

South Dakota Bar Licensure Assessment

National Center for State Courts
AccessLex Institute



Final Report
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Executive Summary



The South Dakota legal community is at a crossroads, trying to ensure that new admittees to the South Dakota Bar have the minimum competence to practice law while also addressing the growing unmet justice needs of South Dakotans. Public defender offices across South Dakota report large and growing case sizes per attorney, civil legal aid providers are turning away as many indigent people with unmet legal needs as they can serve, and other public service agencies share the challenges of filling attorney vacancies. These challenges are experienced statewide; but there are also acute challenges in meeting the legal needs of rural communities across South Dakota.

Over the past twenty years, the South Dakota Supreme Court (hereafter “the Court”) has focused significant effort addressing rural access to justice, and already offers a national model of pairing a financial incentive with rural legal practice. And yet, more is needed to ensure that the legal needs of all South Dakotans are met.

After considering the existing challenges and increasing interest and discussion about bar admission in South Dakota, the Court applied for, and received, funding from the State Justice Institute (SJI) to examine the effectiveness of the current bar admissions process in South Dakota. The Court, in turn, hired the National Center for State Courts (NCSC)—together with its partner, AccessLex Institute—to provide staffing support for a new South Dakota Supreme Court Steering Committee (hereafter “the Steering Committee”) and three workgroups. This process has been collaborative and inclusive with active participation from members of the judiciary, state bar leadership, the Board of Bar Examiners, and the Dean of the University of South Dakota Knudson Law School. Over the past year, this Steering Committee (and its workgroups) have sought to identify the unique needs of legal providers (with special focus on those in the public interest) across South Dakota and considering how, if at all, the bar admissions process could be adapted to respond to the legal gaps across South Dakota. The three workgroups were: (1) Minimum Competence to Practice Law, (2) Pre-Law and Law School, and (3) Applications and Admissions to Practice Law.

The Steering Committee offers the Court several recommendation concerning the existing admissions process, including an alternative pathway that incentivizes public interest practice:

- ***Streamlined pathway for public interest.*** The reform with the clearest consensus is to develop a new public interest pathway in collaboration with the South Dakota Board of Bar Examiners and the University of South Dakota (USD) Knudson School of Law. This pathway would offer law students seeking to practice public interest law or serve underserved rural areas of the state a fast track to admission without examination through a curriculum of required coursework and completion of externships with one or more trained attorney supervisors and a two-year post-graduate commitment to public service. This public interest pathway, if adopted by the Court, would build on South Dakota’s work to address unmet legal needs, and would immediately help public defender’s offices, the attorney general’s office, state’s attorneys, civil legal aid providers, and other local government legal departments.

The Steering Committee’s other recommendations include:

1. Continue with the current bar examination in South Dakota on a short-term basis.
2. Continue to study and consider adoption of the NextGen Bar Examination when it becomes available in 2026 or 2027.
3. Maintain a requirement that all licensed South Dakota attorneys demonstrate knowledge of Indian Law through a course of study or through the bar examination.

Project Overview

South Dakota is a predominantly rural state with a large tribal population. The large population centers of South Dakota are in the urban areas of Sioux Falls and Rapid City. There are currently 2,033 active attorneys licensed to practice law in South Dakota.¹ While that is an average of about two attorneys per 1,000 residents, the majority of the attorneys (72%) practice in just four counties, leaving many residents in counties underserved for their legal needs. South Dakota has been actively recruiting attorneys to practice in these rural areas for a number of years.

In order to further address legal deserts in the state and evaluate the current admissions process for the South Dakota bar, the Court appointed the South Dakota Bar Licensure Assessment Steering Committee on November 18, 2022. To assist the Steering Committee in its duties, the Court engaged NCSC and AccessLex Institute to conduct an in-depth study of the process of admission to the South Dakota Bar and to determine if South Dakota should make changes to their current process or consider the adoption of additional pathways to law licensure.

Throughout this project, NCSC and AccessLex Institute assisted the Court in examining the bar admissions process, including whether the current process satisfactorily assesses minimum competence to practice law, and identified the options available to the existing bar admissions system that would better fit the needs and resources available in South Dakota.

To aid the work of the Steering Committee, three workgroups were created:

1. Pre-Law and Law School to Study Bar Admissions Process
2. Bar Applications and Admissions
3. Bar Exam and Licensing to Determine Minimum Competence

The workgroups were tasked with reviewing the current bar admissions process in South Dakota and making recommendations to the Steering Committee.

After thorough consideration, the Steering Committee has completed its work and presents its recommendations to the Court.

¹ Data from State Bar of South Dakota.

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South Dakota Bar Exam and Admissions Process



History of Admissions to the Bar in South Dakota

Since 1889, the South Dakota Constitution has provided that “[t]he Supreme Court by rule shall govern...admission to the bar[.]”² The Court has recognized that the requirements for admission to the bar in South Dakota “have a unique and complicated history.”³

The first statutory scheme in 1893, required an applicant to pass a “satisfactory” examination before the Supreme Court; it also permitted admission without examination for attorneys admitted/licensed to practice in another state.⁴ In 1903, however, the diploma privilege was instituted for graduates of the USD Knudson Law School. This privilege allowed USD Law graduates to be admitted to the South Dakota bar without taking the bar examination if they met other admission requirements.⁵

The diploma privilege for USD Knudson Law School graduates was in effect from 1903 until 1957. In 1958, USD Knudson Law School graduates were required to take the bar exam for the first time. In 1973, the diploma privilege for USD Knudson Law graduates was reinstated. It was repealed in 1983. Thus, USD Knudson Law School graduates licensed before 1957, and those graduating between 1973 and 1983 were not required to sit for a bar examination.⁶ After South Dakota’s residency requirement for applicants licensed in other states was declared unconstitutional in 1982, the bar examination was instituted for South Dakota bar applicants licensed in other jurisdictions.⁷

Timeline of Changes to South Dakota Bar Admissions

1893	South Dakota first requires a written bar examination.
1903	First diploma privilege period begins for graduates of University of South Dakota’s law school. Graduates of other law schools must still pass the written bar examination or be licensed in another jurisdiction.
1957	First diploma privilege period ends.
1973	Second diploma privilege period begins for graduates of University of South Dakota’s law school.
1976	South Dakota adopts the Multistate Bar Examination (MBE) for applicants who did not graduate from University of South Dakota’s law school.
1983	Second diploma privilege period ends.

² S.D. Const. art. V, sec. 12.

³ *In re Yanni*, 2005 S.D. 59, ¶ 9, 697 N.W.2d 394, 398.

⁴ 1893 S.D. Sess. Laws, ch 21, § 2, § 3.

⁵ 1903 Revised Codes of South Dakota, Sec. 687, Political Code.

⁶ *Yanni*, 2005 SD at ¶ 13, 697 NW2d at 400.

⁷ *Stalland v. South Dakota*, 530 F. Supp. 155 (D.S.D. 1982); 1983 S.D. Sess Laws, ch 397.

Current South Dakota Bar Exam and Admissions Process

South Dakota Bar Examination

In South Dakota, the Board of Bar Examiners consists of five members of the State Bar appointed by the Court and is charged “with the duty of administering the requirements for admission to practice law [.]”⁸

The process for applying to be licensed to practice law in South Dakota is governed by the Rules for Admission to Practice Law in South Dakota and the Regulations of the Board of Bar Examiners.

Eligibility Requirements

To be eligible for admission to practice law in South Dakota, an applicant must be at least eighteen years of age, possess good moral character, graduate from an American Bar Association-accredited law school,⁹ and satisfy the requirements of the applicable rules, which includes, in most cases, passing the bar examination.¹⁰

Process for Applying to the Bar

The South Dakota Supreme Court and the Board of Bar Examiners have worked to streamline the bar application process so that it does not place an undue burden on applicants. The Board, along with the Court’s Information & Technology Division, has developed an applicant portal where bar applications can be completed online and payment accepted by credit card or money order. This portal allows an applicant flexibility in the application process should the applicant fail the bar exam and reapply. The Board also has a separate email account where applicants and the public can submit questions and ask for materials relating to the bar admission process.

Components of the South Dakota Bar Examination

The South Dakota Bar Examination has the following components:

1. the Multistate Bar Examination (MBE),
2. the Multistate Performance Test (MPT),
3. the Multistate Essay Examination (MEE),
4. one Indian Law Question (ILQ), and
5. the Multistate Professional Responsibility Examination (MPRE).

All components of the bar examination except the ILQ are developed by the National Conference of Bar Examiners (NCBE).

⁸ SDCL 16-16-5.

⁹ If an applicant has graduated from a law school that is not accredited by the American Bar Association, then, upon good cause shown, the Supreme Court may permit the applicant to take the bar if the applicant has passed the bar examination in another state and is a member in good standing with the bar of that state. SDCL 16-16-6.

¹⁰ SDCL 16-16-2.

Multistate Bar Examination.

The MBE is a six-hour test with 200 multiple-choice questions covering seven subject areas: civil procedure, constitutional law, contracts, criminal law and procedure, evidence, real property, and torts. Each question on the MBE is followed by four possible answers and examinees are directed to choose the best answer from the four stated. Examinees have three hours to answer all the questions in the morning session and three hours to answer all the questions in the afternoon session. Examinee answer sheets are sent to the NCBE for scoring.

The MBE was administered for the first time in 1972. South Dakota first administered it in July 1972 to graduates of out-of-state law schools.

Multistate Performance Test.

The MPT section consists of two 90-minute simulated lawyering tasks. Each MPT contains a factual scenario with a task for the examinee to complete. The applicant is given a library of materials to be used to answer the task assigned. The MPT is designed to test an examinee's ability to use fundamental lawyering skills in a realistic situation and complete a task that a beginning lawyer should be able to accomplish. The MPT is not a test of substantive knowledge. The South Dakota Board of Bar Examiners grades and scores the MPT.¹¹

Multistate Essay Examination.

The MEE section of the South Dakota Bar Exam consists of five 30-minute essay questions that are developed by the NCBE. For each bar examination, the NCBE develops six essay questions for the MEE. In South Dakota, the Board of Bar Examiners reviews the six essay questions before each examination and selects five for the test. The Board of Bar Examiners grades and scores the MEE using a ten-point scale for each question.

Indian Law Question.

Beginning in 2007, the ILQ replaced one MEE essay question that the Board chose not to use. Indian Law includes the basic federal law principles. It does not include tribal or customary laws. Originally, a long-time Indian Law professor at the USD Knudson Law School developed the Indian Law question. Currently, members of the Board of Bar Examiners write the question. The Board of Bar Examiners grades and scores the ILQ using the same ten-point scale as it uses for MEE questions.

Multistate Professional Responsibility Examination.

The MPRE is a two-hour, 60-question multiple-choice examination administered three times a year. It is designed to measure an applicant's knowledge and understanding of established standards related to the professional conduct of lawyers. Examinee answer sheets are sent to the NCBE for scoring. A scaled score of 85 is deemed a passing score on this portion of the examination.

11 As discussed in more detail below, the NCBE is developing the NextGen Bar Exam. While details of the NextGen Bar Exam are still being developed, early indications suggest a move to assessments more similar to the MPT than the MBE or MEE. See NextGen Bar Exam of the Future, Nat'l Conf. of Bar Ex'ners, <https://nextgenbarexam.ncbex.org/>.

Bar Passage Requirements.

Currently, to pass the bar exam, an applicant must have a 75% combined average on the MPT, MEE, and ILQ, as well as a score of 133 on the MBE.¹² The national mean total passing bar exam score (when converted to a 200-point scale) is 135.¹³ The mean total passing score for South Dakota's six neighboring states is 133.¹⁴

Prior to the July 2014 examination, bar applicants were required to earn a combined score of 130 on the MBE and essay sections of the examination. Applicants who failed the bar were required to retake the entire examination.¹⁵

Beginning in July 2014, applicants were required to pass the combined MPT/MEE/ILQ, the MBE, and the MPRE. The passing score on the MPT/MEE/ILQ was a general average of 75% or higher. A scaled score of 135 or higher was deemed a passing score on the MBE, which was the national mean passing score at that time.¹⁶ Applicants who failed one section of the bar examination were allowed to retake only that section rather than the entire examination to pass the bar.

Beginning in July 2018, an applicant who fails the combined MPT/MEE/ILQ may review the questions and the applicant's answers on that portion of the test for the purpose of preparing for future reexamination. The passing score on the MBE is a scaled score of 133 or higher. An applicant may receive additional points on their MBE score, not to exceed three additional points, based upon each percentage point above 75% on the combined MPT, MEE, and ILQ portion of the examination. It should be noted that an applicant who fails one portion of the bar examination has the option of retaking the entire bar examination or only retaking the portion that the applicant failed.

South Dakota Admission Without Taking the Bar Examination

South Dakota allows some out-of-state attorneys the ability to be licensed to practice law in the state without taking the bar examination.¹⁷

Reciprocity

South Dakota allows out-of-state attorneys to be admitted to practice law without taking an exam if they meet eligibility requirements,¹⁸ have practiced law as their principal occupation¹⁹ for three of the last five

¹² *In re Amendments and Adoptions to Appendix A to Chapter 16-16, SCR 18-15.*

¹³ See *Nat'l Conf. of Bar Exam'rs & Am. Bar Ass'n, Comprehensive Guide to Bar Admission Requirements 2022*, at 38–39.

¹⁴ *Id.* See also *Minimum Passing UBE Score by Jurisdiction*, *Nat'l Conf. of Bar Exam'rs*, <https://www.ncbex.org/exams/ube/score-portability/minimum-scores/>.

¹⁵ *In re Amendment of Appendix to Chapter 16-16, SCR 14-10.*

¹⁶ See *Nat'l Conf. of Bar Exam'rs & Am. Bar Ass'n, Comprehensive Guide to Bar Admission Requirements 2013*, at 29–30.

¹⁷ *In addition to the options listed in this section, South Dakota temporarily allows attorneys working for legal aid or public defender entities to practice law while their bar application is pending before the Board of Bar Examiners. SDCL 16-16-7.1.*

¹⁸ *These eligibility requirements include being at least 18 years old, being a person of good moral character, and graduating from an ABA-accredited school. SDCL 16-16-12.1 (citing requirements in SDCL 16-16-2).*

¹⁹ *Under the rules, principal occupation includes working as (1) a sole practitioner; (2) member of a law firm, professional corporation or association; (3) a judge in a court of record; (4) an attorney for any local or state governmental entity; (5) inside counsel for a corporation, agency, association or trust department; and/or (6) an*

years in a state that allows South Dakota attorneys substantially similar admission without examination.²⁰ Below is a chart indicating which states have substantially similar reciprocity provisions for South Dakota attorneys.

Substantially Similar		Not Substantially Similar	Not Yet Requested or Researched
Alaska	New Hampshire	Alabama	Arkansas
Arizona	New York	California	Hawaii
Colorado	North Carolina	Delaware	Maine
Connecticut	North Dakota	Florida	Rhode Island
District of Columbia	Ohio	Indiana	South Carolina
Georgia	Oklahoma	Louisiana	Vermont
Idaho	Oregon	Maryland	
Illinois	Pennsylvania	Montana	
Iowa	Tennessee	New Jersey	
Kansas	Texas	Nevada	
Kentucky	Utah	New Mexico *rule change effective June 1, 2015	
Massachusetts	Virginia		
Michigan	Washington		
Minnesota	West Virginia		
Mississippi	Wisconsin		
Missouri	Wyoming		
Nebraska			

For states appearing on the not substantially similar or the not yet requested or researched lists, an applicant seeking admission without an examination is instructed to write a letter to the Board of Bar Examiners and include a copy of that state’s rules for admission by motion or reciprocity for further consideration.

Admission Based on Employment

An attorney licensed in another jurisdiction in the United States may be admitted to practice law in South Dakota under two circumstances: (1) the attorney has been appointed to the Unified Judicial System as its state court administrator; or (2) the attorney is employed by the USD Knudson School of Law as a full-time administrator or faculty member. In either case, the applicant must complete a specific application for such admission. The period of admission lasts only while the attorney is employed in the qualifying position.²¹

attorney with the federal government or a federal governmental agency including service as a member of the Judge Advocate General Department of one of the military branches of the United States.

²⁰ SDCL 16-16-12.1.

²¹ SDCL 16-16-7.6

Military Spouse Admissions

An attorney licensed in another jurisdiction in the United States may be admitted to practice law if the attorney’s spouse is a member of the United States armed forces subject to a military transfer to South Dakota for active-duty military service, and the attorney left his or her employment to accompany the spouse to South Dakota.²²

Summary of Recent Changes to Bar Exam Scoring and Re-examination

Bar Exams	MPT/MEE/ILQ Passing Score	Scaled Passing MBE Score	Portion of Exam to Retake if Fail	Other
Before July 2014		130 Combined score on MPT/MEE/ILQ and MBE	Entire Exam	
July 2014-Feb 2018	75%	135	Option to take portion failed or whole exam	
July 2018-Present	75%	133	Option to take portion failed or whole exam	May receive up to 3 additional points on MBE based on exceeding pass score on MPT/MEE/ILQ portion.

Bar Passage Rates

In 2013, South Dakota’s first-time bar passage rate was 91% and overall bar passage rate was 87%.²³

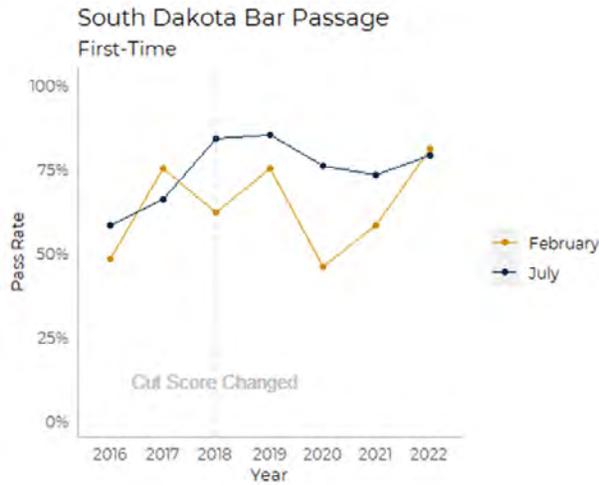
Over the past decade, bar passage rates dipped nationally and in South Dakota. However, the pass rate in South Dakota is trending up significantly and the pass rate in South Dakota for first time test takers exceeds those in most jurisdictions.

The charts below display **first-time** bar examinee counts and bar passage rates, respectively, disaggregated by exam administration.²⁴

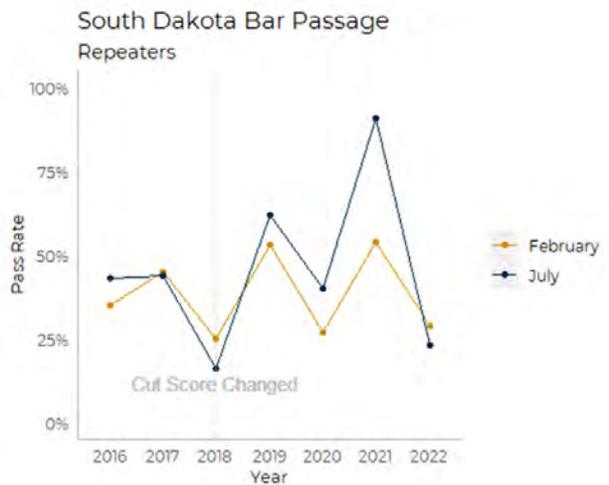
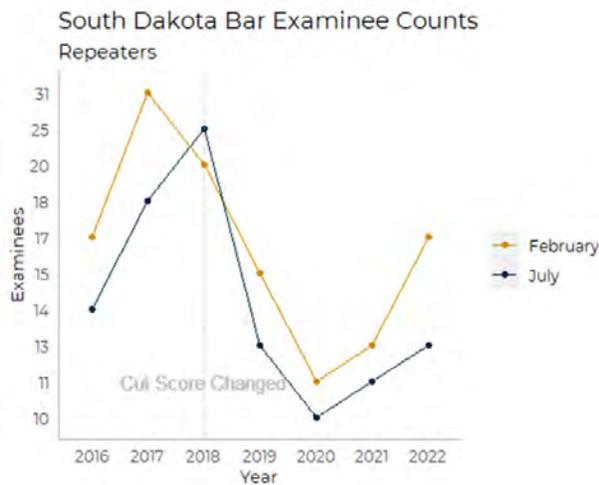
²² SDCL 16-16-12.3

²³ *Ten-Year Summary of Bar Passage Rates, Overall and First-Time, 2012–2021*, NAT’L CONF. OF BAR EXAM’RS, BAR EXAM’R, <https://thebarexaminer.ncbex.org/2021-statistics/ten-year-summary-of-bar-passage-rates-overall-and-first-time-2012-2021/>.

²⁴ *Id.*



The charts below display **repeat** bar examinee counts and bar passage rates, respectively, disaggregated by exam administration.²⁵

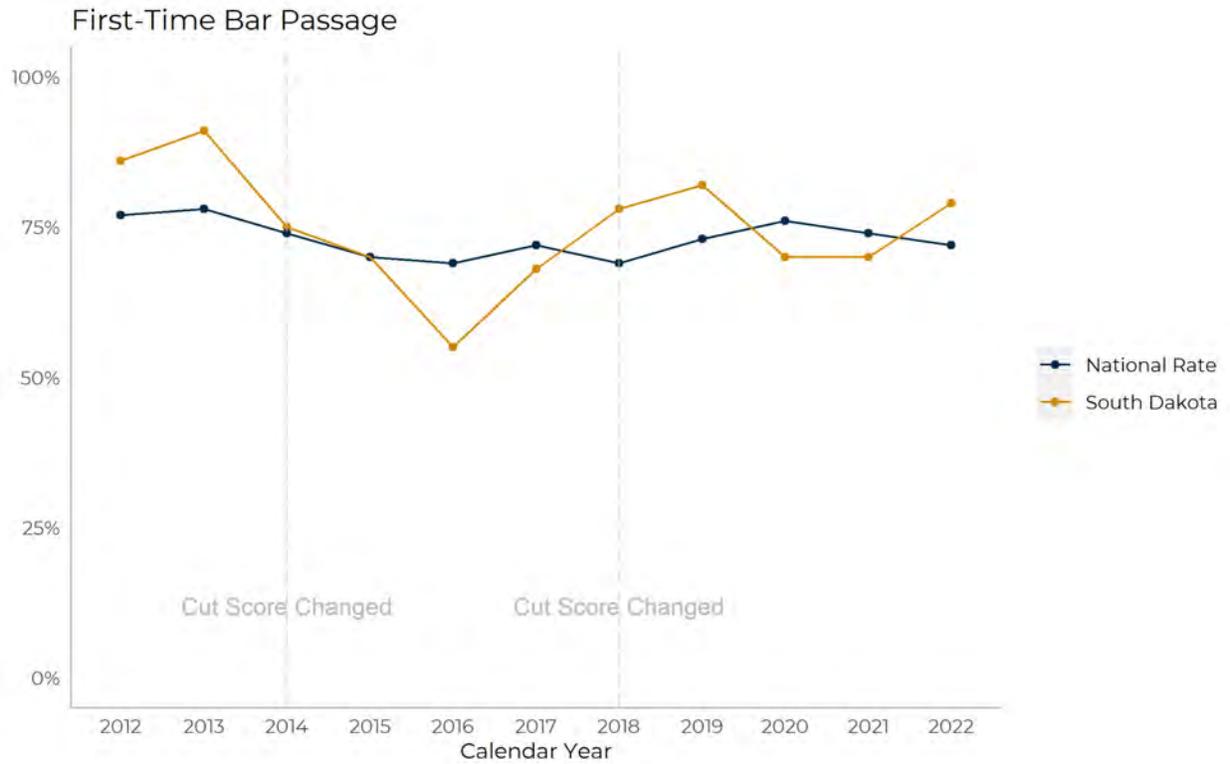
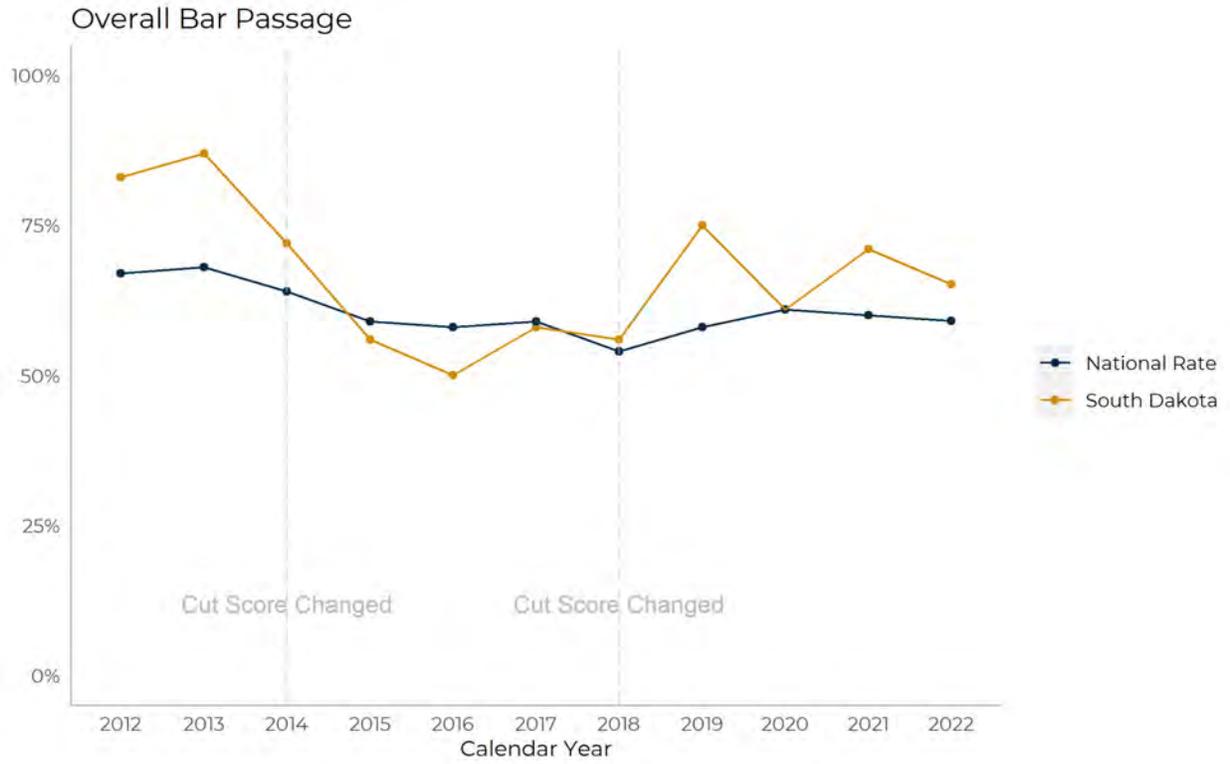


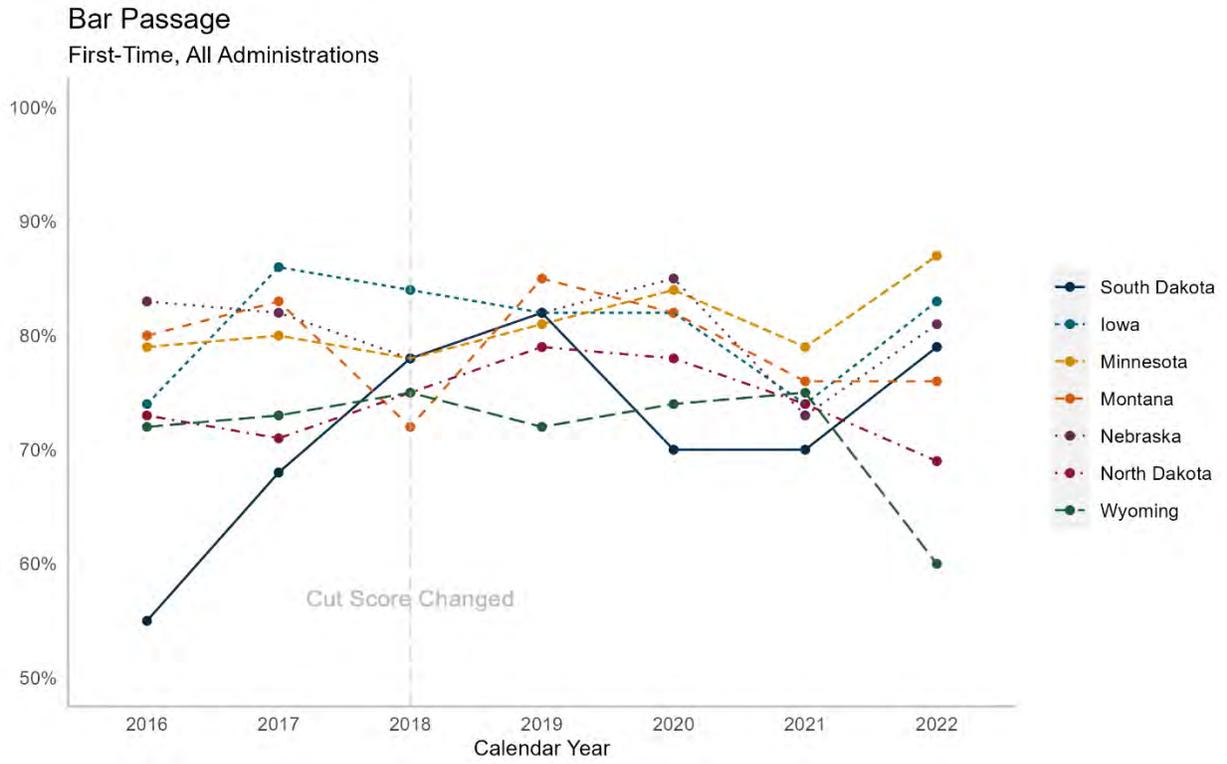
How does South Dakota bar passage compare to other states?

The first and second charts below compare first-time and overall bar passage rates in South Dakota with national rates. The third chart below compares first-time bar passage rates in South Dakota with its neighboring states.²⁶

²⁵ *Id.*

²⁶ See *Statistics*, NAT'L CONF. OF BAR EXAM'RS, THE BAR EXAM'R, <https://thebarexaminer.ncbex.org/statistics/>.





3

Access to Legal Services

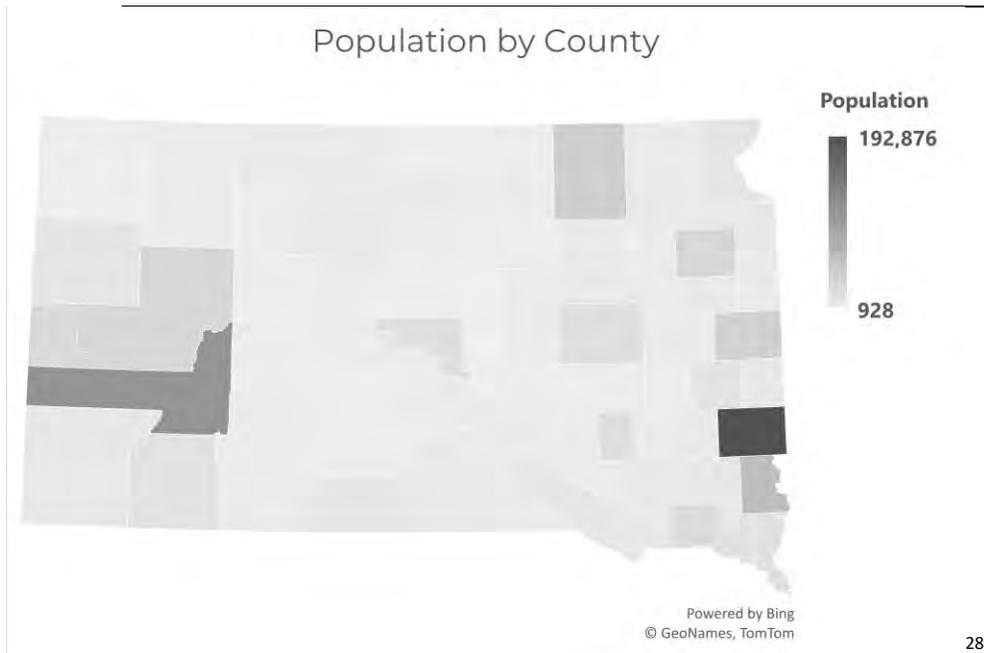


To assist the Committee in developing strategies to recruit and retain talent in South Dakota’s rural and underserved areas, the following section provides information where people live and where lawyers work in South Dakota.

Where do people live in South Dakota?

South Dakota Population Statistics²⁷

Total Population:	882,235
White:	85.5%
American Indian and Alaska Native:	9%
Hispanic or Latino:	3.6%
Two or More Races:	2.2%
Black or African American:	1.8%
Asian:	1.4%
Median Household Income:	\$50,957



The general population is increasing in South Dakota’s urban centers of Sioux Falls (Minnehaha County) and Rapid City (Pennington County) at a higher rate than the remainder of the state. From 2013 to 2022,

²⁷ U.S. Census Bureau

²⁸ *Id.*

the population increased by 20.2% in Sioux Falls and 6.2% in Rapid City. While the overall growth in population for the state of South Dakota during this time was 6.2%, taking out the growth in population from Sioux Falls and Rapid City, the remainder of the state only experienced a population growth of 2.5% between 2013 and 2021.²⁹

Where do attorneys work in South Dakota?

Similar to the general population trend, the lawyer population in South Dakota’s urban areas is increasing. In 2013, an estimated 65% of South Dakota lawyers lived in Sioux Falls (Minnehaha County), Rapid City (Pennington County), Aberdeen (Brown County), and Pierre (Hughes County); now, an estimated 72% of attorneys live in these urban areas, an increase of almost 11%.³⁰

Recent data from the State Bar of South Dakota indicates that there are currently 2,033 active, licensed attorneys residing in South Dakota. Thirty-five counties have fewer than one attorney per 1,000 residents, and six counties have no attorneys at all. While most active, licensed South Dakota attorneys were admitted to the bar in 2000 or later, there are 26 counties where the majority of attorneys were admitted before 2000. Counties in this category are shaded in the table below.

County	Total Attorneys	Attorneys Per 1,000 Residents	Bar Admission 1940–1999	Bar Admission 2000–Present
Aurora	4	1.46	3	1
Beadle	16	0.84	12	4
Bennett	3	0.89	1	2
Bon Homme	6	0.86	2	4
Brookings	40	1.16	19	21
Brown	81	2.11	41	40
Brule	8	1.52	7	1
Buffalo	0	0.00	0	0
Butte	12	1.17	8	4
Campbell	1	0.73	1	0
Charles Mix	6	0.64	1	5
Clark	3	0.78	2	1
Clay	23	1.54	8	15

²⁹ US Census data.

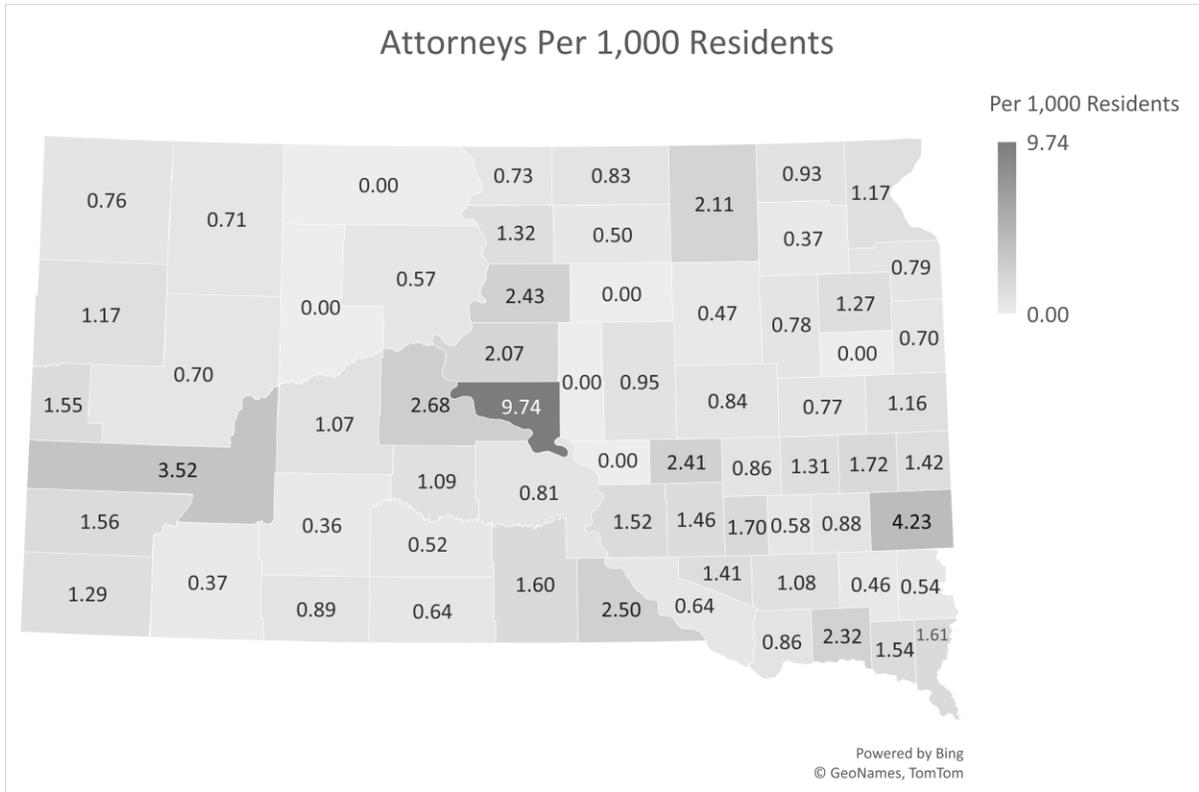
³⁰ John Hult, *Rural Lawyer Recruitment Efforts Show Local Results, But Fail to Alter Urban-Rural Divide*, S.D. SEARCHLIGHT (Jan. 15, 2023), <https://southdakotasearchlight.com/2023/01/15/rural-lawyer-recruitment-efforts-show-local-results-but-fail-to-alter-urban-rural-divide/>.

SOUTH DAKOTA BAR LICENSURE ASSESSMENT

Codington	36	1.27	19	17
Corson	0	0.00	0	0
Custer	13	1.56	8	5
Davison	34	1.70	14	20
Day	2	0.37	2	0
Deuel	3	0.70	2	1
Dewey	3	0.57	2	1
Douglas	4	1.41	3	1
Edmunds	2	0.50	1	1
Fall River	9	1.29	3	6
Faulk	0	0.00	0	0
Grant	6	0.79	5	1
Gregory	10	2.50	3	7
Haakon	2	1.07	0	2
Hamlin	0	0.00	0	0
Hand	3	0.95	2	1
Hanson	2	0.58	1	1
Harding	1	0.76	0	1
Hughes	173	9.74	64	109
Hutchinson	8	1.08	7	1
Hyde	0	0.00	0	0
Jackson	1	0.36	0	1
Jerauld	4	2.41	2	2
Jones	1	1.09	0	1
Kingsbury	4	0.77	3	1
Lake	19	1.72	8	11
Lawrence	40	1.55	16	24
Lincoln	35	0.54	14	21

SOUTH DAKOTA BAR LICENSURE ASSESSMENT

Lyman	3	0.81	2	1
Marshall	4	0.93	2	2
McCook	5	0.88	4	1
McPherson	2	0.83	1	1
Meade	21	0.70	7	14
Mellette	1	0.52	0	1
Miner	3	1.31	2	1
Minnehaha	834	4.23	291	543
Moody	9	1.42	1	8
Oglala Lakota	5	0.37	2	3
Pennington	385	3.52	186	199
Perkins	2	0.71	1	1
Potter	6	2.43	3	3
Roberts	12	1.17	4	8
Sanborn	2	0.86	2	0
Spink	3	0.47	2	1
Stanley	8	2.68	7	1
Sully	3	2.07	2	1
Todd	6	0.64	3	3
Tripp	9	1.60	5	4
Turner	4	0.46	1	3
Union	27	1.61	13	14
Walworth	7	1.32	5	2
Yankton	54	2.32	25	29
Ziebach	0	0.00	0	0
Statewide	2,033	2.29	855	1,178

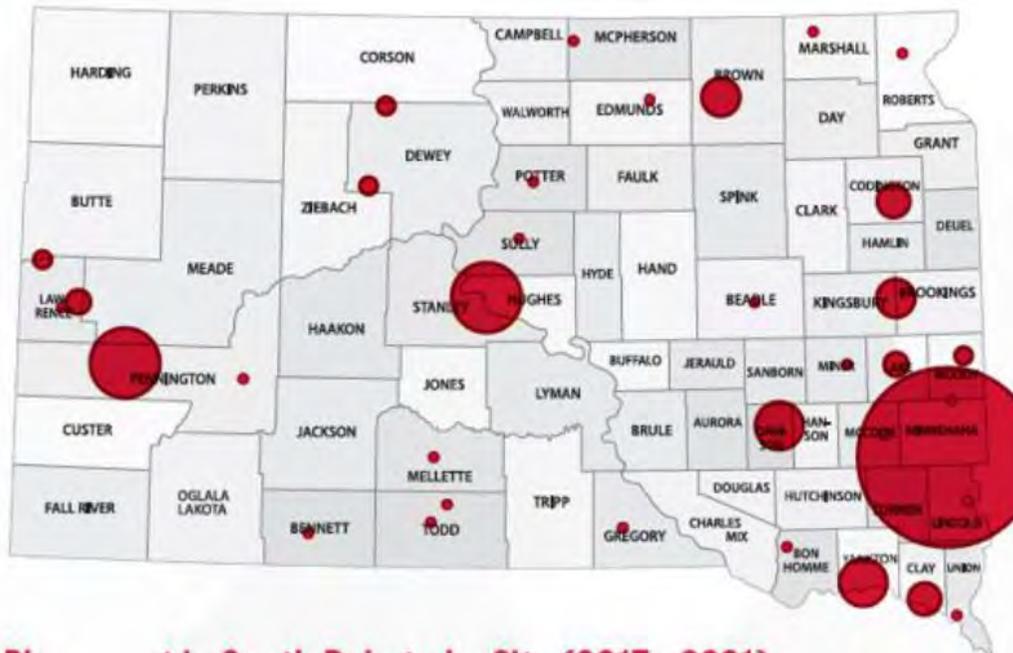


Source: State Bar of South Dakota and U.S. Census Bureau

Where in South Dakota do USD Law graduates go to work?

The map below visualizes where USD Law graduates have taken their first job after graduation, by city.³¹ Note that graduates represented by this data may have relocated since taking their first job.

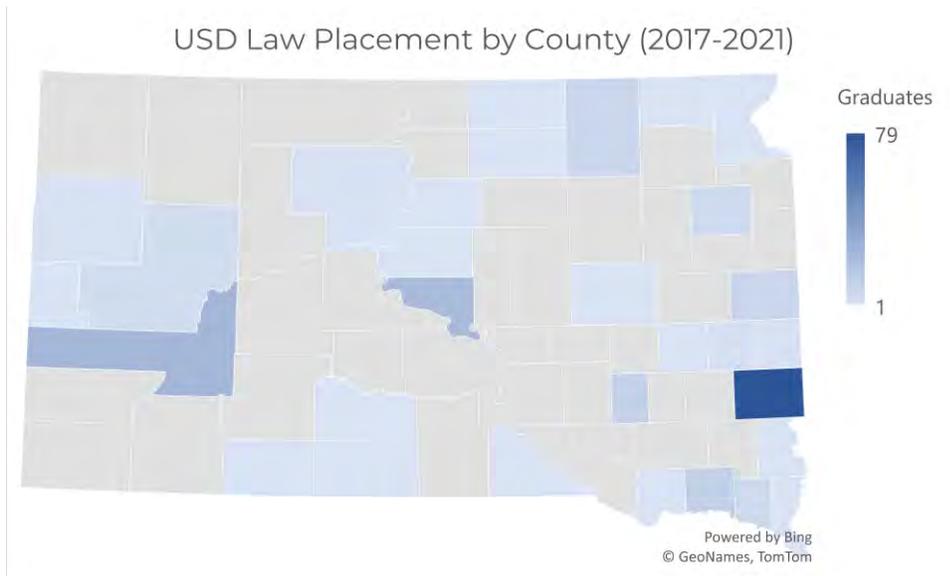
³¹ USD Law Knudson Class of 2025 Review



Placement in South Dakota by City (2017 - 2021)

Sioux Falls	79	Sturgis	5	Deadwood	1	Martin	1
Rapid City	25	Madison	3	Dell Rapids	1	Mission	1
Pierre	23	Belle Fourche	2	Elk Point	1	Rosebud	1
Mitchell	11	Eagle Butte	2	Eureka	1	Sisseton	1
Yankton	11	Flandreau	2	Gettysburg	1	Wall	1
Aberdeen	8	Timber Lake	2	Hartford	1	White River	1
Brookings	8	Bon Homme	1	Howard	1	Canton	1
Vermillion	6	Britton	1	Huron	1	Onida	1
Watertown	6	Burke	1	Ipswich	1		

And by county:



Rural Recruitment Efforts in South Dakota

South Dakota established its Rural Attorney Recruitment Program in 2013 to address the shortage of lawyers practicing in rural areas of the state.³² The program provides monetary incentives for lawyers who commit to practice full time as an attorney in a rural area for a minimum of five years.³³ Rural areas are defined as counties with fewer than 10,000 residents, or municipalities with fewer than 3,500 residents.³⁴ Participants in the program receive five annual payments of \$12,513.60; 35% of the incentive is paid by the rural county or municipality, 15% is paid by the State Bar, and 50% is paid by the Unified Judicial System.³⁵

As of 2022, there have been 31 participants in the program across 26 rural counties, with 14 currently active. Of the ten participants who have graduated out of the program, seven remained in their rural area.³⁶

Other states have followed South Dakota's lead and established their own rural lawyering initiatives. Some components of these programs include monetary incentives,³⁷ assistance finding internships and permanent positions in rural areas,³⁸ and legal education pathway programs for rural residents.³⁹

³² RURAL ATTORNEY RECRUITMENT ANNUAL REPORT 1 (2022), <https://uj.s.sd.gov/uploads/RARPreport.pdf>.

³³ *Id.*

³⁴ *Id.*

³⁵ RURAL ATTORNEY RECRUITMENT PROGRAM CONTRACT/LETTER OF AGREEMENT 3–4 (2022).

³⁶ RURAL ATTORNEY RECRUITMENT ANNUAL REPORT, *supra*, at 2.

³⁷ See *Rural Attorney Recruitment Program*, STATE OF N.D. CTS., <https://www.ndcourts.gov/rural-attorney-recruitment-program>; *Rural Practice Fellowship Program*, ILL. STATE BAR ASS'N, <https://www.isba.org/ruralpractice>.

³⁸ See *Rural Practice Initiative*, NEB. STATE BAR ASS'N, <https://www.nebar.com/page/RPI>.

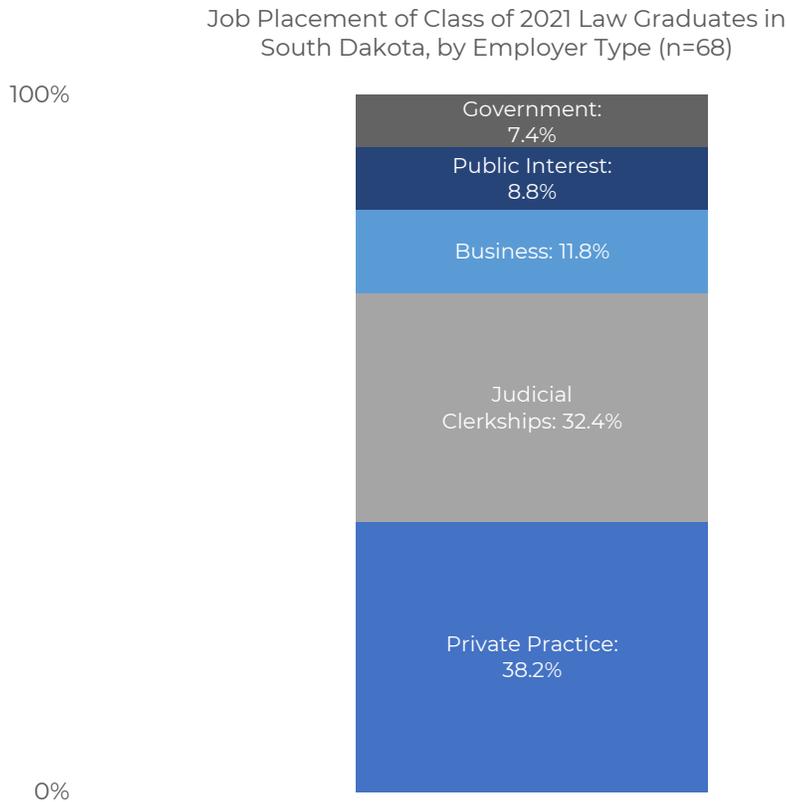
³⁹ See Karen Sloan, *How to Lure Lawyers to Small Town USA? Start There*, LAW.COM (Nov. 1, 2016), <https://www.law.com/2016/11/01/how-to-lure-lawyers-to-small-town-usa-start-there/>.

Access to Legal Services by Employment Type

The project focuses in part on developing a strategic plan to recruit and retain talent to enter public service in South Dakota. The sections below discuss available data about where recent law graduates work in South Dakota.

What types of jobs do recent law school graduates obtain?

Most 2021 law school graduates (from all applicable law schools) who came to work in South Dakota after graduation found employment in private practice and judicial clerkships.⁴⁰



Note: Percentages do not sum to 100% because figures for academic and unknown employer types are not shown.

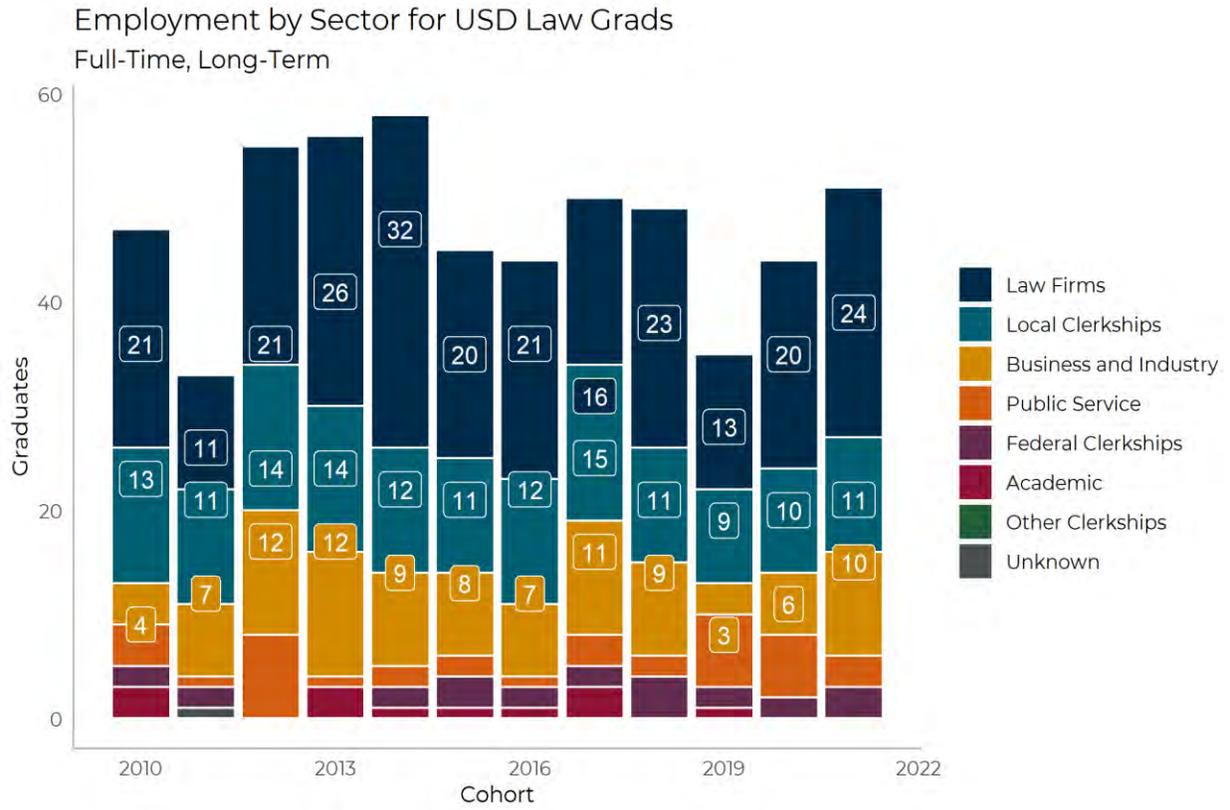
Most graduates of USD Law School work in roles that require bar-passage, while a notable minority undertake roles for which a JD provides an advantage.⁴¹

Most new USD Law graduates go to work at law firms or local clerkships.⁴²

⁴⁰ NALP Jobs & JDs Class of 2021

⁴¹ *Employment Outcomes*, AM. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, <https://www.abarequireddisclosures.org/EmploymentOutcomes.aspx>.

⁴² *Id.*



4

USD Knudson Law School

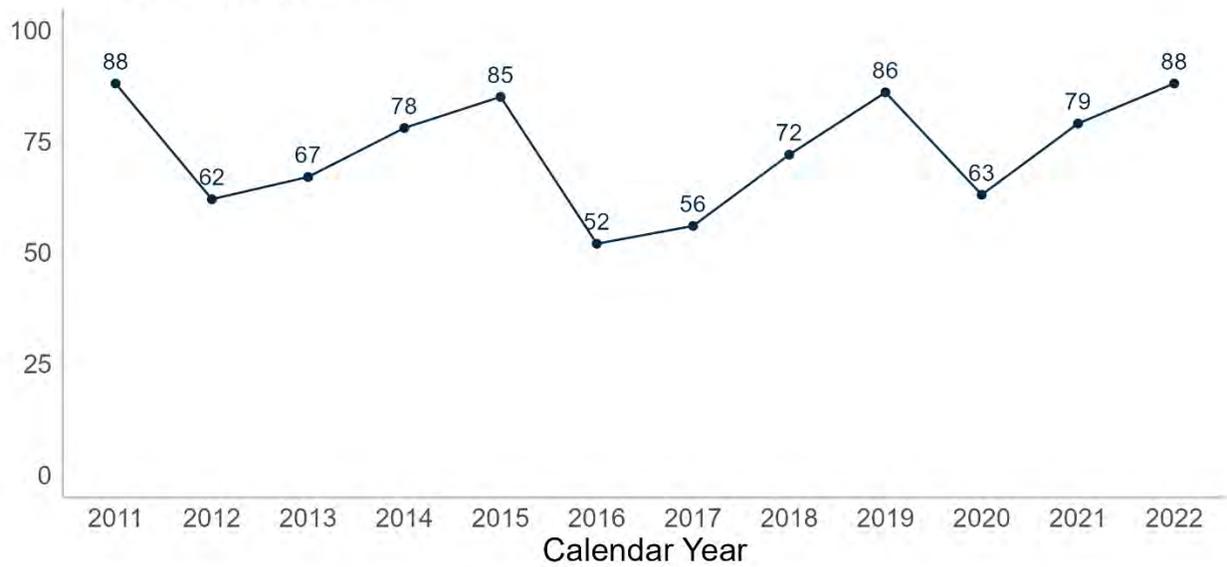


Because a majority of USD Knudson Law School graduates choose to take the South Dakota bar and practice law in South Dakota, the following section explores data from the USD Law School.

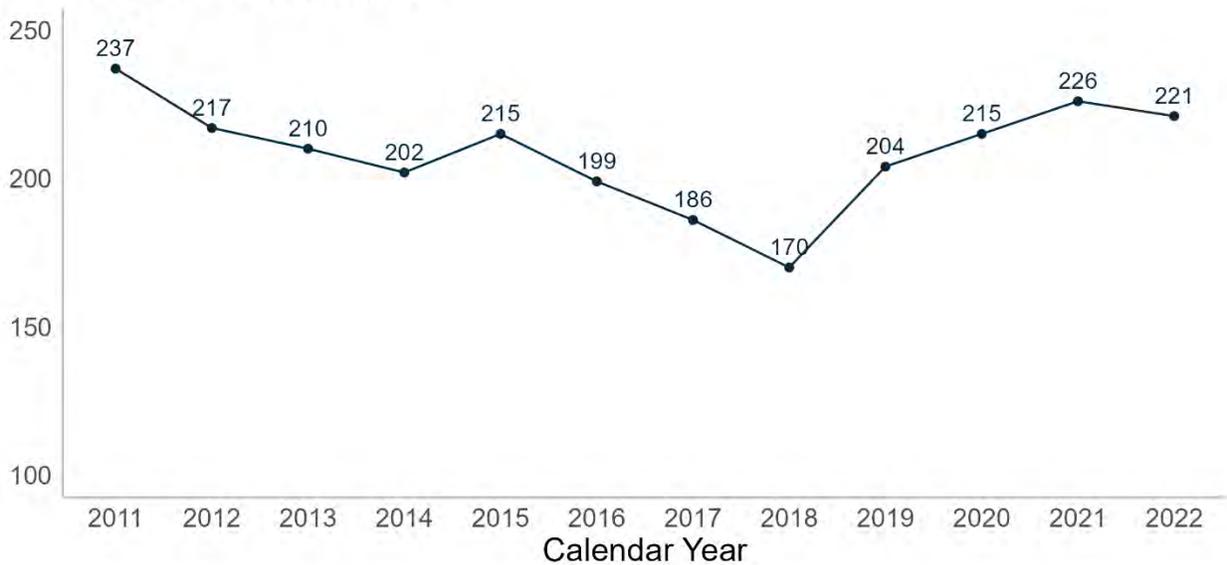
The chart below displays USD Knudson Law School enrollment counts since the 2011 calendar year.⁴³

Enrollment

USD Law 1L Enrollment



USD Law Total JD Enrollment

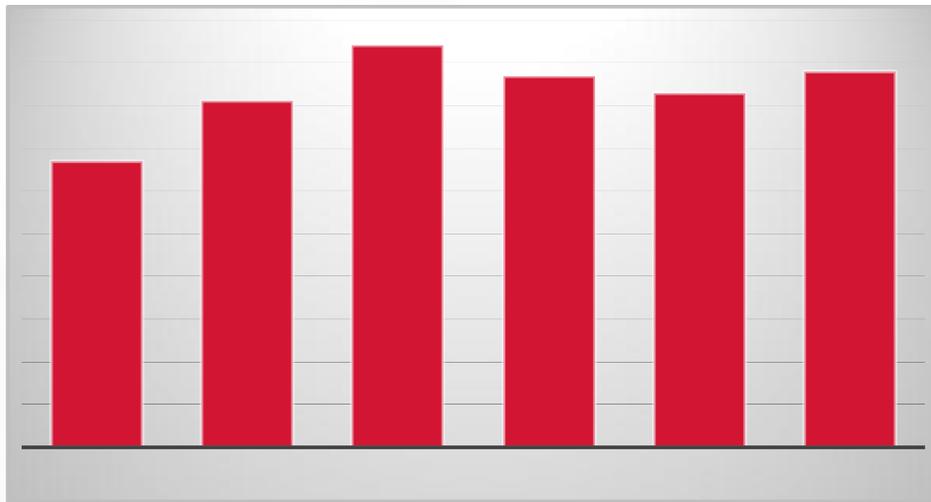


⁴³ *Standard 509 Disclosure*, AM. BAR ASS'N, SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR, <https://www.abarequireddisclosures.org/Disclosure509.aspx>.

Total Degrees Awarded at USD Law

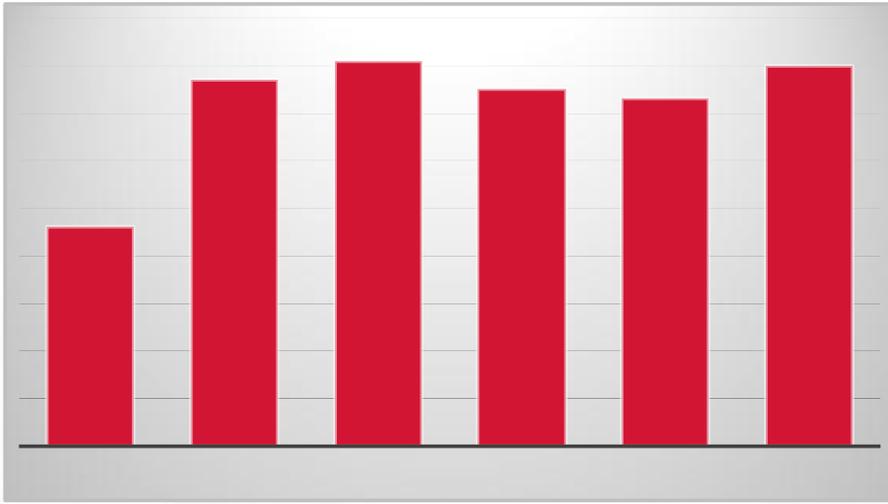
Calendar Year	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
JD Degree Count	55	76	73	80	63	62	65	77	49	50	64	83

USD Ultimate Bar Pass Rate

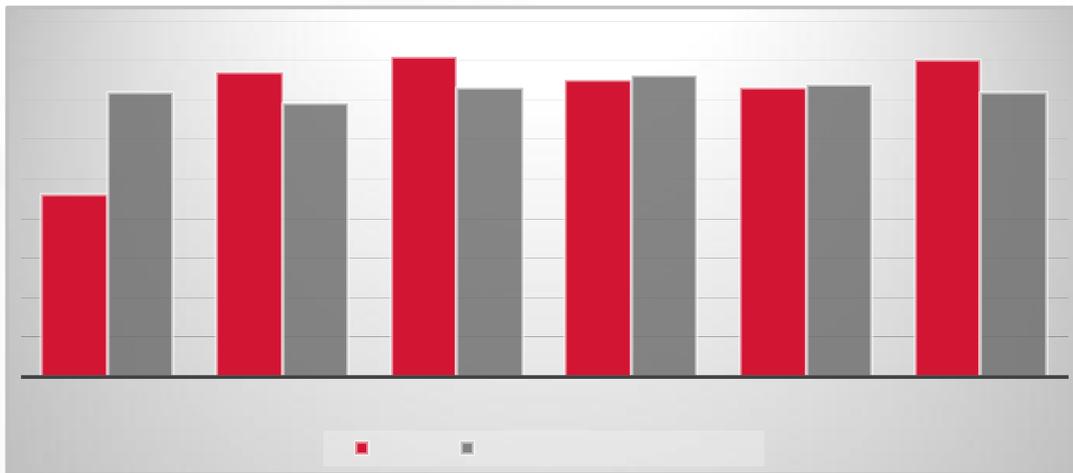


Note: Ultimate Bar Pass Rate is the percentage of a law school’s graduates who sat for and passed a bar examination administered within two years of their graduation. The rate for the class of 2022 is current as of the date of this report and is subject to change until it is finalized in 2024.

USD First Time Bar Pass Rate



First Time Pass Rates



5

Other Types of Bar Examinations and Admissions



The Uniform Bar Examination (UBE)

The Uniform Bar Examination is a test developed by the NCBE and first administered in 2011. According to the NCBE, the primary benefit of the UBE is to enable bar exam scores to be transferable across state lines, lowering the costs associated with taking the bar exam in multiple jurisdictions.⁴⁴

South Dakota is one of eleven states that does not administer the UBE. Of those eleven, South Dakota is one of four that utilizes all three NCBE-developed exam components.⁴⁵



Source: *Uniform Bar Examination, NAT'L CONF. OF BAR EXAM'RS*, <https://www.ncbex.org/exams/ube/>.

The UBE uses the same NCBE-developed components as the South Dakota bar exam: (1) the Multistate Performance Test (MPT), (2) the Multistate Essay Examination (MEE), and (3) the Multistate Bar Examination (MBE).⁴⁶

The NCBE grades the MBE portion of the exam, while the jurisdiction is responsible for grading the MEE and MPT sections. Raw scores for the MEE and MPT are then provided to the NCBE so that they can be scaled, combined, and weighted. The MEE is weighted 30%, the MPT is 20%, and the MBE is 50% in the UBE score, with the total score reported on a 400-point scale.⁴⁷

Once an applicant has taken the UBE, their score is portable to other UBE jurisdictions.⁴⁸ Only the test score is portable, not the results. Passing the UBE and being admitted to practice in one jurisdiction does

⁴⁴ See *NAT'L CONF. OF BAR EXAM'RS, UNDERSTANDING THE UNIFORM BAR EXAMINATION 12–13 (2017)*, <https://www.ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F209>.

⁴⁵ *NAT'L CONF. OF BAR EXAM'RS, ADOPTION OF THE UNIFORM BAR EXAMINATION (2022)*, <https://www.ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F196>.

⁴⁶ *Uniform Bar Examination, Nat'l Conf. of Bar Exam'rs*, <https://www.ncbex.org/exams/ube/>.

⁴⁷ *UBE Scores, Nat'l Conf. of Bar Exam'rs*, <https://www.ncbex.org/exams/ube/scores/>.

⁴⁸ Kellie R. Early, *The UBE: The Policies Behind the Portability, Bar Exam'r*, Sept. 2011, at 17, https://thebarexaminer.org/wp-content/uploads/PDFs/800311_Early.pdf. (“The UBE is more than just a shared set of test components. At its essence, it is an agreement to give full faith and credit to examination scores generated in participating jurisdictions...”).

not guarantee admission in any other jurisdiction.⁴⁹ Jurisdictions may set their own passing score for the UBE, determine the maximum age of transferred scores, as well as maintain additional requirements for admission beyond passing the UBE.⁵⁰ UBE jurisdictions also continue to make their own character and fitness decisions.⁵¹ As of January 1, 2021, out of the 151,224 examinees who received UBE scores, 27,379 examinees (18%) had transferred that score to another UBE jurisdiction.⁵²

Thirty-nine states and the District of Columbia have adopted the UBE.⁵³ The minimum passing score ranges from 260 to 280, with a mean of 268.⁵⁴ Limits on the maximum age of transferred scores ranges from two to five years.⁵⁵ Fourteen jurisdictions require the completion of additional components, such as classes or tests on state-specific law, before admission to the bar.⁵⁶ All jurisdictions bordering South Dakota have adopted the UBE. A summary of their participation is provided below.

State	First UBE Administration	Minimum Passing Score	Jurisdiction Specific Component
North Dakota	February 2011	260	No
Nebraska	February 2013	270	No
Montana	July 2013	266	Yes
Wyoming	July 2013	270	No
Minnesota	February 2014	260	No
Iowa	February 2016	266	No

NextGen Bar Examination (NextGen)

The NCBE is developing the “NextGen” bar exam that is set to debut in 2026. This exam will utilize a narrowed set of fundamental legal concepts and expanded set of legal skills identified as needed in the practice of law and reasonably expected from a new lawyer. It is designed to balance the skills and knowledge needed in litigation and legal practice.

The NCBE will begin the new bar exam in July 2026. The new exam will move away from separate components (e.g., MBE and MPT) and instead integrate knowledge and skills questions throughout the

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *UBE Score Portability*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/ube/score-portability>.

⁵² *The UBE’s 10-Year Anniversary*, BAR EXAM’R (Spring 2021), <https://thebarexaminer.org/article/spring-2021/ube-10-year-anniversary>.

⁵³ *Uniform Bar Examination*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/ube/>.

⁵⁴ *Minimum Scores*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/ube/scoreportability/minimum-scores/>.

⁵⁵ *Maximum Score Age*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/ube/score-portability/maximum-score-age/>.

⁵⁶ *Local Components*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/ube/score-portability/local-components/>.

exam. The new exam will also incorporate changes to its tested subjects, along with a greater focus on skills testing.⁵⁷

According to an August 28, 2023, press release, “(t)he NextGen bar exam will be divided into three sessions of three hours each, with each session containing two integrated question sets, one performance task, and approximately forty multiple-choice questions. These three-hour sessions will be administered over one and a half days, with six hours of testing time on day one and three hours on day two.”⁵⁸

A decision on the NextGen Bar Exam will need to be made in the near future as the change will impact the law school and the students entering law school. The 1L class entering in fall of 2023 could presumably take the NextGen Bar Exam in 2026. The latest information is that the NCBE plans to make both exams available in 2026 and 2027.

Additional Pathways to Licensure without Examination

Bar examinations are administered in every U.S. jurisdiction as a requirement for licensure to practice law, but some states allow for additional means of admission to the bar. The Steering Committee reviewed three additional licensure methods that are either currently in use or have been proposed in other states. Those include: (1) diploma privilege, (2) supervised practice, and (3) portfolio assessments such as New Hampshire’s Daniel Webster Scholar Honors Program.

Diploma Privilege

Diploma privilege is a licensure method in which graduates of certain law schools designated by the jurisdiction are automatically admitted to the bar without needing to take a bar exam. Only Wisconsin currently has a diploma privilege system, but thirty-two states and the District of Columbia have used the system in the past. South Dakota had two periods of diploma privilege: from 1903 to 1957, and 1973 to 1983.

Wisconsin’s diploma privilege is limited to graduates of the two law schools in that state. In the historical diploma privilege systems of other jurisdictions, some limited the privilege to only graduates of the state law school, while others extended the privilege to graduates of any law school in the country.

Wisconsin also places strict credit-hour and course subject matter requirements on those admitted by diploma privilege. The graduate must complete at least eighty-four semester credits in law school. Thirty of those credits must be earned in ten mandatory law school courses, and another thirty credits earned in elective courses in thirty possible subject areas.

During the COVID-19 pandemic, five jurisdictions (Louisiana, Oregon, Utah, Washington, and the District of Columbia) instituted temporary, modified versions of diploma privilege. All five of the jurisdictions made diploma privilege available to graduates of any ABA-accredited law school, even those outside of the jurisdiction. Utah required that those admitted under diploma privilege complete 360 hours of supervised legal practice, while the District of Columbia required diploma privilege admittees to practice under supervision indefinitely.

⁵⁷ *FAQs About Recommendations, NEXTGEN BAR EXAM OF THE FUTURE*, <https://nextgenbarexam.ncbex.org/faqs/>.

⁵⁸ <https://www.ncbex.org/news-resources/ncbe-announces-nextgen-exam-structure-sunset-current-bar-exam>

Supervised Practice

Supervised practice is a concept for licensure that would allow a law school graduate to become licensed to practice law after successful completion of a supervision period.

The Oregon Supreme Court recently adopted an alternative licensing program that includes a supervised practice component. That program requires a candidate to spend 675 hours working with an experienced attorney and creating a portfolio of legal work that can be assessed by bar officials as an alternative pathway to admission.

Under the draft rules, an applicant would work at least 675 hours under the supervision of an attorney with an active Oregon license and who has been practicing for at least 3 of the last 5 years. During that period, the applicant must produce at least eight pieces of written work product, lead at least two initial client interviews or counseling sessions, and lead at least two negotiations. Portfolios would be submitted to the Board of Bar Examiners for evaluation halfway and at the end of the program. If the applicant earned a “qualified” score on all program requirements, as well as passed a character and fitness review, they are admitted to the bar.

Workgroups for the New York and Minnesota State Bars have also recommended adopting a supervised practice pathway to licensure.

Daniel Webster Scholar Honors Program

The Daniel Webster Scholar Honors Program (DWS) is a licensure method used by New Hampshire. Beginning in 2005, through a collaboration between the University of New Hampshire (UNH) School of Law and the New Hampshire Supreme Court and Board of Bar Examiners, DWS is a two-year law school program with a heavy focus on experiential learning whose graduates are admitted to the New Hampshire bar without taking a bar exam. Students at UNH apply for the program during the second semester of their first year, and fifteen to twenty-four students are admitted based on a combination of law school grades and an interview.¹¹⁰ As of 2015, 147 students had graduated from the program.

The DWS curriculum has strict courses and sequencing requirements that include six credits of a clinic/externship and seventeen credits in courses specific to the DWS program. The DWS courses focus on simulations and writing assignments, with regular assessments of the students. Class performance is evaluated by UNH professors, and those evaluations, along with student portfolios, are submitted to the Board of Bar Examiners after every semester for feedback. At the conclusion of the two-year program, each graduate’s full performance is evaluated by the bar examiners to determine if they will be admitted to the bar.

While New Hampshire is currently the only state with a DWS-style program, the Alternatives to the Bar Exam Task Force of the Oregon Board of Bar Examiners recommended creating similar programs in Oregon law schools and this proposal was “approved-in-concept” by the Oregon Supreme Court. Workgroups for the New York and Minnesota State Bars have also recommended adopting similar, curricular-based pathways to licensure.

6

Recommendations of the Steering Committee



The Bar Licensure Steering Committee met on July 17, 2023, to begin considering the recommendations from the three workgroups: Pre-Law and Law School, Minimum Competence, and Applications and Admissions. The Steering Committee discussed recommendations proposed by the workgroups related to bar licensure and potential alternative pathways to licensure. Following this meeting, NCSC continued to receive public input and individually surveyed Steering Committee members to narrow potential recommendations. Steering Committee members met again on September 26, 2023, to consider the recommendations for the report to be submitted to the Court.

Protection of the public by maintaining character and fitness requirements for bar admission is an overarching concern to the Steering Committee and the workgroups. Therefore, any pathway to licensure must maintain established standards for determining minimum competence to practice law.

The current bar exam in South Dakota has been offered for approximately forty years. The current bar examination, except for the Indian Law Question, is prepared by the National Conference of Bar Examiners (NCBE) and is administered in 39 states. The NCBE scores a portion of the bar exam, while the South Dakota Board of Bar Examiners scores the rest of the bar exam. The South Dakota bar exam is designed to test an applicant's knowledge of, and ability to apply, foundational legal principles. The current bar examination also provides some portability for licensure.

As part of its study, the Steering Committee considered other states' efforts to consider alternative pathways for bar admission. These efforts have been aimed at maintaining or even enhancing standards for assessing minimum competence, while also accomplishing other goals designed to benefit the legal profession. In considering an alternative pathways program in South Dakota, the Steering Committee considered whether a pathways program could improve the number of lawyers located in underserved areas of the state or the public interest sector, while also providing an assessment of minimum competence.

Based upon these considerations, the Steering Committee recommends the following to the Court:

1. Do not reinstate a diploma privilege.
2. Do not adopt a post-law school supervised practice pathway to bar admission.
3. Do not adopt the Uniform Bar Exam (UBE) before the NextGen Bar Exam becomes available.
4. Continue to study and consider adoption of the NextGen Bar Examination when it becomes available in 2026 or at a later date that gives South Dakota sufficient time to prepare for the implementation of the NextGen Bar exam.
5. Maintain a requirement that all licensed South Dakota attorneys demonstrate knowledge of Indian Law through a course of study or through the bar examination.
6. Implement a law-school-based public service pathway with a requirement to practice for two years in South Dakota's underserved rural areas or public interest sectors.

Diploma Privilege

The Steering Committee and the workgroups unanimously recommended that the diploma privilege not be implemented. The survey responses showed little to no support for the diploma privilege, and a survey of other states shows that only Wisconsin currently has diploma privilege for licensure. The Steering Committee supports a standard for minimum competence determined by the Court and assessed by the Board of Bar Examiners, which is independent of the law school course of study.

The Steering Committee supports a minimum competence determination through successful passage of the bar examination or through an alternative pathway that maintains established standards to assess minimum competence, and thus, does not support implementing diploma privilege.

Post-Law School Supervised Practice Pathway

A supervised practice pathway must ensure minimum competence that compliments the law school curriculum. A stand-alone pathway presents many practical challenges when it is not tied to the law school curriculum. These challenges include identifying oversight for the participants, monitoring supervision, selecting and training supervisors, developing standardized criteria to establish minimum competence and developing program length or hour requirements.

The Steering Committee does not support a post-law school supervised practice pathway at this time.

Uniform Bar Exam (UBE)

Based on survey results and stakeholder interviews, the portability of a law license is a priority among current USD law students, members of the South Dakota bar, and employers looking to hire out-of-state applicants. While the current bar examination provides some portability for licensure, adopting the UBE would improve portability, but it must be balanced with timing. The earliest the UBE could be offered is July 2024. This is just two years before the NextGen Bar Exam is anticipated to be available in 2026. The Next Gen Bar Exam will continue to test foundational legal skills. The Steering committee anticipates that the NextGen Bar Exam will also continue to allow portability of licensure between states. Additionally, the adoption of the UBE would only be temporary as the NCBE has also announced that it will no longer offer the UBE after February 2028.⁵⁹ Finally, the effort to implement the UBE may also detract from the planning necessary to implement the NextGen bar exam and implementing the recommended alternative public service pathway to admission.

The Steering Committee recommends that the Court not implement the UBE.

NextGen Bar Exam

As of the date of the publication of this report, NCBE has announced changes to the implementation of the NextGen Bar Exam and will allow jurisdictions to administer the current format of the UBE until February 2028.⁶⁰

The Steering Committee recommends that the Court and the Board continue to study and consider implementing the NextGen Bar Exam in 2026 or at a later date, when the current bar examination will no longer be offered.

Indian Law Component to the Bar Exam

Demonstrating an understanding of Indian law and related jurisdictional principles is fundamental for South Dakota practitioners. The Steering Committee believes that minimum competence in Indian law should continue to be demonstrated through the current bar exam format and that an Indian law question be included as a part of the NextGen Bar Exam if the Court decide to implement NextGen. The Steering Committee believes that minimum competence could also be demonstrated through the passage of a law

⁵⁹ NCBE Announces Update to NextGen Exam Content, Extends Availability of Current Bar Exam, <https://www.ncbex.org/news-resources/update-nextgen-exam-content-extends-availability>.

⁶⁰ NCBE Announces Update to NextGen Exam Content, Extends Availability of Current Bar Exam, <https://www.ncbex.org/news-resources/update-nextgen-exam-content-extends-availability>.

school course focused exclusively on Indian law. The Steering Committee supports a continued requirement to demonstrate minimum competence for Indian law by (1) passage of a South Dakota-specific bar examination question, or (2) passing a three-hour or more credit course on Indian law at an ABA accredited law school.

The Steering Committee recommends that the Court continue to include an Indian law requirement as a component of licensure.

Public Service Pathway

General support from all three workgroups showed that some version of an experiential training program instead of taking and passing the bar examination could be a viable option for South Dakota. The advantages of such a program include: (1) creating established standards for demonstrating minimum competence to practice law, (2) assisting program participants to be more practice ready, and (3) incentivizing lawyers entering the legal profession to consider public service and work in underserved rural areas of the state. Creating a program will require a coordinated effort by the Court, the Board of Bar Examiners, the Law School, and the Bar and a sufficient period to implement standards and protocols for the program.

The Steering Committees supports the Court's adoption of rules establishing the framework for a pilot public service pathway program to practice law in South Dakota. Such a pilot pathway program must include the following:

1. A law school-based program that provides experiential-based educational opportunities during the second and third years of law school through an externship that places students in a practice directly under the supervision of one or more trained attorneys.
2. The program should be structured as a five-year pilot program with a small cohort not to exceed ten students in any one law school class.
3. The Board of Bar Examiners should work directly with the students accepted into the program to observe and review the portfolio of the student's work created during the externship and other experiential portions of the program.
4. Accepted students would be required to pass the Multistate Professional Responsibility Examination (MPRE) prior to admission.
5. The Board of Bar Examiners should assess the character requirements of the accepted students during their second and third years of law school utilizing the standards in SDCL 16-16-2.1, 2.2, 2.3, 2.4, 2.5, and 2.6.
6. Upon successful completion of the law school-based public service pathway program requirements and graduation from the University of South Dakota Knudson School of Law, the student would immediately receive a two-year conditional license to practice law in South Dakota. Conditional licensure would continue so long as the applicant is engaged in the practice of law with a public sector employer (such as a public defender's office, Attorney General's Office, legal services entity, prosecutor's office, Unified Judicial System, tribal government, or other public sector employer), or the applicant engages in the private practice of law under the supervision of an experienced attorney in a county or municipality with a population set forth in SDCL 16-23-2.1 and 2.2 (Rural Attorney Recruitment Program Qualifying Counties and Municipalities). After two years, the conditional license would be converted to an unconditional license to practice law by the Court after the program participant submits an affidavit to the Court certifying the completion of the two years of legal practice in the public sector or supervised private practice in an underserved community.

7. The Court should consider adding additional bar examiners as necessary for the Board of Bar Examiners to ensure the minimum competence of applicants involved in the public service pathway program.
8. The Steering Committee recommends the Court establish standards for qualification and training of attorneys supervising law students during the externship portion of the program.
9. The Court should consider rules providing that all participants complete a two-year service commitment, even if that extends beyond the five-year pilot time frame. The rules would need to address the Court's ability to waive the two-year requirement for exceptional circumstances such as extended medical absences, military service, and other hardship exemptions.
10. The Court should appoint a committee to establish specific implementation details of the program, including: (1) the criteria for application and acceptance of students into the public service pathway program; (2) the requirements for participating students to work with supervising attorneys in a law school-based externship and recommend the course of study to be completed by such students subject to final curriculum choices made by the law school; and (3) minimum competence standards and assessments of students participating in the program.
11. The Steering Committee also recommends that the rules authorizing the pilot program have a sunset date with the option to renew, reauthorize, or expand the rules and the program at the end of five years.

Conclusion

While there is no one solution to completely address the legal needs of South Dakota, implementing the Public Service Pathway and continued study and review of the NextGen Bar Exam would greatly benefit the legal community in South Dakota. The implementation of the Public Service Pathway program based in the Knudson School of Law could attract more students to the law school who are interested in practicing in rural South Dakota or the public service sector or an alternative pathway for licensure without examination. The more students licensed through this pathway, the greater likelihood that more graduates will stay in South Dakota to practice law. South Dakota is in a unique position to implement this program given its single law school, great collegiality amongst bar members, and support from the Knudson School of Law, the Board of Bar Examiners, and the Court.

7

Appendices



Appendix A: Stakeholder Interviews

Methodology

The National Center for State Courts (NCSC) conducted anonymous stakeholder interviews and focus groups to understand bar admission challenges, the access to justice gap, challenges facing the rural communities, and how the current bar admissions process either helps address these challenges or creates further impediments. With the assistance from the South Dakota Project Team, Steering Committee members, and workgroup members, NCSC consultants were provided with contact information for a broad range of stakeholders who experienced the South Dakota bar including years of practice, admission to the bar, pass rates, practice area, experience, and geographic location. Stakeholders included practicing attorneys, retirees, bar examiners, law students, judges, and other professionals in the legal field.

Stakeholders were grouped into focus groups based on feedback from the South Dakota project team by profession, however, due to the sensitive nature of the project, all stakeholders were given the option for an individual one-on-one interview. All focus groups and interviews were conducted via Zoom.

The NCSC project team conducted over 25 interviews or focus groups from mid-February through the first week of April. Stakeholders were open and responsive, and extremely candid with their thoughts regarding the bar admissions process in South Dakota. All views expressed below were made by the stakeholders.

Current Bar Examination

Many of the stakeholders interviewed took the South Dakota bar with a few who were admitted via diploma privilege or reciprocity. Of those who took the bar exam, there were several attorneys who took the bar multiple times before passing. Despite these differences, nearly all attorneys interviewed are supportive of South Dakota continuing with a bar exam for admission to the South Dakota bar. While there were comments that the bar exam is not “completely perfect” and improvements could be made to the exam, interviewees felt the bar exam is a good indicator of whether new attorneys *understand* the law. They expressed a need for something to test for minimum competence. In addition to their support, they did recognize some flaws: not every person is a good exam taker, timed restraints could be challenging for slower readers, and while the bar exam tests the application of rules and law, it does not test practical skills needed for the profession. Many recommended more practical skills development in law school such as client interactions, filing documents with the court, and negotiating with opposing counsel. Stakeholders were mixed in wanting South Dakota to become a UBE state – nearly a quarter of attorneys interviewed are also licensed in neighboring states.

For those who took the bar more than once before passing, many expressed that they didn’t pass because they had personal matters that took their focus away from studying. Those who were able to devote the time needed to study were able to pass the bar their second time.

The majority of those interviewed also expressed support for the current Board of Bar Examiners. They felt that the Board was fair in their grading, and felt the Board was supportive in their interactions with applicants to take the Bar. A few interviewees asked for accommodations and their experience showed the Board was timely with their response as well as allowing the accommodation requested.

Those Unable to Pass the Bar

South Dakota allows candidates three attempts to pass the current bar exam and then the candidate must meet the requirements of SDCL 16-16-11 to sit for the examination again. The NCSC project team spoke with a handful of candidates who were unable to pass the bar. Nearly all of those who did not pass the bar exam, passed the essay portion of the bar, but were unable to pass the multiple-choice portion of the bar exam. Some of the candidates admitted difficulty in studying and the timed constraints of the multiple-choice portion created more anxiety – especially for those who are slow readers. Many expressed a lack of self-confidence after failing the first time. Some retook the BARBRI course, hired tutors, did internships to gain real-world experience, or applied months to studying but still had issues passing the bar. All stakeholders interviewed expressed a desire for an alternative pathway option, as well as a desire to become an attorney practicing in South Dakota.

Alternative Pathways

The NCSC project team interviewed stakeholders on their opinions about the following alternative pathways: Diploma Privilege, Supervised Practice, and the Daniel Webster Scholar’s Program (DWS). The vast majority of stakeholders opposed reinstating diploma privilege even if they were admitted via diploma privilege. Those in opposition felt that gatekeeping should not be at the law school level – they felt that the curriculum may not be robust enough for graduates to immediately practice law citing lack of practical skill development, nor did they feel that the law school would want to “flunk out” students who may not be suited to practice law.

Stakeholders were more supportive of supervised practice; however, they stressed supervised practice should be an option AFTER someone takes the bar. Stakeholders were extremely supportive of implementing this alternative pathway to those who failed the bar by a small margin but showed promise in being a competent attorney – whether based on their grades or professors vouching for them. Most felt that supervised practice should last at least eight months to a year for an attorney to gain enough experience. Many practicing attorneys mentioned their firms taking in interns or implementing a mentorship program for new hires. Stakeholders were supportive of creating a “residency” type program similar to the medical field for those wanting to enter the legal profession. A few stakeholders mentioned collaborating with the public defender’s offices, state attorneys’ offices, and larger firms to create a robust supervised practice program so a graduate could be well-rounded and well-versed in all areas of the law.

They did express some concerns about supervised practice. Stakeholders worried about nepotism, the time needed for supervisors to supervise, as well as vetting the supervisors. They worried about the capacity of current attorneys to properly provide supervision, as well as concerns of how a supervisor could ultimately decide on “passing” a new attorney.

Not many stakeholders were familiar with the Daniel Webster Scholar’s Program (DWS). Many brought up concerns with USD’s capacity to implement a program like DWS. Most stakeholders expressed indifference to implementing a DWS type program.

Overall, the majority preferred a combination of taking the bar exam and supervised practice. A resounding majority opposed diploma privilege.

Rural Access to Justice

Stakeholders were asked for their opinions about access to justice in rural counties and the tribal lands. The NCSC project team heard that while not every county or town has an attorney or legal services, those living in the rural areas are used to driving long distances to secure legal services in addition to other services needed. Many stakeholders expressed that if South Dakota were to implement alternative pathways, it likely will have little to no effect in increasing the number of practicing attorneys in rural areas. Some expressed wariness of competence of attorneys because they felt that South Dakota shouldn't appoint any attorney in a rural area if they are not capable; ultimately hurting the community needing legal services. Stakeholders acknowledged the difficulty of new attorneys practicing in rural areas such as lack of mentorship. Since rural attorneys need to be well versed in many practice areas (land deeds, wills, family law), new attorneys in rural areas may not have accessibility to another attorney. Though many stakeholders lauded the camaraderie of bar members and the willingness to help one another, they felt newer attorneys had a hard time reaching out to build those connections.

Other concerns, aside from location and wages, stakeholders identified were that their spouses would be unable to find a position if they practiced in a rural area, many didn't feel the urge to do general practice, and many expressed unwillingness to live in a rural area where they did not have a connection. Those currently practicing in rural areas, some through the Rural Attorney Recruitment Program, chose to practice in the area due to personal ties and familial connections. The stakeholders enrolled in the Rural Attorney Recruitment Program also stated that they would be staying in the area after the completion of the program.

Stakeholders recommend creating a stronger pipeline through middle school and high schools in rural communities and tribal communities. Stakeholders have experienced attorneys returning to their hometowns and feel the best way to increase rural access is to plant the seed early and extend incentives for the Rural Attorney Recruitment Program and develop a similar program for tribal communities.

Many mentioned with the advent of remote hearings and Zoom, residents in rural areas can access an attorney when needed. Stakeholders mentioned that while not everyone may have a computer, nearly everyone has a cell phone with internet connection. Stakeholders mentioned that COVID has allowed everyone to feel more comfortable using technology in ways they haven't before to bridge the gap.

Several stakeholders pointed out that rural communities are truly lacking attorneys in the public sector, legal aid, and especially court appointed attorneys. Aside from salary, stakeholders expressed that not enough information is provided or available for these positions, especially to newer graduates/newer attorneys. Stakeholders felt that more focus should be applied to these positions in rural areas.

Reciprocity and Portability

The NCSC project team asked stakeholders about their views regarding portability of their law license, and whether they felt South Dakota's reciprocity system should be amended. A few of the practicing attorneys interviewed graduated from law schools outside of South Dakota, with some taking the bar exam in other states prior to practicing in South Dakota. Additionally, a good number of practicing attorneys are also licensed in other states and had to take a UBE exam. Many practicing attorneys living/practicing in cities near neighboring states expressed the need to be able to practice in neighboring states. Some attorneys who were graduates of neighboring states and licensed to practice in those states expressed frustrations on the reciprocity requirements to practice in South Dakota. They preferred that South Dakota keep the

Indian Law essay question and felt that as long as an attorney can pass the ethics portion and is in good standing at the bar, they should be able to practice in South Dakota regardless of years of practice. Stakeholders appeared to be equally divided when asked if loosening reciprocity requirements would help South Dakota’s “legal deserts,” those in support felt there wouldn’t be a giant influx of out-of-state attorneys rushing to practice in South Dakota, and those in opposition felt that South Dakota has enough attorneys to meet legal needs.

Minimum Competence

The NCSC project team asked stakeholders for their thoughts on how well the current bar exam measures minimum competency, and how minimum competency could be measured if implementing alternative pathways. Interviewees had varying definitions of “minimum competency” with many acknowledging that a new attorney is never “client ready” and skills needed to be developed in their first few years of practice. They felt the current bar measures an attorney’s understanding of the law, expressed support for the MPRE portion in measuring minimum competence, and many joked that they would not be able to pass the current bar exam. More confidence was expressed with their support for supervised practice. Stakeholders felt that this pathway would not only determine a new attorney’s understanding of the law, but whether a new attorney was minimally competent to practice law. They were supportive and optimistic that there are enough “minimally competent” attorneys currently practicing in South Dakota to be a supervisor if a program like this was implemented.

A good number of stakeholders expressed that minimum competence should continue to be measured for all practicing attorneys. A great number of those interviewed supported CLE requirements for practicing attorneys. While they joked for a “few hours every year, nothing crazy,” many were supportive of implementing a CLE program in South Dakota to ensure minimum competency for all attorneys.

Conclusion

A resounding majority of those interviewed are supportive of the bar exam. Stakeholders agreed to keep a bar exam for South Dakota and appreciated the uniqueness of the Indian Law essay question as an important part of South Dakota culture and history. Stakeholders also support supervised practice as an alternative pathway, but more interviewees are supportive of a combination of the bar exam and supervised practice.

While legal deserts are not unique to South Dakota, many felt that while there is an issue with rural access to justice, creating alternative pathways would not increase the number of attorneys in these areas. Stakeholders expressed the need for continued pipeline efforts, as well as incentivizing programs to bring attorneys to these areas.

The NCSC project team would like to express their gratitude to those interviewed for taking the time to participate in these focus groups and interviews. We would also like to express our thanks to the South Dakota project team for taking the lion’s share in providing a broad range of interviewees.

Appendix B: South Dakota Survey Results

In March of 2023, the National Center for State Courts (NCSC) project team conducted a two-week online survey of current South Dakota bar members, current Knudson School of Law students, and current Knudson School of Law faculty members to review of the current bar exam and licensure process in South Dakota. This anonymous survey also gathered feedback regarding potential alternative pathways and the respondent's views of rural access to justice. The survey layout was a few short answer questions, Likert scale questions, and a few open-ended text boxes. The responses gathered were then used to draft and supplement stakeholder interview questions, and to provide a broad overview of South Dakota's legal population's responses to assist the Working Groups to draft their recommendations.

South Dakota Bar Member Results

An impressive total of 792 bar members responded to the survey (note: because this was an anonymous survey, the NCSC was unable to track multiple responses from the same respondent). The respondents were a good representation of South Dakota covering years of practice, practice areas of law, geography, bar admission and passage, and educational background.

The survey responses revealed that 62% of respondents Agreed or Strongly Agreed that the current bar exam adequately measures an attorney's overall minimum competence to practice law, and 75% of respondents Agreed or Strongly Agreed that the Board of Bar Examiners grade the exams fairly. However, 61% of the respondents felt that the current Bar Exam DOES NOT adequately test attorneys on their practice skills, such as counseling clients, drafting documents, and negotiation skills.

When asked about new hires, respondents were favorable (more than 50% either agreed or strongly agreed) and felt that new hires are adequately prepared to practice law, are competent to practice law, and have the adequate knowledge and skills to practice law, and most newly licensed attorneys were graduates of USD Law School.

Respondents were asked about alternatives to licensing measures including the Daniel Webster Scholar's Program (DWS) or portfolio assessment, supervised practice, and diploma privilege. They were asked to rate how well these programs would measure minimum competence to practice law compared to the Bar exam as well as their support for implementation. While most of the respondents were unfamiliar with the DWS program, respondents were nearly evenly split in supporting implementation of a similar program noting that a similar program would likely help graduates be practice ready.

When asked about supervised practice, 42% of respondents did not support implementing a supervised practice pathway in lieu of taking the bar exam. The open-ended comments were predominantly supportive of implementing a supervised practice pathway and taking the bar exam or allowing a supervised practice pathway to students unable to pass the bar (but they still had to take the bar exam at least once).

As for diploma privilege, 69% of respondents did not support reimplementing diploma privilege. Many respondents noted that times have changed since the last iteration of diploma privilege and felt that USD Law may not "weed out" or fail students or that the curriculum is not robust enough to ensure graduates

are minimally competent. They strongly felt that a testing measure must be implemented to determine minimum competence. Respondents also pointed out that some graduates should not be attorneys, or do not want to be attorneys, and creating a diploma privilege pathway is not the approach South Dakota should take to address the perceived lack of attorneys.

Current USD Law Student Results

A total of 56 current USD Law School students responded to the survey. Of the 56 respondents, nearly 36% respondents noted they plan on taking the bar exam July 2024 with nearly 61% responding they plan on staying and practicing in South Dakota. The majority of the respondents planning to stay and practice in South Dakota noted they plan on practicing in a larger city in South Dakota focusing on civil litigation and trusts and estate law.

Likert questions asking about how well respondents felt USD prepared them to practice law/prepare for the bar exam scored very high (above 80% rating). Respondents also felt that South Dakota offered enough opportunities to practice law whether in rural settings, or more metropolitan areas.

Respondents noted what would be helpful for them to feel more prepared to practice law including more opportunities for practical experience and incorporating bar exam style questions into course final exams. Many respondents noted that they expect a bar exam to be difficult and while many noted it is more about memorization, respondents were fine with taking the bar exam.

There were mentions of implementing mandatory CLE to ensure that current attorneys are minimally competent to practice law, and if mandatory CLE were implemented, it would ensure that future attorneys are being vetted as well, if an alternative pathway to licensure is implemented.

When asked about alternative pathways, respondents were more favorable to a supervised practice program, or DWS/portfolio assessment type program with the DWS style program scoring slightly higher (86% vs. 81% for supervised practice). Seventy eight percent of respondents felt that alternatives to licensing measures competence and ability just as well as the Bar exam.

Most current law students noted that portability was a larger need rather than an alternative pathway to licensure. They support South Dakota becoming a UBE state and would prefer UBE be implemented.

Current USD Law School Faculty Results

A total of 16 faculty members responded to the survey. The responses were similar in rating as current USD law students: USD law faculty were confident in the coursework and opportunities offered through the law school to ensure students are prepared for the bar exam and to practice law. Faculty rated alternatives to licensing measuring competence and ability just as well as the Bar exam very low, with a 57% rating. Many responses centered around needing some measure of testing to ensure minimum competence and many supported implementing more mentoring opportunities for students, implementing CLE requirements, and perhaps incorporating supervised practice. Respondents also did not support diploma privilege as they felt that taking and passing the bar should be the minimum.