

OREGON STATE BOARD OF BAR EXAMINERS

16037 SW Upper Boones Ferry Road, PO Box 231935, Tigard, OR 97281-1935
(503) 620-0222 or (800) 452-8260 • www.osbar.org

June 18, 2021

Oregon State Board of Bar Examiners
16037 SW Upper Boones Ferry Road
Tigard, Oregon 97224

Re: Recommendation of the Alternatives to the Bar Exam Task Force

Dear Board Members:

For the reasons discussed below, the Alternatives to the Exam Task Force respectfully requests immediate adoption of the Oregon Experiential Pathway and the Supervised Practice Pathway models as alternatives to the bar exam. The Task Force further requests that the Court order the formation of implementation committees to draft the implementing Rules for Admission.

I. Executive Summary

As charged by the Oregon Supreme Court, the Alternatives to the Exam Task Force (“the Task Force”) assessed alternatives to the bar examination as pathways to attorney licensure. We studied alternative models including (1) supervised practice as it exists in Canada, (2) the emergency models from Utah and Washington D.C., (3) diploma privilege as it exists in Wisconsin, and (4) a curriculum-based experiential learning model in place at the University of New Hampshire. The Task Force researched each model, spoke to constituents in the jurisdictions where these models are in place, and consulted with stakeholders in Oregon. Two principles guided our mission: consumer protection and equity. With these considerations in mind, the Task Force also considered how to improve the models currently employed in other jurisdictions.

As a result of our research, the Task Force recommends the Court adopt two alternative pathways to admission: an experiential learning pathway (Oregon Experiential Pathway or OEP) and a supervised practice pathway (SPP). The OEP is a curriculum-based model with a focus on experiential coursework during an applicant’s last two years of law school culminating in a capstone portfolio

submitted to the Oregon State Bar Board of Bar Examiners (BBX) to measure minimum competence. By contrast, the SPP is a post-graduation model where applicants work directly under a licensed attorney for 1000-1500 hours of practice and submit a portfolio of work samples to the BBX to measure minimum competence. These pathways are “alternatives” to an applicant sitting for and passing the Uniform Bar Examination (UBE) and are not proposed as replacements for that pathway to admission. The Task Force recommends that Oregon continue to offer passage of the UBE as a pathway to admission. Continuing to offer the UBE will provide law graduates who chose to take the exam with a portable exam score that can be used to apply for licensure in 35 additional jurisdictions.

Currently, there are several components to admission in addition to sitting for and passing the bar examination, including graduating from an ABA accredited law school, passing a character and fitness review, and passing the Multistate Professional Responsibility Examination (MPRE).¹ The proposed alternative pathways are intended to offer only an alternative to a single component of admission: sitting for and passing the Uniform Bar Examination (UBE). The other components of admission would remain unchanged by the adoption of these alternative pathways.

Additionally, while the UBE is coordinated by the National Conference of Bar Examiners, the BBX currently maintains oversight over that aspect of bar admission by recommending a passing score to the Court and grading the Multistate Essay Examination and the Multistate Performance Examination. Accordingly, the Task Force sought to ensure that the BBX also maintains oversight over the two proposed alternative pathways. This is accomplished in two ways: (1) the BBX will be responsible for supervising applicants’ compliance with the rules applicable to their chosen pathway and for documenting completion of the requirements; and (2) the BBX will review of representative work samples to ensure the applicant meets minimum competence requirements (referred to for each pathway as an “Exam Alternative Portfolio” or EAP).

An applicant’s EAP will provide sufficient material to measure the applicant’s skills and abilities against the minimum competence standard and offer examination of work performed under realistic law practice conditions. Therefore, the BBX’s review of an applicant’s EAP under either alternative pathway should

¹ See *Supreme Court of the State of Oregon Rules for Admission of Attorneys*, OSBAR.ORG (Jan. 1, 2021), https://www.osbar.org/_docs/rulesregs/admissions.pdf.

constitute an “examination of the applicant” and avoids the need for legislative changes to ORS 9.220.² Both alternative pathways, however, will require new rules for admission to be drafted to operationalize the recommendation of the Task Force.

Both of these alternative pathways will rely heavily on volunteer support from the Oregon legal community. But even with ample volunteer support, they will create significant additional work for the admissions staff of the OSB. It is likely that if the Court approves these alternatives, the admissions department will require additional staff or technology upgrades. Due to the increased work for the OSB, the Court will need to consider, following the implementation phase when cost increases are more certain, whether applicants applying for admission through these pathways would pay an increased application fee. We believe any increased admissions cost would be far outweighed by the value the applicants receive from being able to start practice immediately upon graduation and in savings from not needing to prepare for the bar exam.

This report reviews the considerations of the Task Force (Section II), the recommendations of the Task Force (Section III), an in depth look at the two recommended pathways (Sections IV and V).

II. Considerations of the Task Force: Consumer Protection and Equity

In considering alternative pathways to licensure, the Task Force asked two questions: (1) Will this model provide adequate consumer protection by ensuring applicants to the practice of law demonstrate the minimum competence to practice law prior to licensure; and (2) Will this model increase accessibility to and equity in the profession by removing unnecessary barriers to entry.

² “An applicant for admission as attorney must apply to the Supreme Court and show that the applicant . . . (3) Has the requisite learning and ability, which must be shown by the examination of the applicant, but the judges or under their direction.” OR. REV. STAT. § 9.220(3) (2021).

In considering the first guiding question, the Task Force looked to the Oregon Essential Eligibility Requirements (RFA 1.25), adopted by the Court in 2019.³

The Task force also considered the Building Blocks of Minimum Competence identified by the Institute for the Advancement of the American Legal System (“IAALS”). IAALS is “a national, independent research center dedicated to facilitating continuous improvement and advancing excellence in the American legal system.”⁴ In October 2020, IAALS published the result of a two-year

³ RFA 1.25 provides:

The board considers demonstration of the following attributes, and the likelihood that one will utilize these attributes in the practice of law, to be essential for all applicants seeking admission to the Oregon Bar:

- a. Knowledge of the fundamental principles of law and application;
- b. The ability to competently undertake fundamental legal skills commensurate with being a lawyer, such as legal reasoning and analysis, recollection of complex factual information and integration of such information with complex legal theories, problem solving, and recognition and resolution of ethical dilemmas; and
- c. Ability to:
 - i. Communicate honestly, candidly, and civilly with clients, attorneys, courts, and others;
 - ii. Conduct financial dealings in a responsible, honest, and trustworthy manner;
 - iii. Conduct oneself with respect for and in accordance with the law;
 - iv. Demonstrate regard for the rights, safety, and welfare of others;
 - v. Demonstrate good judgment on behalf of clients and in conducting one’s professional business;
 - vi. Act diligently, reliably, and punctually in fulfilling obligations to clients, lawyers, courts, and others;
 - vii. Comply with deadlines and time constraints;
 - viii. Comply with the requirements of applicable state, local, and federal laws, rules, and regulations; any applicable order of a court or tribunal; and the Rules of Professional Conduct.

⁴ See *About IAALS*, IAALS.DU, <https://iaals.du.edu/about> (last visited June 16, 2021).

research study of the building blocks of minimum competence to practice law.⁵ Through the study, including an academic review and 50 focus groups with practicing attorneys, IAALS identified the following core competencies:

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

To ensure adequate consumer protection, any alternative to the current examination must adequately assess applicants against the Essential Eligibility Requirements in RFA 1.25 and the 12 core competencies identified by IAALS.

The Task Force also sought to remove unnecessary barriers to attorney licensing and ensure that all applicants had a fair opportunity to demonstrate their competence to practice law. As such, the Task Force wanted to ensure that the alternatives it proposed did not further perpetuate or exacerbate already existing disparities in the profession. Similarly, the Task Force wanted to ensure that the proposed alternatives did not introduce new sources of disparities. Some of the questions that arose were: whether curriculum requirements in the OEP would place undue burdens on non-traditional law students and how to mitigate such effects; how to ensure the SPP model does not solely benefit law graduates with pre-existing connections in the field; how to craft a fair and unbiased rubric system to review applicants’ EAPs; and how to mitigate any stigma in the legal

⁵ See DEBORAH JONES MERRITT & LOGAN CORNETT, BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE (Dec. 2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf (providing additional information about the study and a further explanation of each competency).

community for applicants who gain licensure through an alternative model. In considering these factors, the Task Force concluded that no single model could completely address these concerns. These issues are addressed in more depth in Sections III, IV, and V.

III. Recommendation of the Task Force

The Task Force unanimously concluded that consumers can be protected and equity served by offering applicants alternatives to the traditional bar exam. The success other jurisdictions have had using pathways other than the bar examination confirms this conclusion. The Task Force found that the different pathways it explored could be crafted in a manner that ensured minimum competency standards were met. Each pathway, however, had its own advantages and drawbacks in terms of equity and access issues. The Task Force believes providing two alternative methods of proving competence will capture the advantages and avoid some of the drawbacks of the single methods adopted in other jurisdictions. For example, having the OEP model available to applicants reduces the concern that only applicants with connections to the Oregon legal market will be able to access an alternative licensure method, which would be the case if the SPP was the only model. On the flip side, having the SPP model as an option provides an alternative path to licensure for graduates who, for various reasons, could not commit to a course of experiential learning in law school or who come from out-of-state law schools. Thus, for the reasons discussed in Sections IV and V the Task Force recommends the Court adopt *both* the Oregon Experiential Pathway and the Supervised Practice Pathway.⁶

⁶ The Task Force unanimously voted to recommend the Oregon Experiential Pathway. One task force member voted against recommending the Supervised Practice Pathway until the parameters of the program were further defined. The remaining members voted to recommend the Court adopt the SPP with further details of the program to be determined by an implementation task force.

The Task Force also considered a third alternative: true “diploma privilege” as offered in Wisconsin to graduates of University of Wisconsin or Marquette University. Under the Wisconsin model students of in-state law schools are admitted to the state bar upon completion of a prescribed curriculum of predominantly doctrinal courses and passage of the MPRE and a character and fitness review. The subcommittee that studied the Wisconsin model recommended adoption of the model but with an increased focus on experiential learning and an additional course in practice skills. With these changes, the proposed model became very similar to the model being proposed by the OEP. The subcommittee that crafted the OEP also recommended a

Each of the models proposed below will require an implementation period to allow for drafting and implementation of the Rules of Admission. The Task Force does not, however, believe a change in state law is required. Because both alternative pathways require EAPs to be submitted to and assessed by the BBX, applicants are still required to demonstrate their “requisite learning and ability . . . by the examination of the applicant” as required by ORS 9.220. Additionally, it does not appear that either proposed model will raise the same dormant commerce clause concerns that the Wisconsin model has raised. The SPP model is open to all applicants regardless of whether they attended an in-state or out-of-state law school. The OEP is primarily focused on in-state law schools because of the partnership between the BBX and the law schools that is required to implement the program. But if an out-of-state law school believed it would have sufficient applicants in Oregon to build a curriculum that met the requirements of the OEP, the BBX would entertain applications from out-of-state schools to participate in the program. Thus, Oregon would not be discriminating against out-of-state applicants.

IV. Oregon Experiential Pathway

The Task Force unanimously recommends immediate adoption of a two-year curriculum-based experiential pathway to licensure. This Part addresses, in separate subsections, the rationale supporting that recommendation. Section A discusses the importance and value of creating an experiential pathway. Section B describes, in more tangible terms, the benefit of an experiential pathway to licensure. Section C considers the potential drawbacks of such a pathway. Finally, Section D outlines the framework for implementation.

A. Introduction

The Task Force unanimously recommends immediate adoption of a two-year curriculum-based experiential pathway to licensure, which, as noted above, we propose calling the Oregon Experiential Pathway. Applicants applying for admission through the OEP would complete a set curriculum during law school,

change to the New Hampshire model that made it more similar to the Wisconsin model: rather than being an avenue to only a select few students each year, the program would be open to all interested applicants. As the two curriculum-based models largely began to merge to have a focus on experiential learning open to all students, the Task Force voted to recommend only the OEP as the curriculum-based model recommended to the Court.

culminating in a capstone portfolio or examination assessed by the BBX—an EAP. The OEP would focus on assessing competence in skills including legal research and writing, issue spotting, legal analysis, argument development, understanding of the law, attention to detail, written and oral advocacy, and teamwork—directly addressing the competencies in RFA 1.25 and the IAALS Building Blocks. The OEP will provide the means for new lawyers to develop skills faster, to serve clients well, and to provide legal employers with a cohort of practice-ready law school graduates. Assessment of those skills would occur while a student was still in law school through a handful of key mechanisms: (1) incorporation of formative feedback from professors throughout the program, (2) intensive self-reflection by participants, and (3) summative feedback and assessment provided by a dedicated bar examiner at the end of each semester throughout the program.

At the core of the OEP is recognition of the value of experiential learning. The experiential focus reinforces the curricular changes that have already begun at each of the Oregon schools. More specifically, law schools across the country are in a period of transformation—moving from traditional doctrinal-focused courses to an innovative and experiential legal education. Although this trend toward implementation of experiential learning in law schools has been happening for quite some time, in 2015, the ABA, for the first time, mandated that every law student complete at least six credit hours of experiential learning prior to graduation.

Historically, students have satisfied experiential learning requirements through law clinics and externships. However, in their 2015 reforms, the ABA also introduced simulation courses as a third and new way to meet this experiential learning requirement. These still relatively new ABA standards around experiential learning have already fostered innovation and growth in law clinics, externships, and simulation courses at law schools across the country. Establishment of the OEP not only incorporates that trend but affirms its importance.

The OEP would focus students on completion of certain practice-based benchmarks, including, for instance, the creation of documents (transactional and litigation-focused), simulated client interviews, depositions, and trial practice. Further illustrations might include students negotiating for actual clients or representing them in court proceedings. Those experiences could be supplemented by student exploration of ethical issues in the context of simulated exercises, in addition to engaging legal reasoning and analysis, issue spotting, and problem-solving skills. Ideally, the OEP would also cultivate students' practice management

skills, including how to address time constraints and appropriately manage deadlines. The OEP might do so by incorporating exercises built around the use of fee agreements, engagement letters, time keeping, billing, and the use of associated technology.

Collectively, the OEP model would prepare students to be admitted to practice. Accordingly, and upon successful completion of the program, students would be admitted to practice following graduation, passage of the MPRE, and clearance of character and fitness requirements.

B. Benefits of the OEP

The Task Force believes there are manifold benefits to the OEP. Most importantly, adoption of the OEP would continue the transformation of both legal education and bar admission while providing an alternative and durable pathway to licensure that works to address any gap between legal education and law practice. At the local level, this experiential pathway would help address Oregon's well-documented access-to-justice gap at a time of demographic transition in the bar.

Moreover, rather than measuring a narrowly-defined type of "minimum competency," the OEP would measure a candidate's ability to perform fundamental types of legal work. Program graduates would be practice-ready, having demonstrated the competencies needed to provide effective and responsible legal services. OEP graduates will have received robust formative and summative feedback, thereby giving them the confidence and experience necessary to effectively spot substantive legal issues, gather relevant information, craft a compelling written product, advance a client's position through oral argument and negotiation, and at a general level, serve clients professionally and competently.

We also believe that the OEP can serve as a durable recruiting strategy for Oregon law schools and the bar more generally. This program could be another way to attract diverse students to study, stay, and practice in the state. Offering an experience-focused pathway for practice allows law schools to consider a more holistic approach to admissions with less focus on standardized test scores and more emphasis on life experiences. And as discussed above, adoption of an experiential pathway to licensure will incentivize law schools to innovate in the curriculum rather than simply offer the same set of bar courses that have remained static, despite dramatic changes in the substance of modern legal practice.

We already have evidence of the benefits of adopting an experiential model. In New Hampshire, their sole law school runs the Daniel Webster Scholar Honors Program (“DWS”) where students hone their skills in both simulated and real settings—counseling clients, working with practicing lawyers, taking depositions, appearing before judges, negotiating, mediating, and drafting business documents—while creating portfolios of written and oral work for bar examiners to assess every semester. Through completion of an experiential capstone project, successful DWS participants pass a variant of the New Hampshire Bar exam during their last two years of law school and are sworn into the New Hampshire bar the day before graduation.

Focus groups of stakeholders report that DWS graduates are “a step ahead of new law school graduates.” They also report that the feedback DWS participants receive, coupled with personal reflection, encouraged continual improvement and proved invaluable with respect to fundamental skill development. DWS graduates gain practical skills, confidence, and a cohort community.

The DWS approach also successfully meets students’ expectations for practice readiness. From the student perspective, DWS students benefit from regular feedback gleaned from a career practitioner which provides a different perspective from that offered by a professor. This structure also provides additional support for students as they evaluate career options. Students engage in interviews with confidence knowing that they have firsthand experience with the language, projects, and expectations of practice.

DWS graduates are immediately employable because they are admitted to the bar following graduation and clearance of character and fitness. Employers appreciate that predictability and report not needing to invest as much in training and mentoring. They also know that these candidates are dedicated to practicing in the state, and they can hire with the confidence of knowing graduates have a portfolio of experience from which to draw when working with real clients.

C. Drawbacks of the OEP

The Task Force discerns few, if any, meaningful drawbacks of the OEP model. However, there are three that are worth mentioning and acknowledging. First, depending on its construction and implementation, maintenance of the OEP could prove to be resource intensive. Investments would need to be made by the bar, law schools, and the broader legal community to make the program successful.

This is particularly important as the Task Force is recommending that the OEP is broadly accessible to Oregon law students rather than limiting it in the same manner as the DWS program. Second, a defined OEP curriculum may necessarily limit some student choices, although the curriculum proposed below seeks to address that concern. Third, the program will likely only be open to applicants who attend an in-state law school. While the BBX would entertain applications for partnerships with out-of-state schools, it is unlikely that an out-of-state school would craft such a resource intensive program for a few students who may wish practice in Oregon. This drawback is addressed by having a second alternative pathway open to all out-of-state applicants who would otherwise qualify to sit for the Oregon bar exam.

D. Implementation

The Task Force requests immediate adoption of the OEP with a charge to the Oregon law schools to prepare a curricular path for alternative licensure for the class of 2024 and a charge to the BBX to develop an assessment plan for such applicants. In doing so, we offer the following general recommendations, followed by a set of specific recommendations.

1. General recommendations

First, following adoption, the Supreme Court and OSB should set broad standards for the program and provide the law schools with flexibility to implement the OEP based on their respective curricular capacity. As discussed more fully below, certain baseline classes might be required (e.g., Evidence, Criminal Procedure, Business Transactions, etc.), but schools should have some discretion to design a program that otherwise meets the standards. We recommend that law schools adopt programs that include a curriculum broader and deeper than just litigation and business transactions; doing so via requirements like Indian law, family law, or civil rights law may help to attract a diverse group of students.

Second, we recommend charging an OEP Implementation Task Force with (a) drafting appropriate licensure admission rules, and (b) creating rubrics that will guide completion of a graduate's capstone project.

Finally, we recommend expressly encouraging holistic admission practices including admitting law students on more than an evaluation of LSAT/GPA in order to ensure reliance on more inclusive criteria, such as work experience, life experience, and/or overcoming personal challenges. Law schools will inherently be

encouraged to do so if they have the confidence that all first-year students can apply for the OEP program. Accordingly, we recommend making clear that the OEP will be open to all students in the spring of 1L year (rather than limiting participation to those pre-selected for the program).

2. Specific recommendations

The Task Force anticipates that law schools would need at least the entirety of the 21-22 academic year to implement the program. We are hopeful that the OEP could be available beginning in the fall of the 2022 to the class of 2024 who would have the opportunity to opt into the OEP at the end of the first year of study. We imagine law schools would use the 21-22 academic year to implement the following curriculum, comprising three core pillars: (1) foundational courses beyond the first year, (2) experiential requirements, and (3) completion of a capstone project. Students would need to complete courses listed from each pillar to be eligible to submit their capstone project. We further imagine a division in workflow where Oregon’s law schools would be responsible for implementation of the OEP curriculum while BBX would be responsible for assessing the graduate’s capstone.⁷ With those introductory comments in mind, the Task Force recommends that the implementation committee in consultation with the three law schools create curriculum and experiential requirements that satisfy the OEP requirements. We would expect any law school applying to participate in the OEP to provide a proposed curricular path that meets the objectives of the OEP.

The Task Force provides the following as an example of curriculum that would provide an applicant the opportunity to experience the knowledge, skills, and clinical activities supportive of a successful OEP program:

Foundational Courses Beyond the Required First Year Courses: (range: ~20-24 credits, noting that credits assigned by the law schools for completing these courses can vary)

- Successful completion of the following foundational upper-level courses:
 - Professional Responsibility (2-3)
 - Evidence (3-4)

⁷ -The implementation committee must determine who will assess whether the work produced in an applicant’s EAP meets or exceeds the minimum competence standard. The Task Force recommends that it be volunteer experienced attorneys.

- Two of the following:
 - state/ local law (2-3),
 - constitutional or statutory interpretation (2-3), or
 - administrative law or processes (2-3).
- Take 3 of the following:
 - Criminal Procedure (3),
 - Business Associations (3),
 - Family Law (3),
 - Trusts & Estates (3),
 - Personal Income Tax (3).
- Successful completion of a graduate writing requirement (2-3 credits) that complies with ABA Standard 303(a)(2).

Experiential Requirements (15 credits)

- Successful completion of no fewer than 9 credits of closely supervised clinical work or simulation coursework.
- Successful completion of up to 6 credits of externship work.

EAP Capstone Requirement (for development by the OEP Implementation Task Force during AY21-23)

- To be developed in partnership with BBX. We could imagine, for instance, the creation of performance tests using case files and a limited universe of materials. We could alternatively imagine creation of a capstone project that relies on a rubric generated by the OEP Implementation Task Force. The rubric could serve as a curricular planning tool for students and, in doing so, could permit development of EAPs that students could begin during the fall of their second year. That rubric should consider the building blocks of minimum skills competence alongside ABA learning outcomes.

The requirements in this curriculum, including the first-year, total between 65-69 credits, although most of those requirements allow considerable choice among subject areas. Since ABA accreditation standards require at least 83 credits of academic work to secure a J.D., the course requirements in this example permit at least 14 credits (i.e., a full semester) of completely elective courses. The system,

in other words, structures the JD program while still allowing considerable student choice.

V. Supervised Practice Pathway

Apart from adopting the OEP, the Task Force also recommends adoption of a Supervised Practice Pathway. Part V, in Section A, addresses the rationale for creating such a pathway. Section B then offers a more detailed discussion of implementation considerations. Finally, in Section C, Part V addresses an assortment of other considerations relevant to the creation of a successful Supervised Practice Pathway.

A. Rationale for a Supervised Practice Pathway

The Task Force also recommends adoption of a supervised practice pathway to licensure, which we propose calling the Supervised Practice Pathway (“SPP”). The SPP model has applicants establish their minimum competence by (a) engaging in 1000 to 1500 hours of supervised legal practice (the specific set of hours to be determined by an implementation committee), and (b) submitting to the BBX an EAP of non-privileged work-product done during the applicant’s supervised practice to assure that the applicant is developing the skills necessary for admission.

In crafting this recommended pathway, the Task Force seriously considered two jurisdictions that have employed a supervised practice path to admission: Canada, which has long employed an “articling” program, and Utah, which adopted a modified diploma-privilege/supervised practice program for 2020. We believe that the success of the programs in both jurisdictions demonstrate that the goal of protecting the consumer can be met through a supervised practice pathway. As discussed in the OEP section, our confidence is bolstered by the knowledge that one of the most effective ways to train new practitioners to provide competent representation is through practical experience.

Rather than recommending a wholesale adoption of the Utah or Canada program, the Task Force recommends that Oregon should craft its own model. The recommended model pulls not only from lessons learned in both of those jurisdictions but also from the New Hampshire DWS program and the BBX’s experience in grading applicants’ work on the Multistate Performance Exam (MPE). We believe that the recommended SPP provides a meaningful alternative pathway to law graduates interested in becoming admitted in Oregon while still

protecting the consumer. Indeed, the consumer is assured that a licensed, practicing lawyer is supervising the applicant's work prior to their admission to the Bar, and that a newly admitted lawyer who has taken this pathway was only admitted after gaining meaningful practical experience designed to ensure the person met the competency requirements set forth in RFA 1.25 and the IAALS Building Blocks.

To understand the recommended SPP, we provide a very brief overview of the programs we reviewed and what the Task Force took from those programs. To practice law in a Canada, one must complete a post-law school apprenticeship referred to as "articling." Generally, each province requires a 9-to-12-month articling term, which is accompanied by some type of "barrister" or "solicitor" exams that occur during the articling period and are administered by the relevant licensing authority. Some programs also include a formal practice orientated educational program that must be completed during the articling year.

While the Task Force feels confident that people who are admitted through these articling programs meet the requirements of minimum competence, we also recognize that some of the strictures of a 9-to-12-month apprenticeship create unfair barriers that keep others—people who are qualified to practice law—from being admitted. One significant barrier is the availability of meaningful, paid articling positions and who gets selected for those positions. The Task Force is hopeful that because the Oregon SPP will not be the only pathway for admission, this problem of access will be somewhat alleviated. Whether this is a significant issue is, however, something that the Court and the BBX should be careful to periodically review as the program is implemented.

The Task Force believes that two other points of emphasis can help alleviate equity concerns of a supervised practice pathway without compromising the development of an applicant's legal skills. First, we believe that the program should explicitly authorize applicants to have more than one qualified supervising attorney. Second, although the Task Force is recommending that the Court leave the precise number of hours required for admission through this pathway to an implementation committee, we believe the Court should expressly direct the committee to set the requirement in terms of hours contemporaneously measured and documented in six-minute increments rather than as a term of months to be documented only upon completion of the program or even monthly intervals. This assures that an applicant is not beholden to a single supervising attorney to accomplish the work needed for admission.

Measuring experience in hours rather than months is important for numerous reasons. First, it may be difficult for an applicant to find a supervised attorney who is willing to provide supervision for the entire period, but there may be practitioners who could provide meaningful supervision for a shorter term or for a particular project. Second, there may be meaningful pro bono opportunities that an applicant could participate in (while receiving the appropriate supervision) that would not be available if the applicant were tied to a single supervisor or a metric like “months.” Finally, it is an unfortunate reality that any type of apprenticeship, regardless of the profession, creates a potential for exploitation because the apprentice does not want to suffer a set-back in training by leaving an otherwise untenable situation; we believe that the two suggestions we have made help to alleviate at least some of that concern. Finally, the Task Force believes that so long as the work being done fits within the program’s requirements for the development of legal skills and the attorney providing the supervision is qualified to do so, these two provisions will not create any consumer protection concerns.

Additionally, most Canadian provinces do still employ exams (albeit not “bar exams” as we know them here in the United States) as part of their articling programs. The Task Force believes that because the SPP is going to serve as an alternative to sitting for and passing a bar examination, a better alternative to gauging the success of the supervised practice would be to implement a “portfolio” review by the BBX—an EAP. As discussed above, the New Hampshire DWS, participants create portfolios of legal work-product that is submitted to bar examiners for their review and assessment. As this Court knows, one component of the UBE is the Multistate Performance Test, which is designed to test applicant’s practical legal skills, rather than substantive legal knowledge, by requiring examinees to complete an ordinary practice skill (e.g., drafting a memorandum to a supervising attorney, or a persuasive memorandum or brief). BBX members and Court-approved “co-graders” have become adept at grading the MPT. We believe that an EAP requirement could be crafted as part of the SPP that would assure that the completion of the required hours of supervised practice is operating to develop the applicant’s legal skills and that the applicant is competent to practice law.

In addition to reviewing Canada’s program, the Task Force also looked at Utah’s 2020 modified-diploma privilege/supervised practice program.⁸ The Utah

⁸ See UTAH STATE BAR DIPLOMA PRIVILEGE RESOURCES, <https://utahdiplomaprivilegeorg.wordpress.com/> (last visited June 16, 2021).

program was adopted by the Utah Supreme Court in recognition of the difficulties created by the pandemic. Applicants were eligible for admission to practice after only 360-hours of supervised practice, but the pool of applicants were limited (as relevant to this discussion) to those who had not previously sat for any bar examination and who had graduated from an ABA-accredited law school with a Bar Examination passage rate of 86% or greater.

Utah has created detailed rules regarding what is required by a supervised attorney in this context to both ensure the protection of the consumer and the development of the applicant's legal skills. It has created detailed rules regarding the legal activities that qualify in the program and the Task Force believes those activities appropriately target developing an applicant's legal competence, while protecting the consumer. In sum, the Task Force believes that Utah's program has developed a great deal of the "infrastructure" necessary to implement a SPP here in Oregon.

However, because of the circumstances under which it was adopted, the Utah program attempted to ensure minimum competence standards were met not through supervised practice hours alone, but also by restrictions that were tied to success in bar examinations (either one's individual success or one's school's historical success). Because one reason for developing this alternative pathway is the recognition of some of the institutional inequities of bar examinations, the Task Force believes that it is inappropriate to tie this pathway to any type of bar exam metric. Rather, we believe that the assurance of appropriate competence can be accomplished in two other ways: (a) increasing the hours required by the program from 360 to somewhere between 1000 and 1500 hours; and (b) employing an EAP requirement.

One advantage of the SPP is that it is available to graduates of any qualified law school, whether that school is in Oregon or another jurisdiction.⁹ Moreover, the SPP would not be limited to either new graduates or those who have never taken and failed a bar examination; instead, if one were qualified under Rule for Admission 3.05 to sit for the Oregon bar exam, one would be qualified to apply for admission through the SPP. Additionally, the Task Force believes that, once approved, the rules and infrastructure required to adopt the SPP could be crafted relatively quickly. It is likely such a program could be available to graduates in the class of 2022. Finally, we believe that this pathway fully meets the Court's

⁹ See RFA 3.05(1).

obligation to ensure that an applicant meets minimum competence requirements before admission while creating a meaningful alternative pathway for those for whom the bar exam is a less than desirable option.

In sum, the Task Force recommends that the Supreme Court adopt—as an alternative to the bar examination and not a replacement for it—a supervised practice pathway to admission. Although the details of this pathway, including the specific licensure admission rules, should be carefully crafted by an implementation committee, the Task Force outlines several parameters for the program below.

B. Implementation Considerations

This Section addresses considerations relevant to implementation of the SPP. Subsection 1 first considers a candidate’s eligibility for the SPP. Subsection 2 then discusses the requirements to serve as a supervising attorney in the SPP. Subsection 3 then proposes a set number of required supervised practice hours. Subsection 4 offers guidance on what constitutes eligible supervised practice activities. Finally, Subsection 5 discusses how to evaluate candidates seeking admission to licensure pursuant to the SPP.

1. Eligibility

The SPP offers an alternative to a single component of admission: sitting for and passing the UBE. Neither avenue for admission should be considered better or worse than the other. Accordingly, the Task Force recommends that the universe of people who are deemed qualified applicants for admission via the SPP should mirror (but not expand or contract) the universe of people who are deemed qualified to sit for the Oregon bar exam. Those qualifications are set out in Rule for Admission 3.05; accordingly, the Task Force will not set them out in further detail here.¹⁰

The Task Force believes it is important to explicitly note the following:

¹⁰ We note that RFA 3.05(4), which involves being able to sit for an exam prior to graduation from law school under specified limited circumstances necessarily does not, for obvious reasons, apply to SPP applicants.

- One need not seek admission via the SPP immediately upon becoming a qualified applicant;¹¹
- One need not only seek admission via the SPP. The implementation committee should be sure to address how fees should be structured if a person seeks admission via both the bar examination and the SPP at the same time or sequentially;
- Prior failure of a bar examination has no impact on a person’s ability to seek admission via the SPP;¹² and
- There is no “cap” on how many people can apply for admission via the SPP at any one time, but the Task Force notes that, at least initially, there is unlikely to be infrastructure within the BBX or, more broadly, the OSB, to formally assist an otherwise qualified applicant locate a qualified supervising attorney. As the SPP program develops, the BBX and the OSB should explore whether it can develop more formal ways to offer such assistance.

2. Supervising Attorney Requirements

A supervising attorney must have:

- An active Oregon license;
- 5-7 years’ experience¹³ as a licensed attorney with two of those years being engaged in practice in Oregon;

¹¹ For example, most applicants will become eligible to apply for admission under RFA 3.05(1), which provides that the applicant—in addition to being at least 18 years of age at the time of admission—has graduated from an ABA accredited law school. Just as an applicant is not required to seek admission by applying to sit for the bar examination immediately upon graduation from that law school, an applicant is not required to seek admission via SPP immediately upon graduation from law school.

¹² See RFA 3.05.

¹³ Years of experience for supervisors should be determined by the implementation committee, perhaps with different requirements for different practice areas.

- No record of public discipline; and
- Completed any training requirements *and* formally agree to serve as a supervising attorney *before* the attorney supervises any practice activities. There are several workable models available for an implementation committee to consider for supervising attorney certification and training. Regardless of the model ultimately recommended by the implementation committee, however, the Task Force thought an appropriate guiding principle would be that no hours could be earned unless the supervising attorney was formally qualified and aware *at the time the hours were being earned* that the applicant was documenting them as supervised practice hours. (There can be no “*nunc pro tunc*” certification of hours.)

Most supervised attorney programs involve recognition that a supervising attorney will often delegate to another licensed attorney (even one who does not meet all of the other requirements for serving as a supervising attorney) the obligation of directly supervising an SPP applicant’s daily activities. (For example, a partner in a firm may be the supervising attorney, while a “3rd year” associate is, on a daily basis, working directly with the SPP applicant). With appropriate rules in place, the Task Force thought that the use of such intermediate supervisors was appropriate.

The Task Force notes that the implementation committee must also determine whether an exception to the active license requirement should be made for federal judges acting as supervisors.¹⁴ The resolution of this issue likely turns on the specific activities that the implementation committee recommends qualify as supervised practice hours, a point left unresolved by the Task Force. If the final implementation rules include as qualifying activities work for a judge, then the Task Force believes it is also appropriate to create an exception to the supervising attorney requirements for federal judges.

There is no limit on the number of qualified supervised attorneys an applicant may have.

¹⁴ Oregon state court judges are required to maintain active Oregon licenses; federal judges are not required to do so.

3. Supervised Practice Hours

The Task Force believes that an applicant seeking to be admitted via SPP needs to complete 1000 to 1500 hours of supervised practice in approved qualified activities, the equivalent of 9-12 months of full-time practice. The activity should be completed employing six-minute increments and contemporaneously kept time records that are approved/certified by the supervising attorney. Those hours must be completed within a set window of time.

A majority of the Task Force agreed that the rules should be drafted in a manner that made it possible for some portion of the qualifying hours to be earned during law school. However, there were three points that the Task Force believed were worthy of additional reflection by an implementation committee. First, the Task Force agreed that if this was permitted, there should be a cap on how many hours can be earned while in law school. (For example, 200 hours of a 1000-hour requirement might be permitted.) Second, the activity must qualify for credit in all other respects. In other words, the supervising attorney must be certified as a supervised attorney before the work is completed; and the activity must be for a qualifying activity, etc. One complicating factor is that the Task Force recommended that only attorneys with active Oregon licenses could supervise practice; the Task Force was aware when it did so that this may limit the ability of people attending law school outside of Oregon to earn supervised practice hours during the school year. Ultimately, the Task Force considered the requirement of supervision by an active Oregon lawyer sufficiently important to justify that decision; the implementation committee, in consultation with the Court and other stakeholders, may reach a different conclusion. Third, there should be a cap on how long the hours used in law school can be used by an applicant. For instance, the rules may provide that the hours can only be used if a person seeks admission via the SPP within a specified period after graduation.

Collectively, the salient theme of the Task Force's timing recommendations is that, while the Task Force believes that it is important for there to be flexibility built into the process for those applicants who are not able to simply secure a position with a single employer and complete 1000 to 1500 hours of supervised practice in 9-to-12-months after graduating from law school, we also believe that consumer protection dictates that the supervised practice hours occur within a reasonably condensed period of time to ensure that the lessons that are learned through repetition and consistent exposure to concepts are not lost to time. We

appreciate, however, that there are numerous models for how those interests might be appropriately balanced.

4. Supervised Practice Activities and Payment

The Task Force believes that the list of qualifying activities should be focused on activities that tangibly relate to developing the applicant’s legal competence as detailed in the essential eligibility requirements in RFA 1.25 and the Building Blocks identified by IAALS. Qualifying activities (whether paid, unpaid, pro bono, or low bono) would likely include, but not be limited to:

- All activities related to the direct representation of clients;
- Advising businesses and their employees;
- Developing or implementing policies and practices for nonprofit organizations or government agencies;
- Meeting with the Supervising Attorney or attorneys on case matters, professional development or ethical matters;
- CLE courses and other professional trainings or workshops as would be typical of an attorney in that area of practice (but with a limitation on the number of CLE hours that qualify).

The Task Force recommends that administrative, ministerial and purely paralegal activities be deemed to not qualify or that a cap be placed on the number of hours that can be earned while engaged in those activities.

The Task Force further recommends that the implementation committee carefully consider whether to set explicit policies on activities such as “document review” that, while important to a client and in practice, may have limited professional growth components.

We also recommend that the implementation committee discuss with practitioners and other stakeholders whether to include as qualifying activities “the assistance and counsel to judges.” As noted above, if this activity is included, an exception to the requirement that the supervising attorney have an active Oregon license should be carved out for federal judges.

Two important points of reference for the implementation committee would be the “Law Student Appearance Program,” contained in the Rules for Admission, and the New Lawyer Mentoring Program. While admission via the SPP is not intended to replace either of these programs, the implementation committee will want to consider how they interact and whether amendments to those programs would be required for them all to work with each other properly.

While supervised practice hours can be completed in appropriate pro bono or low bono settings, it should be made explicit that this program is not intended to provide admitted members of the Bar, whether those members are solo practitioners, members of small firms or large firms, with free or low-cost labor. Applicants working for supervising attorneys can and should be paid a reasonable wage for their work. Moreover, it is likely that—assuming a practitioner properly accounts for the practice in client retainer agreements—much of the work of a SPP applicant will be of a nature that it could be properly billed to clients.

5. Evaluation of Participants Seeking Admission Via the SPP

The Task Force offers three core recommendations to guide further consideration about how to evaluate applicants applying for licensure through the SPP:

- Documentation of Supervised Practice Activities. Procedures should be implemented to ensure that every aspect of an SPP applicant’s participation in the program is appropriately documented with the BBX. For example, there should be clear procedures for registering a qualified supervising attorney, and a clear procedure for documenting hours worked, etc.
- EAP Review and Certification. The Task Force recommends that the implementation committee also craft an EAP requirement, modeled somewhat after New Hampshire’s DWS program, that calls upon an SPP applicant to submit non-privileged written work product to the BBX at regular intervals throughout the SPP period so that the BBX can ensure that, before the applicant is recommended for admission, the BBX has seen work product by the applicant that demonstrates minimum competency for admission. The EAP review regulations will have to carefully layout what process is due (and what procedure will be used) if the BBX is concerned at any point that the work product submitted fails to meet minimum competency requirements.

- BBX Oversight. The BBX will remain responsible for admission recommendations to the Court.¹⁵ A favorable recommendation in this context will effectively certify that the applicant has completed the ordinary prerequisites to admission (graduation requirements, passing the MPRE, payment of fees, passing character and fitness evaluation), met all of the practical requirements of the SPP, and that the applicant’s EAP demonstrates minimum competence.

C. Other Considerations

Although there would be a great deal of work to be done, the Task Force believes that it is possible to craft the regulations and procedures necessary to establish a meaningful version of the SPP by the summer of 2022. Whether such a program could be launched by that time will depend on whether the infrastructure required by those regulations is immediately available and the resolution of the outstanding questions noted through Section V of this Report and in the Report of the Supervised Practice Pathway subcommittee to the Task Force. Once those questions are resolved and proposed procedures drafted, the Court will be in a position to either order the immediate implementation of the program or to direct the BBX to work on securing the resources needed to permit its implementation.

Also, as previously noted, the SPP pathway to admission will not include any formal assistance by the OSB or BBX to applicants looking for supervising attorneys. Nor, very likely, will the OSB or BBX be able to develop meaningful partnerships with non-profits or other organizations through which applicants might be able to engage in meaningful practice development activities while simultaneously providing important assistance to underserved communities. However, we hope that as the program becomes more robust the OSB and the BBX will be able to play a greater role in both of those areas.

¹⁵ Like the OEP program, this will require a great deal of volunteerism on the part of bar membership. The program requires many experienced lawyers who wish to train a new apprentice, and other experienced lawyers to assess whether the EAP of the apprentice meets or exceeds the minimum competence standard.

VI. Conclusion

The Task Force believes that there is substantial evidence to support offering alternative pathways to licensure that maintain and enhance rigor, while ensuring that new lawyers enter the profession with the knowledge and skills that they need to serve clients. Both the OEP and the SPP meet this call. For the reasons discussed above, the Alternatives to the Exam Task Force respectfully requests immediate adoption of the Oregon Experiential Pathway and the Supervised Practice Pathway models as alternatives to the bar exam. The Task Force further requests that the Court order the formation of implementation committees to draft the implementing Rules for Admission.

Sincerely

A handwritten signature in cursive script that reads "Joanna T. Perini Abbott".

Joanna Perini-Abbott
Chair, Alternatives to the Exam Task Force
Oregon State Board of Bar Examiners