



National Conference
of Bar Examiners

Bar Admissions During the COVID-19 Pandemic: Evaluating Options for the Class of 2020

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The class of 2020 faces unprecedented challenges as a result of the COVID-19 pandemic, as does the American public. These challenges are especially being felt by low income and vulnerable populations. Decisions about how to meet the anticipated increased need for legal services, while ensuring public protection through the licensure process, are vested with each court. Tied up in such decisions, however, is the issue of how to minimize the financial impact on law school graduates resulting from potential delays in licensure. NCBE offers this paper to provide courts and admissions boards with information to assist them as they weigh options for allowing the class of 2020 to become licensed in the event the traditional bar exam cannot safely be administered.

CURRENT STATUS OF THE JULY BAR EXAM

The July bar exam is still scheduled to be administered on July 28–29, 2020. While the status of the exam administration might be in question at this time because of COVID-19 stay-at-home orders and social distancing measures, the scheduled administration date is still over three months away. The class of 2020 will complete law school coursework in early May.

As of April 7, 2020, six jurisdictions have postponed their exams—New York, Massachusetts, Connecticut, Hawaii, New Jersey, and Vermont—but the other 50 jurisdictions have not made any such announcements. Many of these jurisdiction administrators have told us that their boards intend to proceed with administering the July exam

as long as doing so is in compliance with public health guidelines and state or local orders in effect at that time.

NCBE will do everything we can to support these jurisdictions, their courts, and their graduates; we've committed to providing July bar exam materials to those jurisdictions that go ahead with the exam, *provided* there are enough examinees nationally to properly score and grade the exam. NCBE will assess the state of jurisdiction decisions about the July exam in early May to get a better idea of whether this is the case.

We understand the urgency of the situation and the plight of 2020 law school graduates. NCBE is actively exploring additional opportunities for them to become licensed in 2020. We have committed to provide bar exam materials for two fall bar exam administrations—September 9–10 and September 30–October 1—both of which will include the Uniform Bar Exam (UBE) and the opportunity for examinees to earn portable scores. We are serving as a central repository for up-to-date jurisdiction decisions and announcements about the July and fall exam administrations on our website at <http://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information>.

Additionally, we are actively consulting with outside testing, technology, and exam security experts to evaluate alternative methods of testing, including options such as online, remote-proctored testing, if the traditional group setting must be canceled or modified.

DIPLOMA PRIVILEGE

Several courts have been asked to implement diploma privilege on an emergency basis in light of the uncertainty about whether the bar exam can be administered.

Diploma privilege allows law school graduates to secure a license to practice without taking a bar exam. Those advocating for emergency diploma privilege present it as a solution to permit law graduates to become licensed so they can begin working and reduce the financial impact of the crisis on themselves as well as serve the millions of people whose lives have been upended as a result of the pandemic. These are worthy goals that NCBE applauds and shares. However, diploma privilege is not necessarily the best way to achieve them.

In Wisconsin, the only jurisdiction that grants diploma privilege, diploma privilege is limited to graduates of its two in-state law schools who comply with an extensive required curriculum as well as undergo a character and fitness investigation. (See <https://law.wisc.edu/studenthandbook/04.0.html>.)

Some of the various emergency diploma privilege petitions put forth in light of the pandemic have proposed granting temporary diploma privilege to in-state ABA-approved law school graduates to practice under supervision *until they can take and pass a bar exam*, which might be better categorized as “temporary limited practice” and is a solution NCBE supports. At least one petition has had no provision for requiring subsequent bar exam passage, and some have included a provision for a period of supervised practice under a licensed attorney in lieu of bar exam passage. Some are silent on the requirement of approval of character and fitness as a precondition to licensure. (Every US jurisdiction requires completion of a character and fitness investigation prior to being licensed.) And at least one petition for diploma privilege has included sharp criticism of the bar exam as an additional reason, beyond the current COVID-19 crisis, for implementing diploma privilege on a permanent basis.

It probably goes without saying, but diploma privilege-licensed lawyers gain *a local admission only*, so diploma privilege affects lawyer mobility. If graduates are not required to take a bar exam, they obviously would not have the benefit of earning a portable UBE score. Great strides have been made with the UBE in supporting mobility by allowing newly licensed lawyers to seek admission in multiple jurisdictions without having to repeat the bar examination. Moreover, some jurisdictions do not permit diploma-privilege lawyers to be admitted on motion, and new graduates admitted by diploma privilege might find themselves having to later take a bar exam should they relocate or seek to practice in multiple jurisdictions. (See http://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020_021820_Online_Final.pdf, Chart 13.)

As those charged with the important responsibility of regulating the legal profession understand, public protection remains a priority even in this time of crisis. Diploma privilege in effect removes the public protection function vested in the courts and places it with the law schools, but with no independent, vetted, objective, or consistent final check on whether graduates are in fact competent to provide legal services. The public, and certainly legal employers, rely on passage of the bar examination as a reliable indicator of whether graduates are ready to begin practice.

Many law schools would take the responsibility of public protection seriously were diploma privilege to be instituted. That said, some law schools could feel pressures to pass large numbers of their students and/or individual students. Diploma privilege removes or curtails one of the criteria--bar passage--used by the ABA Council on Legal Education and Admissions to the Bar to determine compliance with accreditation

standards. The accreditation of law schools serves a critical function of protecting prospective law students, as well as protecting the public.

Diploma privilege would create inconsistency in the qualifications of new lawyers (dependent on which school they attended) and introduce subjectivity into the standards for minimal competence to serve the public, with each ABA-accredited school deciding whether an individual student is qualified. This creates an extraordinary conflation of roles for law schools—to be both educator and licensing authority.

Academic assessments used in law school classes are prepared and graded by individual professors and are naturally of varying degrees of quality and rigor from one professor to the next and from one law school to the next. In contrast, the bar exam meets the professional standards for testing at the level of quality and reliability needed for a *licensure exam* and ensures consistent standards are applied to all who earn the privilege of practicing law.

Some of the petitions urging diploma privilege have suggested requiring a period of supervised practice (in lieu of passage of a bar exam) before licensing graduates under diploma privilege. This is viewed as offering an additional check on competency to practice. Supervised practice can provide valuable, real-world practice experience, but it can also be fraught with limitations and challenges that courts and admissions offices should be aware of. The problems mentioned above, in the context of law schools, of inconsistency in the qualifications of new lawyers and the subjectivity of standards applied for minimum competence would be present to an even greater extent due in part to the number of supervising attorneys that would be needed. Additionally, supervised

practice can create conditions for unequal opportunity, as students must find licensed attorneys to supervise them in order to qualify. Well-connected students might not struggle to find a licensed supervising attorney, but first-generation law students from socioeconomically disadvantaged families might find it difficult to do so. The courts need only look at the increasing difficulty faced by bar applicants seeking to secure sponsors in countries that have required periods of “articling” to observe this disparate impact. (See https://lsodialogue.ca/wp-content/uploads/2018/05/lawyer_licensing_consultation_paper_bookmarks-weblinks-toc.pdf.)

BETTER OPTIONS TO HELP THE CLASS OF 2020

It is not necessary to take the extreme step of diploma privilege and the risk of diminishing public protection in order to solve the challenges brought on by the pandemic. Many jurisdictions are adopting or modifying temporary practice rules to permit graduates to work under the supervision of a licensed attorney until they are able to take the bar exam and obtain their results. Despite the potential problems noted above, supervised practice can be a good option to temporarily alleviate the financial hardships experienced by graduates facing delayed admission due to the pandemic. The courts in Tennessee, Arizona, and New Jersey have already issued orders implementing such measures to address the crisis. NCBE maintains a list of these orders and COVID-related bar admissions news on its website at <http://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information>. And the ABA recently adopted a policy resolution urging states to consider temporary admission pending bar exam passage. (See <https://www.abajournal.com/>

[files/2020_law_grad_limited_practice_resolution.pdf](https://www.abajournal.com/files/2020_law_grad_limited_practice_resolution.pdf).)

Jurisdictions are also making other modifications to support students through the bar examination and admissions process, including extending application deadlines, relaxing refund policies, and relaxing or replacing notarized document and fingerprint card requirements. Such modifications are in addition to preparing to administer a fall exam in addition to or instead of the July exam. These and other measures should be considered and implemented to the extent possible to support law students.

PROFESSIONAL LICENSURE EXAMS—PUTTING THE BAR EXAM IN CONTEXT

The law is not unique in requiring a licensing exam before individuals are allowed to serve the public. Medicine, accounting, nursing, dentistry, piloting, architecture, and engineering are examples of other professions that require passage of one or more standardized examinations before an individual is permitted to work unsupervised in a profession.

All of us recognize the unprecedented need for nurses and doctors in this pandemic. We have not, however, seen calls to waive licensure exam requirements for medical or nursing students to become doctors or nurses. At the time of this writing, medical licensure exams have suspended testing because of COVID-19. For example, the USMLE Step 2 Clinical Skills (CS) test has been suspended with a tentative reopen date of June 1, 2020 (i.e., over a month before the first of the three scheduled bar examinations) (See <https://www.usmle.org/announcements/>). The licensure exam for nursing (NCLEX) is not being suspended nor the requirement to pass the exam

waived. Rather, testing is happening as of the time of this writing on a limited basis (only at certain test centers, with a limited number of test-takers per day.) (See <https://www.ncsbn.org/14496.htm>.)

THE BAR EXAM

Some of the proponents of diploma privilege argue not only that it is necessary because of uncertainty about whether the bar exam can be administered, but they also assert that the bar exam does not measure competence to begin practice. In fact, the exam is designed for exactly that purpose (a claim that can't be made regarding law school curricula) and has been used for decades to make licensing decisions.

The UBE consists of three exam components, many or all of which are also used by non-UBE jurisdictions. The Multistate Bar Exam (MBE) consists of 200 practice-centered, multiple-choice questions in seven core areas of law. Multiple-choice formats permit objective grading and sampling of a broad array of content contributing to the high reliability of scores. The Multistate Essay Exam (MEE) is a six-question essay exam that also covers core practice areas and offers assessment of candidates' ability to identify and analyze legal issues and show their analyses in writing. The Multistate Performance Test (MPT) consists of two 90-minute case simulations that require candidates to create a written product for a supervising attorney using a case file and a closed universe of legal resources. Samples of MBE questions and past MEE and MPT questions are available on NCBE's website at www.ncbex.org.

NCBE is confident in the validity, reliability, and fairness of the bar exam because the exam has been carefully developed and vetted to meet professional testing standards

promulgated by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education and set out in the *Standards for Educational and Psychological Testing* (AERA, APA, NCME, 2014). NCBE has a professional and highly credentialed staff of psychometricians who ensure that NCBE's exams meet or exceed the *Standards*. NCBE's psychometricians have a collective 150 years of academic, testing, measurement, and test security experience. NCBE also consults regularly with a [panel of outside testing experts](#) and the Center for Advanced Studies in Measurement and Assessment (CASMA), a preeminent educational measurement organization (<https://education.uiowa.edu/centers/casma>).

The claim that individuals who pass the bar examination have mastered the knowledge and skill of newly licensed lawyers may not be immediately self-evident. Validation is the process by which testing organizations such as NCBE gather and evaluate the evidence to support such claims. The content tested on the bar examination has been validated through practice analyses conducted by independent measurement firms, most recently in 2012 and again in 2019 as part of NCBE's Testing Task Force study. Information about that study and the results of the practice analysis can be found at <https://testingtaskforce.org/research/phase-2-report/>. The job responsibilities identified through a practice analysis serve as an anchor point in the validation process. Although NCBE periodically evaluates other types of validity evidence (e.g., internal structure of tests, relationship of test scores to other relevant outcomes, studies of test fairness), a practice analysis serves as the primary source of validity evidence for the use of scores on licensure examinations. No such validation process is done on law

school curricula or course work, and the purpose of law schools is to educate, not to protect the public by ensuring competence to practice under a general license.

Some arguing for diploma privilege have erroneously remarked that NCBE created the Testing Task Force because of recognized deficiencies with the bar exam and to study *whether* the exam tests the knowledge, skills, and abilities needed for practice. In fact, NCBE has confidence that the current exam is a valid measure of minimum competence for entry-level practice. NCBE created the Testing Task Force in January 2018 to ensure that the bar exam *continues* to test the necessary knowledge, skills, and abilities in the face of a changing profession and world. It would be irresponsible if licensing authorities did not periodically conduct such studies. NCBE is undertaking this significant three-year study for the benefit of the jurisdictions that rely on us to provide a bar exam that is of the highest quality and appropriate for licensure.

NCBE TEST DEVELOPMENT AND SCORING

The bar exam components developed by NCBE are created largely through the efforts of volunteer drafters/lawyers who are experts in the legal subjects being tested. Faculty members from 32 law schools serve on our test drafting committees, and every drafting committee also has members who are practicing lawyers and judges. There is also widespread jurisdiction participation on all of our policy committees, including our test policy committees. In short, the jurisdiction bar admission offices and courts that we serve are heavily involved in setting policy and ensuring the appropriateness of bar exam questions for licensure purposes.

NCBE's test development process is lengthy and thorough. All items that appear on the UBE are pretested, reviewed by outside content experts, and subject to bias review. All MEE and MPT items are reviewed in depth by test policy committee members well in advance of administration. Test development is also guided by best practices in measurement science for reliability and validity. (See <https://thebarexaminer.org/wp-content/uploads/PDFs/BE-860317-TestingColumn.pdf>; <https://thebarexaminer.org/wp-content/uploads/PDFs/750306-testing.pdf>; <https://thebarexaminer.org/wp-content/uploads/PDFs/740105-kane.pdf>.)

CRITICISMS OF THE BAR EXAM

While this is not the place to respond to the unfounded and unsubstantiated criticisms that some commentators are directing at the bar exam, we feel compelled to make two important points. One relates to charges that the bar exam disproportionately burdens and disadvantages people of color and women. The second relates to recent declines in bar passage rates.

Regarding disproportionate impact, it is true that differences in average performance on the bar exam tend to be observed across racial/ethnic groups. However, the same or greater differences in average performance across racial/ethnic groups also tend to be observed in performance in law school (law school GPAs), on the LSAT, and in undergraduate GPAs. Similarly, gender differences in average performance observed on the bar exam are also observed in law school and on the LSAT: men tend to perform better, on average, on multiple-choice exams (like the MBE and the LSAT), and women tend to perform better, on average, on essay exams (like the MEE and MPT portions of the bar exam). To say that the bar exam disadvantages particular racial/

ethnic groups ignores the bigger picture of educational pipeline-related differences in performance that are observed in law school and prior to law school. These differences are not eliminated, nor are they exacerbated, by the bar exam. They are the result of deeply rooted societal problems that create unequal educational (and other) experiences and opportunities. NCBE cannot erase the problems that contribute to the performance gap, but we are committed to contributing to solutions, such as through [our partnership with the Council on Legal Education Opportunity, Inc. \(CLEO\)](#), and taking every measure to ensure the bar exam is free from bias.

Regarding the decline in bar passage rates, performance of graduates on the bar exam has declined since 2014. That decline has been of great concern to NCBE, as we know it has to all courts and bar admissions offices. It has been well documented by NCBE and others that the decline in bar exam performance correlated with a decline in the credentials of law students, such as undergraduate GPAs and LSAT scores that began with the recession of 2008. (See <https://www.nytimes.com/roomfordebate/2015/09/24/is-the-bar-too-low-to-get-into-law-school/incoming-law-students-have-weaker-exam-credentials>; <https://excessofdemocracy.com/blog/2018/9/mbe-scores-drop-to-34-year-low-as-bar-pass-rates-decline-again>; <https://excessofdemocracy.com/blog/2018/4/february-2018-mbe-bar-scores-collapse-to-all-time-record-low-in-test-history>; <https://lawprofessors.typepad.com/legalwhiteboard/2016/01/in-late-december-2014-i-posted-a-blog-analyzing-how-the-distribution-of-matriculants-across-lsat-categories-had-changed-si.html>.)

Further, those declines have been shown to reflect actual declines in demonstrated proficiency by examinees on the bar exam.

When MBE scores in July 2018 hit what we hope is their low point, we looked at those MBE questions that had been used in a previous July exam. We found a performance decrease on those questions that was consistent with the decrease in the mean scaled score, indicating that the July 2018 examinees performed less well than previous July examinees. Looking at the LSAT scores of the examinees who had entered law school in 2015 and were the primary group of first-time takers of the July 2018 bar exam, we found that the group's LSAT scores were the lowest they had been since at least 2010. The entering class of 2015 also had the fewest LSAT takers, the fewest applicants, and the lowest first-year enrollment since at least 1995. (See <https://thebarexaminer.org/article/fall-2018/the-testing-column-july-2018-mbe-the-storm-surge-again/>.)

While law schools are not obliged to hold their entering classes to the exact same standards year after year, there should be no compromise in ensuring that students' competence to enter practice meets the jurisdictions' determination of minimum competence. The bar exam is the most important reliable, independent, objective assessment of graduating student competence. Law schools are student-centric and understandably have an interest in seeing *all* their graduates authorized to practice law. A court's interest, in contrast, is to ensure that the public can rely on the fact that the individuals who receive a license are, in fact, proficient to represent the public.

CONCLUSION

There are good reasons the jurisdictions have relied upon the bar exam for decades as a fair, objective, valid, and efficient method for making licensing decisions, rather than relying upon diploma privilege. Those reasons are still compelling in the

face of the current crisis. That is why NCBE has been working diligently to offer solutions to jurisdictions that will enable them to maintain a bar admissions process that ensures the public is served by competent and ethical lawyers while also considering the financial impact of the crisis on law graduates seeking admission.

We are developing webinars and FAQs to prepare bar administrators for administrative issues and questions from applicants related to the three exam administrations (July and two fall dates). And we are providing information, like this white paper, to assist courts and admissions offices in making difficult decisions about the bar exam and licensure.

Of course, none of us knows for sure what will happen with COVID-19 or when in-person testing can be safely carried out. That is why NCBE is also exploring alternative methods for jurisdictions to conduct testing of bar applicants. One method being used for academic tests in law schools and for some *admissions* tests like the LSAT and the GRE is online testing with remote proctoring. Just as licensure testing is different from academic testing, it is also different from admissions testing. While licensure tests are designed to protect the public, admissions tests are designed to

protect prospective students from embarking on educational pursuits for which they might not be suited, and to provide educational institutions with objective, reliable test scores to evaluate potential students' aptitude as part of enrollment decisions. Students are not awarded their degrees on the basis of admissions tests, however; they are only given the opportunity to earn the degrees. That is not to suggest that online testing cannot be used for the bar exam; rather, it is to emphasize that careful study is needed before jumping to a decision. NCBE is working with outside technology, testing, and exam security experts who have experience with online testing to carefully but expediently evaluate the many technical, logistical, legal, administrative, and measurement issues that online testing creates. We will share the results of our exploration with the jurisdictions as soon as possible.

NCBE remains committed to supporting the jurisdictions, as we have since 1931, in carrying out their licensing responsibilities during these difficult times. We hope we have earned your confidence in our expertise and trust in our integrity over our many years of service. Know that we never take it for granted and will continue to work to deserve it.