

# OREGON STATE BOARD OF BAR EXAMINERS

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August 2, 2023

Oregon State Board of Bar Examiners  
16037 S.W. Upper Boones Ferry Road  
Tigard, OR 97224

Re: Proposed Adoption of the  
Supervised Practice Pathway Examination

Dear Board Members,

As you know, on January 12, 2022, the Oregon Supreme Court expressed “approval in concept” of two pathways for admission along with the Uniform Bar Examination (UBE): the Supervised Practice Portfolio Examination (SPPE; then titled the Supervised Practice Pathway), and the Oregon Experiential Portfolio Examination (OEPE; then titled the Oregon Experiential Pathway). In response, the Oregon Board of Bar Examiners (BBX) convened the Licensure Pathways Development Committee to draft proposed rules for these two pathways.

The Committee convened in May 2022 and began working on the proposed parameters for both pathways. Since January 2023, the Committee has focused its attention exclusively on the SPPE. Accompanying this letter are the proposed rules for the SPPE, along with a set of explanatory notes.<sup>1</sup> We ask that the BBX forward these rules to the Court with a recommendation from the BBX that the Court adopt the SPPE as a pathway to admission in Oregon.<sup>2</sup>

The attached materials are a complete articulation of the proposed pathway as envisioned by the Committee. In this letter, we have summarized the process that led to

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<sup>1</sup> The rules are captioned, “The Oregon Supervised Practice Portfolio Examination.” The rules approved by the Committee are dated August 2, 2023. (The rules released for public commentary are dated March 8, 2023.) The explanatory notes are captioned, “Notes and Explanations on Proposed Rules for the Supervised Practice Portfolio Examination (SPPE) Licensing Pathway.” For clarity, we have added the August 2, 2023, date to the version submitted to the Board with this letter. (The version released for public commentary is undated.)

<sup>2</sup> We anticipate returning our attention to the OEPE in the Fall. We are hopeful that we will be able to release rules, along with explanatory notes for public comment by the close of 2023.

the proposed rules, a summary of the public commentary provided in response to the proposed rules, and a summary of the Committee's response to those comments.

## **I. Background and Process for Pathway Development.**

On September 14, 2020, following a flurry of emergency licensure reform taken in response to the COVID-19 pandemic, then Oregon Supreme Court Chief Justice Walters charged the BBX with advising the Court as to whether "Oregon should grant admission to the bar on some basis in addition to the passage of the Oregon Bar Exam or the Uniform Bar Examination (UBE), such as a form of 'diploma privilege.'"<sup>3</sup>

In response to the Court's charge, in January 2021, the BBX convened a task force. The Alternatives to the Exam Task Force had representatives from these organizations:

- Oregon Supreme Court;
- Oregon BBX;
- Oregon State Bar (OSB);
- Oregon Professional Liability Fund (PLF);
- Each Oregon Law School (administration and students);
- OSB Affinity Bar Sections; and
- OSB Practice Area Sections.<sup>4</sup>

The initial Task Force meetings took place between February and May 2021.<sup>5</sup> The Task Force meetings took place via Zoom and were open to the public.

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<sup>3</sup> A copy of the September 14, 2020, CJ Walters Letter to BBX is available at: <https://taskforces.osbar.org/files/2021/02/CJLetterReAdmissionsBBXTaskForces.pdf> (last accessed August 2, 2023).

<sup>4</sup> The roster of the Alternatives to the Exam Task Force is available at: <https://taskforces.osbar.org/files/ATERoster.pdf> (last accessed August 2, 2023).

<sup>5</sup> The meeting minutes and agendas are available at: <https://taskforces.osbar.org/ate/agenda/> (last accessed August 2, 2023).

The Task Force broke into three groups to study the models of licensure (other than the bar exam) in place in the United States and Canada at that time: (1) Supervised Practice, such as articling in Canada and the emergency policies put in place in Utah and Washington D.C. during the pandemic; (2) A Law School Portfolio Review, as done in the Daniel Websters Honors Program from University of New Hampshire Law School; and (3) Diploma Privilege, as employed in Wisconsin.

Each group focused on whether a pathway that increased accessibility to and equity in the profession by removing unnecessary barriers to admission could be developed in Oregon while still meeting the state’s requirements for admission found in ORS 9.220. That statute, which is designed to ensure consumer protection provides, in relevant part:

An applicant for admission as attorney must apply to the Supreme Court and show that the applicant: \*\*\*\*\* [h]as the requisite learning and ability, which must be shown by the examination of the applicant, by the judges or under their direction.<sup>6</sup>

Since 2017, Oregon has offered the UBE, which is drafted by the National Conference of Bar Examiners (NCBE). In conducting its analysis of the other models, the study groups presumed that obtaining a passing score on the UBE would remain a path to admission in Oregon.<sup>7</sup> While both the Court and the BBX have long accepted that a passing score on the UBE demonstrates the requisite learning and ability for admission, the Task Force concluded that its purpose was not to look for a model that tested exactly what the UBE tests, either as the test exists now or as it will exist once the NCBE implements the NextGen Bar Exam.<sup>8</sup>

The Task Force agreed, instead, to review models with an eye toward identifying pathways that would permit the BBX (as directed by the Court) to measure applicants against the “Essential Eligibility Requirements” found in Oregon Rule for Admission

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<sup>6</sup> ORS 9.220(3).

<sup>7</sup> Currently, there are several components to admission in addition to securing a passing score on the UBE, including complying with Rule for Admission 3.05 (which most applicants accomplish by graduating from an ABA law school), and passing a character and fitness review. The prospective pathways are intended to address “the requisite learning and ability” component of the admission requirements found in ORS 9.220(3).

<sup>8</sup> See *Next Generation of the Bar Exam*, NCBEX.ORG, <https://www.ncbex.org/about/nextgen-bar-exam/> (last accessed August 2, 2023) (discussing the upcoming evolution of the UBE and noting that it is expected to be implemented in July 2026).

(RFA) 1.25<sup>9</sup> and the 12 core competencies identified by the Institute for Advancement of the American Legal System (IAALS) in its October 2020 publication on the Building Blocks of Minimum Competence.<sup>10</sup>

After around 4 months of study, the three study groups made recommendations to the Task Force:

- The Supervised Practice study group recommended that Oregon adopt a pathway that allowed for admission following a term of supervised practice provided that the applicant showed the requisite learning and ability to practice through a work-product portfolio assessment conducted by the BBX.
- The Law School Portfolio Review study group recommended that Oregon adopt a pathway for admission that is similar, substantively, to the Daniel Webster's Honors Program in New Hampshire, with a goal of making the program one that could be implemented first at Oregon law schools and, eventually, at any ABA accredited law school that elected to implement it for an applicant. Again, the

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<sup>9</sup> A copy of Oregon's Rules for Admission for Attorneys is available at <https://www.osbar.org/docs/rulesregs/admissions.pdf> (last accessed August 2, 2023).

<sup>10</sup> IAALS identified the following core competencies:

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

Deborah Jones Merritt & Logan Cornett, Inst. For the Advancement of the Am. Legal Sys., *Building a Better Bar: The Twelve Building Blocks of Minimum Competence* 3 (2020) [https://iaals.du.edu/sites/default/files/documents/publications/building\\_a\\_better\\_bar.pdf](https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf) (last accessed August 2, 2023).

group expected that admission would ultimately be governed by a work-product portfolio assessment conducted by the BBX.

- The Diploma Privilege study group recommended that to meet the requirements of ORS 9.220(3), a Diploma Privilege pathway would need to include specific curriculum requirements and a BBX review of work product before admission. These changes brought the Diploma Privilege study group’s recommendation almost exactly in line with what the Law School Portfolio Review study group recommended.

After further discussions and a vote, the Task Force voted to recommend adoption of what is now known as the Supervised Practice Portfolio Examination (SPPE) and the Oregon Experiential Portfolio Examination (OEPE). The Task Force drafted a summary report of its recommendations, which it forwarded to the BBX and the Court.<sup>11</sup> In June 2021, the Court released the Task Force report for public comment. Following the public comment period, the Court posed a series of questions stemming from the report and public comment back to the Task Force and asked for another report answering these questions.<sup>12</sup> The Task Force met several times in the fall of 2021 to discuss the public comments and provided a supplemental report to the Court in November 2021.<sup>13</sup>

At a public meeting held in January 2022, the Supreme Court considered the Task Force’s report, supplemental report, and the public comment. The Court “approved in concept” the recommendations of the Task Force and asked the BBX to convene a new group to provide specific recommendations of how each program could be implemented.

The BBX determined that the voting body of this group should be smaller in number than the task force but that the voting members should be supported by an

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<sup>11</sup> The June 18, 2021, Alternatives to the Exam Task Force report is available at: <https://taskforces.osbar.org/files/Bar-Exam-Alternatives-TFReport.pdf> (last accessed August 2, 2023).

<sup>12</sup> The public comments received in response to the Task Force report are available at: <https://taskforces.osbar.org/files/Comments-Export-2021-ATE.pdf> (last accessed August 2, 2023.). The Court’s September 2, 2021, letter to the Task Force sent in response to the public comment is available at <https://taskforces.osbar.org/files/Exhibit-1-2021.09.02-ltr-to-Task-Force.pdf> (last accessed August 2, 2023).

<sup>13</sup> The Task Force’s supplemental report is available at: <https://taskforces.osbar.org/files/2021-11-29SupplementalReporttoJune182021ATEReport.pdf> (last accessed August 2, 2023).

advisory committee. The voting members of the newly formed committee were identified as:

- 4 members of the BBX;
- 1 representative from each Oregon law school (3 members total);
- 1 representative from the OSB Board of Governors;
- 1 representative practicing law outside the Willamette Valley;
- 1 representative from private practice;
- 1 representative from state-court criminal practice;
- 1 student or recent graduate representative; and
- The OSB Executive Director.<sup>14</sup>

A member of the Court was also invited to attend the group's meetings as a non-voting member.

The Committee then invited an expansive list of individuals to serve as members of an advisory committee. Those individuals include representatives from: the NCBE, the Institute for the Advancement of the American Legal System (IAALS), each affinity bar group in the OSB, each practice area bar group in the OSB, Disability Rights Oregon, and any other members of the bar or public who wished to join. Members of the advisory group were invited to attend and fully participate, except by voting, in all meetings. This group was invaluable to the progress of the Committee.

The Committee meetings have taken place via Zoom and have been open to the public. There have been around 19 meetings since the first meeting was convened in May 2022.<sup>15</sup>

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<sup>14</sup> The roster of the Licensing Pathway Development Committee is available at: <https://lpdc.osbar.org/files/LPDCRoster.pdf> (last accessed August 2, 2023).

<sup>15</sup> The meeting agendas and minutes are available at: <https://lpdc.osbar.org/meeting-agendas-and-minutes/> (last accessed August 2, 2023).

The Committee broke into three work groups: The SPPE group; the OEPE group (the law school portfolio model); and the outreach group. The SPPE group and OEPE group began work on drafting rules for each program. The outreach group coordinated presentations to nearly 20 groups throughout the state and other media outreach including an article in the Oregon Bar Bulletin to ensure the bar membership was fully informed during the process.<sup>16</sup>

The Committee decided to decouple the progress of the two pathways so that if one was ready for consideration first it could move forward. The SPPE group presented draft rules to the full committee and advisory group in January 2023. The full committee and advisory group then spent several meetings discussing the proposed SPPE rules in detail and debating any provisions raised for discussion by a meeting attendee.

In March 2023, the Committee presented the proposed SPPE rules, along with detailed explanatory notes that outlined the rationale for each of the rules, to the Oregon Supreme Court at a public meeting.<sup>17</sup> As discussed below, in early April 2023, the same proposed rules and notes were released for public comment.

In June 2023, at the close of public comment period, the full committee and advisory group met several times to review the public comment and revise the proposed rules based on the discussions that flowed from that review.

On August 2, 2023, the Committee voted to approve the final version of the proposed SPPE rules, along with the revised explanatory notes and this letter.<sup>18</sup> We ask

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<sup>16</sup> Shannon Gormley, *Expanding the Bar: OSB Applicants Soon May Choose From Bar Exam, Two Novel Examinations*, Oregon State Bar Bulletin (Feb/March 2023), <https://www.osbar.org/bulletin/issues/2023/2023FebruaryMarch/index.html> (last accessed August 2, 2023).

<sup>17</sup> The proposed rules and explanatory notes as they existed when circulated to the Court and to the public are available at: <https://lpcd.osbar.org/files/SPPEDraftRules-SupervisedPracticePortfolioExamination.pdf> (proposed rules; last accessed August 2, 2023) and <https://lpcd.osbar.org/files/SPPEDraftRules-ExplanatoryNotes.pdf> (explanatory notes; last accessed August 2, 2023). The revised rules and explanatory notes are included with this letter and will be made available on the OSB website at <https://lpcd.osbar.org> (last accessed August 2, 2023).

<sup>18</sup> With one abstention on the proposed SPPE rules themselves, the votes were unanimous. Associate Dean John Parry, representing Lewis & Clark Law School, abstained from voting on the proposed rules to avoid having his vote construed as the institutional position of Lewis & Clark, and he does not have the authority to speak on behalf of the law school in that



the BBX to consider these materials at your August 24, 2023, Board meeting. We also request that you forward them to the Oregon Supreme Court with a recommendation that the Court adopt the SPPE as a pathway to admission to practice in Oregon.

We note that, although Admissions staff and members of the BBX have been extensively involved in the work of the Committee, if the Court adopts the SPPE as a pathway for admission, the BBX and Admissions staff will then need to undertake the logistical steps necessary to implement the SPPE. We appreciate that the work left to be done to get the pathway up and running is substantial. Still, with these rules and explanatory notes, we have tried to provide a comprehensive outline of the program such that the implementation could occur in short order.

The Committee expects that work on the OEPE rules will resume in the fall, now with the benefit of the work of the SPPE group and the discussion of and comments on the SPPE drafts. When the OEPE rules are drafted, a similar process of full group consideration, public comment, and revisions will take place. We hope that work can be done by the close of 2023.

## II. Summary of Public Commentary.

As noted above, following our March 2023 presentation to the Oregon Supreme Court, we convened a 90-day public comment period. Members of the public could review the rules and leave a comment on the OSB website.<sup>19</sup> In addition, every OSB member received an email from the bar soliciting comment on the proposed rules.<sup>20</sup>

Forty-four comments were received.<sup>21</sup> Twenty-seven of the comments can be characterized as “in support” of the SPPE; seven can be characterized as against it; three

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way. He did vote in favor of the Notes and Explanations and the letter to the Board of Bar Examiners. Notably, after the rules were released for public comment, the outreach group gave a presentation for any Lewis & Clark faculty on the proposed SPPE. The impression of the Committee members presenting was that the Program was being favorably received and, to our knowledge, no Lewis & Clark professor submitted a negative public comment on the proposed rules.

<sup>19</sup> See OSB Licensing Development Pathway Committee, <https://lpdc.osbar.org> (last accessed August 2, 2023).

<sup>20</sup> A copy of the letter that was emailed to OSB members is available at: <https://lpdc.osbar.org/files/March132023BBXLettertoOSBMembers.pdf> (last accessed August 2, 2023).

<sup>21</sup> The public comments will be made available on the Committee website at <https://lpdc.osbar.org> (last accessed August 2, 2023).



comments were substantively unrelated to the SPPE.<sup>22</sup> The balance offered specific comments without offering a clear-cut for/against position on the overall concept.

None of the public comments related to the SPPE raised substantive considerations that were new to the Committee. The Committee reviewed a summary of the comments at the May 24, 2023, meeting. It then discussed issues raised by the comments at two meetings in June. A final discussion and vote occurred on August 2, 2023.

Below we have attempted to address public comments that raised specific points of concern. When we made a change in response to the comments, we noted it. When we did not, we tried to explain why not. While we have tried to provide context for each comment, as well as the Committee's response, the discussion below presumes the reader has read both the proposed rules and the explanatory notes.

**A. Summary of Reasons Commenters Supported the SPPE (27 Commenters).**

Twenty-seven people offered broad support for the SPPE; their stated reasons were—in summary—as follows:

- Individuals who participate in the SPPE will be better prepared to practice law because learning by doing under the tutelage of an experienced professional is a critical component of acquiring and demonstrating competency.
- The SPPE will bring the profession in line with the medical, accounting, architecture, and other fields that require supervised practices for a predetermined period at the outset of practice.
- The SPPE will be a better indicator of attorney quality than the bar exam.
  - SPPE seems harder than passing the bar, but that is good.

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<sup>22</sup> Three commenters did not express an opinion on the SPPE but, instead, expressed frustration with the OSB more broadly. One commenter indicated that bar dues were too high; another indicated that the OSB does not prioritize its members; and a third indicated that the OSB is not taking steps to promote inclusion and diversity or to protect its members.

- SPPE will provide a better assessment of one’s abilities to practice law than the bar. (4)<sup>23</sup>
- The one-size fits all model of the bar exam is not the best entry into our profession.
- The bar exam doesn’t effectively test an individual’s ability to practice; the SPPE does. (3)
- The ability to communicate orally and in written form, listen and relate well to clients, to be organized and act professionally cannot be measured in a two-day exam, but can be measured in the SPPE.
- The bar exam is arbitrary and outdated.
- Removes the bias of testing that harms:
  - practitioners of color;
  - rural practitioners;
  - practitioners with disabilities; and
  - lower socioeconomic status practitioners (because you can earn an income while completing the program and it removes the cost of bar prep classes, as well as the waiting between exam and results).
- Removes barriers to “good people helping other[s] solve problems.” (2)
- The plan is thoughtful and well-drafted and:
  - A little too stringent, but seems to “strike a good balance”;
  - Comprehensive and well-considered;
  - Practical, thoughtful, and innovative guidance;

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<sup>23</sup> When a theme or idea was expressed more than once, the number of commenters who shared that view is included in parentheses.

- Balances the need for equity and consumer protection;
- A careful and thoughtful approach in line with recent studies and scholarship describing the need to “reshape the bar”; and
- Consistent with the plan for the Lawyer Justice Corps.

**B. Summary of Reasons Commenters Opposed the SPPE (7 Commenters)**

Seven commenters opposed the SPPE; their stated reasons were—in summary—as follows:

- The SPPE is inferior to the bar exam. More specifically:
  - Preparing for the bar requires us to deepen our learning of all major areas of the law and frankly make connections between different areas of the law that we hadn’t made completely in law school as we took courses over three years;
  - Lawyers need to know how to focus and synthesize information and the bar exam process required that “on steroids”;
  - Learning to be ready for a one-time exam is also an important skill for lawyers preparing for many “one time” stressful situations and to perform on demand;
  - If you can’t handle the stress of the bar exam, you can’t be a successful attorney;
  - Lacks the element of surprise;
  - Oregon Bar Exam is “one of the easier bar exams to pass and has a very high pass rate already (74%, 68%, 79%, 64% etc.), so why should we further lower the admission standards”;<sup>24</sup>

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<sup>24</sup> Oregon administers the UBE, which is a standardized exam administered by the NCBE in over 40 jurisdictions across the country. Each jurisdiction sets its own minimum passing score on this uniform exam; only two jurisdictions require a higher score for admission than Oregon, which requires a score of 270. NCBE UBE Minimum Scores at

- Too diffuse and could easily be “cut and pasted” or not the internal work of a prospective attorney.
- Would flood the state with attorneys; and
- “This proposal seems to me a solution in search of a problem. The effect will be to create a second-class tier of lawyers who will be seen as unable to pass the bar. Prospective clients with any sophistication will avoid them.”
- “I do not support the SPPE project as currently outlined. \* \* \* I would be very interested in the administration cost for the BBX to administer and review the work samples, versus the cost to administer the current Bar Exam.”

The Supreme Court considered these types of concerns, as well as the Task Force’s comprehensive response to them,<sup>25</sup> when it approved the SPPE and OPPE “in concept,” and directed the BBX to convene a committee to develop rules outlining these forms of examination. Accordingly, the Committee offers just a few additional observations in response.

The Court and the BBX’s task when making admission determinations is guided by ORS 9.220, which focuses on the character, fitness, and abilities of an individual applicant. A desire to avoid a surplus of new lawyers cannot justify denying admission to a qualified applicant. Once there is recognition that some *qualified* applicants are being excluded from admission because of there is only one way to demonstrate competence, fairness dictates an exploration of whether there are other viable ways to examine applicants for competence.

Beyond fairness, however, the notion that Oregon should fear a “flood” of attorneys is misplaced. Oregon is not only facing a well-known shortage of public defenders but is in the bottom tier of lawyers per capita nationally, with just 2.9 lawyers

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<https://www.ncbex.org/exams/ube/ube-minimum-scores>) (last accessed August 2, 2023).

Oregon’s “high pass rate” reflects the quality of the applicants, not the ease of the exam. The adoption of the SPPE is not related to Oregon’s bar passage rate for any specific UBE exam but, instead, is related to the recognition that—whatever the passage rate—there are applicants who do not pass for reasons unrelated to their competence to practice.

<sup>25</sup> See Footnotes 11, 13, *supra*.

per 1000 citizens.<sup>26</sup> Lawyers and adequate legal services are even harder for people to secure in parts of Oregon outside the Willamette Valley.

Thus, both individual applicants and the Oregon legal consumer are served by developing additional pathways for admission. And the relevant inquiry when evaluating a pathway is not how it compares to another pathway but whether it places the BBX—as the Court’s designee—in a position to make a fair assessment of whether an applicant has the “requisite learning and ability” to practice as required by ORS 9.220.

The SPPE does so. In 2022, the BBX implemented the Provisional Licensing Program (PLP), which is a portfolio review model, to assess applicants affected by the HVAC failure for the February 2022 bar examination and, through that process, it has confirmed its ability to assess the competence of the work product submitted using detailed rubrics.<sup>27</sup>

As proposed, the SPPE positions the BBX to assess an applicant’s analytical thinking skills, their ability to apply those skills in practice of law, and to apply other practical skills necessary for practice. The portfolio assessment over time aligns with the Oregon’s Essential Eligibility Requirements<sup>28</sup> and the competencies identified by IAALS<sup>29</sup> in a more authentic way than a standardized test focused on a single point in time. Because of the rigor of the pathway, as well as the meaningful experience SPPE Provisional Licensees will gain in practice before being admitted to the bar, we believe that Oregon employers and consumers will quickly come to see value in lawyers admitted via the SPPE.

For the reasons discussed in the Task Force reports, recognized by the BBX and Court when forming this Committee, and touched on above, we do not believe any of the comments in opposition should stop Oregon from moving forward with the SPPE.

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<sup>26</sup> The ABA Profile of the Legal Profession 2022 (Lawyers by State) is available at <https://www.abalegalprofile.com/demographics.php#anchor2> (last accessed August 2, 2023).

<sup>27</sup> Though the rules the Committee has put forth for the SPPE differ from the PLP program, the portfolio submission requirements are similar.

<sup>28</sup> RFA 1.25.

<sup>29</sup> See Footnote 10, *supra*.

**C. Summary of Specific Comments About SPPE with Committee Responses.**

**1. Consistency with PLF Terminology.**

The PLF reminded the Committee that the PLF requires “coverage” rather than “insurance,” and asked the Committee to change that terminology in the rules. The requested technical correction was made throughout the rules.

**2. Missing Definitions.**

**a. Affinity Bar Association (SPPE Rule 6.8).**

One commenter requested further clarification on what constituted an affinity bar association. SPPE Rule 6.8 requires individuals complete at least 10 hours of activities related “to diversity, equity, inclusion, or access to justice” which may include work with “affinity bar associations.” To address the concern raised by the comment, the rules were amended to add the underlined words: “an Oregon State Bar sponsored affinity bar association or affinity section.”<sup>30</sup> This clarifies the term and limits the activity to those associations and sections formally sanctioned by the OSB, which are listed on its website.<sup>31</sup>

**b. Non-Profit Organization (SPPE Rule 2.1).**

One commenter asked whether the reference in SPPE Rule 2.1 to a “Non-Profit Organization” included law schools. The reference to nonprofit organizations does include law schools. The question, however, prompted us to clarify SPPE Rule 2.2(C) by providing that to qualify as work within the pathway, an SPPE employer must hire the Provisional Licensee to perform paid “Legal Work,” as defined in SPPE Rule 1.2(J), rather than simply “work.” This means that a law school that hired a licensee to provide legal services (*e.g.*, as part of a law school clinic) could qualify under the rules if the other components of the SPPE were met (if there were a Supervising Attorney, etc.), but if a law school hired a licensee to perform other types of work, those hours would not qualify in the program.

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<sup>30</sup> SPPE Rule 6.8.

<sup>31</sup> A copy of the current list of affinity bar associations can be found at <https://www.osbar.org/diversity> (last accessed August 2, 2023).

**c. Immediate Family (SPPE Rule 2.4).**

One commenter requested that the SPPE Rules define “immediate family” to include spouses. Immediate family is a term used to limit who may serve as a Supervising Attorney. The Committee intended to prohibit a Provisional Licensee from being supervised by a spouse, along with other immediate family members. The Committee amended the rule to address this concern. SPPE Rule 2.4 now expressly includes spouses, former spouses, cohabitants, and former cohabitants as “immediate family members” who cannot serve as a supervising attorney for a Provisional Licensee.

**3. Requested Clarifications.**

**a. “workspace, tools, and technology” (SPPE Rule 5.2).**

SPPE Rule 5.2 provides that “Employers participating in the Program must: \* \* \* \* (C) Provide Provisional Licensees appropriate workspace, tools, and technology to accomplish the tasks assigned by the Supervising Attorney[.]” One commenter suggested that the rule should specify whether the Provisional Licensee can be required to cover some or all of these expenses. The Committee believes that the rule is clear that a licensee *cannot be required* to cover any of these expenses.

**b. Timing of Releases for Written Work Product (SPPE Rule 6.4(F)(2)).**

One commenter suggested that we clarify when a client must consent to the use of a work product in a Provisional Licensee’s portfolio. SPPE Rule 6.4(F)(2) states that when a work product relates to a client matter, “the work product must be redacted to protect the client’s interests; and the client must consent to inclusion of the work product in the Portfolio.” The Committee agreed and thus clarified in SPPE Rule 6.4(F)(2) by adding the underlined clause to the rule: “Before the Portfolio is submitted, the client must consent to inclusion of the work product in the Portfolio.”

**c. Applicant Participation Limited to those Authorized to Sit for the Oregon Bar Exam.**

**i. Applicants from Law Schools Located in a Foreign Jurisdiction (SPPE Rule 2.1).**

An inquiry was made as to whether applicants from law schools located in foreign jurisdictions were eligible to participate in the SPPE. SPPE Rule 2.1(A) provides that one



prerequisite to SPPE participation is that the applicant meets the qualifications set out in RFA 3.05(1), (2), or (3) to sit for the Oregon Bar Exam. While most applicants for admission meet those requirements by graduating from an ABA accredited law school,<sup>32</sup> there is also a provision that guides when an applicant who graduated from a law school in a foreign jurisdiction can sit for the Oregon Bar Exam.<sup>33</sup> Provided an applicant who graduated from a law school in a foreign jurisdiction is qualified to sit for the bar exam under that rule, that applicant will also qualify to seek admission via the SPPE.

**ii. Out-of-State Applicants and Long-Standing Law School Graduates (SPPE Rule 2.1).**

One commenter asked whether this program was only available to recent law school graduates. Another asked whether attorneys admitted in other jurisdictions would be eligible for licensure under the SPPE. And, finally, a third asked if an Administrative Law Judge licensed in another state could use the SPPE to seek licensure.

Under SPPE Rule 2.1(A), the SPPE is available to any individual who is eligible to sit for the Oregon Bar Exam, provided they meet the other qualifications identified in Rule 2.1. Thus, as with the exam, applicants interested in the SPPE do not have to pursue admission within a specified period after graduation. And, as with the exam, applicants may also pursue the SPPE if they have failed the bar exam.

Attorneys licensed in other jurisdictions may have other avenues for admission to the Oregon bar beyond either sitting and passing the Oregon Bar Exam or, should this program be approved, pursuing admission the SPPE, including completing a UBE score transfer<sup>34</sup> or seeking admission via comity.<sup>35</sup> That said, if a lawyer practicing in another United States jurisdiction is not admissible via those pathways but is eligible to sit for the Oregon Bar Exam under RFA 3.05, that lawyer can seek admission in Oregon via the SPPE.

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<sup>32</sup> RFA 3.05(1).

<sup>33</sup> RFA 3.05(3).

<sup>34</sup> RFA 19.05.

<sup>35</sup> RFA 15.05.

**d. Comments Relating to Supervising Attorneys.**

**i. State Circuit Court Judges Can Supervise Provisional Licensees (SPPE Rule 2.4).**

There was an inquiry about whether state circuit court judges could supervise Provisional Licensees. ORS 3.050 requires Oregon circuit court judges to be members of the Oregon bar. We thus believe that most Oregon circuit court judges will meet the qualifications outlined in SPPE Rule 2.4 to serve as a Supervising Attorney should they elect to act in that role. (And we hope that many will do so.)

A person who works with the Multnomah County Circuit Court asked whether judges in that courthouse could act as Supervising Attorneys even though, structurally, the court has a “Clerk Supervisor, as the official supervisor, [rather than] the Judge for whom the clerk works.” The Committee intended for this type of structure to work within the SPPE, as long as the attorney—here the judge—agreed to serve the Provisional Licensee’s Supervising Attorney as that position is envisioned within the program.<sup>36</sup>

When reviewing the rules to confirm that the structure was authorized by them, the Committee noticed an error: SPPE Rule 2.4, relating to the qualifications of Supervising Attorneys referred to the attorney being employed by the “same organization” as the Provisional Licensee and not the “same employer.” With that correction, the rules now provide as follows:

SPPE Rule 1.2(E): “Employer is a business entity, non-profit organization, or government agency (including instrumentalities thereof) that employs the Supervising Attorney and employs or has agreed to employ a Provisional Licensee.”

SPPE Rule 2.4(E): “An individual may participate in the Program as a Supervising Attorney if that individual meets the following requirements: \* \* \* \* (E) Is employed by the same employer as the Provisional Licensee.”

With that clarification, we believe that the rules are clear that employment structure asked about would be permitted under the rules.

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<sup>36</sup> See SPPE Rule 5.3 (Role and Duties of Supervising Attorneys).

**ii. Supervising Attorneys Can Have a Disciplinary History Provided They Satisfy All of the Provisions Outlined in the SPPE Rules, Including Board Approval (SPPE Rule 2.6).**

One commenter maintained that the rules should not permit an attorney with a disciplinary history to ever serve as a Supervising Attorney. The Committee disagrees. SPPE Rule 2.4 provides that to qualify as a Supervising Attorney, the attorney must have “no record of public discipline in any jurisdiction to which they are or have been members or satisfies the requirements of Rule 2.6.” SPPE Rule 2.6 lays out a multi-step procedure that, if followed, permits (but does not require) the BBX to authorize a person with a history of discipline to become a Supervising Attorney. SPPE Rule 2.6 contains a temporal requirement (no history of discipline in the past five years), a substantive requirement (the attorney must detail their rehabilitation), and, as mentioned, leaves the decision to the discretion of the BBX. We believe that a rehabilitated attorney who undertakes that procedure and who is approved by the BBX is not only one who should be permitted to be a Supervising Attorney but is likely a person who will take their role as a Supervising Attorney seriously.

**iii. Requiring Supervising Attorneys to Have a “Demonstrated Record of Experience and Competency” (SPPE Rule 2.4).**

One commenter thought a Supervising Attorney should be limited to those who have a “demonstrated record of experience and competency.” SPPE Rule 2.4 includes these requirements for supervising attorneys:

- (A) Is an active member of the Oregon State Bar;
- (B) Has been an active member of the Oregon State Bar for two or more years preceding the application to serve as a Supervising Attorney;
- (C) Has been an active member of the bar in at least one jurisdiction for at least three of the five years preceding the application;
- (D) Has no record of public discipline in any jurisdiction to which they are or have been members or satisfies the requirements of Rule 2.6;
- (E) Is employed by the same organization as the Provisional Licensee;

- (F) Is not an immediate family member of the Provisional Licensee they will supervise; and
- (G) Signs the “Declaration of Supervising Attorney” and files that document with the Admissions Department.

We believe that rule adequately balances the need for many and diverse Supervising Attorneys across Oregon with a requirement that the attorney “evidences a record of experience and competency.”

**iv. “There Should be An Avenue of Appeal for Supervising Attorney’s Negative Decisions.”**

One commenter asserted that there “should be an avenue of appeal for supervising attorney’s negative decisions.” SPPE Rule 17.1 provides for the appointment of two Ombudspersons to help administer the program. Provisional Licensees will be encouraged to contact them (or one of them) to address any concern relating to the program, including concerns with a supervising attorney.<sup>37</sup> The rules also provide a mechanism for a licensee to change Supervising Attorneys without being removed from the program.<sup>38</sup> Further, although interim decisions by a supervising attorney (whether to sign an hour sheet, or the determination of whether a writing assignment is minimally competent) may affect the BBX’s review of an applicant’s portfolio, it is the formal decisions of the BBX not a Supervising attorney that directly determines whether an applicant passes the SPPE. And, when an applicant’s portfolio or piece of writing is determined not to meet the standard of minimal competence, applicants may submit different pieces to demonstrate competence. Thus, while these rules do not directly provide an avenue for appeal, they do adequately address this commentator’s concerns.

**v. Burden on Supervising Attorneys / Incentives for Supervising Attorneys.**

A few commenters noted that the administrative burden on small practices and non-profits will be substantial and suggested that there should be incentives created for Supervising Attorneys to participate.

While the Committee worked to minimize unnecessary burdens that could dampen interest in participating in the program, because the BBX must document the applicant is

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<sup>37</sup> SPPE 17.2.

<sup>38</sup> SPPE 15.1.

completing the program requirements and Provisional Licensees must work within the confines of their limited licenses, there will, necessarily, be administrative burdens on Supervising Attorneys that cannot be “offset” by the OSB.

We are optimistic that participation in the program will provide significant benefits to employers, including the employer’s ability to have their chosen employee working (including work that can be billed to clients) during the time that person would otherwise have had to devote time to studying for the bar examination. Employers may also find that providing the supervision required by the program will enhance the productivity and proficiency of new hires, benefiting both employers and clients.

We do believe that it would be appropriate to offer Supervising Attorneys the type of incentives that are available to lawyers who act as mentors in the New Lawyer Mentoring Program: CLE credits. We urge the BBX to reach out to the appropriate entities within the OSB to encourage the adoption of rules that provide such an incentive for participation for Supervising Attorneys. If such rules are adopted, we urge the BBX to include a cross-reference to those rules in the SPPE rules and make the existence of that “benefit” a part of any FAQ created for employers who are considering participating in the program.

#### **e. Comments on Program Requirements.**

##### **i. Number of Practice Hours Required.**

SPPE Rule 6.1 outlines ten substantive requirements for participation in the SPPE along with an “hours requirement.” Specifically, the rules require that a Provisional Licensee document *at least* 675 hours of work within the program before they can seek admission via the SPPE. The parameters of the work that can be included in the 675 hours are detailed in SPPE Rule 6.12. As noted in that rule, each week, a licensee can log *at most* 40 hours of “Legal Work assigned by the Supervising Attorney.”<sup>39</sup>

Of the 44 public comments submitted, four expressly endorsed that number of hours as appropriate; two commenters indicated that the number of hours was too low, suggesting it be increased to 1800 to 2000 hours, and 2000 hours respectively.<sup>40</sup>

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<sup>39</sup> SPPE Rule 6.12.

<sup>40</sup> Two commenters spoke favorably about the program but, in so doing, referenced the 1000 to 1500 range initially proposed by the Task Force. One wrote: “I think that the alternative to the bar exam of 1000-1500 hours is a good idea, because you will be getting experience in a

Having reviewed the public comments and engaged in discussion anew, the Committee stands by its recommendation that the minimum hours requirement for successful completion of the SPPE pathway be set at 675 hours with a 40/week cap. If a Provisional Licensee does log 40 hours of qualifying work per week, the completion of the “hours” requirement—standing alone—would take just under 17 weeks.

While the Committee considers the hours worked in a “real” legal setting an invaluable part of ensuring that an attorney who gains admission via the SPPE is, indeed, competent, the BBX’s substantive assessment of the applicant’s learning and ability to practice is accomplished not through an assessment of those 675 hours but by the applicant’s satisfactory completion of the ten substantive requirements outlined in SPPE Rule 6.1. The successful completion of those substantive tasks must take place *while* the applicant is working under the supervision of a qualified and engaged Supervising Attorney. Most significant among those substantive requirements is the submission of eight pieces of work-product, evaluations of two negotiations, and evaluations of two client encounters; all of which must be deemed “qualified” by the BBX to count toward the program requirements. Because of the nature of the substantive requirements and the rigors of practicing law (even only provisionally), the Committee expects that most applicants will work more than 675 hours as a Provisional Licensee before they will be admitted via this pathway. In other words, we believe that for most licensees, they will be unable to complete the program requirements in four months.

But what about applicants who can complete the program requirements in 675 hours? The BBX’s task is to ensure an applicant has shown the “requisite learning and ability” to practice before being admitted. ORS 9.220(3). The key question, then, is: provided an applicant can complete all 10 of the substantive requirements for admission, including submitting eight pieces of competent work-product, and engaging in the required counseling and negotiation sessions, what is the minimum number of hours that applicant must complete before being eligible for admission?

As the rules reflect, the Committee landed on 675 hours. The Committee’s rationale for concluding 675 hours was appropriate is outlined in the explanatory notes on pages 12 to 13. At its core, however, the figure stems from the Committee’s conclusion that if a Provisional Licensee can competently complete all those requirements while engaged in the rigors of working in a real-world setting, the BBX and the Court should

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job that you are going to be doing rather than memorizing laws that you don’t actually need to know by heart.” The other called the SPPE an “exceptional” option as compared to the bar exam but, in so doing, referenced the proposal at hand as “this new passage of the 1000 to 1500 hours of apprenticeship under a supervised lawyer.”

feel comfortable that the applicant has the “requisite skills and learning” to be admitted to practice as required by ORS 9.220(3). Because of that conclusion, we did not change our recommendation.

**ii. Negative Impact that Current Law School Hours Rules Have on Applicants Who Attend Law School Outside Oregon (SPPE Rule 6.13).**

One commenter argued that SPPE Rule 6.13, which outlines the circumstances in which an applicant can receive credit in the SPPE for hours worked while in law school, was unfair to applicants from out-of-state law schools. Nothing in the rule explicitly prohibits a student attending law school outside of Oregon from earning hours during law school. That said, the rule requires (among other things) that the work must have been directed and supervised by a person qualified to act as an SPPE Supervising Attorney,<sup>41</sup> that the Supervising Attorney has signed the declaration for Supervising Attorneys required by the rules,<sup>42</sup> and that the student must have been certified under Oregon’s Law Student Appearance Program (RFA 13.05 through 13.30).<sup>43</sup> We appreciate that these requirements will make it harder (though not impossible) for a non-Oregon based law student to earn qualifying hours during law school.

In crafting this rule, however, the Committee considered it key that any hours earned were completed under circumstances similar to those a Provisional Licensee would face while working within the confines of the SPPE program. That includes a consciousness on the part of both the student and the supervisor that the work could be credited as “hours” in the SPPE should the student subsequently seek admission in Oregon via that pathway. We believe that this increased awareness will ensure that both the student and the supervisor will be thinking about the student’s work as it relates to the student’s future practice. These rules serve that goal. Moreover, just as with the post-graduation work, we believe that it is important that the Supervising Attorney is accountable to the OSB for any ethical violations during the relationship.<sup>44</sup> For those reasons, we declined to reconsider these requirements at this point.

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<sup>41</sup> SPPE Rule 6.13(A).

<sup>42</sup> SPPE Rule 6.13(B).

<sup>43</sup> SPPE Rule 6.13(C).

<sup>44</sup> SPPE Rule 2.5 provides that, “A federal judge, magistrate, or bankruptcy judge whose primary chambers are in Oregon may serve as a Supervising Attorney” without meeting the Oregon bar membership requirements found in SPPE Rule 2.4. The rules relating to supervising a student in Oregon’s Law Student Appearance Program (RFA 13.05 through 13.30) provide no



### **iii. Timing of Completion of Hours (SPPE Rule 6.14).**

SPPE Rule 6.14 provides that “At least three quarters of the work product described in Rules 6.4, 6.5, and 6.6 must have been scored as ‘qualified’ within 3 calendar years” of the final portfolio being submitted. One commenter contended that, instead, there should be a minimum and maximum amount of time in which the hours should be completed.

There is no time limit on when a person can seek admission via the UBE or the SPPE. Provisional Licensees are professionally motivated to complete the program as quickly as possible, and their employers are equally interested in their progression into fully admitted members of the bar. Consideration was thus given to putting strict time limits on when—once undertaken—the SPPE must be completed. But one can readily imagine that if such a rule were put into place, the BBX (or the Admissions Department) would regularly have to field requests for exceptions to the rule, and would thus be put in the position of assessing and comparing the merits of one request against another.

When crafting the SPPE, the Committee tried to keep the principles of Universal Design at the forefront, including the principle that programs should be designed in a manner that maximize the functionality of the program for people with various characteristics. Applying that principle here, the BBX considered whether there was a rule that would meet the goal of ensuring that the applicant had the requisite learning and ability to practice, without inviting concerns that the program was unfair to people who—despite the incentives to do so—did not complete the program within a set time.

We concluded that tethering the timing requirements to the work-product that will be assessed for competency by the BBX, rather than the completion of the “minimum hours” was the best way to accomplish that goal.

### **iv. Minimum Number of Words for Portfolio Submissions (SPPE Rule 6.4).**

As part of their Portfolio requirement, each Provisional Licensee must prepare and submit at least eight pieces of written work product for review by the BBX.<sup>45</sup> After a significant amount of debate and discussion, the Committee recommended that two

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such exception. If the Court adopts the SPPE, the BBX might consider whether a similar exception should be added to that program so that a student serving in an extern position with such a judge could seek to have the hours credited to the SPPE.

<sup>45</sup> SPPE Rule 6.4.

submissions had to be at least 1,500 words, and the balance of the portfolio submissions had to be at least 300 words.<sup>46</sup> Only one person commented on this word requirement, offering the position that the 300-word minimum was too low; that commenter suggested a 500-word minimum.

The word minimum was another topic the Committee discussed extensively both before and after the public comment period. The Committee’s reasoning is detailed in the explanatory notes on page 6. A successful written submission must competently address “some substantive aspect of a legal matter,” and include “a prediction, conclusion, or recommendation related to that issue.”<sup>47</sup> To meet that requirement, the Committee believes that Provisional Licensees may find that their “short” submissions must be significantly longer than the 300-word minimum.

That said, the Committee also believes that a quality written submission—whether it is a motion to the Court or an email to opposing counsel—can be accomplished within 300 words. Lawyers are rarely criticized for being succinct and often criticized for being verbose; we do not believe it is appropriate to discourage brevity if it does not detract from the quality of the submission and the submission meets the other requirements of the rule. We therefore did not change the word minimum for the six shorter submissions.

**v. Permitting Counseling and Negotiations to Occur in Writing (SPPE Rules 6.5, 6.6).**

To complete the SPPE, the Provisional Licensee must lead at least two client interviews or client counseling sessions and at least two negotiations.<sup>48</sup> Those sessions can take place orally or in writing.<sup>49</sup>

One commenter suggested that the client counseling and negotiation requirements should not be permitted to be completed in writing. After hearing from attorneys who practice in diverse areas, the Committee concluded that being able to competently negotiate and counsel in writing is central to many attorneys’ legal practice. Indeed, in a “post-Pandemic” world, it is often hard to get either opposing counsel or a client to participate in a live interaction. Examples of meaningful written negotiations provided were demand letters and responses, mediation statements, and discovery meet and confer letters. Examples of meaningful written client counseling included client emails and

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<sup>46</sup> SPPE Rule 6.4(A)(2).

<sup>47</sup> SPPE Rule 6.4(A)(1).

<sup>48</sup> SPPE Rules 6.1(D), (E).

<sup>49</sup> SPPE Rules 6.5, 6.6.

letters and case evaluation memoranda to clients. The Committee believes that for many new lawyers, these types of written negotiations are their primary responsibilities in practice and are how they grow their negotiation and counseling skills. In short, while the Committee recognizes the importance of oral negotiation and counseling skills, the Committee believes that written negotiations and counseling are equally important.

Moreover, as relevant to the BBX's task of determining for the Court whether an applicant has the "requisite learning and ability" to practice as required by ORS 9.220(3), there is no meaningful distinction between completing these tasks orally or in writing. Accordingly, we declined to change this rule.

#### **vi. Breadth of Program Requirements.**

One commenter asserted that applicants should be required to report on the type of work they are performing to ensure that they were working on several tasks daily. The Committee concluded that detailed reporting requirements would be unduly burdensome to Provisional Licensees and their supervisors, and that sufficient variety will be assured through the demands of practice combined with the portfolio requirements. It would also unreasonably burden Admissions staff who would be required to review and assess such logs.

One commenter suggested that Provisional Licensees be required to appear in court at least once as part of their supervised practice and portfolio. While many licensees will appear in court at least once as part of this process, the Committee decided that this went beyond what would be required to show minimum competence to practice law.

Three commenters expressed concerns about the lack of breadth of material tested through the SPPE. Two commenters praised the SPPE explicitly asserting that the breadth tested on the bar exam is limited when compared to the variety of practice in the "real world."

The breadth of the program was a topic the Committee revisited often. The Committee believes that the program as designed adequately addresses the issue. The program tests more of the core competencies identified by IAALS,<sup>50</sup> and does so more authentically than can be accomplished in a standardized test.

We expect that Provisional Licensees will interact with several areas of law throughout their practice. For example, a Deputy District Attorney ostensibly only

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<sup>50</sup> See Footnote 10, *supra*.

practices “criminal law” but regularly applies the rules of evidence, negotiates and drafts contracts in the form of plea agreements, and considers the constitutional implications of the actions of the investigating officers and the statutes they are enforcing. Similarly, a civil litigation associate must apply contract and torts law while also applying the rules of civil procedure and evidence. Additionally, the work-product that each would submit for review must address different legal questions, even if the questions all fall under a common area of law.<sup>51</sup>

The Committee concluded that the program’s requirements—which require demonstration of a deeper understanding and application of, perhaps, fewer areas of law—are at least as effective at demonstrating competence to practice law as the UBE which requires a more surface level understanding of more subjects. This conclusion by the Committee reflects broader licensure reform trends throughout the country. Contrary to the comment that suggested proficiency be required in “all areas of law” no bar examination has ever tested “all areas of law.” On the contrary, the number of subjects tested has continued to shrink. Most notably, the NCBE will be reducing the number of subjects tested on the UBE from 12 to 8 on the NextGen examination.

Professor Carol Chomsky, who teaches at the University of Minnesota Law School, attended many Committee meetings, and submitted comments in support of the proposed rules. Her comments on this provision largely capture the conclusion of the Committee:

Those who consider non-bar-exam-focused pathways to licensing sometimes express concern that the bar exam tests knowledge in a range of subject areas, while a supervised practice pathway may not. Even the bar exam only tests a limited number of subjects, however, and the number of subjects tested is slated to be reduced considerably in the NextGen examination. Moreover, the kind of knowledge demonstrated on the bar exam—surface knowledge of subjects, memorized for the exam and then mostly forgotten immediately afterwards—is not the hallmark of competence, especially because lawyers do not rely on memory in their work but at least refresh recollection and often research in order to familiarize themselves with new areas. Being a competent lawyer requires the ability to research, understand, and apply the law, and once a lawyer has that ability, they can use that ability to deal with any area of law. The proposed rules will require each document in the portfolio to represent discussion of a unique legal issue, which is a sufficient requirement of

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<sup>51</sup> SPPE Rule 6.4(A)(4).

breadth to ensure that the applicant has demonstrated minimum competence to practice.<sup>52</sup>

**vii. Use of Mock Exercises (SPPE Rules 6.4(G), 6.5(G), and 6.6(G)).**

The SPPE program is intended to work as a viable pathway for admission even if an attorney’s planned area of practice does not regularly require a practitioner to engage in the work required for a Provisional Licensee’s Portfolio. To that end, the rules provide that if a licensee cannot gather sufficient work product from legal work performed for their employer, the licensee can use mock exercises for their submissions.<sup>53</sup>

Two commenters suggested the use of mock exercises to provide a standardized portion of the portfolio examination while another commenter suggested that mock exercises should not be allowed at all. One commenter suggested that they not be mandatory but be available for applicants whose area of practice does not naturally lend itself portfolio assignments.

The Committee, with the input from the NCBE and IAALS, spent a long time—perhaps more than any other subject—debating the value of including a single, standardized, mock exercise in the substantive requirements of this pathway. Ultimately, we landed on the last approach mentioned above: mock exercises should be available but not required.

For some members of the Committee, the suggestion to incorporate a single standardized exercise that every participant in the SPPE would complete amounted to a “non-starter” because the genesis of the SPPE is the recognition that some applicants have the requisite knowledge and skills for admission but for whom standardized testing presents a barrier that is unrelated to the question of competence. It serves both those applicants and the public to permit them to prove their competence in a different way; to that end the SPPE measures competence not by completion of standardized exercises but through the documented, competent practice of law in the real world (albeit in a setting that has controls in place to protect consumers if the applicant is not competent). From that perspective, introducing a required, standardized, exercise is contrary to the SPPE’s design.

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<sup>52</sup> Professor Chomsky’s full letter in support will be included with the public comments and made available on the OSB website at <https://lpdc.osbar.org> (last accessed August 2, 2023).

<sup>53</sup> SPPE Rule 6.4(G) (simulated written exercises); SPPE Rule 6.5(G) (simulated client encounters); SPPE Rule 6.6(G) (simulated negotiations).

For other members of the Committee, the suggestion of adding a single standardized exercise was not inherently problematic, but when its perceived value was weighed against the logistics of coordinating such an exercise, the value in incorporating such an exercise diminished significantly. Presuming one could identify a logical “cohort” of SPPE Provisional Licensees to see how they did, comparatively, on a single mock exercise questions immediately arise as to how to make that insight meaningful on the question of any one individual’s competence to practice. For example, what insight is gained from learning that a Provisional Licensee working as a Deputy District Attorney did not perform as well when answering a mock exercise query about a business transaction as a Provisional Licensee who is working in a civil law firm? What value is there in requiring a DDA to undertake that project while working in a prosecutor’s office? The SPPE is premised on the conclusion that if a DDA submits, while working, eight documents that demonstrate their ability to identify, research and analyze areas of criminal law, one can feel confident that if the lawyer moved to a civil firm, they would have the skills necessary to engage in the legal research and analysis necessary to practice in that field.

For those who were drawn to the inclusion of such an exercise, the core appeal was not particularly related to the *applicants* but to the *examiners*. With a standardized exercise, the BBX could create a model answer and a library containing the relevant legal principles. One could have confidence that the examiner could make a substantive assessment of whether the submission was “qualified” or “not qualified” as it related to the legal principles espoused. That could create greater confidence in the pathway itself.

The Committee agreed that a better approach was to create explicit and implicit tools that examiners can use to ensure they are accurately assessing the submission. For instance, the rules provide that multiple examiners will “participate over time in grading components of each Provisional Licensee’s Portfolio,” and that, “[i]f practicable, at least two Examiners will grade each piece of written work product (Rule 6.4) included in the portfolio.”<sup>54</sup>

The BBX will also develop rubrics for each Portfolio component. These rubrics will focus graders on the specific criteria that demonstrate minimum competence within a component. Rubrics of this nature have proven valuable in other assessment contexts

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<sup>54</sup> SPPE Rule 9.1. When assessing portfolios submitted as part of the PLP, the BBX has found assignment of two examiners practicable and, thus, we anticipate that you would continue that practice if the SPPE is adopted.

(such as law school clinics and the PLP). We also expect that the BBX would hold training/calibration sessions to better ensure that graders apply the rubrics consistently.<sup>55</sup>

The rules also require Supervising Attorneys, who practice in the areas represented by a Provisional Licensee’s Portfolio, to submit information that will help graders evaluate Portfolio components. For client encounters and negotiations, the Supervising Attorneys will complete rubrics evaluating the Provisional Licensee’s work; those rubrics will include assessment of the Provisional Licensee’s accuracy in describing legal principles. For each piece of written work product, the Supervising Attorney must “[a]ttest that the legal analysis is accurate” and “[i]ndicate if and how the Employer used the work product.”<sup>56</sup> Supervising Attorneys will hesitate to make those attestations if the work product is inaccurate. Still, graders will have free rein to “spot-check” the law cited in any submission and both the Provisional Licensee and their Supervising Attorney will know that.

Finally, most submissions being assessed will be authentic work produced by attorneys in their everyday practice. The graders—all practicing attorneys or judges—regularly assess the type of documents that the applicants will submit. We believe that such attorneys can competently assess whether a submission reflects that the attorney submitting it is “qualified” or “not qualified.” We believe that the Court and the BBX can feel confident that a Provisional Licensee who submits *eight* qualified submissions while engaged in the real-world practice of law and while completing all the other requirements of the program has established the “requisite learning and ability” to practice as required by ORS 9.220.

For these reasons, the Committee elected not to include a single, standardized mock exercise.

The Committee did, however, agree that mock exercises should be available for applicants to submit when their job does not provide them with an opportunity to complete an SPPE requirement as a part of their regular responsibilities in that position. To that end, we continue to recommend that the rules provide for mock written assignments,<sup>57</sup> simulated client encounters,<sup>58</sup> and simulated negotiations.<sup>59</sup>

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<sup>55</sup> SPPE Rule 14.1.

<sup>56</sup> SPPE Rule 6.4(C).

<sup>57</sup> SPPE Rule 6.4(G).

<sup>58</sup> SPPE Rule 6.5(G).

<sup>59</sup> SPPE Rule 6.6(G).



**viii. Time Spent on Access to Justice Activities (SPPE Rule 6.8).**

SPPE Rule 6.8 requires provisional licensees to devote at least 10 of their 675 practice hours “to activities related to diversity, equity, inclusion, or access to justice. These activities may include pro bono work, MCLE programs, volunteer work with affinity bar associations, and self-study.” One commenter suggested that this should not be required of SPPE applicants if applicants pursuing admission via the bar exam do not have a similar requirement. The Committee did not attempt to create a model that tested exactly what the UBE tests, either as the test exists now or as it will exist once the NCBE implements the NextGen Bar Exam. Instead, we worked to create a pathway focused on documenting that the applicant was competent in the core areas identified in Oregon’s Essential Eligibility Requirements<sup>60</sup> the IAALS 2020 Building Blocks of Minimum Competence study.<sup>61</sup> The former requires applicants to “demonstrate regard for the rights, safety, and welfare of others.”<sup>62</sup> The latter identifies skills such as “the ability to communicate as a lawyer,” “the ability to interact effectively with clients,” and “the ability to see the ‘big picture’ of client matters.”<sup>63</sup> We believe that all these skills are served by this requirement and did not change it.

**ix. Continuing Education Requirements (SPPE Rule 6.9).**

As released for public comment, SPPE Rule 6.9 required that a participant complete the “Learning the Ropes” CLE offered by the PLF. Because the timing and content of that program is not controlled by the BBX, the Committee concluded it was prudent to revise the rule as follows:

6.9 Practice Overview. The BBX will designate 15 hours of CLE programs that, taken together, provide an overview of doctrinal principles commonly encountered in entry-level law practice. The Provisional Licensee must attend or watch all 15 hours of these designated programs. As the Provisional Licensee attends or watches these programs, they must include their certificates of completion in their Portfolio.

With this rule, the BBX could make it explicit to Provisional Licensees that attending or watching the “Learning the Ropes” CLE could satisfy this requirement. If the SPPE is

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<sup>60</sup> RFA 1.25.

<sup>61</sup> See Footnote 10, *supra*.

<sup>62</sup> RFA 1.25(c)(4).

<sup>63</sup> See Footnote 10, *supra*.

adopted, the Committee further suggests that the BBX reach out to the appropriate entities within the OSB to consider whether attorneys admitted via the SPPE should have the same first-year CLE requirements as attorneys admitted following passage of the bar exam or should, alternatively, transition to the requirements applicable after one's first year in practice.

**x. *Pro Bono Work (SPPE Rule 2.3).***

SPPE Rule 2.3 permits Provisional Licensees to fulfill their hours requirements by providing pro bono services. One commentator worried that this “unpaid work is likely to be taken less seriously by candidates and employers.” Another felt that “Supervisees are likely to be taken advantage of when providing pro bono work”; consequently, this commenter suggested that only paid work should be considered as qualifying hours.

As to the former commenter's position, we disagree. An attorney's standard of practice cannot—while practicing ethically—vary depending on whether the attorney has agreed to accept payment or handle the matter *pro bono*. We do not believe that Oregon attorneys take their *pro bono* client representation less seriously than paid work.

As to the latter's comment, the Committee believes that providing *pro bono* representation—along with a Supervising Attorney—could provide an outstanding opportunity for a Provisional Licensee to gain experience outside the licensee's ordinary practice. There is also unquestionably a need for *pro bono* services; if that need can be met, at least in part, through a Provisional Licensee's drive to secure qualifying hours, it strikes the Committee as a situation that will be beneficial to all involved.

That said, we believe that the BBX should regularly review the SPPE to ensure that its rules are working as intended; that includes acting to ensure that applicants seeking admission via this pathway are not exploited. SPPE Rule 17.1 provides for the appointment of two Ombudspersons to help administer the program. Provisional licensees will be encouraged to contact them (or one of them) to address any concern relating to the program, including if they feel they are being exploited under this rule. Thus, the BBX should be alerted should this become an issue.

Given the value of such services and the procedural protections that are already in place in the rules, we believe that, at least at the outset of the program, the rule should be adopted as written.

**xi. Apprenticeship Instead of Law School.**

One commenter argued that a true apprenticeship program should be designed/included as a fourth pathway to admission in Oregon, and such a pathway should not require law school graduation as a prerequisite to admission. Whatever the merit of such an approach to admission to the bar, it is beyond the scope of the Committee's work.

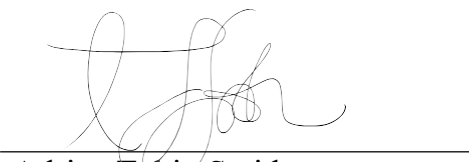
**III. Conclusion.**

We come to the BBX almost exactly three years after the Oregon Supreme Court first asked the BBX to undertake an analysis of alternative pathways. Since that time, volunteers working with the Task Force, the Committee, and the BBX have devoted hundreds of hours to the inquiry. Those volunteers included many Oregon judges and lawyers, as well as thought leaders on bar admissions from across the country. All of them were interested in helping Oregon not just adopt a pathway that would make bar admissions more equitable in Oregon—without compromising our commitment to protect the legal consumer—but to help Oregon lead the way nationally. The rules, explanatory notes, and this submission follow from those countless hours.

After you have conducted your review of these materials, we ask you to forward them to the Court with a recommendation from the BBX that the Court adopt the SPPE as a pathway to admission in Oregon.

Thank you for your consideration and we look forward to discussing the matter with you on August 24, 2023.

  
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Joanna Perini-Abbott  
Co-chair LPDC

  
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Adrian Tobin Smith  
Co-chair LPDC