



# The State Bar of California

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## **OPEN SESSION AGENDA ITEM**

**DATE:** October 13, 2022

**TO:** Members, Blue Ribbon Commission

**FROM:** Audrey Ching, Program Director, Office of Admissions

**SUBJECT:** Updates to the open agenda item "Discussion and Recommendation for a California Non-Exam Pathway to Licensure" from August 16, 2022

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## **EXECUTIVE SUMMARY**

The October 13 meeting was scheduled to allow further discussion and analysis of issues surrounding bar exam alternatives.

## **DISCUSSION**

Following on the August 16, 2022 meeting, the Blue Ribbon Commission discussion on October 13 will focus on key topics associated with bar exam alternatives which warrant further discussion and detail: what type of objective assessments could be part of a bar exam alternative and how make acquisition of a supervisor more equitable and accessible.

On the issue of how to create objective assessments to ensure minimum competence, areas to be discussed will include:

- The Ontario model (which includes two open-book exams)
- The "PREP" course used by several Canadian provinces (online modules, in-person workshops, a simulated law firm, and a four day, in-person, capstone phase evaluated by the Canadian Centre for Professional Legal Education)
- Portfolio review currently being developed in the State of Oregon.

On the issue of supervision, areas of discussion will include whether a matching program, like those used in the medical field, can help bring equity to the process of identifying and securing a

supervisor; as well as issues around compensation during supervised practice to make it accessible to more individuals.

As a reminder to the Commission, the following motions were made at the August 16 meeting; neither motion passed:

### **PROPOSED MOTION A**

The Blue Ribbon Commission recommends to the State Bar Board of Trustees and the California Supreme Court that California explore a bar exam alternative for licensure to practice law. It is recommended that this exploration of an alternative pathway have a significantly increased focus on assessment of knowledge, skills and abilities for entry-level practice, deemphasizing the need for memorization of doctrinal law. The precise elements of a bar exam alternative (including eligibility and timeframe to completion) should be determined in consultation with experts, including psychometricians, to ensure the pathway is valid and reliable with a standard equivalent to the bar examination.

It is further recommended that the alternative pathway shall include the following elements:

#### **Law School**

Any applicant interested in availing themselves of the alternative pathway would need to complete at least six units of experiential coursework in law school that covers CAPA's skills and abilities. However serious consideration should be given to increasing this experiential education requirement.

#### **Supervised Practice**

- There shall be a post-law school supervised practice requirement. The exact number of hours required remains to be determined, with the goal of consistency with the exam timeline to licensure;
- Mandatory and structured supervisor training and oversight to be developed by the regulator shall be required in order to provide consistency in the supervised practice component and ensure that the supervision continues to emphasize the skills and abilities necessary for minimum competence;
- A to be determined percentage of supervised practice hours may occur during law school; and
- Equity, disparity and cost issues must be taken into account

#### **Assessment**

- Summative assessment may include a capstone/portfolio, simulated in-person assignments and/or a written exam component
- Scoring and grading must be valid, reliable and conducted by the regulator

### **PROPOSED MOTION B**

The Blue Ribbon Commission recommends to the State Bar Board of Trustees and the California Supreme Court that California does not adopt a non-exam pathway for licensure to practice law.

It is further recommended that a bar exam alternative be considered after the implementation of a revised California bar exam.



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## OPEN SESSION AGENDA ITEM

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**TO:** Members, Blue Ribbon Commission

**FROM:** Audrey Ching, Program Director, Office of Admissions

**SUBJECT:** Discussion and Recommendation for a California Non-Exam Pathway to Licensure

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## EXECUTIVE SUMMARY

The joint Supreme Court/State Bar Blue Ribbon Commission on the Future of the Bar Exam was formed in 2021--with the inaugural meeting on July 6, 2021—to review and recommend whether and what changes to make to the bar exam, and to develop recommendations regarding whether a bar exam is the correct or only tool to determine minimum competence to practice law in California. This agenda item will walk through the information gleaned from pathways to licensure in other U.S. jurisdictions – either in practice or development – and the licensure process in Canadian jurisdictions. From this information presented in prior Blue Ribbon Commission meetings, the members have moved forward to this meeting three options for discussion that will be outlined in detail in this item. The Commission members will be asked to adopt a recommendation on a non-exam pathway to licensure.

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## BACKGROUND

Following discussion and input at the [September 1, 2021](#) meeting of the Blue Ribbon Commission, members reviewed and agreed to this set of guiding principles in carrying out its charge at the [October 7, 2021](#) meeting:

- Admission to the State Bar of California requires a demonstration of knowledge, skills, and abilities currently required for the entry-level practice of law, otherwise referred to as minimum competence.
- Admission to the State Bar of California requires minimum competence in professional ethics and professional responsibility.

- Criteria for admission to the State Bar of California should be designed to ensure protection of the public.
- The recommended examination, or examination alternative, should be evidence-based.
- Fairness and equity of the examination, or examination alternative, should be an important consideration in developing the recommended approach. Fairness and equity include but are not limited to cost and the mode and method of how the exam or exam alternative is delivered or made available.
- The recommended examination, or examination alternative, should minimize disparate performance impacts based on race, gender, ethnicity, or other immutable characteristics.

The [September 1, 2021](#), meeting of the Blue Ribbon Commission also included presentations on bar exam alternatives. The Commission heard from prominent scholars in favor of bar exam reform – Deborah Merritt and Joan Howarth. Their research and presentation looked at what an entry-level attorney needs to begin practicing, which is similar to the analysis conducted by the State Bar’s California Attorney Practice Analysis (CAPA) conducted in 2018. They also presented options for alternatives to the bar exam, including highlighting the success of the Daniel Webster Scholar Honors Program in New Hampshire. (ATTACHMENT A)

The program director for the Daniel Webster Scholar Honors program (DWS) at the University of New Hampshire’s School of Law, Courtney Brooks, also presented at the September 2021 meeting. The Daniel Webster Scholar Honors Program launched in January 2006 in a collaborative effort of the New Hampshire Supreme Court, the New Hampshire Board of Bar Examiners, the New Hampshire Bar Association, and UNH School of Law to blend legal education with legal practice. Students selected for this program participate in a two-year practice-based, client-oriented education and are then licensed in New Hampshire without taking the bar examination. In essence, the two years of special courses, clinics, externships, client-interviews, and in-person, one-on-one portfolio reviews with a New Hampshire bar examiner is deemed an equivalent assessment to a bar examination. The program is [highly selective](#) and is limited to 24 students a year. (ATTACHMENT B)

The final speaker on bar exam alternatives at the September 1, 2021, meeting was Jacquelyn B. Rothstein, the Executive Director & General Counsel of the Wisconsin Board of Bar Examiners. The Wisconsin Supreme Court permits graduates of American Bar Association (ABA) accredited Wisconsin law schools (Marquette University Law School and the University of Wisconsin Law School) the ability to be licensed after graduation without taking the bar exam—this is called diploma privilege. While 32 states and the District of Columbia had historically offered diploma privilege at some point since the 1800s, only Wisconsin continues to offer this licensure option<sup>1</sup>.

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<sup>1</sup> The Utah, Washington, Oregon, Louisiana, and D.C. Supreme Courts did provide pandemic-related, limited diploma privilege to 2020 graduates of ABA law schools.

Graduates wanting to be licensed through diploma privilege (Wisconsin does offer a Wisconsin bar exam) must meet the academic requirements in the Wisconsin Supreme Court rule and pass the character and fitness requirements. (ATTACHMENT C)

At the [October 7, 2021](#), meeting of the Blue Ribbon Commission, Joanna Perini-Abbott, the Chair of the Oregon State Board of Bar Examiners, gave a presentation on the non-exam pathways to licensure under development in Oregon. The Oregon Supreme Court, following the disruption to the bar exam in 2020 and the provision to allow limited diploma privilege, charged the Oregon State Board of Bar Examiners to develop an Exam Task Force to make recommendations for pathways to licensure that did not require a bar exam. This task force looked to other jurisdictions that had similar pandemic-related diploma privilege orders, Canadian jurisdictions that require extensive “articling,” or practice under a supervising attorney, and the aforementioned Daniel Webster Scholar Honors program. The Task Force moved forward two recommendations: an Oregon Experiential Pathway (OEP) and a post-graduation Supervised Practice Pathway (SPP). The OEP is modeled extensively on the DWS program and includes two years of special coursework, clinics, externships, and portfolio review during law school. The SPP requires 1,000 – 1,500<sup>2</sup> hours of supervised practice after law school graduation, under a licensed attorney, and work product portfolio review. Perini-Abbott returned to the Blue Ribbon Commission on [May 5, 2022](#), with an update on the Oregon pathways in development. The launch of the pathways has been pushed to the fall of 2023 to allow time for the National Conference of Bar Examiners (NCBE) and the Institute for the Advancement of the American Legal System (IAALS) to assist the Court in developing these pathways. (Attachment D)

After the October 2021 meeting, the Blue Ribbon Commission separated into subcommittees – one for the bar exam, and one tasked with bar exam alternatives. At the [December 8, 2021](#), bar exam alternative subcommittee meeting, representatives from several Canadian provinces presented on their licensing processes, and in particular “articling” and what requirements, assessments and training exists for supervisors and supervisees. Articling refers to the provision of experiential learning as a means of preparing someone for licensure, this involves supervised practice under a qualified, licensed lawyer. Representatives from Alberta, British Columbia, and Ontario presented on their licensing processes and Erica Green, the manager of the Canadian Centre for Professional Legal Education (CPLED) discussed the components of the Practice Readiness Education Program (PREP) used in bar admissions for Alberta, Manitoba, Nova Scotia, and Saskatchewan. All of the Canadian provinces require articling (or the equivalent) and the supervised practice period ranges from eight to 12 months, depending on the province. The PREP program that four provinces use combines virtual coursework, in-person workshops, and a capstone simulated transaction in addition to the required articling.

British Columbia offers a Professional Legal Training Course (PLTC), which is a full-time, in person, ten-week course emphasizing practical skills training, ethics, practice management, and practice and procedure. In Ontario, all the candidates for licensure take two open book exams -- the barrister and the solicitor exams (these can be taken at any time in the licensing process)

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<sup>2</sup> The required number of hours for the SPP is still under consideration.

along with an experiential training path. The experiential training requirement is either met by the Integrated Practice Curriculum at two universities, the Law Practice Program, or articling. Two universities in Ontario, Lakehead University Law School and Toronto Metropolitan University (formerly Ryerson University), offer an approved experiential curriculum that exempts their students from articling or the Law Practice Program. The Law Practice Program is an eight-month program—a four-month training course where candidates learn practical lawyering skills in a simulated law firm environment, followed by a four-month work placement with an approved supervisor. The Law Practice Program is delivered for the Law Society of Ontario by Toronto Metropolitan University and the University of Ottawa. The majority of licensure candidates, however (85%), fulfill the experiential training requirement through articling. Traditionally, the articling period has been ten months, but during the pandemic it was reduced to eight months. (Attachment E)

After the extensive background on bar exam alternatives provided to the full committee of the Blue Ribbon Commission and the subcommittee on alternatives, staff developed a draft framework for discussion which was discussed at the [May 5, 2022](#) meeting and the [June 9, 2022](#) meeting. At the [July 19, 2022](#) meeting, staff brought seven options for possible non-exam pathways, which paired different combinations of program components focused on the law school curriculum, a post-law school component, and various types of assessments. These combinations reflected the Commission’s prior discussions, and of these, the Commission members selected three options for further discussion.

## **DISCUSSION**

The Commission overwhelmingly narrowed the seven options down to three, with a fourth, not having any non-exam pathway, also open for consideration.

Of note – all the options selected to be discussed include a supervised practice period, but there is not a consensus on the number of hours that should be required between 750 and 1,500. Also, since all options include supervised practice, it is important to delineate the specific historic challenges brought to light by the Canadian provinces to the Blue Ribbon Commission. The Commission received a 2018 report from the Law Society of Ontario that outlined challenges in the articling program, specifically that the demand for articling positions surpassed the number of available supervisors. Hence, the LPP or Law Practice Program was developed (see Background, above), but the number of candidates choosing that alternate path to licensure has been much lower than projected. This report also highlighted the disparity in remuneration for candidates, the power imbalance that can lead to racial and gender discrimination and the inconsistency in articling experience. At the December 8, 2021, bar exam alternative subcommittee meeting with multiple Canadian provinces in attendance, many reported similar issues with articling, and all were working on sourcing more “principals,” or supervisors, and adding additional training for those principals. Since the 2018 report, the Law Society of Ontario has landed on a policy to ensure minimum remuneration standards for all articling candidates<sup>3</sup>. (Attachment F)

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<sup>3</sup> <https://lso.ca/gazette/news/mandatory-minimum-compensation-for-experiential-tr>

In all options:

- Any pathway-related assessments are designed and graded by the State Bar
- Supervisors are vetted and trained by the State Bar
- Attorneys licensed through the non-exam pathway will meet all the other requirements for licensure in B&P §6060 (including a positive moral character determination)

The three options for discussion are:

1. Option 1 would require:

- No change to the program of legal education (no additional unit or course requirements), but the six experiential education units already required in ABA, Cal-accredited and California registered, unaccredited law schools<sup>4</sup> will be modified to meet the CAPA requirements for skills and abilities
- A post-graduation, supervised practice period between 750-1,500 hours
- A summative capstone/portfolio at the conclusion of the supervised practice period to be reviewed and scored by the regulator.

The pros of Option 1 include the following: law schools do not have to significantly modify curriculum to provide the option to students and students do not have to commit to a particular pathway at any time during law school, giving them great flexibility.

A con of Option 1 would be that post-graduation supervised practice followed by a capstone/portfolio may not meet the guiding principles set out by the Commission, as it is not an evidence-based bar exam alternative, as it does not mirror any of the models considered. The licensure pathways used in Canadian provinces have an exam component (Ontario) or a practical training course/workshop/simulation component (PREP or BC's PLTC), which help ensure consistency. The Daniel Webster Scholars Honors program has two years of modified, experiential law school curriculum. This option is very similar, however, to the Supervised Practice Program being considered in Oregon.

GUIDING PRINCIPLE CHECK: This option, again, falls short on the desire the Commission members expressed for an examination alternative to be evidenced based. As discussed above, all the options, since they include supervised practice, could have issues with fairness and equity, if the demand for supervisors outpaces the availability, and the available supervisors are distributed inequitably.

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<sup>4</sup> *Unaccredited law schools must require JD students to take at least six hours of practical skills training (Rule 4.240 (F)). This training can be part of a course, including an online course, or may take place in a clinic or internship.*

*California accredited law schools must require JD students to take at least six hours of practical skills training (Current Rule 4.160 (F)/New Accredited Rule 4.160 (D)(2)(a)), and must offer them the opportunity to take at least 15 hours of practical skills training as part of their JD course (Guideline 6.9 (A) (1)/New Accredited Rule 4.160 (D)(2)(b)). This training can be part of a course, including an online course, or may take place in a clinic or internship.*



2. Option 2 would require:

- A non-exam pathway, introduced during law school, with expanded doctrinal and experiential education requirements modified to reflect CAPA (skills and abilities)
- This option would increase the requirements and add a State Bar regulated curricular path (for CA law schools) that would diverge at some point from the standard law school curriculum to cover additional externships, practica, simulations and clinics
- A post-graduation, supervised practice period between 750-1,500 hours
- A summative capstone/portfolio at the conclusion of the supervised practice period

The pros of Option 2 include the following: an expanded experiential curriculum will provide more opportunity for applied knowledge and to assess minimum competence to practice law and can possibly reduce the number of hours required for supervised practice. This option is also similar to the Oregon Experiential Pathway and our state can lean on the curriculum requirements designed by the Oregon Task Force and the assessment products being developed by IAALS/NCBE.

A con of Option 2 would be scalability, as the evidenced-based program the curricular expansion is based on (DWS) is limited to 24 law students a year and the Oregon proposal is based on Oregon's three law schools – a sharp contrast to California's 52. This has the potential to impact fairness and equity as it may require limiting the number of participants.

GUIDING PRINCIPLE CHECK: This option has the seventeen years of evidenced-based data on curriculum/assignments/clinics and assessments from the Daniel Webster Scholars Honors program. Also, this option has three enhanced components – law school curriculum, supervised practice, and a summative capstone/portfolio – these layers conceivably add more public protection with increased regulation. Since this option includes supervised practice, the question of fairness and equity comes into play here as well.

3. Option 3 would require:

- No change to the program of legal education (no additional unit or course requirements), but the six experiential education units already required will be modified to meet the CAPA requirements for skills and abilities
- A post-graduation, supervised practice period between 750-1,500 hours
- A California "PREP" program like the one used in several Canadian provinces with online modules, in-person workshops, a simulated law firm, and an in-person capstone to be completed concurrently with the supervised practice period

The pros of Option 3 are the same as Option 1, but also include the evidenced-based benefit that the "PREP" program can be developed with insight from the Canadian provinces that use this style of hands-on assessment. Also, completing the PREP program and supervised practice concurrently could lead to licensure on a more streamlined timeframe than the other options.

The cons of Option 3 would be the resources required to create and scale a program that includes online and in-person sessions, along with subject matter experts to score an in-person capstone.

**GUIDING PRINCIPLE CHECK:** The “PREP”-style component would have the evidence-based data and development template from the Canadian provinces. A well-developed, competency-based, multi-part PREP program would, similar to Option 2, have more layers of regulation and, assumedly, more public protection. Finally, as expressed for all options, supervised practice has fairness and equity concerns.

### **Outstanding questions**

Throughout the presentations and discussions since the inception of the Commission, and especially through the discussions related to a bar exam alternative, there have been a list of running questions that will require resolution prior to any implementation.

In addition to the question of how many supervised practice hours will be required in a recommended pathway, there are a few other outstanding questions to resolve.

- 1) Is the non-exam pathway open to all law school types in California? (ABA, Cal-accredited, Cal-registered, unaccredited)
- 2) How will the non-exam pathway be phased-in?
  - a. Will it be limited to certain law schools?
  - b. Will it be limited to certain practice areas (such as housing) or sectors (such as public interest)?
  - c. Will it be limited by application and with a total cap on the number of participants?
- 3) Is there a non-exam pathway for out-of-state law school applicants? Out-of-state attorneys? Foreign educated applicants? Foreign attorney applicants?

## **POSSIBLE RESOLUTIONS**

In this section, possible resolutions have been prepared by staff depending on the outcome of the discussion.

### **Two possible overarching resolutions:**

The Blue Ribbon Commission recommends to the State Bar Board of Trustees and the California Supreme Court that California adopt a non-exam pathway for licensure to practice law. Consistent with the recommendation for also adopting an exam pathway, it is recommended that the implementation of a non-exam pathway, from the assessments designed on the regulator-side and/or the law school-side, focus on assessment of skills along with the application of knowledge and performance of associated skills for entry-level practice, deemphasizing the need for memorization of doctrinal law.

It is further recommended that there be a criterion developed in order to phase in the implementation of a non-exam pathway.

OR

The Blue Ribbon Commission recommends to the State Bar Board of Trustees and the California Supreme Court that California does not adopt a non-exam pathway for licensure to practice law.

#### **OPTION 1**

The non-exam pathway identified as Option 1 in this agenda item be recommended to the State Bar Board of Trustees and the CA Supreme Court as modified herein.

It is further recommended that this pathway will also require \_\_\_\_\_ hours of supervised practice and a summative, psychometrically reliable capstone/portfolio assessment.

OR

#### **OPTION 2**

The non-exam pathway identified as Option 2 in this agenda item be recommended to the State Bar Board of Trustees and the CA Supreme Court as modified herein. This pathway will be open to \_\_\_\_\_ law school types, but not required to be offered.

It is further recommended that this pathway will also require \_\_\_\_\_ hours of supervised practice and a summative, psychometrically reliable capstone/portfolio assessment.

OR

#### **OPTION 3**

The non-exam pathway identified as Option 3 in this agenda item be recommended to the State Bar Board of Trustees and the CA Supreme Court as modified herein.

It is further recommended that a post law school series akin to Canada's PREP program be developed as the of a non-exam pathway with a concurrent recommended \_\_\_\_\_ hours of supervised practice.

### **ATTACHMENT(S) LIST**

- A. Howarth and Merritt materials
- B. Daniel Webster Honors Scholars materials
- C. Rothstein Wisconsin materials

- D. Oregon Task Force materials
- E. Canadian province and PREP materials
- F. Ontario—Options for Lawyer Licensing 2018