

IMPROVING DIVERSITY IN THE DELAWARE BENCH AND BAR

Strategic Plan

REPORT AND RECOMMENDATIONS

JANUARY 31, 2022



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I. Executive Summary

On May 13, 2021, the Delaware Supreme Court adopted an administrative order establishing a Diversity Strategic Planning effort to address diversity issues in the Delaware legal community and to serve as a national model that other court systems could adapt to address their own jurisdiction-specific diversity challenges. Pursuant to its order the Delaware Supreme Court created a steering committee and five working groups to examine considerations and needs from pre-college efforts to appointments to the bench. Additionally, the Delaware Supreme Court enlisted the assistance of the National Center for State Courts and AccessLex to provide subject matter expertise, data analysis, facilitate work groups, and conduct additional interviews.

The Steering Committee has completed its work and presents the Delaware Supreme Court with this Strategic Plan and recommendations for its consideration in addressing the challenge of increasing diversity in the Delaware legal profession. Four initial observations are warranted.

First, strategic planning should be understood as an ongoing process with two components: (a) articulating a set of values that frame a generally unifying vision; and (b) articulating a series of steps, programs, policies or practices designed to implement that vision. If strategic planning stops at the visioning stage, it is nothing more than an articulation of bold values unsupported by practical steps. Therefore, this Strategic Plan seeks to not only refine the vision of a more diverse legal profession but to offer to the Supreme Court a series of practical recommendations that it can consider in pursuing the vision.

Second, the vision for this Strategic Plan was established by the Delaware Supreme Court in its order of May 13, 2021, creating the Steering Committee and this planning process. That vision is to have a Delaware legal profession that grows to reflect the diversity of the people of the state so that the public's trust and confidence in the legal system also grows. The activities of the Steering Committee and its working groups are framed by this vision.

Third, strategic planning in the context of the courts and the legal profession can be challenging for this reason: the courts and the legal profession reflect a series of complex and often interrelated political, social, and legal values that define their purposes. A significant purpose of the legal profession is to articulate and maintain a coherent and fair set of legal standards and values that *all members* of the public can rely upon in managing their affairs. It is taking often esoteric legal norms informed by political, social, and economic considerations, and translating them into a practical and reliable legal system not just a system of laws. Therefore, strategic planning in this context must be framed by the constant pursuit of improving public access, public service, public understanding, and public trust and confidence in the effective administration of justice and the legal system upon which they rest.

Finally, there are several significant entry points to and advancement within the legal profession that can act as barriers to the goal of increasing diversity. While many similar barriers can be found in other states, those most impacting Delaware include:

- **Inadequate Pipeline.** The roots of the Delaware legal profession’s diversity challenges begin long before a prospective law student contemplates a legal career or even sits for the Law School Admissions Test (LSAT). Even for students from underrepresented communities that graduate from high school, significant barriers to higher education remain thus affecting the pipeline to law school and beyond. Fewer people of color¹ go to college, which means that fewer still will attend law school and become attorneys and judges. Accordingly, the diversity challenges facing the Delaware legal profession cannot be addressed merely by changing law school or bar admission processes and practices, although changes here may be critically important. A “whole of system” approach is needed.
- **Delaware State Bar Exam and Admission.** In Delaware, any law school graduate seeking to practice law in the state, regardless of prior legal experience, must first pass the state bar exam *and* complete a mandated clerkship and observation requirement.² The Delaware Bar Exam consists of several parts including the Multistate Bar Exam (MBE), Multistate Performance Test (MPT), and a state-specific essay section.³ Historically, despite having a comparatively low passage rate relative to neighboring states, the bar exam is offered only once per year. The combination of a relatively high cut score, more testing topics to study (even though only 8 topics will be tested in any one year),⁴ the single, annual bar exam, and additional observation requirements may significantly limit the pool of attorneys interested in practicing law in Delaware. While there is no current data to quantify the disparity, it is commonly asserted that passage rates vary considerably along racial and ethnic lines. Additional data is needed to confirm this assertion.
- **Practice of Law.** People of color are further underrepresented in the private legal profession’s top echelons. Nationally people of color make up approximately 39 percent of the U.S. population. However, less than seven percent of law firm partners and fewer than nine percent of general counsels at large corporations are people of color.⁵ This suggests that barriers exist that can impede career advancement for attorneys of color.

¹ “Terms used to refer to racial and ethnic groups continue to change over time.” PUBLICATION MANUAL OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION, 7TH ED. § 5.7, p. 142 (2020). To maintain a consistent reference, this report will use the terms “people of color” and “underrepresented groups” as recommended in the APA style manual to refer to individuals and groups of individuals included in this report and affected by the Delaware legal profession’s diversity challenges. *Id.* Depending on the topic or context, this report may also use the following terms: students of color; underrepresented communities; communities of color; attorneys of color; and judges of color.

² *See*, DEL. SUP. CT., R. 52; DEL. BD. BAR EXAM., R. 9. In addition to the clerkship requirements, all persons seeking admission to the bar must locate “an attorney who is qualified and willing to serve as the applicant’s preceptor in accordance with Supreme Court Rule 52 and these Rules.” *Id.* *See also*, DEL. BD. BAR EXAM., R. 10 (qualifications of preceptors).

³ Applicants must also separately complete the Multistate Professional Responsibility Examination (MPRE). DEL. BD. BAR EXAM., R. 8. The MBE, MPT and MPRE are standardized tests prepared and overseen by the National Conference of Bar Examiners (NCBE).

⁴ The potential list of exam topics include: Agency, Constitutional Law, Contracts, Corporations, Criminal Law (including the Delaware Criminal Code), Equity, Evidence, Partnerships, Procedural law (state and federal), Property, Torts, Trusts, Uniform Commercial Code, Wills, DEL. BD. BAR EXAM., R. 12.

⁵ U.S. Census Bureau, 2013-2017 American Community Survey 5-Year Estimates (2017).

- **The Judiciary.** Limited career advancement among attorneys of color extends to judicial appointments. Courts must reflect the communities they serve. Delaware’s judiciary is more reflective of the licensed bar than the diversity of the state and its local communities. One important and positive change over time is the strides that judges of color have made in the last decade, going from being vastly underrepresented to moving closer to their representation in the population. This diversity is, however, often limited in terms of geography and particular court level.

The lack of diversity in the legal profession and judiciary can be traced to two primary causes. First, people of color are underrepresented in colleges, universities, and law schools. The lack of diversity can be attributed to hurdles to educational advancement including institutional biases, achievement gaps, and the lack of early exposure to career opportunities in the legal field. These problems begin long before students apply to law school and extend at least through the time when they take the bar exam. Second, assuming all pipeline issues are addressed and students of color graduate from law school and pass the Bar Exam, new attorneys of color entering the legal profession generally find insufficient support and limited opportunities to achieve standing at the highest level of the profession. These general problems may be exacerbated in Delaware by its unique practices as discussed below.

This Strategy Plan presents to the Delaware Supreme Court a series of both programmatic and policy recommendations that if adopted, in collaboration with others can improve the diversity of the Delaware legal profession, over time.

- **To improve the K-12 pipeline to college and law school,** the Delaware Supreme Court should consider partnering with public schools (especially existing vocational schools) to encourage academic and career technical education, business partnerships, mentoring, and internships to students in this age group. Local courts can offer a variety of court tours, paid internships, and youth leadership academies to encourage students of color to go to college and consider a legal career. While not always strictly a diversity initiative, the Delaware Supreme Court in partnership with the Delaware Law Related Education Center (DELREC) should establish a K-12 civil learning project to highlight the importance of a fair and impartial judiciary and for students to understand their roles and responsibilities when they come to court as jurors, litigants, or witnesses. There may also be programs like the Leading Youth Through Empowerment program (LYTE) that could be designed to promote high school student interest in the law, gain admission to and complete college, and then pursue law school.
- **To improve access to college and law school,** the Delaware Supreme Court should encourage higher education authorities to explore opportunities to link Delaware State University,⁶ community colleges, and other centers of higher learning with Widener University Delaware Law School (“Delaware Law School”) to create pathways for students of color to move from community college to a four-year college, and onto law school. Beyond directing resources to students, there is also a growing body of scholarship suggesting that faculty diversity is critical to maintaining a positive law school experience for individuals from underrepresented

⁶ Delaware State University (DSU) is one of America’s Historically Black Colleges and Universities (HBCUs). DSU was founded as a land-grant educational institution in 1891. *See*, ABOUT, DELAWARE STATE UNIVERSITY, <https://www.desu.edu/about>.

- communities.⁷ The Delaware Supreme Court should consider adopting a “Delaware Scholars Program” as an alternative to the bar exam and explore with state authorities a loan repayment program for law graduates who gain bar admission through the Delaware Scholars Program and agree to practice in Delaware for a specified period.
- **To improve bar exam passage rates**, the Delaware Supreme Court should consider examining and then prioritizing potential reforms to the bar admission process. Critical to this effort is (a) increasing collection of racial and ethnic data of bar candidates and the legal community, and (b) conducting a study of minimum competence and its relationship to the current Delaware bar admission process. As part of any such study, it is recommended that the Court revisit the number of subjects tested on the exam, offer the exam twice each year, modify the substance and format of the clerkship requirement and task list, consider producing bar study preparation materials, increase transparency relating to bar exam grading policies, and reconsider the cost of the fee for late bar applications.⁸
 - **To reduce attrition and improve advancement in the legal profession**, the Delaware Supreme Court should consider taking steps that (a) reinforce law firm partners’ engagement with mentorship programs, and (b) increase training to address ongoing biases that can inhibit attorneys of color and female attorneys from advancing further in the legal profession. To address bias in the legal profession, the Court should consider requiring all active attorneys to participate in training on implicit bias and bias-reducing strategies to expand their understanding of how race, ethnicity, gender identity, sexual orientation, citizenship status, socioeconomic status, or other characteristics-based bias undermine community support for and confidence in the legal system.
 - **To improve diversity within the judiciary**, the Delaware Supreme Court should consider establishing a Diversity, Equity, and Inclusion Coordinator (DEIC) at the Supreme Court and eventually at all court levels. Additionally, an effort should be considered to increase outreach efforts to qualified attorneys having diverse backgrounds to pursue a judicial career. This could include implementing a judicial mentorship program to pair potential judicial candidates with existing judges and holding seminars designed to assist interested applicants through the judicial application process.

⁷ Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean’s Perspective*, 96 IOWA L. REV. 1549, 1558 (2011) (“The presence of historically underrepresented minorities on law faculties sends an unmistakable message to students of color—and most effectively teaches them—that they, in fact, belong in law school and the legal profession, as well as that they have the ability to be top-flight attorneys, scholars, judges, and policymakers.”).

⁸ Current bar application fees are as follows: (a) for applications filed on or before April 1, \$700 if the applicant is not admitted in another jurisdiction and \$800 if the applicant is admitted in another jurisdiction; and (b) for applications filed after April 1 but on or before May 15, \$1400 if the applicant is not admitted in another jurisdiction and \$1600 if the applicant is admitted in another jurisdiction. *See*, DEL. BD. BAR EXAM. R. 5(b)(i), (ii). The fees are non-refundable.

II. Project Overview

On May 13, 2021, the Delaware Supreme Court established the Delaware Bench and Bar Diversity Project (Project) to develop a strategic plan to address diversity concerns in the state’s legal profession. The Supreme Court tasked leaders of the Project with “engag[ing] in a strategic effort to address diversity issues in the Delaware legal community, develop a strategic plan to support a more diverse Delaware Bench and Bar, and serve as a national model for addressing diversity challenges in the legal community.”⁹ Of particular concern to the Project is the role that diversity plays in promoting and maintaining public confidence “in a fair and impartial judiciary and the legal profession[.]”¹⁰

A. Project Structure

To accomplish the objectives of the Project, the Supreme Court established the project Steering Committee composed of diverse members. The Steering Committee then established a series of subject matter working groups to guide its work. The subject matter working groups and functions were:

- **Pre-College Engagement Working Group:** Examine and make recommendations designed to improve educational opportunities that increase pre-college student understanding of the rule of law, the practice of law, and the courts.
- **Colleges and Law Schools Working Group:** Examine and make recommendations designed to address obstacles impeding access to legal education, successful matriculation into college and law school, and eligibility to become a member of the bar.
- **Bar Exam and Licensing Working Group:** Examine and make recommendations designed to address concerns with the bar exam and admission process.
- **Bar Diversity Working Group:** Examine and make recommendations designed to support a more diverse bar and wider inclusion of bar members from communities of color in bar and employment activities.
- **Bench Diversity Working Group:** Examine and make recommendations designed to increase the diversity of the bench at all levels of the courts.

⁹ In Re: Delaware Bench and Bar Diversity Project (Del. Sup. Ct., May 13, 2021).

¹⁰ *Id.*

The topics assigned to each subject matter working group represented a stage in the process of going from layperson to member of the legal profession and possibly to the bench. The groups sought to identify the multitude of diversity challenges at their specified stage and then identify possible interventions and other opportunities to address the diversity challenge. Given the dynamic nature of the diversity challenges, working groups' areas of focus naturally overlapped with one another. As a result, working groups regularly considered information and context that fell outside of their immediate areas of focus.

Each working group was led by a moderator (or two) whose task was to facilitate discussions and lead the process of devising final recommendations for this Strategic Plan. The working groups met regularly during the timeframe of the Project, cognizant of deadlines to ensure that the Project did not languish. Given that all members of the working groups had full-time professional obligations, their commitment to push ideas and adhere to an aggressive timeline should be recognized.

To provide support for the Project, the Delaware Supreme Court engaged the National Center for State Courts (NCSC) and AccessLex Institute (AccessLex). These organizations provided subject matter expertise, assisted and facilitated working group activities, conducted interviews with more than 50 different justice system stakeholders, and compiled data and other information to support the Steering Committee and working groups in developing their strategic recommendations.

The Steering Committee has completed its work and presents the Court with its findings and recommendations.

B. Project Goals

As noted, the goal of the Project was to develop a strategic plan and series of practical steps that the Delaware Supreme Court could consider implementing to ensure that “the courts and the legal profession reflect the diversity of the communities they serve.” The Project’s primary concern was the diversity challenges facing the organized bar and bench, what is termed the “legal profession.” But the Project’s scope encompassed a broader set of experiences and phenomena, starting at the earliest stages of one’s educational and professional development and moving forward.

The process of becoming a member of the legal profession is best understood as a series of stages that begin long before a person even contemplates applying to law school. The stages necessary to join the legal profession are overlapping and compounding, with the latter stages building upon the previous ones. A person’s pre-college education and exposure impact their chances of gaining admission to law school. A person’s law school experiences impact their future career choices and options as a member of the profession. A person’s experiences as a lawyer have ongoing impacts that influence the type of work they do; their perceptions of their career; and whether they pursue opportunities for judicial appointments.

The Project, therefore, focused on examining diversity challenges in the Delaware legal profession starting with ways to reach young people before they make career decisions. According to a 2018 study by Gallup and the Association of American Law Schools,¹¹ over half of the law students reported deciding to go to law

¹¹ See ASSOC. OF AMERICAN LAW SCHOOLS (AALS), HIGHLIGHTS FROM BEFORE THE JD: UNDERGRADUATE VIEWS ON LAW SCHOOL, <https://www.aals.org/wp-content/uploads/2018/09/BJDReportsHghlights.pdf> (last checked 12/22/21).

school before becoming undergraduate students. For example, nearly half of all Black or African American law students reported making that decision before high school. These findings underscore the importance of early education in efforts to diversify the legal profession. As such, this plan identifies challenges at each stage of the pipeline and then identifies possible interventions to address each challenge.

In addition to the integrated nature of the stages, the legal profession itself is comprised of multiple diverse actors—from law school admission offices to the bar admissions practices, to legal employers, to state supreme courts as primary bar regulators, and, if applicable, to judicial nominating commissions—each with different roles and responsibilities that are interconnected by overlapping professional subcultures. These inherent structures will require the Delaware Supreme Court to consider the recommendations in this Strategic Plan as a series of integrated and cascading choices. Any one choice can have both prospective and retrospective systemic impacts across the stages. A change in the bar admission process, for example, will not only drive the actual admission to the practice of law (prospective) but can also impact law school admission practices and perhaps curriculum design (retrospective).

There is no single solution. Meaningful reform will also take time. Increasing diversity among Delaware attorneys and judges will involve a comprehensive set of evidence-based and data-driven programs and initiatives. And while this Strategic Plan does not address every relevant question or provide possible solutions to every diversity challenge, the working groups have identified a convincing set of recommendations that, if implemented, could tangibly move Delaware over time towards a legal profession that better reflects the state's diverse population.

III. The Importance of Diversity in the Legal Profession and the Judiciary

While diversity is important for all professions, it is especially important for the legal profession. As professor Naomi Mezey notes, “Put generally, law shapes individual and group identity, social practices as well as the meaning of cultural symbols, but all of these things (culture in its myriad manifestations) also shape law *by changing what is socially desirable, politically feasible, legally legitimate*. (Emphasis added)”¹² The legal profession is a quintessential actor in this process with attorneys and judges translating often esoteric legal concepts into practices that affect a broad range of human relationships. In doing so, the profession helps shape a set of coherent and reliable principles, *i.e.*, legal norms, that undergird social order based largely on their general acceptability. The legal profession should, therefore, generally reflect the diversity of the people it serves and who are governed by the standards it helps create and enforce. Throughout this Project, several themes for *why* this topic is so important were consistently expressed by interviewees. There are six distinct but often interrelated reasons that frame these recommendations.¹³

- A. Demographic Need for Diversity.** The first and most obvious reason for diversity is the demographic rationale: the legal profession should look like the people it serves. A lack of diversity undermines public confidence in the fair administration of justice, particularly in underrepresented communities that have long historical experiences of discrimination and exclusion.
- B. Business Need for Diversity.** A second rationale for diversity holds that “a diverse workforce within legal and judicial offices exhibits different perspectives, life experiences, linguistic and cultural skills, and knowledge about international markets, legal regimes, different geographies, and current events.”¹⁴ It makes “business sense” to have a legal profession that “reflect[s] the diversity of citizens, clients, and customers around the globe.”¹⁵
- C. Democratic Need for Diversity.** The third rationale for the diversity of the legal profession is its importance to the preservation of democracy and democratic institutions of governance. Attorneys have “been in the vanguard” of the “political, constitutional, and legislative struggles” to create

¹² Naomi Mezey, *Law as Culture*, 13 *Yale J.L. & Human.* 35, 46 (2001).

¹³ AMERICAN BAR ASSOCIATION, *DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS* 9 (April 2010)

¹⁴ *Id.*

¹⁵ *Id.*

and sustain democratic institutions.¹⁶ Without a diverse bench and bar, “the rule of law is weakened as the people see and come to distrust their exclusion from the mechanisms of justice” and from democratic institutions.¹⁷

- D. Leadership Need for Diversity.** “Society draws its leaders from the ranks of the legal profession,” and without a more diverse legal profession, leaders in government and business will be less diverse and will not adequately represent their business or representative democracy.¹⁸
- E. Public Interest Need for Diversity.** Research indicates that legal professionals of color are more committed to public service and investing in their communities than other legal professionals. National law student data “suggest a deep commitment to service work, with students of color more likely to aspire to public interest and government positions after graduation” and “legal professionals of color are more likely than whites to serve the community through public interest law.”¹⁹
- F. Innovative Need for Diversity.** Research indicates that groups that include people with diverse backgrounds and perspectives are better at solving problems and are more innovative than those who are less diverse.²⁰ And under this rationale, law schools, law firms, government agencies, and judges and their clerks will all perform better if they are sufficiently diverse.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at p. 10.

¹⁹ See AALS, HIGHLIGHTS FROM BEFORE THE JD: UNDERGRADUATE VIEWS ON LAW SCHOOL, <https://www.aals.org/wp-content/uploads/2018/09/BJDReportsHghlights.pdf> (last checked 12/22/21).

²⁰ See, e.g., Orlando C. Richard, et al., *Cultural Diversity in Management, Firm Performance, and the Moderating Role of Entrepreneurial Orientation Dimensions*, ACAD. OF MGMT. J. 47(2), 255-266 (2004).

IV. Key Context and Major Findings

Several key findings were derived by NCSC and AccessLex from interviews, demographic analyses, data analyses, and working group discussions. A review of the demographics and characteristics of the Delaware population and its legal profession highlights the challenges that this Project seeks to address.

Delaware's population is relatively diverse. Its legal profession does not match that diversity. According to the U.S. Census Bureau, people of color constitute 38.7% of Delaware's population, with Black or African Americans being the largest group at 22%.²¹ Demographic profile data of Delaware attorneys is limited, but indirect data suggest a profession that does not reflect the population. According to the National Association for Law Placement (NALP), in 2020 only 5.3% of Wilmington law partners and 11.6% of associates identified as people of color. Nationally 10.23% of partners are attorneys of color and 26.48% of associates are attorneys of color.²² Delaware's proportions²³ generally lag nearby regions, including the Philadelphia area,²⁴ the Central/Southern New Jersey area,²⁵ and Washington, D.C.²⁶

Additionally, the demographics of area law schools do not reflect the diversity of the population. For example, students of color comprise about one-quarter of the enrollment at Delaware Law School, the

21 According to the U.S. Census Bureau, Blacks or African Americans comprise 12.4% of the US population compared to Delaware's 22%. In contrast, Hispanic or Latino, the second largest demographic group comprise 9.6% of Delaware's population compared to 18.4% of the U.S. population.

22 NATIONAL ASSOCIATION FOR LAW PLACEMENT, 2020 REPORT ON DIVERSITY IN U.S. LAW FIRMS, Table 6, at https://www.nalp.org/uploads/2020_NALP_Diversity_Report.pdf.

23 In Wilmington, Delaware, only 1.3% of law firm partners identify as Black or African American and only 2.27% of associates identify with this demographic group. Similarly, only 1.33% of partners identify as Latinx and only 1.94% of associates identify with this demographic group. *Id.* at Tables 9 and 10 respectively.

24 People of color were 5.2% of partners and 18.5% of associates. Additional demographic breakdown: 1.90% of partners identify as Black or African American; 0.79% of partners identify as Latinx; 6.05% of associates identify as Black or African American; 2.67% of associates identify as Latinx. *Id.*

25 People of color were 8.5% of partners and 24.7% of associates. Additional demographic breakdown: 1.89% of partners identify as Black or African American; 1.89% of partners identify as Latinx; 6.74% of associates identify as Black or African American; 4.49% of associates identify as Latinx. *Id.*

26 People of color were 11.4% of partners, 26.7% of associates. Additional demographic breakdown: 3.47% of partners identify as Black or African American; 2.17% of partners identify as Latinx; 7.11% of associates identify as Black or African American; 4.67% of associates identify as Latinx. *Id.*

state's only law school. Within that number, the 10.5% proportion that are Black or African American students is less than half the share of members of this demographic group among the general population. Data from the America Bar Association and other sources show that other area law schools have similar demographic under-representations.²⁷

A. Pre-College Engagement

There is a widely accepted view that the Delaware legal profession could significantly improve its engagement efforts with the pre-college student population. There is a real benefit to democracy in educating high school students about the rule of law, the function of courts, and the role of the bar in our system of government, even if they decide not to go to law school. But to create a more equitable and diverse legal profession, there must be early education pipeline programs that cultivate the aspirations of students of color and other individuals from traditionally underrepresented communities with an interest in the law and legal profession. The Delaware legal profession should make addressing this shortfall in pre-college education a key objective given its potentially high, long-term impact.

Currently, the existing institution for engaging this level of education and students – the Delaware Law Related Education Center (DELREC) – is woefully underfunded and under-resourced to meet current demands and future objectives. If the DELREC is to develop more widespread and engaging programs, significant resources – both in terms of financial and legal community support – are needed. For example, there is no law-related analog to the Minority Engineering Regional Incentive Training (MERIT) program, a program that is designed to increase diversity in that professional field. Delaware's core education standards include instruction on government, participation, politics, and citizenship. However, the Delaware legal profession could significantly enhance the civics education component of the state's curriculum by providing speakers, targeted educational materials, essay contests, field trips to courts, and a competitive legal-based program that focuses particularly on schools with highly diverse populations. The legal profession has a unique opportunity with this demographic group to make early introductions and interventions to help all students, and particularly students of color, understand the law, influence their career decisions, and support them in reaching their career goals. As noted earlier, society draws its leaders from the ranks of the legal profession. Delaware legal profession's engagement with a new generation of citizens not only furthers social interest in developing solid future leaders, but it can also further the interest of developing future leaders that reflect the societies they lead.

²⁷ Villanova Charles Widger School of Law reports that 24% of its students come from communities of color comprised of: (a) 8% Asian/Pacific Islander; (b) 6% Black or African American; (c) 5% Hispanic/Latino; and (d) 4% two or more races. *See*, Villanova Class Profile, <https://www1.villanova.edu/university/law/admissions/how-to-apply/class-profile.html>. Temple University (Beasley): (a) White 67.2%; (b) Black or African American 7.9%; (c) Hispanic/Latino 11.4%; and (d) Asian/Pacific Islander 8.2%. *See*, INT'L LEGAL RESEARCH GROUP, LAW SCHOOL RANKINGS 2020, <https://www.ilrg.com/rankings/law/view/104>. The University of Pennsylvania (Carey): (a) White 57.1%; (b) Black or African American 7.0%; (c) Hispanic/Latino 6.8%; and (d) Asian/Pacific Islander 10.7%. *See*, INT'L LEGAL RESEARCH GROUP, LAW SCHOOL RANKINGS 2020, <https://www.ilrg.com/rankings/law/view/158>.

B. College and Law School

Financial barriers may discourage aspiring attorneys from underrepresented racial and ethnic groups from attending law school or require them to take on higher levels of student loan debt than their peers. Law school graduates from underrepresented groups tend to rely more heavily on student loans to finance their education, and thus graduate from law school with high debt levels. Law school admission process requirements can result in the disproportionate exclusion of individuals from underrepresented racial and ethnic groups. There are no coordinated pathways between students who attend Delaware State University (DSU) and other external institutions and organizations that serve significant numbers of potential law school applicants from underrepresented groups. Formal and coordinated programs and initiatives could be effective at engaging and supporting potential law school applicants and fostering greater interest in studying law. A bar admissions process that appears to be biased to bar candidates from underrepresented groups can discourage members of those groups from considering a career in the law.

C. Bar Admission Process

There is a widespread feeling among members of the Delaware legal profession that the diversity challenge is a broad “pipeline” challenge. At each stage of the process of going from layperson to lawyer, the pool of potential members of the profession lacks sufficient diversity. Some members of the legal profession feel that the bar admission process may significantly contribute to the lack of diversity within the Delaware bar. Several interviewees view elements of the bar admission process as critical to maintaining the bar’s perceived status as one of the nation’s most elite.²⁸ But some questioned whether the bar admission process was intentionally designed to be difficult in ways that are not tied to establishing one’s competence and fitness to practice law.

The Delaware clerkship requirement received mixed reviews from interviewees. Some view it as a critical element in the bar admission process because it helps orient new attorneys to the practice of law in Delaware, or “the Delaware Way.” Relatedly, some interviewees felt that the clerkship contributed to cohesiveness and civility among members of the legal community. In contrast, some interviewees questioned whether the requirement is relevant to the contemporary practice of law in Delaware and the critical role of ensuring minimum competence. Direct and indirect costs associated with the clerkship requirement were cited as particularly burdensome for younger and/or out-of-state attorneys who do not have ready access to mentors, sponsors, and the income to make multiple trips to complete all requirements. Some interviewees believe that people of color are most impacted by the complexity and the costs.

The Delaware bar examination is reputed to be one of the most difficult in the nation.²⁹ Candidates must

²⁸ Delaware’s Court of Chancery and expertise in the fields of corporate and intellectual property law are highly prized by the bar and state leaders. Numerous interviewees expressed concern that adjustments to the bar admission process should not compromise Delaware’s standing in these fields or the reputation of the Court of Chancery. It should be noted, however, that Court of Chancery caseloads, though often highly complex, occupy only 0.3% of the state’s overall caseload. It was further noted by numerous interviewees that relatively few members of the bar (~200 practitioners out of more than 4,000) regularly practice in the Court of Chancery.

²⁹ Delaware uses all components of the NCBE examination except for the essay portion of the UBE. Thus, multiple elements of the exam are tied to the uniform examinations utilized by most other states, meaning that the Delaware bar exam, at least with respect to those elements, is not any more or less difficult than other states’ bar exams. The Board also engages in an essay review process to ensure accuracy of the questions and

obtain at least a 145 to pass, which is the highest cut score in the nation. There are more topics tested on the Delaware Bar Exam than in most other states. Numerous interviewees questioned the utility of different aspects of the exam, including the number of subjects that must be studied; the relevancy of some subjects; and the quality of the questions. Several expressed concern that the essay portion of the bar exam as constructed is not a measure of minimum competence but merely a rite of passage. Others expressed the view that at times questions did not effectively frame a legal issue, stated the incorrect proposition of law, or merely sought rote, not analytical, responses.³⁰

The timing of the bar exam was also a topic of concern. Delaware is the only jurisdiction in the nation that offers the bar exam only one time per year. Many interviewees viewed this infrequency as a major obstacle to diversity, particularly given the potential financial impact on those who need to start their legal careers as early as possible.³¹ There was general agreement, however, that offering the bar twice a year would require significantly more resources for the Board of Bar Examiners and its administrative staff.³²

The topic of reciprocity was raised by interviewees, specifically the fact that Delaware offers no reciprocity to out-of-state attorneys. With limited exceptions, this means there is only one path into the profession irrespective of any experience practicing law a bar candidate may already possess.³³ Some interviewees felt the lack of reciprocity contributes to the diversity challenge. This view was rooted in a belief that a truncated admission path for experienced attorneys could potentially attract a more diverse pool of people seeking admission to the Delaware bar.

Overall, there was a broadly shared belief that the single greatest opportunity for addressing bench and bar diversity challenges rests in the rigorous consideration of whether each element of the admission process is designed to objectively ensure a competent bar while not creating needless barriers, including those that hamper diversity. There was some concern among interviewees that the rigors of the admission process have contributed to a culture of the “Delaware Way” that can hamper consideration of adjustments or alternative approaches to becoming a member of the bar.

Lastly, there was a near-universal agreement that the admission process, however adjusted, should apply equally and fairly to all applicants regardless of race or ethnicity to avoid the perception that some attorneys are less qualified than others. Many attorneys and judges of color who were interviewed voiced concern that adjustments might be seen as race-based accommodations that would lead others to claim that they are not as qualified as others seeking admission.

address implicit bias. It is the state-centric essay portion of the bar that is seen as making the bar more difficult than that of many other states.

³⁰ The Board of Bar Examiners conducts annual training to ensure uniformity and consistency in grading across questions and engages a psychometrician to adjust exam results to conform with the scoring procedures in the Rules.

³¹ The Delaware Supreme Court has adopted rules that enable law school graduates to engage in the limited practice of law while they await the opportunity to take the bar exam. DEL. SUP. CT. R. 55. Delaware also provides law students limited practice opportunities. DEL. SUP. CT. R. 56.

³² On November 4, 2021, the Delaware Supreme Court amended Rule 51(g) of the Rules of the Board of Bar Examiners to read as follows:
(g) A person who has failed the Bar Examination three times may not be approved to practice and may not continue to practice under Supreme Court Rule 55.

Given that the bar exam is offered only once per year, this rule amendment extends the limited practice opportunities under Rule 55 for bar applicants who fail to pass the bar exam the first, second, or third time.

³³ Delaware does, however, authorize limited practice certification in the following areas: (1) providing certain public sector and legal aid services; (2) limited in-house counsel; (3) foreign legal consultants; (4) assistant U.S. Attorneys; and (5) spouses of military personnel stationed in Delaware. *See generally*, DEL. SUP. CT. R. 55, 55.1, 55.2, 55.3, and 55.4.

D. Bar Diversity

A workforce that reflects a community’s diversity has been shown to not only be fairer by offering more opportunities for all but also to be a more effective workforce. Diversity in the legal profession is especially important because it provides access to our justice system and democratic institutions. Unfortunately, the legal profession is consistently among the least diverse professions nationally, and Delaware is no exception. There have been decades of diversity efforts, but according to many interviewees, gender, racial, and other diversity in partnerships and corporate legal leadership positions remains low in Delaware. Challenges may include the lack of diversity and leadership at senior levels, lack of access to mentors, and perceptions and experiences of having to fight off preconceived racial, ethnic, and gender biases.

True diversity and inclusion in the legal profession requires more than completing a series of requisite boxes on a checklist or survey. In addition to measures meant to increase the numbers of diverse populations in law schools, law firms, and professional associations, many felt it was critical to also focus on retention by establishing a culture where all people are welcomed

E. Judicial Selection Process

Numerous interviewees expressed concern that the lack of diversity among the Delaware bar and bench contributed to feelings among people of color that judges do not understand their needs and challenges. Approximately 22% of judges in Delaware identify as people of color. While the Delaware judiciary is more diverse than Wilmington firms (and likely the Delaware legal profession overall), much of this diversity can be attributed to the diversity of the Justice of the Peace courts. Justices of the Peace do not have to be licensed attorneys to qualify for office.³⁴ Accordingly, the “pipeline” for Justice of the Peace courts is not as restricted as the pipeline for judicial positions requiring a law degree and bar admission. On the other hand, courts like the Court of Chancery have no judges of color. Other courts, like the Family Court, have very low percentages of such judges.³⁵

Increasing the diversity of the bench is a particular challenge given its position within the pipeline and its dependence on the many requisite stages before it. Interviewees cited several common factors as contributing to the lack of diversity among Delaware judges. Some interviewees described a significant cultural disparity in the State between New Castle County and the other two Delaware counties with Kent County and Sussex County viewed as less accepting of attorneys and judges of color. Although judicial positions are “statewide” positions, appointments tend to be geographically based; attorneys within the county where a judicial vacancy occurs are more likely to be appointed than attorneys from other counties. Therefore, if attorneys of color do not feel adequately accepted within a county, they may be less likely to pursue a judicial vacancy or be appointed. Several interviewees noted that attorneys of color often do not apply to be considered for judicial office notwithstanding efforts to encourage a more diverse applicant pool.

³⁴ The fact that the non-lawyer Justice of the Peace court reflects a higher degree of diversity that more aligns with the demographics of Delaware is itself a significant indicator of the diversity pipeline challenge facing the legal profession.

³⁵ According to the Delaware Administrative Office of the Courts, 12 of the 61 members of the justice of peace courts are Black or African American, approximately 20%. A full breakdown of the demographic profile of the Delaware courts can be found in the Landscape document in Appendix I.

The judicial qualification process is driven exclusively by the executive order establishing the Judicial Nominating Commission (JNC).³⁶ That order has been adjusted by Governors over time. Unlike other states with such commissions, Delaware's commission is not based on any statutory or constitutional requirements. Governors have historically respected and abided by the judicial qualifications process to ensure the nomination of highly qualified applicants. However, this can be changed solely by a Governor. Some interviewees described the application and nominations processes as secretive and opaque.

F. Information Gaps

One of the most apparent findings pertains to gaps in information and data relevant to addressing diversity challenges facing the Delaware legal profession. Several working groups struggled to understand the dimensions of potential challenges due to a paucity of data. Neither the Delaware Supreme Court nor the Delaware Bar collects broad demographic information on members of the legal profession. In addition, there is a dearth of data on the impact of current practices and programs on the demographics of the profession.

These information gaps make it difficult to identify causal links between existing practices and the lack of legal diversity in the profession. Useful anecdotal information about possible linkages was gained through various Project activities. But more quantitative data is needed to deeply consider the challenges and possible solutions. To account for these gaps, several recommendations center on data gathering and information acquisition. These recommendations represent opportunities to conduct further study to ensure that steps taken will achieve the dual purpose of promoting a more diverse legal profession while maintaining a high standard of legal services for all Delawareans.

³⁶ Del. Exec. Order No. 16 (2017), <https://governor.delaware.gov/executive-orders/eo16/>. The Commission has twelve members, eleven appointed by the governor and one member appointed by the President of the Delaware State Bar Association.

V. Recommendations

This section contains 50 recommendations from the five working groups as follows:

- Pre-College Education Working Group – 7 Recommendations
- Colleges and Law School Working Group – 3 Recommendations
- Bar Exam and Licensing Working Group – 12 Recommendations
- Bar Diversity Working Group – 8 Recommendations
- Bench Diversity Working Group – 20 Recommendations

A. Pre-College Education Working Group

The Pre-College Working Group was tasked with examining and making recommendations aimed at increasing the diversity of the Delaware legal profession through programming designed to target the state’s precollegiate population. To broadly increase students’ knowledge, skills, and abilities, and engagement with members of the Delaware legal profession, the working group recommends:

- Overhaul the Delaware Law-Related Education Center (DELREC) and its current educational programming.
- Create a law-related analog to the Minority Engineering Regional Incentive Training (MERIT) program to stimulate underrepresented groups’ interest in the law and legal profession.
- Create paid internship programs to give students opportunities for experiential learning to increase interest in pursuing a legal career.
- Create a targeted media campaign to increase student awareness of the Delaware legal profession and career paths available.
- Implement Delaware Civics Standards in all public schools Grades K – 12, with a special focus on existing legal vocational programs.
- Update and expand current Law Day materials and curriculum so they are more relevant to students.
- Create a “Supreme Court on the Road” program to expose students to the work of the Court and bar.

1. Overhaul the Delaware Law-Related Education Center (DELREC) and its current educational programming.

The Delaware Law-Related Education Center (DELREC) is a private non-profit organization that seeks to promote law-related educational programs in Delaware.³⁷ The organization is made up of educators, judges, attorneys, law enforcement, and community leaders who promote active learning experiences and skills development for Delaware students.³⁸ DELREC is most widely known for organizing the Delaware High School Mock Trial Competition and Law Day in Delaware high schools.³⁹ Although this program offers important educational experiences for the pre-college-aged students of Delaware, the working group recommends its mission and programming be expanded to better promote the state's efforts to increase diversity and representation in the Delaware legal community.

To invest in the existing DELREC program, the Ohio Center for Law-Related Education (OCLRE) offers a template for improving DELREC's reach and programming to follow. The OCLRE constitutes one of the most successful and robust state law-related education programs in the country. Sponsored by the Supreme Court of Ohio, the Ohio Attorney General, the Ohio State Bar Association, and the ACLU of Ohio Foundation, the OCLRE offers interactive educational programs that spark lively classroom discussion, enhance student problem-solving skills, and introduce students to the legal community of Ohio.⁴⁰ The organization adopts a multi-pronged approach that focuses on the development of original case materials, generation of professional development tools for educators, promotion of scholarship opportunities for students, administration of specific legal programming, and the creation of mentorship relationships for educators.

As an initial matter, considerable resources – both capital and human – must be invested into DELREC. Currently, DELREC operates on approximately \$50,000 per year of funding.⁴¹ By comparison, OCLRE's funding for 2020 was approximately \$1.3M.⁴² While Ohio is admittedly a state with a much larger population, DELREC cannot offer robust programming – and the programming outlined below – as it currently exists. DELREC, as an institution, constitutes the best vehicle for promoting law-related education statewide and particularly in communities disenfranchised from the justice system. The Supreme Court, in conjunction with the Delaware Bar, should examine DELREC's funding and staffing with an eye toward greater support for its mission.

With proper funding and staffing, DELREC should be expanded to provide more tools and resources to educators. As noted above, the OCLRE provides a mentorship program that connects new participants with experienced teachers. DELREC should adopt this model and include legal actors (attorneys, judges, law enforcement) in the mentorship program. Additionally, the OCLRE provides a helpful

37 *About DELREC*, DELREC: DELAWARE LAW RELATED EDUCATION CENTER, <http://delrec.org/about/>.

38 *Id.*

39 *Id.*

40 *About*, OHIO CENTER FOR LAW-RELATED EDUCATION, <http://www.ocle.org/aws/OCLRE/pt/sp/about>.

41 Information obtained from 2020 990 Tax Form.

42 Information obtained from 2020 990 Tax Form.

“Teacher Toolbox” that offers worksheets, lesson plans, and interactive online resources.⁴³ These tools address topics such as freedom of the press, voting rights, contextualizing the culture of the country’s founding fathers, and anti-racism curriculum. In contrast, DELREC currently offers two “Lessons” that address (1) comparative government and (2) desegregation.⁴⁴ While these topics are important, the implementation and expansion of more culturally relevant topics is needed. Moreover, the OCLRE has many updated topics readily available.

The OCLRE also sponsors numerous educational programs that provide students with engaging, hands-on experiences. These experiences not only enhance the students’ education but also introduce them to the legal community of Ohio in a meaningful way. In addition to middle and high school mock trial programs, the organization also offers a moot court program that focuses on the appellate court process. OCLRE also provides myriad other programs aimed at encouraging civic engagement. The “Youth for Justice” program allows students to “identify an injustice, intolerance or problem relevant to their local community, and develop a plan of action and work together to remedy the injustice.”⁴⁵ Additionally, “Project Citizen” promotes “competent and responsible participation in state and local government” by encouraging students to learn how to “monitor and influence public policy.”⁴⁶ Finally, OCLRE’s “We the People Program” teaches “the history and principles of the American constitutional democracy while enhancing students’ understanding of the government.”⁴⁷ This program is “aligned to the Ohio Learning Standards for Social Studies and English Arts.”⁴⁸ Upon the expansion and restructuring of DELREC, Delaware could offer these revitalized programs to students.

The legal profession provides a variety of avenues through which individuals can pursue a legal career – litigation, appeals, transactional work, government, and state/local politics. DELREC programming should be expanded to better reflect this reality. The OCLRE programming shows that engagement with the legal community need not be one-size-fits-all. Rather, the OCLRE offers numerous programs that engage and educate students in a variety of ways.

DELREC’s programs should be expanded to offer additional educational activities that cater to the differing needs and interests of the Delaware student population. For example, while some students may not be interested in pursuing oral advocacy through mock trials or moot courts, they may feel compelled to become involved in their local government or pursue a cause that promotes social justice. Further, programs such as “Project Citizen” and “Youth for Justice” can be tailored to fit the needs of younger audiences. This program tailoring would ensure that exposure to the legal system can begin at the elementary level. Without the State’s investment in the expansion of DELREC’s educational programs, Delaware will miss the opportunity to engage with these populations of students.

43 Teacher Resources, OHIO CENTER FOR LAW-RELATED EDUCATION, http://www.oclre.org/aws/OCLRE/pt/sp/teaching_toolbox.

44 *Lesson*, DELAWARE LAW RELATED EDUCATION CENTER, <http://delrec.org/lessons/>.

45 *Youth for Justice*, OHIO CENTER FOR LAW-RELATED EDUCATION, http://www.oclre.org/aws/OCLRE/pt/sp/programs_youthforjustice.

46 *Project Citizen*, OHIO CENTER FOR LAW-RELATED EDUCATION, HTTP://WWW.OCLRE.ORG/AWS/OCLRE/PT/SP/PROGRAMS_PROJECTCITIZEN

47 *We the People*, OHIO CENTER FOR LAW-RELATED EDUCATION, http://www.oclre.org/aws/OCLRE/pt/sp/programs_wethepeople.

48 *Id.*

The expansion of DELREC will undoubtedly require both capital and human resources. The Supreme Court must be willing to invest in both the framework and the implementation of these ideas. Investment on both the capital and human side is critical as well. DELREC must collaborate with all corners of the community – the Supreme Court, the Bar Association, state and local government, law schools, and high school and middle school educators. Only through intentional investment and expansion can the Delaware legal community utilize DELREC to improve representation within our profession.

2. Create a law-related analog to the Minority Engineering Regional Incentive Training (MERIT) program that was created to stimulate underrepresented groups' interest in science, technology, education, and math (STEM) education.

The Minority Engineering Regional Incentive Training (MERIT) program was created in 1974 in downstate Delaware to stimulate underrepresented groups' interest in science, technology, education, and math (STEM) education. The National Action Council for Minorities in Engineering (NACME) recognized a national disparity between the racial/ethnic minority group population and their representation in higher education in science and technical fields. At the time, the Seaford DuPont Plant was the world's first and largest Nylon plant. Inspired by a call to action from NACME, DuPont examined the downstate Delaware population and noticed a similar disparity. Specifically, the downstate Delaware population was roughly 25% Black or African American, Native American, and Latino/Hispanic – but less than 1% of those groups were matriculating into science and technical fields.

In response to this disparity, DuPont created a “science club” with science-based, STEM programming aimed at talented, elementary and middle-school minority children. These children met on Saturday mornings and engaged in activities designed by DuPont engineers. This Saturday morning program eventually morphed into a “total youth” development program. Forty-three years later, the program has matriculated 350 students – 97% of whom have graduated from college.

The current MERIT program offers team-building engineering competitions (think fighting robots), in and out-of-state college visits, academic enrichment field trips, and continued Saturday science club meetings. MERIT also offers a comprehensive summer program through in-kind support from Delaware Technical Community College. This summer program focuses on intense preparation in math, computer, and communication skills.

The MERIT program should be duplicated with a focus on intense preparation in oral communication/advocacy, writing, and critical thinking. A MERIT-like “total youth development” program, with law-based, advocacy programming, and training, could be replicated utilizing MERIT as a template. MERIT still exists and thrives today. Its founder and director, John Hollis, still participates in the program. Mr. Hollis would be an excellent resource for the recreation of the program in another professional space.

3. Create internship programs to give students opportunities for experiential learning to increase interest in pursuing a legal career.

To increase interest in and awareness of career opportunities in the legal field, students must be exposed to the justice system in meaningful ways. One of the most effective means of accomplishing

this exposure is through well-planned and funded internship programs. Leading Youth Through Empowerment (LYTE) was established to help change the academic trajectory of under-represented youth by preparing middle school students to attend rigorous high school programs and colleges. This preparation occurs through personal mentoring, rigorous teaching, and leadership.

LYTE has a successful series of internships through a partnership with the Delaware Department of State. These internships allow students to intern at various offices in state government, such as the Court of Chancery, the Department of Labor, the Department of State, and other offices.

Establishing these internships requires LYTE to develop and maintain strong support and relationships with government officials and business leaders. LYTE works closely with the Department of State to identify what departments/agencies might offer the strongest internship opportunities, and with third parties to develop and secure speakers to connect with students. As part of its ongoing efforts, LYTE helps create the curriculum and manages the day-to-day program responsibilities – from monitoring attendance to helping students with bus routes to working with students on professional behavior.

The Delaware Supreme Court should partner with LYTE to develop internships that connect students to legal professionals and career opportunities in the justice system. To attract a broad range of students, paid internships need to be strongly considered. The Project must be mindful that many students from low-income families cannot afford to take on unpaid internships. LYTE’s program provides paid internships and provides training on financial responsibility, such as how to save for college and other expenses. LYTE monitors the effectiveness of the program based on attendance and other professional work ethics. LYTE also conducts student surveys to report on the efficacy of the program.

4. Create a targeted media campaign to increase student awareness of the Delaware legal profession and career paths available.

No tangible media product currently exists to introduce Delaware’s children to the legal community. The Supreme Court should create a tangible media campaign to educate and engage with Delaware’s youth. Tangible media products – such as brochures, pamphlets, booklets, coloring books, etc. – would provide informative infographics, engaging photographs, and compelling testimonials. These products should also explicitly highlight the need for diversity in the Delaware legal community and address the benefits of a professional population that accurately reflects the makeup of the community it serves.

Further, these media products could be customized for each targeted audience. For example, a brochure intended for distribution at the high school level could contain information about the SAT, pre-law college programs, the LSAT, and internship opportunities. In contrast, a pamphlet intended for younger children would provide more generalized information about what attorneys do in their day-to-day careers, how citizens can participate in the Delaware legal system, and visual representations of what a judge, jury, and courtroom look like. By tailoring these tangible media products to meet the needs of each audience, the Supreme Court could ensure that it is educating pre-college individuals in an accessible and memorable way.

These products must also explicitly highlight the need for diversity in the Delaware legal community and address the benefits of a professional population that better reflects the makeup of the community it serves. The materials must also reflect diverse voices and experiences. They should recognize and

celebrate the people of color within our legal community. Pre-college-aged individuals must see people that look like them represented within the media produced and distributed.⁴⁹

The creation of these tangible media products should be accompanied by the development of a related social media campaign. Social media has transformed the way we, as a society, communicate, educate, and engage with one another. This social media interaction is especially relevant for young adults, teenagers, and tweens. A recent report by Common Sense Media found that teenagers spend an average of more than seven hours a day on social media. Thus, social media apps such as Instagram, Snapchat, YouTube, and TikTok can be utilized as effective tools through which the Delaware legal community could engage with pre-college-aged individuals.

Although these apps are well-known for their popular dance trends, catchy songs, and silly pranks, they can be utilized as effective educational tools. For example, an attorney could use TikTok or Instagram to film “a day in the life of an attorney.”⁵⁰ Attorneys, judges, and clerks could conduct live Q&A sessions through the “Instagram Live” feature. This platform allows Instagram users to submit comments and questions through a live video stream. The live stream can then respond to the questions in real-time. This type of live Q&A session would allow young audiences to connect virtually with actors in our legal community and ask questions in a low-pressure setting. Thus, by utilizing these popular social media platforms, the Delaware legal community would be able to engage with pre-college-aged individuals through a dynamic and interactive medium.

However, it is important to recognize that barriers to access to technology continue to exist. Not all students have easy access to Wi-Fi, computers, or cell phones. For example, in Woodbridge, the school district found that 30% of families could not consistently access the internet.⁵¹ Although Delaware has made efforts to expand broadband throughout the state, access continues to be unequal.⁵² Thus, the creation and integration of social media platforms must be one part of a larger media engagement plan.

5. Implement Delaware Civics Standards in all public schools Grades K – 12.

The Delaware civics standards are implemented in all Delaware public schools in grades K-12 in prioritized grades. The domain of civics includes the following: (1) government; (2) politics; (3) participation; and (4) citizenship. Civics directly addresses citizenship education within the context of political systems. Students study the assumptions upon which governments are founded, as well as the organizations and strategies governments employ to achieve their goals. In the United States, students learn the underlying principles of representative democracy, the constitutional separation of powers, and the rule of law. Great emphasis is placed on comprehending that an essential premise of representative democracy is the willingness of citizens to place a high premium on their responsibility for participation in social decision-making. Students develop the skills necessary to discharge those

49 See Rawan Elbaba, *Why on-screen representation matters, according to these teens*, PBS (Nov. 14, 2019), <https://www.pbs.org/newshour/arts/why-on-screen-representation-matters-according-to-these-teens>.

50 Victoria Rideout & Michael B. Robb, *The Common Sense Census: Media Use by Tweens and Teens*, COMMON SENSE MEDIA 1, 3 (2019).

51 Natalia Alamdari, *Students can't learn online without internet access. Here's what Delaware is doing.*, DELAWARE ONLINE (Aug. 24, 2020), <https://www.delawareonline.com/story/news/2020/08/24/delaware-takes-steps-get-students-internet-access-remote-learning/3429351001/>.

52 *Id.*

responsibilities while protecting their rights and the rights of others. The study of civics prepares students to translate their beliefs into actions and their ideas into policies.

The Delaware social studies standards are grouped by their discipline (civics, history, economics, and geography), and by grade band (K-3, 4-5, 6-8, 9-12). Most grades in K-3 have at least one prioritized civics standard. All civics standards are prioritized together in grades 4, 7, and 9.

Current opportunities do exist for students to learn about the judicial system. For example, in fourth grade, civics 1(b) requires students to “understand that the United States government is divided into executive, legislative, and judicial branches, each with specific responsibilities and powers.” Likewise, in seventh grade, civics 1(a) requires students to “understand why governments have the authority to make, enforce, and interpret laws and regulations, such as levying taxes, conducting foreign policy, and providing for national defense.” Other grade-specific standards with judicial connections are included on the chart below:

Grade 4	Grade 7	Grade 9
<p>C1 4-5a: Students will understand that governments have a variety of structures and exist for many purposes and that in America these are explained in the United States and State constitutions.</p> <p>C1 4-5b: Students will understand that the United States government is divided into executive, legislative, and judicial branches, each with specific responsibilities and powers.</p>	<p>C 1 6-8a: Students will understand why governments have the authority to make, enforce, and interpret laws and regulations, such as levying taxes, conducting foreign policy, and providing for national defense.</p> <p>C 1 6-8b: Students will analyze the different functions of federal, state, and local governments in the United States and examine the reasons for the different organizational structures in each level of government employs.</p> <p>C 2 6-8a: Students will understand that the concept of majority rule does not mean that the rights of minorities may be disregarded and will examine and apply the protections accorded to those minorities in the American political system.</p> <p>C 2 6-8b: Students will understand the principles and content of major American state papers such as the Declaration of Independence; the United States Constitution (including the Bill of Rights); and the Federalist Papers.</p> <p>C 3 6-8b: Students will understand that American citizenship includes responsibilities such as voting, jury duty, obeying the law, service in the armed forces when required, and public service.</p>	<p>C 2 9-12b: Students will understand that the functioning of the American government is a dynamic process that combines the formal balances of power incorporated in the Constitution with traditions, precedents, and interpretations that have evolved.</p> <p>C 9-12a: Students will understand that citizens are individually responsible for keeping themselves informed about public policy issues on the local, state, and federal levels; participating in the civic process; and upholding the laws of the land.</p>

The Delaware Supreme Court should build on these requirements. Expansion opportunities should provide an enhanced curriculum; creating a Speakers Bureau made up of judges and legal professionals to help students learn about the judicial system, the diversity of the profession, and the responsibilities it entails; and inviting students to attend notable Bench/Bar activities.

The Project should also provide a variety of additional outreach strategies, such as videos featuring the justice system, essay contests, field trips to courts, and a competitive legal-based program like the Science Olympiad. These efforts would help students develop an interest in the legal profession and learn about career opportunities, while also developing a more positive and diverse perspective on the legal profession. Additionally, the Project should connect with other organizations that offer curriculum resources used throughout Delaware by educators, such as iCivics, the National Constitution Center, and Education for American Democracy. Creating relationships with these existing resources gives the Project inroads to educators already teaching civics and should contribute to helping the Project reach its goals.

6. Update and expand current Law Day materials and curriculum so they are more relevant to students.

The Supreme Court should also focus on expanding and updating its “Law Day” programming. In 1961, Congress passed a resolution designating May 1st of each year as “Law Day.”⁵³ In most states, Law Day activities occur sometime during the first week in May.⁵⁴ The most common activity is to have an attorney come to speak to a class.⁵⁵

DELREC offers Law Day materials on its website. However, a number of these lessons appear to be dated and have not been recently updated. For example, the Law Day lesson plan currently featured on the DELREC website is from 2014.⁵⁶ These materials should be updated and expanded.

Importantly, the Law Day curriculum should explicitly address the importance of diversity within the legal field and should recognize people of color within our legal community. The Supreme Court could recruit diverse attorneys to speak to students in classrooms throughout the State. Schools with higher populations of minority students should not be overlooked in these efforts. It is important for students of color to meet, see, and learn from attorneys and judges who look like them. Representation matters.

53 *The History of Law Day*, DELAWARE LAW RELATED EDUCATION CENTER, <http://delrec.org/lessons/law-day/>.

54 *Id.*

55 *Id.*

56 *Id.*

7. Create a “Supreme Court on the Road” program to expose students to the work of the Court and bar.

The Supreme Court of Delaware should also create a “Supreme Court on the Road” program. Through this program, the Justices of the Supreme Court of Delaware and appellate attorneys would travel to schools throughout the State. There, they would conduct oral arguments to show students the realities of appellate advocacy work. The cases argued would be real, current cases before the Court. Alternatively, the State could develop a “model” case that involves relevant, but more simplified legal issues. Students throughout the state would have the opportunity to witness a Supreme Court oral argument without needing to travel to Dover. After each oral argument, the students should be allowed to ask questions of both the Justices and the advocates.

The program could also be tied in with the school’s social studies, history, and writing curricula. Before attending the “Supreme Court on the Road” program, students would learn about United States Supreme Court Justices (and/or the Justices of the Supreme Court of Delaware) and principal Supreme Court Cases (and/or Supreme Court of Delaware seminal cases). Older students could be assigned writing projects in which they attempt to write a legal brief (or another form of a persuasive essay) addressing the issue to be argued during the program. There are also numerous depictions of the United States Supreme Court in TV and movies that could be shown to students before the arguments.

Given the Delaware Supreme Court’s busy docket, it may be necessary to enlist other members of the Delaware Bar to participate in this program. For example, retired Judges and attorneys could be recruited to stand in as the Justices and advocates. Again, it is crucial that, in conducting this program, the outreach focuses on schools with higher populations of minority students. Additionally, the volunteer advocates and Justices must include people of color.

This program would provide concrete examples and visual representations of what legal advocacy looks like in the real world. Although students may have an abstract understanding of what the United States Supreme Court is and who the Justices are, the Supreme Court on the Road Program would allow them to see advocacy demonstrated directly in front of them. By bringing the advocacy to the students in their high schools, the Supreme Court on the Road program would expose a larger number of students to appellate advocacy and the larger Delaware legal community.

B. Colleges and Law School Working Group

The population of attorneys in Delaware does not reflect the racial and ethnic demographics of the state's residents. This trend is the direct result of the underrepresentation of people from various racial and ethnic groups within the proverbial pipeline into the Delaware legal profession. To address causes of the lack of diversity of the Delaware Bar, the working group recommends:⁵⁷

- Adopt a “Delaware Scholars Program,” as an alternative to the bar exam.
- Consider the feasibility of a loan repayment program for attorneys who gain bar admission through the Delaware Scholars Program and practice law in the state for a specified length of time.
- Establish coordinated pathways to admission with students who attend Delaware State University and other external institutions and organizations that serve significant numbers of potential law school applicants from underrepresented racial and ethnic groups.

1. Adopt a “Delaware Scholars Program” as an alternative to the bar exam.

The Delaware Scholars Program (described below and in more detail in Appendix VII) would provide a pathway to admission to the Delaware Bar through a “diploma privilege” program for applicants who successfully fulfill the program requirements, the Delaware Clerkship Program, and the Character and Fitness process.

The bar exam is a central requirement of admission to the Delaware Bar. The bar exam, however, likely serves as a barrier to the racial and ethnic diversity of attorneys in Delaware. Recent American Bar Association data highlights significant racial and ethnic disparities in bar exam pass rates nationwide.⁵⁸ Even without specific data, it is safe to assume that this trend manifests in Delaware. Therefore, the Delaware Supreme Court should authorize the consideration and adoption of an alternative to the bar exam.

The Delaware Scholars Program could be modeled after the Daniel Webster Scholar Honors Program (DWS).⁵⁹ Through DWS, graduates of the University of New Hampshire School of Law who complete the mandatory curriculum are granted admission to the New Hampshire Bar without taking the traditional bar exam. According to the program website:

⁵⁷ Fuller explications of each recommendation are provided in the attached Report and Recommendations of the Working Group on Colleges and Law School.

⁵⁸ AMERICAN BAR ASSOCIATION, *New ABA data indicate minorities lagging in bar pass rates* (July 5, 2021) <https://www.americanbar.org/news/abanews/aba-news-archives/2021/07/bar-passage-rates/>.

⁵⁹ UNIV. OF NEW HAMPSHIRE, FRANKLIN PIERCE SCHOOL OF LAW, DANIEL WEBSTER SCHOLARS HONORS PROGRAM, <https://law.unh.edu/academics/daniel-webster-scholar-honors-program>

Students are accepted into the program prior to their second year of law school and discover first-hand what it takes to succeed in today’s legal marketplace. They hone their skills in both simulated and real settings - counseling clients, working with practicing attorneys, taking depositions, appearing before judges, negotiating, mediating, drafting business documents - while creating portfolios of written and oral work for bar examiners to assess every semester.

The value of DWS is captured by the way it utilizes different forms of assessment over two years. This program design requires students to demonstrate mastery of a wide range of knowledge and skills while reducing bias that comes from heavy reliance on a single form of assessment, such as the bar exam. A study of the program,⁶⁰ conducted by a highly reputable legal research organization, produced the following findings:

- Members of the profession and alumni said they believe that students who graduate from the program are a step ahead of new law school graduates.
- When evaluated based on standardized client interviews, students in the program outperformed attorneys who had been admitted to practice within the last two years.
- The only significant predictor of standardized client interview performance was whether the interviewer participated in the Daniel Webster Scholar Honors Program. Neither LSAT scores nor class rank was significantly predictive of interview performance.

In discussing potential replication of the program elsewhere, the report remarked “the DWS program is a small program in a small school in a small state with a bench and bar motivated to collaborate with the school and committed—on a long-term basis—to the program.” Like New Hampshire, Delaware is a small state with a close-knit legal community and a single law school. It seems, based on the report findings, that Delaware would be an ideal setting for a DWS-style program considering the success of the DWS program thus far. It also seems that providing this alternative pathway could help foster both a more diverse legal profession in the state and also more “practice-ready” cohorts of new attorneys.

Other jurisdictions are considering alternatives as well. The Oregon Alternatives to the Bar Exam Task Force recently submitted recommendations to the Oregon Board of Bar Examiners for two alternative paths to licensure in that jurisdiction.

The first path, the Oregon Experiential Pathway, resembles New Hampshire’s DWS program in that it largely consists of structured, experiential coursework during law school and culminates in a capstone portfolio submitted in place of a bar examination. The second path, the Supervised Practice Pathway (SPP), takes place after graduation and more closely resembles Delaware’s existing clerkship requirement. Under the SPP framework, applicants work between 1000-1500 hours under the direct supervision of a licensed attorney, accumulating work samples for a portfolio to be reviewed in place of a bar exam.⁶¹

60 INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, *Ahead of the Curve, Turning Law Students into Lawyers, A Study of the Daniel Webster Scholar Honors Program*, https://iaals.du.edu/sites/default/files/documents/publications/ahead_of_the_curve_turning_law_students_into_attorneys.pdf

61 OREGON STATE BOARD OF BAR EXAM., RECOMMENDATION OF THE ALTERNATIVES TO THE BAR EXAM TASK FORCE (June 18, 2021), <https://taskforces.osbar.org/files/Bar-Exam-Alternatives-TFReport.pdf>.

2. Consider the feasibility of a loan repayment program for attorneys who gain bar admission through the Delaware Scholars Program and practice law in the state for a specified length of time.

Law school graduates from underrepresented backgrounds tend to rely more heavily on student loans to finance their education.⁶² This trend is most pronounced for Black or African American law students and graduates. In a recent survey of 1,300 early-career attorneys nationwide, about 80% stated that student loan debt influenced their career path. Seventy percent of respondents who work in the public or non-profit sector reported that income-based payment options and the prospect of eventual forgiveness of their student loans (through the Public Service Loan Forgiveness Program) allow them to work in their desired profession. Given both the disproportionate debt burdens borne by underrepresented people and the influence that debt and the possibility of forgiveness have on career choices, the Delaware Supreme Court and Delaware Bar should consider the feasibility of a loan repayment program as part of the Delaware Scholars Program framework presented earlier.

Loan repayment would be targeted at attorneys who gain bar admission through the Delaware Scholars Program and who practice law in the State for a specified length of time. More consideration is needed to determine specific details; but the overall framework could be relatively straightforward, with a specified public or quasi-public agency acting as a third-party payee on student loans held by participants in the program. Payments would be made by the agency in specified intervals (e.g., monthly, yearly) during periods in which participants are eligible for forgiveness. An income cap could be imposed to further target this aid on attorneys who may need it most. If desired, the program could also be targeted at specific geographic locations or topical areas of law practice.

3. Establish coordinated pathways to admission with students who attend Delaware State University and other external institutions and organizations that serve significant numbers of potential law school applicants from underrepresented racial and ethnic groups.

Formal and coordinated programs and initiatives could be effective at engaging and supporting potential law school applicants from underrepresented racial and ethnic groups. Engagement would be premised on fostering interest in studying law. Support would be premised on helping make law school and bar admission goals a reality. Programming would be integrated at every phase of the proverbial pipeline, with components that reach into middle and secondary schools to plant seeds about law as a career and colleges and universities to further foster interest and provide viable pathways for underrepresented aspiring attorneys. These pipeline efforts could funnel into the Delaware Scholars Program and eventually into the Delaware Bar.

Delaware benefits from the presence of Delaware State, a historically black university. Delaware State and Delaware Law School could enter into a matriculation agreement that would grant automatic admission into the Delaware Scholars Program to any Delaware State University student admitted to Delaware Law School. Matriculation agreements could also be entered into between Delaware State and the Delaware Technical Community College to further formalize the pathway to law practice, from the state's community college through Delaware State, on to Delaware Law School, and into the Delaware Bar.

⁶² AMERICAN BAR ASSOCIATION & ACCESSLEX INSTITUTE, STUDENT DEBT: THE HOLISTIC IMPACT ON TODAY'S YOUNG LAWYER (2021), https://www.accesslex.org/sites/default/files/2021-09/Student%20Debt_The%20Holistic%20Impact%20on%20Today's%20Young%20Lawyer.pdf.

C. Bar Exam and Admission Working Group

Aspects of the Delaware bar licensing process may be potential barriers to admission to the practice of law for people from underrepresented racial and ethnic groups who may nonetheless be qualified to practice in the State. The working group's recommendations are divided into the following general areas: (1) information gathering; and (2) process and programmatic reforms. The working group recommends:

- Collect racial and ethnic data of its bar candidates and attorneys.
- Conduct a study of minimum competence.
- Conduct a bar exam cut score study.
- Revisit the substance and format of the clerkship requirement and task list.
- Consider an alternative pathway to bar admission, such as the Daniel Webster Scholar Honors Program.
- Consider producing bar study prep materials.
- Increase transparency relating to bar exam grading policies.
- Redesign the Board of Bar Examiners' website.
- Increase "feeder school" outreach.
- Reconsider the cost of the fee for late bar applications.
- Consider reducing the number of essays and topics tested on the bar exam.
- Explore the feasibility of offering two bar examinations annually to include a study of the makeup of the Board and impacts on the staff.

1. Information Gathering

More information and data are needed to assess the impact of licensing barriers on the racial and ethnic composition of the Delaware Bar. The following recommendations address these gaps.

a. **Collect racial and ethnic data of its bar candidates and attorneys.**

Currently, racial and ethnic demographic data is not collected from candidates for admission to the Delaware Bar or members of the bar. Knowing the extent of demographical disproportions is very important in implementing an effective plan to increase diversity. The important tasks of determining strategies, defining success, and measuring impact require demographic data to be collected consistently. Therefore, the Delaware Supreme Court should require that bar candidates be prompted to provide information about their racial and ethnic identity, with a "no response" option for candidates who do not want to share that information. The Court should also authorize a study of the racial and ethnic demographics of current Delaware attorneys.

b. Conduct a study of minimum competence.

The purpose of the licensing process is to ensure that people granted the privilege to practice law in Delaware are *minimally competent* to do so. This includes possessing a baseline set of knowledge, skills, and ethical inclinations. The operative questions are:

- What should an entry-level lawyer know?
- What should an entry-level lawyer know how to do?

Considerations of the *tangible* meaning of minimum competence are requisite starting points to discussions about possible reforms to the licensing process. These considerations implicate core notions of the fairness and legitimacy of the process, including issues of diversity and equity. For Delaware, they could inform the substance and format of the bar exam, the clerkship requirement, and the task list. Therefore, the Delaware Supreme Court should authorize a study to define minimum competence among attorneys in the state.

Two large-scale studies of minimum competence have been conducted recently, including an AccessLex-funded study conducted in California.⁶³ The results of the study led the working group to recommend that California reduce the number of subjects on the bar exam. Another AccessLex-funded study identified 12 components of minimum competence and created frameworks for using the licensing process to test the acquisition of these components.⁶⁴

c. Conduct a bar exam cut score study.

The purpose of a bar exam cut score study would be to assess the extent to which the cut score is a valid demarcation of minimum competence to practice. Cut scores (i.e., minimum passing scores) are inherently imprecise instruments. There is no such thing as a perfect cut score. There are, however, points at which a cut score can be so imprecise as to be unhelpful and even unfair. With no data regarding the validity of its bar exam cut score, the Delaware Supreme Court should authorize such a study.

It is often assumed that higher cut scores are associated with higher levels of public protection from unqualified and unethical attorneys. But a 2020 study, funded by AccessLex, that analyzed six years of disciplinary statistics from 48 jurisdictions found no relationship between cut scores and the number of disciplinary complaints, charges, or sanctions taken against attorneys in those jurisdictions.⁶⁵ The results of this study contributed to the California Supreme Court's decision to lower its bar exam cut score in 2020.

63 THE STATE BAR OF CALIFORNIA, THE PRACTICE OF LAW IN CALIFORNIA: FINDINGS FROM THE CALIFORNIA ATTORNEY PRACTICE ANALYSIS AND IMPLICATIONS FOR THE CALIFORNIA BAR EXAM, FINAL REPORT (MAY 11, 2020), <https://www.calbar.ca.gov/Portals/0/documents/reports/2020/California-Attorney-Practice-Analysis-Working-Group-Report.pdf>

64 INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, BUILDING A BETTER BAR (Oct. 28, 2020), <https://iaals.du.edu/publications/building-better-bar>

65 ACCESSLEX INSTITUTE, GROUNDBREAKING NEW STUDY EXAMINING THE CALIFORNIA BAR CUT SCORE (Oct. 14, 2020), <https://www.accesslex.org/news/groundbreaking-new-study-examining-california-bar-cut-score>

d. Revisit the substance and format of the clerkship requirement and task list.

Delaware’s clerkship requirement and task list render the licensing process substantially more labor-intensive than that of other jurisdictions. Therefore, the Delaware Supreme Court should authorize a rigorous review of these requirements to ensure that they are serving tangible functions of enhancing minimum competence and orienting bar candidates to the practice of law in Delaware. Revisiting these requirements should be aligned with efforts to define minimum competence.

2. Process and Programmatic Reforms

The following recommendations seek to address the barriers through reforms to the licensing process.

a. Consider an alternative pathway to bar admission, such as the Daniel Webster Scholar Honors Program.

This recommendation aligns identically to Recommendation B.1. described above and will not be repeated here.

b. Consider producing bar exam study materials.

Delaware does not partner with commercial bar preparation providers to develop study materials. And the high cost of commercial bar study programs may constitute a barrier for applying to the bar. Therefore, the Delaware Supreme Court should consider authorizing the production of an official subject matter outline and possibly other study materials. This would help make high-quality preparation aids more broadly accessible, potentially attracting a more diverse pool of candidates and yielding a more diverse group of bar passers.

c. Increase transparency relating to bar exam grading policies.

Information about how the Delaware bar exam is graded is difficult for candidates to discern. This lack of clarity potentially discourages some aspiring attorneys from seeking admission to the Delaware bar. Therefore, the Delaware Supreme Court should revise Rule 13 to mandate greater clarity and transparency regarding bar exam grading policies.

d. Redesign the Board of Bar Examiners’ website.

The Delaware Board of Bar Examiners should redesign its website to increase ease of use across desktop and mobile platforms and increase clarity and transparency regarding important information. An important component of this redesign would be to incorporate more inclusive messaging and imagery, presenting the Delaware Bar as welcoming of all people, including members of underrepresented racial and ethnic groups

e. Increase “feeder school” outreach.

Delaware could potentially benefit from an established pipeline with regional law schools. Such a relationship could attract a more diverse pool of bar candidates. Therefore, efforts should be made to target outreach at regional law schools that serve or could serve as “feeders” to the Delaware Bar. These efforts could involve members of the bar and judiciary promoting the benefits of law practice in Delaware. Data about the extent of unmet legal needs in the state and potential opportunities for attorneys seeking to meet those needs could be a compelling part of the pitch. These efforts could be tied to other efforts to increase the transparency and inclusivity of the licensing process.

f. Reconsider its fee for late bar applications.

Delaware assesses a substantially higher fee than other jurisdictions for bar applications submitted after the initial registration deadline. This fee might be a discouraging factor for aspiring attorneys who are considering admission to the Delaware Bar. Therefore, the Delaware Supreme Court should reconsider bar application fees, particularly the practice of doubling the fee for late applicants. The goals could be to reduce the chances of fees discouraging qualified aspiring attorneys from underrepresented groups from seeking admission and to ensure that the fees are in line with other states in the region.

g. Consider reducing the number of essays and topics tested on the bar exam.

Delaware has an unusually high number (14) of “fair game” essay topics and a wide array of topics that are typically tested. Until a clearer picture of the ideal exam format, content, and structure is available from the above bar exam validity study and cut score study, one tangible step toward reducing inordinate licensure barriers would be the reduction of both the tested and “fair game” topics on the Delaware bar exam. Additionally, the committee recommends considering reducing the number of Delaware essay questions to six, bringing the length of the bar exam in line with neighboring states.

h. Explore the feasibility of offering two bar examinations annually, including studying the impacts on the makeup of the Board and staff.

Delaware is the only U.S. state to offer one bar exam per year instead of two. This raises the cost of failing the July bar exam and may disadvantage applicants who do not have the financial luxury of waiting a year to reattempt. In considering this recommendation, Delaware should also consider increasing the administrative capacity of its Board of Bar Examiners through a combination of additional paid positions and expanded volunteer support.

D. Bar Diversity Working Group

The Delaware State Bar Association (DSBA) is a voluntary bar association. Nevertheless, given its wide membership and deep legal community links, the DSBA plays a key role in promoting diversity among its membership and across the legal profession. The DSBA “believes (i) that a diversity in backgrounds, perspectives, and experiences strengthens our organization and the entire legal profession and (ii) in promoting increased diversity among members of the Judiciary, legal professionals, and institutions providing legal education.”⁶⁶

It has implemented several programs to promote diversity. The lack of bar demographic data inhibits the ability to understand the breadth of diversity challenges within the bar, design more targeted approaches to address such challenges, and evaluate the effectiveness of existing outreach efforts and programs. The working group recommends:

- Develop and implement a Delaware-specific diversity certification program for law firms patterned after the Mansfield Rule.
- Develop and implement a coordinated career-long program of evidence-based implicit bias training for attorneys.
- Establish a commission to develop a structured, cross-firm mentoring program for attorneys.
- Provide opportunities for judicial leaders to engage in regular personal interaction with attorneys at all career stages.
- Engage an expert to audit and restructure the hiring process for judicial clerkships.
- Take steps to reduce implicit bias and identity threat in the court environment.
- Continue and expand the Supreme Court’s support of the Delaware Bar Association’s summer diversity clerkship program.
- Collect data to support the analysis of racial, gender, and ethnic disparities in the Delaware bar and the evaluation of programs to mitigate those disparities.

⁶⁶ Delaware State Bar Association, DSBA Policy on Diversity & Inclusion, <https://www.dsba.org/sections-committees/standing-committees/diversity/>. The DSBA statement further provides, “The DSBA recognizes that achieving diversity in the legal profession requires continued effort and commitment. DSBA leaders, including Executive Committee members, Section chairs, and Committee chairs are expected to promote diversity and inclusion within the DSBA as well as in the legal profession.”

1. Develop and implement a Delaware-specific diversity certification program for law firms patterned after the Mansfield Rule.

In 2017, the Diversity Lab⁶⁷ developed the Mansfield Rule certification process to promote diversity in law firm hiring and advancement. Participating firms agree to “affirmatively consider at least 30 percent women, attorneys of color, LGBTQ+ attorneys, and attorneys with disabilities for leadership and governance roles, equity partner promotions, formal client pitch opportunities, and senior lateral positions.”⁶⁸ The Rule is modeled after the National Football League’s Rooney Rule, which requires teams to interview at least one nonwhite (“minority”) candidate when filling a head coach position⁶⁹ and is credited with a 20 percent increase in the likelihood of a nonwhite candidate being hired.⁷⁰ The Mansfield Rule is designed to increase the representation of “diverse” attorneys in law firm leadership by ensuring sufficient diversity in the candidate pool to overcome status quo bias. Status quo bias is an unconscious preference for maintaining the status quo that can influence hiring and promotion committees to inadvertently avoid selecting candidates who appear to be demographic outliers within the pool.⁷¹ The Diversity Lab certifies law firms’ compliance with the Mansfield Rule. Different versions of the Rule exist for large firms, midsize firms, and in-house legal departments.⁷² The Diversity Lab’s analysis demonstrates that the majority of firms participating in the Mansfield Rule 2.0 pilot increased the percentage of “diverse” attorneys promoted to equity partnership, elected or appointed to Office Head positions and Management/Executive Committees, hired as lateral senior associates, and participating in formal pitches.⁷³

The Bar Working Group recommends that the Delaware Supreme Court develop a “Delaware version” of the Mansfield Rule to promote diversity in hiring and advancement in Delaware law firms, taking into account the various sizes of Delaware firms and the dynamics of some Delaware firms being offices of national firms, as well as the demographic composition of the Delaware bar as a whole. To encourage participation and collaboration among firms to meet the Rule’s diversity goals, the working group recommends that the Supreme Court publish a list of firms working towards implementation of the Rule. Additionally, it is recommended that aggregate statistics on the total number of firms meeting the goals and statistics on progress over time, rather than firm-specific statistics, be published.

67 The Diversity Lab is an incubator for innovative ideas and solutions that boost diversity and inclusion in law. It works to pilot diversity ideas and programs in collaboration with more than 150 top law firms and legal departments across the country. See, Diversity Lab, What We Do, <https://www.diversitylab.com/>.

68 DIVERSITY LAB, *Mansfield Rule 4.0*, <https://www.diversitylab.com/mansfield-rule-4-0/> (last visited Nov. 30, 2021).

69 The Rooney Rule has since been expanded to include general manager jobs and equivalent front office positions. NATIONAL FOOTBALL LEAGUE COMMUNICATIONS, <https://nflcommunications.com/Pages/NFL-EXPANDS-ROONEY-RULE-REQUIREMENTS-TO-STRENGTHEN-DIVERSITY.aspx>.

70 DIVERSITY LAB, *64 Law Firms Announced As Mansfield Rule 2.0 Certified*, <https://www.diversitylab.com/pilot-projects/mansfield-rule-2-0/> (last visited Nov. 30, 2021).

71 Stefanie K. Johnson, David R. Hekman & Elsa T. Chan, *If There’s Only One Woman in Your Candidate Pool, There’s Statistically No Chance She’ll Be Hired*, HARV. BUS. REV., <https://hbr.org/2016/04/if-theres-only-one-woman-in-your-candidate-pool-theres-statistically-no-chance-shell-be-hired> (Apr. 26, 2016).

72 See, DIVERSITY LAB, WHAT WE DO, <https://www.diversitylab.com/what-we-do/>.

73 DIVERSITY LAB, *64 Law Firms Announced As Mansfield Rule 2.0 Certified*, <https://www.diversitylab.com/pilot-projects/mansfield-rule-2-0/> (last visited Nov. 30, 2021).

2. Develop and implement a coordinated career-long program of evidence-based implicit bias training for attorneys.

Implicit bias is an unconscious attitude towards a group of people that can influence a person's behavior without the person's knowledge or intent. Implicit bias can affect the outcomes of large and small decisions that shape the trajectory of a lawyer's career, from work assignments to selection for partnership. Implicit bias can also lead to seemingly minor everyday interactions that, intentionally or unintentionally, communicate bias or hostility towards marginalized groups.⁷⁴ Over time, repeated exposure to negative interactions can result in cognitive overload, burnout, self-doubt, and feelings of isolation.⁷⁵ Reducing the prevalence of implicit bias and negative interactions can be expected to assist in retaining attorneys who are members of historically marginalized groups and in reducing barriers to their career advancement.

Research demonstrates that many types of training aimed at mitigating implicit bias in the workplace are ineffective.⁷⁶ Two specific forms of training, however, are effective. Long-term educational programs, often lasting weeks or months, that teach people to become aware of situations when they are most vulnerable to implicit biases, replace their automatic response with a more egalitarian response, and practice the new egalitarian response until it becomes a habit, have been shown to result in behavioral changes that persist months or years after the intervention has ended.⁷⁷ Programs based on implementation intentions, which train participants to implement if-then action plans to interrupt biased thinking patterns (e.g., "If I see a Black face, I will think safe."), have also demonstrated effectiveness in helping people to override implicit associations.⁷⁸

The Bar Working Group recommends that the Delaware Supreme Court develop and implement a coordinated career-long program of evidence-based implicit bias training for attorneys as part of the continuing legal education requirement for attorneys licensed to practice in Delaware (similar to the enhanced ethics requirement). The program should be developed and presented by social science researchers, rather than business consultants, and should employ strategies demonstrated to be effective in peer-reviewed studies. Requiring attorneys to report compliance with this requirement on a more frequent basis be considered than the current biennial reporting requirement for CLE compliance is expected to increase the effectiveness of the training (or require training on an annual

74 Derald Wing Sue et al., *Racial microaggressions in everyday life: Implications for clinical practice*, 62 AMERICAN PSYCHOLOGIST 271 (2007).

75 Lucas Torres, Mark W. Driscoll & Anthony L. Burrow, *Racial Microaggressions and Psychological Functioning Among Highly Achieving African-Americans: A Mixed-Methods Approach*, 29 J. SOCIAL & CLINICAL PSYCHOL. 1074 (2010).

76 See, e.g., Chloë Fitzgerald et al., *Interventions designed to reduce implicit prejudices and implicit stereotypes in real world contexts: a systematic review*, 2019 BMC PSYCHOL. 29 (May 16, 2019); Calvin K. Lai et al., *Reducing implicit racial preference: I. A comparative investigation of 17 interventions*, 143 J. EXP. PSYCHOL. GEN. 1765 (2014).

77 See, e.g., Calvin K. Lai, Kelly M. Hoffman & Grian A. Nosek, *Reducing Implicit Prejudice*, 7 SOC. AND PERSONALITY PSYCHOL. COMPASS 315 (2013).

78 Heather Rose Rees, Andrew Michael Rivers & Jeffrey W. Sherman, *Implementation Intentions Reduce Implicit Stereotype Activation and Application*, 45 PERSONALITY & SOC. PSYCHOL. BULLETIN 37 (2019); Saaid A. Mendoza, Peter M. Gollwitzer & David M. Amodio, *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 PERSONALITY & SOC. PSYCHOL. BULLETIN 512 (2010); Brandon D. Stewart & B. Keith Payne, *Bringing automatic stereotyping under control: implementation intentions as efficient means of thought control*, 34 PERSONALITY & SOC. PSYCHOL. BULLETIN 1332 (2008).

basis even if reporting is biennial). Additionally, creation of virtual “badges” for individual attorneys who reach certain levels of training, which can be displayed in their firm’s personal biographies, and recognition through publication in the *Bar Journal* (similar to how the Combined Campaign for Justice recognizes donors) to further incentivize attorneys to engage in training beyond what would be required as part of the mandatory CLE requirement, is recommended.

3. Establish a commission to develop a structured, cross-firm mentoring program for attorneys.

Providing employees of color with a broad network of role models, mentors, and sponsors helps them to feel valued by their organization and advance to leadership roles. In particular, same-race mentors and role models can attenuate otherwise identity-threatening cues in the workplace environment, such as underrepresentation, and equip mentees with strategies to overcome obstacles within the organization and the profession. Relying on senior personnel to form their own informal, ad hoc mentoring relationships with junior personnel typically leads to the neglect and underdevelopment of employees of color. Cross-firm mentoring programs can provide additional opportunities to connect attorneys with same-race mentors and can broaden participants’ professional networks beyond the firm.

The Bar Working Group recommends that the Supreme Court establish a commission to develop a structured cross-firm mentoring program that pairs attorneys with mentors who share their demographic characteristics. To maximize the program’s potential to assist in recruiting and retaining attorneys in Delaware practice, the program should be open to attorneys at all career levels, including summer associates. The program should include incentives for mentor participation, such as virtual “badges.”

4. Engage in regular personal interaction with attorneys at all career stages.

Several members of the Bar Working Group noted that the accessibility of Delaware Supreme Court Justices (and judges of the other Courts) is a unique and attractive feature of the Delaware legal community. Members mentioned a variety of opportunities for attorneys to interact with the judges, such as lunches with summer associates or younger attorneys following observation of an oral argument and “brown bag lunches” with a small group of attorneys. Such informal interactions and relationships are central to the collegial legal culture known as the “Delaware Way,” which working group members note is essential to recruiting attorneys to, and retaining them in, Delaware practice, as well as developing candidates for the bench.

The Bar Working Group recommends that the Supreme Court continue and expand its participation and encourage judges of the other Courts to participate in programs that facilitate personal interaction with attorneys at all career stages. These programs should be held in each of the three counties in the state.

5. Engage an expert to audit and restructure the hiring process for judicial clerkships.

Judicial clerkships are a critical pathway for building new attorneys' connections to Delaware and developing their interest in eventually becoming candidates for the bench. Carefully designed recruiting and hiring processes can help to overcome disparities and biases and increase the representation of people of color in the workforce. Diversity-conscious policies and procedures, along with structured decision-making processes, are particularly effective in reducing racial disparities in employment decisions.

Diversity-conscious policies recognize that in the absence of intentional efforts to promote diversity and equity, inequality in an organization will continue to reproduce itself. In the absence of diversity-conscious policies, employment decisions that appear on the surface to be merit-based may be grounded in stereotyping and discrimination. A diversity audit can help to establish diversity-conscious hiring policies. Such an audit involves a close examination of every stage of the hiring process to identify subtle factors that may be working against people of color. If the organization is large enough, an audit may also involve analyzing demographic data to identify statistical patterns of disparate impact.

One of the most consistently effective interventions against implicit and unintended biases in the hiring process is to impose a consistent structure and criteria for decision-making. When people make decisions applying subjective criteria, they are more likely to make decisions laced with unconscious bias. Subjective criteria can include varying the relative weights of the decision criteria depending on the race of the applicant, applying available options differently to members of different groups, holding members of different groups to different standards, or changing the decision-making procedures from one candidate to the next. Hiring decisions should be structured including the process to be followed and ensuring that the criteria to be used are specified in writing and applied consistently by all decision-makers. Furthermore, the criteria used to make employment decisions should be as objective as possible, clearly related to the skills required for the job, and not grounded in group stereotypes.

To reduce the possibility of unintended bias and inconsistency in the recruiting and hiring of judicial clerks, the Bar Working Group recommends that the Delaware Supreme Court engage a qualified expert to conduct a diversity audit of the hiring process and establish a consistent, structured clerkship selection process to be implemented in all courts. Although the timeline for hiring judicial clerks may vary from court to court, the selection process and decision-making criteria should be consistent across courts. The Bar Working Group also recommends that the Supreme Court adhere to the diversity rule described in Recommendation 1 in considering candidates for judicial clerkships.

6. Take steps to reduce implicit bias and identity threat in the court environment.

Implicit bias not only affects attorneys within the confines of law firm offices. They can also manifest themselves in the courthouse; for example, court staff may incorrectly assume a nonwhite attorney is a litigant and therefore treat the attorney differently from white attorneys. Even the physical environment of the court can signal a lack of belonging, creating a social identity threat for members of historically disadvantaged groups.⁷⁹ For example, if all or nearly all of the portraits displayed in a courthouse depict white male judges, this can signal that people of color are less welcome in legal practice and on the bench. Conversely, when steps are taken to increase inclusiveness for one group (e.g., establishing gender-neutral restrooms to benefit transgender and nonbinary people), members of other historically disadvantaged groups may also feel less identity threat as they perceive a general spirit of inclusiveness. In addition to making the general public more welcomed in courthouses, reducing implicit bias, may aid in the retention of attorneys from historically underrepresented groups and in encouraging these attorneys to become candidates for the bench.

The Bar Working Group recommends that the Delaware Supreme Court take several steps to reduce implicit bias and identity threat in the court environment. First, the Supreme Court should implement a requirement of evidence-based implicit bias training for court staff similar to the program of training described for attorneys in Recommendation 2. Second, the Supreme Court should implement procedures to ensure that all court users, including attorneys, litigants, witnesses, jurors, and the public, are treated consistently at security and elsewhere in the courthouse (e.g., asking every person who enters the courthouse whether they have a bar card instead of making assumptions about who is an attorney and who is not). Third, the Supreme Court should engage a qualified expert to recommend ways to make the physical environment of each courthouse more inclusive (e.g., prominently displaying portraits of eminent Black or African American jurists). This would also apply to each court's webpage.

7. Continue and expand the Supreme Court's support of the Delaware Bar Association's summer diversity clerkship program.

In 2021, the Diversity, Equity, & Inclusion Committee of the Delaware State Bar Association implemented its Diversity Clerkship Program. This program provides selected candidates the opportunity to clerk in Delaware courts and provides a stipend to the clerks for the six to eight-week summer clerkship. The clerks are required to be physically present in Delaware during the term of the clerkship. A key component of the program is providing opportunities for the clerks to have meaningful interactions with Delaware attorneys and jurists. It is also important for the clerks to have exposure to Delaware Courts other than the Court in which they are clerking. The Committee believes that making these connections with the clerks increases the chances of their returning to Delaware to practice after graduation.

⁷⁹ Katherine T.U. Emerson & Mary C. Murphy, *Identity threat at work: How social identity threat and situational cues contribute to racial and ethnic disparities in the workplace*, 20 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 508 (2014).

In its inaugural year, the DSBA placed four clerks with the Courts. The clerks noted that a highlight of their summer program was the exposure to Delaware judges. They specifically cited the opening reception where the judges personally greeted them and the visit to the Supreme Court where they observed oral arguments and met with the justices to discuss the cases.

The working group recommends that the Supreme Court continue its interactions with the DSBA clerks. The other Courts were also very supportive of providing opportunities for the clerks and the working group recommends that the Court encourage the other courts to continue their efforts. The summer program goes by quickly and trying to schedule a visit to another Court can be challenging given the burdens on the Courts' calendars. It is recommended that the Courts schedule a visit/lunch/meeting with the clerks before the start of the program in June. Having preset dates will also allow the Committee to schedule other opportunities that do not conflict with a Court visit.

8. Collect data to support the analysis of racial, gender, and ethnic disparities in the Delaware bar and the evaluation of programs to mitigate those disparities.

Without accurate and reliable data on the race and ethnicity of Delaware attorneys and judges, it will be impossible to determine whether any intervention to improve diversity is effective. At present, there exists no comprehensive and reliable source of data on the race and ethnicity of members of the Delaware bar.

The Bar Working Group recommends that the Supreme Court amend the bar admission and bar registration forms to include required fields for disclosure of race, gender, and ethnicity, with a “decline to state” option for those who do not wish to participate. Race and ethnic data can then be used by qualified researchers to evaluate Delaware’s progress in recruiting and retaining a diverse bar and in attracting a diverse field of potential judicial candidates.

E. Bench Diversity Working Group

The Delaware bench does not reflect the diversity of the population it serves, a critical consideration to the public's trust and confidence in the fair administration of justice. The working group recommendations are divided into five general areas: (1) education; (2) promoting/supporting judicial diversity; (3) data; (4) residency requirements; and (5) other activities. To increase opportunities for qualified, racially, and ethnically diverse judicial candidates to pursue a judicial career, the working group recommends:

- Develop continuous education for all members of the bar on the judicial appointment process.
- Use the annual judicial retreat to introduce new data, information, and programs on ways to increase diversity.
- Promote the work of the Delaware Supreme Court, NCSC, and AccessLex within the legal community, including in Delaware-focused publications.
- Ensure outreach to law firms (especially smaller law firms, which are more prevalent downstate) and diverse bar associations on the importance of a diverse bench, judicial opportunities, and the judicial appointment process.
- Provide direct mentorship opportunities between judicial officers and diverse members of the bar and students (law, college & high school) interested in a judicial career.
- Establish a Diversity, Equity, and Inclusion Coordinator (“DEI Coordinator”) at the Supreme Court, and eventually at all courts. If necessary, reclassify positions in the interest of speed. Have trial court DEI Coordinators take direction from the Supreme Court’s Coordinator.
- Support initiatives of other institutions/agencies that have a direct impact on the diversity of the bench and bar in Delaware (i.e., New Law School at Delaware State University).
- Retain a firm/company to survey bar members about their race and ethnicity.
- Survey bar members about their interest in joining the judiciary and actual and perceived barriers to entry and success.
- If available to the AOC, look at the schools that former clerks have attended.
- Survey members of the bench about obstacles they have faced in recruiting racially and ethnically diverse clerks and interns, any steps they have found helpful in improving their recruitment and hiring of diverse applicants, and any ideas they have for helping the judiciary to draw more diverse candidates into the applicant pool and accept positions.
- Develop metrics and reporting requirements for each court, so that the Delaware Supreme Court can measure the success of program initiatives (e.g., applicants seeking positions, clerks hired, interns hired) and report improvements to the bench and bar.
- Review and, wherever necessary, seek or support improvements in the clarity and consistency of statutes governing judicial appointments. More specifically, seek or support the amendment of statutory residency requirements for judicial officers in ways that may increase the pool of qualified judicial applicants.
- Before posting or circulating a judicial vacancy, confirm that draft notices accurately reflect the legal requirements for appointment as provided in the Delaware Code.

- Send notices of judicial vacancies to affinity groups to ensure a broader and more diverse distribution.
- Promote judicial vacancies across all counties. Encourage diverse candidates to seek appointments in any county to which they would be willing to travel to serve, or to move to if the judicial position has a county residency requirement.
- Create law and/or policies that allow time for new appointees to move to the county where they will sit, if necessary.
- Promote diversity recruitment at major law firms and the Attorney General's office, traditional elements of the pipeline.
- Promote the importance of racially and ethnically diverse membership on the Judicial Nominating Commission.
- Consider (through a survey or other means) whether the use of remote participation platforms would encourage more racially and ethnically diverse candidates to seek judicial clerkships and employment in Sussex County, which may create a pipeline for more diverse clerks to work in and seek judicial appointments in Sussex County in the future.

1. Education Recommendations

a. **Develop continuous education for all members of the bar on the judicial appointment process.**

New attorneys should be introduced to the prospect of a judicial appointment early in their careers so that those who are interested can gather information and lay the groundwork for seeking an appointment to the bench. Some attorneys may not develop an interest in a judicial appointment until later in their career. Accordingly, information should be provided at regular intervals and through continuing legal education. The information should be widely available so that attorneys who are not personally interested in joining the bench can mentor and sponsor racially and ethnically diverse attorneys who would like to join the bench.

b. **Use the annual judicial retreat to introduce new data, information, and programs on ways to increase diversity.**

Judicial clerkships and internships can provide a significant opportunity for encouraging racially and ethnically diverse students and graduates to locate in Delaware and establish a law practice. The annual retreat also provides an annual opportunity during the Chief Justice's Judicial Conference to examine efforts at increasing diversity and to discuss new ways to increase and promote the number of diverse applicants hired. Information collected by the Delaware Administrative Office of the Courts regarding judicial law clerk hiring over the last 15 years should be used to set a baseline.

2. Promotion/Support

a. Promote the work of the Delaware Supreme Court, NCSC, and AccessLex within the legal community, including in Delaware-focused publications.

The Delaware Supreme Court and Delaware State Bar Association should make a concerted effort to promote diversity using opportunities such as the *Delaware Lawyer* and *Delaware Bar Journal* to address the subject of diversity in the bench and bar. This effort could include a standalone section in each publication and engagement with NCSC and AccessLex as resources. Moreover, the Court should encourage members of each working group to author articles and discuss the work of their respective group to include publication of specific change developed and implemented because of the group's work. The Court should develop a plan to highlight future developments growing out of the Delaware Supreme Court's Strategic Plan to keep the work and its importance at the forefront of initiatives. Members of the bar need to know that increasing diversity is one of the Supreme Court's top priorities.

b. Ensure outreach to law firms (especially smaller law firms, which are more prevalent downstate) and diverse bar associations on the importance of a diverse bench, judicial opportunities, and the judicial appointment process.

Some law firms are working to expand the racial and ethnic diversity of their workforce but may not be exploring how to better partner with the bench and bar to help to diversify the pool of judicial candidates. Law firms that are not yet working to diversify their applicant pool may be more inclined to do so if they see the potential for helping their alumni to grow into judicial officers.

c. Provide direct mentorship opportunities between judicial officers and diverse members of the bar and students (law, college & high school) interested in a judicial career.

Current and former judicial officers understand the pros and cons of serving, and their encouragement may give attorneys of color more confidence to seek a judicial appointment. To the extent that attorneys of color may lack sponsors in the traditional networks that influence judicial appointments, a broader group of mentors could begin to equalize the representation.

d. Establish a Diversity, Equity, and Inclusion Coordinator (“DEI Coordinator”) at the Supreme Court, and eventually at all courts. Reclassify positions in the interest of speed. Have trial court DEI Coordinators take direction from the Supreme Court’s Coordinator.

Having a group of DEI Coordinators for the courts is likely to yield multiple benefits. For example, it would reinforce the importance of the mission and the efforts that the Supreme Court and others are making. It would help the Supreme Court to convey consistent messages about its commitment to diversity to the public and to the individual courts. DEI coordinators could also promote the speed and accuracy of communication in both directions. Coordinators would guide courts and judicial officers when new initiatives are implemented, monitor, and measure the progress of those initiatives, and coordinate training as needed. The coordinators could ensure that courts collect the right data and help courts meet reporting deadlines. The most significant benefit may be to sustain the momentum that the Supreme Court, Steering Committee, and working groups have generated.

- e. **Support initiatives of other institutions/agencies that have a direct impact on the diversity of the bench and bar in Delaware (i.e., Collaboration with Delaware State University).**

Any institution or agency that supports the project's goals should be considered as a member of a network committed to increasing racial and ethnic diversity in Delaware's legal profession, and members should work together and support each other's efforts. Therefore, the Court should consider creating a formal network of institutions committed to increasing the legal profession's diversity. In this way, every avenue that may help to achieve the goal can be put to maximal use.

3. Data

- a. **Retain a firm/company to survey bar members about their race and ethnicity.**

A material number of attorneys decline to state their race or ethnicity in the annual bar registration. Without good data, it is difficult to understand where the bench and bar can make the biggest impact, set realistic goals, and measure results.

- b. **Survey bar members about their interest in joining the judiciary and actual and perceived barriers to entry and success.**

Working group members believe that there are attorneys of color in Delaware who want to be on the bench but (a) do not seek an appointment, or (b) who never consider the possibility because of perceived obstacles. The surveys recommended in this section should explore the extent to which either is true and where the bench and bar can help to remove obstacles and demystify the judicial appointment process.

- c. **If available to the AOC, look at the schools that former clerks have attended.**

The core to this recommendation is understanding the pathways most often utilized by those successful at securing a clerkship. For example, which schools appear frequently? Do they do a good job of recruiting and supporting through graduation racially and ethnically diverse students? What are the key elements of their programs? Would schools that have high rates of clerkships be candidates for partnering with our bench and bar on their diversity efforts?

- d. **Survey members of the bench about obstacles they have faced in recruiting racially and ethnically diverse clerks and interns, any steps they have found helpful in improving their recruitment and hiring of diverse applicants, and any ideas they have for helping the judiciary to draw more diverse candidates into the applicant pool and accept positions.**

Some judicial officers have tried to increase the diversity of their law clerk hires but have not been as successful as they would like. Some judicial officers have been successful in hiring diverse clerks and interns. Survey results would be helpful by identifying for the former group different approaches that are available to them and that they may use to draw more diverse candidates into the applicant pool.

- e. **Develop metrics and reporting requirements for each court, so that the Delaware Supreme Court can measure the success of program initiatives (e.g., applicants seeking positions, clerks hired, interns hired) and report improvements to the bench and bar.**

The mere request to report on clerkship hiring and retention practices may encourage judicial officers who have not considered diversity in hiring to do so. The exercise of reporting may encourage each judicial officer to examine whether they are reaching their desired audience and whether different or additional approaches should be considered. If members of the bench and bar report and celebrate measurable improvements, we may start a virtuous cycle and see more diverse candidates considering Delaware as a place to work and live.

4. Residency

- a. **Review and, wherever necessary, seek or support improvements in the clarity and consistency of statutes governing judicial appointments. More specifically, seek or support the amendment of statutory residency requirements for judicial officers in ways that may increase the pool of qualified judicial applicants.**

There are a limited number of judicial appointments available. Some seats are or are perceived to be, “connected to” an individual county because of a statute, the number of case filings, or tradition. In very few cases, however, there are judicial seats reserved by law to candidates who reside in the county. Even when this is so, a statute may clarify that the lawyer need not reside in the county until after the appointment.

Allowing attorneys who reside in one county to seek appointments in any county may help to diversify the bench across the state. This may be encouraged by adding “reside after appointment” language to relevant statutes.

- b. **Confirm that draft notices of judicial vacancies accurately reflect the legal requirements for appointment outlined in the Delaware Code before posting or circulating.**

Candidates can misunderstand a notice of vacancy that has incomplete information. To the extent that a statutory judicial position allows for residency “after appointment,” *e.g.*, three judges of a court must live in Kent County, a notice of vacancy for that court should do more than state that “the candidate must reside in [X] county.” The lack of clarifying language on when a candidate must take up residency can discourage attorneys of color in other counties from applying for positions.

- c. **Send notices of judicial vacancies to affinity groups to ensure a broader and more diverse distribution.**

To promote a more diverse applicant pool, a concerted effort should be made to get vacancy notices into the hands of racially and ethnically diverse attorneys to encourage them to consider becoming candidates for appointment. Notices should also be provided to the network of professionals who mentor and sponsor potential candidates to ensure they are aware of vacancies as early as possible.

d. Promote judicial vacancies across all counties.

Encourage diverse candidates to seek appointments in any county to which they would be willing to serve, or to move to if the judicial position has a county residency requirement. See comments to section 4.a.

e. Create law and/or policies that allow time for new appointees to move to the county where they will sit, if necessary.

See comments to section 4.a. The working group is not aware of guidelines or requirements, if any, regarding how soon after appointment an appointee must move to reside in the county of appointment.

5. Other (maybe within the purview of other working groups or branches of government)**a. Promote diversity recruitment at major law firms and the Attorney General's office, traditional elements of the pipeline.**

Alumni of large firms and the Department of Justice have traditionally been well-represented on the bench. Increasing the number of diverse attorneys practicing in these settings may help to increase the pipeline diversity of candidates for judicial appointment. We know that these institutions are independently making efforts to increase the number of racially and ethnically diverse attorneys in their hiring pipelines.

b. Promote the importance of racially and ethnically diverse membership on the Judicial Nominating Commission.

Diverse attorneys may be more likely to seek appointment and to feel at ease in the interview process if they see diverse lawyers and non-lawyers serving on the Commission. Having diverse lawyers and non-lawyers on the Commission also broadens the perspective of the group as a whole and may increase the likelihood that the group will notice when members' implicit biases may be impacting a discussion and should be explored.

c. Consider (through a survey or other means) whether the use of remote participation platforms would encourage more racially and ethnically diverse candidates to seek judicial clerkships and employment in Sussex County, which may create a pipeline for more diverse clerks to work in and seek judicial appointments in Sussex County in the future.

Few law students of color seek internships and clerkships in Sussex County. Sussex County judges and employers could be seen as more worthwhile in the eyes of law students living outside of Delaware if they were not required to relocate or drive a long distance to serve. Non-judicial employers might also improve their odds of hiring racially and ethnically diverse attorneys if new hires were able to practice remotely for a provisional period or a portion of the week. This would allow a newly hired attorney to learn more about the work, their colleagues, and the area before deciding to relocate.

VI. Conclusion

Diversity within the bench and bar is an essential component of a fair and impartial legal system. This Strategic Plan identifies a range of opportunities that the Delaware Supreme Court and others can pursue—often in partnerships with other government, educational, non-profit, and philanthropic entities—to increase the diversity of the legal profession within Delaware.

Proposed recommendations begin with actions to encourage the pursuit of legal careers by young Delawareans, especially from groups that are currently underrepresented in the legal profession. Suggested policy reforms include paid judicial internships with judges and attorneys, creating a law-related analog to the Minority Engineering Regional Incentive Training program, and direct judicial and legal engagement with existing pipeline programs and vocational paralegal and criminal justice programs.

The requirements to enter and stay in the legal profession have critical ramifications for access to justice. Whether people have access to good attorneys has a significant impact on building and maintaining public trust in the justice system, as does the degree to which the legal profession reflects the communities they serve. There are many factors to increase attorney diversity, including the quality of legal education and training, reforms to the system of higher education finance and student debt repayment, bar admissions practices, lifelong training and continuing legal education opportunities, mentoring programs, and the bar’s commitment to diversity as a critical element in building and maintaining the public’s trust and confidence in the legal system.

Increasing the demographic diversity of judges is important because of the need for broader perspectives and life experiences that can inform the real-world issues facing citizens in criminal, family law, and Court of Chancery cases. Not only are people of color represented at disproportionately high rates in the criminal justice system,⁸⁰ but the judges who are hearing cases are disproportionately white. When

⁸⁰ Each year from 2010 to 2020, more than 1% of Black and American Indian or Alaska Native adults were serving a sentence of at least 1 year in prison. U.S. Dept. of Justice, Bureau of Justice Statistics, Prisoners in 2020, Highlights, 1 (Dec. 2021), <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf>. In 2020, the Bureau of Justice Statistics reported the following per 100,000 U.S. adults within each demographic group: White 223/100,000; Black 1,234/100,000; Hispanic 639/100,000; American Indian/Alaska Native 1027/100,000; Asian 93/100,000. *See, Id.*, Statistical Tables, 14, Table 6.

judges do not look like the communities they serve, individuals in those communities may develop mistrust in the justice system's capacity to be fair to everyone. Increased outreach and continuous education for all members of the bar on the judicial appointment process along with establishing a DEIC within the Delaware Supreme Court may provide a wider and more diverse applicant pool.

Delaware is a small state with limited resources. Given the number of recommendations, the Supreme Court will have to prioritize its diversity efforts. This Strategic Plan is just the starting point for the larger rethinking of how the legal profession can educate, license, support attorneys, and assist in appointing judges that better reflect the experiences of all Delawareans. But this Strategic Plan is a fundamental step, and the Steering Committee stands ready to support the work ahead.

Appendices

I. Landscape Report

Delaware Diversity Project Landscape Brief

I. Introduction

This Landscape Brief uses current publicly available data regarding the demographics of the state's population and its legal profession (including its judiciary). Additionally, this Brief provides an overview of the state's caseload. This information is being provided to the Delaware Bench and Bar Diversity Project Steering Committee solely for its use in developing a strategic plan to address diversity challenges in the legal profession. As this document is preliminary in nature, members of the project are encouraged to add to its content and provide clarifying comments.

A. Project History

The Delaware Supreme Court established the Delaware Bench and Bar Diversity Project (Project) to develop a strategic plan designed to address diversity concerns in the legal profession. The Delaware Supreme Court has tasked leaders of this Project with “engag[ing] in a strategic effort to address diversity issues in the Delaware legal community, develop a strategic plan to support a more diverse Delaware Bench and Bar, and serve as a national model for addressing diversity challenges in the legal community.” The Steering Committee is to share its findings and recommendations with the Delaware Supreme Court by December 31, 2021.

The overarching goal of the Project is to ensure that “the courts and the legal profession reflect the diversity of the communities they serve.” Therefore, the project will focus on increasing the diversity of the legal profession along the *continuum* of the profession. Accordingly, when we use the term “legal profession” in this Brief we are referring to this continuum: admission to law school; matriculation in law school through graduation; admission to the bar, and access to the bench.

To provide support for this Project, the Delaware Supreme Court has engaged the National Center for State Courts (NCSC) and AccessLex Institute (AccessLex). These organizations will provide subject matter expertise, facilitation, and staff support, and will work collaboratively with the Steering Committee and Working Groups in developing the strategic plan.

This Project may raise sensitivities, as topics of diversity and equity can touch upon painful realities, past and present. Moreover, there may be certain aspects of this Project where raw statistics cannot alone drive recommendations or goals. Any final recommendations from this Steering Committee must aim to increase the diversity of the legal community while also maintaining high-quality legal services for the residents of the State.

B. The Landscape

There are cultural, historic, and tradition-based policies and practices (both stated and unstated) that may contribute to the challenge of diversifying the legal profession in Delaware. While data cannot replace such considerations, data can be highly relevant to understanding whether existing policies and practices remain responsive to the legal needs of Delawareans. Data can assist leaders in either affirming the value of such policies and practices or identifying potential options for improvement.

This Brief provides the Steering Committee with a summary of known data about the state and its legal profession as a starting point in developing a strategic plan. A successful strategic plan – that is, one that has practical and measurable outcomes – must be based on obtaining sufficient data to inform the targeting of actions, measure their efficacy over time, and determine whether desired results have been achieved. While there are certainly qualitative and quantitative aspects to consider in determining what success would look like, a complete lack of data to confirm the same would leave progress (or the lack thereof) solely to the eye of the beholder. Progress becomes a matter of perception, conjecture, and interpretation that may or may not be supported by facts because it is not data-driven and, therefore, unmeasurable. Accordingly, this Brief is intended to assist the Steering Committee in beginning its work based on what is known, what is not known, and what needs to be determined. Part of the final strategic plan may well be the recognition of the need and methods for the collection of more robust data to inform policy decisions.

This initial Brief uses currently available data from multiple sources, including:

- Census data regarding the diversity of the state’s population (the people served by the legal profession).
- Caseload data regarding the nature of the cases being handled by the bar and the judiciary (how the people are generally using the legal system).
- Diversity data on Delaware’s legal profession.
- Data on Delaware’s legal education pipeline.
- Delaware’s bar licensing practices.

The Brief also outlines areas of concern where data appears sparse or unavailable thus limiting opportunities for deeper analysis. This Brief will be updated as new information and analyses become available during the work of the Steering Committee and its Working Groups.

C. Preliminary Observations

Two data sets provide the initial context for the Project: (a) census data regarding the diversity of the population of the state (the people served by the legal profession); and (b) caseload data regarding the nature of the cases being handled by the bar and the judiciary (how the people are generally using the legal system). The first data set provides insight into the demographics of the state. For example, Delaware’s Black or African American population is almost twice the national average of the United States – 22.0% versus 12.4%, respectively.

The second data set provides useful insight into how Delawareans are using their courts. Using caseload data as the sole proxy for understanding a community’s legal needs is, itself, imperfect. People rely on the legal profession for many things beyond representation in court (e.g., transactional legal representation, preparation of estate plans, tax compliance, etc.). Notwithstanding this limitation, caseload data can provide important insight into who is currently using the courts and for what types of legal purposes. For example, there is significant respect for the Delaware judiciary’s and bar’s expertise in the areas of corporate and intellectual property law. As is evident in the caseload profile of the state, however, the legal needs of Delawareans are generally similar to those reported in other states. Delawareans have representational needs in a wide range of areas including criminal law, family law, consumer debt law, traffic law, housing law, and even civil law unrelated to the corporate or intellectual property practice areas. Indeed, Delaware’s

corporate and intellectual property practice as measured by the court cases is relatively small in comparison to other case types handled by the state’s judiciary.

Within the context of these two data sets (population and caseload) are a number of other data sets that provide important insights into the diversity challenges Delaware faces at various points along the legal profession continuum. For example, if admission to law schools does not reflect a diverse population, the lack of diversity at this entry point will propagate throughout the legal profession. Similarly, if the process of being admitted to the bar limits diversity, this will eventually be reflected throughout the remaining continuum including the composition of the state’s bar and bench. The additional data sets are thus intended to provide the Steering Committee with a wide-angle view of the diversity challenge in terms of steps on a continuum, with each step providing possible opportunities to either make improvements or compound the challenges. The additional data sets should assist in providing further context relative to those particular steps.

II. Delaware’s Population is Relatively Diverse

Delaware’s population represents one benchmark for understanding the need for diversity in the legal profession. The table below depicts a racial and economic demographic breakdown of Delaware’s population by county. Each county is about 52% female.

Category	New Castle	Sussex	Kent	DE	US
Total Population (N)	558,753	234,225	180,786	973,764	328.2m
White	56.0%	74.8%	60.2%	61.3%	60.0%
Black or African American	25.0%	11.9%	25.7	22.0%	12.4%
American Indian and Alaska Native	0.2%	0.3%	0.7%	0.3%	0.7%
Asian	5.4%	1.4%	1.6%	3.7%	5.6%
Native Hawaiian and Other Pacific Islander	0.0%	0.0%	0.1%	0.0%	0.2%
Some other race	0.4%	0.6%	0.2%	0.4%	0.3%
Two or More Races	2.5%	1.7%	4.1%	2.6%	2.5%
Hispanic or Latino of any race	10.4%	9.3%	7.4%	9.6%	18.4%
Median Household Income	\$73,892	\$63,162	\$60,910	\$68,287	\$62,843
Persons in Poverty	10.4%	12.1%	12.7%	11.3%	10.5%
Median Gross Rent	\$1,163	\$1,030	\$1,084	\$1,130	\$1,062
Bachelor’s Degree or Higher (25 or older)	36.2%	28.3%	23.7%	32.0%	32.1%

Source: [US Census](#), 2019, [Data USA](#), 2020.

As indicated by the table, Delaware’s Black or African American population is almost twice the U.S. average. Its Hispanic or Latino population is almost half the U.S. average.

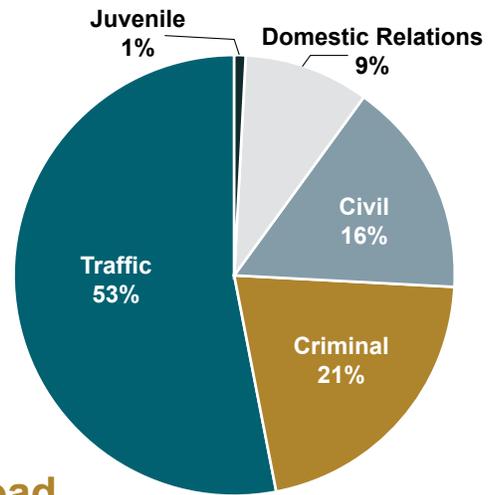
III. Delaware’s Caseload Composite Reflects Diverse Legal Needs

Judicial caseloads can be important indicators of a community’s broad justice needs. The vast majority of Delawareans engage the state courts across the spectrum of case types. While contract disputes account for nearly 46% of the state courts’ civil cases, it is important to note that this is 46% of 16% of the state’s overall caseload.

A. Contract Cases Drive Delaware’s State Court Civil Caseload

According to data reported by the Delaware Administrative Office of Courts to NCSC’s *Court Statistics Project (CSP)*, in 2019 the state courts saw 546 new filings in their Supreme Court, and 395,592 new filings in their trial courts. More than half of these new trial court filings were related to traffic, parking, or other ordinance violations. The second largest case type category was criminal cases, accounting for 21% of the 2019 trial caseload, followed by civil cases at 16%. The AOC provides enough detailed civil data to the CSP to determine that nearly half (46%) of the civil caseload is made up of contract cases (*Source: [Court Statistics Project](#)*).

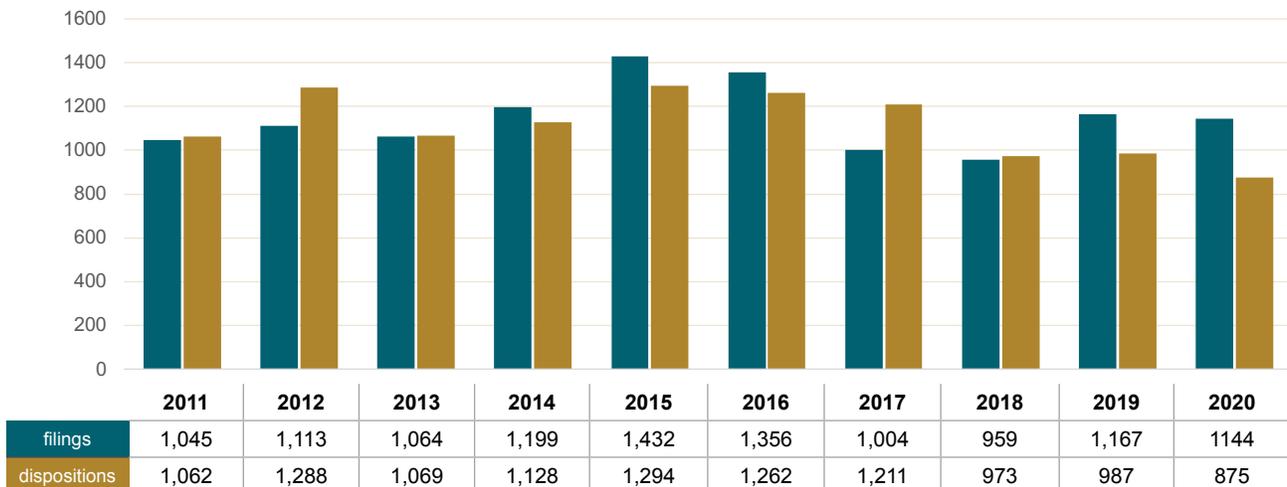
Trial Court Caseload Composition, 2019



B. Chancery Cases Represent a Low Portion of Delaware’s Total Caseload

Delaware’s bar and judiciary has internationally recognized expertise in corporate law. However, Court of Chancery cases, though complex, represent a very small portion of the state’s caseload, approximately 0.3% of total caseload.

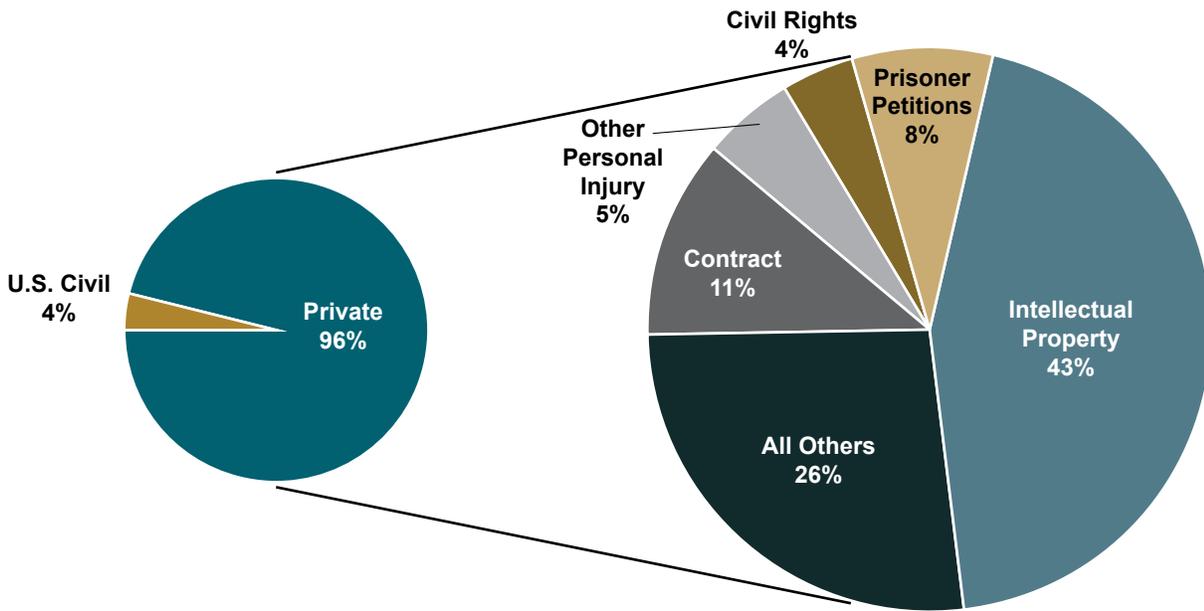
Court of Chancery 10-Year Civil Caseload Trend



C. Intellectual Property Cases Account for Nearly Half of the U.S. District Court of Delaware’s Private Civil Caseload

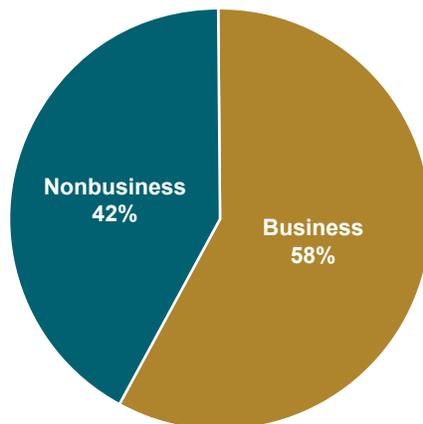
According to data obtained from the Administrative Office of the U.S. Courts, in 2020 the U.S. District Court of Delaware had a total of 1,842 civil case filings. Of those, 1,769 cases were categorized as private civil and 73 were U.S. civil. Of the private civil cases, 794 involved intellectual property, 200 were contract cases, 139 were prisoner petitions, 88 involved personal injury, and 77 were civil rights cases. All other private civil cases totaled to 471 (Source: United States Courts).

U.S. District Court of Delaware’s Private Civil Caseload, 2020



In the U.S. Bankruptcy Court, District of Delaware, the court had a total of 3,249 cases filed in 2020. Of those, 1,882 were classified as Business cases and 1,367 were classified as Nonbusiness cases (Source: United States Courts).

Delaware U.S. Bankruptcy Court Caseload, 2020



IV. The Demographics of Delaware’s Legal Profession Do Not Track with the State’s Overall Demographic Diversity: What is Already Known

An estimated 3,700 attorneys, judges, magistrates, and other judicial employees work in Delaware. Their average salary is \$157,104 (Source: [Data USA](#)). According to a 2019 report, only 5.33% of Wilmington law partners are people of color, and only 11.65% of Wilmington associates are people of color (Source: [NALP](#)). Comparing this information alongside the state’s demographics illustrates the degree to which the legal profession does not reflect the racial and ethnic make-up of the state.

A. Delaware’s Legal Profession Diversity Challenge

Although the legal profession faces diversity challenges nationally at a macro level, Delaware’s diversity challenge is particularly apparent. Neighboring cities still perform better than Wilmington on this metric. Washington, D.C. has over 26% associates of color, Philadelphia has 18.4%, and New York City has over 30%. These cities have larger proportions of non-Hispanic white residents and smaller proportions of non-Hispanic Black residents than Wilmington (Source: [US Census](#)).

B. Delaware’s Legal Education Pipeline Also Does Not Reflect the State’s Diversity

As Delaware’s only law school, Widener University-Delaware (Delaware Law) is also the only law school with a large enough number of graduates taking the Delaware bar exam to consistently report outcomes for ABA required disclosure purposes. However, only 23% of Delaware Law first-time takers sat for the Delaware bar exam in 2019, comprising just 14% of ABA first-time takers that year (Source: [ABA](#), [NCBE](#)). (Since 2013, Delaware Law, Villanova, Penn State Dickinson, Penn, Duquesne, and Temple have also furnished enough applicants to meet ABA reporting guidelines, which leaves many Delaware bar takers unaccounted for.)

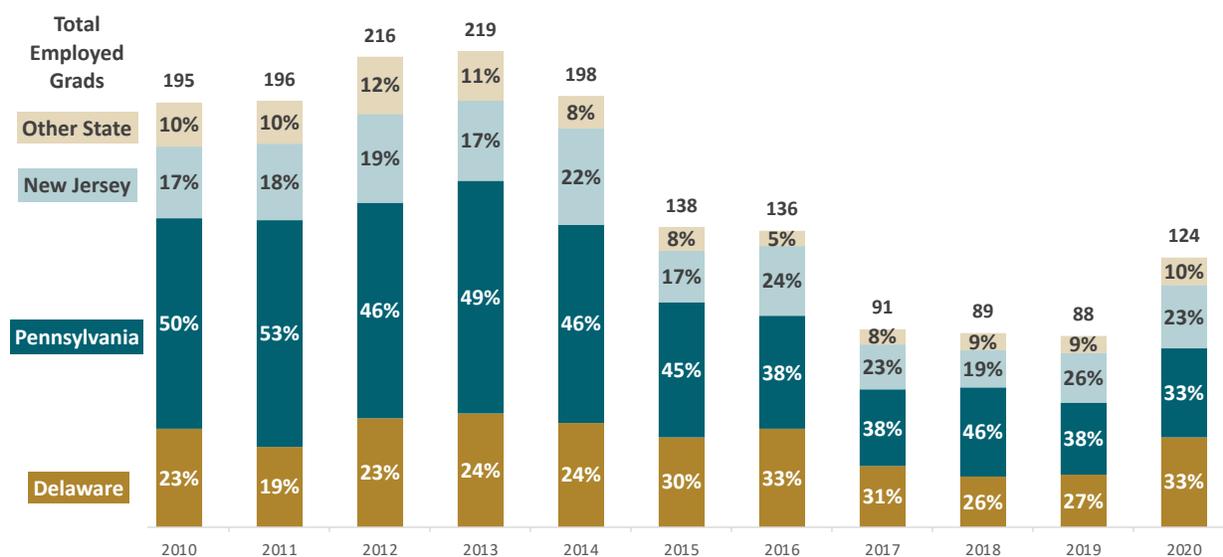
The table below summarizes Delaware Law’s enrollment by race/ethnicity for the top racial/ethnic groups. Notably, the proportion of Black students at Delaware Law was less than half that of Black Delaware residents.

	Bach. Degree Recipients: (2019)		DE Law Enrollment (2019-2020)		DE Population
	N	%	N	%	%
White	4,662	64%	487	73.2%	61.3%
Black or African American	1,160	16%	70	10.5%	22.0%
Hispanic or Latino	525	7%	40	6%	9.6%
Asian	284	4%	24	3.6%	3.7%

C. We Can Only Speculate About the Push and Pull Factors Associated With the Delaware Bar

Although it is the only law school in Delaware, the maximum proportion of Delaware Law graduates who remained in Delaware after graduation from 2011-2020 was 33%. Throughout this period, graduates were equally or more likely to take positions in Pennsylvania—often by a wide margin.

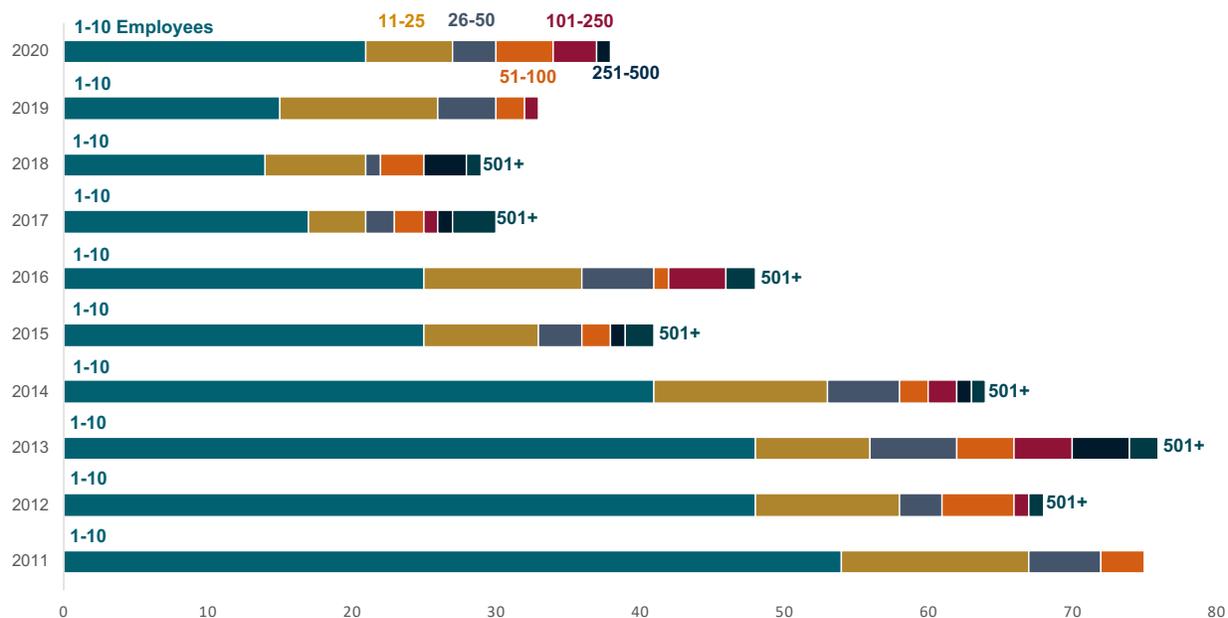
Prior to the Class of 2020, Widener-Delaware Law graduates were more likely to obtain jobs in Pennsylvania than Delaware.



In their 2019 publication, *Jobs and JDs*, the National Association for Law Placement (NALP) reported that 15.6% of available Delaware law jobs went to Delawarean class of 2019 graduates, whereas 33.1% went to Pennsylvanian graduates. VA and DC class of 2019 graduates both took about 9% of Delaware law jobs each.

Historically, most DE Law graduates have headed for smaller firms after graduation. This could create difficulties for their Delaware licensure prospects on two fronts: First, smaller firms in Delaware may be less willing or able to support applicants through a 5-month clerkship requirement and task list due to resource constraints. Second, larger firms in Delaware may see Delaware Law graduates as less competitive or established as “big law” recruits. If true, these phenomena would hurt DE Law graduates and broader access to justice within the state.

DE Law Alumni Full-Time Long Term Law Firm Employment by Firm Size and LS Class



D. Delaware’s Licensing Process is Rigorous, Requiring Significant Time and Effort

As a state that does not grant reciprocity, all aspiring Delaware bar applicants must take the state’s bar exam and complete its rigorous application process. In 2019, Delaware’s exam saw one of the lowest first-time bar passage rates in the region and the country.

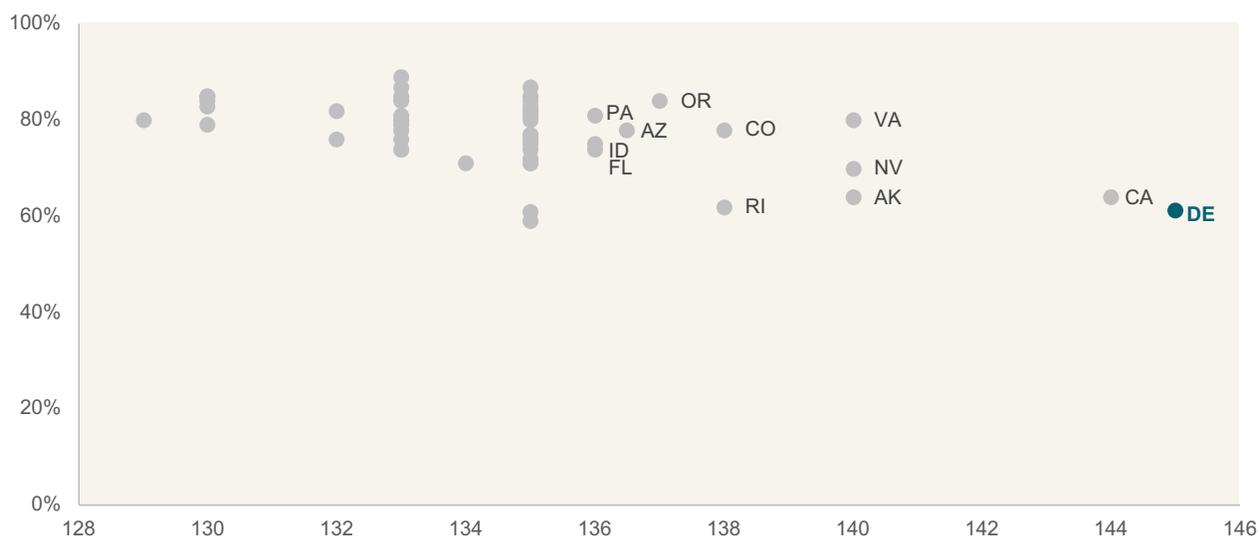
ABA First-Time Takers - July 2019 Administration

Jurisdiction	Taking	Passing	% Passing
Delaware	156	95	61%
Maryland	649	526	81%
New Jersey	581	459	79%
New York	5,517	4,748	86%
Pennsylvania	1,092	880	81%
U.S.	35,758	27,176	76%

(Source: [Board of Bar Examiners](#), [NCBE](#)).

Delaware’s bar admission standards are more rigorous compared to its neighbors. By 2023 New York, Pennsylvania, New Jersey, Maryland, and the District of Columbia will all offer the [Uniform Bar Exam \(UBE\)](#) and reciprocity with other UBE jurisdictions (*Source: NYBOLE, PABOLE, NJBOLE, UMD, OSU*). These jurisdictions’ cut scores range from 133 (NY, NJ, DC) to 136 (PA). Meanwhile, Delaware uses a state-specific exam (that includes the MBE as one of its components) and does not offer reciprocity with other jurisdictions. Delaware also has the highest cut score in the nation (145) (*Source: [Law School Transparency](#)*). Delaware additionally requires a 5-month clerkship in the state under an applicant-selected “preceptor”, during which they are required to complete a specific [checklist](#) of legal experiences (*Source: [Board of Bar Examiners](#)*).

July 2019: MBE Passing Scores and First-Time Pass Rates



E. Delaware’s Judicial Demographic Profile

The Delaware AOC provided demographic data for sitting state court judicial officers in 2020 to CSP’s State Court Organization. In 2020, 81% of Delaware’s state court judicial officers were identified as White, and 16% were identified as Black or African American. The remaining 3% of judges were American Indian/Alaska Native, Asian, or more than one race. 94% of judicial officers were of non-Hispanic or Latinx ethnicity. Judicial officers were 56% male and 44% female. The Justice of the Peace Court accounted for the most judicial officers and the most diverse demographic make-up. However, judicial officers in this category of court do not need to be attorneys. The table below provides demographic detail for state court judicial officers by court (*Source: [State Court Organization \(pending publication\)](#)*). Of the federal courts, demographic information was only available for the U.S. District Court of Delaware (*Source: [Federal Judicial Center](#)*).

	U.S. District Court, DE	Bankruptcy	Magistrate	Supreme Court	Alderman's Court	Court of Chancery	Court of Common Pleas	Family	Justice of the Peace	Superior Court	Totals
Total Judges	4	8	4	5	6	7	9	17	61	21	142
White	4	-	-	4	6	7	6	15	46	18	106
African American/ Black	-	-	-	1	-	-	2	2	12	3	20
American Indian/Alaska Native	-	-	-	-	-	-	-	-	1	-	1
Asian	-	-	-	-	-	-	-	-	2	-	2
Native Hawaiian/ Pacific Islander	-	-	-	-	-	-	-	-	-	-	0
More Than One Race	-	-	-	-	-	-	1	-	-	-	1
No Data	-	8	4	-	-	-	-	-	-	-	12
Hispanic or Latinx	-	-	-	-	-	-	-	-	6	1	7
Not Hispanic or Latinx	4	-	-	5	6	7	9	17	55	20	123
No Data	-	8	4	-	-	-	-	-	-	-	12
Male	3	-	-	3	2	5	5	7	33	15	70
Female	1	-	-	2	4	2	4	10	28	6	56
No Data	-	8	4	-	-	-	-	-	-	-	12

V. The Picture is Incomplete: More Data is Needed to Understand and Address Root Causes of the Diversity Gaps in Delaware’s Bench and Bar

Delaware does not collect bar passage data disaggregated by race/ethnicity, and such information would be useful in advancing the mission of this Committee. However, the ABA recently released a national report detailing first-time and ultimate bar passage by race/ethnicity for the last three graduating cohorts. Minority applicants passed at lower rates than White applicants nationally. The success rates of Black and African American bar applicants evidences particularly bleak disparities—a first-time pass rate 12 percentage points lower than White applicants, an ultimate rate 16 percentage points lower one year after graduation, and 14 percentage points lower two years after graduation (*Source: [ABA](#)*).

Data and information gaps persist all along the pipeline. Below are some initial remaining questions with desired data points in bullets.

1. Can Delaware Law and other feeder law schools for the Delaware bar exam improve diversity among their law students and graduates?
 - Application and admission statistics by law school, including # of minority students accepted and # minority students applied
 - Bachelor's degrees awarded in law school feeder majors at Delaware and surrounding undergraduate institutions, by race/ethnicity

2. What is the pre-law landscape in Delaware and the pipeline leading to Delaware bar exam applicants?
 - What pre-law and pipeline programs exist among the largest Delaware colleges and universities?
 - Does the Delaware bar (via associations or otherwise) sponsor, host, or contribute volunteers to local pre-law and pipeline programs?
 - What articulation agreements currently exist in Delaware that lead/feed into Delaware Law School?
 - Among those who attended the pipeline program at Delaware Law but did not matriculate to law school, what was involved in their decision?

3. Who is drawn to the Delaware bar exam and why?
 - Law schools awarding J.D.s to Delaware bar exam takers (feeder law schools)
 - J.D. degrees awarded at feeder law schools, by race/ethnicity
 - Licensure status and/or attempts in other jurisdictions, by race/ethnicity
 - Attorneys from other states seeking admission to the Delaware bar, by state(s) of bar admission and race/ethnicity

4. Why do Delaware Law graduates choose not to join the Delaware Bar?

5. How much do Delaware bar applicants' clerkships pay and who, if anyone, is deterred or delayed by this and other licensing requirements in addition to the bar exam? To obtain this information, consider conducting focus groups, surveys, and/or interviews with:
 - Delaware bar applicants of color who utilized the preceptor bank to learn more about their experiences;
 - Small and large firms about their capacity and willingness to support bar applicants' clerkship requirements; and,
 - Delaware bar applicants, bar members, and DE Law graduates who migrated out-of-state, especially people of color, about their experiences and decision-making factors.

6. What is the racial and ethnic breakdown of Delaware bar passage? How does minority bar passage in Delaware compare to neighboring jurisdictions?
 - Bar exam pass rates by race/ethnicity, gender, first-time takers, and repeaters in Delaware and neighboring states
 - Counts and reasons for character and fitness denials, by race/ethnicity, gender, first-time, and repeat
 - Delaware bar exam raw scores (overall and by section), by race/ethnicity, gender, first-time, and repeat

7. What are the demographics of Delaware's bar membership and bench? How have those demographics changed over time?
 - Several states have demonstrated success administering demographic surveys to their bar members to be published at regular intervals (Source: The State Bar of CA, The State Bar of Michigan, North Carolina State Bar, State Bar of Texas).
8. What do caseloads evidence about the legal needs of Delaware's population, what is the profile of users, and who is meeting their legal needs?
 - Bar and bench diversity can be important factors in bolstering public trust and confidence in the fair administration of justice. Significant divergences between the demographics of a community, the bar and the bench can lead to the perception that a community's courts will not be responsive the unique needs of community members.
9. How are Delawareans using the state's legal system and who do they turn to for help?
 - A state's legal system is far greater than the cases filed in court. If certain types of legal needs are going unmet or met only through limited avenues of service, public confidence in the justice system can falter.

II. NCSC Interview Summary Report

NCSC Delaware Supreme Court Diversity Project Interviews

I. Background

As part of the Delaware Bench and Bar Diversity project, the NCSC conducted many individual and small group interviews with a diverse sample of stakeholders to discuss the diversity of the bench and bar in Delaware and the work of this project specifically. Interview subjects were provided by Chief Justice Seitz, Justice Montgomery-Reeves, and Gayle P. Lafferty, and stakeholders included attorneys, judges, retired judges, law clerks, professors, high school educators, executive and legislative leaders, and community activists. There was great diversity among the interviewees, who had a diversity of life experience, age, race or ethnicity, geographic diversity across Delaware and for those among our subjects who were attorneys, a range of legal experiences and pathways to join the Delaware bar.

Using both Zoom and in-person interviews, the NCSC conducted forty-four (44) interviews with stakeholders within a five-week period.

This memo summarizes the high-level themes and ideas shared during these interviews. Because of the sensitive nature of what was shared, NCSC has anonymized the results to protect interviewee confidentiality. To a person, those interviewed were engaging and willing to share their experiences and opinions as to what and how to improve the diversity of the Delaware legal community. Interviewees were candid, passionate, and eloquent in describing their experiences and provided valuable feedback.

II. What We Heard

A. Pipeline to the Delaware Bar

There was consensus that, in order to improve the diversity of Delaware's legal community (including judges), outreach needs to start early to encourage young Delawareans to consider legal careers. Because Delaware is a small state, there may be increased likelihood that people from Delaware who pursued legal training would want to practice in Delaware.

The challenges for many aspiring attorneys (especially those from diverse backgrounds) originate from academic, economic, and systemic challenges arising at much earlier stages in their lives and educational journeys. Factors such as often segregated public schools, financial pressure that leaves little time and resources for career exploration, and the inconsistent participation in pipeline programs from elementary school through college, combined with the lack of exposure to the legal field, all play a role. To change the trajectory of underrepresented students to attend rigorous college and law school programs is best met through personal mentoring, rigorous experiential learning, and leadership. As such, there was consensus that addressing why these students continue to be underrepresented must start with introducing legal careers early and supporting interested students throughout their career development.

1. **Expand mock trials in underprivileged high schools with attorney coaches.** The State of Delaware is known for its prestigious statewide mock-trial program. However, it seems that most of the successful existing mock trial programs are housed at charter and private schools in Delaware, and that many of the student participants have direct connections to and receiving coaching from existing members of the Bar (who may be related to some of the team members). While there is nothing wrong with having and supporting prestigious schools to excel with mock trial, there should be an effort to support robust mock trial programs at more Delaware high schools, such as at Howard High School. To assist in this effort, it would be great for members of the Bar to serve as volunteer mock trial coaches at these traditionally underserved schools.
2. **Create paid summer internship/clerkship programs for high schoolers.** High school and college internships provide an important way to spark interest in the legal field, and internships can be a critical way to support interested students with professional experience and mentoring as they pursue schooling. To work well, it is best that these internship and clerkship opportunities offer payment so that students (especially those who come from low-income families) are able to participate.

It is a noted national best practice for students (especially those traditionally underrepresented in higher education) to save \$6,000 before starting college to cover both college application costs and expenses throughout college. Delaware is lucky to have such wonderful community programs, like LYTE Scholars, that would make excellent partners with the judicial branch in this effort going forward.

3. **Create better partnerships with Vocational Technical Schools and/or community college paralegal programs.** There are several criminal justice and paralegal programs offered at Vocational Technical Schools across Delaware, and it was suggested that the Delaware Supreme Court focus efforts on partnering with those existing programs (rather than work to start new high school legal educational curricula). Many educators interviewed felt strongly that the best ambassadors for speaking with these interested high school students will be existing members of the Delaware bench and bar.

B. Delaware Bar Exam

The mechanics of the Delaware Bar Exam was the most passionate topic discussed during these interviews, concerning both the mechanics of bar licensure process and the unique requirements necessary to join the Delaware Bar.

The Delaware legal community has fostered a strong ethos of professionalism and civility (often referred to as the “Delaware Way”). That said, many of those interviewed shared strong negative feelings and/or painful stories about the Delaware Bar licensure process personally and/or as it related to experiences of their colleagues, family members, and/or law clerks or interns.

While it is undoubtedly true that there will be some number of young attorneys who will elect not to sit for the Delaware Bar because they would like to live in a larger urban jurisdiction, there may also be a chilling effect to some of the unique aspects of the Delaware bar licensure process (including the exam only being offered once per year, the high cut score, the lack of reciprocity, the need for a preceptor and the scavenger hunt requirements, and the number of topics covered by the exam).

There were several universal recommendations, as follows:

1. **Offer the exam twice a year.** Historically, the Delaware Bar Exam has a 50% passage rate, and because the exam is only offered once in July, anyone who does not pass and wants to practice in Delaware must wait an entire year before trying again. Many interviewed shared examples of diverse attorneys who failed the Delaware Bar exam and took another bar (like New Jersey or Pennsylvania, who each have lower cut scores on the MBE), and then, never returned to Delaware. This disproportionately affects lower income candidates, who may not have the financial cushion to wait an entire year before securing a legal job.

Moreover, it was suggested repeatedly that the combination of having a national reputation of being a difficult bar exam coupled with only offering the exam once per year may dissuade some potentially interested students from even attempting the exam in the first place.

2. **Revisit the number of subjects in the scavenger hunt.** Universally, there was a sense that the “scavenger hunt” offers bar applicants an opportunity to observe a range of legal proceedings that can offer legal training and connections to members of the bar, but that the number of requirements was simply too onerous, especially for those who did not have pre-existing ties to Delaware. One person interviewed mentioned that it took this person an extra year to complete the requirements because it was simply too burdensome (both in financial cost to travel to Delaware for each hearing and in time) to observe all the requirements within the time limits. Moreover, because some of the requirements are relatively uncommon (such as jury trials), it is possible that a candidate might have to devote multiple days (through many court observation attempts) before successfully completing a requirement, like a jury trial.

Also, a few out-of-state interviewees shared that it was stressful and difficult to find a preceptor within the Delaware Bar, and without those connections, it made it significantly harder to find the right proceedings to satisfy the requirements of the “scavenger hunt.”

3. **Independent review of Bar exam questions and use of UBE questions.** It was suggested that the bar exam might be improved if the essay questions were reviewed by outside legal experts. While not privy to the exam questions, it was recommended that the Court hire an independent test developer to work with the Board of Bar Examiners (1) to review the Bar exam questions; (2) to periodically conduct a review to ensure that the bar exam is not showing bias and (3) to consider the qualifications on those writing the exam questions and how the essay portions are graded.
4. **Create an environment within the professional staff of the Board of Bar Examiners that is welcoming and responsive.** Many shared that they had negative encounters with existing staff, especially as it related to logistics or requesting accommodations throughout the process; this feedback was shared by candidates and legal mentors (including members of the bench). Based on the feedback, it is evident that the Board and Office has a poor reputation amongst current and incoming Bar members. As this is the first point of contact for all new inductees, the office and board should be warm, welcoming, and responsive. This is an extremely stressful period and the unresponsiveness of current office employees had had many scrambling to get a response.

5. **Collect demographic information on candidates and current bar members.** To recognize the issue on the lack of diversity, data must be collected on current and incoming candidates to the bar. Nearly all interviewees were frustrated that the Bar does not collect any demographic information, nor do they make it mandatory for the very few questions they do ask.
6. **Explore a pathway outside of the bar exam, perhaps akin to the Daniel Webster Scholars program in New Hampshire or the Wisconsin model.** This was a very divided topic area amongst interviewees. While some expressed enthusiasm for this method, others were wary that it would further divide and possibly enforce stigmatization in creating an “easier” pathway to become an attorney. If this method is adopted in Delaware, the NCSC recommends careful language in not limiting this program specifically for ethnically diverse candidates, but leaving it open to all.

C. Satisfaction and Inclusion of Law

As mentioned in the prior section, many feel that demographic data should be mandatory and collected on current Bar members within Delaware. They feel the data can be useful in showing areas where diversity is lacking, and law firms and courts can use the data to take an active approach in recruiting and diversifying their workplaces. Mentions of loan forgiveness, like medical professions, were also bounced around to make Delaware a more attractive state to stay and practice in.

1. **Collect demographic information on current bar members.** As everyone needs to annually renew their bar membership, it was recommended that the Court add mandatory demographic questions at renewal. The Attorney General’s Office also shared that it would be willing to assist with providing a legal opinion about the merits of including such information within bar membership.
2. **Public loan forgiveness.** The cost of education is rising and is continuing to rise to astronomical figures. Providing loan forgiveness, especially for those committed to public service within Delaware, or any kind of loan assistance would make Delaware a more attractive place for practicing law.

D. Judicial Recruitment

Many judges and attorneys shared their experiences with courts users visibly relaxing once they enter the courtroom and see someone “like them” on the bench. Many shared strong feelings that judges of color are critical to the public trust and confidence of the judiciary. Several interviewees shared moving personal stories about the importance of representation. Even if a litigant is handed potentially life changing news, they were appreciative that the sentence was passed down from someone who looked like them or were perceived to have similar experiences.

A few interviewees mentioned the lack of appeal of public service whether it was the wage disparity or lack of knowledge at an earlier stage on one’s career.

- 1. Create mentorship programs and demystify the judicial role.** Once on the bench, a judge should maintain relationships with their former law firm, and others, to recruit and mentor clerks. Judges can also reach out to alumni groups or law schools to actively speak on their experiences and importance of public service. It was recommended that both judges (in their individual capacities) and as courts create mentorship programs working with law firms, law schools, and public speaking engagements in high schools to outline their experiences, roles, and importance of public service.
- 2. Provide clerkship programs with higher dividends.** Those interviewed felt strongly that increased opportunities for judicial clerkships (especially at the Court of Chancery level) would be great way to expose more diverse law students to the Delaware legal community. Several diverse attorneys shared the role that a judicial clerkship played in their professional trajectories, and they suggested that more similar opportunities for others could be pivotal. One strong recommendation that ran through the interviews was for the Delaware judiciary to offer more clerkships, especially recruiting candidates from underrepresented communities.

III. Working Groups

Improving Diversity in the Delaware Bench and Bar Pre-College Working Group Subcommittee

Name	Office
*Moderator: Hon. Reneta L. Green-Streett	Judge, Superior Court
*Hon. Kathaleen McCormick	Chancellor, Court of Chancery
Alonna Berry	Founder, Bryan A. Stevenson School of Excellence in Georgetown, DE
Rev. Christopher Bullock	Canaan Baptist Church
Margie Lopez Waite	CEO, Las Americas ASPIRA Academy and Delaware Community Foundation Board Member
Atnre Alleyne, CEO	CEO, TeenSHARP and The Proximity Pro
Don Baker, CEO	CEO, FAME, Inc.
Ankur Arya, Exec. Director	Founder & Exec. Director, LYTE
N. Christopher Griffiths, Esq.	Connolly Gallagher LLP
Holly Golder	Red Clay School District
Paul Herdman	Rodel Foundation
*Floating Member: Chief Justice Seitz	Chief Justice, Supreme Court
*Floating Member: Justice Montgomery-Reeves	Justice, Supreme Court
*Floating Member: Gayle P. Lafferty	State Court Administrator-AOC

*Indicates Steering Committee Member

Improving Diversity in the Delaware Bench and Bar College and Law School Working Group Subcommittee

Name	Office
*Moderator: Rodney Smolla, Esq.	Dean, Delaware Law School
*Elizabeth Marchioni, Esq.	Chair, Dept. of Law and Justice, Political Science & Sociology, Wesley
*Kimeu Boynton, Esq.	Assistant Professor, Dept. of Sociology & Crim. Justice, Del. State Univ.
*Jen Becnel-Guzzo, Esq.	Assistant VP and Deputy General Counsel, Univ. of Delaware
Joseph D. Farris, Esq.	Asst. Dean of Diversity, Equity and Inclusion, DE Law School
David Golberg	Pre-Law Advisor/Asst. Professor, Goldey-Beacom
Dr. Valencia (Lynn) Beaty	VP of Human Resources and Equity, Diversity & Inclusion, Del Tech
*Floating Member: Chief Justice Seitz	Chief Justice, Supreme Court
*Floating Member: Justice Montgomery-Reeves	Justice, Supreme Court
*Floating Member: Gayle P. Lafferty	State Court Administrator, AOC

*Indicates Steering Committee Member

Improving Diversity in the Delaware Bench and Bar Bar Exam and Licensing Working Group

Name	Office
* Moderator: Jennifer Wasson, Esq.	Chair, Board of Bar Examiners
*Chancellor Kathaleen McCormick	Chancellor, Court of Chancery
*Judge Rae Mims	Judge, Court of Common Pleas
Justice Gary Traynor	Justice, Supreme Court
Mary Akhimien, Esq.	Sr. VP and Asst. General Counsel, Bank of America
Andy Cordo, Esq.	Attorney, Wilson, Sonsini, Goodrich & Rosati
Tricia Enerio, Esq.	Partner, Heyman, Enerio, Gattuso & Hirzel
Kelly Farnan, Esq.	Attorney, Richards, Layton & Finger
Bill Lafferty, Esq.	Partner, Morris Nichols
Kathleen McDonough, Esq.	Partner, Potter Anderson Corroon
Tom Sager, Esq.	Senior Counsel, Ballard Spahr
Greg B. Williams, Esq.	Partner, Fox Rothschild
* Floating Member: Chief Justice Seitz	Chief Justice, Supreme Court
* Floating Member -Justice Montgomery-Reeves	Justice, Supreme Court
* Floating Member -Gayle P. Lafferty	State Court Administrator, AOC

*Indicates Steering Committee Member

Improving Diversity in the Delaware Bench and Bar Bar Diversity Working Group Subcommittee

Name	Office
* Moderator: Kathleen Miller, Esq.	Attorney, DE State Bar Association
*Attorney General Kathleen Jennings	Attorney General, DE Dept. of Justice
*Doneene K. Damon, Esq.	President & Director, Richards, Layton & Finger, PA
*Paige Chapman, Esq.	Assistant Public Defender, Office of Defense Services
*Frances Gauthier, Esq.	Legal Services Corp. of Delaware
Daniel M. Attaway, Esq.	Partner, Womble Bond Dickinson
Patricia Winston, Esq.	Partner, Morris James
David E. Ross, Esq.	Partner, Ross, Aronstam & Moritz
Bill Chapman, Esq.	Chief Diversity Officer, Potter Anderson Corroon
Tammy L. Mercer, Esq.	Partner, Young Conaway, Stargatt & Taylor
* Floating member: Chief Justice Seitz	Chief Justice, Supreme Court
* Floating member: Gayle P. Lafferty	State Court Administrator, AOC

*Indicates Steering Committee Member

Improving Diversity in the Delaware Bench and Bar Bench Diversity Working Group

Name	Office
*Co-Moderator: Judge Natalie Haskins	Judge, Family Court
*Co-Moderator: Danielle Gibbs, Esq.	Chief Legal Counsel to Governor Carney's Office
*Judge Maria Perez-Chambers	Magistrate Judge, JP Court
President Judge Jan Jurden	President Judge, Superior Court
William Bowser, Esq.	Partner, Young, Conaway, Stargatt & Taylor
Tasha M. Stevens, Esq.	Attorney, Fuqua, Willard, Stevens & Schab, PA
Cleon Cauley, Sr., Esq.	Chief Operating Officer, Del State Univ.
Commissioner Gretchen Gilchrist	Commissioner, Family Court (Kent Cty.)
*Floating Member: Chief Justice Seitz	Chief Justice, Supreme Court
*Floating Member: Justice Montgomery-Reeves	Justice, Supreme Court
*Floating Member: Gayle P. Lafferty	State Court Administrator, AOC

*Indicates Steering Committee Member

Improving Diversity in the Delaware Bench and Bar Steering Committee

Name	Office
Collins J. Seitz, Jr. (Co- Chair)	Chief Justice Supreme Court
Tamika R. Montgomery- Reeves (Co-Chair)	Justice Supreme Court
Jen Becnel-Guzzo	Assistant VP and Deputy General Counsel, Univ. of Delaware
Kimeu Boynton, Esq.	Assistant Professor, Dept. of Sociology & Crim. Justice, Del. State Univ.
Paige Chapman, Esq.	Assistant Public Defender, Office of Defense Services
Doneene K. Damon, Esq.	President & Director, Richards, Layton & Finger, PA
Francis Gauthier, Esq.	Legal Services Corp. of Delaware
Danielle Gibbs, Esq.	Chief Legal Counsel to Governor Carney's Office
Reneta Green-Streett	Judge, Superior Court
Natalie J. Haskins	Judge, Family Court
Kathleen Jennings	Attorney General, DE Dept. of Justice
Gayle P. Lafferty, Esq.	State Court Administrator, AOC
Elizabeth Marchioni, Esq.	Chair, Dept. of Law and Justice, Political Science & Sociology, Wesley
Kathaleen St. J. McCormick	Chancellor, Court of Chancery
Kathleen M. Miller, Esq.	DE State Bar Assn
Rae M. Mims	Judge, Court of Common Pleas
Maria Perez-Chambers	Magistrate Judge, JP Court
Rodney Smolla	Dean, Delaware Law School
Jennifer Wasson, Esq.	Chair, Board of Bar Examiners

IV. Delaware Interviews

Delaware Bench and Bar Diversity Interviews

Stacey Anderson	Widener Graduate
Ankur Arya	Exec. Director, LYTE
Alonna Berry	Founder, BASSE (Bryan A. Stevenson School of Excellence, Georgetown DE)
Bill Bowser	Judicial Nominating Commission; Partner, Young, Conaway, Stargatt & Taylor, LLP
John Carney	Governor
Bill Chapman	Chief Diversity Officer, Potter Anderson Corroon
Bart Dalton	Founder Dalton & Assts.
Doneene Damon	President/Director, Richards, Layton & Finger
Alexis Desire	Law Clerk for Justice Montgomery-Reeves
Kyle Evans Gay	State Senator
Jennifer Fernandez	Clinical Supervisor, Civil Practice
Danielle Gibbs	Chief Legal Counsel to Gov. Carney
Holly Golder	Supervisor, Red Clay Consolidated School District
Amanda Gould	Former Law Clerk for Chief Justice Seitz
Reneta Green-Streett	Judge, Superior Court DE
Krista Griffith	State Representative
Kiadii Harmon	Associate, Maron, Marvel, Bradley, Anderson & Tardy, LLC
Natalie Haskins	Judge, Family Court DE
Paul Herdman	Rodel Foundation
Loren Holland	DAG Labor/Employment Gen. Counsel
Monica Horton	Judge, CCP DE
Kathleen Jennings	Attorney General, DE Dept. of Justice
Jan Jurden	President Judge, Superior Court DE
Bill Lafferty	Partner, Morris Nichols
Ernesto Lopez	State Senator
Margie Lopez-Waite	CEO, Las Americas ASPIRA Academy and DE Community Foundation Board Member
Alex Mackler	Chief Deputy Attorney General
Josh Martin	Sr. Counsel, Potter Anderson & Corroon
Sarah McBride	State Senator
Kathaleen McCormick	Chancellor, Court of Chancery, DE
Vivian Medinilla	Judge, Superior Court DE
Debby Merritt	Professor, Ohio State University
Tamika Montgomery-Reeves	Justice, Supreme Court of DE
Michael Newell	Chief Judge, Family Court DE
Coby Owens	NAACP
Marie Pinkney	State Senator
Sheldon Rennie	Judge, Superior Court DE
Andrea Rocanelli	Founder, Delaware ADR
Alex Smalls	Sr. Counsel, Leroy A. Tice
Rodney Smolla	Dean, Delaware Law School
Jason Solomon	Professor, Stanford
Jeffrey Spiegelman	State Representative
Tasha Stevens	Attorney, Fuqua, Willard, Stevens & Schab, PA
Charles Toliver	Sr. Counsel, Leroy A. Tice
Patricia Winston	Partner, Morris James LLP
Brenda Wise	OMB/Director of Policy & Communications

V. NCSC and AccessLex Project Staff

NCSC Project Staff

Michael L. Buenger	Executive Vice President/COO
Danielle Hirsch	Principal Court Management Consultant
Alisa Kim	Court Management Consultant
Cynthia Lee	Principal Court Research Associate
Lorri Montgomery	Director of Communications (Ret.)
Lillian Wood	Business Analyst
Chris Wu	Director, Government Relations

AccessLex Project Staff

Aaron N. Taylor	Executive Director
Sara Berman	Professor of Law (Touro Law School)
Tiffane Cochran	Managing Director of Research
Domonique Edwards	Senior Research Analyst
Fletcher Hiigel	Librarian
Kelsey Risman	Senior Evaluation Methodologist
Paige Wilson	Research Analyst

VI. Delaware Bench and Bar Diversity Order

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: DELAWARE BENCH §
AND BAR DIVERSITY PROJECT §

ORDER

This 13th day of May, 2021, it appears to the Court that:

WHEREAS, state and national attention has been drawn to diversity issues and the role diversity plays in a fair and impartial judiciary and the legal profession;

WHEREAS, the courts and the legal profession reflect the diversity of the communities they serve;

WHEREAS, in Delaware, the State must attract and retain diverse members of its Bar to enable the Judicial Nominating Commission to recommend to the Governor a diverse slate of applicants when judicial vacancies arise;

WHEREAS, the National Center for State Courts (NCSC), an organization working collaboratively with the Conference of Chief Justices, the Conference of State Court Administrators, and other associations of judicial leaders, has been on the vanguard of helping courts tackle some of their most pressing challenges in the areas of court education, strategic planning, diversity and community engagement, and justice system reform;

WHEREAS, AccessLex Institute is a nonprofit member organization comprised of the nearly 200 American Bar Association-approved nonprofit and state-affiliated law schools dedicated to increasing the access, affordability and

value of legal education, and has in-depth knowledge and understanding of the diversity issues facing law schools and the legal community;

WHEREAS, AccessLex has been instrumental in helping states and other entities develop pipeline and other initiatives to support aspiring lawyers and law students in their journey to become licensed members of the legal profession; and

WHEREAS, NCSC and AccessLex have offered to support the Delaware Bench and Bar Diversity Project, and will contribute staff and financial resources to the Diversity Project to create the first of its kind strategic effort to address diversity issues in the Delaware legal community and serve as a national model that other states can adapt to address their own state-specific diversity challenges.

NOW THEREFORE, IT IS ORDERED THAT:

1. There shall be established a Delaware Bench and Bar Diversity Project, led by co-chairs Chief Justice Collins J. Seitz, Jr. and Justice Tamika Montgomery-Reeves. The Diversity Project shall engage in a strategic effort to address diversity issues in the Delaware legal community, develop a strategic plan to support a more diverse Delaware Bench and Bar, and serve as a national model for addressing diversity challenges in the legal community.

2. The Co-Chairs shall lead a Steering Committee composed of a judicial officer representing the courts, and a representative from each of the following organizations or entities: the Department of Justice, the Office of Defense Services,

the Executive Branch, the Delaware State Bar Association, Delaware Law School, Delaware State University, the University of Delaware, nonprofit legal aid organizations, Delaware law firms, the Administrative Office of the Courts, and other individuals designated by the Co-Chairs.

3. The Steering Committee shall create working groups to study various issues involving diversity and report their findings and recommendations to the Steering Committee.

4. Any findings and recommendations by the Diversity Project shall be made in the name of the Diversity Project only, and not of the individual members or the institutions by which they are employed.

5. The Diversity Committee shall submit its findings and recommendations and strategic plan to the Supreme Court of Delaware by December 31, 2021, or such later date approved by the Chief Justice.

BY THE COURT:

/s/ Collins J. Seitz, Jr.
Chief Justice

VII. Report and Recommendations of the Working Group on Colleges and Law School

Report and Recommendations of the Working Group on Colleges and Law School

I. Overview

This Report sets forth a series of recommendations from the Working Group on Colleges and Law Schools.

First Recommendation—Adoption of a Delaware Scholars Diploma Privilege Program. The most important recommendation is the adoption of a “Delaware Scholars Program,” as a joint venture between the Delaware Board of Bar Examiners and the Widener University Delaware Law School, to grant a pathway to admission to the Delaware Bar through a “diploma privilege” program that would grant admission the Delaware Bar for applicants who are otherwise qualified for admission to the Delaware Bar through successful completion of the Delaware Clerkship Program and the Character and Fitness process, without sitting for the Delaware Bar Exam.

Second Recommendation—Creation of a Loan Forgiveness Program. The second recommendation is the creation of a loan forgiveness program that would forgive portions of the law school student loan indebtedness of successful matriculants in the Delaware Law Scholars program for each year they remain active in practice in the Delaware Bar.

Third Recommendation—Adoption of Diversity Pipeline and Matriculation Agreements Coordinated with the Delaware Scholars Program. The third recommendation encompasses a basket of inter-related tactical measures calculated to encourage minority students at an early age to consider careers as lawyers, coupled with matriculation agreements to encourage and enhance such opportunity. The Delaware Scholars program recommended here would enhance diversity in the Delaware Bar through multiple mechanisms. First, a matriculation agreement entered into between the Delaware Law School and Delaware State University would grant automatic admission into the Delaware Scholars Program to any Delaware State University student admitted to the Delaware Law School. Second, matriculation agreements reaching to the Delaware Technical Community College would encourage and support matriculation through Delaware’s two-year community college program through Delaware State and on to the Delaware Law School. Third, pipeline programming reaching into middle school and secondary school programs in Delaware would emphasize the pathways for minority students to successfully complete college, law school, and admission to the Delaware Bar through the Delaware Scholars Program. Fourth, in considering and encouraging admission to the Delaware Scholars Program from students who do not have the benefit of automatic admission by virtue of the matriculation agreement with Delaware State, the Delaware Law School would purposefully consider diversity as an important holistic factor for entrance into the program, consistent with extant constitutional and civil rights law principles articulated by the United States Supreme Court.

II. Proposed Adoption of a “Delaware Scholars” Diploma Privilege Program

A. Introduction

The Delaware Scholars Program recommended here would grant a law student who successfully completes the program admission to the Delaware Bar without having to sit for the Delaware Bar Exam, provided all other applicable requirements for admission are satisfied.

This recommendation may seem shocking at first blush. It is an invitation to reconsider and rethink many core assumptions on which admission to the bar has long been based. This Report urges thoughtful consideration of this recommendation against the backdrop of a series of critical questions.

- (1) Does the current bar exam regime operate as a negative factor in diversifying the legal profession?
- (2) Is the bar exam a poor vehicle for ensuring the ethical and competent practice of law?
- (3) Setting diversity aside, and thinking only of how the traditional modes of legal education and the traditional bar exam function as the gatekeepers for admission to the bar and service to the public and the profession, is the current system of need of reform?
- (4) Is it possible to imagine a creative new approach to law school education, and to admission to the bar, that would both enhance the diversity of the profession, and enhance the ethical compass and practical competency of novice lawyers entering the profession, by adopting approaches to assessment that have proven successful in other programs across the country?
- (5) How should the unique circumstances of the legal profession in Delaware, including its long-standing clerkship requirement, the structure of the Delaware court system, and the traditions and culture of the Delaware bar, shape the design and curriculum of such a diploma privilege program?

B. The Current Bar Exam Regime Operates as a Negative Factor in Diversifying the Profession

The traditional bar exam operates as a negative force in efforts to diversify the legal profession. As a broad consortium of legal organizations supporting reform noted in an “Open Letter” written in August 2020: “We have a shared recognition that diversity in the legal profession remains woefully inadequate, and the bar exam is one of many structural barriers that contribute to that problem.”¹

As discussed more fully in the following section, there is no demonstrated correlation between bar passage and the ethical or competent practice of law. A study by AccessLex exploring this issue, for example, focused on the “cut scores” for bar passage among various states. The “cut score” is the score any particular state adopts on the national multistate exam for passage on that aspect of the state’s overall bar exam. The study concluded that higher cut scores do *not* correlate to the more ethical practice of law, but *do* correlate to the exclusion of minorities from the profession:

The study also determined that no relationship exists between the selection of a cut score and the number of complaints, formal charges, or disciplinary actions taken against attorneys. The study results indicate that maintaining a high cut score does not result in greater public protection as measured by disciplinary statistics but does result in excluding minorities from admission to the bar and the practice of law at rates disproportionately higher than Whites.²

Unfortunately, “[s]tark racial disparities mark the legal profession’s licensing process.”³ In 2020, for example, “just 66% of Black law school graduates passed the bar exam on their first try.”⁴ In contrast, the pass rate for White candidates was 88%.⁵ “Other racial groups fell in between, ranging from a 76% first-time pass rate for Latinx candidates to an 80% rate for Asian exam takers.”⁶ The bar exam’s negative impact on diversity is in part correlated to predictable disparities in resources, more likely to adversely impact minority candidates.⁷ Even after controlling for resource factors, however, candidates of color are significantly more likely to fail the bar exam than White candidates.⁸ “This effect occurred for every racial group studied: Black, Latinx, and Asian/Pacific Islander candidates were all significantly more likely than White candidates to fail.”⁹

1 *An Open Letter from Public Interest Legal Organizations Supporting Diploma Privilege*, Public Rights Project, August 11, 2020, available at: <https://publicrightsproject.medium.com/an-open-letter-from-public-interest-legal-organizations-supporting-diploma-privilege-20390dd50a8e>

2 *Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards*, AccessLex, October 13, 2020, available at: <https://www.accesslex.org/grant-research-and-data-tools-and-resources/examining-california-cut-score-empirical-analysis>

3 Deborah Jones Merritt, Carol L. Chomsky, Claudia Angelos, Joan W. Howarth, *Racial Disparities in Bar Exam Results—Causes and Remedies*, Bloomberg Law, July 20, 2021, available at: <https://news.bloomberglaw.com/privacy-and-data-security/racial-disparities-in-bar-exam-results-causes-and-remedies>

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*, citing *Analyzing First-Time Bar Exam Passage on the UBE in New York State*, AccessLex Institute, May 19, 2021, available at: <https://www.accesslex.org/NYBOLE>.

9 *Id.*

C. The Bar Exam is a Poor Vehicle for Ensuring the Ethical and Competent Practice of Law

1. Memorization vs. Acquisition of Competencies

Many thoughtful commentators have long recognized that the successful and ethical practice of law is not determined by how many legal rules a lawyer can retain in his or her memory, but by other competencies far more important than recall of legal doctrine. The Institute for the Advancement of the American Legal System is “a national, independent research center dedicated to facilitating continuous improvement and advancing excellence in the American legal system.”¹⁰ The Institute identified the following core competencies in the practice of law:

- The ability to act professionally and in accordance with the rules of professional conduct
- An understanding of legal processes and sources of law
- An understanding of threshold concepts in many subjects
- The ability to interpret legal materials
- The ability to interact effectively with clients
- The ability to identify legal issues
- The ability to conduct research
- The ability to communicate as a lawyer
- The ability to see the “big picture” of client matters
- The ability to manage a law-related workload responsibly
- The ability to cope with the stresses of legal practice
- The ability to pursue self-directed learning.¹¹

“Current exams focus too much on memorization of volumes of legal rules at a picky level of detail.”¹² Many lawyers have experienced the ritual of spending day-after-day, or night after-night, weekend after weekend, cramming for the exam for months. For two or three critical days they may manage to hold the hundreds of picayune legal rules they have memorized in their brains. But people lose what they do not use, and commonly within months, if not weeks, much of what had been crammed into

¹⁰ See *About IAALS*, IAALS.DU, at <https://iaals.du.edu/about>

¹¹ *Id.*

¹² Joan W. Howarth *Attorney Licensing Principles & Pathways* (Handout prepared for California Blue Ribbon Commission on the Future of the Bar Exam), September 1, 2021 (To be included in Dean Howarth’s forthcoming book, *Shaping the Bar: The Future of Attorney Licensing*, forthcoming 2022 from Stanford University Press.).

the candidate's short-term memory slips away, because the rules memorized have no application to the actual practice areas and routines of the candidate. It is thus no wonder that "MBE critics have long maintained that the exam forces candidates to memorize hundreds of legal principles that they promptly forget after completing the test."¹³

This regime is not well-calculated to ensure competency and ethical compass in the practice of law. "[T]he reality is that most lawyers forget relatively quickly most of the rules they memorized in order to pass the bar exam."¹⁴ The notion that somehow the ability to retain for a few precious days hundreds of memorized precepts equates to a sufficient working knowledge of fundamental legal precepts is thus itself fundamentally flawed. For to the extent that "the bar claims that it tests minimum competence by testing for baseline knowledge of the substantive law, it operates on the faulty premise that memorization of the law in order to pass the bar exam equates to knowledge of the law."¹⁵

Rote memories of legal rules evaporate, and for many, evaporate quickly. But competencies and skills last for a professional lifetime, and grow and mature with experience. "Memorization should be reduced or eliminated and replaced by a new emphasis on assessing fundamental methods of lawyering."¹⁶

2. The Misplaced Need for Speed

The current exam format also places an unrealistic and unjustified emphasis on speed. To stay on pace in answering the 200 multiple choice questions on the Multistate Bar Exam, a candidate must allocate no more than 108 seconds per question. Yet in actual practice clients do not come to lawyers with multiple-choice questions, and answers to most legal tasks are not performed under a stopwatch to be completed in 108 seconds. "The ungodly speededness and the required memorization of too many rules, neither of which tracks to law practice, make current tests too hard for competent future lawyers who are not rapid-fire memorization superstars."¹⁷ Moreover, both the multiple choice and essay portions of traditional bar exams present questions in a format that fail to mirror the complexity, ambiguity, and exercise of judgment required to practice law. "[T]he questions are also too simple, using cardboard scenarios with falsely stable rules and artificially firm facts."¹⁸ In contrast, "lawyering is about handling ambiguity."¹⁹

So too, competent lawyering involves intelligent and context-driven time-management, understanding when to speed up and when to slow down, and above all, understanding that getting to the best answer is usually far more important than getting to the fastest answer. This is especially true for novice lawyers, "because novices in any field, including legal practice, take longer to perform any task when it

13 Steven Foster *Does the Multistate Bar Exam Validly Measure Attorney Competence?*, 82 Ohio St. L.J. Online 31, 35 (2021), citing Andrea A. Curcio et al., *Society of American Law Teachers Statement on the Bar*, 52 J. LEGAL EDUC. 446 (2002); Ben Bratman, *Improving the Performance of the Performance Test: The Key to Meaningful Bar Exam Reform*, 83 UMKC L. REV. 565, 567-68 (2015).

14 Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 Neb. L. Rev. 363, 374-75 (2002).

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

is new.”²⁰ This is both a matter of common knowledge and common sense, and has long been reflected in the practices of the profession. New attorneys, for example, bill at a lower rate than more established attorneys.²¹ “Thoughtfulness is more important to competent law practice than speed.”²²

3. Insights from the AccessLex *Analyzing First-Time Bar Passage Study*

One of the most comprehensive modern studies examining success and failure on traditional bar exams was published in 2021 by the AccessLex Institute, in conjunction with the New York Board of Law Examiners and the New York Court of Appeals, entitled *Analyzing First-Time Bar Exam Passage on the UBE in New York State*.²³ The ambitious and comprehensive research studied more than 5,000 JD graduates who took the Uniform Bar Exam for the first time between July 2016 and February 2018.

To begin, perhaps counter-intuitively, the study did not find any general correlation between bar passage and the number of courses candidates completed in law school on core bar-tested subjects, concluding that “there was no association between aggregate course completion and first- or second-time bar passage.”²⁴

Most importantly, the study identified factors *not* related to legal study as the most predictive of success or failure, such as issues relating to finances, mental and emotional health, family concerns, and related personal life-circumstances and challenges.²⁵ Candidates who were able to easily arrange for full-time study for months after graduating from law school, or were able to pay the costs of expensive bar exam prep courses from commercial vendors, or who had few family or personal demands, were more likely to pass the exam than those without such resources.

In sum, the traditional bar exam does not function well as a meaningful vehicle for discerning future competency in the practice of law. Unfortunately, it tends to exacerbate the gulf between the “haves” and the “have-nots” with regard to the resources and time available to candidates.

20 Joan W. Howarth, *Attorney Licensing Principles & Pathways* (Handout prepared for California Blue Ribbon Commission on the Future of the Bar Exam), September 1, 2021 (To be included in Dean Howarth’s forthcoming book, *Shaping the Bar: The Future of Attorney Licensing*, forthcoming 2022 from Stanford University Press.).

21 *Id.*

22 *Id.* See also Marsha Griggs, *Building a Better Bar Exam*, 7 Tex. A&M L. Rev. 1 (2019).

23 *Analyzing First-Time Bar Exam Passage on the UBE in New York State*, AccessLex Institute, May 19, 2021, available at: <https://www.accesslex.org/NYBOLE>

24 *Id.* at 5.

25 *Id.* at 5-6.

D. Greater Reform in the Structure and Design of Legal Education is Required to Enhance the Ethical Compass and Competency of Novice Lawyers

1. The MacCrate Report

In 1992, a report conducted under the auspices of the American Bar Association leveled the first modern salvo questioning the propriety of traditional law school instruction. Led by Robert MacCrate, a former President of the ABA, it came to be called the “MacCrate Report.”²⁶ The report addressed the perceived gap between law schools on the one hand and practicing lawyers and judges on the other. At its core, the MacCrate Report seriously challenged the traditional ways in which law schools had for decades treated the study of law. The report reflected the growing frustration expressed by practicing lawyers and judges that law students were not entering practice prepared to serve as ethical and competent professionals:

It has long been apparent that law schools cannot reasonably be expected to shoulder the task of converting even very able students into full-fledged lawyers licensed to handle legal matters. Thus a gap develops between the expectation and the reality, resulting in complaints and recriminations from legal educators and practicing lawyers.²⁷

The MacCrate Report suggested “[l]icensing authorities, the law schools and the organized bar should engage in continuing dialogue to determine the optimum content, methods and mix of instruction in skills and values in law school, during the licensing process and after admission to practice.”²⁸

The MacCrate Report was an important and influential document encouraging reform in legal education. The Report had a laudable impact, spurring the ABA and American law schools to work toward narrowing the gap between teaching law and practicing law. Yet the gap remained. In 2013, Dean Mary Lu Bilek was the principal author of a nuanced and thoughtful assessment of the impact of the MacCrate Report twenty years after its original release.²⁹ As that assessment candidly recognized, “[n]ow, two decades after the issuance of the MacCrate Report, there is once again a public perception of a problematic gap between legal education and legal practice.”³⁰

²⁶ *ABA Section of Legal Education and Admissions to the Bar, Legal Education and Professional Development – An Educational Continuum* (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) 4 (1992) (“MacCrate Report.”)

²⁷ *Id.*

²⁸ *Id.*

²⁹ Dean Mary Lu Bilek et al., *Twenty Years After the MacCrate Report: A Review of the Current State of the Legal Education Continuum and the Challenges Facing the Academy, Bar, and Judiciary*, A.B.A. Section on Legal Education and Admission to the Bar 2 (2013), available at: http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/june2013councilmeeting/2013_open_session_e_report_prof_educ_continuum_committee.authcheckdam.pdf.

³⁰ *Id.*

2. The Carnegie Foundation Study

In 2007, the Carnegie Foundation for the Advancement of Teaching published one of the most profound and important studies of modern legal education, entitled *Educating Lawyers: Preparation for the Profession of Law*, authored by five distinguished voices in legal education and the legal profession, William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, and Lee S. Schulman.³¹

The Carnegie Report again spurred a national conversation on whether the traditional three-year law school curriculum does enough to prepare students for entry into practice. The traditional curriculum does work very well in the first-year of law school to master what law schools have always touted as learning to “think like a lawyer.” Students master the basic doctrinal building blocks of legal doctrine, analysis, and theory through the use of the Socratic method, or other related approaches to teaching that rely heavily on the study of cases and interactive dialogue among students and professors. Fundamental courses such as contracts, property, torts, criminal law, civil procedure, or constitutional law provide students with a heavy dose of basic legal principles, and truly do work well to help students master what law schools have always touted as “learning to think like a lawyer.”

This process of learning to think like a lawyer is enormously important, and law schools do an excellent job of it. But the Carnegie Report, like the MacCrata Report before it, attempted to function as a “wake up call” to law schools that this was not enough. The second and third years of law school generally repeated the same techniques, primarily through a potpourri of elective courses, but did little more to help students develop habits of ethical professionalism or the core competencies necessary to actually practice law. As the Carnegie Report persuasively emphasized: “Most law schools give only casual attention to teaching students how to use legal thinking in the complexity of actual law practice. Unlike other professional education, most notably medical school, legal education typically pays relatively little attention to direct training in professional practice.”³²

One sharply accented anecdotal example of the perceived shortcomings of traditional legal education in preparing students for the practice of law occurred in 2010, when the Associate General Counsel of the United Technologies Corporation told a national conference that United Technologies does not “allow first or second year associates to work on any of our matters without special permission, because they’re worthless.”³³ Or, as conveyed in the title of a provocative piece in 2011 published in *The New York Times*, what law schools don’t teach law students is lawyering.³⁴

31 William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, and Lee S. Schulman, *Educating Lawyers: Preparation for the Profession of Law* (2006) http://archive.carnegiefoundation.org/publications/pdfs/elibrary/elibrary_pdf_632.pdf

32 William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, and Lee S. Schulman, *Educating Lawyers: Preparation for the Profession of Law* (2006) http://archive.carnegiefoundation.org/publications/pdfs/elibrary/elibrary_pdf_632.pdf

33 Clark D. Cunningham, *Should American Law Schools Continue to Graduate Lawyers Whom Clients Consider Worthless?* 70 Md. L. Rev. 499 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1805936

34 David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. Times, Nov. 20, 2011, at A1, available at: http://www.nytimes.com/2011/11/20/business/afer-law-school-associates-learn-to-be-lawyers.html?pagewanted=all&_r=0.

3. Responses of Law Schools

There certainly were legal educators who “got the memo,” and law schools that implemented meaningful reforms. Rodney Smolla, then the Dean of the Washington and Lee Law School and now Dean of Delaware Law School, built on the findings of the Carnegie Foundation Report to urge reform of legal education to provide for a more meaningful and realistic transition from law school to law practice, emphasizing the difference between teaching students to “think like a lawyer” and teaching students “to be a lawyer.”³⁵ The Washington & Lee Law School faculty ultimately adopted one of the most far-reaching reforms in contemporary legal education, completely altering the third year of law school to make it entirely experiential, using a blend of real-client and simulated practice environments instead of traditional classroom instruction to create a transition “bridge year” from traditional law study to practice-based development of professionalism and practice competencies.

Many other law schools around the country undertook similar reforms to build more experiential learning opportunities into their programs of legal education. The Delaware Law School is among them. The Delaware Law School has long been committed to increasing opportunities for such “experiential learning.”

4. The Current System Skews the Allocation of Scarce Resources

Yet while matters have improved, they have not improved enough.

One of the drag forces pushing downward against greater emphasis by law schools on the development of professional competencies is the traditional bar exam. While bar exams have begun to include some modest effort to test legal competencies, such as the inclusion of “Multistate Performance Test” segments, the traditional bar exam in most states, including Delaware, is overwhelmingly based on multiple choice and essay questions that largely resemble the mode of testing for first-year law school courses, at a level of memorization density and artificiality entirely divorced from the realities of modern practice.

For law schools throughout the nation that provide access and opportunity for upward mobility to students who are often first-generation college students (let alone first-generation law students), and who often are among the most successful schools in promoting diversity, the traditional bar exam actually operates as a perverse *disincentive* to emphasize experiential learning and professional development. Those law schools provide opportunities to students who may never have dreamed they could someday practice law. Yet those same students often struggle to pass the bar exam on the first or second attempt.

Given those realities, law schools feel pressure to devote an inordinate amount of resources to the sorts of doctrinal memorization tested on the bar exam. Given the financial pressures on law schools, the current system creates skews the allocation of scarce resources away from much-needed professional development of practice-oriented competencies.

³⁵ See Leslie Gordon, *Rodney Smolla: Running a New Play*, ABA, September 25, 2009, available at: https://www.abajournal.com/legalrebels/article/rodney_smolla_running_a_new_play

E. It is Possible to Imagine a Creative New Approach to Legal Education and Admission to the Bar that will Enhance Diversity and Better Prepare Novice Lawyers for Practice

1. The Diploma Privilege in Historical Context and the Wisconsin Experience

The diploma privilege has a longer pedigree than most contemporary lawyers might imagine. At one point in the nation's history 34 states permitted bar admission under through a diploma privilege.³⁶ The diploma privilege gave way to the modern bar exam, however, in all states but Wisconsin. The diploma privilege was originally extended to graduates of the University of Wisconsin Law School, and then in 1933 extended to the state's other law school, at Marquette University. It remains enormously popular in Wisconsin, where members of the bar and bench have for generations insisted that the lawyers admitted to Wisconsin under the diploma privilege are every bit as competent and ethically principled as lawyers admitted through the bar exam. As explained in one account:

In his 60 years of law practice, Milwaukee attorney Franklyn M. Gimbel has known good and bad attorneys. And, according to him, whether they passed a bar exam, which in Wisconsin is not required for most in-state law school graduates, has no bearing on their lawyering abilities or character.³⁷

Similarly, as attested by Keith L. Sellen, Director of Wisconsin's Office of Lawyer Regulation:

My experience in 20 years of disciplinary regulation informs me that the causes of professional misconduct have little to do with whether the lawyer took a bar exam or was admitted by diploma privilege. These causes are, in general, a poor or nonexistent mentor; anxiety, depression and chemical dependency; inadequate organizational skills; character issues; and a lack of business acumen.³⁸

The Dean of the University of Wisconsin Law School, Margaret Raymond, observed in 2019 a linkage between the diploma privilege and broader issues of access to justice:

It is critically important for states to think about flexible ways to assure new graduates that they can work as lawyers and to assure the many prospective clients with unmet legal needs that new law graduates will be able to serve them. There are many ways to do that; diploma privilege is certainly one that has worked very well for us.³⁹

³⁶ Steven Levine, *End Separate but Equal Bar Admission*, 75 Wisconsin Lawyer No. 12 (December 2002), available at: <https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=251#5>

³⁷ Stephanie Francis Ward, *Bar exam does little to ensure attorney competence, say lawyers in diploma privilege state*, ABA Journal, April 21, 2020, available at: <https://www.abajournal.com/web/article/bar-exam-does-little-to-ensure-attorney-competence-say-lawyers-in-diploma-privilege-state>

³⁸ *Id.*

³⁹ *Id.*

2. The Daniel Webster Scholars Program in New Hampshire

The Daniel Webster Scholars Program at the University of New Hampshire Franklin Pierce Law Center combined the “how to build a better starting lawyer” insights of studies such as the MacCrate Report and the Carnegie Foundation Report, with the diploma privilege model that had long existed in Wisconsin.

The Daniel Webster Scholars Program did *not* have its geneses in a push for greater diversity in the bar. Rather, the impetus for the creation of the Daniel Webster Scholars program was to adopt an alternative approach to legal education that would more meaningfully prepare novice lawyers to be “practice ready” upon graduation to serve clients and courts.

Sometimes one determined voice can make a profound difference, and in New Hampshire that one determined voice was Senior Associate New Hampshire Supreme Court Justice Linda S. Dalianis, who was disturbed by the ineptness and lack of preparation of the young lawyers.⁴⁰ A tripartite series of conversations and negotiations involving the New Hampshire Supreme Court, the New Hampshire Board of Bar Examiners, and the New Hampshire Law School led to the creation of the Daniel Webster Scholars program.

The Daniel Webster Scholars Program created an alternative law school curriculum for the second and third years of law school that was practice-oriented. After successful completion of the program, a student who matriculated as a Daniel Webster Scholar was granted admission to the New Hampshire Bar under a diploma privilege, without having to take or pass the New Hampshire Bar exam.

The Daniel Webster Scholars program was a bold and innovative “how to build a better mousetrap” approach to “how to better prepare a novice lawyer.” It was grounded in the suppositions of studies such as the MacCrate Report and the Carnegie Foundation study that the three years of law school would be better spent on transitioning students from abstract doctrinal and theoretical classroom instruction on how to “think like a lawyer” to more real-world exposure to “how to be a lawyer.” The program emphasized legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution, organization and management of legal work, recognition and resolution of ethical dilemmas, providing competent representation, striving to promote justice, fairness, and morality, striving to improve the profession, and engaging in professional self-development.⁴¹

Yet a legitimate question remained. Was the Daniel Webster Scholars program actually accomplishing what it promised to do? Were the graduates of the program as prepared for and competent to practice law, ethically and professionally, as those who had passed the traditional bar exam?

In an enormously consequential study conducted by scholars Alli Gerkman, Elana Harman, Lloyd Bond, and William M. Sullivan, the resounding answer, backed by rigorous empirical data, is a resounding “Yes.”⁴²

40 Alli Gerkman, Elena Harman, Lloyd Bond, William M. Sullivan, *Ahead of the Curve Turning Law Students into Lawyers: A Study of the Daniel Webster Scholar Honors Program at the University of New Hampshire School of Law* (2015) at 4; available at: <https://arc.accesslex.org/bs-barexam/62/>

41 *Id.*

42 *Id.*

The study was exhaustive in its methodology and analysis. The key investigative technique was an evaluation of objectively graded “standardized client interviews,” measuring the core competencies of Daniel Webster Scholars graduates against identical exercises by non-Daniel Webster Scholars graduates who had been admitted to practice in New Hampshire during the same periods through the traditional bar exam method.⁴³ One hundred and ninety-two total standardized client interviews were included in this study, 69 by Daniel Webster Scholars and 123 by non-Daniel Webster Scholars lawyers.

The empirical results were striking.⁴⁴ Overall, Daniel Webster Scholars’ performance rated an average of 3.76 out of 5, compared to non-Daniel Webster Scholars lawyers whose overall performance was rated an average of 3.11, a large and statistically significant difference.⁴⁵ When evaluated on their ability to absorb substantive “relative information points,” the differential was equally striking. Daniel Webster Scholars achieved an average learned information score of 89%. In comparison, non-Daniel Webster Scholars lawyers averaged 69%. The study considered the entering academic credentials of students, such as LSAT scores and class rank, and determined that neither correlated to success. “Rather, the only significant predictor of standardized client interview performance is whether or not the interviewer participated in the DWS program.”⁴⁶

Focus groups conducted under the study, which included all constituencies of the New Hampshire bench and bar, overwhelmingly concluded that graduates of the Daniel Websters Scholars program were *ahead* of their contemporaries who gained admission to the bar through the traditional bar exam pathway. They uniformly expressed the view that “DWS graduates are a step ahead of new law school graduates, with some claiming DWS graduates are up to two years ahead.”⁴⁷ Real-world lawyers and judges adjudged the Daniel Webster Scholars admittees better equipped to engage in the real world. “Compared with new lawyers who spend their first few years learning to practice, DWS graduates are able to hit the ground running, working with clients and taking a lead role on cases immediately.”⁴⁸

3. Insights from the Oregon Proposal

The Oregon State Board of Bar Examiners recently published a revolutionary proposal for an alternative track to admission to the Oregon Bar, an alternative track that emphasized experiential learning and the development of professional competencies.⁴⁹ The Oregon proposal “would focus on assessing competence in skills including legal research and writing, issue spotting, legal analysis, argument development, understanding of the law, attention to detail, written and oral advocacy, and teamwork.”⁵⁰ The goal of the proposal is to “provide the means for new lawyers to develop skills faster, to serve

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.* at 21.

47 *Id.*

48 *Id.*

49 *Recommendation of the Alternatives to the Bar Exam Task Force, Oregon State Board of Bar Examiners*, June 18, 2021, available at: <https://taskforces.osbar.org/files/Bar-Exam-Alternatives-TFReport.pdf>

50 *Id.*

clients well, and to provide legal employers with a cohort of practice-ready law school graduates.”⁵¹

The Oregon proposal is yet another sign that across the country, times are changing, and the profession is increasingly open to alternatives to the long-existing regime.

4. The Unique Diversity-Enhancing Potential in Delaware

Admission to the Daniel Webster Scholars program is competitive. Only a limited number of students are admitted to the program each year. It is not open to “all comers” who elect the practice-oriented diploma privilege route.

The Working Group’s proposed adoption of a “Delaware Scholars” program at the Delaware Law School does not opine on whether the Delaware Scholars program would be similarly capped at some designated number. The proposal assumes that at least in the initial years of the program, admission to the program would also be competitive, though the Working Group recommends this issue be subjected to further study and deliberation.

To the extent that admission is competitive, however, the Working Group *strongly* recommends that purposeful attention to enhancing the diversity of the Delaware Bar be a principal feature of the admissions process.

One mechanism for promoting the diversity-enhancing elements of the program is an articulation agreement between the Delaware Law School and Delaware State University, guaranteeing admission into the Delaware Scholars program to students who attend the Delaware Law School from Delaware State.

A second diversity-enhancing component would be a diversity-conscious holistic approach to admissions to the program for students attending the Delaware Law School from other undergraduate schools.

While the Daniel Webster Scholars program is worthy of praise and emulation, the Delaware version of a similar program has the potential to achieve what the Daniel Webster Scholars program does not—enhance diversity.

The Daniel Webster Scholars “program is a small program in a small school in a small state with a bench and bar motivated to collaborate with the school and committed—on a long-term basis—to the program.”⁵² This observation invites contemplation on how Delaware and New Hampshire are alike, and how they are different.

As states, Delaware and New Hampshire are similar in the size of their practicing bars. According to the ABA National Lawyer Population Survey, Delaware had 3,058 resident active attorneys, and New

51 *Id.*

52 Alli Gerkman, Elena Harman, Lloyd Bond, William M. Sullivan, *Ahead of the Curve Turning Law Students into Lawyers: A Study of the Daniel Webster Scholar Honors Program at the University of New Hampshire School of Law* (2015) at 4; available at: <https://arc.accesslex.org/bs-barexam/62/>

Hampshire 3,495.⁵³ Yet as states, Delaware and New Hampshire are worlds apart in their demographic diversity. Delaware, for example, has one of the highest percentages of Black or African-American citizens in the United States, at approximately 22%, placing it 7th among all American states. New Hampshire, in contrast has a Black or African-American population of only 2.24%, placing it 7th from the bottom of all American states.⁵⁴

Comparing the two law schools, there are also substantial differences. The University of New Hampshire Law School is a considerably smaller law school than the Delaware Law School. New Hampshire had 407 total JD students.⁵⁵ By comparison, Delaware Law had 665 JD students.⁵⁶ The University of New Hampshire Law School, like New Hampshire itself, is significantly less diverse than either the Delaware Law School or the state of Delaware. For example, the graduating class at New Hampshire in 2020 was comprised of 70 students, only 7 of whom (10%) were minority, with zero Black or African American graduates.⁵⁷ In 2020 the graduating class at Delaware was comprised of 153 students, of which 34 (22%) were minority students, and 15 (9.8%) Black or African-American.⁵⁸

The entering class of JD students at the Delaware Law School for the fall of 2021 was approximately 32% minority. Of the: 256 students in the incoming class, 1 identified as American Indian, 12 as Asian, 1 as Native Hawaiian, 30 as African American, 7 as Two or More Races, 167 as Caucasian, 2 as Nonresident Alien, and 8 as Race or Ethnicity Unknown.

In sum, the Delaware version of a program modeled along the lines of the Daniel Webster Scholars program would have one enormously important quality that the Daniel Webster Scholars program lacks—the capacity to meaningfully enhance diversity.

By incorporated pipeline programming, and a special matriculation agreement with Delaware State University, the Delaware Scholars Program may advance the goals of the Delaware Bench and Bar to make the legal profession in Delaware more closely reflective of the state’s diversity.

53 ABA National Lawyer Population by State, 2021, available at: https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf

54 World Population Review, Black Population by State 2021, <https://worldpopulationreview.com/state-rankings/black-population-by-state>

55 ABA Standard 509 Information Report, University of New Hampshire Law School; available at: https://law.unh.edu/sites/default/files/media/2019/12/std509inforeport-92-92-12-13-2019_13-39-09.pdf

56 ABA Standard 509 Information Report, Widener University Delaware Law School <https://delawarelaw.widener.edu/files/resources/std509inforeport-26-27-12-09-2020-12-23-04december.pdf>

57 ABA Standard 509 Information Report, University of New Hampshire Law School; available at: https://law.unh.edu/sites/default/files/media/2019/12/std509inforeport-92-92-12-13-2019_13-39-09.pdf

58 ABA Standard 509 Information Report, Widener University Delaware Law School <https://delawarelaw.widener.edu/files/resources/std509inforeport-26-27-12-09-2020-12-23-04december.pdf>

F. A Delaware Diploma Practice Curriculum May Be Designed in a Manner that Incorporates Such Unique Delaware Elements as the Clerkship Requirement, the Structure of the Delaware Court System, and the Special Traditions and Culture of the Delaware Bar

1. The Values of Experimentation

Justice Louis Brandeis famously observed that states in our federal system often serve constructively as laboratories for experiment. As Justice Brandeis wrote, we are prone to naturally regard the current order of things as the natural order of things. Yet the progress of science teaches otherwise:

There are many men now living who were in the habit of using the age-old expression: ‘It is as impossible as flying.’ The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged.⁵⁹

As with physical science, so with government. “The science of government . . . is the science of experiment.” *Anderson v. Dunn*, 6 Wheat. 204, 226, 5 L.Ed. 242 (1821).

The dislocations caused by the COVID pandemic spurred new experiments, from which the entire profession may learn. To again quote Justice Brandeis, “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments.”⁶⁰ As two thoughtful researchers have admonished, “[h]owever the experimenting is done, the resulting research and findings from this laboratory have the potential to be historic and long-lasting, making access to the legal profession more equitable for those that have been historically underrepresented and resulting in a new, more diverse generation of lawyers.”⁶¹

2. Incorporating the Delaware Clerkship Requirement

In experimenting with new approaches to legal education and bar admission in Delaware, the unique characteristics of the bench and bar in Delaware may and should be incorporated in the program’s design.

Delaware’s unique clerkship program should weigh substantially in the mix. As Justice Randy J. Holland explained in his article describing the history and purpose of the Delaware Clerkship requirement, it has always drawn strength by drawing on members of the Delaware bar and bench to make it work. “The strength of Delaware’s clerkship program has been the voluntary participation of judges and senior

⁵⁹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310 (1932) (Brandeis, J., dissenting).

⁶⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310 (1932) (Brandeis, J., dissenting).

⁶¹ Jason Scott and Paige Wilson, *Learning from the July 2020 Bar Exam Results: Creating a Laboratory for Experimentation and Study*, Research and Data, Access Lex, July 23, 2021, available at: <https://www.accesslex.org/news/learning-july-2020-bar-exam-results-creating-laboratory-experimentation-and-study>

lawyers as preceptors.”⁶² So too, it has drawn strength from its emphasis on “the Delaware Way” of civil and ethical professionalism, based on the belief “that it is important for senior members of the bar to supervise practical and substantive legal training for new lawyers, while at the same time mentoring them about civility, legal ethics, and professionalism.”⁶³

The Delaware Scholars Program could put students through all of the existing requirements of the Delaware Clerkship “checklist.” Aside from mere passive attendance, however, such as attendance at a criminal jury trial or a Delaware Supreme Court oral argument, the program would incorporate reflective “before and after” exercises forcing the student to explain what the student observed and learned.

The program would likely not be a substitute for the “clerkship hours” currently required for admission to the Delaware Bar. Students could begin acquiring those clerkship hours during the third year of law school. Most students would likely complete the bulk of those hours in the summer and fall following graduation, leading to the admission swearing-in ceremony held each year in December.

3. The Length and Curricular Design of the Program

The Daniel Webster Scholars program is a two-year program, occupying the second and third years of law school. The Washington & Lee program, in contrast, occupies only the entirety of the third year of law school.

The Delaware Law School has a “Regular Division” in which students graduate in three years, and an “Extended Division” program for students who attend law school in evening classes, and graduate in four years. It is imperative that a Delaware Scholars program be available to both Regular Division and Extended Division students, particularly because the Extended Division is often itself diversity-enhancing.

The Working Group does not opine on whether the proposed Delaware Scholars Program should be a two-year or one-year program, or one-and-half year program, believing that such details are better left for more detailed study and deliberation.

The substantive curricular design of the proposed Delaware Scholars program is actually among the easier tasks looking forward. The Delaware Scholars program would likely track the insights of the Daniel Webster Scholars program, as modified and appropriate for preparation for practice in Delaware. The Working Group does not opine on the specific content of the courses and units that would comprise the Delaware Scholars program, leaving that effort to the combined expertise of legal educators at the Delaware Law School, Delaware Bar Examiners, and others within the Delaware Bench and Bar. The Working Group does, however, restate that the design details should be aligned with the structure of the court system in Delaware, with sub-units that expose students to experiential learning specific to the various Delaware courts, including the state’s unique Chancery and Family Courts. The program should also integrate critical elements of substantive legal principles grounded in Delaware law and practice.

62 Randy J. Holland, *The Delaware Clerkship Requirement: A Long-Standing Tradition*, The Bar Examiner, November 2008 at 28, available at: <https://courts.delaware.gov/forms/download.aspx?id=103428>

63 *Id.*

Finally, as with the Daniel Webster Scholars program, the Working Group recommends that mechanisms be created whereby the Delaware Bar Examiners are actively engaged in the program’s design, as well as in the processes of assessment, as detailed more expansively below.

4. Assessment Models

One way to think about the proposed Delaware Scholars Program, much as one might accurately think about the New Hampshire Daniel Webster Scholars program, is that it swaps two days of bar examination for two years of bar examination. This is not a path to “bar admission light” but a path to “bar admission heavy,” in which students are forced to perform and acquit themselves with *greater* demonstrated accomplishment and rigor in assessments that *really matter* in judging competency, and are likely to *really stick* in their ongoing impact on the quality of the student’s future success as an ethically aware and professionally accomplished lawyer.

“Formative assessment” is a central component of the Daniel Webster Scholar’s program. This comes from professors, lawyers, judges, bar examiners, and other student participants. Reflective assessment complements formative assessment. Through frequent reflection exercises, students contemplate what they are learning about themselves, and develop a plan to address any weaknesses. “Reflection allows them to understand better the lessons they are learning, how those lessons are intended to help them improve, and how those lessons are related to the practice of law and their roles as lawyers.”⁶⁴ Summative assessment is a joint venture between professors and bar examiners, designed to evaluate the student’s performance and progress throughout the course.

Designing appropriate assessment methods rests at the core of all alternative models of legal education and admission to the bar. Here is how the Oregon proposal articulated its approach to assessment:

Assessment of those skills would occur while a student was still in law school through a handful of key mechanisms: (1) incorporation of formative feedback from professors throughout the program, (2) intensive self-reflection by participants, and (3) summative feedback and assessment provided by a dedicated bar examiner at the end of each semester throughout the program.⁶⁵

Proper assessment should emphasize the achievement of competency in practice-based benchmarks. These might include, for example, demonstrations of competency in the drafting of documents involving both transactional and litigation-focused practice tasks, counseling and advising of clients, negotiations on behalf of clients, navigation of realistic ethical conflicts, oral advocacy, participation in alternative dispute resolution, and the like. So too, the program could generate an understanding of fundamentals of sound practice management, such as “by incorporating exercises built around the use of fee agreements, engagement letters, time keeping, billing, and the use of associated technology.”⁶⁶

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Recommendation of the Alternatives to the Bar Exam Task Force, Oregon State Board of Bar Examiners*, June 18, 2021, available at: <https://taskforces.osbar.org/files/Bar-Exam-Alternatives-TFReport.pdf>

In sum, well-designed assessments in practice-based legal education tend to be “competency based.” Competency based assessment models differ from more traditional exam-based models in that “passing” requires a demonstration that the student has mastered the relevant proficiency skills or succeeded in the acquisition of the required doctrinal knowledge. Put most simply, it permits “do-overs” in which the student gets to keep attempting passage, and is allowed to progress in the program once the student gets it right. The program might create, for example, a series of competency-based exercises for a topic such as Civil Procedure. The exercise would combine practice skills (such drafting a complaint, or memorandum in support of a motion for summary judgment), and simultaneously test critical doctrinal understandings (such as federal court diversity or the jurisdiction of the Delaware Court of Chancery). Though permitted multiple attempts, all students would be ultimately required to demonstrate appropriate proficiency in every such area of the curriculum.

III. Loan Forgiveness

The Working Group recommends that exploration be given to the creation of a loan forgiveness program attached to the Delaware Scholars diploma privilege proposal. It is beyond the competence of the Working Group to advise on the structure and financing of such a program. Rather, the purpose here is to suggest the general outlines of a model to be explored by those with appropriate expertise.

Law school graduates from underrepresented backgrounds tend to rely more heavily on student loans to finance their education.⁶⁷ This trend is most pronounced for Black law students and graduates. In a recent survey of 1,300 early career lawyers nationwide, about 80% stated that student loan debt influenced their career path. Seventy percent of respondents who work in the public or non-profit sector reported that income-based payment options and the prospect of eventual forgiveness of their student loans (through the Public Service Loan Forgiveness Program) allow them to work in their desired profession. Given both the disproportionate debt burdens born by underrepresented people and the influence that debt and the possibility of forgiveness have on career choices, the Delaware Supreme Court and Delaware Bar should consider the feasibility of a loan repayment program as part of the Delaware Scholars Program framework presented earlier.

Loan repayment would be targeted at lawyers who gain bar admission through the Delaware Scholars Program and who practice law in the state for a specified length of time. More consideration is needed to determine specific details; but the overall framework could be relatively straightforward, with a specified public or quasi-public agency acting as a third-party payee on student loans held by participants in the program. Payments would be made by the agency in specified intervals (e.g., monthly, yearly) during periods in which participants are eligible for forgiveness. An income cap could be imposed to further target this aid on lawyers who may need it most. If desired, the program could also be targeted at specific geographic locations or topical areas of law practice.

67 [Student Debt: The Holistic Impact on Today's Young Lawyer \(accesslex.org\)](https://www.accesslex.org)

IV. Integration with Diversity-Enhancing Pipeline Programming and Articulation Agreements

The Working Group recognizes that effectiveness of the proposed Delaware Scholars Program in enhancing diversity will be increased by other measures that enrich the diversity of the underlying “pipeline” of applicants to the Delaware Law School. This begins with pipeline programming as early as middle school and high school, and extends through pipeline programming and articulation agreements with undergraduate two-year and four-year institutions. One key element of the proposal is a special articulation agreement between Delaware State University and the Delaware Law School, guaranteeing admission to the Delaware Scholars Program to any Delaware State student admitted to the Law School.

V. Conclusion

The Working Group is convinced that a comprehensive approach, including a blend of aggressive pipeline programming, articulation agreements, expanded trial admissions, the path-breaking Delaware Scholars program, and loan forgiveness would in combination be substantially and meaningfully diversity-enhancing for the legal profession within Delaware.





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