

THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

IN THE MATTER OF THE PROPOSED) NOTICE OF RULES HEARING
ADOPTION OF NEW RULES RELATING TO)
PUBLIC SERVICE PATHWAY PROGRAM FOR) No. 156
BAR ADMISSION TO BE DESIGNATED AS A)
NEW CHAPTER)
)
)

The Implementation Committee has proposed the adoption of the following rules for the implementation of a public service pathway program for bar admission. Additionally, the Board of Bar Examiners has proposed the adoption of regulations pertaining to the public service pathway program for bar admission should the Court adopt the Implementation Committee's proposed rules. The Court having determined that the proposed rules and regulations should be noticed for hearing, now therefore

NOTICE IS HEREBY GIVEN THAT ON FEBRUARY 18, 2025, at 10:00, C.T., at the Courtroom of the Supreme Court in the Capitol Building, Pierre, South Dakota, the Court will consider the following:

1. Proposed Rules to be Adopted as a New Chapter, ch. 16-16A - Public Service Pathway Program

16-16A-1. Definitions

Terms used in this chapter mean:

1. Board - the South Dakota Board of Bar Examiners;
2. Law school - the University of South Dakota Knudson School of Law;
3. NCBE - the National Conference of Bar Examiners;
4. Public Service - full-time employment within South Dakota with any federal, state, local, or tribal government, Dakota Plains Legal Services, or East River Legal Services;
and

5. Supervising attorney - an attorney who meets the requirements of § 16-18-2.9 and agrees to undertake the supervision of a participant in accordance with the provisions of §§ 16-18-2.1 to 16-18-2.10, inclusive.

16-16A-2.

An individual may be admitted to the public service pathway program if the student:

1. Is currently enrolled at the law school;
2. Completes an application for participation and is approved by the dean of the law school and the hiring authority of the host public service entity with whom the participant will be placed;
3. Satisfactorily completed all required 1L curriculum;
4. Satisfactorily completed all required 2L curriculum;
5. Satisfactorily completed the Professional Responsibility class;
6. Successfully completed 60 or more credits towards the individual's degree with the law school;
7. Is registered to take or has taken the Multistate Professional Responsibility Exam by November of the participant's 3L year;
8. Has never taken a bar examination or been admitted to the practice of law in another jurisdiction; and
9. Agrees to work full time with a host public service entity approved by the dean of the law school and the board as outlined in § 16-16A-3.

An individual is not required to meet these requirements at the time of application but must satisfy the eligibility requirements by the commencement of the program. The student must complete the application on a form provided by the dean of the law school. Notice of the application period shall be given in the same way internships and externships are noticed within the law school. The dean of the law school shall review applications and select program

participants. No more than ten students may be admitted to the program from one law school class.

16-16A-3.

A participant in the public service pathway program shall complete a minimum of 500 hours of work experience as a legal extern with a host public service entity approved by the dean of the law school. The host public service entity shall offer a variety of experiences and opportunities for each participant to demonstrate competence in the law and shall provide enough supervising attorneys necessary to effectively mentor and assist each participant. The law school shall provide training to each supervising attorney regarding relevant rules, regulations, and policies.

16-16A-4.

Notwithstanding § 16-16-6, an applicant may obtain admission to practice as an attorney in this state through the public service pathway program if the applicant:

1. Meets the requirements set forth in § 16-16-2;
2. Complies with the criminal background investigation as required by § 16-16-2.6;
3. Provides evidence of graduation from the law school;
4. Provides evidence of successful completion of the public service pathway bar admission program through the law school;
5. Provides a portfolio of work demonstrating minimum competence to the satisfaction of the board;
6. Demonstrates competence in Indian law either through successful completion of a board-approved Indian law course at the law school with the testing option or successful completion of a one-question examination on Indian law offered by the board following an applicant's successful completion of the program;
7. Achieves a score of 85 or higher on the Multistate Professional Responsibility Exam; and
8. Commits to providing at least two years of public service.

16-16A-5.

On or before October 1 during the semester of placement with a host public service entity, participants seeking admission to practice as an attorney in this state through the public service pathway program shall submit to the board:

1. An application on the form provided by the Board;
2. An application fee prescribed by the Supreme Court;
3. A photograph taken within six months of the date of application;
4. A current law school transcript;
5. Completed South Dakota Division of Criminal Investigation and United States Federal Bureau of Investigation fingerprint cards;
6. The required fingerprinting fee; and
7. A copy of the request for preparation of a character report and accompanying submissions to the NCBE with proof of payment of the fee prescribed by the NCBE.

An application is not complete until each of these items is received.

16-16A-6

Upon completion of the public service pathway program and the board's character and fitness investigation, the board shall make a recommendation regarding the participant's admission to practice as an attorney in this state to the Supreme Court for its consideration and order.

16-16A-7.

Upon admission to the practice of law through the public service pathway program, a participant shall complete two years of public service. The two-year commitment must be completed within three years of the date of admission to practice as an attorney in this state. The three-year period to complete the public service requirement is tolled during service in a state or federal judicial clerkship.

16-16A-8.

A participant seeking a waiver or extension of time to complete the public service requirement must submit a written

request for waiver or extension to the secretary of the board as soon as practicable. Upon receiving a waiver or extension of time to complete the public service requirement, the board shall conduct a hearing. The board may also initiate an investigation and hearing upon belief that a participant has not, or will not, complete the two-year public service commitment. To qualify for a waiver or extension, the participant must demonstrate, by a preponderance of the evidence, extraordinary circumstances, personal hardship, or that the public service employment was terminated for reasons beyond the control of the participant and the participant is unable to secure new employment in public service.

The board may take testimony and compel, by subpoena, the attendance of witnesses and the production of documents. Any member of the board may administer an oath or issue a subpoena. Upon conclusion of its investigation and hearing, the board shall issue a recommendation to the Supreme Court for its consideration and order. The board may recommend to extend the deadline to complete the public service, to waive the remainder of the term of public service, or to deny the request and revoke the participant's license to practice law in this state.

16-16A-9.

Each participant shall report to the secretary of the board the participant's place of employment until completion of the public service requirement. The participant shall file with the secretary of the board an affidavit upon a form provided by the board attesting to the completion of the public service requirement.

16-16A-10.

The Supreme Court shall appoint an oversight committee to monitor the public service pathway program and suggest changes. The committee must include one member from the law school, one from the board, and one from the Supreme Court.

16-16A-11.

Each participant shall comply with the South Dakota Rules of Professional Responsibility. Failure to do so may result in denial of admission to practice law as an attorney in this state and referral to the Disciplinary Board. The board may refer a participant to the Disciplinary Board for any violation of the Rules of Professional Responsibility. Failure to furnish information or answer truthfully the inquiries of the board pertinent to the participant's application may also result in denial of admission to practice law.

In any application for waiver or extension pursuant to § 16-16A-8, a participant shall disclose to the board any allegation of misconduct involving the participant.

16-16A-12.

The provisions of this chapter are effective for five years from the date of the order adopting these rules. The oversight committee shall make a recommendation to the Supreme Court whether the program should continue or be amended.

16-16A-13.

The board is authorized to promulgate policies and regulations necessary to implement this program.

16-16A-14.

The application for admission to practice law as an attorney in this state and all accompanying materials, including investigative reports and transcripts but not including portfolio submissions, are confidential and for the use of the board, the Supreme Court, and its staff in determining admission to the practice of law in the state. This rule does not prohibit the board from furnishing relevant information to the Disciplinary Board when the Disciplinary Board is conducting an investigation. The information and records may be released to the applicant or, with the applicant's consent, to another jurisdiction for purposes of admission to the practice of law.

2. Proposed Amendment to SDCL 16-16-6. Examination required of applicants to practice law--Educational requirements.

All applicants for admission, except those applying pursuant to § 16-16-7.6, 16-16-12.1, or §§ 16-16-12.3, and 16-16-12.4, or chapter 16-16A shall be required to pass satisfactorily an examination conducted by the Board of Bar Examiners. An applicant for permission to take an examination, in addition to the general qualifications prescribed in § 16-16-2, must furnish satisfactory evidence that he graduated from a law school accredited by the American Bar Association with a J.D. or LL.B. degree or that he will so graduate prior to the examination, or that he has successfully completed all of the requirements for graduation prior to the examination.

An applicant for admission who is a graduate of a foreign law school, not accredited by the American Bar Association, may apply for permission to take the South Dakota bar examination upon good cause shown if the graduate has passed the bar examination in another state and is a member in good standing of the bar of that state.

Explanation for Proposals 1 and 2.

The Steering Committee proposed that the Court consider an alternative pathway for bar admission that would encourage service in the public sector. The Steering Committee further suggested a program developed in collaboration with the University of South Dakota Knudson School of Law that would provide a supervised practice program administered by the law school with students being evaluated by the South Dakota Board of Bar Examiners to determine minimum competence for admission to the practice of law. The Court appointed an implementation committee to examine and propose rules for such a program. Proposal 1 consists of proposed rules which provide a framework for that program, including the qualifications of the participants in the program, how the program would be administered, as well as the details of the public service requirements and how that requirement would also be overseen. Proposal 2 modifies the existing rule to provide for admission to the practice of law through this alternative pathway.

3. Proposed Amendments to SDCL 16-18-2.1 and 2.9.

16-18-2.1. Legal assistance by law students--Purpose of provisions.

The bench and the bar are primarily responsible for providing competent legal services for all persons including those unable to pay for these services. As one means of providing assistance to lawyers and to encourage law schools to provide field placement instruction in legal work of varying kinds, §§ 16-18-2.2 to 16-18-2.10, inclusive, are adopted. For the purposes of §§ 16-18-2.1 to 16-18-2.10, "extern" means a student in a field placement program for academic credit offered by a school of law in accordance with the American Bar Association Standards for Approval of Law Schools, including a participant in the public service pathway program pursuant to chapter 16-16A, and "intern" means any other student providing legal assistance under the supervising lawyer.

16-18-2.9. Qualifications of supervising lawyer--Professional responsibility.

A supervising lawyer under whose supervision a legal intern or extern does any of the things permitted by §§ 16-18-2.4 to 16-18-2.7, inclusive, shall be a lawyer authorized to practice law in this state, and:

- (1) ~~Shall be approved by the dean of the school of law of the University of South Dakota or by the director of the externship program of the school of law; and such approval by the dean or the director may be general, may have time, scope, or case limitations, or may be on an ad hoc case by case basis; all~~

~~such as the dean or the director shall from time to time determine. The approval may be modified or withdrawn by the dean or the director at any time without notice or hearing and without any showing of cause. Such approval shall be in writing except that at the option of the dean or the director the approval may be oral for all matters relating to the externship program.~~

Shall be a member of the South Dakota bar, in good standing, and shall certify such in writing, and

- (2) Shall assume personal professional responsibility for the conduct of the legal intern or extern.

Explanation for Proposal 3.

Proposal 3 clarifies that participants in the public service pathway program must be certified pursuant to the provisions of SDCL ch. 16-18 to practice under the supervision of a licensed attorney. Furthermore, the proposal streamlines the process for certification for student practice. Currently, the rule requires the dean of the law school to approve both the student seeking the ability to practice as well as the student's supervising attorney. The proposal shifts the burden of ensuring that a supervising attorney is a licensed attorney in the state of South Dakota in good standing from the dean of the law school to the supervising attorney. Under the proposed amendment, the dean will still be required to certify a student but the supervising attorney will be required to attest that the supervising attorney is a member in good standing of the South Dakota bar and will assume responsibility for the conduct of the law student being supervised.

4. Proposed Regulations to Comprise the Appendix to SDCL Chapter 16-16A.

Regulation 1.

Each participant must prepare and submit a portfolio of work product. By May 31 of the year of placement, the board shall publish the requirements of the portfolio.

Regulation 2.

After each court appearance, each participant shall complete a form provided by the board detailing the case name and number, the subject matter of the litigation, the purpose of the appearance, and the feedback received from the supervising attorney, and, if any, the feedback received from the court or adjudicator. If the

court appearance is for a block of cases, the participant shall so indicate on the form and, in lieu of providing details on each case, the participant shall report only the most significant case. The participant shall provide this form to the secretary of the board each week, or as otherwise ordered by the board, and provide a copy to the supervising attorney. The supervising attorney shall review the form and complete a section pertaining to the accuracy of the form and submit the form via email to the secretary of the board.

Regulation 3.

Each participant shall complete the daily time and activity form provided by the board, which must detail the title of the legal matter, the date, the scope of the activity, the time spent in 15-minute increments, and what was observed. Additionally, in a separate word document attached to the form, the participant shall also provide a short synopsis of what the participant learned if the activity involved observation or, if the activity required participation, what the participant did correctly and what the participant could have done differently and why. The participant shall submit the daily time and activity form and attachment to the secretary every week or as otherwise ordered by the board.

Regulation 4.

A participant shall inform the secretary of the board of any hearings or trials which would provide an opportunity for observation of the participant actively engaging before the court or adjudicator. It is preferable that notice of three days or more be given of such events.

Regulation 5.

The board will regularly assess each participant. The board shall apprise each participant of the participant's progress by November 15 of the year of placement. The board's assessment pursuant to this regulation is preliminary and non-binding. The assessment does not constitute a waiver of the consideration of facts or conduct that are either later discovered or occur after the board's assessment under this regulation.

Explanation for Proposal 4.

Proposal 4 is comprised of the regulations proposed by Board of Bar Examiners for adoption by the Court if the Court chooses to adopt and implement the public service pathway program. The proposed regulations set forth deadlines for the Board's publication of

portfolio requirements and preliminary assessments. The regulations also set forth certain documentation requirements for participants in the public service pathway program.

The proposed rules, regulations, and amendments are not based upon a Federal Rule of Civil Procedure and should not affect other existing rules or statutes.

Any person interested may appear at the hearing and be heard, provided that all objections or proposed amendments shall be reduced to writing and filed with the Clerk of the Supreme Court no later than February 7, 2025. Subsequent to the hearing, the Court may reject or adopt the proposed amendments of any rule germane to the subject thereof.

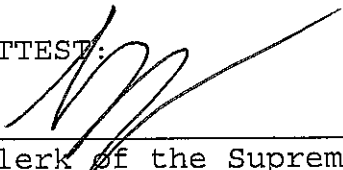
Notice of this hearing shall be made to the members of the State Bar by electronic mail notification, by posting notice at the Unified Judicial System's website at <https://uj.s.sd.gov/Supreme Court/Hearings.aspx> or the State Bar of South Dakota's website <https://www.statebarofsouthdakota.com>.

DATED at Pierre, South Dakota this 10th day of January,

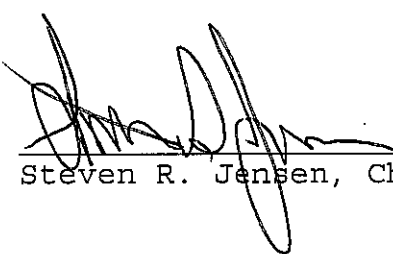
2025.

BY THE COURT:

ATTEST:



Clerk of the Supreme Court
(SEAL)



Steven R. Jensen, Chief Justice

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

JAN 10 2025


Clerk

SOUTH DAKOTA BAR LICENSURE
IMPLEMENTATION COMMITTEE

Public Service Pathway to Bar Admission Proposal



December 2024

Table of Contents

Introduction	3
The Committee and Its Work	3
Overview of Proposed Plan	4
Application.....	4
Externship.....	5
Bar Admission	5
Public Service	6
Oversight Committee.....	7
Discussion of Essential Issues	8
Assessment of Minimum Competence	8
Indian Law.....	13
Character and Fitness.....	14
Length of Public Service Commitment.....	14
What Qualifies as Public Service.....	15
Failure to Complete Public Service Commitment.....	16
Conclusion	16
Endnotes	18
Appendix A	21
Implementation Committee Meeting Minutes: March 4, 2024	21
Implementation Committee Meeting Minutes: April 19, 2024.....	22
Implementation Committee Meeting Minutes: May 29, 2024.....	24
Implementation Committee Meeting Minutes: June 24, 2024.....	27
Implementation Committee Meeting Minutes: July 19, 2024.....	31
Implementation Committee Meeting Minutes: August 12, 2024.....	33
Implementation Committee Meeting Minutes: November 12, 2024.....	34

Introduction

In 2023, the South Dakota Supreme Court appointed a steering committee to examine the needs of legal providers, including the bar admissions process. In its final report issued in December of 2023, the Steering Committee recommended a streamlined pathway to bar admission for public interest. The Steering Committee suggested a program be developed in collaboration with the University of South Dakota Knudson School of Law (hereinafter “Law School”) during which law students would engage in a supervised practice during law school which would be evaluated by the South Dakota Board of Bar Examiners (hereinafter “Board”) to determine minimum competence. These participants would then be admitted to the bar without examination with a two or three-year commitment to public service.

The Committee and Its Work

The Implementation Committee was subsequently appointed in January of 2024 by the South Dakota Supreme Court to propose a plan to implement a public service pathway to admission. The Committee is comprised of a variety of stakeholders including members of the judiciary, long-time members of the bar, new attorneys, a member of the Board, and individuals currently engaged in the public service sector. Committee members were:

- **Justice Scott Myren**, South Dakota Supreme Court
- **Hon. Jane Wipf Pfeifle**, Retired Circuit Judge, Seventh Circuit
- **Neil Fulton**, Dean, University of South Dakota Knudson School of Law
- **J. Crissman Palmer**, Gunderson, Palmer, Nelson & Ashmore, LLP
- **Daniel K. Haggart**, Minnehaha County State’s Attorney
- **Eric D. Witcher**, Director, Pennington County Public Defender’s Office
- **Josey Blare**, Lynn, Jackson, Shultz & Lebrun, P.C.
- **Rachelle M. Norberg**, Gunvordahl, Gunvordahl, & Norberg Prof. L.L.C.
- **John T. Richter**, General Counsel, South Dakota Retirement System
- **Ann F. Mines Bailey**, Chief of Bar Exam/Secretary, Board of Bar Examiners

The Committee met seven times throughout the course of 2024. (Meeting minutes are attached hereto as Appendix A.) In drafting the proposed program, the Committee focused on how best to determine minimum competence and provide public service. The following will provide the Committee’s proposed plan and its

analysis of the most essential topics in designing the Public Service Pathway Program.

Overview of Proposed Plan

Like the Steering Committee, the Implementation Committee proposes the authorization of a five-year pilot program for a public service pathway to bar admission. The purpose of the Program is to provide alternative admission to the bar while encouraging public service practice. The Program will be comprised of an extensive law school program to assess academic achievement and its practical application; a review of the competence of the participants by the Board; and a character and fitness review of each participant by the Board. Upon completion of the Law School Program, satisfactory reviews by the Board, and a finding by the Board that the participant meets the character and fitness requirements, an applicant will be granted admission. This admission carries a requirement that the participant completes two or three years of public service.

Application

Students enrolled at the Law School may apply to participate in the Public Service Pathway Program if the student:

1. Is currently enrolled at the Law School;
2. Completes an application for participation and is approved by the dean of the Law School and the hiring authority of the entity with which they will be placed;
3. Has satisfactorily completed all required 1L curriculum, all required 2L curriculum, and the Professional Responsibility class;
4. Has successfully completed 60 or more credits towards their degree with the Law School;
5. Has taken, or is registered to take, the Multistate Professional Responsibility Examination (MPRE) by November of 3L year; and
6. Agrees to work full time with a host public service entity approved by the dean of the Law School and the Board.

Not more than ten students may be admitted from one law school class. The application form will be determined by the dean. Notice of the application period will be given in the same manner that the dean notices internships/externships. The dean will be responsible for reviewing the applications and selecting the participants. It is anticipated that, at least initially, the dean will be recruiting applicants.

The Program will be offered the fall semester of the participant's third year of law school and will require a minimum of 500 hours of work experience. Participants may, with the approval of the dean, be allowed to take outside classes of up to three credit hours.

Externship

Upon entry into the Program, the Law School shall place the participant in an externship with a public service entity which has been approved by the Law School. The placement entity shall provide sufficient supervising attorneys who will mentor and assist the participants in obtaining a variety of experiences which will satisfy the requirements of the Program as determined by the dean of the Law School, as well as the requirements set forth by the Board. The Law School, in collaboration with the Board, will provide training to the supervising attorneys to apprise them of the requirements and expectations.

During the placement, participants will develop a portfolio of written and oral work which will be reviewed by the Board. The portfolio will be comprised of documents and oral or video submissions as determined by the Board. The Board shall make the requirements of the portfolio public and shall provide written notice of those requirements to the dean of the Law School no later than two months before the commencement of the fall semester.

Bar Admission

A participant may obtain admission to the South Dakota bar through the Public Service Pathway Program if the participant:

1. Meets the requirements set forth in SDCL 16-16-2;
2. Complies with the criminal background investigation as required by SDCL 16-16-2.6;
3. Achieves a score of 85 or higher on the Multistate Professional Responsibility Exam;
4. Provides evidence of successful completion of the Public Service Pathway Program through the Law School and graduation from the Law School;
5. Provides a portfolio of work demonstrating minimum competence to the satisfaction of the Board; and
6. Demonstrates competence in Indian law either through completion of an approved Indian Law course completed at the Law School (with the testing option) or passage of a one-question examination on Indian law which the

Board will offer following completion of the Law School Public Service Pathway Program.

Like all applicants for admission to the bar, participants must apply for admission. To afford sufficient time for the character and fitness report to be generated and to place the Board on notice as of the need to review an individual's work product, it is recommended that the deadline for application for these participants be on or before October 1 of the semester of their placement.

The application should include:

1. A South Dakota bar application;
2. The fee prescribed by the Court;
3. A recent photograph (taken within six months of the date of application);
4. A law school transcript;
5. Completed DCI and FBI fingerprint cards; and
6. The required fingerprinting fee.

Each participant will also submit by October 1 during the semester of placement, a request for preparation of a character report and accompanying application to the National Conference of Bar Examiners (NCBE) with the accompanying fee prescribed by the NCBE.

Public Service

Upon admission to the practice of law through this Public Service Pathway Program, participants shall complete two or three years of public service within South Dakota. This commitment must be completed within three years of the date of admission to the bar if a two-year commitment is required or within four years if a three-year commitment is required. If a participant chooses to serve a state or federal clerkship, the time for completing the public service commitment will be tolled and not begin to run until completion of the clerkship. Failure to complete the commitment within the allotted time, except when a waiver or extension has issued, may result in the revocation of the participant's license by the Court.

A participant may seek a waiver of a portion of the public service requirement, or an extension of time to complete the requirement. The waiver or extension may be requested by filing a petition with the secretary of the Board as soon as practicable. To qualify for a waiver or extension, the participant must demonstrate extraordinary circumstances, personal hardship, or that the public service employment is terminated for reasons beyond the control of the participant and the participant is

unable to secure new employment in public service. The Board is empowered to make inquiries and investigate the appropriateness of issuing a waiver. The Board may take and hear testimony and compel, by subpoena, the attendance of witnesses and the production of books, papers, and documents. Any member of the Board may administer oaths and issue subpoenas. Upon conclusion of its investigation, if any, the Board shall issue a recommendation to the Court for its consideration and order. Additionally, while failure to complete the public service requirement alone is not a violation of the Rules of Professional Responsibility, the Board is authorized to make referrals to the Disciplinary Board of the South Dakota Bar when appropriate.

Participants who have received their license through this Program shall report to the secretary of the Board their place of employment until such time as they have satisfied the two-year commitment. At the conclusion of the commitment, the participant shall file with the secretary of the Board an affidavit upon a form provided by the secretary of the Board, and approved by the Board, attesting to the completion of the public service commitment.

If the Board becomes aware of a participant who has not completed the public service commitment, or will not be able to complete the requirement within the deadline, the Board may inquire or investigate and make recommendations to the Court.

Oversight Committee

Finally, the Committee recommends the formation of an oversight committee. The oversight committee should be comprised of three individuals appointed by the Court—one individual from the Law School, one from the Board, and one from the Court. The purpose of the oversight committee would be to monitor the Program, propose changes to the process, and to make a final recommendation at the conclusion of the five-year pilot.

Discussion of Essential Issues

Assessment of Minimum Competence

In reviewing the issue of minimum competence, the Committee looked at the current methods of assessment, the most recent and extensive studies regarding the assessment of minimum competence, and the requirements set forth by the South Dakota Supreme Court.

Currently, South Dakota requires that all attorneys¹ take and pass what is commonly referred to as “the bar examination².” The bar examination is comprised of the Multistate Performance Test (MPT), the Multistate Essay Exam (MEE), and the Multistate Bar Examination (MBE).

The **MPT** is comprised of two questions for which examinees are provided a “file” (documents providing the facts of the case) and a “library” (documents providing the specific law such as cases or statutes). Examinees are given 90 minutes for each question. During those 90 minutes, examinees are required to review the file and library and answer the pertinent questions thus demonstrating the ability to identify legal principles and apply those principles to the facts at hand.

The **MEE** is a three-hour exam comprised of six essay questions which provide a fact pattern and require the examinee to provide analysis based upon the law which they have previously studied. In South Dakota, one of the six questions is an Indian law question which is drafted by one of the sitting members of the Board. The remaining five questions will involve one of the following areas: business associations (agency and partnership; corporations and limited liability companies), civil procedure, conflict of laws, constitutional law, contracts (including Article 2 [sales] of the Uniform Commercial Code), criminal law and procedure, evidence, family law, real property, torts, trusts and estates (decedents’ estates; trusts and future interests), and Article 9 (secured transactions) of the Uniform Commercial Code. A question may include issues involving more than one area of law.

The **MBE** is comprised of 200 multiple choice questions administered over two, three-hour testing periods. The MBE covers the following legal topics: civil procedure, constitutional law, contracts, criminal law and procedure, evidence, real property, and torts.

Thus, upon successful completion of the bar examination, an examinee **will have been** tested on:

- Civil Procedure

- Constitutional Law
- Contracts
- Criminal Law and Procedure
- Evidence
- Real Property
- Torts

and **may have been** tested on:

- Business Associations
- Conflict of Laws
- Family Law
- Trusts and Estates
- Secured Transactions

This version of the bar examination, however, is currently undergoing a major overhaul. Beginning in July of 2026, NCBE will be offering the NextGen bar examination, and the current version will be phased out with its final test date February of 2028.

The **NextGen** bar exam will test the following foundational concepts and principles: business associations, civil procedure, constitutional law, contract law, criminal law, evidence, real property, torts, family law³, trust and wills⁴, legal research, legal writing, issue spotting and analysis, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, client relationship and management.

The catalyst for the NCBE's change in the format and testing areas of the bar examination was its own task force which reviewed the current assessment and made recommendations that the bar examination "should test fewer subjects and should test less broadly and deeply within the subjects covered, that greater emphasis should be placed on assessment of lawyering skills to better reflect real-world practices [.]"⁵ Thus, there is a fundamental shift from the focus on areas of knowledge to using those foundational areas of knowledge to test foundational skills.

The Institute for the Advancement of the American Legal System (IAALS) also conducted a study to develop a definition of minimum competence and to review methods of assessment. The IAALS came up with twelve building blocks of competence and made ten recommendations⁶ regarding assessment. The essence of the study is that jurisdictions need to focus on more than rote memorization of topics and should be looking at practical skills that attorney's use daily.

In addition to these two studies, the Committee looked to SDCL 16-16-1.1⁷ and SDCL 16-16-10⁸ for guidance in determining what should be assessed during a minimum competence assessment. The Committee then examined how the Public Service Pathway Program would compare to the benchmarks set by the NCBE report, the IAALS study, and SDCL 16-16-1.1. The following charts best demonstrate that comparison.

Comparison of Areas of Foundational Knowledge

**Indicates that the subject may be tested but is not required to be tested.*

Current Bar Exam	NextGen	Public Service Pathway Program	Required by Rule ⁹
*Business Associations	X		
*Conflict of Laws			
*Family Law	Tested in performance tasks for 2026-2028. Tested with foundational concepts beginning in July 2028.	Participants may have to demonstrate knowledge during Pathway Program.	
*Trusts and Estates	In performance tasks in 2026-2028		
*Secured Transactions			
Torts	X	Coursework Participants may have to demonstrate knowledge during Pathway Program.	
Real Property	X	Coursework Participants may have to demonstrate knowledge during Pathway Program.	
Evidence	X	Coursework Minimum 500 hours in Pathway Program	
Criminal Law and Procedure	X	Coursework Minimum 500 hours in Pathway Program	
Contracts	X	Coursework Participants may have to demonstrate knowledge during Pathway Program.	
Constitutional Law	X	Coursework	

		Minimum 500 hours in Pathway Program	
Civil Procedure	X	Coursework Participants may have to demonstrate knowledge during Pathway Program.	
No corresponding requirement		One Question Exam or Approved Indian Law course at Law School Participants may have to demonstrate knowledge during Pathway Program.	Indian Law (SDCL 16-16-10 and Regulation 3)

Comparison of Areas of Foundational Skills

NCBE's Areas of Competence (NextGen)	IAALS Building Blocks Provisions	SDCL 16-16-1.1	How Demonstrated by Pathway Program?
Legal Research	2. Understanding of legal processes and sources of law 3. Understanding of threshold concepts in many subjects 6. Ability to identify legal issues 7. Ability to conduct research 9. Ability to see the "big picture" of client matters 12. Ability to pursue self-directed learning	SDCL 16-16-1.1(2), (3), (4), and (8).	<ul style="list-style-type: none"> • Coursework • Minimum 500 hours in Pathway Program • Portfolio documents including pleadings, motions, findings of fact
Legal Writing	2. Understanding of legal processes and sources of law 4. Ability to interpret legal materials 6. Ability to identify legal issues 7. Ability to conduct research 8. Ability to communicate as a lawyer 9. Ability to see the "big picture" of client matters	SDCL 16-16-1.1(2), (3), (8), and (10).	<ul style="list-style-type: none"> • Coursework – Law School requires a writing course each year. • Minimum 500 hours in Pathway Program • Portfolio documents • Potentially sitting for the Indian law question in lieu of the Indian Law class

Issue Spotting and Analysis	<p>2. Understanding of legal processes and sources of law</p> <p>4. Ability to interpret legal materials</p> <p>6. Ability to identify legal issues</p> <p>7. Ability to conduct research</p> <p>9. Ability to see the “big picture” of client matters</p> <p>12. Ability to pursue self-directed learning</p>	SDCL 16-16-1.1(2), (4), (8), (9), and (10).	<ul style="list-style-type: none"> • Coursework – Law School requires a writing course each year. • Minimum 500 hours in Pathway Program • Portfolio documents • Potentially sitting for the Indian law question in lieu of the Indian Law class.
Investigation and Evaluation	<p>5. Ability to interact effectively with clients</p> <p>6. Ability to identify legal issues</p> <p>7. Ability to conduct research</p> <p>9. Ability to see the “big picture” of client matters</p> <p>12. Ability to pursue self-directed learning</p>	SDCL 16-16-1.1(2), (3), (4), (7), (8), (9), and (10).	<ul style="list-style-type: none"> • Coursework – Law School requires a writing course each year. • Minimum 500 hours in Pathway Program • Portfolio documents • Potentially sitting for the Indian law question in lieu of the Indian Law class.
Client Counseling and Advising	<p>5. Ability to interact effectively with clients</p> <p>7. Ability to conduct research</p> <p>8. Ability to communicate as a lawyer</p>	SDCL 16-16-1.1(1) through (10).	<ul style="list-style-type: none"> • Minimum 500 hours in Pathway Program • Portfolio documents
Negotiation and Dispute Resolution	<p>1. Ability to act professionally and in accordance with the rules of professional conduct</p> <p>7. Ability to conduct research</p> <p>8. Ability to communicate as a lawyer</p>	SDCL 16-16-1.1(1) through (10).	<ul style="list-style-type: none"> • Minimum 500 hours in Pathway Program • Portfolio documents
Client Relationship and Management	<p>5. Ability to interact effectively with clients</p> <p>8. Ability to communicate as a lawyer</p>	SDCL 16-16-1.1(1), (3), (6), (7), (8), (9), and (10).	<ul style="list-style-type: none"> • Minimum 500 hours in Pathway Program • Portfolio documents
No corresponding requirement	<p>1. Ability to act professionally and in accordance with the rules of professional conduct</p>	SDCL 16-16-1.1(1) through (10).	<ul style="list-style-type: none"> • Coursework • Exam – a score of 85 or higher on the Multistate Professional Responsibility Exam • Minimum 500 hours within the Pathway Program

			<ul style="list-style-type: none"> • Character and Fitness Review
No corresponding requirement	10. Ability to manage a law-related workload responsibly	SDCL 16-16-1.1(3), (4), (7), (8), (9), and (10).	<ul style="list-style-type: none"> • Minimum 500 hours in the Pathway Program • Submission of the portfolio
No corresponding requirement	11. Ability to cope with the stresses of legal practice	SDCL 16-16-1.1(1) through (10)	<ul style="list-style-type: none"> • Minimum 500 hours in the Pathway Program • Submission of the portfolio • Character and Fitness Review

- Based upon these comparisons, as set forth in the charts above, the Public Service Pathway Program will assess many of the areas of foundational knowledge that are routinely tested in the current iteration of the bar examination and the NextGen exam.
- The Public Service Pathway Program will assess all the foundational skills that have been found to be essential in the practice of law.
- Finally, the Public Service Pathway Program will satisfy the requirements of SDCL 16-16-1.1 and 16-16-10.
- The Committee is confident that the Public Service Pathway Program will provide a holistic assessment of the minimum competence of the participants.

Indian Law

South Dakota requires that its attorneys demonstrate competence in Indian law.¹⁰ The Committee has reviewed this requirement and recommends that it also be applied to applicants admitted through the Public Service Pathway Program. The Committee further recommends that applicants seeking admission through the Public Service Pathway Program may satisfy this requirement by either successfully passing a one-question Indian law exam offered by the Board or by successfully completing the Indian Law course with the testing option offered by the Law School.

Both the Steering Committee and this Committee received public comment regarding this issue. The Committee took all comments into consideration in making this recommendation. While the comments suggested that the Indian law requirement should not be satisfied by taking an Indian Law class, the Committee finds that some flexibility is necessary in this alternative pathway program. The

most important purpose of the Indian law requirement is to ensure that the attorneys practicing in this state are able to recognize potential Indian law issues and act accordingly. This assurance can be achieved through the completion of a well-rounded Indian Law class which comports with the definition of “Indian Law” as set forth in Regulation 3. See SDCL Ch. 16-16, § 3. “Indian Law”, as defined by the Board, includes the “basic principles of federal Indian law, including but not limited to civil and criminal jurisdiction, the Indian Civil Rights Act, the Indian Child Welfare Act, and the Indian Gaming Regulatory Act.” Referring to this definition should alleviate some of the concerns that the requirement could be satisfied by taking a class focusing on the law of only one particular Tribe or a class that focused only on jurisdiction.

Additionally, the Committee understands that the Indian Law course as currently offered at the Law School may be taken with a writing option or a testing option. Thus, to ensure that the applicant has a wide range of knowledge, the Committee recommends that the Indian law requirement can only be satisfied by the Indian Law course with the testing option.

Character and Fitness

The Committee recommends that applicants seeking admission through the Public Service Pathway Program undergo the same rigorous character and fitness review utilized for applicants who are admitted by examination or those admitted without examination because of years of lawful practice in another jurisdiction. Accordingly, the Committee recommends that these applicants complete all the same character and fitness application requirements, including fingerprinting, completion of a character and fitness report request, and submission of all the applicable fees.

Length of Public Service Commitment

In its report, the Steering Committee suggested the admission through this Program be conditioned on a two or three-year public service commitment. Discussion was held as to whether two years was a sufficient commitment to recoup the time and resources expended by the Law School, the Board, and the Court in the implementation of this Program. Several of the Committee members who currently engage in public service practice noted that, in their experience, an individual generally knows if he/she is suited to public service within eighteen months of practice. Moreover, it takes approximately one year for a new attorney to confidently practice. As a result, the Committee does not recommend less than two years.

The Committee also considered whether the public service commitment should be longer than two years. The Committee is split on whether the public service commitment should be two years or three years. A lengthier period of service would provide a greater return on the investment made in providing this Program. Additionally, it could encourage participants to remain in public service as they work toward loan forgiveness.¹¹ Moreover, the Committee recognizes that it could be more difficult to increase the length of the public service commitment later should the Program be permanently adopted. The Committee also agrees, however, that recruiting participants will be more challenging if a three-year commitment is expected. Also, based upon the experience of the Committee members, an individual will conclude sometime within the first one to one-and-one-half years whether public service is the right career path for him/her. Compelling an individual to stay in public service once he/she has determined that public service is not the right path for him/her provides no benefit to the participant, the employer, or the public. Furthermore, a shorter public service requirement may entice individuals not currently contemplating public service to try public service and find it to be the right fit. As a result, there is a split among the Committee as to whether the appropriate public service requirement is two years or three years.¹²

What Qualifies as Public Service

The Committee also engaged in extensive discussion regarding what types of employment could satisfy the public service requirement. The Committee concluded that work for any federal, state, local, or tribal government should qualify. The Committee also concluded that work for Dakota Plains Legal Services and East River Legal Services should also fulfill the requirement. The Committee further recommends that only full-time employment with these entities should discharge the obligation.

The Committee also contemplated whether clerkships should satisfy the public service commitment. While clerkships are a vital service to the public, such positions are generally temporary. Moreover, while a clerkship provides invaluable experience in the practice of law, it does not necessarily lead to a career in the public service sector. Accordingly, the Committee recommends that clerkships not qualify for satisfaction of the requirement. However, not wanting to deter participation in the Program, the Committee recommends a compromise—that the time for completion of public service requirement would be tolled during the term of the clerkship. Thus, those individuals who have the opportunity to serve as

clerks will not have to choose between the Public Service Pathway Program and the immeasurable opportunity of a clerkship.

Failure to Complete Public Service Commitment

Finally, the Committee considered the possibility of a participant failing to discharge the public service requirement. The Committee recognizes that one is unable to anticipate the twists and turns of life and the need for some flexibility to adapt to those unforeseeable issues. Accordingly, the Committee recommends the Program include a “safety valve” by providing authority to the Board and the Court to review issues on a case-by-case basis. First, the Committee recommends that a waiver be allowed in extraordinary circumstances, in cases of personal hardship (such as need to relocate due to a spouse’s employment or the need to provide care for a parent), or in those instances when the public service employment was terminated for reasons beyond the control of the participant and the participant is unable to secure new employment in public service. The burden should always be on the participant to demonstrate that he/she qualifies for the waiver. The Committee recommends the adoption of a process similar to the procedures utilized for bar admission wherein the Board can receive the request for waiver, conduct an investigation/hearing, and make a recommendation to the Court. In this instance, upon completion of the investigation and hearing, the Board could make a recommendation of extending the deadline to complete the public service, waiving the remainder of the public service requirement, or denial of the request for waiver. The Board could also recommend revocation of the license. The Court would then be able to make a decision based on the record before it.

Conclusion

There is no question that it is essential that each attorney be assessed for minimum competence and character and fitness before admission to the South Dakota Bar. There is also no question that the methodology of assessing candidates to ensure that they possess the minimum competence is changing. Assessments are expanding to focus on foundational skills rather than rote knowledge. This trend is evident in the imminent changes in the bar examination itself. The proposed Public Service Pathway Program offers an opportunity to explore a more holistic methodology of the assessment of minimum competence while maintaining a thorough review of an applicant’s character and fitness. The Committee believes this Program, as administered by the Law School and critically reviewed by the Board, will ensure that these participants will meet the standard of minimum

competence and will encourage new lawyers to enter into practice in the public sector.

For the Court's consideration, the Committee has proposed a series of rules regarding the Program. These proposed rules also include some modifications to the student practice rules found in SDCL Ch. 16-18. Additionally, for the consideration of the Board, a series of regulations outlining potential requirements and processes are also offered.

Endnotes

1. An exception to this requirement is that those attorneys who are licensed in another jurisdiction and have been engaged in the active and continuous practice of law for three of the last five years are not required to test.
2. Attorneys are also required to take the Multistate Professional Responsibility Examination (MPRE). The focus of the MPRE is on the professional rules of responsibility. This exam is not taken at the same time as the bar examination. Rather, it is offered three times a year (March, August, and November).
3. “From July 2026 through February 2028, family law concepts will appear on every NextGen exam in a performance task and may also be included in integrated question sets. During this period, family law concepts will be tested with the provision of legal resources. Starting in July 2028, family law will be included in the foundational concepts and principles tested on the NextGen bar exam and will be tested in the same manner as the other foundational concepts and principles.” NCBE, *About the NextGen Bar Exam*, <https://www.ncbex.org/exams/nextgen> (last visited November 26, 2024).
4. “From July 2026 through at least February 2028, trusts and estates concepts will appear on every NextGen exam in a performance task and may also be included in integrated question sets. During this period, trusts and estates concepts will be tested with the provision of legal resources.” NCBE, *About the NextGen Bar Exam*, <https://www.ncbex.org/exams/nextgen> (last visited November 26, 2024).
5. NCBE Testing Task Force, *Overview of Recommendations for the Next Generation of the Bar Examination*, <https://nextgenbarexam.ncbex.org/themencode-pdf-viewer/?file=https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Next-Gen-Bar-Exam-Recommendations.pdf#zoom=auto&pagemode=thumbs> (last visited November 26, 2024).

The Committee recognizes that not every area of law can be assessed for minimum competence through the Public Service Pathway Program. However, the Committee notes that not every area of law is currently assessed by the bar examination nor will be by the NextGen bar examination.

6. The recommendations include a finding that “written exams are not well suited to assessing all aspects of minimum competence.” Deborah Jones Merrit and Logan Cornett, IAALS study, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence*, https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar_pre_print.pdf (last visited November 26, 2024).
7. SDCL 16-16-1.1 provides as follows:

[a]pplicants must be able to demonstrate the following essential eligibility requirements for the practice of law:

 - 1) The ability to be honest and candid with clients, lawyers, courts, the board, and others;
 - 2) The ability to reason, recall complex factual information, and integrate that information with complex legal theories;
 - 3) The ability to communicate with clients, lawyers, courts, and others with a high degree of organization and clarity;
 - 4) The ability to use good judgment on behalf of clients and in conducting one's professional business;
 - 5) The ability to conduct oneself with respect for and in accordance with the law;
 - 6) The ability to avoid acts that exhibit disregard for the rights or welfare of others;
 - 7) The ability to comply with the requirements of the Rules of Professional Conduct, applicable state, local, tribal, and federal laws, regulations, statutes, and any applicable order of a court or tribunal;
 - 8) The ability to act diligently and reliably in fulfilling one's obligations to clients, lawyers, courts, and others;
 - 9) The ability to use honesty and good judgment in financial dealings on behalf of oneself, clients, and others; and
 - 10) The ability to comply with deadlines and time constraints.
8. SDCL 16-16-10 provides:

[t]he subjects upon which applicants shall be examined shall be such as the Board of Bar Examiners deems necessary to prepare properly for the practice of law in this state, including the subjects of legal ethics and Indian Law. The board shall make public such subjects, giving full and ample public notice of any change or addition thereto and written notice to the dean of the Law School, University of South Dakota.”

9. SDCL 16-16-10 requires the examination of legal ethics. This requirement is satisfied through the MPRE which is taken separately from the bar examination.
10. Attorneys who are admitted without examination pursuant to SDCL 16-16-12.1 and 12.2 are not required to demonstrate competence in the area of Indian law.
11. Individuals who are employed by a government or not-for-profit organization may be eligible for the Public Service Loan Forgiveness (PSLF) Program. The PSLF Program provides an opportunity for eligible borrowers to have qualifying student loans forgiven after they have served full time at a public service organization for at least ten years and have made 120 qualifying payments. (Details regarding the PSLF Program can be found at <https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service>.)

Requiring three years of public service may provide an incentive for those working towards student loan forgiveness as they would have completed three of the ten years required for loan forgiveness completed versus two years. Likewise, although clerkships do not satisfy the public service requirement for the Public Service Pathway Program, clerkships do qualify as public service for PSLF Program. Thus, if an individual has a two-year clerkship and three years through the Public Service Pathway Program, they would be halfway toward loan forgiveness which may entice them to stay in public service.

12. The proposed rules contemplate a two-year public service commitment. Should a three-year commitment be determined to be appropriate, the Committee would recommend that the rules be altered to give participants four years to complete the commitment.

Appendix A

Implementation Committee Meeting Minutes: March 4, 2024

Attendance: Justice Myren, Daniel Haggar, Hon. Jane Wipf Pfeifle, Neil Fulton, Cris Palmer, Josey Blare, Rachelle Norberg, John Richter, and Ann Mines Bailey

The meeting began with introductions of committee members.

The discussion then began with what the Committee expects from a recent law school graduate.

Dean Fulton discussed the law school curriculum and what classes are required for graduation.

The question was then posed if this public pathway should test the competencies covered by the bar exam.

Discussion was then had regarding whether this pathway should include rural practice at this time.

Discussion was had regarding the need to demonstrate an ability to analyze and write/draft but that a basic understanding of both civil and criminal subjects is required for success.

Discussion was also had regarding the reliance of new attorneys on more experienced attorneys and how essential that is in a rural practice setting.

Concern was also expressed regarding how to get buy-in from the local political forces (county commissions, etc.).

Apparent Consensus Items:

- This Program should evaluate the same skills and knowledge as the NextGen exam (Foundational concepts: civil procedure, contract law, evidence, torts, business associations, constitutional law, criminal law, real property and Foundation lawyering skills: legal research, legal writing, issue spotting and analysis, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, client relationship and management).
- The Program will not be able to assess every area.
- The nature of the placement will control the areas that will be evaluated; and
- We will begin with Dean Fulton's proposed Program elements.

Implementation Committee Meeting Minutes: April 19, 2024

Attendance: Justice Myren, Hon. Jane Wipf Pfeifle, Neil Fulton, Cris Palmer, Josey Blare, Rachelle Norberg, John Richter, and Ann Mines Bailey

The meeting began with a review of the minutes from the 3/4/24 meeting.

The Committee then discussed character and fitness reviews. After the process was described for the current process, the consensus was that NCBE should do the background investigations if possible and the process should be timed so that they could be sworn in after graduation.

The Committee then discussed supervisor training. Dean Fulton described the training provided for supervisors for externships and elaborated that this training should include evaluation of participants, supervision of a young lawyer, and perhaps, some areas of substance such as professional responsibility and engagement. The members of the Committee believed that training is critical especially to bring consistency to evaluations.

The Committee also discussed whether the participants would be required to take the bar prep class as that is a current requirement of the law school.

The Committee then turned to the length of the Program. Dean Fulton suggests 600 hours. Hon. Wipf-Pfeifle agreed that it should be a minimum of 500 hours. Ms. Blare and Ms. Norberg agreed that it should be a semester-long program.

The Committee then discussed whether participants should be allowed to work. The consensus was that it was unrealistic to ask participants to refrain from working but that the Program should be their focus and main concern. The Committee was in favor of not prohibiting work. The Committee overall desires that the participants not be allowed to take other classes during the Program but recognizes that there may be some instances where it should be permissible and that the Dean would be in the best position to authorize.

The Committee further discussed what can be done to ensure that the participants maintain full-time student status. The Dean relayed that once the Program is created and rules promulgated, the Law School will have to essentially “reverse engineer” but would structure the academic credit to keep participants on track for graduation.

The Committee then discussed what would satisfy the public service requirements. Dean Fulton encouraged the Committee to cast the broadest net possible for post-graduation possibilities.

The dates and times for the next meetings were set with the Committee agreeing to May 29 from 1pm-3pm CT and June 21 from 9am-11am CT.

Apparent Consensus Items:

- Pathway candidates should undergo the same character and fitness process as those sitting for the bar exam – which includes a character and fitness review report from NCBE paid for by the applicant.

- Supervisor training is an essential part of the Program. The training will be handled by the Law School and the Board of Bar Examiners will be involved to share their expectations.
- The Public Service Pathway Program will be a one semester program with a minimum of 500 -600 hours. Participants will not be prohibited from working. The committee recommends not taking classes during the Program; however, the Dean should be vested with the authority to approve taking classes under extraordinary circumstances.

Follow-Up Items

- What employment that satisfies public service requirement and whether it must be full-time.
- Grading of the portfolio by the supervisors and the Board – including various levels rather than just a pass/fail type of grading.
- What happens if a participant is unable to complete the Program?

Implementation Committee Meeting Minutes: May 29, 2024

Attendance: Justice Myren, Hon. Jane Wipf Pfeifle, Daniel Haggar, Neil Fulton, Cris Palmer, Eric Whitcher, Josey Blare, Rachelle Norberg, John Richter, and Ann Mines Bailey

The meeting began with a review of the minutes from the 4/19/24 meeting.

The Committee then turned to the public service requirement. Discussion was had as to whether the requirement could be fulfilled with part-time service or if full-time employment was required. Acknowledgement was made that there are many part-time state's attorney offices. The overall feeling was that it takes 18 months to two years to learn the job.

Discussion was then had as to the purpose of a public service requirement. Dean Fulton expressed that it is the pilot program is an investment in the participants with a return investment made by the participants in the State. Dan Haggar expressed that the public service requirement will help encourage county commissions to invest in the Program.

Some discussion was had as to whether the public service requirement should be two years or three years in length. The committee agreed that the requirement should be two years of full-time employment in public service.

The discussion then turned to the types of employment that would satisfy the public service requirement. Dean Fulton suggested placement with any entity with any federal, state, local, or tribal government. Whether clerkships should qualify was then discussed. The Committee discussed the benefits of clerkships and agreed to include clerks. Discussion was then had regarding whether legal aid work would qualify. The Committee determined to specifically include DPLS and ERLS.

Justice Myren suggested that an oversight committee be recommended for the pilot program to come back to the Court with suggestions.

Next, the Committee discussed what happens if a participant cannot complete the public service requirement. It was suggested that the requirement could be waived by the Court or the authority could be delegated to the Board of Bar Examiners upon a showing of exceptional circumstances, personal hardships, or the placement is terminated for reasons beyond the control of the participant. Potential repercussions were discussed if the requirement could not be fulfilled including a disclaimer on letterhead and revocation.

There was discussion as to how to track whether a participant was meeting the obligation. The Committee agreed the onus should be on the participant. Failure to comply with two-year public service requirement should result in the revocation of the license. The participant should be required to file an affidavit attesting to completion of the obligation.

The discussion then shifted to how it was envisioned that the Program would work. Hon. Wipf-Pfeifle discussed the importance of feedback to the participants and the need to see that they are being exposed to a variety of things and that the work is getting done. Dean Fulton explained how the Law School currently oversees externships and indicated that he believes this will be a version of what is already done.

The Committee then discussed whether the Program will sufficiently demonstrate competence in the same manner the bar exam does. Hon. Wipf Pfeifle noted that what the bar examiners get from the bar exam is essentially a snapshot of the candidate of one day in their lives. The bar exam potentially tests on many subjects but, in the end, not all subjects are tested and an examinee need not demonstrate competence in all the areas actually tested in order to pass. Dean Fulton pointed out that even though many of these placements will be in the criminal arena, participants will be demonstrating competence in many areas. For instance, a motion to suppress will demonstrate competence in criminal law, research, writing, procedure, constitutional law, ethics, etc. Other members noted that there has to be some reliance on the Law School.

The Board then turned to the current Indian law requirement. There was some confusion as to the scope of the Committee's authority as to the Indian law requirement. Due that that question and the shortage of time, the Committee agreed to take up the issue at the next meeting.

Apparent Consensus Items:

- The public service requirement is two years, full-time but this requirement could be reevaluated as the Program progresses.
- Public service commitment could be satisfied by DPLS and ERLS, as well as federal and state clerkships.
- Should recommend an oversight committee for the pilot program.
- A waiver of the public service requirement could be made upon a showing to the Board of Bar Examiners of exceptional circumstances, personal hardships, or the placement is terminated for reasons beyond the control of the participant.
- Failure to comply with public service requirement or a failure to self-report non-compliance will result in revocation.
- At the conclusion of the two years of public service, participants should file an affidavit of completion.
- The Program should be offered in the fall semester to afford time for the Board of Bar Examiners to review and if admission is not recommended, for the applicant to apply for the July bar examination.

Past Consensus Items:

- Pathway candidates should undergo the same character and fitness process as those sitting for the bar exam – which includes a character and fitness review report from NCBE paid for by the applicant.
- Supervisor training is an essential part of the Program. The training will be handled by the Law School and the Board of Bar Examiners will be involved to share their expectations.

- The Public Service Pathway Program will be a one semester program with a minimum of 500 -600 hours. Participants will not be prohibited from working. The committee recommends not taking classes during the Program; however, the Dean should be vested with the authority to approve taking classes under extraordinary circumstances.
- This Program should evaluate the same skills and knowledge as the NextGen exam (Foundational concepts: civil procedure, contract law, evidence, torts, business associations, constitutional law, criminal law, real property and Foundation lawyering skills: legal research, legal writing, issue spotting and analysis, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, client relationship and management).
- The Program will not be able to assess every area.
- The nature of the placement will control the areas that will be evaluated; and
- We will begin with Dean Fulton's proposed Program elements.

Follow-Up Items

- How to satisfy the Indian law requirement

Implementation Committee Meeting Minutes: June 24, 2024

Attendance: Justice Myren, Hon. Jane Wipf Pfeifle, Neil Fulton, Cris Palmer, Josey Blare, Rachelle Norberg, and John Richter.

The meeting began with a review of the minutes from the 5/29/24 meeting.

The Committee first discussed the Indian law requirement as it pertains to both admission by examination and admission through the Public Service Pathway Program. The Committee agreed that Indian law should continue to be required for admission to the bar whether it be through examination or through the public service pathway. The Committee further agreed that for admission by examination it would be best to leave the Indian Law question as part of the bar exam.

Dean Fulton explained that currently, Indian Law is offered in the fall semester which would conflict with the Public Service Pathway Program. Dean Fulton described the different considerations that go into the timing of courses in the curriculum offered, including faculty workload and preference, other courses offered that might hinder student scheduling, sufficient classrooms, etc.

Discussion was also had as to whether the class could be taken as a 2L. While it is possible, it appears that the majority of students in the class are 3Ls.

The Committee members were not in favor of participants being interrupted during work hours to attend a class as it could limit participation in trials, etc. The potential of whether the participants could take the class via zoom or watch a recording after work hours was discussed. It would, in large part, be at the discretion of the professor.

The letters of Professor Pommersheim and Professors Tweedy, Simmons, and Brazeal were also discussed. The letters generally express concern regarding a change of the Indian law requirement which would allow the requirement to be satisfied by passage of an Indian Law class. The professors are concerned that there would be no uniformity in what would be taught or that that it would somehow diminish the importance of Indian Law and it would become the only bar exam topic with a “work around.”

In response to the letters and with a commitment to the Indian Law requirement, the Committee agreed that for the Public Service Pathway Program, it would be acceptable for a participant to pass the Indian Law course offered by the Knudson School of Law in lieu of taking an exam question. However, given the fact that participants may not be able to take the Indian Law course, the Committee also recommends offering a single Indian Law question to the participants on a pass/fail basis.

Discussions were had as to whether the Indian Law question could be offered during at the same time as the MPRE. It would require coordination with NCBE and could pose some logistical issues.

Dean Fulton also explained grading at the Law School. The Law School does not use letter grades. The numeric grades used do not correspond to letter grades. Rather, if a student is below 60, the student has failed. There is no curve but a cap on the cumulative average of

the class which cannot exceed 86 (if 15 or fewer students, the cap is 85 and if 5 or less students, there is no cap). The first-year cumulative cap is 84.

Additionally, it was noted that Indian Law is offered at the Law School with a testing option or a writing option.

The consensus of the Committee is that the Indian Law class must be taken with the testing option and that the participant must score 60 or higher.

The next topic for discussion was if anything should be handled differently should a participant of the Program come before the Disciplinary Board after licensure. The consensus was no.

Next, the Committee discussed the waiver of the public service requirement and whether it should be confidential. It was pointed out that waiver could be granted for hardship such as a spouse's health or harassment and that the participant may wish to keep such topics confidential. It was also noted that there is merit to transparency. The Committee agreed that the waiver would be public but the reason for the waiver would remain confidential.

The Committee also discussed a scenario where a participant is admitted through the Public Service Pathway Program but then fails the bar examination. The Committee determined that it would not affect the licensure through the Public Service Pathway Program.

Also discussed was whether the oversight committee should be responsible for following participants after completion of the Program. Judge Wipf Pfeifle pointed out that the Bar Examiners do occasionally reach out to examinees to follow up. Dean Fulton liked the idea of a survey. Questions that could be asked should include: did you stay in public service (full-time or part-time) and did you end up taking a bar examination.

Whether the oversight committee should track complaints to the Disciplinary Board of those who successfully completed the Public Service Pathway Program was also considered. The Committee felt there was not any reason for the oversight committee to know of unfounded complaints but it could be good for the Court to have anonymized reports for assessment at the end.

The Committee then turned its focus to how a claw back provision would work and the potential interaction between the Board of Bar Examiners and the Disciplinary Board. While it is generally that the Board of Bar Examiners is pre-licensure and the Disciplinary Board is post-licensure, the failure to complete the public service requirement is an admission issue not a disciplinary issue. However, the failure to complete the public service requirement could rise to a disciplinary issue as well. A two-track approach was proposed wherein the Board of Bar Examiners could hear a request for waiver should a participant be unable to satisfy the public service requirement. The Board would then make a recommendation to the Court. The Board could also file a complaint with the Disciplinary Board if the participant fails to make a request for waiver or is denied a waiver and fails to complete the public service requirement. It was also suggested that the participant be required to report to the Board of Bar Examiners employment and completion of public service requirement. The Board of Bar Examiners should also be given the authority to extend the time to satisfy the public service requirement.

Discussion was also had to the timing of the character and fitness review. A suggestion was made that the C&F review should occur before admission to the Program. It was shared that the Dean signs off on C&F for placements. The bar admission C&F is much more extensive. Timing would be off as the participants would have to request the NCBE C&F review report at the same time as July bar examinees. Additionally, the review would be complete as of that time and there would be approximately an entire year that would not be reviewed unless we required a subsequent report – which would cost additional money.

Apparent Consensus Items:

- The Indian Law requirement for admission by bar examination should remain as it currently is. Satisfaction of the Indian Law requirement for the public service pathway could be made by completion of the Indian Law course (with the testing option) as offered by the USD Knudson School of Law or passing a single question examination of Indian Law offered by the Board of Bar Examiners.
- No additional action or alternate action should be taken should a participant who has obtained licensure be brought before the Disciplinary Board.
- Waiver of a portion of the public service requirement should be public as to the name of the participant but the reasons for the waiver should remain confidential.
- A participant's subsequent failure of a bar examination would have no effect on his/her licensure through the Public Service Pathway Program.
- The oversight committee should follow participants after completion of the Program and public service requirement to determine how many participants stay in public service and if any take the bar examination.
- The oversight committee should not track complaints to the Disciplinary Board filed about participants who have received licensure. However, it could be helpful for the Court to receive anonymized reports at the end to consider when assessing the Program.
- The Board would also have the authority to grant an extension to complete the public service requirement.
- The Board would also have the authority to file a complaint with the Disciplinary Board.
- Requests for waivers and failure to complete the required public service term would be handled by the Board of Bar Examiners. The Board would have authority to conduct hearings and gather information. The Board would then make a recommendation to the Court.

Past Consensus Items:

- The public service requirement is two years, full-time but this requirement could be reevaluated as the Program progresses.

- Public service commitment could be satisfied by DPLS and ERLS, as well as federal and state clerkships.
- Should recommend an oversight committee for the pilot program.
- A waiver of the public service requirement could be made upon a showing to the Board of Bar Examiners of exceptional circumstances, personal hardships, or the placement is terminated for reasons beyond the control of the participant.
- Failure to comply with public service requirement or a failure to self-report non-compliance will result in revocation.
- At the conclusion of the two years of public service, participants should file an affidavit of completion.
- The Program should be offered in the fall semester to afford time for the Board of Bar Examiners to review and if admission is not recommended, for the applicant to apply for the July bar examination.
- Pathway candidates should undergo the same character and fitness process as those sitting for the bar exam – which includes a character and fitness review report from NCBE paid for by the applicant.
- Supervisor training is an essential part of the Program. The training will be handled by the Law School and the Board of Bar Examiners will be involved to share their expectations.
- The Public Service Pathway Program will be a one semester program with a minimum of 500 -600 hours. Participants will not be prohibited from working. The committee recommends not taking classes during the Program; however, the Dean should be vested with the authority to approve taking classes under extraordinary circumstances.
- This Program should evaluate the same skills and knowledge as the NextGen exam (Foundational concepts: civil procedure, contract law, evidence, torts, business associations, constitutional law, criminal law, real property and Foundation lawyering skills: legal research, legal writing, issue spotting and analysis, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, client relationship and management);
- The Program will not be able to assess every area.
- The nature of the placement will control the areas that will be evaluated.
- We will begin with Dean Fulton’s proposed Program elements.

Implementation Committee Meeting Minutes: July 19, 2024

Attendance: Justice Scott Myren, Hon. Jane Wipf Pfeifle, Neil Fulton, Josey Blare, John Richter, Eric Witcher, Cris Palmer, and Ann Mines Bailey

The Committee reviewed the minutes from the July 9, 2024 meeting.

The next order of business was to revisit the issue of whether clerkships should satisfy the public service requirement. Members of the Committee had been receiving feedback that clerkships, particularly federal clerkships, should not count. The Committee also discussed the possibility of tolling the time to complete the two-year public service commitment during the participant's clerkship. It was determined that the Committee would revisit the issue at the next meeting.

The Committee then turned to discussing minimum competence. Prior to the meeting the Committee had reviewed the IAALS's building blocks and the NCBE's paper identifying minimum competencies.

Hon. Wipf Pfeifle noted the difficulties in assessing every area.

Dean Fulton shared that the purpose of the assessments is to determine that there is possession of some substantive legal knowledge and that there is a certain degree of professional skills. Assessments for many years have focused on substantive legal knowledge because it is somewhat less complicated to measure. IAALS and the NCBE reviews have recognized a need to move more towards a skills assessment. Dean Fulton proposed that we start with the NCBE skills identified and incorporated into the NextGen exam and use the IAALS building blocks and SDCL 16-16-1.1 to inform.

Mr. Palmer agreed with both Hon. Wipf Pfeifle and Dean Fulton that cannot assess every skill and substantive area but focus on the concepts.

Ms. Blare agreed that the Program should be more skills based than a substantive based assessment.

It was then discussed what foundational classes that are tested on the bar exam are required at USD KSOL– civil procedure, constitutional law, contracts (but not expressly sales), criminal law, criminal procedure, evidence, real property (but not mortgages), torts, and professional responsibility.

The Committee concluded that the Program should lean heavily on foundational skills and concepts.

The Committee then discussed how to assess the client counseling, negotiation, and management skills.

Mr. Witcher discussed how his office performs a six-month assessment reviewing whether an attorney is performing the fundamental procedures in the office. He was asked to share those forms with the Committee.

The Committee contemplated a checklist that could be completed with the client counseling skills for a prosecutor's office being viewed more as stakeholder advising.

Ms. Mines Bailey will ask Mr. Haggar if his office has forms similar to Mr. Witcher's. Ms. Mines Bailey will also attempt to match the proposed portfolio requirements with the NextGen skills and perhaps identify the alignment with SDCL 16-16-1.1 and the IAALS building blocks.

Arizona's new admission program was also briefly discussed. Arizona is allowing those who receive a score of 260-269 on the UBE an opportunity to be admitted through a two-year supervised practice program. Members were asked to review the materials before the next meeting.

The Committee then took up the issue of whether there should be an appeal process for participants. Dean Fulton indicated that there is an academic appeals process in place that is set by the Board of Regents. It was pointed out that bar examinees are not allowed to appeal their bar scores. The Committee agreed that there should be a recommendation of the Board to the Court regarding admission with the court making the final decision as to admission, extension, or waiver. Additionally, the Committee agrees that there should not be an appeal right from the dean's decision regarding entry to the Program.

The next topic was whether the Board should be involved in the application process to enter the Program. Hon. Wipf Pfeifle felt the Board should not be involved. Dean Fulton agreed. Discussion of the application process then ensued. Dean Fulton shared that incoming students are surveyed regarding interests at orientation. He will be watching performance and begin searching for participants about approximately one year prior to the Program. Discussion was held as to whether the application process should be formalized. Concerns were raised that all students should be aware of the Program. Dean Fulton indicated that the Program could be advertised with the experiential program announcements. In order to avoid issues, the Committee agrees that the Program should be announced to all students and recommend that there be some initial paperwork such as a letter of interest for documentation purposes.

Apparent Consensus Items:

- The Committee agrees that competencies identified by the NCBE and tested in the NextGen examination should be those used in this Program with reference to the IAALS building blocks and SDCL 16-16-1.1. The Committee, however, recognizes that not every competency – whether it be substantive or skill-based – can be assessed.
- The Committee agrees that the Board should make recommendations to the Court regarding admissions, waivers, and extensions and that the Court should make the final decision.
- The Committee agrees that there should not be an appeal right from the dean's decision regarding entry to the Program.

Implementation Committee Meeting Minutes: August 12, 2024

Attendance: Justice Scott Myren, Hon. Jane Wipf Pfeifle, Neil Fulton, Cris Palmer, John Richter, Eric Witcher, Josey Blare, Rachelle Norberg, Dan Haggar, and Ann Mines Bailey

The Committee reviewed the minutes of the last meeting.

The Committee then began the discussion with the topic of clerkships and whether they should count as public service for the purposes of this Program. The Committee agreed that federal and state clerkships should be treated similarly. Several members voiced that have a clerkship satisfy no more than one year of the requirement would be acceptable. Concerns were expressed that it might be an impediment to recruiting participants if clerkships do not count towards the public service requirement. It was also noted that it would be difficult to gain the support of the bar if clerkships counted. In the end, the Committee agreed that allowing the public service requirement to toll the two-year public service commitment would be appropriate.

The Committee then discussed the Arizona program which provides a supervised practice pathway to bar admission for those individuals who did not pass the bar exam but were within a certain range.

The Committee then discussed the charts comparing what is currently tested, what NextGen will test, what is required by statute, and what would be assessed by the Public Service Pathway Program.

Next, the Committee turned to the requirements for bar admission. The initial draft required a report after each court appearance. Mr. Haggar and Mr. Witcher noted that in their offices, an individual could have five or more court appearances in one day or could appear in a block hearing handling multiple cases. The Committee agreed that it would be best to have the participants report on substantive hearings rather than every court appearance. The Committee then agreed that the language should be altered to reflect that for multiple hearings in one block, the participant must report on the most significant hearing.

The Committee concluded by discussing the timeline and when the Program could possibly be implemented.

Apparent Consensus Items:

- Clerkships should not satisfy the public service requirement but the deadline to complete the requirement should be toll during the term of the clerkship.
- If a participant enters an appearance for multiple hearings in one block, the participant must report on the most significant hearing.

Implementation Committee Meeting Minutes: November 12, 2024

Attendance: Justice Scott Myren, Hon. Jane Wipf Pfeifle, Neil Fulton, John Richter, Eric Witcher, and Ann Mines Bailey

The Committee began by reviewing the proposed draft report, rules, and regulations.

The Committee discussed what burden of proof should be met for a waiver or extension to complete the public service requirement to issue. The Committee agreed that the burden should be on the applicant to demonstrate the need for waiver/extension. The Committee further agreed that a preponderance burden would be appropriate.

The Committee then discussed the deadlines set forth in proposed Regulations 2 and 3. The Committee agreed that Regulation 2 should be changed to a weekly deadline.

Next, the Committee revisited the length of the public service requirement. Mr. Richter proposed that a 3-year commitment should be imposed as it is more difficult to scale up to three years if we start with two years. Mr. Richter went on to provide that the first year of a new attorney's career at a public service entity is usually spent training. The second year those individuals are able to function on their own but still need a fair amount of supervision. By the third year, the individual is able to function independently.

Mr. Witcher appreciated that it could be difficult to increase the requirement to three years if you begin with two years, unless the Program was very popular; however, he was concerned with recruitment being more difficult with a three-year commitment.

Mr. Haggar indicated that a three-year commitment would aid in convincing his commission to participate as there could be a greater return on the investment.

Judge Wipf Pfeifle commented that if the individual is in public service to receive forgiveness of student loans, the length of the public service requirement will not make a difference. The goal would be to entice those individuals who may have not considered public service to try it.

Ms. Norberg indicated that an additional year of mentorship is beneficial. She voiced that two and one-half would be the best option in her opinion. She did not believe that two was too short but that three would probably be better.

Dean Fulton indicated that shortening it makes the Program more enticing to the student but lengthening it makes it more enticing to the host. He felt a two-year commitment makes it easier to recruit those who don't know that they will love public service.

Mr. Witcher also voiced that when his office hires individuals who want to try public service they usually leave within 1-2 years if public service is not a good fit. He did not care to be in a position where someone had decided it wasn't the right path for them but had to stay.

Mr. Haggar agreed with Mr. Witcher but felt that the decision to leave public service was after the third or fourth year.

Accordingly, the Committee decided that it would be best to alter the report to note the split amongst the members regarding the length of the public service commitment.

Apparent Consensus Items:

- An applicant must demonstrate by a preponderance of the evidence that a waiver or extension should issue.
- Regulation 2 should be altered to apply a weekly deadline.
- The Committee report should be revised to recognize a split among the Committee members regarding the length of the public service requirement.