NextGen Licensure & Accreditation

Nachman N. Gutowski

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Nachman N. Gutowski

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22 U.N.H. L. Rev. 311 (2024)

ABSTRACT. The Bar Exam is changing. The National Conference of Bar Examiners is pushing full steam ahead with a replacement for the current elements that make up the Uniform Bar Exam (UBE). This new exam, called the NextGen Bar Exam (NextGen), is scheduled to launch in Summer 2026. Current American Bar Association (ABA) accreditation standards do not consider the coming changes. A full picture of what the adjustments will look like is hazy and very much in the trial stages still. These shifts impact current law students, the legal education practices of law schools, and accreditation standards. There is a near-universal agreement that changes are overdue to the current legal licensure format. Simultaneously, alternatives to the NextGen, and even to the “need” for any summative licensure exam, are being actively explored.

Performance on the Bar Exam is used as a measurement tool by the American Bar Association for law schools to maintain accreditation. Standard 316, commonly referred to as Ultimate Bar Passage, has undergone several changes over its short life; yet, even in its current iteration, it fails to meaningfully consider what is just around the corner. There is no question that the Bar Exam continues to have racially discriminatory, disparate outcomes and impacts. Making matters worse, the use of aggregate limited durational performance data on post-graduation individual licensure exams as a meaningful metric by which accreditation is affected is inconsistent with accepted practices in similarly situated professions. Rectifying some baseline injustices can start with acknowledging how changes starting in 2026 are unaccounted for in the current standard. Adjusting or removing current prelicensure requirements and standards, either in ABA accreditation requirements for law schools or in educational prerequisites on examinees placed before the exam itself, would go a long way to align stated accreditation goals with licensure outcomes.

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INTRODUCTION

The Bar Exam continues to be held out as a reliable method of ensuring minimal competence in new attorneys.\(^1\) Causing considerable complications is the reality that this exam, which is relied upon to be a beacon of reliability for competence, has been deemed so ineffective by even the organization that created it that it is slated to be replaced by NextGen as soon as 2026.\(^2\) To make matters worse, the ability of law school graduates in nearly all jurisdictions to even attempt the licensing exam is limited.\(^3\) Having a requirement to graduate from an ABA-accredited school does not make sense.\(^4\) Much of this is made worse by the inconsistent methods of public data publication on performance across the country.\(^5\)

Jurisdictions should remove the need for ABA accreditation, which does not seem to be adding anything of substance to the current scheme of creating new attorneys. The Bar Exam has shown time and again, despite what many continue to believe, that it is not the ultimate indicator of competence. It makes no difference which educational organization examinees graduate from. The Bar Exam is touted as being so effective that there should not even be the need for an educational component. Of course, all of this is taking the argument to the extremes to show the absurdity of holding onto the need for, and the importance of, a single exam as the ultimate barrier to the practice of law. Using aggregate data of individual alumni


\(^3\) Forty-six states have a requirement of graduation from an ABA-approved law school as a prerequisite to sit for the Bar Exam. About Us, A.B.A., https://www.americanbar.org/groups/legal_education/about_us/ [https://perma.cc/6XAN-2GNY] (last visited Jan. 9, 2024). Similarly, the ABA accreditation stamp is accepted and recognized as being sufficient in other jurisdictions that are not ABA-approved school applicants only. See id. This makes the ABA’s influence and power incredibly outsized. See Benjamin Hoorn Barton, Why Do We Regulate Lawyers?: An Economic Analysis of the Justification for Entry and Conduct Regulation, 33 ARIZ. ST. L.J. 429, 434 n.16 (2001).


performance on the Bar Exam to evaluate and ultimately penalize institutions by holding their accreditation hostage is absurd.

One of the most contentious ABA standards for accreditation to exist in the last decade is Standard 316, relating to ultimate bar passage rates.\(^6\) This ever-evolving standard is relatively new and has undergone considerable debate and infighting amongst ABA members, the council, and law schools.\(^7\) The first time a version of this standard made its appearance was in the 2013–2014 ABA Standards and Rules of Procedure for Approval of Law Schools under Standard 301.\(^8\) This standard, by

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\(^7\) The most recent changes occurred in 2019, having significant implications and adjustments in time and calculation format to maintain compliance. See Nicola A. Boothe, *Black and Barred: The Bar Examination’s History of Exclusivity and the Threat of Further Exclusion Posed by ABA Standard 316*, 74 S.C. L. Rev. 179, 187–88 (2022). Despite widespread pushback, and proposed changes to the standard being sent back to the Council twice for reconsideration, the ABA moved ahead. See id.


Interpretation 301-6 [For further guidance regarding compliance with 301-6 and for the explanation of the application of 301-6 for provisionally approved schools, see Appendix 3.]

A. A law school’s bar passage rate shall be sufficient, for purposes of Standard 301(a), if the school demonstrates that it meets any one of the following tests:

1) That for students who graduated from the law school within the five most recently completed calendar years:
   (a) 75 percent or more of these graduates who sat for the bar passed a bar examination, or
   (b) in at least three of these calendar years, 75 percent of the students graduating in those years and sitting for the bar have passed a bar examination.

In demonstrating compliance under sections (1)(a) and (b), the school must report bar passage results from as many jurisdictions as necessary to account for at least 70% of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency.

2) That in three or more of the five most recently completed calendar years, the school’s annual first-time bar passage rate in the jurisdictions reported by the school is no more than 15 points below the average first-time bar passage rates for graduates of ABA-approved law schools taking the bar examination in these same jurisdictions.

In demonstrating compliance under section (2), the school must report first-time bar passage data from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. When more than one jurisdiction is reported, the weighted
the ABA’s own reported data, shows a significant negative disparate impact based on race, for examinees. The ABA should at the very least suspend the standard. More than fifty other standards are still in place for compliance to ensure educational standards in legal accreditation. Alternatively, they could decide to revert to the previous standard from before the changes of 2019, allowing five years and multiple formats to meet the standard. The best option would be to eliminate

average of the results in each of the reported jurisdictions shall be used to determine compliance.

B. A school shall be out of compliance with the bar passage portion of 301(a) if it is unable to demonstrate that it meets the requirements of paragraph A (1) or (2).

C. A school found out of compliance under paragraph B and that has not been able to come into compliance within the two year period specified in Rule 13(b) of the Rules of Procedure for Approval of Law Schools, may seek to demonstrate good cause for extending the period the school has to demonstrate compliance by submitting evidence of:

(i) The school’s trend in bar passage rates for both first-time and subsequent takers: a clear trend of improvement will be considered in the school’s favor, a declining or flat trend against it.

(ii) The length of time the school’s bar passage rates have been below the first-time and ultimate rates established in paragraph A: a shorter time period will be considered in the school’s favor, a longer period against it.

(iii) Actions by the school to address bar passage, particularly the school’s academic rigor and the demonstrated value and effectiveness of the school’s academic support and bar preparation programs: value-added, effective, sustained and pervasive actions to address bar passage problems will be considered in the school’s favor; ineffective or only marginally effective programs or limited action by the school against it...

(viii) Other factors, consistent with a school’s demonstrated and sustained mission, which the school considers relevant in explaining its deficient bar passage results and in explaining the school’s efforts to improve them.


10 Standards, supra note 6.

A factor that plays a major role in the impact of Standard 316 is the many changes being promised in the NextGen exam. Many things about NextGen invite concern. One of the foundational concerns is that these changes and the adjusted format are being created and proposed by the National Conference of Bar Examiners (NCBE), rather than at the jurisdictional level. Unfortunately, this group is composed of otherwise unaccountable and unelected parties with significant financial interests in the Bar Exam. They hold unreasonable levels of influence over the exam and, as a result, over the licensure of new attorneys and the accreditation of the law schools they graduated from. Seemingly corresponding with the 2013–2014 date of implementation of ultimate bar passage standards by the ABA, the NCBE launched the new Uniform Bar Exam (UBE) format in 2011. Forty-one jurisdictions currently utilize the UBE. Additionally, while some of the changes being explored by the NCBE in the NextGen have the potential to be a welcome shift in the Bar Exam format, promising a renewed focus on practical skills, it is far from clear what will ultimately be delivered.

Options for what to do about changes to the bar, alternative licensure approaches, and the impact they have on the accreditation of schools are fairly robust and plentiful. One possible solution would be to create a dual track to


13 See generally Joe Patrice, NCBE President Gives Trainwreck of an Interview, ABOVE THE L. (Aug. 14, 2020), https://abovethelaw.com/2020/08/ncbe-president-gives-trainwreck-of-an-interview/ [https://perma.cc/R4HR-J2X8]; see also Nonprofit Explorer: National Conference of Bar Examiners, PROPUBLICA, https://projects.propublica.org/nonprofits/organizations/362472009 [https://perma.cc/LQ3M-GRUP] (last visited Jan. 9, 2024). The NCBE is sitting on well over $100,000,000 in assets and brings in $25,000,000+ in revenue yearly. Patrice, supra; PROPUBLICA, supra. It brought in an astounding $39,284,236 of revenue and $17,288,671 in net income in 2020, at the height of the pandemic! PROPUBLICA, supra. It should be clarified, however, that the NCBE is not alone in benefitting from the existence of, and changes to, a Bar Exam and an ever-changing landscape. There are more bar review companies, spending and earning millions of dollars focusing on preparing students for these exams, entering the market seemingly yearly. An entire economic ecosystem benefits from the continuity of a post-graduation legal licensure examination.

14 See Griggs, Outsourcing Self-Regulation, supra note 12, at 28, 45.


16 Id.

17 See Terra Nevitt, Examining the Bar Exam: Exploring Alternative Models for Licensing, WASH. ST. BAR NEWS, June 2021, at 10, 10–11 (discussing the need to address the disproportionate impact of the Bar on underrepresented groups); see also Stephanie Francis Ward, As Some Jurisdictions Consider Bar Exam Alternatives, ABA Legal Ed Section Again Looks at Bar Pass Standard, A.B.A. J. (Aug. 19, 2022, 2:54 PM), https://www.abajournal.com/web/article/as-some-jurisdictions-
licensure after graduating from law school. Graduates would have the option to take the NextGen, and it is safe to presume there would still be twenty to twenty-five percent of law graduates who historically fail on their first attempt. There could be a choice to utilize a supervised practice track to ensure additional support and competency. Those who pass in the traditional exam setting would not be required to take on the additional supervision, though it is something that should be seriously considered and scaled for all new attorneys. Presumably, there will still be large groups of people who choose to use NextGen; but particularly in the first few years of its implementation, there needs to be a parallel licensure path. Similarly, this will allow those jurisdictions who do sign up to use this new format some flexibility and the ability to decide how to proceed as they work out any concerns with the NextGen, scoring, and any supervised licensure path moving forward.

Finally, adjustments need to be made in many jurisdictions that only permit students, and not graduates, to engage in supervised practice. For these jurisdictions that do not simultaneously have an alternate licensure path, taking this position makes little sense. It is inconsistent to say that law students who have not yet taken or passed the Bar Exam are permitted to practice under the supervision of a licensed attorney for clinics and externships, yet upon graduation, if they fail the exam, they cannot practice under supervision. It does not follow logically that

consider-bar-exam-alternatives-legal-ed-again-looks-at-bar-pass-standard

18 See generally Various Statistics on ABA Approved Law Schools, A.B.A., https://www.americanbar.org/groups/legal_education/resources/statistics/ [https://perma.cc/Z5GR-HAP6] (last visited Jan. 10, 2024) (providing data on bar passage rates for the years 2018, 2019, and 2020, the three most recent graduating classes (for which data is available) who have met the two-year window for Ultimate Bar Passage under the amended two-year timeframe of Standard 316). First-time bar passage nationally for students who graduated in 2018, 2019, and 2020 was 74.8%, 79.64%, and 82.83%, respectively.


20 There is talk in states, like Nevada, to implement a component to licensure that includes supervised practice for all new attorneys, regardless of bar exam passage. It is a smart and meaningful approach.

21 At the time of writing this, only thirteen jurisdictions have publicly announced their intent to adopt NextGen. See New Mexico Adopts NextGen Bar Exam, NAT’L CONF. OF BAR EXAM’RS, https://nextgenbarexam.ncbex.org/new-mexico-adopts-nextgen/ [https://perma.cc/CV44-3ZDP] (last visited Feb. 19, 2024).

22 A Certified Legal Intern is a law student who is approved by the state Supreme Court to represent clients in court under the supervision of a licensed attorney. See e.g., RULES REGULATING THE FLA. BAR ch. 11 (Sup. Ct. Fla. 1992); see also SUP. CT. RULES FOR THE GOV’T OF THE BAR OF OHIO rule II (Sup. Ct. Ohio 1972).

23 SUP. CT. OHIO, supra note 22 (“I have already graduated from law school. Can I apply for a legal
supervision is somehow more robust for a student than a graduate. For those concerned about the timing and impact of deviating to alternative paths of licensure, such as supervised practice, the truth is there is never a good time to implement and figure out concerns for such a departure from standardized licensure. However, because the NCBE is mandating the shift in these UBE jurisdictions, which will affect more than seventy percent of the country, a significant departure from the established norm is the only reasonable solution. If we seek to remedy what otherwise is little more than a laboratory experiment on law school graduates seeking admission to practice law, new and alternative methods of licensure must be considered.

I. DEPARTMENT OF EDUCATION AND THE AMERICAN BAR ASSOCIATION

The Department of Education (DOE), acting in line with its mandate from the Secretary of Education, provides recognition to organizations as approved accrediting bodies. For legal education, the American Bar Association Council of the Section of Legal Education and Admission to the Bar (Council) is the only recognized authority. The Section of Legal Education and Admission to the Bar (Section) was the first section created by the ABA in 1893. While accreditation is publicly referred to as “ABA-Approved,” the Council acts independently from the larger body of the ABA and does so by regulations set by the DOE. The ABA intern certificate? No. Applicants must be currently enrolled in an ABA-approved law school to apply.); see also Marsha Griggs, Sorry, Not Sorry: Temporary Practice in a Pandemic, NW. U. L. REV.: NULR OF NOTE (May 11, 2020), https://blog.northwesternlaw.review/?p=1399 [https://perma.cc/J9AN-H589].


28 Standards, supra note 6. The Council acts with such independence, that despite getting
adopted the Standards for Approval of Law Schools (Standards) in 1973. The Standards have undergone several changes, but schools must adhere to them to receive or retain accreditation from the ABA.\footnote{Id.}

In 2016, there was serious concern on behalf of the DOE that the Section was not fulfilling its requirements for standard enforcement, and they threatened to suspend this ability to act as an approved accrediting agency.\footnote{James S. Heller & Simon F. Zagata, \textit{Back to the Future: ABA Law School Accreditation in the 21st Century and America’s First Law School’s Battle to Survive in the 1970s}, 111 LAW LIBR. J. 509, 515, 516–517 (2019); Judith Areen, \textit{Accreditation Reconsidered}, 96 IOWA L. REV. 1471, 1487–90 (2011).} The DOE determined that the Section was not acting in compliance with the Higher Education Act, and as a result, was in danger of not having its authority renewed.\footnote{Stephanie Francis Ward, \textit{Accreditation Question: ABA Responds to Panel’s Threat to Suspend Its Role}, ABA J., Sept. 2016, at 67.} The Section, through its managing director, put out a report downplaying the interaction, stating rather that they needed to “respond to some technical deficiencies that were noted and report-back on our corrective action in a year. That is all within the ordinary and typical flow of an accreditation process.”\footnote{Barry Currier, \textit{Report on the Status of the Accreditation Project}, 47 A.B.A. SYLLABUS (July 1, 2016), https://www.americanbar.org/groups/legal_education/publications/syllabus_home/volume-47-2015-2016/syllabus-summer-2016--47-4-/from-the-managing-director/ [https://perma.cc/M7Y4-REEE].} The Section ultimately did not lose its ability to provide accreditation for law schools.\footnote{List of Agencies, \textit{ supra} note 26.} However, it is interesting to note the timing of this and what has happened in terms of enforcement and tightening of rules since.\footnote{See generally Judith Welch Wegner, \textit{Law School Assessment in the Context of Accreditation: Critical Questions, What We Know and Don’t Know, and What We Should Do Next}, 67 J. LEGAL EDUC. 412, 412 n.3 (2018).}

The NCBE was created by the Section and founded in 1931.\footnote{Michel Ariens, \textit{Know the Law: A History of Legal Specialization}, 45 S.C. L. REV. 1003, 1033 n.153 (1994).} It acts as a semi-autonomous and non-profit organization.\footnote{About NCBE, \textit{ Nat’l Conf. of Bar Exam’rs}, https://www.ncbex.org/about [https://perma.cc/BK3J-3WW4] (last visited Jan. 27, 2024).} Though technically independent from the ABA, their reliance on fee-generating exam administration should call into question whether they are truly acting as either an autonomous or a non-profit entity. The NCBE works closely with the state jurisdictions, through their locally
appointed agencies, primarily the board of bar examiners or similarly situated bodies. It should also be noted that “several former NCBE Board of Trustees chairs have served as chair of the Council,” which should raise all kinds of red flags.

A. Contentious ABA Standard and Disparate Impact

The DOE has come down on the ABA in the past, including for violating the Sherman Act. Ultimately, the DOE entered into a consent decree mandating changes in the process the ABA used for accreditation. One of the big adjustments the ABA was forced to make was to vest final authority and power in the Council, which before this was only acting in an advisory role. This was to adhere to the “separate and independent” requirement from the DOE. They view an inherent conflict to exist when an association of a profession is accrediting itself.

The ABA has a long history of discrimination and an inability to apply standards uniformly. It is reasonable to presume that to meet standards set by the DOE, the ABA may be coming down harshly and more regularly, particularly against institutions whose populations are more diverse than the profession at large. Yet the students from many of these now-closed institutions were still “taught out” elsewhere, and the professors are transferring to teaching at other schools. The only thing that is being accomplished is that the physical buildings are now closed, and it makes it harder for future similarly situated students to have an opportunity to practice law.

This is not a new rebuke of the ABA. This line of thinking goes back to the very early 1920s when the ABA first began its crusade against diploma privilege: “In

39 See Areen, supra note 30, at 1487–91.
43 Staver & Staver, supra note 42, at 22.
44 Id. at 8 n.34.
case[s] of institutions whose high reputation has become established through years of competent performance, there would be little or no danger to the profession if their graduates were to be admitted to the bar without further examination."47 It would make great sense to say that any school that has met its high standard and lofty oversight by the ABA is of high reputation since there are no differences between ABA-approved schools. Either the ABA is needed to accredit law schools to provide sufficient levels of protection in education, in which case they should be able to practice after graduation, or the need for an exam is a direct response to the inability of the ABA to enforce and adhere to its own unrealistic and arbitrary standards. It cannot be that the ABA accreditation needs to be pervasive and so authoritative, yet still need a summative exam. It is at best one or the other.

B. American Bar Association Standard 316

ABA Standard 316 is a compilation and aggregation of individualized results on the bar.48 They are not a reliable, accurate, or meaningful reflection of the school the examinees graduate from. Imagine for a moment a situation comprised of the worst students at the best-ranked law school, and the best students at the worst-ranked school. One grouping fails, and the other passes, respectively. Neither is an indictment or reflection of anything other than their individualized performance in studies pertaining particularly to approach, and maybe even utilization of third-party Bar Exam study aids. The ABA even considers diploma privilege (where it exists) as sufficient for meeting the standard!49 For schools in a jurisdiction with alternative pathways where their students are taking advantage of these licensure paths, Standard 316 is effectively moot. If it’s moot for them, it must be moot for everyone else.

If the Bar Exam in any jurisdiction itself is a test that is valid and worthwhile and the ultimate example of whether someone is competent, then we should not care about ABA accreditation as a precursor to attempting the test. If the Bar Exam is truly a test of competence, then it would be sufficient that someone could pass it regardless of what school they attended. Additionally, since performance on the Bar Exam is correlative to law school performance, it is redundant in its replication of the already-stated educational requirement of law school.50 Furthermore, the lack of a need for using the Bar Exam for practicing attorneys to be able to continue practicing law as a regular test of competency is, by every definition of the term,

48 See Standards, supra note 6.
granting what can only be called a Bar Exam privilege.51

II. NEXTGEN BAR EXAM

A. How Did We Get Here?

The NCBE manufactures the Bar Exam that is administered in forty-one jurisdictions, as well as some components for all but two jurisdictions.52 The NCBE purports to “promote[s] fairness, integrity, and best practices in admission to the legal profession for the benefit and protection of the public” and “serve admission authorities, courts, the legal education community, and candidates by providing high quality assessment products, services, and research; character investigations; and informational and educational resources and programs.”53 Concurrently, the NCBE relies heavily on the administration of the UBE, which a staggering 42,101 people took in 2022.54

When law schools in the United States were first created, there was talk of two divergent theories of how education should be approached, mainly the Case Method and the more lecture and practical based.55 The format we currently know, with the Socratic method and teaching heavily from case review, ultimately won out.56 However, there was another approach that we should give serious consideration to reintroducing. While abandoning the classic education format for lawyers may be difficult to accept, there must be, at a minimum, a shifting of its focus and licensing element to be more in line with the practical performance of the profession. The Bar Exam is now in the process of shifting to testing more technical skills under the new NextGen format, and this has the potential to be a good thing.57

51 David A. Friedman, Do We Need a Bar Exam . . . for Experienced Lawyers?, 12 U.C. IRVINE L. REV. 1161, 1208 (2022).
54 The Uniform Bar Examination (UBE), supra note 15.
56 Dean Christopher Langdell at Harvard University was one the first and primary proponents of this case and classroom interactive method, professor-student engagement, to be completed over a three-year period, as being the proper way to distinguish lawyering as a profession and not just a trade capable of being learned through an apprenticeship. See 2 Charles Warren, History of the Harvard Law School and of Early Legal Conditions in America 374 (N.Y. Lewis Publ’g Co. 1908).
There is historical context at every step of the way that indicates that becoming an attorney in the United States has a lot to do with keeping out of the profession certain groups of people while providing control to those already admitted.\(^{58}\) There is an avalanche of data showing that the performance on this licensure exam is not representative or consistent amongst racial and gender groups.\(^{59}\) The idea that providing public safety and protection by having an exam that ensures minimum competency is only a relatively recent justification for the Bar which is not based in reality.\(^{60}\)

Having the Bar Exam as the guard standing at the door of the profession does not protect the public and it does not ensure competency. Instead, it serves to continue a tradition of exclusion, bias, and disparate impacts all while hiding behind the false flag of consumer protection.\(^{61}\) There is an uncontested existence of negative racial impacts of the Bar Exam.\(^{62}\) This has been attributed to a range of reasons, including implicated test bias and hostile learning environments.\(^{63}\) During the COVID-19 pandemic, the issues that arose in creating, administering, and grading the bar exam were so rampant that it is difficult to even begin grasping its long-term impact.\(^{64}\) Substantive, well-reasoned pushback against the exam, about

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\(^{62}\) *Summary Bar Pass Data*, supra note 9.


\(^{64}\) Eura Chang, *Note, Barring Entry to the Legal Profession: How the Law Condones Willful
the futility and lack of utility of the Bar Exam in its current format exists.\textsuperscript{65} Unfortunately, the NCBE decided to double down on its position that the exam has been confirmed to measure minimum competence many times and that positions contrary to theirs must be based on preconceived notions or personal vendettas rather than merit.\textsuperscript{66} Following independently funded, multi-year research, the Institute for the Advancement of the American Legal System (IAALS) produced the 12 building blocks of minimum competence.\textsuperscript{67} These consist of interlocking components, or “building blocks.”\textsuperscript{68} With the upcoming launch of NextGen, the


\textsuperscript{65} See Deborah Jones Merritt, \textit{Raising the Bar: Limiting Entry to the Legal Profession}, 70 The Bar Exam'r (Nov. 2011), https://thebarexaminer.ncbex.org/wp-content/uploads/PDFs/700401-KaneMerrittKleinBahlscornelle.pdf [https://perma.cc/33PE-KLVT]. \textit{See also Building a Better Bar: The Twelve Building Blocks of Minimum Competence}, Inst. for the Advancement of the Am. Legal Sys. (Dec. 2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf [https://perma.cc/33PE-KLVT] (evaluating the Daniel Webster Scholar Honors Program to analyze the program’s outcomes). In 2015, IAALS conducted an evaluation of the Daniel Webster Scholar Honors Program to analyze the program’s outcomes. Through focus groups and interviews, we learned that: members of the profession and alumni believe that students who graduate from the program are a step ahead of new law school graduates; when evaluated based on standardized client interviews, students in the program outperformed lawyers who had been admitted to practice within the last two years; and the only significant predictor of standardized client interview performance was whether or not the interviewer participated in the Daniel Webster Scholar Honors Program. Neither LSAT scores nor class rank was significantly predictive of interview performance. This innovative combination of formative and reflective assessment in a practice-based content—with a focus on collaboration between the academy and the profession—is why IAALS believes other jurisdictions should look to the Daniel Webster Scholar Honors Program as an example of preparing new lawyers to venture into the profession with the skills they actually need to succeed in today's legal marketplace. The Institute for the Advancement of the American Legal System last year called for a new approach to determining who’s qualified to practice law. It said the skills new lawyers need and use cannot be identified through closed-book exams with time limits and multiple-choice questions.


\textsuperscript{68} \textit{Id.} “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
B. Proposed Elements of the New Exam

The NCBE created a Testing Task Force (TTF) in 2018 to explore alternatives to the current format of the exam. The creation of the TTF is “to ensure that the next generation of the bar exam continues to test the knowledge, skills, and abilities required for competent entry-level legal practice . . . .” After conducting some initial surveying of members of the profession, the TTF recommends creating a new Bar Exam to replace many of the elements of the current UBE. These elements consist of the Multistate Essay Exam (MEE), Multistate Performance Test (MPTE), and the Multistate Bar Exam (MBE). According to the NCBE, this new exam is intended to test less broadly or deeply within subjects, allowing for less rote law memorization to be required. This would certainly be an improvement.

Overreliance on memorization continues to be a significant concern for critics of the Bar Exam as an area that needs change. However, no one can seriously take the position that the NCBE is living up to this promise. Additionally, they would still test legal topics that they think are important in a format of their choosing. It is not entirely clear what it is exactly about these selected topics, and not others, that make them so necessary for testing competence. Still problematic in choosing 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.”

69 Jaylin K. Johnson, In Response to Professor, Please Help Me Pass the Bar Exam, 125 W. VA. L. REV. 913 (2023) (Perhaps, it looks like they are trying to continue consolidating power and close ranks against any dissension.).


76 For example, take the practice of immigration law, a topic that is not tested or included on
topics is that the exam would continue to be testing the “law of nowhere.” Based on the available public information, there are those in the legal community who feel the new exam format is a simplification, dumbing down, and synthesizing of materials. The decision to recycle memorization-focused multiple choice questions and only tweak MPT style questions means that the “new” elements of the NexGen are just more of the same.

C. NCBE “Recommendations”

There is a growing list of recommendations and notes by the NCBE that, for the most part, are surface-level and not followed by real examples. The lack of information and materials to help law schools prepare for the seemingly mandatory shift to this new exam is unacceptable. The NCBE recommends that there should be a greater emphasis on lawyering skills. This is right on the money and absolutely what many proponents of change have been saying for a long time. However, saying these skills need to be tested and doing that testing are two very different things. They have not yet shown how lawyering skills can be tested utilizing a standardized exam format in any kind of convincing way. Using a standardized any bar exam. A law school graduate could take the bar exam, pass, and go into practice for something they never took a class in, never were tested on for the Bar; yet the argument is they are somehow competent. How can they say one area is important but not another? Unless we want to consider—and perhaps we should—specialized licensure, such as exists for specializations in medicine, accounting, and engineering.

77 Milan Markovic, Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege, 35 GEO. J. LEGAL ETHICS 163, 196 (2022). The law of nowhere denotes these fictional legal doctrines that are not based in reality or connected to any jurisdiction.

78 See Paul Caron, Blackman: NCBE Dumbs Down Bar Exam By Testing Only The 1 in IRAC; If States Adopt NextGen, They Should Raise The Cut Score, TAXPROF BLOG (July 13, 2023) https://taxprof.typepad.com/taxprof_blog/2023/07/ncbe-dumbs-down-bar-exam-if-states-adopt-nextgen-they-should-raise-the-cut-score.html [https://perma.cc/6V77-3L2M] (last visited Feb. 19, 2024); see also NCBE Publishes First Sample Questions for NextGen Bar Exam, NAT’L CONF. OF BAR EXAM’RS (2022), https://nextgenbarexam.ncbex.org/ncbe-publishes-first-sample-questions-for-nextgen-bar-exam/ [https://perma.cc/CZ25-JVDB]. This is already visible in the first round of released questions from July 2023, which seem to be a far cry in terms of quality and the change promised. There doesn’t seem to be as much change as they promised, as they are keeping a huge chunk of the questions in multiple-choice format. This is problematic and not in line with the radical shift that is necessary. Additionally, other elements of the new exam seem to be simply slight tweaks of the current format. So much for a focus on change and skills.

79 It is frankly embarrassing how little in the way of innovation and changes are being presented after all these years of ‘work’ on the next ‘generation’ of the exam. If a plane (the current Bar Exam) crashed and burned due to incompetence on the part of the pilot (NCBE), to expect everyone (the legal community) to just get on board a new plane (NextGen) and not worry when the same pilots are the ones in charge still, is negligent at best.

80 See supra note 79.

81 See Curcio, supra note 75, at 452.
exam is littered with problems in general.\textsuperscript{82} It can be a nightmare when it comes to testing skills.\textsuperscript{83} Many of the problems that are appearing, in theory, could be worked out with a thoughtful approach and commitment to the process. However, it is inconceivable that this is going to be done with a focus on the best outcomes when the development and testing of this new format is proceeding with an immovable ticking clock hanging over the process.

Another recommendation is the need to focus on fairness and accessibility.\textsuperscript{84} This is something that should be a given for any examination and needs follow through. Yet the reality is that there are too many unanswered questions—particularly surrounding the decision to shift to a strictly computer-based exam in NextGen.\textsuperscript{85} These computer-based exams are still going to be administered outside of testing centers and organized and executed through the local jurisdictions.\textsuperscript{86} There could also be continuing implications relating to barriers to access for the visually impaired and other applicants who require accommodations.\textsuperscript{87}

The existing benefit of score portability should be maintained.\textsuperscript{88} The shift to NextGen is intended to replace the UBE.\textsuperscript{89} However, the details of scoring for the new exam are not yet flushed out. There will likely need to be some resemblance to the current system of cut scores, despite the many adjustments that have

\textsuperscript{82} See Michael Couch II et al., Rethinking Standardized Testing from An Access, Equity and Achievement Perspective: Has Anything Changed for African American Students?, 5 J. OF RSCH. INITIATIVES 3, 1 (2021); see also Peter Sacks, STANDARDIZED MINDS: THE HIGH PRICE OF AMERICA’S TESTING CULTURE AND WHAT WE CAN DO TO CHANGE IT 218 (Da Capo Press, 1999); see also Deseriee A. Kennedy, Access Law Schools & Diversifying the Profession, 92 TEMP. L. REV. 799, 799 (2020).


\textsuperscript{84} Nat’l Conf. Bar Exam’rs Testing Task Force, supra note 72.

\textsuperscript{85} Id.

\textsuperscript{86} See FAQs about Recommendations, supra note 24.

\textsuperscript{87} See, e.g., Consent Decree at 4–9, Stanley v. Barbri, Inc., No. 16-01113 (N.D. Tex. Jan. 22, 2018) (requiring Barbri to take measures to ensure accessibility for “individuals with visual disabilities” in response to a lawsuit which alleged that Barbri lacked sufficient “auxiliary aids and services”).

\textsuperscript{88} Nat’l Conf. Bar Exam’rs Testing Task Force, supra note 72.

\textsuperscript{89} Id. The NCBE says it as to ‘remain’ affordable. To call the current exam affordable is laughable.
occurred, and concerns that will undoubtedly reappear.90 How these scores will be transposed on a new exam while still maintaining the relative scores to other jurisdictions is one of the most unclear repercussions of the NextGen.91 There has been a recent trend of jurisdictions that utilize the UBE lowering their cut scores.92 A reasonable understanding of this trend is that whatever the scoring model will be for NextGen, it will be applied in the same interrelated way as the current UBE. This is incredibly important since the portability of scores and reciprocity of status undoubtedly had a large impact on the initial attractiveness and adoption of the UBE and can be one of the main reasons why it grew so quickly.93 A single exam, available in forty-one jurisdictions with a transferable score, in theory, allows for much greater portability and mobility than ever before. However, the exact details cannot be worked out until a reliable test is fully functional. It is a little bit of a chicken and egg problem.

It should go without saying that the exam should be affordable.94 This should be seen as non-controversial. Yet, there are serious and considerable concerns that the current exam is not living up to this, and many other basic standards.95 One example of this is by jurisdictions continuing to be limited in their administration to twice per year and by maintaining the local jurisdictions as the administering location.96 This leads to problems and costs related to travel, hotels, and other

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96 Maria Florencia Cornu Laport, Break It Up, Florida Bar Exam – Break It Up, LINKEDIN (Mar. 5, 2023), linkedin.com/pulse/florida-bar-exam-break-up-m-florencia-cornu-laport%3FtrackingId
economically impactful effects. Certainly, there will still be the need for students to purchase and utilize a commercial bar preparation program to assist. The costs associated with studying for, taking time off work for, and traveling to an exam that is limited in availability do not seem to be getting the attention they should with NextGen.

D. Pilot Testing & Field Testing

Initial pilot testing for the NextGen format began on November 9, 2022 and has included a large participant pool. This pilot testing involved current law students, recent examinees and graduates, and a handful of the associated professors from the schools. The next step is the Field Testing took place in late January 2024. There are going to be seven Foundational Skills. Significant questions remain about how to implement a test of these skills on a computer-based exam. There is

99 Wellington, supra note 99. Without violating the non-disclosure, they required everyone to sign, including promising to not sit for the actual NextGen for several years post its launch, this author can safely say they were nothing short of disappointed and that the pilot testing was simply underwhelming. With the release of examples of questions in July 2023, it became public just how short of the mark they came in the first attempt. To be clear, the issue is not in the lack of quality or range of potential questions in the changing exam. Rather, one of the biggest problems is the insistence of the NCBE to be rigid in their adherence to 2026 as the implementation date. This places educators, schools, and jurisdictions under pressure to decide how to respond, whether to adopt and what the next steps are, all before having all the problems worked out. It is quite simply irresponsible and unethical.
100 Email from Sophie Martin, Dir. of Communications, Educ., and Outreach, NCBE, to Nachman Gutowski, Dir. of Acad. Success Program, William S. Boyd Sch. of L., regarding NextGen Field Testing: “About NextGen Field Testing: The NextGen bar exam, which is scheduled to launch in July 2026, will test a broad range of foundational lawyering skills, utilizing a focused set of clearly identified fundamental legal concepts and principles needed in today’s practice of law. Field testing is a critical component of NCBE’s research to solidify the structure of the NextGen exam, which will include long-answer, short-answer, and multiple-choice questions. During this phase, our researchers will be pretesting questions that may be included in the live exam. Participating 3L/4L students and recent grads (2022–2023) will be bound to confidentiality and will receive a $350 payment from NCBE for completing the test” (Aug. 14, 2023) (on file with author).
nothing to indicate that examinees would have access to search databases. Additionally, there are accessibility and disability requirements to consider. This has the hallmarks and potential for where what is really being tested is computer literacy and access to the best and, incidentally, most expensive technology instead of lawyering skills.

These skills will be tested through eight Foundational Concepts and Principles.103 Regarding the depth of knowledge, in the new format of the exam, there are supposed to be two levels.104 They will be either general familiarity or detailed knowledge.105 What that distinction means and how students will both prepare and be tested on them, is another element of the NextGen that is also as of yet still unclear. An initial release of sample questions went out in the middle of July 2023.106 However, they were hardly representative of the changes and caliber that were promised. With a sustained and overly heavy focus on multiple-choice, and even reintegration of previously released MBE questions, the old concerns about the impact of standardized exams focused on in this format will resurface.107 Overall, there is supposed to be a reduction in topic coverage, as well as a decrease in the scope of topics that remain.108 Some people fear this will mean a reduction of standards as well.109

The NCBE is also undoubtedly looking at timing.110 It seeks to understand exactly how much time is needed for each question type. The initial pilot testing and the subsequent field testing were designed to be completed within two hours.

103 Id. They include the same topics currently found on the MBE, with the addition of Business Associations. These are Civil Procedure, Contract law, Evidence, Torts, Constitutional law, Criminal Law and Constitutional Protections Impacting Criminal Proceedings, and Real Property.


105 See id.


107 Id. They included in the questions releases examples of several previously released MBE questions. It appears based on the released information that at least, approximately, fifty percent of the NextGen Bar Exam will be in some kind of multiple-choice format; see Press Release, AASE Raises Serious Concerns About NextGen Prototype Questions (Sept. 6, 2023).

108 Final Report, supra note 104.

109 Josh Blackman, Justice Mitchell (Alabama): “The New Bar Exam Puts DEI Over Competence.” REASON (May 5, 2023, 12:55 AM), https://reason.com/volokh/2023/05/20/justice-mitchell-alabama-the-new-bar-exam-puts-dei-over-competence/ [https://perma.cc/427D-9359]. Of course, this is another instance of the public and members of the legal community equating the current exam and its purpose as one of testing and ensuring competency. Nothing could be further from the truth. Moreover, this judge is (respectfully) absolutely wrong about the focus on DEI.

110 Wellington, supra note 99.
However, access does not close until four hours have passed to consider what those with accommodations and other test takers may need.\textsuperscript{111} Presumably, having this more open approach in testing allows for deviation and ultimately a better understanding of the time necessary for each task completion element. The NCBE has announced that the new format will consist of nine hours of testing in a day and a half rather than the current UBE twelve hours over two days.\textsuperscript{112} This reduction in time can allow for jurisdictions with local components to try and fit them into the missing three-hour timeframe. Simultaneously, the NCBE declared all components of the old exam will sunset after the July 2027 exam.\textsuperscript{113} On brand and consistent with announcing unilateral decisions, this date was changed, and another topic was added not even two full months after that declaration.\textsuperscript{114}

A great deal is still undecided, or at least not publicly known yet about the questions and logistics for NextGen. Only recently has there been a glimpse into information such as how many of each question format will appear and how much time will be allotted.\textsuperscript{115} The NCBE states that the question focuses will be less on the predictive measure of outcome to a question prompt, and keener on how the examinee, in the shoes of the lawyer, would work on a resolution.\textsuperscript{116} This, like much already discussed, does not provide a clear explanation of what that means or how it would be replicated, tested, graded, or scaled. Based on the released questions


\textsuperscript{113} \textit{Id.} This means in February 2028; no jurisdiction will have access to utilize any current element making up the UBE.

Jurisdictions may elect to adopt the NextGen bar exam starting in July 2026. The July 2027 bar exam will be the last for which the current NCBE-developed bar exam components will be administered. These components are the Multistate Bar Examination (MBE), Multistate Essay Examination (MEE), and Multistate Performance Test (MPT).

\textsuperscript{114} \textit{NCBE Announces Update to NextGen Exam Content, Extends Availability of the Current Bar Exam}, \textit{NAT’L CONF. OF BAR EXAM’RS} (2022), https://nextgenbarexam.ncbex.org/update-nextgen-exam-content-extends-availability-current-bar-exam/ [https://perma.cc/JT3L-ZCK2]; see also \textit{Some Subjects to be Removed from MEE in 2026}, \textit{NAT’L CONF. OF BAR EXAM’RS} (Jul. 27, 2023), https://ncbex.org/news-resources/some-subjects-be-removed-mee-2026 [https://perma.cc/Z7YK-67JX]. Now the UBE exam will be available through the February 2028 examination. Presumptively its components will also be available to utilize, even if the jurisdictions are not full UBE states. Additionally, family law is not being added to the NextGen exam, despite a statement saying otherwise previously.

\textsuperscript{115} \textit{See generally NCBE Announces Next-Gen Exam Structure, supra note 112.}

The NextGen bar exam will be divided into three sessions of three hours each, with each session containing two integrated question sets, one performance task, and approximately 40 multiple-choice questions. These three-hour sessions will be administered over one and a half days, with six hours of testing time on day one and three hours on day two.

\textsuperscript{116} \textit{See generally Final Report, supra note 104.}
and the pilot testing, it seems that there will be short answer prompted questions, some variation or evolution of the current performance tests.\textsuperscript{117} Multiple choice prompts could include more than four options and the examinee will likely have to choose multiple answers to achieve a full score allocation.\textsuperscript{118}

E. Additional Concerns

We have already seen examples of the significant problems with transferability, portability, and score setting for competence with the UBE.\textsuperscript{119} Some of these problems directly impact the requirements for reporting to the ABA related to Standard 316.\textsuperscript{120} These problems are additionally exacerbated by differing standards of “competence” on the same exam, nationally.\textsuperscript{121} Further complicating this is that there will be a period where both the NextGen and the current version of the UBE will be offered concurrently.\textsuperscript{122} This has serious implications for schools whose students traditionally take the Bar Exam in one of the jurisdictions that are early adopters.

Regardless of the ultimate percentage used, a reworking of multiple-choice questions will be needed for essay scaling purposes, as well as to ensure general reliability.\textsuperscript{123} They have not yet made it public knowledge how that will be completed likely due to the newer multi-answer format. Essays are currently utilized only on a singular basis, presumably since they are released and available

\textsuperscript{117} Sample Questions, supra note 106.


\textsuperscript{119} See Darrow-Kleinhaus, supra note 93, at 684–685. Among the problems associated with a range of acceptable ‘cut scores’ is that there seems to be an arbitrary appointment of value and meaning to the percentage-based performance. Many of the cut scores assigned to jurisdiction-specific exams have been adjusted on multiple occasions already. There is no reason to think that jurisdictions will somehow pick the correct correlating score on the NextGen, the first time out.

\textsuperscript{120} Gutowski, Stop the Count, supra note 5, at 593.

\textsuperscript{121} Id. at 604.

\textsuperscript{122} NCBE Announces Update to NextGen Exam Content, Extends Availability of Current Bar Exam, NAT’L CONF. OF BAR EXAM’RS (Oct. 25, 2023), https://www.ncbex.org/news-resources/update-nextgen-exam-content-extends-availability#:~:text=The%20current%20exam%20and%20the,)%20February%202028 [https://perma.cc/43KG-VDVC] (“The current exam and the NextGen exam will be offered concurrently for two full years, making the current UBE and its components—the Multistate Bar Exam (MBE), Multistate Essay Exam (MEE), and Multistate Performance Test (MPT)—available through February 2028.”).

\textsuperscript{123} See generally J.A. Krosnick, Improving Question Design to Maximize Reliability and Validity, in THE PALGRAVE HANDBOOK OF SURV. RSCH. 95, 100 (David L. Vannette & Jon A. Krosnick eds., 2018); see also Ronald K. Hambleton et al., A COMPARISON OF THE RELIABILITY AND VALIDITY OF TWO METHODS FOR ASSESSING PARTIAL KNOWLEDGE ON A MULTIPLE-CHOICE TEST, 7 J. OF EDUC. MEASUREMENT 75, 75 (1970).
after each exam. Therefore, to ensure the accuracy of scores and that the test is of the same or substantially similar difficulty in each administration, it needs to be scaled to some static measurement, like the multiple choice. There is a hope that the item sets are similar in creation and utilization as a mini-MPT would be and, as such, should be able to be somewhat reusable. However, this has the problem of conceding that changes are not as meaningful as promised. The adjustment would need to come against these item sets instead of the current MBE, for scaling and reliability conformity.

In terms of who will adopt this new format and unproven test, there is currently a high-stakes game of chicken happening. The NCBE is actively advocating and lobbying for jurisdictions and decision-makers across the country to come on board. This is done despite the continuous pushback and concerns of the Academic Success community which is being unheard in their warnings. There is a lack of uniformity on when jurisdictions that have committed to adopting NextGen will first administer the test.

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124 Preparing for the MEE, Nat’l Conf. of Bar Exam’rs, https://www.ncbex.org/exams/mee/preparing-mee [https://perma.cc/KC5E-GSB4] (last visited Feb. 10, 2024) (One can access free MEE questions and analyses from older administrations on NCBE’s website. Similarly, more recent ones are available for a fee through the NCBE Study Aids.).

125 See The Testing Column: Scaling, Revisited, The Bar Exam’r (2020), https://thebarexaminer.ncbex.org/article/fall-2020/the-testing-column-3/ [https://perma.cc/997M-8ETC]. This is only a partially true statement, as at a smaller sample it is possible to not scale essays to a multiple-choice reference. Nevada has such a process, but it requires substantially more interaction from the graders, having multiple reviews, an initial calibration, after reviewing for scores close to the cut-off, a holistic review, as well as deferring to the writer of the prompt in instances of conflict. Nevada has barely 400 examinees during a large administration, this is not scalable to 50,000+ examinees nationally.

126 See generally Anatol Rapoport & Albert M. Chammah, The Game of Chicken, The American Behav. Scientist 10, 10 (1966); see also Michael Maschler, Elon Solan, Shmuel Zamir, Game Theory (Mike Borns ed., 2nd ed. 2020).

127 AASE, supra note 107. The July 11, 2023, and August 18, 2023, releases create additional uncertainty regarding the exam. In the July release, the multiple-choice section of NextGen Bar was described as follows: “[i]nitially, many of these questions will closely resemble Multistate Bar Examination (MBE) questions; this will ensure stability between scores for the current and NextGen bar exams. In future administrations, the variety of multiple-choice question types will increase.” The statement raises a significant concern. Graduates will be preparing for an exam that is quite literally a moving target. The NCBE provided no information about how the “variety of multiple-choice question types will increase.” They only provided fourteen questions to represent countless rules and skills. Graduates and law schools do not know what that variety looks like, how significant is the increase in variety, and how it will impact studying. In the August press release, the exam structure once again changed from previous announcements clearly illustrating the moving target. For a high-stakes licensure exam, a moving target with so few examples released in advance is inappropriate. Graduates have the right to know the exact make-up and nature of the exam they will take and have access to ample practice questions produced by the licensing authority.

128 NextGen (July 2026), Nat’l Conf. of Bar Exam’rs (2024),
adoption of the NextGen are Arizona, Connecticut, Guam, Iowa, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Mexico, Oregon, Utah, Vermont, and Wyoming.\textsuperscript{129} Localities, led by schools and education professionals, are right to be wary of being the first group to adopt this exam. Predicting what will happen and how to interpret what is coming is a fool’s errand.\textsuperscript{130}

\textbf{F. Thoughts}

The attempt to execute a wholesale change to the Bar Exam, with a new focus on lawyering skills and similar alternative metric measuring items, runs into problems, not least of which is that practically no stakeholders know what any of this means. The NCBE uses a lot of fancy terms and colorful graphs in their public-facing reports, but boots on the ground, what it is, why it is better, and how it will work are all yet to be determined. A unified, coherent, and, most of all, simple explanation of the most basic elements of the new exam have yet to be relayed to the academy and the public in a consistent, meaningful manner.

It is necessary to allow law schools to prepare the already admitted class of 2026 for the new format. Ultimately, the only way many elements of NextGen will be found to be effective or not is after exam day in 2026. This will be when real law school graduates place their licensure future at risk. Schools have to trust the outcome of their students on this exam and, by extension, their accreditation, to the decisions of unelected, unaccountable, private entity corporation psychometricians.

Local jurisdictions need to have alternatives and break free from the monolithic NCBE.\textsuperscript{131} Certainly, writing and creating a licensure exam is difficult and costly; this is undoubtedly one of the main reasons so many jurisdictions have farmed this task out.\textsuperscript{132} However, the duty they owe is to their examinees, applicants, and jurisdictional public, not to ease. While it may not be feasible to create unique exams for each jurisdiction nationally, and maybe doing so would even harm the transferability and movement of attorneys, it must at least be considered. It would be a response to what appears to be a unilateral decision by an organization that seems to have serious conflicts of interest. The NCBE, in its attempt to either revolutionize or tighten its already strong grip on the lucrative market of bar exams, is not giving current UBE jurisdictions much choice.

All need not be doom and gloom. There is potential here for a rethinking of what the licensing exam for new attorneys can look like. Focusing on skills and

\begin{itemize}
  \item \url{https://www.ncbex.org/exams/nextgen} [\url{https://perma.cc/JD7L-MD2Z}]. These include July 2026, July 2027, and July 2028.
  \item \textsuperscript{129} \textit{Id.}; see also \textsuperscript{130} First Jurisdictions Announce Plans to Adopt NextGen Bar Exam, \textsc{Nat’l Conf. of Bar Exams} (2022), \url{https://nextgenbarexam.ncbex.org/first-jurisdictions-announce-plans/} [\url{https://perma.cc/SF8E-UGTE}].
  \item Yet here I find myself.
  \item \textsuperscript{131} \textit{See generally} Marsha Griggs, \textit{Outsourcing Self-Regulation}, 80 \textsc{Wash. & Lee L. Rev.} (forthcoming 2024).
  \item \textit{Id.}
\end{itemize}
practical approaches of what newly minted attorneys will need to engage in is a significant step in the right direction. If removing the Bar Exam as the method of creating new lawyers is not going to happen in a widespread fashion shortly, these changes are the next best thing. We must ensure the road is being built with more than just good intentions. Something that must be stated explicitly is that adhering to the strict timeline in the creation and execution of this new format is incredibly reckless and problematic. Failure to have the flexibility to address concerns means that we are making holes in the proverbial boat without a bucket in sight, all while promising to reach our faraway destination intact and dry. That is a recipe for serious disaster.

Theoretically, changes in the format of the exam can increase access and fairness, as well as provide a real-world impact and reflection of skills. Another angle that needs further exploration is how law schools will support this approach with professors who will take charge of preparing students. The thing is, attorneys who wish to become law professors already need to be hyper-credentialed, with nearly half holding PhDs and almost three-quarters having completed teaching fellowships. This all while overwhelmingly representing the same small list of elite and not particularly diverse law schools who are not having trouble on the Bar Exam in its current forms. We do not need to guess at the makeup of the class in relation to the diversity that most professors come from. Yet, bringing skills into the class changes who will be leading and the focus will go more to clinicians with actual useful skills. This can maybe help change the second-class nature of

133 Otherwise, we all know where it will lead us.
137 See generally Jo Anne Durako, Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing, 50 J. LEGAL EDUC. 562, 564, 576 (2000); see also O. J. Salinas, Secondary Courses Taught by Secondary Faculty: A (Personal) Call to Fully Integrate Skills Faculty and Skills Courses into the Law School Curriculum Ahead of the NextGen Bar Exam, 107 MINN. L. REV. 2663, 2694 (2023). Skills and Academic Success professors are more representative of women and people of color than in traditional doctrinal professor roles.
III. CRITIQUE OF ACCREDITATION PROCESS & ABA’S ROLE

A primary consideration of NextGen is its potential impact on the ABA Standard 316 rate.139 With no real understanding of where cut-offs should be set, a miscalculation on the front end may very reasonably create a situation where schools are substantially missing their accreditation-required mark. This can be solved by the ABA adjusting Standard 316, before the potential shift to NextGen. This could allow for the requirement to be met so long as a graduate has either passed the Bar Exam, or is actively engaged in good standing and making progress (whatever that definition is) toward a supervised-practice alternative path within the same time window allowed. Another approach would be to reimplement the pre-2019 version of the standard and take into account the impact of schools and jurisdictional mission and access focus.140

Standard 316 creates an arms race with the scores that bastardizes and cannibalizes the third year of legal education to transform it into an extended bar exam preparatory course on steroids.141 Many of us in legal education are guilty of it. There are standards that must be met, but the truth is that this time is more important and could be utilized better to instill real experience and skill in soon-to-be attorneys. Clinical hours, hands-on experience, real client interactions, and God forbid accounting or business for lawyers (so they know how to run a firm), are all better uses of their time than preparing for the Bar Exam.142

The ABA needs to get out of the business of thinking the Bar Exam results have any bearing on a law school’s ability to provide meaningful, sufficient, and educationally sound experiences,143 particularly since they are linked to increasingly

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138 See generally Durako supra note 137, at 565; Salinas supra note 137, at 2693.
139 In 2019 the current, revised definition of Standard 316 (at least seventy-five percent of a law school’s alumni who take a bar exam must pass the bar within two years of graduation, as opposed to the previous five-year period) was implemented, against dissent from many schools and the membership of the ABA at large. See Guidance Memorandum from the Managing Director, ABA Section of Legal Educ. & Admissions to the Bar on Standard 316 and Reporting of Bar Exam Outcomes (June 2019) (on file with author). It “replaced previous Standard 316 that permitted measuring compliance based on as few as seventy percent of a law school’s graduates and included multiple methods for complying, including multiple measures for first-time and ultimate pass rates based on different cohorts of students and different time frames.”
140 See Boothe, supra note 7, at 185.
143 See generally JOAN W. HOWARTH, SHAPING THE BAR THE FUTURE OF ATTORNEY LICENSING (1st ed. 2022).
shifting, untested, unproven, and historically discriminatory methods.\footnote{Gutowski, \textit{Stop the Count}, supra note 5, at 593.} The stark truth is that the “ABA’s accreditation standards did \textit{not} originate as a means of ensuring the quality of education, but rather as a means of combating increasing competition among lawyers and among law schools.”\footnote{Herb D. Vest, \textit{Felling the Giant: Breaking the ABA’s Stranglehold on Legal Education in America}, 50 J. LEGAL EDUC. 494, 497 (2000).}

The ABA should focus on the schools and the three years a student is there, not the time after. What happens post-graduation needs to be left to the jurisdictions, who are the licensing bodies anyway.\footnote{See generally Karis Stephen et al., \textit{Regulating the Legal Profession}, THE REGUL. REV. (Feb 5, 2022), https://www.theregulrev.org/2022/02/05/saturday-seminar-regulating-legal-profession/ [https://perma.cc/HDA5-UHVK].} The local jurisdictions, not the ABA, get to decide, what is sufficient on an individual basis. The local jurisdictions are not admitting or denying entire schools, they are only looking at each applicant’s performance. This goes back to the fact that the performance of graduates on any standardized exam post-school is only a reflection of that individual student’s ability, access to support, and life circumstances at the time. It is not somehow a mirror of the school they graduated from. If there is a fear that removing Standard 316 would cause a decline in education levels from the school side, there are still dozens of other standards and regulations to maintain.\footnote{See Standards, supra note 6.} Surely this recently-adjusted standard, full of historic battles, is not the only thing protecting students in law schools from what would otherwise be a failing legal education.\footnote{See \textit{Karen Sloan \\& Celia Ampel, ABA Rejects Stricter Bar-Pass Rule for Law Schools}, BLOOMBERG L. (Feb. 6, 2017), https://www.law.com/nationallawjournal/alnID/1202778545389/ [https://perma.cc/CYY3-2VMV]; see also \textit{William Wesley Patton, A Blueprint for a Fairer ABA Standard for Judging Law Graduates’ Competence: How a Standard Based on Students’ Scores in Relation to the National Mean MBE Score Properly Balances Consumer Safety with Increased Diversity in the Bar}, 24 WASH. \\& LEE J. C.R. \\& SOC. JUST. 3, 7 (2017).}

Furthermore, the focus of the ABA in Standard 316 being placed at seventy-five percent pass rates as being some magical number, seems arbitrary. Schools that get fifty, sixty, and seventy percent of their students to pass the Bar Exam are just as valuable and necessary for the legal community and the public. The need to make schools publish their information is more understandable, but that is something they already do through public disclosure Standard 509.\footnote{509 Required Disclosures, A.B.A., https://www.abarequireddisclosures.org/Disclosure509.aspx [https://perma.cc/45R3-X5P].} Along the same line of data collection and distribution, the ABA should be the entity collecting bar passage numbers, not the schools. The ABA should also publish all the law school results in full.\footnote{Gutowski, \textit{Stop the Count}, supra note 5, at 589 (2023).} Let the public make up their mind about what law school they want to attend and whether it is worth the time and money.

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\textsuperscript{144} Gutowski, \textit{Stop the Count}, supra note 5, at 593. \\
\textsuperscript{145} Herb D. Vest, \textit{Felling the Giant: Breaking the ABA’s Stranglehold on Legal Education in America}, 50 J. LEGAL EDUC. 494, 497 (2000). \\
\textsuperscript{146} See generally Karis Stephen et al., \textit{Regulating the Legal Profession}, THE REGUL. REV. (Feb 5, 2022), https://www.theregulrev.org/2022/02/05/saturday-seminar-regulating-legal-profession/ [https://perma.cc/HDA5-UHVK]. \\
\textsuperscript{147} See Standards, supra note 6. \\
\textsuperscript{150} Gutowski, \textit{Stop the Count}, supra note 5, at 589 (2023). 
\end{flushleft}
A. Accreditation & Licensure in America

The accreditation status of institutions in America is generally presented to the world in a binary format of either accredited or non-accredited.\textsuperscript{151} Accreditation has historical roots in being used as a conduit for information-sharing related to the quality and rigor of an institution or program of higher education.\textsuperscript{152} Accreditation has devolved into a method to determine access to funding, both private and federal-based, as well as student loan eligibility.\textsuperscript{153} It has turned into a gatekeeping checklist item to be obtained or else schools risk not being able to attract students with the funding that the students as well as the institution need.\textsuperscript{154}

A good way to understand the landscape of accreditation in the United States is to look at the last century and its evolution during several distinct periods in the twentieth century. Before 1936, the system of accreditation was focused on regional, voluntary associations to create standards that were internally facing and to compete for enrollments.\textsuperscript{155} Students who enrolled at the time were spending their own money and had little way to differentiate schools outside of their limited and regional familiarity.\textsuperscript{156} This is where accreditation provided a valuable service for comparison.

Between 1936 and 1952, there was a refocusing from simply standardizing educational institutions via accreditation to seeing the need to provide support and help these same institutions improve.\textsuperscript{157} Perhaps nothing was more impactful to the changes in accreditation at this stage than the Servicemen's Readjustment Act of 1944, or the G.I. Bill.\textsuperscript{158} This Bill provided incentive and financial support for veterans to go to school with the only limitation being that the school had secured

\textsuperscript{151} ANDREW GILLEN, DANIEL BENNETT & RICHARD VEDDER, THE INMATES RUNNING THE ASYLUM? AN ANALYSIS OF HIGHER EDUCATION 1 (2010).
\textsuperscript{152} Id.
\textsuperscript{153} Kevin Caret, Asleep at the Seal: Just How Bad Does a College Have to Be to Lose Accreditation? WASH. MONTHLY, (Mar. 1, 2010), \url{https://washingtonmonthly.com/2010/03/01/asleep-at-the-seal/} ([A]ccreditation has come to mean evaluating yourself against standards of your own choosing in order to indirectly receive large amounts of free government money.").
\textsuperscript{154} See generally Andy Portinga, ABA Accreditation of Law Schools: An Antitrust Analysis, 29 U. MICH. J.L. REFORM 635, 670 (1996); see also Henry Ramsey, Jr., The History, Organization, and Accomplishments of the American Bar Association Accreditation Process, 30 WAKE FOREST L. REV. 267, 271–2 (1995) (In a similar way, the Bar Exam and particularly its examiners are acting as gatekeepers, with very little (if any) oversight); see e.g., Ashley M. London, Who Watches the Watchmen? Using the Law Governing Lawyers to Identify the Applicant Duty Gap and Hold Bar Examiner Gatekeepers Accountable, MICH. ST. L. REV. (forthcoming 2023).
\textsuperscript{156} Id. at 13–14.
\textsuperscript{157} GILLEN, BENNETT & VEDDER, supra note 151, at 4.
state educational agency approval. This led to significant instances of abuse, diploma mills, a general lack of quality in education, and the waste of federal money.

From 1952 to 1985, in response to the issues that the G.I. Bill brought about, Congress reapproved the next version of the G.I. Bill to extend the benefits to veterans of the Korean War and took into consideration what kind of meaningful limitations they could impose. Part of the Bill created the requirement for the Commissioner of Education (today called the Secretary of Education) to “publish a list of nationally recognized accrediting agencies and associations which he determines to be reliable authority as to the quality of training offered by an educational institution . . . .”

The 1952 Bill was the result of a compromise where private accreditors would be able to determine whether standards were sufficiently met to allow any particular institution to be eligible for federal funding and aid. As a result, since 1952, we have a history of approved accrediting agencies acting in a government-appointed and approved capacity to monitor and decide on federal fund availability. This created a dynamic where many substandard institutions were gaming the system to gain accreditation and by extension, funding, yet were not maintaining the rigor and value that Congress originally envisioned. Emboldened by their newfound authority and shifting focus on support, accrediting agencies found themselves providing feedback to “improve” more often than holding institutions accountable.

Post-1985 is when a shift to increased accountability and assessment in higher educational institutional accreditation—prompted in response to the concerns of educational quality standards not being met as well as growing student loan default—rose out of the ashes. The Reauthorization of the Higher Education Act

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159 Id.
161 GI Bill of 1952, supra note 25.
164 Gillen, Bennett & Vedder, supra note 151, at 5.
165 See Anne D. Neal, Dis-Accreditation, Nat’l Ass’n of Scholars, 431, 432 (2008) (Reviews for accreditations are largely performed by representatives of the education industry, including members of other institutions who are also up for accreditation renewal at some stage in the future. This means that “teams cannot reasonably be expected to be independent arbiters of quality . . . Knowing that their own institutions will undergo accreditation review, there is a tacit interest in keeping standards low.”); see also Peter Ewell, U.S. Accreditation and the Future of Quality Assurances, (2008) (“The experience of working in the academic, in itself, is deemed sufficient preparation for review team members to be able to ‘recognize quality.’”).
166 Terese Rainwater, The Rise and Fall of SPRE: A Look at Failed Efforts to Regulate Postsecondary Education in the 1990s, 2 Am. Acad. 107, 107 (Mar. 2006).
of 1992 provided additional limitations on the utilization of funding allocation at the institution level while also expanding the role and requirement for accreditation agencies to play a larger role in learning assessment outcomes. Today, we can view this as the status quo, where the federal government provides authorization for accrediting agencies to act on their behalf to ensure the quality of education while simultaneously acting as a teller and guard for funding. This created a power shift where accreditors are now able to squeeze and leverage institutions to adjust their academic freedom as well as influence admissions, retention, and overall autonomy.

**B. The Role of Accrediting Bodies**

Consumer protection as an argument for the need for accreditation has been around for a long time. Arguments in favor of the need for accreditation tend to center not only around the idea that it is important to provide public information, but also as a way of ensuring a transparent process so that there can be trust in the accreditation body and process itself. However, often the results of the procedures, advantages and disadvantages, and strengths and weaknesses of an accredited institution are kept confidential and secret. The reality is there is a lack of internal ranking or additional information by the accreditation agencies, such

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170 See Vickie Schray, Assuring Quality in Higher Education: Recommendations for Improving Accreditation (Sec. of Educ. Comm’n of Educ. Comm’n on the Future of Higher Education No. 14 2006) (“[T]he overriding public interest in accreditation over the last 50 years has been defined in terms of protecting consumers as well as federal and state student grant and loan programs from flagrant fraud and abuse.”).
171 Doug Lederman, More Meaningful Accreditation, INSIDE HIGHER ED. (Apr. 22, 2009) (The problem inherent in accreditation is “that higher education accreditation seeks to do two totally different things: ensure a minimum level of quality... and encourage individual colleges to improve themselves.”).
as the ABA. This means that the public is forced to utilize third-party rankings like U.S. News & World Report, which simultaneously are riddled with problems.

The ABA explicitly states that it does not rank or believe in ranking for law schools. If this premise of non-ranking and equality is to be accepted at face value, then it follows that are claiming a view that graduating from any ABA-accredited law school as being the same for the student and the public. If it truly did not believe in a ranking of law schools, why then, if there is no difference between the education at all ABA-approved schools, is there a need for another distinguishing barrier to practice, mainly the Bar Exam?

A better potential approach is to provide a comprehensive, publicly facing report of each law school and how they are performing on required standards. However, there should be a score allocated to each as well as an overall total compliance level. There can be a simplified cut-off overall point, but knowing where each school sits relative to that minimum accreditation point, and which areas are deficient, is a better way.

The notion that accreditors are acting in a fashion that is meaningful and impactful is fallacious. One of the main reasons schools are sanctioned or lose accreditation is more related to financial reasons than anything else. This is not to say that the government would do a better job or that they should take over full control and engage in the accrediting action themselves. “The failure of


[N]either the American Bar Association nor its Section of Legal Education and Admissions to the Bar endorses, cooperates with, or provides data to any law school ranking system. No ranking or rating system of law schools is attempted or advocated by the ABA. Rather, the ABA provides only a statement of the accreditation status of a school. Fully approved schools have demonstrated that they are operating in compliance with each of the ABA Standards for Approval of Law Schools. Their compliance is regularly monitored and comprehensive reviews are conducted every tenth year.


175 Statement on Law School Rankings, supra note 173.


177 GILLEN, BENNETT & VEDDER, supra note 151, at 2.

178 Id.

179 Richard K. Vedder, THIRTY-SIX STEPS: THE PATH TO REFORMING AMERICAN EDUCATION 33 (2014) (“Accreditation provides little useful information because both high and low-quality schools receive the same accreditation . . . they restrict entry into the higher education marketplace . . . and they are riddled with conflicts of interest.”).


accreditation to perform the certification function is increasingly apparent. In fact, the more experience one has with higher education, the less likely one is to believe that accreditation ensures meaningful educational standards.”182

C. Similar Professional Accreditation Bodies

The legal profession is not the only profession that requires post-secondary education.183 Nor is it the only profession that has a post-educational licensure exam before being able to engage in varying levels of work in that profession.184 However, where legal licensure deviates is in the impact that aggregated individualized performance on the licensure test has on the accreditation of the school from which the examinees graduated.185 Taking a closer look at medical, engineering, psychological, and accounting licensure and accreditation will provide a clearer picture and alternatives to the methods that are used for law.

1. Medical: LMCE, COCA

To become a doctor in the United States, students and graduates attending Liaison Committee on Medical Education (LCME)-accredited schools meet the minimum requirements to sit for the United States Medical Licensing Examination (USMLE).186 The accreditation body of the LCME provides the procedure and process for more than 140 medical programs that award Doctor of Medicine (MD) degrees.187 Similarly, the American Osteopathic Association’s Commission on Osteopathic College Accreditation (COCA) oversees the accreditation process for osteopathic medicine and requires students to pass the first two levels of the Comprehensive Osteopathic Medical Licensing Examination (COMLEX) as a prerequisite to graduation.188 COCA produces, reviews, and engages with annual and progress reports as well as complaints.189 There are similarities and differences

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182 GILLEN, BENNETT & VEDDER, supra note 151, at 12.
183 Doctors, Engineers, Psychologists, and Accountants are comparable examples of professions that require postsecondary education.
184 All of these professions have licensure exams for graduates to pass before being able to practice, as professionals. These include the Step exams, the Boards, the NextGen CPA exam, etc.
185 This is a reference to ABA Standard 316.
186 Damon H. Sakai et al., Liaison Committee on Medical Education Accreditation: Part I: The Accreditation Process, 74 HAWAI’I J. MED. AND PUB. HEALTH 311 (2015); see also Donald G. Kassebaum et al., The Influence of Accreditation on Educational Change in U.S. Medical Schools, 72 ACAD. MED. 1128 (1997).
187 Barbara Barzansky et al., Continuous Quality Improvement in an Accreditation System for Undergraduate Medical Education: Benefits and Challenges, 37 MED. TCHR. 1032, 1033 (2015).
in the makeup and activities of the LCME and COCA. Perhaps the most glaring one is that the LCME does not require students to pass any level of the USMLE or the COMLEX as a requirement before graduation.190

The makeup of the USMLE test committee represents the schools and stakeholders they impact. 191 Performance metrics via public disclosure covering students or graduates on either the USMLE or the COMLEX are not required by LCME or COCA.192 In simplified terms, this means that none of this is reflected on the school, and certainly not for accreditation requirements. Indeed, public disclosure of student success rates, along with third-party rankings, is available. They act as a way to provide information and ensure public knowledge of important metrics, but they are not organized as part of systemic accreditation criteria.193 Law schools should have a similar program that has examinations connected to the university for the students while they are still enrolled and under the purview and control of the institution.

2. Engineering: NCEES

Like the ABA, the Accreditation Board for Engineering and Technology, Inc. (ABET) is recognized and authorized as a designated accrediting agency by the DOE.194 Interestingly, unlike institutional accreditation, the specialized accreditation that ABET provides for engineering is not connected to financial aid directly and instead is used as a marker of program strength and prerequisite to

190 Ahmed et al. supra note 188, at 3.
191 About the USMLE, USMLE, https://www.usmle.org/about-usmle [https://perma.cc/TN5Y-BT3K] (“Members of USMLE test committees include biomedical scientists, educators, and clinicians from every region of the United States. Virtually all LCME-accredited medical schools in the United States have been represented on USMLE test committees.”).
193 Jill Kathryn Richardson, An Evaluation of Nursing Program Administrator Perspectives on National Nursing Education Accreditation (May 2015) (EdD dissertation, University of Southern California) (ProQuest)

[In a 2006 survey, the Council of Higher Education Accreditation (CHEA) reported that only 18% of the 66 accreditors surveyed provided information about the results of individual reviews publicly; less than 17% of accreditors provided a summary on student academic achievement or program performance; and just over 33% of accreditors offered a descriptive summary about the characteristics of accredited institutions or programs (Council of Higher Education Accreditation, 2006).

194 See List of Agencies, supra note 26; see also Nancy Kate D. Abel & Abel A. Fernandez, ABET Accreditation of Undergraduate Engineering Management Programs: Established Versus New Programs—The Similarities and Differences, 17 ENG’G MGMT. J. 3, 4 (Mar. 2005) (“[T]he U.S. Council for Higher Education Accreditation recognizes ABET as the agency responsible for evaluating and certifying the quality of engineering education in the United States. . . . [m]ost state licensing authorities recognize ABET accredited programs as satisfying the educational requirements for PE licensure.”).
licensure. There are comprehensive and specific requirements for any program that wishes to be ABET-accredited. There are currently four different commissions, including the Engineering Accreditation Commission (EAC), that ABET uses to accredit programs. The importance of receiving and maintaining accreditation is vitally important. By way of example, the National Council of Examiners for Engineering and Surveying (NCEES) administers the Fundamentals of Engineering Exam (FE), which can only be taken after graduating with an engineering degree from an ABET-accredited program.

In terms of the licensure exam for engineering and the accreditation body, “no formal connection exists between (1) ASCE’s BOK or ABET’s criteria and (2) NCEES’s FE Exam . . . .” While public disclosures of student performance from particular programs can be provided, they are not part of the accreditation policy and requirements. What becomes clear is that just as for medical educational accreditation, so too for engineering, there is not an alumni performance-related metric on the licensing exam set as a requirement for accreditation.

3. Accounting: NASBA, AICPA

This Public Accounting is regulated and governed by state statutes. The Association to Advance Collegiate Schools of Business (AACSB) is actively accrediting nearly 700 business schools and has a specific accounting program accreditation.

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199 Id.
201 See Fridley, supra note 198; see also Accreditation Board for Engineering Technology, ACCREDITATION BD. FOR ENG’G TECH., Accreditation Policy and Procedure Manual (2023–2024) (noting the absence of an accreditation requirement of performance on licensing exams).
For accounting, the licensure exam graduates need to take is the Uniform Certified Public Accountant Examination (UCPA). There are significant changes scheduled for January 2024 (arguably similar to the NextGen for the Bar Exam) to transition into the CPA Evolution-aligned CPA Exam as part of a joint effort by the National Association of State Board of Accountancy (NASBA) and the American Institute of Certified Public Accountants (AICPA) to update the licensure exam for accountants.

Similar to medical and engineering professional licensing and accreditation requirements, accounting does not have a passage rate for graduates of programs of education that are connected to school accreditation. Interestingly, the Association of Collegiate Schools of Business (ACSB), another accrediting agency like the AACSBS, does not require a specific passage rate. Instead, they encourage institutions to describe how the curriculum supports the students to successful outcomes on the exam. When it comes to public disclosures, there are requirements by accrediting agencies related to student performance, attrition, graduation rates, job placements, certification, employment outcomes, etc. Public disclosure requirements, though, are not the same as accreditation-impacting standards.

4. Psychology: APA COA

This The American Psychological Association (APA) provides standards for

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207 ASS’N TO ADVANCE COLLEGIATE SCHOOLS BUS., ACCREDITATION PROCESSES, ACTIONS AND TIME FRAMES POLICY 1 (n.d.).

208 ASS’N TO ADVANCE COLLEGIATE SCHOOLS BUS., 2018 STANDARDS FOR ACCOUNTING ACCREDITATION 20 (2021), (stating that one of the requirements are as follows: “[D]escribe how the degree programs align with professional certification and/or licensure requirements if this is an expectation for graduates of the unit’s degree programs.”).

209 Id.


211 Haeyoung Shin et al., Schools’ CPA Review Course Affiliations and Success on the Uniform CPA Examination, 50 J. ACCT. ACCREDITATION 1 (2020) (discussing that while UCPA performance by individual graduates is not impactful for AACSBS accreditation, examinees who attend these institutions are claimed to outperform similar cohorts.).
accreditation to educational institutions for psychology. The APA Commission on Accreditation (APA-COA) is the primary programmatic accreditor for psychology professional training in the United States. Another accreditor is the Psychological Clinical Science Accreditation System (PCSAS) and it is recognized by the Council of Higher Education Accreditation (CHEA). A similar theme of lack of accreditation impact of aggregated individual licensure exam performance runs in psychology that there is an educational requirement present before being able to attempt the licensure exam and that graduates from accredited programs tend to outperform other examinees. This is neither surprising nor out of what is seen when comparing ABA- and non-ABA-accredited school graduates’ performance on the Bar Exam.

Where psychology professional licensure and education accreditation deviates from legal education, similar to medical, accounting, and engineering, is in the failure to attach personal post-graduate performance as impactful on accreditation of the school the examinee graduated from in the aggregate. The APA requires institutions to publish their data as part of the accreditation mandates. But there is


213 About APA Accreditation, AM. PSYCH. ASS’N, https://accreditation.apa.org/about [https://perma.cc/CV2X-67EE] (last visited Jan. 21, 2024); see also Thomas K. Fagan & Perri Dawn Wells, History and Status of School Psychology Accreditation in the United States, 29 SCH. PSYCH. REV. 28 (2000) (technically there is also the National Council for Accreditation of Teacher Education (NCATE), which along with the Teacher Education Accreditation Council (TEAC) merged with the Council for the Accreditation of Educator Preparation (CAEP) in 2014. However, these are not strictly psychology accreditation agencies and are therefore being left out of the analysis).


216 See generally, NAT’L ASS’N SCH. PSYCH., POLICIES AND PROCEDURES FOR THE REVIEW AND ACCREDITATION OF GRADUATE PROGRAMS IN SCHOOL PSYCH. (2023) (Psychological Clinical Science Accreditation System (PCSAS) guidelines state: “This commitment must be articulated explicitly in the program’s documents, public disclosures, and website; must be operationalized through a coherent educational plan, curriculum, and allocation of resources; and must be demonstrated in the activities and accomplishments of the program’s faculty, students, and graduates.”); see generally also The PCSAS Accreditation Process, PSYCH. CLINICAL SCI. ACCREDITATION SYS., https://pcsas.org/the-pcsas-accreditation-process/ [https://perma.cc/UA8S-TQWU] (last visited Jan. 21, 2024); AM. PSYCH, ASS’N, STANDARDS OF ACCREDITATION FOR HEALTH SERVICE PSYCHOLOGY AND ACCREDITATION OPERATING PROCEDURES 11 (2015).

Doctoral programs’ specific educational aims and expected competencies may differ from one another; therefore, there is no specified threshold or minimum number for reviewing a program’s licensure rate. Instead, the Commission on Accreditation shall use its professional judgment to determine if the program’s licensure rate, in combination with other factors, such as attrition of students from the program and their time to degree, demonstrates students’ successful preparation for entry-level practice in health service psychology.
IV. OPTIONS & SOLUTIONS

Unfortunately, in reality, some version of a summative examination such as the Bar Exam will have to probably remain in many jurisdictions, at least for the time being. However, that exam should be a secondary option amongst a list of approved methods of licensure. Several steps, including in-school education shifts, post-graduation oversight, summative capstone projects, portfolio submissions, or an adjusted format of the exam, are all viable alternatives.

Even if the Bar Exam must exist, the ABA should not use performance on it to indicate compliance with standards to maintain accreditation amongst their schools. If they want to have some kind of standard to show law schools are keeping up with what they need to see, that there are no fly-by-night schools, they can have an examination testing metrics measurement; but it has to be within the school attendance parameters. Maybe at the end of the first year, leaving time for adjustments, is a reasonable option. However, to wait for a post-degree examination, which the school has no control over—to hold accreditation hostage—is ridiculous and inconsistent with similar DOE accreditation bodies.

A. ABA Accreditation as a Prerequisite

Being able to provide a good law education and having your students pass the bar exam do not necessarily go hand in hand. They are not synonymous with each other. There are many reasons why students may want to gain a law school education but are uninterested in practicing law. Similarly, if the make-up of the student body is simply one that historically underperforms or has elements that impact performance, bar exam performance will not match up. To say that a law school that takes in students who otherwise are not even given an opportunity, trains them, and teaches them (even if only fifty percent pass the bar exam) is not doing important work is short-sighted and elitist. Every single student who does pass is someone in a family who was not given access or an opportunity otherwise. Not everyone will pass the Bar Exam. This is a reflection on the exam, not the school an examinee graduated from.

There are a handful of locations nationally that allow graduates from non-ABA schools to sit for the Bar Exam. However, the most obvious advantage of attending an ABA-accredited law school is that it permits any graduate of that
institution to sit for the bar exam in any jurisdiction. There is no need for this format to exist anywhere, and for a long time, the ABA accreditation decision of a law school did not have an impact on the ability to become an attorney for students of those institutions.

Educational decisions in law schools, particularly focused in the final year, are heavily influenced by the desire to ensure maximum positive performance on the bar exam. This leeching into the academic curriculum ends up being nothing more than an extended bar preparatory period, without much value for practical attorney work. It only serves to reinforce unrealistic confidence in those who pass the bar exam while simultaneously undermining the ability to innovate legal education. It is interesting to note that studies claiming a negative impact correlation between increased student participation in clinical programs and bar performance are questionable at best, yet they are actively propped up by the NCBE.

B. Licensure Reforms, New Paths, and Reciprocity

The creation of a Bar Exam with little or even no input from the NCBE is possible. Beyond the traditional renegade jurisdictions, six additional jurisdictions during the COVID-19 pandemic held bar exams in their jurisdictions that were not reliant on the NCBE. There are alternatives to this exam; several states

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224 See Markovic, supra note 77, at 19.
226 Gutowski & Bell, supra note 219, at 11, 24 (Louisiana and Puerto Rico are examples of jurisdictions that go it alone, with no elements of their exam coming from the NCBE, hopefully, this list will grow considerably in the future).
227 July 2020 Bar Exam: Jurisdiction Information, NAT’L CONF. OF BAR EXAM’RS (September 24, 2020, 11:34 AM), https://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information [https://perma.cc/UY7X-DKCS] (These jurisdictions were California, Florida, Indiana, Michigan, and Nevada. These same jurisdictions have historically created elements of their own exam and supplemented them with some input from the NCBE, usually in the form of the MBE.
are already looking at what they may be, their impacts, and ultimately how to thoughtfully implement them. Oregon has an idea for a two-year program alternative.\textsuperscript{228} There are even discussions to have more specific examinations tailored to individual practice areas.\textsuperscript{229} Many attorneys pass the bar exam as it exists currently, and will do so for the new iteration; yet, they will go on to practice in an area of law that was not included on the test. Under the current system, they are considered competent yet are wholly unprepared to serve their clients and the public. There is a real need to ensure adequate representation, but there are already mechanisms for enforcement via the local jurisdictional bar associations that are responsible for lawyer misconduct and continued competency.\textsuperscript{230}

Several jurisdictions have begun the review process to complete analysis studies focused on what approach to take moving forward. Florida is an example of a jurisdiction that has relied on the MBE component from the NCBE for the last fifty years.\textsuperscript{231} They have looked at what alternatives may be possible for the second day of a two-day exam, and have completed a Practice Analysis Study.\textsuperscript{232} The purpose of their study was to ensure the validity of the bar exam.\textsuperscript{233} Additionally, the Florida Board of Bar Examiners administers their bar exam to ensure demonstrated technical competence, defined as possessing the knowledge, skills, and abilities that are critical for newly licensed Florida attorneys to have at the time of admission to the Florida Bar.\textsuperscript{234} They are charged with exploring potential alternatives to the exam’s design, not to whether there should be an exam to administer.\textsuperscript{235} This model of research and approach should be celebrated.

There needs to be a serious conversation about alternative licensure paths for new attorneys.\textsuperscript{236} We may want to call it licensure reform, not alternative pathways, component. Many of these jurisdictions are actively considering how to move forward on their own or with even more limited reliance on the NCBE).\textsuperscript{228}

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\textsuperscript{228} Recommendation from Joanna Perini-Abbott, Chair, Alternatives to the Exam Task Force, Oregon State Board of Bar Examiners (June 18, 2021) (on file with Oregon State Board of Bar Examiners).


\textsuperscript{232} Id. at 1.

\textsuperscript{233} Id. at 15.

\textsuperscript{234} Id. app. A at 1.

\textsuperscript{235} See id. at 7–8.

\textsuperscript{236} See Deborah Jones Merritt, Andrea Anne Curcio & Eileen R. Kaufman, \textit{Enhancing the Validity and Fairness of Lawyer Licensing: Empirical Evidence Supporting Innovative Pathways}, WASH. U. J.L. & POL’Y (forthcoming 2024) (“Survey responses from more than 1,750 bar candidates and

\end{footnotesize}
because sometimes the term “alternative” is seen as being less than.237 A common sentiment amongst attorneys in practice, when asked about changes to the process, is to take the position of “This is the way it’s always been.”238 That is nothing short of archaic thinking; similar arguments about student loan forgiveness are being made.239 We must innovate and adjust to thinking about better uses of choices and metrics for determining admission to the profession. The exam is problematic, no doubt. We also have to look more at the educational aspect for the examinees and students at the same time. Education needs to be more hands-on and practical for the benefit of everyone.

Moreover, in jurisdictions that currently allow any level of diploma privilege, or that utilized temporary supervised practice during COVID-19, the standards for performance are and were considered still met, and these examinees are removed from the count.240 Extrapolating out, with so many states looking for reforms to a traditional exam, the ABA must rethink Standard 316. When the time requirements for supervised practice are several hundred hours, required submission of portfolios, and other items, they are not going to be able to meaningfully maintain and apply the static standard uniformly. Whatever limited purpose Standard 316 was supposed to have, and any value that it is viewed as being held intrinsically in it, will all surely be moot in the coming years.

supervisors demonstrate that supervised practice provides a solid foundation for valid, feasible, and fair assessment of lawyering competence.”).

237 Brian R. Gallini, Dean and Professor of Law at Willamette University College of Law, is a highly respected leading licensure reformer and vocal proponent of this.


239 Atlas Porter, The 5 Most Common Arguments Against Student Debt Forgiveness (And Why They Are Wrong), MEDIUM (Oct. 17, 2019), https://atlasporter.medium.com/the-5-most-common-arguments-against-student-debt-forgiveness-and-why-they-are-wrong-6c28a1f0ec2f [https://perma.cc/4Y5X-VDB6]. If we were to hold to this approach, then no one should use penicillin as it would be unfair to everyone who died of polio for us to not go through the same experience. This whole line of thinking is perverse.

240 Annual Questionnaire: 2023 Bar Passage Questionnaire Instructions, A.B.A., https://www.americanbar.org/groups/legal_education/resources/questionnaire/ [https://perma.cc/F3DN-UDU4] (last visited Jan. 21, 2024): Reporting graduates who have been admitted or have applications pending to be admitted via diploma privilege. Schools report the number of graduates who have been admitted or have applications pending to be admitted via diploma privilege separately from those graduates who took a bar exam. These “diploma privilege” graduates are not counted as bar exam “takers” or bar exam “passers” – they are reported as graduates who did not sit for a bar examination and are additionally reported in a separate “diploma privilege” category. This must be done in order to generate two bar passage rates. One bar passage rate will include just those graduates who took a bar exam. The second bar passage rate will include graduates who took a bar exam plus those who have been admitted or have applications pending to be admitted via diploma privilege.
C. States Leading the Pushback

1. Oregon

Oregon is leading the way in many respects to understanding potential varying pathways. Oregon’s Alternatives to the Exam Task Force (Task Force) submitted its recommendations to the Oregon Supreme Court in July 2021. Their recommendations relied heavily upon IAALS’s *Building a Better Bar* research and, ultimately, proposed two new paths to licensure. They are piloting a new pathway with two new ways to be licensed, including a Supervised Practice Pathway. This is intended primarily for out-of-state law graduates who want to practice in Oregon. Additionally, they would call Oregon Experiential, which involves a Capstone Project. Quoting the outgoing chair of the Oregon Board of Law Examiners, Joanna Perini-Abbott, “We are not lowering the bar to become a lawyer. We feel there are other ways that someone can demonstrate competence to practice law.”

On September 7, 2023, the Oregon Supreme Court heard testimony regarding the proposal from the Task Force and rendered a decision on November 7, 2023, unanimously adopting the recommendations of the Oregon Board of Bar Examiners.

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242 Recommendation from Joanna Perini-Abbott, *supra* note 228. The first proposed path is the Oregon Experiential Pathway (OEP), a curriculum-based pathway in which law students would be required to complete a rigorous set of experiential learning credit hours. See id. at 7–14. At the end of law school, students would submit a capstone portfolio that the Oregon Board of Bar Examiners would use to assess minimum competence. Id. at 7–8. The second proposed path is the Supervised Practice Pathway (SPP), a practice-based pathway in which law graduates would engage in law work under a supervising lawyer for 1000–1500 hours. See id. at 14–24. Once the supervised practice hours are completed, the applicant would submit a portfolio of work samples that the Oregon Board of Bar Examiners would use to assess minimum competence. Id. at 14. The Oregon Supreme Court has approved these two new paths “in concept” and charged the Task Force with creating a new committee to propose a detailed plan for implementation. Letter from Joanna Perini-Abbott and Adrian Tobin Smith, Co-chairs, Licensure Pathway Development Committee, Or. State Bd. of Bar Exam’rs, to Or. State Bd. of Bar Exam’rs 5 (Aug. 2, 2023), https://lpdc.osbar.org/files/2023.08.02LPDCltrtoBBXreSPPE-ApprovedbytheLPDC.pdf [https://perma.cc/YKJ2-PJK3].

243 Id.


245 Id.

246 Davis, *supra* note 244.
and the Supervised Practice Portfolio Examination (SPPE). There are multiple elements of the new SPPE pathway that graduates need to meet to gain licensure. This is not a diploma privilege and rather requires graduates to still produce work products as well as complete specified hours of supervised practice and other benchmarks. Impressively, this is only the beginning of the work Oregon is looking to do. They are now actively pushing and working to adopt another pathway that would be specific to the three in-state schools.

2. New Hampshire

New Hampshire and its Daniel Webster Scholar Honors Program is another good example of plausible approaches. This program was established in 2005 at the

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249 See Recommendation from Joanna Perini-Abbott, supra note 228, at 14–24; see also The Oregon Supervised Practice Portfolio Examination, supra note 248 (these include completing 675 hours of supervised legal work. Additionally, there will need to be a submission of legal writing examples, 8 to be exact. Moreover, there needs to be leadership in client interviews, negotiations, and other lawyering-focused skills. The compilation of all the requirements would be submitted to the Oregon bar examiners for ‘grading.’ Only after confirmation that the ‘examinee’ (graduate) has met the standards needed will they ‘pass.’ This is partly a semantic game to say is not a traditional diploma privilege, and to get around the need to still have some kind of ‘examination.’ This will meet that requirement.).

250 It is interesting to note that Oregon appears to be hedging their bets by both moving forward with alternative pathways, while simultaneously being among the first in the nation to announce adoption of the NextGen.

251 See Karen Sloan, Oregon Supreme Court to Vote on Bar Exam Alternative, REUTERS (Sep. 5, 2023), https://www.reuters.com/legal/legalindustry/oregon-supreme-court-vote-bar-exam-alternative-2023-09-05 [https://perma.cc/3JS8-ZUYL]. This would be similar to, and even partially based on, the University of New Hampshire Daniel Webster Scholar Program. See Letter from Joanna Perini-Abbott, supra note 242, at 7–14. There would be specified practice-focused coursework in the last two years of law school. Id. After completion of this track and graduation, there would potentially be no additional need for any other requirements. See id. This is more of a diploma privilege, though it requires more than the traditional ABA curriculum, and is focused on making the student practice-ready. This should be emulated everywhere.

University of New Hampshire Franklin Pierce School of Law. Students are accepted into the program before their second year of law school and learn a host of practical skills such as counseling clients, taking depositions, appearing before judges, and negotiating. Throughout the program, they create portfolios of written and oral work that are assessed by bar examiners every semester; upon completion of the program, students are sworn into the New Hampshire State Bar.

3. Nevada

Several other states are joining the call in rejecting the NextGen approach. Nevada recently completed an internal examination of the validity of their exam and the cut scores. During COVID-19, they removed the MBE entirely and have had the exam remote for several exam periods after COVID-19. The exam is now back in person and includes the MBE again, but perhaps they do not need the MBE moving forward at all. The current format of the Nevada exam is one-third unscaled MBE questions, one-third Nevada-created/specific performance exam, and one-third Nevada-created/specific essays. They are hoping to create a three-legged stool with a state-created and specific in-school multiple choice element, refocusing on problem-solving likely in the form of a Nevada-specific Performance Exam, and a post-exam supervised practice element for all examinees. This last part they need to still engage in further studies and the Nevada Supreme Court is actively

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253 Id. It is especially rewarding to have the University of New Hampshire Law Review be the publishing entity for this article.

254 Daniel Webster Scholar Honor Program, supra note 252.

255 Id.


259 Id.

considering.

Separately, but in the same line of important adjustments being made, Nevada is also leading how recently graduated students can engage in limited supervised practice. A proposal to offer limited legal services in rural and underserved communities, as well as to extend a pipeline of attorneys to these areas, was submitted in the summer of 2023. On October 19, 2023, Nevada Supreme Court Rule 49.5 was adopted, allowing recent graduates engaged in qualified employment limited certification as supervised legal practitioners. This would allow for supervised practice of up to twelve months, presuming all the requirements are met. The permitted activities are fairly robust. They include the ability to appear in court (without the presence of the supervising lawyer), prepare documents for filing, prepare transactional documents, negotiate and mediate settlements, prepare and mail correspondence, and counsel and give legal advice. There is currently no publicly viable role for the UBE in future reform for Nevada, which all but guarantees that there is no role for the NextGen either.

Wisconsin does not need to dictate to states what to do to ensure the public that the lawyers taking this exam are minimally competent. States can do it better themselves and Nevada is a great example of that. Unfortunately, as is the case of non-UBE jurisdictions, the one element missing is reciprocity, as Nevada currently does not have any. However, this concept of accepting admission status and performance from neighboring jurisdictions is something that can be overcome, particularly as similar states such as California continue to move away from a national exam standard and are actively exploring reforms. Perhaps the biggest impediment to reciprocity in these cases is more of protectionist ideology and fear of flooding the market with other states’ attorneys. Even in this problem, there is

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262 Order Adopting Supreme Court Rule 49.5, In the Matter of the Adoption of Supreme Court Rule 49.5, ADKT No. 0611 (Nev. Oct. 19, 2023).

263 Id. Ex. A, at 3.


265 A term of endearment for the NCBE, who are based out of this diploma privilege state.

266 Admission Requirements, STATE BAR OF NEV., https://nvbar.org/licensing-compliance/admissions/admission-requirements [https://perma.cc/KFL4-RPVV] (last visited Feb. 1, 2024) (“Nevada has NO RECIPROCITY OR ADMISSION BY MOTION of any kind. The Supreme Court of Nevada does provide limited practice rules including government or in-house counsel, student practice, and legal services.”).

hope for the creation of recognition and portability amongst at least regional jurisdictions once new exam protocols are created and prove to be just as effective—and hopefully more even than—the current Bar Exam.

4. Delaware

Delaware is another example of a jurisdiction that appears to be distancing itself from the NCBE and NextGen. It is actively engaging in a study on diversity on the bench and for membership in the bar. Delaware prides itself on having one of the hardest bar exams in the country.268 The state used to only give the exam once a year; that has recently changed in 2023.269 Delaware is also looking at cut-score reform.270 The Delaware exam still currently utilizes the NCBE for some of its exam questions.271 However, with NextGen coming as an integrated exam, the NCBE will not have those elements available for à la carte selection. This means that, presumably, Delaware will need to revamp its approach to be 100% NCBE-free.

Delaware already requires twelve weeks of service under an attorney who has practiced for ten years, even after passing the exam.272 This is an additional element needed that is not replicated in most other jurisdictions, though perhaps it should be more common nationally. It is important to remember that this is a relatively small bar and jurisdiction.273 Out of the 259 people who took the exam in July 2022, only 52.9% passed.274 Before the NCBE individual components become no longer available with the launch of NextGen for smaller and medium-sized jurisdictions like Delaware, considering non-exam pathways should be an easy decision to make. This can have the added benefit of reducing the investment in creating a valid state-specific exam.

5. California

California is an exceptionally large jurisdiction that has to be in the conversation for what reforms to consider. There are approximately 16,000 people who take the California exam every year.275 Their Board of Bar Examiners is funded by the


269 Id.

270 Id.


272 Del. Sup. Ct. R. 52. This is the concept referred to in Delaware as a Preceptor. See id.


274 Id.

legislature, and while that means they have considerable access to funding that other states do not, it also means they are politically influenced and appointed. 276 There has been a Blue-Ribbon Commission on the Future of the California Bar. 277 The recommendation from this study is to not go down the path of the relationship with the NCBE. 278 The primary reasons for this include control, transparency, and access. 279 The Commission is now developing a unique California exam and is moving away entirely from the NCBE.

Simultaneously, California is actively considering adopting a proposal for a Portfolio Bar Exam, for which it sought public comment through October 25, 2023. 280 The proposal is in response to and based on the Report from the Alternative Pathway Working Group. 281 The Portfolio Bar Exam would allow for the supervised practice of law, followed by a submission of a working portfolio of essays, written work, negotiations, client encounters, and timesheets for review. 282 The basic elements of the process are robust and are created with the protection of the public in mind. 283 There hopefully will be a push for recognizing other jurisdictions’ exams, and an understanding that to do so would be necessary if they want anyone to reciprocate with their examinees as well. This is where neighboring states like Nevada may be able to come to an understanding about their exams. Ultimately, the California Supreme Court will be the decisionmaker on these changes.

6. Minnesota

Similarly, the Minnesota Board of Law Examiners is undertaking a two-year study that will require a comprehensive look at the bar examination and its history.

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277 Blue Ribbon Commission on the Future of the California Bar Exam, supra note 267. The commission developed “recommendations concerning whether and what changes to make to the California Bar Exam, and whether to adopt alternative or additional testing or tools to ensure minimum competence to practice law.”


282 Id. at 3.

283 See id. attach. A, at 4–5 (listing the basic elements envisioned for the assessment method).
in the state, what the implications of being a UBE jurisdiction mean, and the potential for implementing reforms for determining minimum competency to practice law.\textsuperscript{284} The board will host several meetings and public hearings as well as solicit a broad range of stakeholders for input throughout the process.\textsuperscript{285} Lastly, the board plans to survey other states exploring this subject and will use the information gleaned to make its recommendations to the Minnesota Supreme Court in 2023.\textsuperscript{286} Dena Sonbol, Dean of Academic Excellence at Mitchell Hamline said, “My biggest concern as a lawyer myself . . . is ensuring that people that are becoming attorneys are people who are competent, skilled and ethical . . . If there is a way to achieve that without a bar exam, I would definitely support it.”\textsuperscript{287}

7. Utah & New York

Utah is similarly interested in potentially extending some form of supervised practice same as it implemented during the pandemic.\textsuperscript{288} As one of the few jurisdictions to embrace temporary changes to licensure in response to COVID-19, it is a significant positive to see Utah continue to consider positive pathways forward. Utah is looking to consider a novel approach to how they license new attorneys.\textsuperscript{289} Utah is relying heavily on the IAALS report as a guide to model what should be covered as part of the exam priorities and goals.\textsuperscript{290}

Finally, New York, one of the largest jurisdictions by size of annual applicants and in their influential power, has not yet publicly decided on whether to adopt NextGen.\textsuperscript{291} Seeing as how once New York came on board for the UBE, that was seen by many other jurisdictions as a go-ahead signal that it was okay for them also to adopt it, what New York does in these next few years may be incredibly influential.

\begin{footnotes}
\footnotetext{285}{Id.}
\footnotetext{286}{Id.}
\footnotetext{290}{See Cornett, supra note 288.}
\footnotetext{291}{See NextGen (July 2026), NAT’L CONF. OF BAR EXAM’RS, https://www.ncbex.org/exams/nextgen [https://perma.cc/4B49-4CPK] (last visited Feb. 6, 2024); see also Perlinger, supra note 284.}
\end{footnotes}
nationally. The New York State Bar Association, hoping to engage with the New York Board of Law Examiners, wants to follow the example of Oregon when it comes to licensure rather than adopt the NextGen. If it does go a route similar to Oregon, it could (hopefully) spell the beginning of the end for the Bar Exam as we know it today and could certainly weaken the death grip the NCBE currently holds over the licensure of attorneys.

CONCLUSIONS

If the purpose of the Bar Exam is to ensure an objective baseline test of competency and skill, it is not achieving its intended goal. The hard truth is that data shows most lawyers reprimanded for failure to adhere to required standards are not newly minted attorneys, but rather those who have considerably more experience. It stands to reason that if a test is needed for admission to the profession to ensure that there is consistent proficiency, maintaining such a standard throughout practice should be a no-brainer. Unless the profession is willing to seriously entertain a continuing examination requirement for all attorneys, it seems that there is little merit in utilizing a bar exam at all.

By way of example, during COVID-19, the Louisiana Supreme Court voted four-to-three to allow for emergency admission only for specific categories of students and with additional requirements upon admission. Justice Crain dissented, saying that the court was making a mistake and they were listening to students who did not want to be tested for minimal competency. Another concern of his was that this would be added fuel to an already growing call to “eliminate such high-stakes testing.” Justice Crain was wrong about the former, but correct about the latter.

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292 Unfortunately, there have been unofficial whispers that it is inevitable for New York to Adopt NextGen. All we can do is hope that is not the case.


While a New York bar examination should be the primary pathway to practice, it also remains our view that New York should consider providing two alternative pathways to admission: (a) a pathway for admission through concentrated study of New York law while in law school; and (b) a pathway for admission through supervised practice of law in New York.

294 David Adam Friedman, Do We Need a Bar Exam . . . for Experienced Lawyers?, 12 U.C. IRVINE L. REV. 1161, 1173 (2022).

295 See id. at 1162–64.


297 Id. (Crain, J., dissenting).

298 Id. (Crain, J., dissenting).

299 See Levin, supra note 64, at 142 (“The temporary changes in bar admission standards in 2020 may have created a window of opportunity for continuing advocacy for alternatives to the bar exam.”).
The promise of an empirically and foundationally sound Bar Exam in the form of NextGen is far from there yet. ABA Standard 316 will undoubtedly be impacted by both the unknown aspects of this exam, as well as the yet unsettled adoption questions and cut score methodologies. Continuing to attach accreditation impacts for law schools based on aggregate individualized performance on a post-educational licensure exam does not make sense. It is not only out of line with similar professional licensing schemes, but it is also racially discriminatory. Divergent pathways that include supervised practice, diploma privilege, portfolio review, and other approaches are gaining steam in the face of the forced NextGen format conversion. A failure on the part of the NCBE to live up to its promises, including meaningful feedback from schools and stakeholders, is starting to reap its consequences. States should no longer feel the need to be attached at the hip to the NCBE to ensure a well-thought-out and valid licensing process for new attorneys. Actual and positive change is not only possible, it is here. Join us!