the CLA would comment when the final report reached the Board of Trustees.

written bar exam is not the only way to test the knowledge and skills needed for entry-level law practice. These jurisdictions have adopted—or are considering—more comprehensive ways to assess that knowledge and skills. The BRC learned about several of these programs (including ones adopted in New Hampshire, Oregon, and several Canadian provinces) during its deliberations.⁴ Since the BRC submitted its final report, another proposal has emerged from a working group appointed by the Utah Supreme Court.⁵ Washington, Nevada, Minnesota, Georgia, and Massachusetts are also exploring more comprehensive ways to assess minimum competence.

III. Rationale for the Working Group’s Recommendations

As with the BRC, the Working Group bases its recommendations on the construct that the CAPA Working Group developed “to define the general scope of the bar exam.” That construct is:

The California Bar Exam assesses legal knowledge, competency areas, and professional skills required for the entry-level practice of law and the effective, ethical representation of clients.⁶

In addition to meeting this general construct, the PBE will test the specific skills and doctrinal subjects recommended by the CAPA Working Group and BRC.

To achieve this result, we structured our discussion around the guiding principles adopted by the BRC:

- Admission to the State Bar of California requires a demonstration of knowledge, skills, and abilities currently required for the entry-level practice of law, otherwise referred to as minimum competence.
- Admission to the State Bar of California requires minimum competence in professional ethics and professional responsibility.
- Criteria for admission to the State Bar of California should be designed to ensure protection of the public.
- The recommended examination, or examination alternative, should be evidence-based.
- Fairness and equity of the examination, or examination alternative, should be an important consideration in developing the recommended approach. Fairness and equity include but are not limited to cost and the mode and method of how the exam or exam alternative is delivered or made available.

⁴ For a summary of the programs in New Hampshire, Oregon, and four Canadian provinces (Alberta, Manitoba, Nova Scotia, and Saskatchewan), see JOAN W. HOWARTH, SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING 123-26 (2023). For information about the Oregon programs, including one that has already been implemented, see p. 18 *infra*.

⁵ UTAH BAR ADMISSIONS WORKING GROUP, FINAL REPORT (Aug. 2023).

⁶ CAPA REPORT, *supra* note 2, at 1.

- The recommended examination, or examination alternative, should minimize disparate performance impacts based on race, gender, ethnicity, or other immutable characteristics.

The Working Group, finally, was guided by the closing paragraph of the BRC’s Mission Statement:

In adopting these guiding principles, the Blue Ribbon Commission does not intend to outline all characteristics which are important to set the foundation for the successful practice of law and the protection of the public. Nonetheless, the Blue Ribbon Commission is committed to promoting the highest standards of integrity, civility, and professionalism in the legal profession, and its members will also be guided by these more general objectives.

As discussed further below, the Working Group concluded that a Portfolio Bar Examination (PBE) will further these principles, providing a valid, reliable, fair, and feasible method of assessing minimum competence to practice law in California. Indeed, we believe that the PBE may further those principles more effectively than a two-day exam confined solely to written assessment. As we note in the final portion of this section, the PBE will also confer important benefits on the profession and public.

We thus recommend that the State Bar adopt the PBE, first as a pilot program and then as an option that candidates may choose instead of the two-day bar exam. As we discuss throughout this report, the PBE and two-day exam both have benefits and drawbacks: there is no perfect assessment method. On balance, however, the PBE offers an assessment that is at least as valid, reliable, fair, and feasible as the two-day bar examination. Our primary purpose in proposing the PBE is to improve public protection by exploring a licensing path that assesses candidates’ competence more comprehensively than is possible in a two-day written exam.

A. Demonstration of Minimum Competence

Candidates for bar admission must demonstrate the knowledge, skills, and abilities required for entry-level law practice. California already has a strong evidentiary base identifying those competencies: the CAPA study. Based on that study, the CAPA Working group identified eight doctrinal areas and six lawyering skills that should be tested when assessing minimum competence to practice law. The BRC added a ninth doctrinal area (Professional Responsibility) and a seventh skill (Negotiation and Dispute Resolution), producing the following list of topics and skills that are essential to establishing minimum lawyering competence:

Doctrinal Subjects	Lawyering Skills
Administrative Law and Procedure	Drafting and Writing
Civil Procedure	Research and Investigation
Constitutional Law	Issue-spotting and Fact-gathering

Doctrinal Subjects	Lawyering Skills
Contracts	Counsel/Advice
Criminal Law and Procedure	Litigation
Evidence	Communication and Client Relationship
Professional Responsibility	Negotiation and Dispute Resolution
Real Property	
Torts	

When discussing these competencies, both the BRC and CAPA Working Group stressed that “there should be a significantly increased focus on assessment of skills” in any licensing system, while “de-emphasizing the need for memorization of doctrinal law.”⁷

The CAPA Working Group and BRC acknowledged that it would be challenging to assess some of the above skills on a two-day exam, especially one confined to multiple-choice questions and other written responses. Our Working Group believes that the challenge will be much greater than the BRC anticipated, and that assessment of many essential skills will be shortchanged:

- Competent drafting requires access to model documents, and competent writing benefits from reflection and editing. Due to the constraints of the two-day bar exam, much of the writing produced on that exam falls short of what practitioners and clients would consider minimally competent in practice.
- Research and investigation will be difficult to assess without granting candidates access to electronic databases and other resources, which may raise cost and other concerns.
- Issue-spotting on a two-day exam is far different from issue-spotting in the context of a live client with multi-faceted, evolving concerns.
- Fact-gathering occurs through interviews, online research, and site visits that a two-day exam will not be able to mimic.
- Client counseling and advising in the context of a two-day, exclusively written exam will be a one-dimensional exercise, stripped of the context, competing interests, and back-and-forth exchanges that characterize real client encounters.
- The same concerns hold true for communication and maintaining client relationships.
- A conventional bar exam will not be able to test the multiple facets of litigation, negotiation, and other forms of dispute resolution in a two-day format. Even then, written exercises will be unable to assess the listening skills and dynamic problem solving that are essential to these activities.

To protect the public, the Bar must be serious about assessing candidates on fluid, interactive, real-life competencies. A new lawyer who struggles to research new points of law, gather facts

⁷ STATE BAR OF CALIFORNIA BLUE RIBBON COMMISSION ON THE FUTURE OF THE BAR EXAM, REPORT AND RECOMMENDATIONS 4 (Apr. 26, 2023) [hereinafter BRC REPORT]; CAPA REPORT, *supra* note 2, at 15, 17-19.

related to a client’s case, interact with a client professionally, or negotiate on a client’s behalf, can do serious harm. The Portfolio Bar Examination (PBE) that we propose will assess these critical skills more comprehensively than is possible with a two-day, exclusively written exam.

We base that conclusion in part on a scholarly analysis of the State Bar’s survey of participants in the Provisional Licensure Program (“State Bar Survey”), attached as Appendix A.⁸ The results of that survey were not yet available at the time the BRC deliberated, but they offer comprehensive, reliable information about supervised practice in California. The survey was administered recently (in late 2022), addressed a population of more than 4,000 individuals,⁹ and requested information about almost two years of supervised practice (spanning late 2000 through fall 2022).

The State Bar Survey asked both supervisors and provisional licensees about the types of work that licensees performed; the extent of supervision and training offered to licensees; the benefits and challenges of supervised practice; the interest of licensees and supervisors in expanding the Provisional Licensure Program; and other issues. The respondents who answered these questions were demographically diverse and represented a wide range of California workplaces.¹⁰ The response rates for the survey, finally, were higher than those recorded by most other surveys of the legal profession, yielding particularly reliable insights into the experiences of both supervisors and licensees who participated in the Provisional Licensure Program.¹¹

State Bar staff shared some preliminary findings from the survey with the Board of Trustees in late 2022. Since then, a team of independent scholars has analyzed the survey results, providing more detailed analyses. The PBE we propose is not identical to either of the Provisional Licensure Programs, but those programs have numerous features that resemble the PBE. The survey results, therefore, offer a particularly sound, evidence-based foundation for designing the PBE.

Candidates in the Provisional Licensure Programs, for example, worked with provisional licenses identical to the ones we propose for the PBE.¹² The licensees were also recent law school graduates, like most PBE candidates will be. It is reasonable, therefore, to infer that PBE

⁸ Deborah Jones Merritt, Andrea Anne Curcio & Eileen Kaufman, *Enhancing the Validity and Fairness of Lawyer Licensing: Empirical Evidence Supporting Innovative Pathways*, 73 WASH. U. J. LAW & POLICY __ (forthcoming 2023).

⁹ The survey population included three distinct subpopulations: the 1585 individuals who held provisional licenses from late 2020 through fall 2022; the 1393 licensed lawyers who supervised those licensees (some of whom supervised more than one licensee); and 1154 individuals who qualified for the Pathway Program but had not enrolled by fall 2022. *Id.* at 17. The total population, therefore, included 4,132 individuals.

¹⁰ Merritt, Curcio & Kaufman, *supra* note 8, at 18, 20-21.

¹¹ Response rates were 47.8% for provisional licensees; 32.0% for supervisors; and 47.2% for candidates who were eligible for the Pathway Program but had not yet participated in the program. *Id.* at 19. In comparison, the two CAPA surveys achieved response rates of 8% and 18%, CAPA REPORT, *supra* note 2, at 9. We agree with the CAPA Working Group and BRC that the CAPA Study provides a sound basis for identifying the knowledge and skills needed by entry-level lawyers. The State Bar Survey, with its considerably higher response rates, offers even more reliable data about the operation of supervised practice programs in California.

¹² See *infra* Section IV, Point 3.

candidates will use knowledge and skills similar to those used by candidates in the Provisional Licensure Program.

The State Bar Survey asked all provisional licensees which of the six CAPA skills they used in their practice. According to the scholarly analysis, almost half (47.8%) of provisional licensees used *all six* of the CAPA skills while practicing with their provisional licenses, while 85.4% used at least four of them.¹³ The survey, unfortunately, did not ask about the seventh skill (negotiation and dispute resolution) added by the BRC, but candidate comments suggest that these skills were common in their practice areas.

These survey results support two conclusions. First, entry-level lawyers routinely use skills that cannot be as effectively tested on the traditional bar exam as through a PBE: 91.4% of provisional licensees conducted research or investigation in their work, while 86.2% communicated with clients or maintained client relationships.¹⁴ Entry-level lawyers are performing these tasks, so we must ensure that they can do so competently. Second, supervised practice provides an excellent opportunity to assess performance of these critical skills. In this respect, the PBE will assess minimum competence more broadly than the two-day bar exam.

Some critics have suggested that, conversely, the PBE will not assess the full breadth of doctrinal knowledge that is tested on the two-day written exam. After examining the evidence, we do not agree with that concern for these reasons:

- The State Bar Survey demonstrates that entry-level lawyers routinely draw upon multiple knowledge areas, regardless of their practice area. According to that survey, California's provisional licensees drew upon an average of 5.5 doctrinal areas in their practice, with a quarter of them (25.5%) reporting eight or more subjects.¹⁵ One-tenth of the respondents (9.6%) reported using eleven or more doctrinal subjects in their practice.¹⁶ As the scholarly analysis reflects, moreover, these numbers substantially understate the number of doctrinal subjects used by provisional licensees. Some licensees simply reported their general practice area ("employment law") without noting all the doctrinal subjects used in that field.¹⁷ After accounting for that understatement, the scholars concluded that all licensees drew upon knowledge from at least four subject areas.¹⁸

¹³ Merritt, Curcio & Kaufman, *supra* note 8, at 24. Supplemental analyses from Professor Merritt demonstrate that candidates in the Original Program, who are most like PBE candidates (recent graduates who have not passed the two-day bar exam) used even more of the CAPA skills: an average of 5.14.

¹⁴ *Id.* at 24.

¹⁵ *Id.* at 26. Once again, supplemental analyses from Professor Merritt show that the breadth of practice in the Original Program was even larger. Those candidates drew upon an average of 5.87 doctrinal areas. *See also* NCBE TESTING TASK FORCE, PHASE 2 REPORT: 2019 PRACTICE ANALYSIS at 4 (2020) ("most lawyers work in multiple practice areas").

¹⁶ Merritt, Curcio & Kaufman, *supra* note 8, at 26-27.

¹⁷ *Id.* at 27.

¹⁸ *Id.*

- As judges, practitioners, and scholars frequently observe, the law is a “seamless web.” Practice in any area of the law inevitably draws upon concepts from other fields. This is particularly true of many contemporary practice areas. Intellectual property, for example, incorporates concepts from torts, contracts, real property, criminal law, and constitutional law. Practitioners in this area must also be familiar with civil procedure, administrative law, and evidence—and they must act in accordance with the rules of professional conduct. By successfully practicing in one practice area, entry-level lawyers routinely demonstrate their familiarity with concepts in many more knowledge areas.
- PBE candidates will demonstrate their knowledge of doctrinal subjects in a more contextual, integrated, and holistic fashion than is possible on a two-day exam. Drawing connections among legal subjects in the context of actual client problems is a more essential part of minimum competence than recalling isolated rules from those subjects.¹⁹
- Dr. Buckendahl noted that, based on his work with numerous professional disciplines and bar-related studies, content in law (as in other professions) may be more “equivalent” across doctrinal fields than may be commonly believed. Clearly the knowledge needed for legal practice areas will differ, but the underlying skills and legal way of thinking are comparable across areas. In other words, competency in one subject suggests that a candidate has the capacity to gain competency in another subject. Dr. Anderson, who sits on the ABA’s Outcomes and Assessment Committee, agreed with this perspective.²⁰
- Concerns about doctrinal breadth implicitly prioritize memorization of legal doctrine over the exercise of professional skills. The current exam tests only a few of the skills that the CAPA Working Group and BRC identified as essential for entry-level law practice, and future versions of that two-day exam will suffer the limits we identify above. As the CAPA Working Group, the BRC, and researchers have consistently recognized, however, protection of the public requires “a significantly increased focus on assessment of skills” while “de-emphasizing the need for memorization of doctrinal law.”²¹ The PBE offers a realistic opportunity to assess skills that are essential for entry-level law practice, along with knowledge in an array of doctrinal areas.

¹⁹ DEBORAH JONES MERRITT & LOGAN CORNETT, BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE 56-57, available at https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf (2020).

²⁰ This perspective also accords with California Rule of Professional Conduct 1.1(c), which explicitly acknowledges the ability of lawyers to develop competence in new practice areas: “If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by . . . acquiring sufficient learning and skill before performance is required.”

²¹ See note 7 and accompanying text *supra*. See also MERRITT & CORNETT, *supra* note 19, at 7-12 (summarizing research); *id.* at 32-62 (detailing the essential nature of numerous lawyering skills compared to doctrinal knowledge). NCBE’s practice analyses have also consistently identified skills as more important than doctrinal knowledge in entry-level law practice. See *id.* at 9-10.

We remain sensitive, however, to concerns about the PBE requiring sufficient demonstration of candidates' breadth of knowledge. To address those concerns, we recommend in Section IV that the PBE include these safeguards:

- PBE candidates should confirm through their portfolios that they have worked with concepts from at least seven of the doctrinal knowledge areas identified by the CAPA Working Group and BRC. The current two-day bar exam requires no more than that: The exam is scored as a whole, so candidates may compensate for weak knowledge in one area by demonstrating stronger knowledge in other areas.
- The PBE should be limited to candidates who have completed law school courses in all nine of the doctrinal knowledge areas identified by the BRC and CAPA Working Group as foundational for entry-level practice. Completion of those courses, combined with hands-on practice and portfolio assessments by independent examiners, will provide at least as much assurance as a two-day exam that candidates possess the breadth and depth of foundational knowledge needed for entry-level law practice. Candidates who take the two-day exam answer questions drawn from the CAPA/BRC subjects, but they have no obligation to explore all nine subjects through semester-long courses.

The pilot we propose in Section V will allow the State Bar to further evaluate the breadth of knowledge that PBE candidates use in supervised practice. Consistent with the first requirement above, candidates in the pilot will have to document that they have worked with at least seven of the doctrinal knowledge areas identified by the CAPA Working Group and BRC. This documentation will allow the PBE Committee to study the breadth of doctrinal knowledge used in different practice areas and to determine whether additional safeguards are necessary to ensure appropriate doctrinal breadth in the PBE.

For all these reasons, the PBE will assess the package of knowledge and skills recommended by the CAPA Working Group and BRC at least as broadly as a two-day, written exam. We note, finally, that the PBE will adapt naturally to changes in the knowledge and skills needed by entry-level lawyers. Candidates pursuing the PBE will engage directly in entry-level practice using their provisional licenses. As new legal doctrines emerge, or as practice demands new skills, candidates will incorporate those doctrines and skills directly in their work. Assessment rubrics may need to be adapted, and scoring criteria may need to be adjusted, but those tasks can be accomplished relatively quickly. Assessment of candidate knowledge and skills through the PBE will closely track changes in entry-level law practice.

Standardized bar exams change much more slowly. NCBE estimates that it takes at least two years to develop and vet a performance test; three years to design and vet essay questions; and up to three years to write and pre-test multiple choice questions.²² As a result, NCBE routinely instructs

²² Alexander W. Scherr, *Drafting MPT Items: Guiding Principles and Collaboration*, 88 THE BAR EXAMINER 22 (Winter 2019-2020) ("The drafting process for an MPT item takes about two years"); Sheldon F. Kurtz, *The Gestation of an MEE Question: A Rigorous Process*, 88 THE BAR EXAMINER 22 (Winter 2019-2020) ("Development of an MEE question

test-takers to disregard recent Supreme Court decisions—even though those decisions may significantly alter legal rights.²³ More major adjustments to a standardized exam take even longer. NCBE’s NextGen bar exam, for example, will debut no earlier than eight years after planning for that exam began.²⁴

PBE assessments will adapt much more quickly to changes in legal doctrine and skills. Unlike candidates who take the two-day exam, PBE candidates will grapple immediately with statutory amendments, changes in judicial precedent, and other doctrinal changes. In addition to providing real-time assessments of minimum competence, PBE portfolios may provide useful insights for drafters of the two-day exam, helping to keep that exam as current as possible.²⁵

B. Professional Ethics, Professional Responsibility, Professionalism, Integrity, and Civility

Candidates pursuing the Portfolio Bar Exam, like those who take the two-day bar exam, must obtain a passing score on the Multistate Professional Responsibility Exam (MPRE). This will ensure that they have basic knowledge of the rules of professional conduct that govern our profession. The PBE, however, will also ensure that candidates are able to apply those rules and maintain appropriate standards of professionalism, integrity, and civility *in practice*.²⁶

An extensive nationwide study concluded that law school classes and a two-day bar exam are insufficient to prepare new lawyers for the ethical and professional challenges they face in practice.²⁷ The PBE will more effectively ensure that preparation by requiring candidates to practice under supervision for multiple months and to submit anonymous essays (graded by independent examiners) analyzing ethical, professionalism, or civility issues that arise in their practice. Requiring candidates to demonstrate their professionalism and application of the rules of professional conduct while serving real clients is a more authentic way to assess those competencies.

. . . typically takes about three years”); Timothy Davis, *Drafting MBE Items: A Truly Collaborative Process*, 88 THE BAR EXAMINER 25 (Fall 2019) (“up to three years” to develop MBE questions).

²³ See, e.g., *NCBE Statement on SCOTUS Decisions*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/news-resources/ncbe-statement-scotus-decisions> (June 24, 2022) (“Examinees taking the NCBE-developed July 2022 MBE, MPT, and MEE will not be required to be familiar with this term’s US Supreme Court decisions.”).

²⁴ NAT’L CONF. OF BAR EXAM’RS, FINAL REPORT OF THE TESTING TASK FORCE, <https://nextgenbarexam.ncbex.org/reports/final-report-of-the-ttf/> (noting that the process of researching a new exam began in 2018). The exam’s projected availability date is July 2026. See *NextGen Bar Exam Content Scope and Sample Questions*, NAT’L CONF. OF BAR EXAM’RS, <https://nextgenbarexam.ncbex.org/> (last visited July 14, 2023).

²⁵ Cf. California Rule of Court 9.6(b) (requiring “an analysis of the validity of the bar examination at least once every seven years”).

²⁶ The Board of Trustees recently recognized the importance of enhancing civility in the profession by approving a set of measures proposed by the California Civility Task Force. *News Release: State Bar of California Board of Trustees Approves Measures to Improve Civility in the Profession*, STATE BAR OF CALIFORNIA, <https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-of-california-board-of-trustees-approves-measures-to-improve-civility-in-the-legal-profession> (July 21, 2023).

²⁷ MERRITT & CORNETT, *supra* note 19, at 32-34.

C. Protection of the Public

By incorporating assessment of essential lawyering skills, requiring demonstration of doctrinal knowledge in the context of real-client problems, and assessing professionalism in that same context, the PBE will protect the public at least as effectively as a two-day bar exam. Our Working Group, however, recognized that the PBE can achieve this goal only if it produces reliable results. For that reason, we discussed reliability at length with the two psychometricians who advised us, as well as with Dr. Henderson.

Based on these consultations with experts, as well as discussions previously held by the BRC subcommittee on exam alternatives, the Working Group expects that the State Bar will achieve reliability of scores, grades, and decisions in the PBE. Dr. Anderson and Dr. Buckendahl advised us that measures like these will enhance reliability in a portfolio-based system:

- Include a range of work product in the portfolio, so that assessment does not depend on a handful of components.
- Provide training and calibration sessions for graders.
- Use independent graders who assess all work product anonymously.
- Use multiple graders for each portfolio, or even for each item within a portfolio.
- Use analytic scoring (with rubrics) rather than holistic grading.
- Convene a group of entry-level practitioners, supervisors of entry-level practitioners, educators, and psychometricians to develop rubrics for that scoring.
- Qualitatively evaluate the rubrics to ensure that what is being assessed is consistent with expectations for an entry-level practitioner.
- Evaluate the reliability of graders by asking them to score a small number of samples prior to operational scoring.²⁸
- Evaluate the reliability of graders during operational scoring by embedding performances where the score is known to determine whether graders continue to be calibrated to the scoring criteria at different points in the grading process.
- Evaluate the reliability of the pass/fail decisions being produced by graders to determine the confidence in the outcome.
- Require candidates to disclose the processes they used to produce each portfolio component and to attest that, apart from any collaboration noted in that disclosure, the component represents their independent effort. Software audits can enforce this requirement.
- Require supervisors to attest that, to the best of their knowledge, each component in the portfolio represents the candidate's independent effort (apart from processes disclosed by the candidate).

In sum, the psychometricians explained that, although candidates using a portfolio system do not complete standardized exercises, the State Bar can standardize the submission expectations and

²⁸ Work samples can be created from redacted materials drawn from law school clinics, where students practice under licenses similar to provisional license ones.

more important, the *evaluation of portfolio components*. This standardization can contribute to the consistent system required for a licensing process that protects the public.

Dr. Anderson described in detail the steps that the State Bar should take to achieve that reliability. Those steps are similar to ones that Dr. Buckendahl has employed with respect to two-day bar exams, and that the BRC subcommittee on exam alternatives heard about during their meetings. We incorporate those recommendations in the process we describe in Part IV below.

Dr. Anderson also referred us to a research study she is involved in with one of our Working Group members, Natalie Rodriguez, and another professor at Southwestern Law School.²⁹ As part of that study, Southwestern developed an evidence-based interview process to identify applicants who would succeed in law school based on foundations necessary for entry-level practice. Though ongoing, the first part of the research study, establishing reliability and validity, has been completed. With Dr. Anderson's guidance, the school is creating a highly reliable process—one that provides consistent results for applicants. The internal consistency of questions asked in the interview protocol produced Cronbach's alpha levels of 0.950 in one year and 0.933 in another.³⁰ These reliability levels are comparable to the ones reported for the multiple-choice portion of California's two-day bar exam, the MBE.³¹ In addition, the rubric scores contributed to the increased predictability of 1L Cumulative GPAs, with and without LSAT scores. This means that a statistically significant predictive model that does not include LSAT scores can be developed and used to support students. Work is ongoing to document interrater reliability.³²

The processes developed in the Southwestern study (admissions interviews) differ from the process of reviewing portfolios in the proposed PBE. Both, however, relate to determinations of professional competence and both involve processes that appear more subjective than multiple-choice exams. Based on the success of the Southwestern program and other materials reviewed by the BRC, we are confident that a system for portfolio review can be designed, using the techniques that Dr. Anderson described, that produces reliable scores and decisions. Importantly, according to Dr. Buckendahl, it will also be possible to formatively evaluate different sources of measurement error and make any needed modifications.³³

²⁹ Anahid Gharakhanian, Natalie Rodriguez & Elizabeth A. Anderson, *"More Than the Numbers": Empirical Evidence of an Innovative Approach to Admissions*, 107 MINN. L. REV. 2431 (2023).

³⁰ *Id.* at 2485. The sample size was 123 in the first year and 185 in the second.

³¹ Reliability for the July 2022 MBE was 0.94; for the February 2023 MBE, it was 0.92. See *Press Release, National Mean of 140.3 for July 2022 MBE*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/news-resources/national-mean-1403-july-2022-mbe> (Sept. 13, 2022); *Press Release, NCBE Announces National Mean for February 2023 MBE*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/news-resources/ncbe-announces-national-mean-february-2023-mbe> (Mar. 31, 2023).

³² Gharakhanian, Rodriguez & Anderson, *supra* note 29, at 2488.

³³ We also considered two other studies showing the potential for achieving high reliability and predictive validity from assessments of written work product. These were Eric Lee & Naina Garg, *Reliability of Multiple-Choice Versus Problem-Solving Student Exam Scores in Higher Education*, 6 INT'L CONFERENCE HIGHER EDUC. ADVANCES 1399 (2020) (each of eight different problem-solving tests produced a reliability greater than .87; median reliability was .90); Brent Bridgeman, *Can a Two-Question Test Be Reliable and Valid for Predicting Academic Outcomes?*, 35 EDUC.

Another aspect of public protection relates to shielding the public from any mistakes or unethical practices committed by provisional licensees during the licensing process. The State Bar Survey was quite reassuring on this issue. Provisional licensees reported high levels of supervision and training by their supervisors.³⁴ Supervisors, in turn, were highly satisfied with supervisees' work ethic and the quality of their work.³⁵

Most supervisors, notably, reported few costs from supervising or training provisional licensees. Three-fifths (57.8%) noted that provisional licensees needed no more training than newly licensed lawyers.³⁶ Similarly, half (49.4%) reported that supervising provisional licensees imposed no costs on their organization.³⁷ Most other supervisors characterized the burdens of training and supervising provisional licensees as "small" or "moderate,"³⁸ and these supervisors often pointed to countervailing benefits their organization reaped from the work of provisional licensees. Provisional licensees, for example, can perform more types of legal work than law graduates who are waiting to receive results from the written bar exam.³⁹

Data we received from the State Bar confirms that supervisors and provisional licensees successfully protected clients from harm. Since the Provisional Licensure Program started in 2020, just 1.0% of provisional licensees have been the subject of a disciplinary complaint. This is lower than (and does not differ significantly from) the percentage of newly licensed lawyers (1.3%) who have been subject to disciplinary complaints.

D. Evidence-Based Recommendations

As the above discussions indicate, our Working Group has taken an evidence-driven approach to proposing the PBE. Like the BRC, we relied primarily on the CAPA study to identify the knowledge and skills that entry-level lawyers need to provide competent representation. We also reviewed the *Building a Better Bar* study (cited by the BRC), which complements the CAPA study by providing additional insights into entry-level practice. These studies, BRC discussions, materials reviewed by the BRC, and other resources supplied by our consultants provided the basis for the content of the proposed PBE.

To inform the initial design of the PBE, discussions with our four consultants (two of whom also spoke to the BRC and/or its subcommittees) were invaluable. We also consulted materials reviewed by the BRC (including information about licensing processes in other states and

MEASUREMENT 21, 21 (2016) (summary of several studies that led Distinguished Research Scientist at the Educational Testing Service to conclude that "two-prompt essay tests actually are as reliable and valid as multiple-choice tests of about the same length").

³⁴ Merritt, Curcio & Kaufman, *supra* note 8, at 40-44.

³⁵ *Id.* at 45-46, 49-50.

³⁶ *Id.* at 44.

³⁷ *Id.* at 41.

³⁸ *Id.* at 41, 44.

³⁹ See *infra* p. 30 for further discussion of the benefits received by supervisors and their organizations.

countries). Some other sources, which were published after the BRC finished its deliberations, were also helpful:

- JOAN W. HOWARTH, *SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING* (Stanford Univ. Press 2023) (describing problems with the current bar exam and offering twelve guiding principles for competence-based licensing).
- Deborah Jones Merritt, *Client-Centered Legal Education and Licensing*, 107 MINN. L. REV. 2729 (2023) (describing initiatives in several states to construct portfolio-based licensing systems and explaining how these systems can achieve validity, reliability, and fairness).
- Proposed Rules for Oregon’s Supervised Practice Portfolio Examination, <https://lpdc.osbar.org/files/2023.08.02SPPEProposedRules-ApprovedbyLPDC.pdf> (providing a detailed example of how a portfolio-based examination could be structured). In January 2022, the Oregon Supreme Court approved a portfolio-based licensing path “in concept.” A committee worked over the last year to develop detailed rules for the pathway, submit those rules to public comment, and modify the rules in response to that comment. Oregon’s Board of Bar Examiners recently approved the final version of the rules (linked above) and forwarded them to the Oregon Supreme Court for approval. The Court will consider the rules later this month.
- Meanwhile, Oregon created a version of this portfolio pathway for exam-takers who failed its February 2022 bar exam (which was marred by problems at the testing site). That pathway was launched in fall 2022. Professor Merritt helped Oregon design that pathway and serves as the pathway’s ombudsperson. She was able to provide additional insights about the operation of a portfolio pathway in practice.
- Notes and Explanations on Proposed Rules for Oregon’s Proposed Supervised Practice Portfolio Examination, <https://lpdc.osbar.org/files/SPPEDraftRules-ExplanatoryNotes.pdf> (offering insights into the decisions made by the Oregon committee that designed their proposed portfolio-based examination).

For information related to fairness and feasibility, we relied upon the above sources, BRC materials, and the scholarly analysis of the State Bar Survey (Appendix A). To inform design of a reliable system, we relied upon discussions within the BRC, our supplemental discussions with the psychometricians we consulted, materials gathered by the BRC, and further references provided by our consultants.

E. Fairness and Equity

As the BRC recognized, the principle of fairness and equity includes at least three components: (1) the cost of assessment; (2) the way assessments are delivered; and (3) the possibility of discrimination, bias, or harassment. We address each of those components in turn.

1. *Costs*. The California two-day bar exam imposes significant costs on both candidates and the State Bar. As the BRC acknowledged, the two-day exam imposes heavy costs on candidates

who are already deeply in debt. In addition to paying \$850 to take the exam,⁴⁰ candidates bear significant travel and accommodation costs to stay near the limited number of exam sites. Commercial prep courses cost \$2,300 or more.⁴¹ These courses are not optional: Empirical evidence establishes that they correlate highly with bar passage after controlling for other relevant factors.⁴²

The greatest cost to candidates, however, comes from forgoing 8-10 weeks of paid work during exam preparation. Even at a modest wage of \$25 per hour, that forgone income costs candidates \$8,000-10,000 on top of their direct costs. Once again, these costs are not optional: research shows that candidates who work while preparing for the two-day bar exam are significantly more likely to fail the exam than candidates who dedicate that time exclusively to study.⁴³

Adoption of the PBE would save each candidate at least \$10,000. Candidates would not need to purchase commercial prep courses or travel to exam sites. Nor would they need to incur additional debt to support themselves through 8-10 weeks of bar study—debt that is not covered by educational loans. Instead, candidates could begin work immediately after graduation and receive a salary while demonstrating their competence level through the PBE. As we discuss further in Part IV (point 8), we recommend requiring employers to compensate all PBE candidates with at least the salary and benefits that they provide to other law graduates who have not yet been admitted to the bar. Evidence from the State Bar Survey suggests that it is feasible to require that level of pay. Even without a mandate, almost three quarters (73.0%) of employers paid licensees in the Original Provisional Licensure Program at least that much. Indeed, more than a third (37.4%) paid provisional licensees the same salary paid to newly admitted lawyers. Just 4.9% of provisional licensees were unpaid.⁴⁴

The current exam is also costly to the State Bar. In a recent presentation to the Committee of Bar Examiners, State Bar staff estimated that the cost of simply administering the exam exceeds

⁴⁰ This figure includes the \$153 laptop fee that most candidates pay.

⁴¹ See *California Bar-Related Fees*, UCI LAW REGISTRAR, <https://www.law.uci.edu/academics/registrar/bar-info/cal-bar-fees/> (summarizing prep course fees) (last visited Aug. 1, 2023).

⁴² ACCESSLEX INSTITUTE, ANALYZING FIRST-TIME BAR EXAM PASSAGE ON THE UBE IN NEW YORK STATE 79, available at <https://www.accesslex.org/NYBOLE> (May 2021) (in regression analysis, failing to take a commercial bar course correlated significantly with failing the two-day exam).

⁴³ *Id.* at 78 (in regression analysis, the average weekly number of hours worked during bar preparation correlated significantly with failing the two-day bar exam).

⁴⁴ The remaining 22.1% of employers paid provisional licensees at the same rate they paid law students or paralegals. Professor Merritt calculated these percentages for us from the State Bar Survey database. She noted that a smaller percentage (58.0%) of Pathway participants were paid, but that this reflected the unusual structure of that program. Those participants had all failed the bar exam, often several years earlier, and had taken jobs that did not require a law license. Rather than leave those paying jobs to complete the 300 hours of legal work required by the Pathway Program, a substantial percentage opted to satisfy the Pathway requirement through volunteer work. Merritt, Curcio & Kaufman, *supra* note 8, at 37-38. There is no evidence that employers took advantage of the Pathway participants through those arrangements.

\$5,600,000 a year.⁴⁵ Those costs include facility rental, payment of proctors, ExamSoft licenses, and other expenses related directly to administration. That sum does not include the costs of producing the exam (whether purchased from NCBE or created in-state), costs of grading, office expenses, or staff time. To somewhat reduce the costs of administering the two-day exam, the Committee of Bar Examiners recommended cutting the number of test sites, spreading the exam over more days, and administering half of the exam remotely. Even with those changes, exam administration will still cost the State Bar \$3,692,100 each year.⁴⁶

Adoption of the PBE would generate at least one cost savings for the State Bar. The State Bar currently spends significant sums processing candidate requests for accommodation during the two-day exam, providing those accommodations, and litigating disputes related to accommodations. The civil rights complaint recently filed against the State Bar, alleging violations of the Americans with Disabilities Act, signifies how important—and expensive—these issues are. The PBE we propose follows the principles of universal design. Candidates who live with disabilities would find the PBE much more responsive to their needs than the two-day bar exam, and the State Bar would not have to provide any accommodations for candidates using the PBE.⁴⁷ As we explain further below, the PBE offers an equitable option for candidates who live with disabilities. At the same time, this option would reduce some costs currently borne by the State Bar.

Although the State Bar might recognize some savings related to accommodation requests, it undoubtedly would incur costs related to the PBE. Start-up costs would include finalizing rules for the system; designing and testing rubrics; setting a cut score; creating a website to facilitate portfolio submission and review; and creating training sessions for candidates and supervisors. Ongoing costs would include the incremental administrative costs of supervising two parallel assessments (the two-day exam and the PBE), and any additional cost per candidate of grading portfolio items rather than components of the two-day exam. The PBE does not require drafting exam questions, pre-testing questions, renting facilities for exam administration, or hiring proctors to observe the administration, so there would be no additional costs in those categories.

There are ways to meet the costs generated by the PBE. Given the innovativeness of the program, some private foundations have expressed interest in subsidizing start-up costs for the PBE. For the ongoing costs of administration and scoring portfolios, the State Bar could charge PBE

⁴⁵ STATE BAR OF CALIFORNIA, COST REDUCTION MODELS 6 (June 28, 2023). We have attached a copy of that presentation as Appendix B.

⁴⁶ *Id.*

⁴⁷ Although people who live with disabilities still struggle to obtain necessary accommodations in the workplace, the workplace is much more flexible than a strictly timed two-day exam delivered just twice a year. PBE candidates will be able to work at a pace that is acceptable to them and their employers, and will be able to extend their provisional licensing period if necessary. Practicing lawyers and their employers, meanwhile, have developed a range of technological and other accommodations that function more readily in the workplace than on a high-security exam. These accommodations allow lawyers with disabilities to create work product that clients, courts, and others access seamlessly. In the same way, PBE candidates with disabilities will be able to produce portfolio components readily accessible for examiners.

candidates fees that reflect the marginal cost of scoring the PBE compared to the two-day exam. The State Bar currently pays \$24 per candidate to grade the five essays and one performance test included on the two-day exam.⁴⁸ Even if graders demanded ten times that amount to grade portfolios,⁴⁹ PBE candidates could be assessed a supplemental fee of \$240 (on top of the fee for the two-day exam) to cover that cost.

Even if PBE candidates paid additional fees to support administration of the PBE, they would still save thousands of dollars compared to the costs of preparing for and taking the two-day bar exam. We encourage the State Bar, however, to consider other revenue sources (such as foundation grants) before charging PBE candidates additional fees.

2. *Delivery of Assessments.* Delivery of the two-day bar exam has always imposed significant burdens on candidates, especially those with disabilities and those who lack economic resources. Candidates must travel to administration sites and tolerate intrusive security procedures that exceed those imposed by courthouses and professional workplaces. If a candidate becomes ill or faces a family emergency on the exam days, they must wait six months for another opportunity to demonstrate their competence. Candidates who live with disabilities suffer additional hardships because they must press their case for accommodations while they are preparing for the exam, take the exam in inhospitable conditions if their request is denied, and tolerate accommodations that may fall short of their usual supports even if their request is granted.

If the State Bar begins to administer part of the exam remotely, as recent discussions suggest, additional hardships may arise. Candidates will still have to travel to administration sites for one day of the exam, and they will have to make suitable arrangements for the remote administration day. Making the latter arrangements may be more challenging for candidates with limited financial resources than for those with greater resources. The security measures adopted for remote administration may impose additional hardships on candidates, and those burdens may fall disproportionately on candidates of color.⁵⁰

⁴⁸ See *Becoming a Grader*, THE STATE BAR OF CALIFORNIA, <https://www.calbar.ca.gov/Admissions/Examinations/Exam-Administration/Becoming-a-Grader> (last visited July 26, 2023) (“Book fee compensation for grading examination answers is \$4.00 for each essay answer and performance test answer.”). The State Bar also pays graders \$725 apiece for preparatory work and attendance at orientation sessions and calibration meetings. The PBE would generate similar costs, which we would include in the costs of running parallel systems.

⁴⁹ We doubt that graders would demand this much compensation to grade portfolios. Although portfolio items may take longer to grade than answers to standardized essay questions, the items will more closely resemble the work that practitioners create and read every day. Graders are likely to find the work much more interesting—and even informative for their own practice areas.

⁵⁰ Racial biases in the facial recognition software used for proctoring exams have been widely reported. For one recent study, see Deborah R. Yoder-Himes, et al., *Racial, Skin Tone, and Sex Disparities in Automated Proctoring Software*, 7 *Frontiers Educ.* <https://doi.org/10.3389/feduc.2022.881449>, at 12 (2022) (finding “significant algorithmic biases against students with darker skin tones, Black students, and female students with darker skin tones”).

The delivery of the two-day bar exam, in sum, currently raises questions of fairness and equity—and those concerns may increase with cost-cutting measures. Delivery of the PBE promises to be at least as fair and equitable as delivery of the two-day bar exam.

Some members of COAF and the CBE expressed concern that candidates from traditionally disadvantaged groups would have trouble finding supervisors. Data from the State Bar Survey, however, suggests just the opposite. Almost 1400 licensed lawyers served as supervisors during the first two years of the Provisional Licensure Program, with some supervising more than one candidate over that time.⁵¹ Few candidates reported difficulty finding supervisors, even though the Provisional Licensure Program was launched without incentives for supervisors or assistance in connecting candidates with supervisors.⁵² Even among candidates who did not participate in the program, very few tied their lack of participation to difficulty finding a supervisor.⁵³

Most important, women of color, men of color, and white women were significantly more likely than white men to take advantage of the Pathway Program (the version of the Provisional Licensure Program that supported award of a license).⁵⁴ This table, copied from the scholarly analysis of the State Bar Survey, shows not only that members of historically disadvantaged groups succeeded in finding supervisors, but that the Pathway Program was particularly important to them:⁵⁵

**Participation in the Pathway Program by Gender
and Race/Ethnicity**

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

Candidates living with disabilities also gained ready access to the Provisional Licensure Program. Several candidates and supervisors, in fact, praised the program for providing a more equitable way for candidates living with disabilities to demonstrate their competence to practice law. “I am

⁵¹ Merritt, Curcio & Kaufman, *supra* note 8, at 17.

⁵² *Id.* at 38-40.

⁵³ *Id.* at 39. Instead, the most common reason for failing to participate was lack of knowledge about the program. The State Bar has remedied that by emailing all candidates eligible for the Pathway Program directly and obtaining a program extension from the Supreme Court.

⁵⁴ *Id.* at 30-32. These historically disadvantaged groups were also well represented in the Original Provisional Licensure Program. Women of color made up the largest demographic group within that program, constituting 33.6% of licensees. White women accounted for 23.2% of Original Program licensees; men of color, 22.7%; and white men, 20.5%.

⁵⁵ *Id.* at 31 (Table 3).

a first generation BIPOC law student with a disability,” one candidate wrote in response to the State Bar Survey, and “[a]s a single parent with a disability I do not have the luxury of not earning money for months while I study for the bar.”⁵⁶ A supervisor in the Provisional Licensure Program, similarly, wrote:

Our [candidate] has a physical disability that impacts her typing and computer usage. I have observed that while she finds workarounds, she has not consistently asked for accommodations to which she is entitled. I don't know whether she had the accommodations she needed during the bar exam, which I suspect would have impacted her score. This is another reason this program felt so important for equity issues.⁵⁷

Delivery of the PBE, similarly, will treat candidates equitably, regardless of race, gender, or other personal characteristics. By implementing the requirements of universal design, the assessment method will also avoid disadvantaging candidates who live with disabilities or bear caretaking responsibilities.

3. *Discrimination, Bias, and Harassment.* Several members of the BRC raised concerns that a licensing path rooted in supervised practice might unfairly subject candidates to discrimination, bias, or harassment. Much of this concern rested on data drawn from a survey of current and former articling candidates in Ontario, Canada.⁵⁸ According to that survey, 21% of the respondents who had completed articling “faced comments or conduct related to [protected personal characteristics] that was unwelcome,” and 17% “faced . . . unequal or differential treatment related to [those protected personal characteristics].”⁵⁹ Respondents who were still articling reported similar, but slightly lower, rates of these experiences.⁶⁰

It is not clear how much weight we should attach to these survey results. The psychometrician who reported the results warned that the survey’s response rate was too low to generate reliable findings.⁶¹ Equally important, the Canadian articling system has a distinctive culture rooted in the historic scarcity of articling positions. Until recently, the provinces required all candidates to article for at least eight months, creating very high demand for articling positions and making candidates highly dependent on their supervisors. The PBE is a new program that will not suffer from this history or scarcity of positions. Nonetheless, we agree that any possibility of bias or harassment in a licensing system must be taken seriously.

⁵⁶ *Id.* at 32.

⁵⁷ *Id.* at 52.

⁵⁸ A. SIDIQ ALI, THE LAW SOCIETY OF UPPER CANADA: SUMMARY OF ARTICLING EXPERIENCE SURVEY RESULTS (2017).

⁵⁹ *Id.* at 20. The characteristics listed in the survey questions were “age, ancestry, colour, race, citizenship, ethnic origin, place of origin, creed, disability, family status, marital status, gender identity, gender expression, sex and/or sexual orientation.” *Id.*

⁶⁰ 18% of those respondents reported unwelcome comments or conduct; 16% reported unequal or differential treatment. *Id.* at 38.

⁶¹ *Id.* at 6.

To estimate the potential for discrimination or harassment in the PBE, we turned to the State Bar Survey. The survey population in California was more than sufficient to yield representative information: It included almost 1600 provisional licensees who practiced under supervision in a wide variety of organizations.⁶² The California survey is also more contemporary than the Ontario one: The State Bar measured experiences from late 2020 through fall 2022, while the Ontario survey focused on the years 2014-2017.⁶³ And unlike the Ontario survey, the State Bar Survey achieved a sufficiently high response rate to generate reliable results. Almost half of provisional licensees (47.8%) answered at least one question on the State Bar Survey, and 41.7% completed the full survey.⁶⁴ This response rate substantially exceeds the average response rate for online surveys and provides a reliable foundation for estimating incidences of bias and discrimination.⁶⁵ The State Bar Survey, finally, directly assesses those experiences in the context of California's workplaces and legal culture.

The State Bar Survey yielded two key results related to our concern about bias and harassment. First, the incidence of those negative behaviors in California's Provisional Licensure Program was much lower than reported in the Canadian articling survey. 4.4% of California's provisional licensees reported that discrimination or harassment challenged them to a "small extent," 3.2% reported being challenged by these behaviors to a "moderate extent," and 2.0% to a "great extent."⁶⁶ For the reasons given above, these figures provide a more reliable estimate than the Canadian articling survey of the extent of discrimination and harassment that PBE candidates might experience.

Even low rates of discrimination and harassment, of course, are deeply troubling. For our purposes, however, the second set of results from the State Bar Survey are as important as the first: Provisional licensees who experienced this discrimination or harassment still benefited from their supervised practice opportunities and *strongly supported continuation of supervised-practice licensing programs*. Provisional licensees who reported discrimination or harassment while enrolled in the Pathway Program obtained their licenses at the same rate as other licensees.⁶⁷ The discrimination or harassment they reported thus did not interfere with their licensing. In both the Original and Pathway Programs, moreover, provisional licensees who experienced discrimination or harassment reported the same high levels of satisfaction with the programs as other licensees.⁶⁸ Most important, provisional licensees who reported discrimination

⁶² Merritt, Curcio & Kaufman, *supra* note 8, at 17, 20.

⁶³ The Ontario survey included the articling years of 2014-2015, 2015-2016. *Ali*, *supra* note 58, at 3. California's Provisional Licensure Program launched in November 2020, and the State Bar's survey was administered in fall 2022.

⁶⁴ Merritt, Curcio & Kaufman, *supra* note 8, at 19.

⁶⁵ *Id.*

⁶⁶ *Id.* at 35.

⁶⁷ *Id.* at 36. Candidates who reported discrimination or harassment in the Original Program, similarly, obtained the same outcomes as candidates who did not report those experiences. *Id.*

⁶⁸ This was true for candidates in both the Original and Pathway Programs. *Id.* at 36.

or harassment were *as or more likely* than other licensees to recommend extension of supervised-practice programs.⁶⁹

Why would licensees who experienced discrimination or harassment support continuation (and expansion) of supervised-practice programs? We identified at least two reasons. First, the State Bar Survey (like the Canadian articling survey) did not ask about discrimination or harassment by supervisors—which was of particular concern to BRC members. Both surveys asked about any discrimination or harassment experienced while articling or engaging in supervised practice. Some provisional licensees in California explicitly noted that the discrimination or harassment they experienced came from clients, opposing counsel, judges, or other participants in the legal system.⁷⁰ Those experiences did not affect their evaluation of (and success in) the Provisional Licensure Programs. Indeed, their close relationships with a supervisor during the supervised-practice period might have helped them deal with discrimination or harassment from third parties.

Second, provisional licensees who reported discrimination or harassment (from whatever source) found that the benefits of supervised practice strongly outweighed those costs. These licensees recognized that harassment and discrimination were not unique to supervised practice; they had experienced these negative behaviors in other workplaces and academic settings. Supervised practice at least offered them a strong countervailing benefit. As one Latina licensee wrote, “The [Provisional Licensure Program] did not cause discrimination--it countered it directly by allowing me to practice I didn’t care that I was discriminated [against], I just wanted to be able to represent folks who were in need and do my job well.”⁷¹ Other licensees who reported discrimination or harassment offered similar praise for the opportunities afforded them through the Provisional Licensure Program:

- “Thank you for providing this opportunity. It has truly changed the trajectory of my life.”
- “I wouldn’t have the job I do now without the [Provisional Licensure] program.”
- “I think it was a great opportunity to obtain my license.”
- “I felt that the program was great.”
- “I believe that the [Provisional Licensure] program is the only reason I am an attorney.”
- “Having the ability to serve others as a lawyer meant so much to me and clients (based on their feedback). I am so thankful to all those involved in making it a reality.”
- “Thank you for allowing the dream of an eight-year-old to come true.”

⁶⁹ In the Original Program, candidates who reported discrimination or harassment were significantly more likely than other candidates to recommend replacing the two-day bar exam with determinations of competence based on supervised practice ($p = .034$). In the Pathway Program, there was no significant difference between candidates who reported discrimination or harassment and those who did not report those experiences: About 90% of both groups supported extension of the program ($p = 1.00$). Professor Merritt provided these analyses to us from the State Bar Survey database.

⁷⁰ One provisional licensee, for example, reported: “As a woman of color with a Spanish sounding last name judges and clients did not assume I was an attorney. I was often mistaken for the defendant or respondent.”

⁷¹ Merritt, Curcio & Kaufman, *supra* note 8, at 36.

- “It was a great program that allowed me to work in the field I am passionate about. So much growth personally and professionally through this opportunity that has made me a better woman and attorney today.”⁷²

After reviewing these survey results, we concluded that it would be unduly paternalistic to deprive individuals of an opportunity that they valued highly—and on which they succeeded—because some discrimination and harassment persist in the workplace. Rates of discrimination and harassment were relatively low in California’s Provisional Licensure Program; licensees who experienced that discrimination or harassment still succeeded in the program and rated it highly; and those licensees were as or more likely than other licensees to support licensing through supervised practice. The State Bar and profession should focus on reducing discrimination and harassment directly, rather than limiting opportunities for aspiring lawyers who might be exposed to that unlawful behavior.

Moreover, the licensing path that we propose in Section IV has several measures designed to reduce or ameliorate any bias experienced by PBE candidates. Competence will be determined by independent examiners who review anonymized candidate materials, rather than by supervisors. Supervisors will receive training on providing effective feedback and avoiding implicit bias. Candidates will be able to work for more than one supervisor and switch supervisors, reducing their dependence on a single supervisor. And an ombudsperson will be available for candidates who experience discrimination or other challenges in the program. These measures will improve the experience of all PBE candidates.

Most importantly, the PBE will offer candidates an *option*, not a mandate. Candidates who fear discrimination or other forms of unfair treatment may choose to demonstrate their competence by taking California’s two-day bar exam. But for candidates who believe that they can better demonstrate their competence through supervised practice and portfolio review, the PBE offers an important opportunity.

F. Minimization of Disparate Impact

The two-day California Bar Exam produces strikingly different outcomes that correlate with both race and gender. We reviewed the data provided to the BRC on this issue and updated that information by gathering data on the two most recent two-day bar exams. The first-time pass rates for the five race/ethnicity categories reported by the State Bar on those exams were:

⁷² Professor Merritt provided these quotes to us from the survey database. All these comments were volunteered by provisional licensees who reported experiencing discrimination or harassment. According to Professor Merritt, only one licensee who experienced discrimination or harassment offered a somewhat negative comment about the Provisional Licensure Program. That licensee suggested that the program should pursue “implementation of some sort of safeguard to protect participants from being exploited or discriminated against.” As noted in text, we propose several safeguards of that nature for the PBE.

	July 2022	February 2023
Asian Candidates	58.9%	38.0%
Black Candidates	40.5%	22.8%
Hispanic Candidates	51.5%	23.8%
White Candidates	77.5%	57.2%
Other Candidates	68.7%	44.4%

To our knowledge, and based on information received by the BRC, these gaps have persisted in California and other states for as long as the contemporary bar exam has been given.

The gender differences are smaller, but also persist in California:⁷³

	July 2022	February 2023
Female Candidates	65.0%	42.2%
Male Candidates	69.1%	45.8%

The two-day bar exam appears to have disproportionate impacts on candidates in other categories as well. An analysis by the AccessLex Institute shows that, after controlling for other factors, higher household income correlates with a higher likelihood of passing the two-day bar exam.⁷⁴ Data from the State Bar Survey suggests that candidates over the age of 30 are less likely to pass the two-day exam than younger candidates.⁷⁵ Growing anecdotal evidence suggests that candidates who are not native English speakers are also less likely to pass the two-day exam.⁷⁶ Disputes over the adequacy of testing accommodations for candidates who live with disabilities, combined with the low percentage of licensed lawyers who live with disabilities,⁷⁷ finally, suggest that the two-day bar exam may have a disproportionate impact on candidates who live with disabilities.

The BRC recognized these disparate impacts and directed the State Bar to develop a new two-day exam that “minimizes disparate performance impacts based on race, gender, ethnicity, disability,

⁷³ The State Bar publishes pass rates for female, male, and “other” candidates, but the numbers in the latter category were too small to be reliable. We thus report only pass rates for the female and male categories.

⁷⁴ ACCESSLEX INSTITUTE, *supra* note 42, at 78.

⁷⁵ Among individuals eligible for the Pathway Program, all of whom had failed the bar exam, 94.4% were over the age of 30. In the Original Program, which was open to all 2020 graduates, just 46.2% were older than 30 (p < .001). Professor Merritt provided these figures from her work with the State Bar Survey database. The State Bar could make a more precise calculation of any relationship between age and bar passage, but these figures suggest that an age-related disproportionate impact is quite likely.

⁷⁶ See Karen Sloan, *Japan’s Most Famous Law Grad Beats Odds in 3rd N.Y. Bar Exam Attempt*, REUTERS, <https://www.reuters.com/legal/legalindustry/japans-most-famous-law-grad-beats-odds-3rd-ny-bar-exam-attempt-2022-10-24/> (Oct. 24, 2022) (“Bar exam tutors say that the test is especially difficult for non-native English speakers.”); Merritt, Curcio & Kaufman, *supra* note 8, at 29 (citing example of a non-native English speaker who struggled with the two-day bar exam but succeeded in supervised practice).

⁷⁷ Just 6% of licensed California lawyers identify as people with disabilities, compared to 23% of the adult California population. THE STATE BAR OF CALIFORNIA, DIVERSITY, EQUITY, AND INCLUSION PLAN: 2023-2024 BIENNIAL REPORT TO THE LEGISLATURE 13 (Mar. 2023).

and other immutable characteristics.”⁷⁸ The Commission, however, received no evidence suggesting how this would be possible. NCBE already vets its exam questions for potential bias,⁷⁹ and we assume that the State Bar’s Committee of Bar Examiners does the same for the essay questions and performance tests it creates. Despite these efforts, the stark differences cited above remain.

Research suggests that these differences stem in part from the nature of the two-day bar exam. No matter what changes California makes to the content of the exam, preparation for that exam is likely to require intense study for 8-10 weeks. Candidates who cannot afford to cease paid work during that time, who lack the financial resources to purchase commercial prep courses, or who shoulder significant caretaking responsibilities are disadvantaged by this type of assessment process. Careful research demonstrates that each of these circumstances correlates significantly with first-time bar failure.⁸⁰

In addition, a long line of cognitive science studies demonstrates that high-achieving individuals who belong to groups perceived as doing poorly on a particular assessment suffer from an increase in cognitive load that artificially reduces their performance on the assessment.⁸¹ Depending on the circumstances, this increase in cognitive load can affect people of any race/ethnicity, gender, or other demographic characteristic. Given the historical exclusion of women of color, men of color, and white women from the legal profession—as well as ongoing evidence that these groups perform less well than white men on the two-day bar exam—this cognitive burden may unfairly reduce the performance of these groups. Similar cognitive burdens may also affect the performance of candidates from low-income households, older candidates, non-native English speakers, and candidates who live with disabilities.

Dr. Buckendahl advised us that situational judgment tests, which ask candidates to respond to realistic workplace scenarios, have the potential to produce smaller gaps related to race/ethnicity or gender than more traditional multiple-choice tests. Professor Howarth complemented this information by sharing evidence from a project she conducted with the late Judith Wegner for LSAC. They found that when students who had finished the first year of law school completed performance tests without the severe time constraints of the two-day bar exam, gaps related to race/ethnicity were much smaller than those gaps in first-year grades. In general, she advised, testing experts suggest that the closer an assessment is to a real-world setting, the smaller the disproportionate impact.

⁷⁸ BRC REPORT, *supra* note 7, at 5.

⁷⁹ See, e.g., Marilyn Wellington, *Measurement Bias and the Bar Exam: A Continued Focus for the NextGen Exam*, 92 BAR EXAMINER 61 (Spr. 2023).

⁸⁰ ACCESSLEX INSTITUTE, *supra* note 42, at 78-81 (report of regression analysis showing that hours worked during bar preparation, failure to take a commercial prep course, and household size correlated significantly with bar failure after controlling for other factors).

⁸¹ See, e.g., CLAUDE M. STEELE, *WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO* (2011); Arusha Gordon, *Don’t Remind Me: Stereotype Threat in High-Stakes Testing*, 48 U. BALT. L. REV. 387 (2019); Yoder-Himes, et al., *supra* note 50, at 14 (summarizing research on increased cognitive load and noting that biases in facial recognition software are likely to trigger this burden).

Analysis of the State Bar Survey, which surveyed more than 2,700 candidates who qualified for the Provisional Licensure Program,⁸² suggests that a Portfolio Bar Examination will greatly reduce the disparate impacts produced by California’s current licensing system. As noted above, women of color, men of color, and white women were significantly more likely than white men to use the Pathway Provisional Licensure Program. They also succeeded in obtaining licenses through that program at slightly higher rates than white men.⁸³

This table reports the success rates of candidates in several categories who used the Pathway Program to demonstrate their competence to practice law. Within each category, none of the differences are statistically significant.⁸⁴

	Admission Through Pathway Program
Race/Ethnicity	
Asian Candidates	84.7%
Black Candidates	83.1%
Hispanic Candidates	86.5%
White Candidates	82.4%
Other Candidates	81.6%
Gender	
Female Candidates	83.9%
Male Candidates	83.1%
First-Generation Status	
First-Gen College Grad	90.7%
Not First-Gen College	83.8%
Disability	
Living With Disability	79.6%
Not Living With Disability	87.0%
Age	
30 and Younger	85.7%
31 – 40	83.9%
41 – 50	82.4%
51 – 60	83.3%
Over 60	82.4%

⁸² This total includes 1585 candidates who participated in the Provisional Licensure Program between late 2020 and fall 2022, as well as 1154 individuals who still qualified for the Pathway Program in fall 2022 but had not yet pursued that program. Merritt, Curcio & Kaufman, *supra* note 8, at 17. The total number of eligible candidates reached by the surveys, therefore, was 2,739.

⁸³ *Id.* at 33-34.

⁸⁴ For race/ethnicity, $p = .236$; for gender, $p = .424$; for first-generation status, $p = .289$; for living with a disability, $p = .146$; for age, $p = .542$. The sample sizes for these calculations varied from 323 (living with a disability) to 673 (race/ethnicity), depending on the information available for each candidate. The calculations related to race/ethnicity, gender, and age, notably, did not depend on survey responses; this information was available for respondents and nonrespondents. Professor Merritt provided these calculations for our Working Group.

Success rates may not be as high in the PBE because, unlike candidates in the Pathway Program, PBE candidates will work many more hours and produce portfolios of work product that are scored by independent examiners. It is possible, moreover, that portfolio scoring may produce disparate impacts in one or more demographic categories. Eliminating the challenges that are known to contribute to those differences (e.g., inability to pay for commercial prep courses, need to work while studying for the two-day exam, and increased cognitive load), however, should reduce the disparate impact and make the licensing process more equitable than the two-day exam.

The data from the Pathway Program demonstrates that candidates in groups disadvantaged by the two-day exam were able to access the Pathway and work successfully in that context. The PBE will require candidates to demonstrate their competence through work and anonymously scored portfolios, which we expect to reduce or eliminate the disparate impacts consistently generated by the two-day bar exam.

G. Benefits for the Profession and Public

The State Bar Survey suggests that, in addition to fulfilling the CAPA construct and BRC guidelines, a Portfolio Bar Exam will produce significant benefits for the profession and public. As noted above, supervisors in the Provisional Licensure Program repeatedly praised the work ethic and lawyering quality of the provisional licensees they supervised.⁸⁵ Indeed, several supervisors spontaneously volunteered that candidates participating in the program were better qualified than new lawyers who had passed the bar exam.⁸⁶ A period of supervised practice, these supervisors explained, provided essential “on the job training,” and experience “dealing with clients.”⁸⁷ Attorneys with this experience, they concluded, were “better equipped to help our law firm than someone else who passed the bar exam, but has not [had] real-life experience working in a firm and directly with clients.”⁸⁸

Provisional licensees also helped their employers expand access to legal services. Almost nine-tenths of supervisors reported to the State Bar that provisional licensees allowed them to serve more clients than they had previously served.⁸⁹ Some organizations were even able to serve new types of clients or open new practice areas.⁹⁰ This expansion of services was particularly important with respect to underserved populations and in rural parts of the state.⁹¹

Supervisors were especially pleased with the diversity that provisional licensees brought to their practice teams. More than three-quarters of supervisors reported experiencing this benefit to some extent.⁹² They noted the ability of diverse licensees to communicate with their increasingly diverse client bases, to provide expanded services to those clients, and even to attract new

⁸⁵ Merritt, Curcio & Kaufman, *supra* note 8, at 45-46.

⁸⁶ *Id.* at 29.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 46.

⁹⁰ *Id.* at 45-46.

⁹¹ *Id.* at 46-47.

⁹² *Id.* at 47.

clients. This ability benefited both employers and the public. One supervisor explained that the firm’s provisional licensee “bridges our firm to new client groups because she is known in her [underserved] community as having graduated from law school and is a notable client referral source. Our firm is monetarily better off, and her underserved community has greater access to much needed legal referrals.”⁹³

Most important, the PBE will allow the State Bar to license particularly well-trained lawyers who have been thoroughly vetted for their competence. A study of New Hampshire’s Daniel Webster Scholars Program, which licenses candidates based on portfolios of work product similar to the ones we propose for the PBE, found that graduates of that program were “as competent, or more competent, than lawyers” who had passed a written bar exam and practiced for up to two years.⁹⁴ Professor Courtney Brooks, the program’s director, knows of no disciplinary proceedings against any program graduate. On the contrary, at least one of the program’s graduates serves on the state’s professional conduct committee.

We expect the PBE to deliver similar results. The lawyers licensed through the PBE will benefit from four or more months of post-graduate supervised practice. That practice will include application of doctrinal knowledge to authentic client problems, as well as the exercise of a full range of lawyering skills. Law graduates who participated in California’s Provisional Licensure Program stressed the importance of exercising those skills and knowledge during a period of supervised practice: “I am a better attorney,” many reported, because of my supervised practice.⁹⁵

PBE candidates, moreover, will demonstrate their competence through a series of essays, written work product, client encounters, and negotiations—all judged by independent bar examiners. This work will demonstrate, not only that candidates *have the potential to serve clients competently* (as the two-day bar exam predicts), but that they *are actually serving clients competently*.

In accordance with the State Bar’s mission and the BRC’s guiding principles, we expect the PBE to attract and license a more competent, diverse group of new lawyers than our current licensing system. The profession and public will benefit from their work—not just during the licensing period, but throughout their careers.

⁹³ *Id.* at 48.

⁹⁴ ALI GERKMAN & ELENA HARMAN, AHEAD OF THE CURVE: TURNING LAW STUDENTS INTO LAWYERS: A STUDY OF THE DANIEL WEBSTER SCHOLAR HONORS PROGRAM AT THE UNIVERSITY OF NEW HAMPSHIRE SCHOOL OF LAW 12 (Jan. 2015). Candidates in the Daniel Webster Program pursue an experiential law school curriculum that complements their doctrinal learning. They submit portfolios of work product to independent bar examiners and are admitted to the bar if the examiners find that work competent. The program differs from the PBE because it is rooted in the law school curriculum, but it resembles the PBE in providing candidates hands-on training, supervision, and feedback on their work. Both quantitative and qualitative research studies have confirmed the competence of Daniel Webster Program graduates. *Id.* at 12-22. See also HOWARTH, *supra* note 4, at 124 (discussing research demonstrating the excellence of Daniel Webster graduates).

⁹⁵ Merritt, Curcio & Kaufman, *supra* note 8, at 43.

IV. Description of the Portfolio Bar Examination

The Working Group believes that a PBE Committee of committed, informed experts should make final decisions about the format of the PBE. We do not view that committee as one to debate the merits of the PBE; instead, the committee will work to develop the most feasible program possible that provides evidence of valid, reliable, and fair scores and decisions. The committee can also oversee research assessing the PBE and make recommendations for the continuation, improvement, and expansion of the program.

To explain the contours of the PBE and assist the work of the PBE Committee, we offer these initial recommendations about design of the PBE:

1. Candidate Eligibility. Eligibility for California’s two-day bar exam is very broad. As explained further in Section V, we recommend starting the PBE with a small pilot program and gradually scaling up the program. We would include JD graduates of both ABA-accredited and California-accredited schools within those initial programs, but not graduates of other law schools or candidates who have pursued office study.⁹⁶
2. Curricular Requirements. We recommend requiring all PBE candidates to successfully complete law school courses in the nine doctrinal subjects that the BRC recommended including on the two-day bar exam. Those are the eight subjects recommended by the CAPA Working Group plus Professional Responsibility. At least during the initial stages of piloting and scaling the PBE, candidates would complete each of these courses at an ABA-accredited or California-accredited law school, ensuring that the courses meet accreditation standards. Successfully completing these courses will ensure that the PBE candidates have had broad exposure to doctrinal principles and application in each of these foundational areas.⁹⁷
3. Practice Scope for Candidates. We recommend issuing candidates provisional licenses with the same scope of authority, responsibility, and duties exercised by provisional licensees in the Provisional Licensure Program.
4. Supervisor Qualifications and Responsibilities. We recommend using the same supervisor qualifications and responsibilities that California adopted for the Provisional Licensure Program. It is important that supervisors hold active California licenses so that they are subject to discipline for any misconduct on their part while supervising. In addition, we

⁹⁶ Section 6060.5 of the California Business and Professions Code provides: “Neither the board, nor any committee authorized by it, shall require that applicants for admission to practice law in California pass different final bar examinations depending upon the manner or school in which they acquire their legal education.” Our proposal for a pilot program followed by gradual scaling up of the PBE does not require any candidate to “pass different final bar examinations.” Instead, it offers an option to some candidates while exploring and scaling up a new type of bar examination.

⁹⁷ As discussed further below, we recommend waiving this curricular requirement for the initial pilot program we propose. See Section V *infra*. Eligibility for the pilot program, however, would still require possession of a JD from an ABA-accredited or California-accredited law school.

recommend prohibiting family members from serving as a candidate’s supervisor.⁹⁸ This will enhance fairness and public perceptions of the program.

5. Connecting Candidates and Supervisors. As of October 2022, the Provisional Licensure Program had attracted almost 1,400 supervisors for 1,585 provisional licensees.⁹⁹ The State Bar created no special programs to attract these supervisors; nor did it offer incentives or support to lawyers agreeing to supervise provisional licensees. Even in this laissez-faire context, most provisional licensees found supervisors with relative ease.¹⁰⁰

Equally important, supervisors discovered that they reaped many benefits from supervising provisional licensees. Candidates with provisional licenses can perform more legal work than law graduates who are studying for the bar exam or waiting for exam results. Supervisors benefited from that work: 94.7% reported that their provisional licensees were particularly hardworking, and 86.8% indicated that they were able to serve more clients with the assistance of those licensees.¹⁰¹ As a result of these and other benefits, almost three-quarters of supervisors in the Provisional Licensure Program reported that they were willing to continue supervising their current licensees, future licensees, or both.¹⁰²

The number of attorneys who volunteered to supervise candidates in the Provisional Licensure Program, combined with the benefits those supervisors reported, suggests that PBE candidates will find supervisors without serious difficulty.¹⁰³ Once the PBE moves beyond a pilot stage, moreover, law schools will have a strong self-interest in creating programs to connect their graduates with supervisors. Creating those links will help a graduate achieve their career goals, improve the school’s employment outcomes, and potentially enhance the school’s bar passage numbers.

The State Bar might also want to work with law schools to create opportunities for PBE candidates. We note, however, that this probably would not require a formal matching program. The State Bar Survey suggests that existing placement mechanisms are sufficient to connect candidates with supervisors,¹⁰⁴ and that some employers oppose a mandatory

⁹⁸ Oregon has adopted a definition of “immediate family member” that the PBE Committee could consider adopting or modifying. See Oregon Proposed Rule 2.4, available at <https://lpdc.osbar.org/files/2023.08.02SPPEProposedRules-ApprovedbyLPDC.pdf>.

⁹⁹ Merritt, Curcio & Kaufman, *supra* note 8, at 38.

¹⁰⁰ *Id.* at 38-40.

¹⁰¹ *Id.* at 45-47.

¹⁰² *Id.* at 50-52.

¹⁰³ In July 2022, while the Blue Ribbon Commission was considering various licensing options, twenty-one California bar associations joined a letter expressing concerns about licensing pathways other than a written bar exam. This letter might suggest reluctance on the part of some lawyers to serve as supervisors in the PBE. The lawyers who signed the bar association letter, however, did not have the benefit of a detailed proposal like the one presented here. Many of them may also have lacked experience with provisional licensees or supervised practice. The informed views of attorneys who have worked with provisional licensees carries significant weight in suggesting the feasibility of a PBE.

¹⁰⁴ *Id.* at 39.

matching program.¹⁰⁵ Simply publicizing opportunities might be sufficient to connect PBE candidates with supervisors.

6. Required Supervised Practice Hours. The supervised practice hours required for the PBE serve three purposes: (a) They ensure that the candidate has been exposed to a range of legal tasks, with opportunities to learn from those tasks and demonstrate their competence; (b) they ensure that the candidate is capable of practicing for a length of time without eliciting disciplinary complaints; and (c) they demonstrate that a licensed attorney found the candidate sufficiently competent to continue working with the candidate over a period of time.

The precise number of hours should be long enough to achieve these assurances, but not so long that they become a barrier to entry. After considerable deliberation, the Oregon committee designing its proposed Supervised Practice Portfolio Examination concluded that candidates should complete 675 hours of legal work (including time spent on portfolio preparation).¹⁰⁶ The Oregon committee also decided that candidates should not be allowed to count more than 40 hours per week towards this total, imposing a minimum of 17 weeks in the program.

To err on the side of caution, we recommend requiring 700-1000 hours of legal work in California's pilot PBE. To accompany that total, we recommend defining "legal work" to assure that candidates do not count administrative or paralegal tasks; adding a provision allowing candidates to count some reasonable proportion of training time towards their hours; and placing a cap of 40 countable hours per week. With these requirements, candidates will devote 17.5-25 weeks to the program. Indeed, with a more realistic projection of 35 hours of work per week (allowing for holidays, vacation time, and other non-countable hours), candidates will devote at least 20-29 weeks to the program.

In setting the number of required hours, finally, the PBE Committee should consider the possible alignment of admission dates for candidates who successfully complete the PBE and those who pass the two-day bar exam. Aligning those dates might enhance the fairness of the two admission pathways. On the other hand, the flexible timing of the PBE may be an important feature for some candidates.

7. Practice Areas. We would not limit the type of practices in which candidates work. As noted above, practice in any legal field inevitably draws upon doctrinal knowledge from multiple areas. Candidates will be required to document that breadth in their portfolios (point 9 below). We also note that a candidate's ability to become competent in a particular practice area is a strong signal that the candidate will develop that competency in other practice areas. Entering a new practice area requires a learning curve for any lawyer, but the best predictor of that lawyer's success is not their existing doctrinal knowledge of the new area, but the

¹⁰⁵ According to supplemental analyses provided by Professor Merritt, about one-third of supervisors responding to the State Bar Survey favored a mandatory matching system; one-third opposed that type of system; and one-third were undecided.

¹⁰⁶ Oregon Proposed Rule 6.12, available at <https://lpdc.osbar.org/files/2023.08.02SPPEProposedRules-ApprovedbyLPDC.pdf>.

strength of their lawyering skills and their success in learning the doctrinal knowledge of other areas.

8. Candidate Compensation. To avoid exploitation of candidates, we recommend that the rules require an employer to provide each provisional licensee at least the salary and benefits provided to other recent law school graduates without full licenses. The State Bar Survey revealed that 95.1% of provisional licensees in the Original Provisional Licensure Program received some compensation.¹⁰⁷ It appears, therefore, that resources exist to compensate candidates pursuing the PBE.

On the other hand, we do not feel strongly about this requirement with respect to the proposed pilot PBE. If that pilot includes provisionally licensed lawyers working in the Original Provisional Licensure Program, most of those lawyers will have longstanding relationships with supervisors. We do not believe it is necessary to disturb those relationships, for the small percentage of provisional licensees who are unpaid, by imposing compensation requirements. The PBE Committee can then study compensation issues in the pilot program, using that information to make recommendations for a more permanent program.

9. Portfolio Contents. The portfolio contents allow independent examiners to determine whether the sampled performance is consistent with expectations of minimum competence. The PBE Committee should fully develop portfolio requirements—and evaluate the reliability of the most important sources of error given the measurement approach—but we suggest the following components as a working blueprint. Psychometricians should advise the PBE Committee on the number of portfolio components needed for reliability; we offer simply estimated ranges for each item. The committee could also consider one consultant’s suggestion that candidates submit a larger pool of work from which the examiners would randomly select samples to assess.

The righthand column in the table below explains the rationale for each component:

Component	Rationale
2-3 essays analyzing issues of professional responsibility, professionalism, or civility that have arisen in the candidate’s practice, with citations to appropriate sources	This component embodies the BRC’s focus on professional conduct, professionalism, and civility. It requires candidates to reflect upon and analyze those issues in the actual practice of law.
6-10 other pieces of written work produced by the candidate that reflect the candidate’s analysis of a variety of substantive legal matters. Clients must consent to the inclusion of work related to their matters,	The California two-day bar exam currently requires responses to 5 essay questions and 1 performance test. This component parallels that portion of the two-day exam, requiring candidates to demonstrate their

¹⁰⁷ See *supra* note 44 and accompanying text. This percentage derives from the survey responses of supervisors. A slightly higher percentage of licensees in the Original Program (6.4%) reported working without pay in their survey responses. See Merritt, Curcio & Kaufman, *supra* note 8, at 36. We use the percentage reported by supervisors here because supervisors provided more detail about the pay and benefits provided to provisional licensees.

Component	Rationale
and the work must be redacted to protect client confidentiality. Minimum word counts and rules related to the use of form documents will ensure that each work sufficiently demonstrates the candidate’s legal analysis. ¹⁰⁸	knowledge of doctrinal law, their ability to apply that knowledge to client problems, and their communication skills in at least as many pieces of work product as the two-day exam includes.
Structured cover sheets providing context for each piece of written work and describing the research that the candidate undertook to produce the work	These cover sheets will provide context allowing examiners to judge criteria such as alignment of the work product with the client’s goals and effective communication style for the audience. These criteria assess essential elements of communication and client relationships that are difficult to test on a two-day exam. The cover sheets will also allow examiners to assess the candidate’s research skills in a realistic context.
Demonstrations of doctrinal breadth	The professional responsibility essays, other written work, and cover sheets must demonstrate that the candidate has drawn upon knowledge from at least seven of the doctrinal subjects that the BRC recommended including on the two-day bar exam.
Materials assessing two negotiations. ¹⁰⁹	Examiners will not be able to view negotiations directly due to confidentiality concerns. They will, however, review the candidate’s written negotiation plan, the supervisor’s assessment of the negotiation, and the candidate’s reflection on the negotiation and assessment (all redacted to protect client confidentiality). These

¹⁰⁸ For an example of rules related to minimum word counts and other restrictions, see Oregon Proposed Rule 6.4, available at <https://lpdc.osbar.org/files/2023.08.02SPPEProposedRules-ApprovedbyLPDC.pdf>. Oregon’s rules also contemplate a conflict-checking system to ensure that graders do not review any work product for which they would have a conflict of interest. *Id.* at Section 13. According to Professor Merritt, Oregon’s Board of Bar Examiners has already developed that system for the portfolio-based licensing program it created for candidates who failed its February 2022 exam, and the system works smoothly.

¹⁰⁹ The PBE rules should allow negotiations to occur in any context, including litigation, transactional, regulatory, or other matters. The rules should also make clear that these negotiations need not focus on final resolution of an entire substantive matter; they may focus on preliminary or interim matters.

Component	Rationale
	materials will allow the examiners to assess the candidate’s minimum competence in negotiation.
Materials assessing two client encounters ¹¹⁰	As with negotiation, examiners will not be able to view these encounters directly. They will determine minimum competence by reviewing the supervisor’s assessment of the client encounter and the candidate’s reflection on both the encounter and assessment (with all materials redacted to protect client interests).
Timesheets documenting the candidate’s hours	These documents, signed by both candidate and supervisor, will document the candidate’s compliance with the program’s hours requirement.

These portfolio components allow assessment of all seven lawyering skills identified as essential by the BRC:

- Drafting and Writing (professional responsibility essays and practice-based writings)
- Research and Investigation (professional responsibility essays and practice-based writings; note that the essays require citation to appropriate sources and the other writings include cover sheets revealing research)
- Issue-spotting and Fact-gathering (professional responsibility essays, practice-based writings, negotiations, and client encounters)
- Counsel/Advice (client encounters, likely will also appear in at least some of the practice-based writings)
- Communication and Client Relationship (practice-based writings, negotiations, and client encounters)
- Litigation (professional responsibility essays, practice-based writings, negotiations, and/or client encounters; note that “litigation” should include adversarial proceedings before administrative agencies and that transactional practices often focus on avoiding litigation)
- Negotiation and Dispute Resolution (negotiations, may also appear in practice-based writings and client encounters)

Most candidates should be able to assemble the required portfolio components from their practice. For workplaces that do not support some components (such as negotiations or client

¹¹⁰ We recommend defining “client” broadly, as Oregon has. See Oregon Proposed Rule 6.5(E), available at <https://lpdc.osbar.org/files/2023.08.02SPPEProposedRules-ApprovedbyLPDC.pdf>. We would also follow Oregon in permitting prosecutors to use interviews with complaining witnesses to satisfy this requirement. *Id.*

encounters), a PBE coordinator within the State Bar could refer candidates to alternatives including pro bono work and simulations.

10. Independent Work Product. Law practice is highly networked, collaborative, and dependent upon written and electronic resources. In this sense, the two-day bar exam provides an artificial assessment of lawyering competence. At the same time, a licensing process should provide assurance that a new lawyer is independently capable of mustering resources to resolve a client problem—rather than relying entirely on the work of another person or artificial intelligence. The components included in a PBE portfolio may reflect some input from colleagues, written sources, and electronic resources, but the candidate should be the one who identifies that input, assesses its value, and synthesizes it into a final product.

We recommend achieving the latter goal as follows: First, in addition to providing information about the research supporting each piece of written work, candidates should provide information about whether they used a document template as a foundation for the work; the extent to which they received input from other lawyers; and the extent to which they relied upon artificial intelligence. If their writing derives from a template, they should provide that template along with a version showing their customization.¹¹¹ Candidates who intentionally misrepresent any of these matters would be subject to dismissal from the PBE and would face challenges in establishing their good moral character if they subsequently pass the two-day exam.

Second, the supervisor should attest that, after reviewing the writing and assistance noted by the candidate, they believe that the work product sufficiently reflects the knowledge, research, analysis, and writing of the candidate that an examiner can meaningfully assess the candidate's competence from the writing. Examiners will be able to glean much of this information from information provided by the candidate, but the supervisor's attestation will provide additional assurance. Supervisors who intentionally misrepresent a candidate's contributions to work product would be subject to discipline by the State Bar.

In addition to these requirements, we recommend that the PBE Committee explore the adoption of software, security measures, or other auditing protections.

11. Development of Rubrics. Each component of the candidate portfolios will need a rubric to guide the examiners' assessment. To ensure reliable results from these rubrics, we recommend following processes described by Dr. Anderson and Dr. Buckendahl:
 - A group of subject matter experts (legal educators, entry-level practitioners, and supervisors of entry-level practitioners) will work with a psychometrician to develop rubrics for each of the portfolio components. Note that the legal educators needed for this work are likely to be professors who teach legal writing, client counseling, negotiation, and/or clinics.
 - A group of graders (individuals who will use the rubrics to score portfolio components) will individually score a small set of sample components. From these scores, the

¹¹¹ This is similar to provisions proposed by Oregon for its Supervised Practice Portfolio Examination. Oregon Proposed Rule 6.4, available at <https://lpdc.osbar.org/files/2023.08.02SPPEProposedRules-ApprovedbyLPDC.pdf>.

psychometrician working on the project will be able to calculate reliability. The graders can also provide feedback to the subject matter experts who designed the rubrics.

- This process will continue until the scores reach a sufficient level of reliability. During this process, the rubric designers and graders will also obtain information about the best ways to train graders for consistency.

12. Setting a Cut Score. After finalizing rubrics for scoring the portfolio components, a group of experts will determine the passing score for candidate portfolios. The PBE Committee may want to make an initial recommendation, which can be evaluated by the experts involved in the rubric exercise. The determination of a cut score should be made by a policy body rather than graders. California might favor a compensatory grading rule for the PBE like the one used for the two-day bar exam. That type of grading allows candidates to compensate for weak performance in some areas with strong performance in others.

Dr. Buckendahl also suggested the possibility of using a “policy linking study” that would ensure that the standard of competence applied in portfolio review was equivalent to that applied to materials completed during the two-day exam.¹¹²

13. Grading Portfolios. Portfolios should be anonymous and graded by independent examiners. California already maintains a system that supports efficient grading of more than 60,000 essays and performance tests each year. We suggest that the State Bar establish a parallel system for grading portfolios, with training and monitoring focused on portfolio components as well as the performance of graders who apply the rubrics to candidates’ work product. This parallel system will require some set-up costs, but over time portfolio grading may reduce the overall grading burden by spreading work more evenly over the year.

Based on input from Dr. Anderson and Dr. Buckendahl, we recommend training and monitoring portfolio graders with the following processes:

- During training and calibration, graders will apply the scoring rubric to samples, developing consistent interpretation and application of the rubric. These training and calibration sessions will be similar to those used to prepare graders who score essays and performance tests from the two-day exam.
- Once operational scoring begins, embedded performances with known scores can be used to evaluate the reliability of the scores, graders, and resultant decisions.¹¹³
- Data from the embedded performances can also be used to remediate or improve grading accuracy and consistency of the score and decision.

14. Training of Supervisors and Candidates. Once the PBE is in place, some training about the program should be offered to supervisors and candidates. Oregon’s experience shows that

¹¹² Policy linking studies allow stakeholders to compare scores on different assessments by connecting them to a common scale. In the context of licensing, this type of study would assure the State Bar and other stakeholders that a passing score on the PBE denoted the same level of competence as a passing score on the two-day written exam.

¹¹³ Embedded performances with known scores are ones that have been previously scored by graders. These performances can be included (“embedded”) in new portfolios to assess whether the score awarded by a new grader is consistent with the one assigned by previous graders. If the new and old graders agree on the score assigned the embedded performance, then they are likely to assign consistent grades to other performances.

this can be done inexpensively with recorded video segments. Supervisors and candidates can view (and review) the segments at their leisure. Supervisors should also be required to complete training on implicit bias, harassment, and discrimination.

The PBE offers an opportunity to provide more in-depth training to supervisors about providing effective training and supervision to new lawyers. Learning those skills can increase workplace productivity, benefiting both clients and organizations.

15. Flexibility for Candidates. Candidates should be allowed to work part-time, to work for two supervisors simultaneously, and to change workplaces and supervisors. These provisions are necessary to support universal design, allow candidates to obtain adequate compensation when one employer cannot offer them full-time work, and help candidates who need to change employers for any reason (including encounters with discrimination, bias, or harassment).
16. Ombudsperson. The PBE is designed to maximize fairness. We recommend complementing that design by appointing an ombudsperson to respond to concerns raised by any participant in the program. The State Bar's recently appointed Public Trust Liaison may be able to serve as the Ombudsperson, at least for the pilot program.
17. Public Records. On its public records and websites, the State Bar should not distinguish in any way between attorneys who demonstrated their minimum competence through the current two-day bar exam (or future iterations of that exam) and those who demonstrated their competence through the PBE. It is unclear how employers will react to attorneys licensed through these two processes. Some supervisors who responded to the State Bar Survey volunteered that candidates who engaged in supervised practice were better qualified than newly licensed attorneys who had passed the two-day exam.¹¹⁴ Employers in New Hampshire, similarly, have reported that they prefer new lawyers licensed through New Hampshire's portfolio process over those who demonstrated their competence on a two-day bar exam.¹¹⁵ Anecdotal reports, on the other hand, suggest that some employers may restrict hiring to lawyers who have passed the two-day bar exam.

Without more data, we cannot know the full extent of employer reactions to these different methods of assessing competence. We believe that the comprehensive assessment and training offered by the PBE will make these candidates as or more attractive than candidates who have passed a two-day bar exam, but some employers may feel differently. Since the two pathways are designed to assess the same construct, the State Bar's public records should not distinguish licensed attorneys based on the pathway they pursued.

The legal profession is already marked by systemic inequities. In addition to any biases related to race/ethnicity, gender, and other personal characteristics, some employers attach more weight to an applicant's JD school, law school grades, LSAT score, or even the number of times it took them to pass the traditional bar exam, than to the applicant's demonstrated competence in serving clients. Research demonstrates that these biases undermine effective

¹¹⁴ Merritt, Curcio & Kaufman, *supra* note 8, at 29.

¹¹⁵ GERKMAN & HARMAN, *supra* note 94, at 13-14.

hiring—but that careful hiring processes can overcome them.¹¹⁶ Through careful design and study, the State Bar and PBE Committee should work to ensure that neither the traditional bar exam nor the PBE creates or perpetuates further inequities in the profession.

18. **Ongoing Study.** The State Bar and PBE Committee should regularly study the workings and outcomes of the PBE to ensure that the program continues to offer a process for licensing attorneys that yields valid, reliable, and fair scores and decisions for candidates. That research could parallel similar study of the validity, reliability, and fairness of the scores and decisions produced by the two-day exam. Longitudinal research could also track the career paths of attorneys pursuing different licensing paths, determining whether their chosen licensing path bears any significant relationship to career outcomes.

V. Pilot Program and Scaling

We recommend beginning the PBE with a pilot program limited to candidates who are still active in California’s Original Provisional Licensure Program. According to the State Bar, about 100 individuals meet that description. These provisional licensees are already paired with supervisors and may have engaged in thousands of hours of legal work. The group is small enough to manage efficiently, while large enough to provide insights for developing a larger program. The group is also sufficiently diverse to provide representative information.¹¹⁷ Based on information from the State Bar Survey, the group possesses these demographic characteristics:¹¹⁸

Race/Ethnicity	
Asian Candidates	18.3%
Black Candidates	8.6%
Hispanic Candidates	19.9%
White Candidates	35.5%
Other Candidates	17.7%
Gender	
Female Candidates	56.6%
Male Candidates	40.7%
Nonbinary Candidates	2.6%
Sexual Orientation	
LGBTQIA+	11.6%
Heterosexual	88.4%

¹¹⁶ See ZACHARIAH DEMEOLOA, LOGAN CORNETT, ELIZABETH ANDERSON & KRISTEN UHL HULSE, FOUNDATIONS HIRING GUIDE (2021), available at https://iaals.du.edu/sites/default/files/documents/publications/foundations_hiring_guide.pdf.

¹¹⁷ The sample used for a pilot program need not represent the full target population exactly. Instead, it is most important to include a diverse group of participants who will provide insights into the program’s impact on different populations. As the table in text reveals, provisional licensees remaining in the Original Program meet this criterion.

¹¹⁸ The State Bar Survey was administered in October 2022, and the population of provisional licensees likely has changed since then. The State Bar could provide updated demographic information on provisional licensees remaining in the Original Program, but the diversity of the group is unlikely to have diminished.

First-Generation Status	
First-Gen College Grad	39.0%
Not First-Gen College	61.0%
Disability	
Living With Disability	20.0%
Not Living With Disability	80.0%
Age	
30 and Younger	39.1%
31 – 40	38.5%
41 – 50	13.8%
51 – 60	5.7%
Over 60	2.9%
Employment Setting ¹¹⁹	
Law Firm	49.3%
Solo	35.7%
Legal Aid, Public Defender, or Nonprofit	23.6%
Other Government	7.8%

By studying this group, the PBE Committee and State Bar will obtain insights into the impact of a PBE on a variety of populations. Equally important, the pilot will allow the State Bar to start developing the infrastructure needed to support a larger PBE.

For this pilot group, we recommend waiving the law school curricular requirements suggested above. It is too late for these candidates to add courses to their degree programs and, after three years of practicing under a provisional license, additional coursework is unlikely to add meaningfully to their competence. These candidates, however, will still have to demonstrate in their portfolios the doctrinal breadth that we recommend requiring from all candidates.

After studying the pilot PBE and considering factors that might distinguish the pilot group from future PBE candidates, the State Bar and PBE Committee can make any needed changes in the program. The Bar may then wish to scale the program up gradually. There are several ways in which this could be done:

- The PBE could be offered first to eligible candidates who have accepted positions with public interest employers or employers in underserved parts of the state. The State Bar Survey indicates that public interest employers were particularly satisfied with the Provisional Licensure Program and particularly likely to continue participation in a supervised-practice program.¹²⁰ The survey also reveals that public interest employers have especially strong

¹¹⁹ Percentages in this category sum to more than 100 because some licensees had multiple employers.

¹²⁰ Professor Merritt provided these statistics to us from her analysis of the State Bar Survey database. 73.8% of public interest employers were very satisfied with the provisional licensees working for them and none were very dissatisfied. This satisfaction pattern differed significantly from that of other employers ($p = .022$), although all employers expressed high degrees of satisfaction. The difference in willingness to continue participating in a program like the Provisional Licensure Program was also statistically significant ($p = .001$). See *also* CALIFORNIA

training and supervision programs in place for provisional licensees.¹²¹ Employment in the public interest sector, moreover, is at an all-time high for entry-level lawyers.¹²² Grant money, finally, may also be available to support expansion of the program to these employers and candidates.

- Some preference could be afforded to eligible candidates who live with disabilities. The universal design of the PBE would offer fair assessment of these candidates without the need for the accommodations required for a two-day exam given just twice a year.
- The PBE could begin with eligible graduates of law schools located in California, later expanding to graduates from out-of-state schools.
- If the Supreme Court does not accept the BRC’s reciprocity recommendations, the PBE could include out-of-state attorneys as part of scaling up the PBE.

VI. Governing Statute

California Business and Professions Code § 6060(g) provides that individuals may be licensed to practice law in California only if they “[h]ave passed the general bar examination given by the examining committee.” The statute does not define the content or format of this “general bar examination.” Nor does it identify particular components of that examination. The Working Group believes that the Portfolio Bar Examination we propose fits within the statutory phrase. The PBE is designed to test the same construct as the two-day bar exam: the “legal knowledge, competency areas, and professional skills required for the entry-level practice of law and the effective, ethical representation of clients.”¹²³ Indeed, the PBE will test the package of skills and doctrinal knowledge identified by the BRC and CAPA Working Group more effectively than a two-day exam.

The *Standards for Educational and Psychological Testing*,¹²⁴ which are considered the testing industry standards for developing psychometrically sound examinations, consider portfolio examinations as equivalent to other types of examinations. Under the *Standards*, a “test” includes any “device or procedure in which a sample of an examinee’s behavior in a specified domain is

COMMISSION ON ACCESS TO JUSTICE, CALIFORNIA’S ATTORNEY DESERTS: ACCESS TO JUSTICE IMPLICATIONS OF THE RURAL LAWYER SHORTAGE 1 (July 2019) (“Many parts of California lack sufficient numbers of attorneys to serve their population, a situation that is particularly acute in many rural areas”).

¹²¹ Merritt, Curcio & Kaufman, *supra* note 8, at 43 (90.8% of provisional licensees working for public employers received training or mentoring). *See also* Claire Solot, Jessica Juarez & Lucas Wright, Public Interest Bar Fellowship Information Session, <https://my.visme.co/view/n0q9v6n3-2023-lsfn-public-interest-law-bar-fellowship-info-session#s1> at 16 (97% of provisional licensees working with public interest employers through the Legal Services Funders Network were “extremely satisfied” or “very satisfied” with their supervisors).

¹²² NATIONAL ASS’N FOR LAW PLACEMENT, JOBS & JDs EMPLOYMENT FOR THE CLASS OF 2022: SELECTED FINDINGS 3 (2023) (9.2% of 2022 graduates took jobs with public interest employers “reaching a new all-time high in both percentage of all jobs . . . and total number of jobs”).

¹²³ CAPA REPORT, *supra* note 2, at 1.

¹²⁴ The *Standards for Educational and Psychological Testing* (2014) are jointly published by the American Educational Research Association, American Psychological Association, and National Council on Measurement in Education. These standards apply broadly to education, licensure, certification, employment, psychological, and clinical tests. The volume is available through open source and can be accessed here: <https://www.testingstandards.net/uploads/7/6/6/4/76643089/9780935302356.pdf>.

obtained and subsequently evaluated and scored using a standardized process."¹²⁵ The PBE we propose fits within that definition.¹²⁶

Treating the PBE as a “general bar examination” would also achieve two important policy goals. First, it would make clear that both the two-day bar exam and the PBE share the same purpose: to determine the competence of prospective lawyers before issuing a law license. Second, it would remove any stigma associated with either method of assessment. Members of the profession and public would understand that all licensed attorneys have passed an “examination” testing their competence.¹²⁷

VII. Conclusion

The members of this Working Group, like other former members of the BRC and the CAPA Working Group, are committed to protecting the public by requiring candidates for bar admission to demonstrate that they possess the “legal knowledge, competency areas, and professional skills required for the entry-level practice of law and the effective, ethical representation of clients.”¹²⁸ We, like those groups, are also committed to assessments that are evidence-based, fair, and equitable. The two-day timed exam seeks to forecast whether a candidate will engage in “effective, ethical representation of clients.” The Portfolio Bar Examination offers to achieve all our shared objectives by gauging the actual practice performance of a licensure candidate. By following the guidelines outlined in this report, the Working Group is convinced that the Portfolio Bar Examination can and will produce the most valid, fair, and reliable outcomes.

¹²⁵ *Id.* at 2.

¹²⁶ Oregon, like California, has statutory language that requires candidates for admission to the bar to pass an “examination.” See O.R.S. § 9.220 (“An applicant for admission as attorney must apply to the Supreme Court and show that the applicant . . . [h]as the requisite learning and ability, which must be shown by the examination of the applicant, by the judges or under their direction.”) The Oregon Board of Bar Examiners and Supreme Court have concluded that their portfolio-based examination processes fit within this statutory language.

¹²⁷ In the alternative, an amendment could be proposed to the Legislature allowing admission to those having “passed the general bar examination given by the examining committee or another assessment of lawyering competence that is scored anonymously by independent graders.”

¹²⁸ CAPA REPORT, *supra* note 2, at 1.

Appendix A

**Enhancing the Validity and Fairness of Lawyer Licensing: Empirical Evidence
Supporting Innovative Pathways**

Deborah Jones Merritt¹

Andrea Anne Curcio²

Eileen Kaufman³

Scholars have written for decades about the bar exam’s disparate impact on test-takers of color, examinees with disabilities, and candidates from low-income households.⁴ At the same time, a growing chorus of stakeholders has criticized the bar exam for its weak validity: the exam does not effectively test the knowledge and skills that new lawyers most need to represent clients competently.⁵ Why does our profession maintain a licensing path that is both inequitable and lacking validity? Until recently, the answer has been that there is no better way to measure minimum competence: stakeholders have worried that other approaches would admit unqualified candidates, lack reliability, cost too much, or even increase the inequities in our licensing system.⁶

¹ Distinguished University Professor and John Deaver Drinko/Baker & Hostetler Chair in Law Emerita, Moritz College of Law, The Ohio State University. We thank Dana Ford, Georgia State University College of Law JD ’24, for her excellent research assistance. We also thank the State Bar of California for their assistance gathering PLP program outcomes and their comments on earlier drafts of this Article. We appreciate the State Bar’s willingness to ask tough questions to ascertain the success of its own programs. Absent that, we would not have been able to provide as robust an analysis. The State Bar is not responsible for the analyses in this Article, and it does not endorse any of the conclusions.

² Professor of Law, Georgia State University School of Law.

³ Professor of Law Emerita, Touro College, Jacob D. Fuchsberg Law Center.

⁴ See e.g., JOAN W. HOWARTH, SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING 7–9 (2022) (discussing studies demonstrating long-standing racial disparities); ACCESSLEX INSTITUTE, ANALYZING FIRST-TIME BAR EXAM PASSAGE ON THE UBE IN N.Y. STATE 16, 39 (May 19, 2021), accesslex.org/NYBOLE (discussing how income and the need to work impacts bar passage); Wendy F. Hensel, *The Disability Dilemma: A Skeptical Bar and Bench*, 69 UNIV. PITT. L. REV. 638, 642–43, 650 (1998) (discussing obstacles to bar admission among candidates with disabilities).

⁵ See *infra* Part IB.

⁶ See, e.g., NAT’L CONF. OF BAR EXAM’RS, BAR ADMISSIONS DURING THE COVID-19 PANDEMIC: EVALUATING OPTIONS FOR THE CLASS OF 2020 3–7 (April 9, 2020), https://thebarexaminer.ncbex.org/wp-content/uploads/Bar-Admissions-During-the-COVID-19-Pandemic_NCBE-white-paper.pdf [hereinafter NCBE BAR ADMISSIONS DURING COVID-19].

A few states, however, have started questioning that traditional wisdom and exploring more promising pathways to licensure. One state already licenses candidates based on their work in a structured experiential curriculum, and at least four other states are considering that option.⁷ Other states have created or are considering licensing paths that would grant licenses after law school graduates demonstrate their competence while practicing under supervision.⁸ Advocates of these pathways urge that they measure more competencies than a written exam, and that they may reduce the bias in our profession's licensing process.⁹ Skeptics argue that these pathways will be difficult to implement, fail to identify incompetent candidates, and increase bias.¹⁰

In this article, we present the first empirical data bearing on the validity, feasibility, and fairness of novel licensing paths. That data, drawn from California's Provisional Licensure Program, cannot answer all questions about new licensing formats. The data, however, provides substantial evidence that innovative formats can offer a valid measure of lawyering competence; that they are feasible; that they will improve equity in bar admissions; and that they will help

⁷ See *infra* Part IC.

⁸ See *infra* Part IC.

⁹ HOWARTH, *supra* note 4, at 110–17 (discussing benefits of requiring clinical residencies during or after law school); Deborah Jones Merritt, *Client-Centered Legal Education and Licensing*, 107 MINN. L. REV. 2729, 2753–58, 2763–77 (2023) (discussing increased validity and fairness of alternative licensing paths).

¹⁰ See, e.g., THE STATE BAR OF CAL., BLUE RIBBON COMM'N ON THE FUTURE OF THE BAR EXAM: REP. AND RECOMMENDATIONS (2023), <https://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000030806.pdf#page=6> [hereinafter BLUE RIBBON COMM'N REPORT] (dissenting opinion of Alex Chan) (expressing concerns about the feasibility and inclusiveness of non-exam pathways); *Id.* (dissenting opinion of Ryan M. Harrison, Sr.) (equity concerns); Jane Becker & Lorie King, *Is Passing the California Bar Exam necessary for admittance to the Bar?*, SANTA CRUZ CNTY. BAR ASS'N (Aug. 9, 2022), <https://www.santacruzbar.org/pass-california-bar-exam-necessary-for-admittance/> (feasibility and failure to identify incompetent candidates).

diversify the legal profession. Our database does not provide information about reliability, but our findings complement other research exploring the reliability of novel assessment methods.¹¹

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

I. BACKGROUND

A. *Principles for Licensing*

Professional licensing systems attempt to protect the public from incompetent or unethical practitioners. We focus in this article on assessments designed to measure the former attribute, competence. Attempts to predict a candidate's potential for unethical behavior raise many troubling questions,¹² but are beyond the scope of our discussion. For professions that wish

¹¹ See note 223 and accompanying text *infra*.

¹² For a discussion of problems with the current character and fitness process, and proposed solutions to those problems, see HOWARTH, *supra* note 4, at 79–98.

to measure competence, psychometric principles establish four requirements: the assessments must be valid, reliable, fair, and feasible.¹³

1. Validity. Assessments are not inherently valid or invalid. Instead, the question is whether an assessment offers a valid measure of the characteristic or trait that it claims to measure.¹⁴ A bathroom scale, for example, offers a valid measure of weight but not of competence to practice law. When licensing lawyers, regulators describe the necessary characteristic as possession of the knowledge and skills needed to perform as a “minimally competent” lawyer.¹⁵ This threshold sounds worryingly low, but it signals the fact that we expect all lawyers to hone their knowledge and skills over time, developing more expertise as they practice. One way to understand the “minimally competent” threshold is to think of it as *the knowledge and skills needed to assure that a lawyer will not harm clients while continuing to develop their expertise*.

To establish the validity of a licensing process, therefore, regulators must identify essential competencies and then develop methods to measure them. This process poses numerous challenges. Professionals value excellence, so they may set the licensing threshold unrealistically high. They may also disagree about the specific knowledge and skills that new lawyers need to succeed. Most important, there are few (if any) independent measures of competence among licensed professionals. As a result, it is difficult to determine whether a

¹³ AM. EDUC. RSCH. ASS’N, AM. PSYCH. ASS’N & NAT’L COUNCIL ON MEASUREMENT IN EDUC., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 11–72 (2014) [hereinafter STANDARDS FOR TESTING] (discussing validity, reliability, and fairness); John J. Norcini & Danette W. McKinley, *Assessment Methods in Medical Education*, 23 TEACHING & TEACHER EDUC. 239, 240 (2007) (feasibility).

¹⁴ Michael T. Kane, *Validating the Interpretations and Uses of Test Scores*, 50 J. EDUC. MEASUREMENT 1, 3 (2013) (“Validity is not a property of the test. Rather, it is a property of the proposed interpretations and uses of the test scores.”).

¹⁵ NCBE BAR ADMISSIONS DURING COVID-19, *supra* note 6, at 6 (arguing “the current exam is a valid measure of minimum competence for entry-level practice”).

licensing assessment adequately predicts competence. We can test the validity of a bathroom scale by assessing its performance with standardized weights, but there is no standardized unit of attorney competence that we can use to determine the validity of a licensing process.

Instead, psychometricians rely upon more circumstantial evidence to establish the validity of licensing systems.¹⁶ The claimed validity of the current bar exam rests principally on (1) practice analyses detailing the knowledge and skills that entry-level lawyers use in practice, and (2) judgments by subject-matter experts about which of these knowledge and skills should be included on the exam.¹⁷

2. Reliability. A reliable assessment is one that produces consistent results. A reliable scale gives the same reading, regardless of when a weight is tested or who places the weight on the scale. Measures of human competence rarely reach that level of perfect consistency. Graders who evaluate candidates' writings or other performances may apply slightly different standards. Even if a licensing body relies primarily on multiple-choice questions, the difficulty of those questions may vary over time. Perfect consistency is unlikely in licensing, but we should be reasonably confident that a candidate who passes one version of an assessment would pass another version given at a different time or graded by a different examiner.¹⁸

¹⁶ See Kane, *supra* note 14, at 8–9 (explaining the evolution of this “argument-based approach to validation”); STANDARDS FOR TESTING, *supra* note 13, at 13–19 (discussing types of validity evidence).

¹⁷ See Joanne E. Kane & Andrew A. Mroch, *Testing Basics: What You Cannot Afford Not to Know*, 86 THE BAR EXAM’R 32 (Sept. 2017) (describing NCBE’s 2011–2012 job analysis, which was “used in concert with the opinions of subject matter experts to shape the test blueprints and subject matter outlines” for the bar exam components designed by NCBE).

¹⁸ Candidates themselves may change over time, as their preparation increases or their memories fade. Reliability in testing means that a candidate’s score should not vary based on the exam version they take.

3. Fairness. Fairness in assessment means that all test-takers have “the opportunity . . . to demonstrate their standing on the [competencies] the test is intended to measure,” without the interference of irrelevant conditions or characteristics.¹⁹ Biases in the test or test processes related to race, gender, sexual orientation, or disability should not affect the test results. Nor should a licensing assessment require expensive preparation (beyond tuition paid for attaining the relevant degree) that some candidates struggle to afford.

4. Feasibility. Feasibility means that the licensing authority can administer a valid, reliable, and fair assessment without imposing unreasonable burdens on itself or candidates.²⁰ Licensing authorities, however, should not be too quick to reject new methods as lacking feasibility. When considering the feasibility of new proposals, it is important to account for all costs of the status quo. Recognizing those costs may reveal that new methods are as feasible—or even more feasible—than existing methods.²¹

B. The Bar Exam

All United States jurisdictions rely upon a written bar exam to measure the competence of at least some candidates.²² Thirty-nine states and the District of Columbia administer the

¹⁹ STANDARDS FOR TESTING, *supra* note 13, at 51; *see also* Liesbeth K.J. Baartman, et al., *The Wheel of Competency Assessment: Presenting Quality Criteria for Competency Assessment Programs*, 32 STUD. EDUC. EVALUATION 153, 158 (2006) (“Fairness specifies that [an assessment process] should not show bias to certain groups of learners and [should] reflect the knowledge, skills and attitudes of the competency at stake, excluding irrelevant variance.”) (citations omitted).

²⁰ Norcini & McKinley, *supra* note 13, at 240.

²¹ *See* C.P.M. van der Leuten, *The Assessment of Professional Competence: Developments, Research and Practical Implications*, 1 ADVANCES IN HEALTH SCIS. EDUC. 41, 62 (1996) (“perceived resource intensive assessment methods turn out to be feasible in practice”).

²² Two states, New Hampshire and Wisconsin, admit some candidates based on their work at in-state law schools but require candidates from other states to pass a bar exam.

Uniform Bar Exam (UBE), which is created by the National Conference of Bar Examiners (NCBE).²³

The remaining eleven states develop their own written exams, sometimes incorporating portions of the UBE.²⁴

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

A nationwide study by independent scholars further underscores the mismatch between current bar exams and entry-level law practice. That study convened 50 focus groups of new

²³ For a description of the UBE and states that have adopted it, see *Uniform Bar Examination*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/ube/> (last visited July 14, 2023).

²⁴ *Id.*

²⁵ See, e.g., Andrea A. Curcio, Carol L. Chomsky & Eileen Kaufman, *Testing, Diversity, and Merit: A Reply to Dan Subotnik and Others*, 9 U. MASS. L. REV. 206, 222–44 (2014); DEBORAH JONES MERRITT & LOGAN CORNETT, BUILDING A BETTER BAR 3-4 (Dec. 2020); Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931, 958 (2020); Marsha Griggs, *An Epic Fail*, 64 HOW. L. J. 1, 39 (2020).

²⁶ Susan M. Case, *The Testing Column: The NCBE Job Analysis: A Study of the Newly Licensed Lawyer*, 82 THE BAR EXAM'R 52 (Mar. 2013); KELLIE EARLY ET AL., PHASE 2 REPORT: 2019 PRACTICE ANALYSIS, (NCBE Mar. 2020) <https://nextgenbarexam.ncbex.org/reports/phase-2-report/>.

²⁷ EARLY, ET AL., *supra* note 26, at 42.

²⁸ MERRITT & CORNETT, *supra* note 25, at 37.

²⁹ *Id.* at 64.

³⁰ Joan W. Howarth, *The Case for a Uniform Cut Score*, 42 J. OF THE LEGAL PRO. 69 (2017).

lawyers and supervisors in 18 locations across the country to explore entry-level law practice in detail.³¹ Analysis showed that 12 interlocking building blocks define minimum competence to practice law:

- The ability to act professionally and in accordance with the rules of professional conduct
- An understanding of legal processes and sources of law
- An understanding of threshold concepts in many subjects
- The ability to interpret legal materials
- The ability to interact effectively with clients
- The ability to identify legal issues
- The ability to conduct research
- The ability to communicate as a lawyer
- The ability to see the “big picture” of client matters
- The ability to manage a law-related workload responsibly
- The ability to cope with the stresses of legal practice
- The ability to pursue self-directed learning³²

Current bar exams test fewer than half of these competencies, despite their importance in protecting clients.

NCBE is developing a new exam, the “NextGen” bar exam, that will attempt to address some of these deficiencies.³³ The exam, however, will still require significant memorization—often of common-law rules that no longer govern client matters.³⁴ It will also fail to test legal research and other skills effectively, despite the prominence of those skills in NCBE’s practice analyses.³⁵ Concerns about speededness and setting the passing score also remain.³⁶

³¹ MERRITT & CORNETT, *supra* note 25, at 13–20.

³² *Id.* at 31.

³³ NAT’L CONF. OF BAR EXAM’RS, NEXTGEN BAR EXAM OF THE FUTURE: BAR EXAM CONTENT SCOPE 1–4 (May 2023), <https://nextgenbarexam.ncbex.org/pdfviewer/ncbe-nextgen-content-scope-may-24-2023/>.

³⁴ *Id.* at 5–38 (noting with an asterisk the doctrinal rules that must be memorized).

³⁵ NCBE will assess negotiation and client counseling skills only through analysis of transcripts and other written exercises. *Id.* at 2. Similarly, the NextGen exam will test research skills in a truncated manner, *id.* at 3, rather than giving candidates access to electronic databases and other sources to perform research.

³⁶ HOWARTH, *supra* note 4, at 143–5 (discussing ongoing problems with speededness and standard setting).

In contrast to these validity issues, contemporary bar exams provide relatively high reliability. The large number of multiple-choice questions, regular equating, and the scaling of essay scores to multiple-choice outcomes all contribute to consistency over time.³⁷ As NCBE acknowledges, however, “perfect consistency across graders, essays, time, and administrations is challenging and, perhaps, unrealistic.”³⁸ Scholars have noted numerous flaws in the exam’s reliability based on changes in its content, variations in testing conditions, relative grading of essay answers, and the process for scaling essay scores to multiple-choice ones.³⁹ Reliability is a strength of current bar exams, but it is not ironclad.

Scholars have also questioned the bar exam’s fairness, noting that it sharply favors white test-takers over examinees of color.⁴⁰ In 2021, the most recent year for which data is available, 84.91% of white examinees passed a bar exam on their first try, compared to 60.89% of Black examinees, 71.92% of Hispanic examinees, 78.54% of Asian examinees, and 76.14% of multiracial examinees.⁴¹ These gaps, ranging from six to twenty-four percentage points, have persisted for at least twenty-five years and show little sign of narrowing.⁴²

³⁷ Mark A. Albanese, *The Testing Column: Equating the MBE*, 84 THE BAR EXAM’R 29 (Sept. 2015) (equating); Mark A. Albanese, *The Testing Column, Let the Games Begin: Jurisdiction-Shopping for the Shopaholics (Good Luck With That)*, 85 THE BAR EXAM’R, 51, 51–52 (Sept. 2016) (number of questions and scaling).

³⁸ *Id.* at 51.

³⁹ See, e.g., Deborah J. Merritt, *Equating, Scaling, and Civil Procedure*, LAW SCHOOL CAFE (Apr. 16, 2015), <https://www.lawschoolcafe.org/2015/04/16/equating-scaling-and-civil-procedure/> (changes in content); Deborah J. Merritt, *ExamSoft: New Evidence from NCBE*, LAW SCHOOL CAFE (July 14, 2015), <https://www.lawschoolcafe.org/2015/07/14/examsoft-new-evidence-from-ncbe/> (variations in testing conditions); Suzanne Darrow-Kleinhaus, *A Reply to the National Conference of Bar Examiners: More Talk, No Answers, So Keep on Shopping*, 44 OHIO N. L. REV. 173, 175–83 (2019) (relative grading and scaling).

⁴⁰ HOWARTH, *supra* note 4, at 7-9; Curcio, Chomsky & Kaufman, *supra* note 25, at 271–75.

⁴¹ AM. BAR ASS’N, LEGAL EDUCATION AND ADMISSIONS TO THE BAR, SUMMARY BAR PASS DATA: RACE, ETHNICITY, AND GENDER 2021 AND 2022 BAR PASSAGE QUESTIONNAIRE, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2022/2022-bpq-national-summary-data-race-ethnicity-gender-fin.pdf [hereinafter ABA DATA].

⁴² See 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

Bar exams also favor male candidates over female ones, although the gap is smaller than the one related to race/ethnicity.⁴³ Many candidates who live with disabilities also struggle with bar exams, although statistics about their pass rates are not readily available.⁴⁴ The time-intensive, expensive preparation for these exams, finally, produces lower pass rates for examinees who lack financial resources or shoulder caretaking responsibilities.⁴⁵ All of these issues undercut the fairness of existing bar exams, a fact that is particularly troubling in light of the exam's validity issues.

Bar exams, finally, are very expensive. Test-makers must continuously produce questions, vet those questions for bias, and subject them to pre-testing. Jurisdictions must arrange for testing venues, proctors, and other security measures. After administration of each exam, jurisdictions and NCBE must grade the exams, equate results, and scale essay scores. A recent analysis shows that just one of these elements—administering the exam—costs California more than \$5,600,000 per year.⁴⁶

[<https://perma.cc/MWA2-WHSB>] (showing, inter alia, eventual pass rates of 77.6% for Black candidates and 96.7% for White candidates); NAT'L CONF. OF BAR EXAM'RS, IMPACT OF ADOPTION OF THE UNIFORM BAR EXAMINATION IN N.Y. 166 tbl.4.2.24 (2019), <https://www.nybarexam.org/UBEReport/NY%20UBE%20Adoption%20Part%202%20Study.pdf> [<https://perma.cc/GFT8-MMNA>] (finding that 68.5% of Black candidates passed and 90.1% of White candidates passed); THE STATE BAR OF CAL., CALIFORNIA BAR EXAMINATION STATISTICS, <https://www.calbar.ca.gov/admissions/law-school-regulation/exam-statistics> [<https://perma.cc/EV2Z-587T>] (through clickable links, showing similar disparities from 2007–2023 across multiple racial and ethnic categories every year).

⁴³ See Deborah Jones Merritt, Public Comment to the State Bar of California 6 (Apr. 10, 2023) (calculating a gender gap of 4.4 percentage points in California and of 2.9 percentage points nationally) (on file with authors).

⁴⁴ See generally Haley Moss, *Raising the Bar on Accessibility: How the Bar Admissions Process Limits Disabled Law School Graduates*, 28 AM. U. J. GENDER SOC. POL'Y & L. 537 (2020) (describing many hardships encountered by examinees who live with disabilities).

⁴⁵ ACCESSLEX INSTITUTE, ANALYZING FIRST-TIME BAR EXAM PASSAGE ON THE UBE IN N.Y. STATE 11, 15, 38 (May 19, 2021), accesslex.org/NYBOLE (significant time available for bar prep study, minimal work obligations, smaller household size, and higher household income positively correlate with first-time bar passage rates).

⁴⁶ Meeting of the State Bar of Cal. (June 28, 2023), <https://board.calbar.ca.gov/Agenda.aspx?id=16985&tid=0&show=100035783>. California's Committee of Bar Examiners has proposed reducing those costs by cutting administration sites and moving portions of the exam online. *Id.* Even those measures, which would inconvenience test-takers, would reduce costs just to \$3,692,100. *Id.*

The heaviest expenses, however, fall on examinees. In addition to paying for much of the exam development and administrative costs through fees, examinees purchase expensive bar-preparation courses and forego income while studying for the exam.⁴⁷ Those costs are not an inevitable by-product of licensing; they stem from the type of assessment that states have chosen to employ. Bar exams, in sum, are feasible—but it is an expensive feasibility.

C. *New Methods of Assessing Lawyering Competence*

Methods of assessing lawyering competence have varied over the course of United States history. States have relied upon apprenticeships, oral exams, diploma privilege, and the written exam.⁴⁸ Too often, states designed their methods to exclude “undesirables” from the profession.⁴⁹ Our current exams are rooted in those exclusionary tactics.

Concerns about the exams’ validity, combined with this legacy of exclusion, have started to generate new approaches. In 2005, New Hampshire founded the Daniel Webster Scholars Honors Program.⁵⁰ Students participating in that program, which is run by the University of New Hampshire’s Franklin Pierce School of Law, pursue a structured curriculum that includes clinics and other experiential coursework.⁵¹ While completing that work, they assemble portfolios of

⁴⁷ Karen Sloan, *Does the bar exam cost too much? These law pros think so*, REUTERS (Apr. 22, 2022), <https://www.reuters.com/legal/legalindustry/does-bar-exam-cost-too-much-these-law-profs-think-so-2022-04-22/> (when all the costs are combined, examinees can expect to spend \$2,000–\$10,000 to prepare for and take the bar exam—an amount that does not include lost income during the 6–10 weeks spent studying); Marsha Griggs, *Privatization, Profits, and Perpetuation: Antiracism and the Bar Exam Industrial Complex*, in 6 BUILDING AN ANTIRACIST LAW SCHOOL, LEGAL ACADEMY, AND LEGAL PROFESSION __ (University of California Press forthcoming 2024).

⁴⁸ HOWARTH, *supra* note 4, at 15–21.

⁴⁹ *Id.* at 23–30.

⁵⁰ ALLI GERKMAN & ELENA HARMAN, AHEAD OF THE CURVE: TURNING LAW STUDENTS INTO LAWYERS: A STUDY OF THE DANIEL WEBSTER SCHOLAR HONORS PROGRAM AT THE UNIVERSITY OF NEW HAMPSHIRE SCHOOL OF LAW 5 (Jan. 2015).

⁵¹ *Id.* at 6–9. See also *Daniel Webster Scholar Honors Program*, UNIV. OF N.H. FRANKLIN PIERCE SCHOOL OF LAW, <https://law.unh.edu/academics/daniel-webster-scholar-honors-program> (last visited July 14, 2023).

writings, videos, and other materials that demonstrate their competence to practice law.⁵² Bar examiners review the portfolios and, if they find a student minimally competent, that student may be admitted to the New Hampshire bar without taking the bar exam.⁵³ A study demonstrated that graduates using this licensing path were better prepared to represent clients than peers who took the traditional bar exam, a fact confirmed by employers of Daniel Webster graduates.⁵⁴

Several other states are exploring similar “experiential education pathways” that could substitute for the bar exam. The Oregon Supreme Court has approved such a pathway “in concept,” and a committee is working to create a more detailed plan for that pathway.⁵⁵ The Minnesota Board of Law Examiners has recommended that the state’s Supreme Court appoint an “Implementation Committee” to explore and develop a curricular licensing path.⁵⁶ Committees in Georgia and Washington state have also recommended creation of committees to develop experiential education pathways.⁵⁷

Two jurisdictions adopted a different approach during the pandemic, allowing candidates to bypass the bar exam and demonstrate their competence through a period of law practice supervised by a licensed attorney. Utah limited this option to graduates of some law schools and

⁵² GERKMAN & HARMAN, *supra* note 50, at 11.

⁵³ *Id.*

⁵⁴ *Id.* at 13–14, 17–20.

⁵⁵ See Merritt, *supra* note 9, at 2747 (2023).

⁵⁶ MINNESOTA BOARD OF LAW EXAMINERS, COMPREHENSIVE COMPETENCY STUDY: REP. AND RECOMMENDATIONS 41–42 (June 1, 2023), <https://www.ble.mn.gov/wp-content/uploads/2023/06/Board-of-Law-Examiners-Report-to-Court-Comprehensive-Competency-Evaluation-June-1-2023.pdf> [hereinafter MINNESOTA COMPETENCY STUDY].

⁵⁷ KEITH R. BLACKWELL, ET AL., PRELIMINARY REPORT OF THE GEORGIA LAWYER COMPETENCY TASK FORCE, Appendix A (Dec. 21, 2022), (proposing a pilot experiential pathway to licensure); [Washington cite to be added when available].

required them to log 360 practice hours.⁵⁸ The District of Columbia granted provisional licenses to specified graduates that allowed them to practice under supervision for three years.⁵⁹ After that time elapses, the graduates' licenses will mature into unrestricted ones.⁶⁰

Oregon has also developed a supervised-practice pathway for demonstrating competence, which it offered to candidates who failed its February 2022 bar exam. The hearing unit failed at the venue for that exam, creating inhospitable exam conditions. Rather than forcing candidates who failed that exam to retake it, Oregon has offered them provisional licenses and the opportunity to demonstrate their competence by practicing under a licensed attorney's supervision.⁶¹ The candidates in this program, like those in New Hampshire's Daniel Webster Program, are creating portfolios of work product that are assessed for competence by the state's bar examiners. If the examiners deem a candidate's work minimally qualified and they complete the required number of supervised-practice hours, the candidate will receive a full license without retaking the bar exam.

Oregon is developing a more permanent version of this program that the Oregon Supreme Court has approved in concept. A committee has already proposed detailed rules to govern that program and received public comment.⁶² Groups in at least two other states, California and

⁵⁸ Order for Temporary Amendments to Bar Admission Procedures During COVID-19 Outbreak at 2–4, 8, *In re Matter of Emergency Modifications to Utah Supreme Court Rules of Professional Practice, Rules Governing Admission to the Utah State Bar* (Utah Apr. 21, 2020), <https://images.law.com/contrib/content/uploads/documents/292/Utah-Bar-Exam-order.pdf>. The court limited eligibility for this pathway to recent graduates of ABA-accredited law schools that recorded a 2019 first-time bar exam pass rate of 86% or higher. *Id.* at 1.

⁵⁹ Order, No. M269-20, at 6 (D.C. Sept. 24, 2020), https://www.dccourts.gov/sites/default/files/2020-09/ORD_269-20.pdf.

⁶⁰ *Id.*

⁶¹ See Merritt, *supra* note 9, at 2748–49 (describing Oregon program).

⁶² See *Licensure Pathway Development Committee*, OR. STATE BAR, <https://lpdc.osbar.org/> (last visited July 14, 2023) (Oregon website displaying proposed rules and seeking public comment through May 12, 2023).

Washington, are also exploring supervised-practice options for demonstrating minimum competence.⁶³

California has already implemented two supervised-practice programs that underlie the data analyzed in this article. Through its Original Provisional Licensure Program (“Original PLP”), California allowed 2020 law school graduates to practice under a licensed lawyer’s supervision while waiting to take and pass the bar exam.⁶⁴ That program remains in effect through December 31, 2025.⁶⁵ California’s other Provisional Licensure Program, the “Pathway PLP,” applies to individuals who obtained a score of 1390 through 1439 on any California bar exam administered between July 2015 and February 2020. Those scores fell below California’s passing score at the time the exams were taken but would satisfy the lower passing score that California adopted in spring 2020.⁶⁶ The state refused to apply the new score retroactively but offered recent test-takers the opportunity to demonstrate their minimum competence by completing 300 hours of supervised legal practice and obtaining a positive evaluation from their supervisor(s).⁶⁷

So far, all these curricular and practice-focused licensing paths exist alongside the bar

⁶³ [CA and WA cites to be added in August.] A working group in Minnesota also recommended development of a supervised-practice pathway, but the Minnesota Board of Law Examiners decided to explore development of an experiential education path first. MINNESOTA COMPETENCY STUDY, *supra* note 56, at 43–44.

⁶⁴ See Order Re Request for Approval of Proposed Amendment to the Rules of Professional Conduct of the State Bar of California, Administrative Order 2020-01-21-01 (Cal., Oct. 22, 2020), <https://newsroom.courts.ca.gov/sites/default/files/newsroom/2020-10/Admin%20Order%202020-10-21.pdf> (describing the program and requirements for participation).

⁶⁵ See *Provisionally Licensed Lawyers*, THE STATE BAR OF CAL., <https://www.calbar.ca.gov/Admissions/Special-Admissions/Provisionally-Licensed-Lawyers#:~:text=The%20original%20program%20allows%20eligible,of%20the%20provisionally%20licensed%20lawyers> (last visited July 14, 2023).

⁶⁶ See Letter from Jorge E. Navarrete, Clerk and Exec. Officer, Sup. Ct. of Cal., to Alan K. Steinbrecher, Chair, Cal. State Bar Bd. of Trs. (July 16, 2020), https://newsroom.courts.ca.gov/sites/default/files/newsroom/document/SB_BOT_7162020_FINAL.pdf.

⁶⁷ Order Re Request for Approval of Proposed Amendments to the California Rules of Court at 3, Administrative Order 2021-01-20 (Cal. Jan. 28, 2021), https://newsroom.courts.ca.gov/sites/default/files/newsroom/2021_01/20210128062716391.pdf (describing program requirements and participant eligibility).

exam. Candidates in the states discussed above may still choose to demonstrate their competence by passing a written bar exam. The innovative pathways offer candidates an option, allowing them to demonstrate their competence in a different and rigorous manner.

D. Research Questions

New approaches to assessing minimum competence have generated questions about the validity, reliability, fairness, and feasibility of these methods. Substantial research in health care workplaces suggests that measurements of competence rooted in supervised practice can meet those four criteria.⁶⁸ A study of New Hampshire's Daniel Webster program, meanwhile, demonstrated that graduates of that program are more competent than those who pass the bar exam.⁶⁹ Additional evidence about the value of alternative licensing paths, however, is missing in the legal field.

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

1. Can supervised practice support a valid measure of a candidate's minimum competence to practice law?

⁶⁸ See, e.g., Cees P.M. van der Vleuten & Lambert W.T. Schuwirth, *Assessing Professional Competence: From Methods to Programmes*, 39 *Med. Educ.* 309, 310–14 (2005) (reliability and validity); Nyoli Valentine et al., *Fairness in Human Judgment in Assessment: A Hermeneutic Literature Review and Conceptual Framework*, 26 *ADVANCES HEALTH SCIS. EDUC.* 713, 720–30 (2021) (fairness); Jennifer M. Weller, et al., *Key Dimensions of Innovations in Workplace-Based Assessment for Postgraduate Medical Education: A Scoping Review*, 127 *Br. J. Anaesthesia* 689 (2021) (feasibility).

⁶⁹ GERKMAN & HARMAN, *supra* note 50 at 13–14, 17–20.

2. Is assessing competence through supervised practice fair to candidates?
3. Is supervised practice a feasible method of assessing that competence?

Our data cannot answer every facet of these questions; nor does our data address the reliability of supervised-practice systems that assess competence through independent examination of candidates' work product, a critical component of most systems.⁷⁰ The data, however, offers key insights into the validity, fairness, and feasibility of supervised-practice pathways that should encourage stakeholders to further explore those options.

II. The Dataset

Our analyses draw upon three deidentified datasets provided by the State Bar of California.⁷¹ Each dataset includes demographic information about a surveyed population, together with survey responses from that population. In this Section, we briefly describe the survey population for each dataset, the survey method, and the response rate for each survey. We also report demographic information for the survey respondents and explore issues of response bias.

A. Populations

The three datasets reflect three populations that the State Bar surveyed: (1) all candidates for licensure who participated in either the Original Provisional Licensure Program (Original PLP) or the Pathway Provisional Licensure Program (Pathway PLP);⁷² (2) all supervisors who

⁷⁰ For studies addressing reliability, see the sources cited in note 223 *infra*.

⁷¹ Population members in each dataset were represented by code numbers, with all personally identifying information removed.

⁷² California refers to candidates who used either PLP as "provisionally licensed lawyers" or "provisional licensees," reflecting the fact that these candidates received provisional licenses allowing them to practice under supervision. We use the more general term "candidates," to reflect the fact that these individuals were still candidates for bar admission while participating in the PLP.

participated in either of the PLPs; and (3) all individuals who were still eligible for the Pathway PLP in September 2022, but had not enrolled in the Pathway.⁷³ The Bar did not attempt to survey individuals who qualified for the Original PLP but did not participate.

The first population consists of 1585 individuals: 912 who participated in the Original PLP, and 673 who participated in the Pathway PLP. The second population (supervisors) consists of 1393 individuals. Among those supervisors, 738 participated in the Original PLP; 613 in the Pathway PLP; and 42 in both programs. The final population, those who qualified for the Pathway PLP but had not enrolled, consists of 1154 individuals.

The State Bar database includes self-reported information about race/ethnicity and gender identity for most of the individuals in these three populations. For the first population, the database also includes self-reported sexual orientation.⁷⁴ Table 1 reports that demographic data for each of the three populations.⁷⁵

⁷³ This population omitted any individuals who originally qualified for the Pathway PLP but had retaken and passed the bar exam before September 2022.

⁷⁴ The database also included some information about age and, for supervisors, practice sector. The data in those categories, however, was too incomplete to contribute to our analyses.

⁷⁵ For each demographic category, the table omits participants for whom information is unavailable. Among candidates, 79 (5.0%) did not identify their race/ethnicity; 15 (1.0%) did not identify gender; and 449 (28.3%) did not identify sexual orientation. Among supervisors, 214 (15.4%) did not identify their race/ethnicity, and 157 (11.3%) did not identify gender. Among candidates who were eligible for the Pathway Program but did not participate, 47 (4.1%) did not identify their race/ethnicity, and 22 (1.9%) did not identify gender. The percentages in Table 1 include only participants who provided each type of demographic data.

Table 1: Population Demographics

	Candidates Participating in Either PLP	Supervisors Participating in Either PLP	Candidates Eligible for the Pathway PLP Who Did Not Participate
Race/Ethnicity⁷⁶			
Asian	242 16.1%	137 11.6%	276 24.9%
Black	135 9.0%	65 5.5%	88 7.9%
Latino	264 17.5%	105 8.9%	124 11.2%
Other	220 14.6%	153 13.0%	37 3.4%
White	645 42.8%	719 61.0%	582 52.6%
Total	1506	1179	1107
Gender			
Female	877 56.2%	436 35.3%	565 49.9%
Male	674 43.2%	783 63.3%	565 49.9%
Nonbinary	10 0.6%	17 1.4%	2 0.2%
Total	1561	1236	1132
Sexual Orientation			
Heterosexual	1033 90.9%	NA	NA
LGBTQIA+	103 9.1%	NA	NA
Total	1136	NA	NA

B. Survey Design and Distribution

The State Bar developed a survey for each of the three populations described above. The surveys of candidates and supervisors probed their experiences with the PLP and sought some

⁷⁶ California allows attorneys to choose among nine options for identifying their race/ethnicity. Following the practice in California’s public reports, we have combined five of those options into a single “Other” category. Those five options are American Indian or Alaska Native, Middle Eastern or North African, Multiracial, Native Hawaiian or Other Pacific Islander, and Other.

additional demographic information. The third survey, addressed to individuals who were eligible for the Pathway PLP but did not participate, explored why they did not take part.

Surveys were administered through Qualtrics. The State Bar emailed the link to population members on October 3, 2022, inviting them to respond by October 12, 2022. Initial response rates were good, but the State Bar re-opened the surveys on October 21, 2022, allowing additional responses through October 28, 2022.

C. *Response Rates and Response Bias*

About one-third of supervisors (32.0%) answered at least one survey question, and 28.6% completed the full survey. The response rate was even higher among candidates: almost half of them (47.8%) answered at least one survey question, while 41.7% completed the full survey. The response rate for the third population, individuals who were eligible for the Pathway PLP but did not participate, was similar to that of candidates who did participate: 47.2% answered at least one question, and 46.4% completed the entire survey.⁷⁷

These response rates are in line with response rates for other online surveys.⁷⁸ Recent research, moreover, demonstrates that surveys administered to more than 1,000 population members achieve representative results with response rates as low as 10%.⁷⁹ All three of California's survey populations exceeded 1,000 members, suggesting that survey responses very likely represent experiences of the full survey populations.

⁷⁷ In all three populations, a few individuals opened the survey and (in some cases) answered a single demographic question. We counted these individuals as nonrespondents.

⁷⁸ See, e.g., Meng-Jia Wu, Kelly Zhao & Francisca Fils-Aime, *Response Rates of Online Surveys in Published Research: A Meta-Analysis*, 7 COMPUTS. IN HUM. BEHAV. REPS. 100206 at 7 (2022) (average response rate for online surveys administered to 701–2,500 participants is 33.4%).

⁷⁹ Kevin Fosnacht et al., *How Important Are High Response Rates for College Surveys?*, 40 REV. HIGHER EDUC. 245, 253 (2017).

D. Demographics of Respondents

Two of the California surveys sought additional demographic information about respondents. For both candidates and supervisors who participated in the PLP, the surveys gathered data on the type of organization in which they practiced. The survey of participating candidates also gathered information about whether they were first-generation college graduates and whether they identified as individuals living with disabilities. Table 2 summarizes that information.⁸⁰ We caution that this data reflects the demographic composition of respondents to the two surveys, not the full populations who received those surveys.

Table 2: Additional Demographics of Survey Respondents

	Candidates Participating in Either PLP	Supervisors Participating in Either PLP
Practice Organization⁸¹		
Solo Practitioner	225 33.8%	150 34.9%
Other Law Firm	297 44.7%	178 41.4%
Corporation	36 5.4%	15 3.5%
Prosecutor	17 1.1%	3 0.7%
Public Defender	22 3.3%	7 1.6%
Judicial	5 0.8%	2 0.5%
Other Government	22 3.3%	12 7.2%
Legal Aid	74 11.1%	31 2.8%

⁸⁰ Among candidates, we lacked data about organization type for 91 respondents (12.0%); about first-generation status for 93 (12.3%); and about disability for 98 (12.9%). We lacked organizational data for 16 supervisors (3.6% of those respondents). Percentages in the table reflect only the pool for which we had information on that variable.

⁸¹ Percentages for candidates sum to more than 100% because some candidates worked with more than one supervisor.

	Candidates Participating in Either PLP	Supervisors Participating in Either PLP
Other Nonprofit	56 8.4%	26 6.0%
Education	18 2.7%	6 1.4%
Total	666	430
First-Generation Status		
First-Generation College	208 31.3%	NA
First-Generation JD	308 46.4%	NA
Parent Earned JD	148 22.3%	NA
Total	664	NA
Disability		
Living with a Disability	121 18.4%	NA
Not Living with a Disability	538 81.6%	NA
Total	659	NA

E. *Response Bias*

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

We did find that, among both candidates and supervisors, participants in the Pathway Program were significantly more likely to respond than those in the Original Program ($p < .001$).⁸² The Pathway Program was more distinctive than the Original one; it allowed candidates who had failed the bar exam to demonstrate their competence without retaking the exam. That feature may have generated particular interest among both candidates and supervisors. Participants in the Original Program, in contrast, may have viewed it as a stopgap measure designed to accommodate bar-takers during the pandemic. Once the pandemic eased, they may have had less interest in responding to a survey about the program.

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

III. Results

In this Section, we summarize survey results related to our three research questions addressing validity, fairness, and feasibility. We draw upon responses to all three surveys, reporting insights from (1) candidates who participated in the Original or Pathway Program; (2)

⁸² We computed all p values using SPSS version 28. To compare categorical variables, we used the chi-square test. To compare dichotomous means, we conducted independent sample t-tests. For analysis of means from multiple groups, we conducted a one-way analysis of variance (ANOVA).

supervisors who participated in either program; and (3) candidates who were eligible for the Pathway Program but did not participate.

A. Validity

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

We outline three types of validity evidence below. First, we examine the breadth of skills exercised by candidates during their supervised practice. Second, we discuss the doctrinal knowledge used by those candidates. These two discussions are like the content analysis that experts perform when assessing the validity of a written licensing test.⁸³ We ask, how well does this assessment method (supervised practice) sample the skills and knowledge required for entry-level law practice? Finally, we report comments from supervisors comparing the performance of candidates to newly licensed lawyers. These comments are anecdotal, but they represent the perceptions of professionals with hands-on knowledge of a supervised-practice program.

⁸³ See *e.g.*, THE STATE BAR OF CAL., THE PRACTICE OF LAW IN CALIFORNIA: FINDINGS FROM THE CALIFORNIA ATTORNEY PRACTICE ANALYSIS AND IMPLICATIONS FOR THE CALIFORNIA BAR EXAM, FINAL REPORT OF THE CALIFORNIA PRACTICE ANALYSIS WORKING GROUP, 4 (May 11, 2020) (content validation of a licensing exam requires a compilation of data about the skills and knowledge entry level lawyers need to perform competently), [hereinafter CAPA WORKING GROUP STUDY].

1. Lawyering Skills. Practice analyses repeatedly stress the centrality of lawyering skills in establishing minimum competence.⁸⁴ California's survey asked candidates whether they had used any of six essential skills during their supervised practice:

- Drafting and writing
- Research and investigation
- Issue-spotting and fact investigation
- Counseling/advising
- Litigation skills
- Communicating with clients and maintaining client relationships⁸⁵

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

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

I have been exposed to client intake, interviewing witnesses, drafting law and motion pleadings. I have conducted extensive legal research for all cases, drafted various motions throughout the litigation process for each case, argued motions, prepared cases for both bench and jury trial, prepared and responded to discovery, participated in depositions, participated in bench and jury trials, drafted dispositive motions, and worked on appellate matters.⁸⁶

⁸⁴ See *supra* notes 27–32 and accompanying text.

⁸⁵ California had previously identified these skills as the ones most essential to assess in a licensing process. CAPA WORKING GROUP STUDY, *supra* note 83, at 18–19.

⁸⁶ CR1811[Q12b]. All survey comments were submitted anonymously and are designated here by code numbers. Throughout the Article, we have edited comments for brevity, clarity, and minor stylistic errors. The prefix “CR” indicates comments from candidates. “SR” indicates supervisors’ comments. The number in brackets at the end of comment citations refers to the survey question that elicited the comment.

Another reflected: “There is no match for the depth and breadth of experience that I've gained from working in legal aid, whether it's interviewing clients and gathering facts, negotiating with opposing parties/counsel or making arguments to a judge.”⁸⁷

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

Candidates, moreover, stressed that they exercised these skills in a deeper, more realistic way than they could on a written bar exam. “The ability to issue spot with a live person by asking the right questions and having the right ‘bedside manner’” one candidate wrote, is quite different from “picking apart a written set of facts.”⁸⁸ Similarly, “communicating with peers (particularly, opposing counsel) in a respectful way while still zealously advocating for your client,” is a skill that is difficult to measure on a written test.⁸⁹ One candidate colorfully summed up this perspective by noting:

I feel passing the bar exam and working with clients are two different skills. The bar exam is to an attorney as a cadaver is to a medical doctor. The bar exam and a cadaver are dry, blunt tools to be used in school. After you graduate, you must develop patient/client skills.⁹⁰

⁸⁷ CR2651[Q20].

⁸⁸ CR548[Q40].

⁸⁹ *Id.*

⁹⁰ CR860[Q22].

Supervised practice, candidates agreed, offered the opportunity to demonstrate these more complex, client-focused skills.⁹¹

Supervised practice also allowed candidates to integrate the skills they needed for law practice, rather than demonstrating competence in those skills piecemeal. “I get the advantage of meeting clients,” one candidate explained, “visualizing them as real people with real problems, and then going through their case, researching to help their case, and then applying the law to the facts in court.”⁹² Other candidates praised their ability to participate in client matters “from beginning to end.”⁹³

Supervised practice, finally, allowed candidates to demonstrate their competence in skills beyond the six specified on the survey. In particular, candidates noted that the PLP allowed them to demonstrate their ability to manage caseloads and projects.⁹⁴ As malpractice claims show, the bar exam fails to filter out lawyers who lack this critical skill.⁹⁵ Assessing competence through supervised practice protects the public by measuring a wide range of skills – including ones that cannot be assessed on a written exam.

A small percentage of candidates reported using only one (2.4%) or two (3.2%) lawyering skills in their placements. As we discuss further below, jurisdictions can avoid that limitation by structuring licensing paths to require demonstration of desired skills.⁹⁶ Overall, California’s

⁹¹ See also CR548[Q40] (describing the complexity of managing client expectations).

⁹² CR742[Q22].

⁹³ CR1699[Q12b].

⁹⁴ CR880[Q22] (“balance a busy schedule”); CR2572[Q12b] (“how to manage legal projects on a day-to-day basis”); CR2685[Q12b] (“better manage my time”); CR2223[Q20] (“manage a case calendar”).

⁹⁵ Deborah M. Nelson, *Legal Malpractice: Don’t Be the Defendant!*, AM. ASS’N FOR JUSTICE, ANNUAL CONVENTION (2013) (taking on too many cases and failing to meet deadlines are among the top causes of malpractice claims).

⁹⁶ See *infra* Part IV.

experience demonstrates that supervised practice supports assessment of a wide range of skills essential for entry-level law practice.

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

- I have managed many different types of cases involving unlawful detainer/landlord-tenant, financial/elder abuse, contract disputes, consumer debt disputes and Social Security to name a few.⁹⁷
- I have been able to learn two completely different areas of law - workers compensation/admin law and criminal defense.⁹⁸
- I run a domestic violence clinic for Santa Monica Courthouse, and virtually for all of LA County residents. I also do housing defense and housing rights advocacy.⁹⁹
- I have gained significant experience in prelitigation matters, Tax law, Estate planning, Probate, Personal injury, and other practice areas [including elder abuse, dependency, and Indian law-related issues].¹⁰⁰

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

⁹⁷ CR2651[Q12b]

⁹⁸ CR2251[Q12b]

⁹⁹ CR2464[Q12b]

¹⁰⁰ CR241P[Q12b]

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

These subjects included both ones that a California commission has recommended testing on its bar exam and others that are not commonly tested on those exams.¹⁰¹ Almost all respondents (98.0%) drew upon at least one bar subject, and 31.9% used concepts from five or more bar subjects. At the same time, an overwhelming majority of respondents (89.3%) reported using at least one subject that will not appear on California's written exam, and more than a fifth (22.7%) reported drawing upon four or more subjects that are not bar subjects. Overall, respondents reported an average of 3.5 bar subjects and 2.4 non-bar ones.

Candidates, finally, noted that they learned doctrinal subjects more deeply through supervised practice than by studying for the bar exam. "There is a vast difference between learning and reading about a concept in law school," one observed, "and actually applying that concept to your own case. The actual experience of practicing law really helps you grasp, not only

¹⁰¹ At the time the survey was designed, a California working group had recommended testing eight subjects on any written bar exam: Administrative Law and Procedure, Civil Procedure, Constitutional Law, Contracts, Criminal Law and Constitutional Protections of Accused Persons, Evidence, Real Property, and Torts. BLUE RIBBON COMM'N REPORT, *supra* note 10, at 24-25. The Blue Ribbon Commission subsequently added Professional Responsibility to the list of subjects that will be tested. *Id.* at 25. NCBE plans to test eight subjects on the NextGen exam: the original eight identified by California, except that Business Associations will replace Administrative Law and Procedure. NAT'L CONF. OF BAR EXAM'RS, *supra* note 33, at 5.

how certain laws and procedures work, but also their importance.”¹⁰² “The practical application of the law,” another agreed, “is what truly changes your view and understanding of the complexity of the law itself.”¹⁰³ These comments suggest that candidates not only were able to demonstrate their knowledge of legal doctrine through supervised practice, but that they demonstrated that knowledge in a particularly deep way.

3. Comparisons Between the Bar Exam and Supervised Practice. The PLP survey did not ask supervisors to compare the validity of the bar exam with the validity of assessments made during supervised practice, but numerous supervisors made that comparison spontaneously. “Our [candidate],” one law firm supervisor wrote, “has been the best ‘associate’ that we have had at our firm, better than associates that have passed the bar exam.”¹⁰⁴ “My employee was exceptionally qualified,” another declared, “and was having trouble passing the bar because of her first language was not English. She was better than at least 50% of attorney[s] practicing who have passed the bar.”¹⁰⁵

Other supervisors elaborated on these comparisons, noting that the hands-on work done by candidates made them more competent than peers who had studied for and taken the bar exam. Supervised practice, one supervisor remarked, provided “on the job training,” experience “dealing with clients,” and “more applicable knowledge” than the bar exam requires.¹⁰⁶ As a result, the supervisor concluded, “our [PLP] attorney is better equipped to help our law firm than

¹⁰² CR1085[Q22].

¹⁰³ CR036[Q22]. *See also* PR167[Q20] (“Studying contract law is vastly different from working on contracts at work.”).

¹⁰⁴ SR442[Q23]. “She has been working for us for over a year now,” this supervisor continued, “and in all honesty, should be considered a lawyer whether or not she passes the Bar exam. I have no hesitation in having her handle our cases.” *Id.*

¹⁰⁵ SR696[Q23].

¹⁰⁶ SR015[Q23].

someone else who passed the bar exam, but has not [had] real-life experience working in a firm and directly with clients.”¹⁰⁷ Another supervisor reported that their candidate “did an equal if not better job than some young first and second year attorneys. The training she received, and her willingness to do well and take those opportunities offered was a better indicator of her work ethic and intelligence (both factual and emotional) than a passing bar exam grade.”¹⁰⁸

B. *Fairness*

Much discussion of alternative licensing paths focuses on the fairness of those paths. Advocates of these pathways urge that they will be more equitable, reducing the disparate impact of traditional bar exams and opening the profession to more diverse members.¹⁰⁹ Skeptics, on the other hand, suggest that members of historically disadvantaged groups may struggle to secure supervisors or suffer from biased evaluations in a licensing path tied to supervised practice.¹¹⁰ Critics also suggest that these pathways may subject candidates to low pay, harassment, discrimination, and other abuses.¹¹¹

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

1. Participation Rates. California surveyed candidates who participated in the Pathway Program, as well as individuals who were eligible for that Program but did not participate. This

¹⁰⁷ *Id.*

¹⁰⁸ SR862[Q23].

¹⁰⁹ HOWARTH, *supra* note 4, at 99–135.

¹¹⁰ BLUE RIBBON COMM’N REPORT, *supra* note 10, at 39–41.

¹¹¹ *Id.*

allowed us to determine whether individuals from some demographic groups were more likely than others to take advantage of the Pathway Program. We first created a new population, the “Pathway Pool,” that included all individuals who were eligible for the Pathway Program as of fall 2022.¹¹² The second column of Table 3 summarizes the demographic information for that Pool. As the table shows, women of color were the largest demographic group eligible for the Pathway—suggesting that this historically disadvantaged group was particularly likely to benefit from the Pathway opportunity.¹¹³

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

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

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

¹¹² This pool was somewhat smaller than the pool of individuals who were eligible for the Pathway Program when it began in early 2021. Between that time and fall 2022, some candidates retook and passed the California bar exam.

¹¹³ In this analysis and subsequent ones, we collapsed all racial/ethnic categories into two groups: white candidates and candidates of color. We included candidates who designated their race/ethnicity as “other” in the latter group.

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

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

Some candidates in those groups commented specifically on the importance of the PLP to them. “I am a first generation BIPOC law student with a disability,” one wrote, and “[a]s a single parent with a disability I do not have the luxury of not earning money for months while I study for the bar.”¹¹⁴ Another candidate of color wrote: “I have gained the respect of fellow lawyers, judges, and clients from the work I do. I also got to do good work for many people in my community, have learned to zealously defend and seek justice, and fight for what is right.”¹¹⁵ And a white woman who identified herself as LGBTQIA+ shared: “I have thrived and excelled in my

¹¹⁴ CR906[Q12b].

¹¹⁵ CR1375[Q12b].

career, [after being] held back by some arbitrary test. Please allow this [Pathway] program or something comparable.”¹¹⁶

2. Finding Supervisors. California’s candidate survey asked respondents whether they had difficulty finding supervisors. As we discuss below, relatively few candidates struggled to find supervisors.¹¹⁷ Most important for fairness concerns, any difficulty did not vary significantly by race/ethnicity ($p = .756$), gender ($p = .253$), the intersection of those two variables ($p = .762$), disability ($p = .410$), or first-generation status ($p = .854$). The experience of candidates who identified as LGBTQIA+ did differ from those who identified as heterosexual ($p = .036$), but the difference cut in two directions. The LGBTQIA+ candidates were significantly more likely to report either that finding a supervisor was no problem at all or that it was a great challenge; heterosexual candidates were more likely to report small or moderate challenges.¹¹⁸

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

¹¹⁶ CR2236P[Q12b].

¹¹⁷ See *infra* Part C1.

¹¹⁸ The comparisons reported in text draw from the survey of all candidates who participated in the PLP. When we analyzed responses from candidates who were eligible for the Pathway Program but chose not to participate, we similarly found no significant differences in reported difficulty finding a supervisor based on race/ethnicity or gender. Other demographic characteristics were unavailable for those survey respondents.

3. Success and Satisfaction. A very high percentage of candidates who started the Pathway Program succeeded in obtaining their licenses through that program. By fall 2022, when the State Bar surveyed participants, 83.5% had been admitted to the bar while another 10.5% were still working towards obtaining their licenses.¹¹⁹ Women of color, men of color, and white women were slightly more successful than white men in securing licenses, but this difference was not statistically significant ($p = .686$).¹²⁰ Nor did success in obtaining a license differ significantly by disability ($p = .156$), sexual orientation ($p = .133$), or first-generation college status ($p = .289$). We did not attempt to measure success in the Original Program because candidates could not secure admission through that program.

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

Several candidates from historically disadvantaged groups commented specifically on the program's value for them. "The PLP program boosted my self-esteem," one candidate wrote. "As a formerly undocumented immigrant, queer person of color it also helped combat the imposter

¹¹⁹ The remaining 6.0% had been suspended or terminated from the program. Suspension or termination can stem from various causes, including the candidate's voluntary withdrawal, issuance of an adverse character determination, disciplinary action, or loss of an approved supervisor.

<https://newsroom.courts.ca.gov/sites/default/files/newsroom/2021-01/20210128062716391.pdf>.

¹²⁰ In these four demographic groups, the percentages who gained admission to the bar were: women of color (84.3%), men of color (84.8%), white women (83.2%), and white men (81.6%).

syndrome I experienced next to my peers. I feel valuable.”¹²¹ A first-generation college graduate commented:

I have learned so much [in the PLP] and I have met so many great people. The [PLP] title has made me feel proud of myself and how far I have come as the first person in my family to go to college. I have learned that I have a passion for helping our clients. This program was the best thing that has happened in my career.¹²²

A candidate who identified as a person living with a disability summarized: “The alternative pathway to licensure substantially improved almost every aspect of life. It allowed me to rediscover a sense of purpose and dignity, and to gain additional skills, knowledge and insights that could not have otherwise been achieved without this opportunity.”¹²³

4. Harassment and Discrimination. About one in ten candidate respondents (9.7%) reported experiencing some form of discrimination or harassment. The largest group of those respondents (4.4%) found the unwelcome treatment challenging to just a small extent. Smaller percentages found it challenging to a moderate (3.2%) or great (2.0%) extent. Respondents of color were significantly more likely than white respondents to report discrimination or harassment ($p = .013$). Candidates living with disabilities, similarly, were significantly more likely to report these negative experiences than other candidates ($p = .006$). Differences based on gender, the intersection of race and gender, sexual orientation, and first-generation status were not statistically significant.

Reports of these negative experiences are a sobering reminder that harassment and discrimination still occur in the profession—and that these burdens fall disproportionately on

¹²¹ CR1874[Q40].

¹²² CR1769[Q40].

¹²³ CR1087P[12b].

some groups.¹²⁴ Several respondents, however, noted that any discrimination or harassment they experienced in the PLP was no greater than they had encountered in other workplaces or educational settings. One Black man noted, “I initially encountered some disrespect by other attorneys [in the PLP], however, I encountered that same disrespect (or maybe more accurately “dismissiveness”) as a newly licensed bar attorney as well.”¹²⁵ A Black woman expressed a similar sentiment: “As a [PLP] attorney, I did not face discriminatory treatment that I did not already expect to face as a newly licensed, black, female attorney.”¹²⁶

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

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

¹²⁴ See, e.g., JOAN C. WILLIAMS ET AL., YOU CAN’T CHANGE WHAT YOU CAN’T SEE, INTERRUPTING RACIAL AND GENDER BIAS IN THE LEGAL PROFESSION, EXECUTIVE SUMMARY, 7–10 (2018), <https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf> (summarizing ABA study results demonstrating significant racial and gender biases and sexual harassment within the legal profession).

¹²⁵ CR1206[13b].

¹²⁶ CR2446[Q13b].

discriminated [against], I just wanted to be able to represent folks who were in need and do my job well.¹²⁷

5. Pay. California's PLP rules did not require supervisors to pay candidates. Even without a mandate, however, almost all candidates in the Original Program (93.6%) received compensation. A majority of those candidates (57.8%) were paid an annual salary, while 31.7% were paid on an hourly basis. A small percentage (4.1%) were paid on some other basis, such as by the task. Just 6.4% worked without pay.

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

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

¹²⁷ CR017[Q13b].

candidate commented, “it was still more than nothing, which allowed me to provide more income for myself and my family.”¹²⁸

Responses from individuals who pursued the Pathway program offer less useful information. Many of those individuals had already taken full-time jobs that did not require a law license, and they could not afford to leave those jobs to complete the 300 hours of legal work required by the Pathway Program. A substantial percentage (42.0%), therefore, opted to perform those hours as part-time volunteers.¹²⁹ When Pathway candidates were paid, they were somewhat more likely than candidates in the Original Program to fall in the high-compensation category, but this difference was not statistically significant ($p = .148$).

C. Feasibility

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

1. Availability of Supervisors. Almost 1,400 lawyers stepped forward to supervise the 1,585 candidates enrolled in California’s Provisional Licensure Programs. The programs attracted these supervisors, moreover, despite its novelty—and with no special support or incentives for

¹²⁸ CR710 [Q12b]. *See also* CR1883[12b] (“I was able to find a job as an attorney because I had a Provisional License and it helped me to support myself and family until I passed the Bar Exam.”).

¹²⁹ *See, e.g.*, CR1078[Q13b] (“My [Pathway] work was unpaid, as it was difficult trying to find a paid position that I could balance with my full-time job.”).

participants. This number of supervisors would accommodate more than one-quarter of the candidates seeking first-time bar admission in California each year.¹³⁰

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

Candidates found their supervisors through a variety of avenues. Close to half (45.5%) were already working in their supervisor's workplace or had received an offer to work there. Another 10.3% had previously worked for the supervisor. An existing relationship, however, was far from essential. Candidates also identified supervisors through network contacts (17.3%), by contacting potential supervisors directly (15.0%), by responding to employment advertisements (9.8%), and with assistance from their law schools (5.2%).¹³¹

These percentages, of course, reflect only the experiences of those who succeeded in finding a supervisor and enrolling in the program. The survey of candidates who were eligible for California's Pathway Program but failed to enroll, however, shows that difficulty finding a supervisor was not a major roadblock to their participation. Just 6.8% of those respondents indicated that they failed to participate in the program because they had difficulty finding a

¹³⁰ See *First-Time Exam Takers and Repeaters in 2022*, THE BAR EXAM'R, <https://thebarexaminer.ncbex.org/2022-statistics/first-time-exam-takers-and-repeaters-in-2022/> (last visited July 14, 2023) (6,091 first-time takers in California in 2022).

¹³¹ Percentages total more than 100 because some candidates reported relying upon multiple avenues.

supervisor. Instead, the most commonly cited reason for failing to participate was that the individual had not heard about the opportunity.

The few candidates who did struggle to find a supervisor suggested that their task would have been easier if the program were more established. “It was hard trying to find someone who understood the program,” one candidate wrote.¹³² “Many firms were reluctant to hire me or supervise me,” another agreed, “since this was a new program.”¹³³ “I think if we encourage [provisional licensure] and promote it, make it more known to other law firms and lawyers,” a third candidate summarized, employers “may be more open to it in the future because it does offer great training and learning opportunities.”¹³⁴

2. Supervision. Previous research suggests that new lawyers in some workplaces suffer from poor supervision.¹³⁵ The results of the California survey, however, demonstrate that lawyers are willing to provide that supervision when required to do so. More than two-thirds of candidates (68.6%) said that they benefited from “helpful supervision and feedback” during the program to a “great extent.” Another fifth (19.3%) experienced that benefit to a “moderate extent,” and 8.8% experienced it to a “small extent.” Only 3.3% of respondents indicated that they did not benefit at all from supervision or feedback.

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

¹³² CR1519[Q13].

¹³³ CR1150[Q13b].

¹³⁴ CR2734[Q13b]. *See also* CR1262[Q40] (“It would help if the State Bar did more to establish this program and communicate about it to all licensed attorneys and encouraged them to supervise [candidates] whenever possible.”); CR1515[Q40] (“The only change I would make would be for the California Bar to provide information about the program to practicing attorneys and have them sign up. Then provide that list to potential [candidates].”).

¹³⁵ MERRITT & CORNETT, *supra* note 25, at 23.

- I received the benefit of collaborating with attorneys who otherwise would not have been accessible to me.¹³⁶
- I had a wonderful mentor who taught me a lot about being a good lawyer, not just a lawyer.¹³⁷
- Great mentorship with the opportunity to work on very serious criminal cases with an incredibly skilled attorney.¹³⁸
- I am partnered up with a mentor. My mentor has an open-door policy with me. I can contact him anytime. We go over my case analysis, negotiation strategies, depositions, etc. Although I have a mentor, everyone has been very helpful in developing my skills. One senior principal works with me on writing motions for my cases and everyone is always willing to help.¹³⁹

Excellent supervision, notably, occurred in all types of organizations. Candidates who worked for solo practitioners were just as likely as other candidates to praise the supervision and feedback they received ($p = .127$). Nor did the perceived adequacy of supervision vary significantly between public interest organizations and other workplaces ($p = .211$).¹⁴⁰

The few negative comments about supervision pointed in different directions. One candidate complained that their supervisor “off-load[ed] attorney work on them but provided no training, no guidance, no additional support, no additional pay, etc.”¹⁴¹ This candidate believed that the supervisor was taking advantage of the system to obtain low-cost legal assistance without needed supervision. A different candidate protested that, because their supervisor was unwilling to provide necessary oversight, they “only gave the type of cases that could be handled without legal training.”¹⁴²

¹³⁶ CR2055[Q12b].

¹³⁷C R1314[Q12b].

¹³⁸ CR1623[Q12b].

¹³⁹ CR972[Q13b].

¹⁴⁰ Our “public interest” category includes candidates working for public defenders, legal aid organizations, and other nonprofit organizations.

¹⁴¹ CR1137[Q12b].

¹⁴² CR1867 [Q13b].

Most supervisors, however, provided helpful supervision with little or no costs to their organization. Half of all supervisors (49.4%) reported that supervising candidates imposed no costs on their organization, and another quarter (24.1%) assessed those costs as “small.” For some, these costs were small because they expected to mentor and supervise all new attorneys. As one lawyer explained, “We mentor all of our new lawyers. We take very seriously the idea that a senior lawyer should mentor a junior lawyer. We treated our [PLP lawyers] the same as any new lawyer.”¹⁴³

Some supervisors even welcomed the opportunity to supervise. “Being able to offer guidance and support to my [candidate],” one lawyer wrote, “was personally and professionally rewarding and just made me feel good to be able to share knowledge and help her grow professionally.”¹⁴⁴ This supervisor noted that, as a solo practitioner, “having a [candidate] also provided a much appreciated means to communicate and work with another person. All of that gave me something to look forward to since being an attorney, especially as a solo attorney, is often difficult and stressful.”¹⁴⁵

Some attorneys did find the burdens of supervision inconsistent with their practice structure. One supervisor noted that their firm “hardly hire[s] newly licensed bar passers,” so supervising an unlicensed attorney posed an unfamiliar challenge.¹⁴⁶ Another thought that the burdens of supervising “made the one-year period before licensure uneconomical.”¹⁴⁷ A third noted that “as a solo practitioner, [I] do not have time to do this too regularly,” although that

¹⁴³ SR098[Q12b].

¹⁴⁴ SR858[Q4b].

¹⁴⁵ *Id.*

¹⁴⁶ SR019[Q26].

¹⁴⁷ SR573 Q23].

attorney observed that the experience was “rewarding” enough that they might “do this in the future under the right circumstances.”¹⁴⁸

3. Training or Mentoring. Most organizations offered candidates some training or mentoring: Four-fifths of candidate respondents (79.8%) reported those benefits. Training and mentoring were significantly more common at public interest organizations than in other workplaces: 90.8% of candidates at public interest organizations reported receiving training or mentoring ($p < .001$). Candidates working with solo practitioners were least likely to report receiving training or mentoring, although three-quarters of them (76.2%) reported doing so.¹⁴⁹

Over two-thirds of candidates (69.8%) were fully satisfied with their training. One described the training as “tremendous,”¹⁵⁰ while another praised their “extensive training” and attendance at “multiple classes.”¹⁵¹ Candidates particularly appreciated training that covered knowledge and skills they had not learned in law school. “The education I received on process and procedure,” one wrote, “was thorough and extremely helpful. My advisor made sure she addressed my concerns about what NOT to do in court and the right way to do things. This is what I didn’t learn in law school.”¹⁵² Another noted: “Being able to work under a highly respected attorney provided training and experience I wouldn’t have been afforded” without the

¹⁴⁸ SR844[Q25]. *See also* SR276[Q23] (“Supervision of [the candidate] required a tremendous amount of hand holding to point where it was taking away from supervisor’s ability to handle her own case load. It was hoped that the [candidate] would relieve some of the workload of the attorneys but [they] had little experience and it created more work than it was a help.”).

¹⁴⁹ The percentages reported in this paragraph probably understate the percentage of candidates receiving training because the survey asked candidates whether they had participated in “training or mentoring programs.” Some candidates seemed to interpret that language as referring only to formal programs.

¹⁵⁰ CR2660[Q40].

¹⁵¹ CR1343[Q12b].

¹⁵² CR590[Q12b].

provisional licensure program. “I am a better attorney today,” this candidate concluded, “because of the [PLP] program.”¹⁵³

Smaller percentages of candidates identified insufficient training as a “moderate” (8.2%) or “great” (3.5%) challenge. These candidates were significantly more likely than other candidates to work for solo practitioners ($p = .037$). Even in this group, however, only 4.0% felt challenged to a great extent by the lack of training. Solo practitioners, as one candidate observed, were more likely to “provide[] general mentorship but not specific trainings geared toward new attorneys.”¹⁵⁴

Most supervisors did not find the training of candidates unduly burdensome. When asked whether candidates “needed more training than newly licensed lawyers,” three-fifths of supervisors (57.8%) responded that this was not at all a cost or challenge. One-fifth (20.4%) found this a challenge to a “small” extent, and 13.6% thought it was a “moderate” challenge. One-twelfth (8.3%) of supervisors termed the training of candidates a “great” challenge; one of them suggested that the State Bar should compensate supervisors for this expense.¹⁵⁵

4. Net Benefits for Supervisors and Organizations. To sustain program participation by supervisors and employers, it is helpful for those groups to experience net benefits from participation. As the previous sections indicate, supervisors experienced modest burdens from supervising and training candidates. Some reported other burdens or costs of the program, such as paying malpractice insurance premiums for candidates or being unable to use candidates for

¹⁵³ CR2621[Q12b].

¹⁵⁴ CR2070P[Q11b].

¹⁵⁵ SR203[Q10b].

all types of work. Survey responses, however, suggest that supervisors and employers experienced more benefits than burdens from the PLP. Table 4 compares mean scores on the six burdens and five benefits listed on the survey. Numerical scores ranged from 0 (“I did not experience this at all”) to 3 (“I experienced this to a great extent”).

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

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

As the table reflects, mean scores for four of the benefits exceeded scores for each of the burdens. This does not in itself mean that the benefits for supervisors exceeded the burdens; a single burden could outweigh all benefits for some individuals or organizations. The numbers,

however, suggest that on average supervisors experienced benefits to a greater extent than burdens when participating in California's PLP.

Supervisors expanded upon these ratings with detailed—and often lavish—comments about the benefits that they, their organizations, and their clients reaped from candidates in the program. In particular, supervisors praised the work ethic of their candidates. “The work product of the [candidate],” one supervisor wrote, “was superior to other ‘full’ attorneys because he would put more time and effort into preparing his cases.”¹⁵⁶ “My [candidate] was exceptional,” another supervisor agreed, “and she worked harder for me than some lawyers. She did an equal if not better job than some young first and second year attorneys.”¹⁵⁷ Three-fifths of supervisors (60.7%) experienced the benefit of hardworking candidates “to a great extent,” another fifth (22.1%) experienced it to a moderate extent, and most of the remaining supervisors (11.9%) experienced it to at least a small extent.

Supervisors also lauded the PLP for allowing them to serve more clients. Almost nine-tenths of supervisors (86.8%) experienced this benefit to some extent. One supervisor described a candidate who “stepped right up and [took] over our Unlawful Detainer practice,” which allowed the firm to handle “over 100 cases in 14 counties up and down the state.”¹⁵⁸ Another noted that “among all the other cases this [candidate] handled, we were able to take on a relatively large federal suit against a bank for consumer fraud, that we may not have had the

¹⁵⁶ SR868[Q23].

¹⁵⁷ SR862[Q23]. *See also* SR158[Q25] (candidates are “in a transitory phase which I believe makes them work harder”).

¹⁵⁸ SR097[Q4b]. *See also* SR292[Q4b] (The PLP “allowed our law grad hire to appear in court to represent the rights of tenants being unlawfully evicted and/or locked out without waiting months and months for her bar results. This was in October 2020–Feb 2021, in the very heart of the pandemic. It was very helpful to our office to be able serve more folks who needed advocates in court.”).

capacity to do otherwise.”¹⁵⁹ And a supervisor at a legal aid office underscored the importance of the PLP in increasing access to justice: “[Candidates] allowed us to provide pro bono full representation to clients, whereas we would have only had the resources to provide them with advice.”¹⁶⁰

Expanding client service was particularly important in rural parts of the state. “The [candidates] I supervised,” one supervisor commented, “were highly competent legal advocates [who] expanded the availability of legal services in under-served portions of rural California.”¹⁶¹ Another reflected: “It has been difficult to find new law school graduates who want to move to [our rural area]. Using [PLP candidates] was important to our firm in our defense of public education entities and nonprofit businesses.”¹⁶²

In addition to providing immediate service to clients, some supervisors noted the Pathway Program’s potential to permanently expand client service by allowing poor test-takers to secure licenses through supervised practice. “Our [candidate] did terrific work for us,” one supervisor explained, “and it would’ve really been a loss to society in general if she wasn’t able to practice law just because she couldn’t pass an exam.”¹⁶³ Another reflected:

The [PLP] allowed an individual who was exceptionally qualified to prove her worthiness of being an attorney. My [candidate] now works in the public sector helping indigent criminal defendants. Without the [PLP], she may have been forced to find other work outside of the law and her legal talents would have been wasted.¹⁶⁴

¹⁵⁹ SR050[Q4b].

¹⁶⁰ SR507[Q4b].

¹⁶¹ SR816[Q23].

¹⁶² SR1138[Q23].

¹⁶³ SR1130[Q23].

¹⁶⁴ SR158[Q28]. *See also* SR454[Q28] (“I know two women of color from low-income backgrounds who qualified and succeed[ed] under the program. Our bar will benefit from their admission. Both had given up and moved on and otherwise would have left the profession.”); SR1078[Q28] (“The [PLP] atty I supervised benefitted greatly from the program – it has changed his life for the better. He will ably help many clients in need as a result.”); SR539[Q4b] (“I

Supervisors, finally, extolled the PLP for helping them diversify their lawyering teams: More than three-quarters of supervisors (76.5%) reported experiencing this benefit to some extent. Some candidates spoke multiple languages, allowing their organizations “to take on cases from non-English speaking clients,”¹⁶⁵ better serve existing clients, and prepare educational workshops and materials for underserved communities.¹⁶⁶ Others expanded their organization’s reach because they understood the lives and perspectives of disadvantaged clients. One “dreamer” candidate was able “to share like experiences of illegal immigration and menial labor with clients,” allowing the organization to “expand its base and encourage others to take up these causes.”¹⁶⁷ Another supervisor explained that their candidate “bridges our firm to new client groups because she is known in her [underserved] community as having graduated from law school and is a notable client referral source.”¹⁶⁸ The “bridge” benefited both the firm and the community. “Our firm is monetarily better off,” the supervisor wrote, “and her underserved community has greater access to much needed legal referrals.”¹⁶⁹

In contrast to these benefits, supervisors complained about few burdens. The most cited challenge was obtaining or paying for a candidate’s malpractice insurance. Some supervisors may

think she just had a mental block in passing the bar. She's brilliant and capable and this program allowed her to be all that she can be.”)

¹⁶⁵ SR1019[Q4b].

¹⁶⁶ SR063[Q4b] (“She is also bilingual which allows us to continue to serve the Spanish Speaking community.”); SR083[Q4b] (“Our [candidate] is a fluent Spanish speaker and through his work, we were able to serve monolingual speaking Spanish clients and also provide workshops/clinics in Spanish. We were also able to provide interpretation/translation materials to the community based upon his language abilities.”).

¹⁶⁷ SR544[Q4b].

¹⁶⁸ SR003[Q4b].

¹⁶⁹ *Id.* See also SR019[Q4b] (the candidate “also added diversity and allowed us to reach out to new clients that were within his network”); SR464[Q4b] (the candidate provided “[u]nique personal insight into underserved area”); SR497[Q40] (“Many of the [candidates] come from backgrounds of diversity, are bi-lingual, and serve minority communities.”).

not have anticipated this cost, and at least one had difficulty reconciling the candidate's work with their policy's restrictions.¹⁷⁰ Other supervisors, however, successfully navigated the insurance issue.¹⁷¹

A few supervisors complained that candidates left their organization after obtaining their license, depriving the organization of a return on its training investment.¹⁷² A few others objected to administrative costs such as completing weekly timesheets¹⁷³ or waiting for candidates to clear character and fitness reviews.¹⁷⁴ Still others suggested that, although the administrative costs of the PLP were tolerable, they would not want to undertake any heavier burdens in a permanent program.¹⁷⁵

Even when noting burdens, finally, some respondents observed that these challenges were no greater than the costs of working with newly licensed lawyers.¹⁷⁶ And some explicitly noted that the benefits of the PLP outweighed any burdens. "This program is rare," one supervisor wrote, "in that I cannot identify one downside as it was administered in my office."¹⁷⁷

5. Satisfaction with Candidate's Work. Satisfaction with a candidate's work is an important element in establishing the feasibility of a supervised-practice licensing path. Supervisors in California's PLP reported strong satisfaction with that work. Three-fifths of supervisors (61.4%)

¹⁷⁰ SR513[Q5b] (malpractice policy "would not allow my [candidate] to do hearings or any other work a newly licensed attorney could have done independently. So she was basically limited to a law clerk position.")

¹⁷¹ SR413 Q5b] (insurer "indicated that as long as I reviewed everything my [candidate] did, and submitted nothing under his name, only under my name, they [would] not increase my premiums").

¹⁷² See SR349[Q10b] ("We saw it coming but as soon as she became licensed through this program she left. Waste of our time and training to just use us as a steppingstone."); SR386[Q10b] ("employee quit immediately after receiving her provisional license").

¹⁷³ SR554[Q5b].

¹⁷⁴ SR513 [Q10b]; SR401[Q27b]; SR015[Q 27b]; SR862[[Q27b].

¹⁷⁵ SR015[Q 27(b)]; SR401[Q27b]; SR862[Q27b].

¹⁷⁶ R0000159[Q5b]; R0000507[Q5b].

¹⁷⁷ SR711[Q25].

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

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

- The [candidate] we have hired has served many more clients and done so much more efficiently and competently than many other lawyers I have hired in the past.¹⁷⁸
- In fact, I think that our [candidate], who had taken the Bar Exam multiple times [and failed], was better equipped and had more life experience than a young associate fresh out of law school.¹⁷⁹
- As for their work product, the work product was in most cases better than what I've seen with newly licensed lawyers.¹⁸⁰
- The [candidates] we work with have been extremely sharp and just as effective as new attorneys.¹⁸¹

A few supervisors did express disappointment in the work ethic or competence of the candidates working for them.¹⁸² These supervisors, however, did not remain burdened by those candidates; they simply discontinued work with the candidate.

¹⁷⁸ SR866[Q25].

¹⁷⁹ SR159[Q5b].

¹⁸⁰ SR0507[Q5b].

¹⁸¹ SR843[Q23].

¹⁸² See, e.g., SR1006[Q4b].

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

Respondents offered numerous reasons for their willingness to continue with the program. Some reiterated the advantages to their own organizations: The program offered them a new avenue for hiring attorneys;¹⁸³ it allowed them to assess a candidate before making a permanent offer;¹⁸⁴ it allowed them to expand client services;¹⁸⁵ and it allowed them to hire competent candidates without worrying about disruptions in client service while candidates studied for the bar exam.¹⁸⁶

Others suggested that the program was important for clients and the profession because it offered a better way to assess competence than the conventional bar exam. “By participating in the actual practice of law,” one supervisor observed, “rather than memorization techniques for three months as with the current Bar Exam setup, these new attorneys learn more, focus on what is expected of them in the profession, and can hit the ground running faster when licensed

¹⁸³ SR194[Q25] (“In a tight labor market, it allows us another channel to find good lawyers.”); SR083[Q25] (“It will increase the amount of candidates/applicants for our organization.”); SR706[Q25] (“I oversee a team of over 40 attorneys and am currently trying to fill 10 more attorney positions. Considering the growth in my field and my organization, I would not hesitate to hire law grads qualified to practice through the PLP.”).

¹⁸⁴ SR015[Q25] (“We are desperate to find new lawyers. Giving them a ‘trial run’ through the [PLP] not only gives back to those trying to become lawyers, but gives us a great opportunity to find quality attorneys to help us.”).

¹⁸⁵ SR358[Q25] (“We would consider it for sure. We are a small organization, but could expand our services with a program like this!”).

¹⁸⁶ SR706[Q25] (“I would not hesitate to hire law grads qualified to practice through the PLP, if I knew it would provide a path towards licensure without requiring them to take breaks to study for and take the bar exam each February and July.”).

as compared to those who have just passed a test.”¹⁸⁷ “Good supervision while personally experiencing clients’ real life issues,” another concluded “creates better equipped lawyers.”¹⁸⁸

Several supervisors, finally, stressed the importance of a non-exam licensing path for promoting diversity while maintaining high licensing standards. “I suspect that Pathways [candidates] are more likely to be in the marginalized groups that experience testing bias,” one supervisor urged, “and we need to increase diversity in the Bar. It is important that we hear and speak with many voices of California, and the Pathway Program gives a way to do that while still ensuring the Bar is filled with rigorous professionals.”¹⁸⁹ Another supervisor, after noting that Pathway candidates were as competent as newly licensed lawyers, commented:

We have seen that there is a greater socio-economic and racial diversity of [candidates] than of those who have passed the bar. All of this means that it would serve our organizations and our clients best to continue the program and extend it.”¹⁹⁰

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

Our [candidate] has a physical disability that impacts her typing and computer usage. I have observed that while she finds workarounds, she has not consistently asked for accommodations to which she is entitled. I don't know whether she had the accommodations she needed during the bar exam, which I suspect would have impacted her score. This is another reason this program felt so important for equity issues.¹⁹¹

¹⁸⁷ SR159[Q25].

¹⁸⁸SR1297[Q25]. *See also* SR858[Q25] (“[T]he bar exam has little to nothing to do with the actual practice of law. Thus, it would be great if there were other options that have more to do with the way law is actually practiced in real life.”).

¹⁸⁹ SR003[Q25].

¹⁹⁰ SR843[Q23]. *See also* SR814[Q25] (“Our firm seeks to hire the very type of attorney who might have difficulty passing the bar, attorneys from underserved and underrepresented communities. These attorneys are often best able to relate to our clients who are typically marginalized.”); SR1322[Q25] (“It promotes equity.”).

¹⁹¹ SR711[Q4b].

The much smaller number of supervisors who were unwilling to continue participating in the PLP also reported varied reasons for their decision. Some cited personal reasons, such as plans to retire.¹⁹² Others found the demands of training and supervision too heavy.¹⁹³ And a handful voiced their sentiment that a bar exam is necessary to screen effectively for competence.¹⁹⁴

7. Candidate Satisfaction. Almost two-thirds of all candidates (63.1%) were very satisfied with the program, and another fifth (22.7%) were somewhat satisfied. The 14.2% who expressed dissatisfaction often focused on program characteristics that would not taint a more permanent supervised-practice pathway. Some participants in the Pathway Program, for example, believed that they should have benefited from the new cut score without having to complete hours of supervised practice.¹⁹⁵ Others perceived that the State Bar failed to publicize the PLP sufficiently and explain its structure to the full profession.¹⁹⁶ Overall, the high levels of satisfaction and limited number of complaints suggest strong ongoing demand for supervised-practice licensing paths.

8. Implementation. Some supervisors and candidates offered suggestions for improving the PLP's implementation. Suggestions included developing clear guidelines to govern the permitted scope of practice under a provisional license;¹⁹⁷ creating a dedicated, user-friendly portal for

¹⁹² SR737[Q26]; SR401[Q25].

¹⁹³ SR111[Q26{b}] ("It is nothing but effort."); SR019[Q26] ("Unlikely [to continue] due to the heavy supervision needed. We hardly hire newly licensed bar passers.").

¹⁹⁴ SR585[Q26] ("I doubt that we would participate, we need lawyers who can pass the bar. I don't mean to be blunt, but if you're not smart enough to pass the bar that's not good."); SR1386[Q26] ("I can't imagine that we would support lowering the standards for admission in any way. There are already enough bad lawyers.").

¹⁹⁵ CR435[Q13b]; CR2456[Q13b].

¹⁹⁶ CR2108[Q13b]; CR2339[Q13b]; CR2514[Q 13b].

¹⁹⁷ CR1993[Q13b]; CR1891[Q13b]; CR272[Q13b]; CR023[Q40].

submitting timesheets and other paperwork;¹⁹⁸ publicizing the program widely to both the state bar and members of the public, so that all participants in the legal system would understand the role of PLP candidates;¹⁹⁹ appointing a program coordinator to answer questions, help participants address hurdles, and facilitate administrative aspects of the program;²⁰⁰ helping candidates connect with potential supervisors;²⁰¹ clarifying the status of candidates under malpractice insurance policies;²⁰² and issuing temporary bar cards that would help candidates gain admittance to courthouses, jails, and other venues.²⁰³

IV. Discussion

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

A. *Validity*

The PLP data offers three types of evidence supporting the validity of supervised-practice pathways for demonstrating lawyering competence: (1) candidates used a high percentage of the lawyering skills that practice analyses have identified as essential; (2) candidates drew upon

¹⁹⁸ CR1911[Q40]; CR1774[Q40]; CR2512[Q40]; CR1636[Q40]; CR722[Q40]; CR 1847[Q40].

¹⁹⁹ CR2514[Q13b]; CR1599[Q13b]; CR2108[13b]; CR2339[Q13b]; CR1162; CR2047[13b].

²⁰⁰ CR722[Q40].

²⁰¹ CR1329[Q40]; CR1515[Q40].

²⁰² See *supra* notes 170–171 and accompanying text.

²⁰³ CR1940[Q40]; CR2593[Q40]; CR1162[Q13b]; CR421[Q13b]; CR1725[Q13b]; CR1599[Q13b].

doctrinal principles from many subjects, including subjects that the bar exam does not test; and (3) supervisors spontaneously observed that supervised practice offers a better arena for testing competence than the bar exam.

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

In contrast, a high percentage of PLP candidates used these and other skills as a regular part of their work. Licensing paths rooted in supervised practice would allow examiners to protect the public by assessing those critical skills. To ensure assessment of necessary skills, examiners can specify the skills that candidates must demonstrate. Oregon, for example, will require candidates to demonstrate their competency in both client encounters and negotiation.²⁰⁴

²⁰⁴ Draft Rules for the Or. Supervised Practice Portfolio Examination, Rules 6.5–6.6 (Mar. 8, 2023), <https://lpcd.osbar.org/files/SPPEDraftRules-SupervisedPracticePortfolioExamination.pdf>. If candidates are not able to demonstrate these skills in their supervised-practice placements, Oregon will allow them to substitute simulations. *Id.*

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

2. Doctrinal Knowledge. The PLP data offers similar assurances about the scope of doctrinal knowledge that can be assessed through supervised practice. Candidates reported drawing upon an average of 5.5 doctrinal areas in their practice, with a quarter of candidates listing eight or more subject areas.²⁰⁵ Even candidates who focused on a particular practice area, such as criminal law or personal injury work, drew upon concepts from a range of subjects.

Candidates did not work in every subject area that they might pursue as lawyers—and a licensing system based on supervised practice could not assess their knowledge in all those areas. This, however, is also true of the bar exam. NCBE’s NextGen exam will assess knowledge in just eight doctrinal areas, not in every area in which new lawyers might practice.²⁰⁶

The PLP surveys demonstrate just how narrowly the bar exam tests doctrinal knowledge. Almost nine-tenths of candidates reported using knowledge from subjects that are not tested on the bar exam, and more than a fifth reported practicing in *four or more* subjects that do not appear on the bar exam. On average, respondents reported using doctrine from 2.4 subjects that do not appear on the bar exam. The bar exam, in other words, does not test candidates on basic

²⁰⁵ See *supra* Part III.A.2.

²⁰⁶ The exam will not even require candidates to demonstrate competence in all eight of those areas. Instead, the exam’s compensatory grading system will allow candidates to compensate for lack of knowledge in some areas with deeper knowledge in other areas. See NCBE TESTING TASK FORCE, OVERVIEW OF RECOMMENDATIONS FOR THE NEXT GENERATION OF THE BAR EXAMINATION 3 (2021), <https://nextgenbarexam.ncbex.org/themencode-pdf-viewer/?file=https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Next-Gen-Bar-Exam-Recommendations.pdf#zoom=auto&pagemode=none>.

doctrine in every area in which a new lawyer might practice. Given the breadth of contemporary law practice, that would be impossible.

Instead, the bar exam seems to use a candidate's ability to recall and apply some doctrinal principles as a sign that they will be able to master and apply doctrinal knowledge in many other areas. Otherwise, we could not allow newly licensed lawyers to serve client needs in immigration, tax, social security, employment law, and dozens of other areas that are not tested on the bar exam. In law, the ability to synthesize and apply doctrinal principles in one practice area offers strong assurance that a lawyer can do the same in other practice areas.²⁰⁷

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

This capacity to assess doctrinal knowledge in actual practice areas further supports the validity of licensing systems rooted in supervised practice. As one group of highly regarded

²⁰⁷ The Model Rules of Professional Conduct acknowledge this aspect of law practice, providing that lawyers may practice competently in unfamiliar practice areas by using “skill[s] that necessarily transcend[] any particular specialized knowledge,” and engaging in “necessary study.” MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 2 (AM. BAR ASS'N 1983).

psychometricians wrote: “The time-honored way to find out whether a person can perform a task is to have the person try to perform the task.”²⁰⁸ Supervised practice offers just that opportunity.

3. Observations from Supervisors. The validity of any professional licensing system rests heavily on the opinions of professionals who work in that field. Psychometricians can assist those professionals by conducting practice analyses, guiding deliberations, and helping them create fair and reliable systems, but the members of a profession define minimum competence in their field.²⁰⁹ Legal educators and practitioners determine the scope of knowledge and skills tested on the bar exam, draft the questions that will be asked, and set the cut score for the exam.²¹⁰

In that context, it is telling that numerous supervisors identified supervised practice as an appropriate—or even superior—way to assess minimum competence. These supervisors had direct experience with the knowledge and skills needed to serve clients effectively. They also worked directly with new lawyers who had passed the bar exam and those who were practicing under provisional licenses. Comments from these supervisors cannot on their own establish the validity of a licensing system, but jurisdictions should take them seriously—especially because some supervisors opined that a licensing system based on supervised practice would protect the public better than the bar exam.

²⁰⁸ Michael Kane, Terence Crooks & Allan Cohen, *Validating Measures of Performance*, EDUC. MEASUREMENT: ISSUES & PRAC. 5, 5 (1999).

²⁰⁹ See STANDARDS FOR TESTING, *supra* note 13, at 176 (“panels of experts are used to specify the level of performance that should be required”).

²¹⁰ *Announcing NCBE’s Content Scope Committee*, NCBE, <https://nextgenbarexam.ncbex.org/announcing-ncbes-content-scope-committee/> (last visited July 14, 2023) (listing practitioners and educators who determined the content and scope of the NextGen Bar Exam); *How Are Questions Written for NCBE’s Exams?*, 88 THE BAR EXAM’R 25, 25 (Fall 2019) (committee members who draft questions are “practicing attorneys, judges, and faculty members”); Michael T. Kane & Joanne Kane, *Standard Setting 101: Background and Basics for the Bar Admissions Community*, 87 THE BAR EXAM’R 9 (Fall 2018) (describing role of legal professionals in setting the cut score for the bar exam).

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

Portfolio licensing systems will not be easier to pass than a bar exam. Oregon’s proposed system, for example, will require candidates to submit eight pieces of written work, documentation of two client encounters, and documentation of two negotiations for assessment. Independent examiners must find each of those components minimally competent; strong performance on one will not compensate for poor performance on another. Candidates must also complete at least four months of supervised practice, demonstrating their knowledge, skills, work ethic, and professionalism.²¹¹

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

²¹¹ Draft Rules for the Or. Supervised Practice Portfolio Examination, Rules 6.4–6.6, 6.12, 8.3, 9.3 (Mar. 8, 2023), <https://lpdc.osbar.org/files/SPPEDraftRules-SupervisedPracticePortfolioExamination.pdf>. Workplace hours offer two assurances of competence. First, the experience ensures that the candidate has had an opportunity to demonstrate their knowledge and skills in a realistic setting, with feedback from a more experienced lawyer and an opportunity to correct mistakes. Second, a supervisor’s willingness to retain a candidate during the supervised-practice period, to compensate that candidate, and to expose clients to the candidate’s work suggests that the supervisor found the candidate minimally competent.

candidate possesses minimum competence, they inevitably affect the educational process.²¹²

Candidates who take the bar exam devote at least two months to memorizing doctrinal principles, analyzing multiple choice questions, and practicing how to write essays under extremely tight time limits. This preparation bears little relationship to the skills or knowledge lawyers need in practice.²¹³ Supervised practice, in contrast, requires candidates to work for many months under the direct supervision of a licensed attorney, learning the skills and knowledge they need to serve clients effectively. As one California candidate concluded, the PLP “allowed me to learn more about real law practice than any bar study program ever did.”²¹⁴ The formative aspects of supervised practice, along with summative assessment of candidates’ work product, are likely to protect the public more effectively than the bar exam.

B. *Fairness*

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

²¹² Kane, *supra* note 14, at 52–53 (describing “strong effects” of testing programs on education and providing examples).

²¹³ See *supra* notes 25–36 and accompanying text (discussing validity issues with the current bar exam).

²¹⁴ CR1974[Q40].

First-generation college graduates, individuals living with disabilities, and individuals who identified as LGBTQIA+ also succeeded in the PLP programs. We found no significant difference in success rates for these groups compared to other candidates. Nor did satisfaction ratings differ by race/ethnicity, gender, first-generation status, disability, or sexual orientation. Members of all groups expressed very high degrees of satisfaction with supervised practice. Indeed, respondents from historically disadvantaged groups offered eloquent comments about the importance of the supervised-practice program to them, their families, and their professional careers.

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

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

per hour or \$65,000 per year. These numbers suggest that resources are available to pay candidates in supervised-practice programs.

Even if some candidates must work without pay, or with relatively low pay, their financial position may be better than that of bar-takers. Exam takers forego income for eight to ten weeks as they study for the exam, and they pay hefty fees for bar preparation courses. They then wait another six to twelve weeks for bar results²¹⁵ before beginning work as a fully licensed attorney. Jurisdictions that offer candidates a choice between the exam and supervised practice allow the candidates to choose a pathway that is most financially attractive to them. This may help reduce disparities in bar licensing outcomes between those with resources and those without.²¹⁶

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

²¹⁵ Teresa Lo, *State-By-State Guide to How Soon You’ll Receive Your Bar Exam Results*, JD JOURNAL (Dec. 19, 2016), <https://www.jdjournal.com/2016/12/19/state-by-state-guide-to-how-soon-youll-receive-your-bar-exam-results/>.

²¹⁶ See *supra* note 45 and accompanying text (noting relationship between financial resources and bar passage).

C. *Feasibility*

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

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

Respondents also stressed the PLP's role in helping them diversify their practice teams. Candidates were more demographically diverse than recently licensed lawyers,²¹⁷ and some possessed unusual life experiences or training. That diversity, supervisors reported, allowed their organizations to enhance service to existing clients, tap new client bases, and even explore new

²¹⁷ See THE STATE BAR OF CAL., 2022 PROVISIONAL LICENSURE PROGRAM (PLP) SURVEY: PRELIMINARY FINDINGS 3 (Nov. 2022) (59% of candidates in the Original PLP were people of color; 56% of candidates in the Pathway PLP were people of color; and 53% of newly admitted attorneys were people of color).

practice areas. As several supervisors wrote, this diversity benefited everyone: firms, clients, the profession, and the public.

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

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

California's successful PLP thus provides strong assurances of the feasibility of attracting and retaining supervisors, supervising and training candidates, and protecting clients and the public. Survey respondents also offered several suggestions for enhancing those aspects of the program's feasibility.²¹⁸ A more permanent program will raise other feasibility issues that this

²¹⁸ See *supra* Part III.C.8.

study could not address. Some programs might impose additional obligations on supervisors, which could diminish participation rates. Jurisdictions that require independent assessment of candidate work product will have to establish standards for that assessment; retain evaluators; and develop reliable, cost-effective ways of conducting the assessment. Oregon's pilot program is beginning to offer insights into the feasibility of independent assessment, but more investigation is needed.

When measuring the feasibility of supervised-practice pathways, however, it is important to compare those costs to the heavy burdens imposed by the bar exam. Jurisdictions must either design their own exams or purchase them from NCBE. NCBE's NextGen project demonstrates the extensive costs of that design: from initial exploration to administration, the process will take at least eight years.²¹⁹ Jurisdictions must also conduct standard-setting sessions to choose the passing score for their exam, rent venues to administer the exam, pay for security, and compensate graders.²²⁰

Candidates shoulder many of these costs through exam fees, although members of the profession bear a portion of the costs in some jurisdictions. Candidates must also pay substantial fees for bar prep courses and forego income while preparing for the exam. When considering costs to both candidates and jurisdictions, supervised-practice pathways may be less expensive than bar exams.

²¹⁹ NAT'L CONF. OF BAR EXAM'RS, FINAL REPORT OF THE TESTING TASK FORCE, <https://nextgenbarexam.ncbex.org/reports/final-report-of-the-ttf/> (noting that the process of researching a new exam began in 2018). The exam's projected availability date is July 2026. See *NextGen Bar Exam Content Scope and Sample Questions*, NAT'L CONF. OF BAR EXAM'RS, <https://nextgenbarexam.ncbex.org/> (last visited July 14, 2023).

²²⁰ Just administering the exam currently costs California more than \$5.6 million per year. See *supra* note 46. Grading supervised-practice portfolios may be more expensive than grading bar exams, but that incremental cost is unlikely to exceed the heavy costs of designing, vetting, and administering exams.

It is worth noting, finally, that California established its PLP in a state that receives more applicants for bar admission than any other state but New York.²²¹ That scale makes California's success particularly impressive and should offer encouragement to smaller jurisdictions. Coordinating supervised-practice programs should be easier in smaller jurisdictions, requiring less administrative time. Recruiting a proportionate number of supervisors may also be easier, especially if members of the profession are more tightly knit than in larger states. California's proof of concept in a particularly large jurisdiction bodes well for programs in other jurisdictions.

D. Limitations of the Current Study

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

Our results are also limited by the fact that respondents' experience with supervised practice occurred during the pandemic. On the one hand, pandemic-era experiences may offer a "worst case" view of supervised practice: Lawyers were willing to take on candidates, supervise them, and offer appropriate training during a time that was otherwise challenging for the legal

²²¹ See *Persons Taking and Passing the 2022 Bar Examination*, THE BAR EXAM'R, <https://thebarexaminer.ncbex.org/2022-statistics/persons-taking-and-passing-the-2022-bar-examination/> (last visited July 14, 2023) (listing total examinees in 2022 for each jurisdiction).

profession. On the other hand, it is possible that a “pandemic spirit” made supervisors more willing to help others and provide this assistance.

The structure of California’s PLP, finally, imposes important limits on our findings. Candidates in California’s Original Program continued to take the bar exam to demonstrate their competence, while those in the Pathway Program needed only to secure an undifferentiated “positive evaluation” from their supervisors.²²² Neither of those programs allowed us to assess the reliability of portfolio systems that determine competence based on independent review of candidates’ work product—an important feature of the pathways that jurisdictions are currently designing. The psychometric literature offers evidence that it is possible to construct reliable assessments based on that type of work product,²²³ but our study could not supplement those findings.

E. *Further Questions for Investigation*

We have already identified several questions warranting further study: How will independent review of candidates’ work product enhance the validity of assessing competence through supervised practice? Is that assessment feasible? Does it produce reliable results? Can work product be gathered in a way that assures assessment of the candidate’s competence and

²²² The Pathway candidates had also achieved bar exam scores that satisfied California’s new passing score. The work of those candidates, therefore, may not have been representative of the work that lower-scoring candidates would provide in the workplace. Our study, however, also included candidates in the Original Program, almost half of whom had not passed the bar exam.

²²³ See, e.g., E. Driessen et al., *The Use of Qualitative Research Criteria for Portfolio Assessment as an Alternative to Reliability: Case Study*, 39 MED. EDUC. 214 (2005) (describing new approaches to calculating reliability when assessing portfolios); José Felipe Martínez, et al., *Developing Situated Measures of Science Instruction Through an Innovative Electronic Portfolio App for Mobile Devices: Reliability, Validity, and Feasibility*, 82 EDUC. & PSYCH. MEASUREMENT 1180 (2022) (analyzing reliability of teaching portfolios and offering insights on increasing that reliability); Charlotte E. Rees & Charlotte E. Sheard, *The Reliability of Assessment Criteria for Undergraduate Medical Students’ Communication Skills Portfolios: The Nottingham Experience*, 38 MED. EDUC. 138 (2004) (presenting evidence that discussion and negotiation between independent raters enhances reliability of portfolio assessment).

reduces concerns about cheating? And can jurisdictions bolster the fairness we observed in California's PLP with additional protections for candidates?

As jurisdictions explore supervised-practice licensing paths, they can gather data to answer additional questions: What are the success rates for candidates pursuing supervised-practice pathways? How do those success rates compare to those on the bar exam? Do success rates in either licensing process vary by race/ethnicity, gender, first-generation status, disability, or sexual orientation? If so, can we identify reasons for those differences? And perhaps most important, how does the performance of lawyers licensed through different pathways compare in practice? That type of study is difficult to mount, but not impossible.²²⁴

Oregon's proposed rules for a licensing path based on supervised practice require annual audits and reports related to some of these questions.²²⁵ Other jurisdictions and researchers can build on those requirements to generate useful information about lawyer licensing. With careful study, we may be able to better understand both the competencies that support effective client service and the most valid, feasible, fair, and reliable ways to assess those competencies.

V. Conclusion

For decades, criticisms about the bar exam's weak validity and racially disparate impact have been countered with claims that no viable alternatives can adequately protect the public.

²²⁴ See, e.g., GERKMAN & HARMAN, *supra* note 50 (comparing graduates of the Daniel Webster Scholar Program with graduates who took a traditional bar exam); Jason Scott, et al., *Putting the Bar Exam to the Test: An Examination of the Predictive Validity of Bar Exam Outcomes on Lawyering Effectiveness*, AccessLex Institute Research Paper No. 230-3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4419062 (Mar. 1, 2023) (comparing bar exam scores with measures of attorney effectiveness).

²²⁵ Draft Rules for the Or. Supervised Practice Portfolio Examination, Sec. 20 (Mar. 8, 2023), <https://lpdc.osbar.org/files/SPPEDraftRules-SupervisedPracticePortfolioExamination.pdf>.

This study suggests otherwise. Survey responses from more than 1,750 bar candidates and supervisors demonstrate that supervised practice provides a solid foundation for valid, feasible, and fair assessment of lawyering competence. Indeed, our analyses signal that assessment through supervised practice may better protect the public than a written bar exam. On that score, our work agrees with the only other study comparing the competence of bar-licensed lawyers with that of lawyers assessed through an alternative system.²²⁶ Most important, our data demonstrates that this more-protective system will mitigate—and perhaps eliminate—the racial disparities that plague our profession’s licensing process.

We can no longer hide behind the conventional wisdom that we cannot do better. New licensing processes can better protect the public *and* make the legal profession more inclusive. While this study leaves some questions unanswered, it strongly supports exploration of alternative licensing pathways—a process that has already begun in some states. Those states, as well as others, now have data that can inform their design of new licensing paths. Those paths may finally fulfill our profession’s twin commitments to promoting high professional standards and enhancing diversity.²²⁷

²²⁶ GERKMAN & HARMAN, *supra* note 50 (comparing bar-licensed lawyers with students in New Hampshire’s Daniel Webster Scholars program).

²²⁷ See ABA Mission and Goals, https://www.americanbar.org/about_the_aba/aba-mission-goals/ (last visited July 14, 2023) (listing four goals, including “Improve Our Profession” through, *inter alia*, “Promot[ing] competence, ethical conduct and professionalism;” and “Eliminate Bias and Enhance Diversity”).

Appendix B



The State Bar of California

Cost Reduction Models



Committee of Bar Examiners, June 28, 2023



Cost Reduction Models Considerations

- Bar Exam: single largest expenditure outside of personnel costs
- Ripe for examination of more efficient ways to deliver
- Consideration of impact on applicants with testing accommodations
- Results of surveys and data related to administration of remote exams



Key Opportunities for Changes to Exam Administration



Consolidate administration into fewer sites



Essays and PT delivered remotely



Use of State Bar offices for testing accommodations applicants



Cost Assumptions

Facilities and Proctors

Increases to Facility Costs & Proctors

Applicant Numbers

Forecasted Applicant Pool Based on Trends

Included Direct Costs

ExamSoft Licenses, Other Exam-Related Expenses (water, AV), Staff Travel

Indirect Costs Excluded

Staff Time, State Bar Office Use, Grading-Related Expenses



Reduction Models

No Change "As Is"

All Components Administered In-person

Multiple Test Sites Across the State

\$5,618,700

Six Sites

All Components Administered In-person

Six Test Sites: 3 TA & 3 Standard Sites

No sites in Sacramento, Oakland, or San Diego

Est cost: \$4,763,200

Est annual savings: \$855,500

Six Sites With One Remote Day

MBE Administered In-person / Essays & PT Administered Remotely

Six Test Sites: 3 TA & 3 Standard Sites

No sites in Sacramento, Oakland, or San Diego

Est cost: \$3,787,000

Est annual savings: \$1,500,000

Four Sites With 1 Remote Day

MBE Administered In-person & Essays & PT Administered Remotely

Four Test Sites: 3 Standard Sites & 1 TA Site, **SB Offices Used for TA**

No sites in Sacramento, Oakland, or San Diego

Est cost: \$3,692,100

Est annual savings: \$1,800,000



Rough Order of Magnitude Cost Estimates

	As Is 2024	6 Sites (no SB office)	6 sites & 1 day remote (no SB office)	4 sites & 1 day remote (w/SB office)
Proctor Costs	2,271,550.00	2,271,550.00	1,222,000.00	1,222,000.00
Staff Travel	135,000.00	135,000.00	135,000.00	135,000.00
ExamSoft License	503,500.00	503,500.00	1,203,100.00	1,203,100.00
Facilities	1,575,110.00	803,500.00	1,027,400.00	812,000.00
Other Exam Expenses	1,134,020.00	1,050,000.00	531,600.00	446,100.00
	5,619,180.00	4,763,550.00	4,119,100.00	3,818,200.00
Difference	NA	(855,630.00)	(1,500,080.00)	(1,800,980.00)



Three Supersites



Cow Palace

San Francisco



Ontario Convention
Center

Ontario



Los Angeles
Convention Center

Los Angeles



Three Testing Accommodation Sites



Hilton Arden West

Sacramento



Hilton Culver City

Culver City



DoubleTree Orange

Orange



Potential Exam Schedule for One-Day Remote

Day 1 of Testing

- **Wednesday: MBE Day**
- **Last Week of Feb/ July**
- **Standard Applicants**
- **TA Extended Time Wednesday Through Friday**

Day 2 of Testing

- **Monday: Essays & PT**
- **First Week of Mar/Aug**
- **Standard Applicants**
- **TA Extended Time Monday Through Wednesday**

evaluation of other schedule options still ongoing





Motion

MOVE that the Committee of Bar Examiners recommends, based on the information available, that the Board of Trustees consider cost reduction model [INSERT].



Questions?

