

August 3, 2020

Re: Comment on No. M-269-20

Dear Chief Judge Blackburne-Rigsby and Associate Judges:

I strongly support creation of a diploma-based privilege for candidates registered to take the District of Columbia bar examination in October 2020 or February 2021. Your decision to cancel the in-person exam, protecting the health of both exam-takers and the community, was very wise. As I explain below, however, the October online exam presents numerous challenges for both candidates and the Court. Rather than rely exclusively on that licensing path, I encourage the Court to protect the public by adopting one or more of the alternatives explained below. These alternatives could complement the online exam, giving candidates a choice of options and reducing burdens on the Court generated by an online exam.

As a professor, much of my scholarship and public service have focused on legal education, the qualifications of new lawyers, and our licensing system. I am familiar with psychometrics, served as a member of the ABA's recent Commission on the Future of Legal Education, and recently completed a national study of the knowledge and skills that new lawyers need to practice law. I draw upon those experiences in the comments below. I hope these thoughts will be helpful to the Court.

Challenges with an Online Exam

High-stakes exams are difficult to administer online, as the last two weeks have illustrated. Indiana and Nevada were forced to postpone their exams when the online system failed during testing; Indiana has now decided to administer its exam open-book and by email, rather than rely on an online platform. Michigan was able to administer an online bar exam last week, but only with glitches that challenged both candidates and the exam administrators. The Law School Admission Council, meanwhile, lost the scores of 140 candidates who completed the most recent version of the LSAT online. Online exams have a promising future for licensing, but at present they are—at best—in an early pilot phase.

In addition to these technical problems, candidates will face significant problems taking an online bar exam. Some will lack sufficiently high-speed or stable internet connections. Others lack quiet spaces to take the exam. The candidates who lack these necessities are disproportionately people of color and first-generation graduates, groups that we repeatedly encourage to join our profession. Although law schools and some employers are working to provide appropriate testing spaces for candidates, the availability of those spaces cannot be guaranteed. On the contrary, there is a significant chance that campuses and offices will be under lockdown in early October.

Perhaps most important, the online exam will not produce reliable results. The District of Columbia's cut score, like cut scores in other jurisdictions, is based on *scaled* scores computed by NCBE for the Multistate Bar Exam (MBE). NCBE has announced that it will not scale scores for this online exam. Instead, it will report only raw scores—and those scores will have no meaning in the context of the District's existing cut score of 266. Is a raw score of 260 this year equivalent to a scaled score of 266? Or would candidates need a raw score of 270 this year to reach a scaled score of 266? There will be no way to know.

Without a reliable cut score, the exam lacks any validity. It is not fair to candidates, and it cannot protect the public. It is especially inappropriate to administer a licensing exam that is known to have a disproportionate racial impact when the cut score is unreliable. Simply stated: Applying a cut score of 266

to raw scores (rather than scaled ones) is likely to fail candidates who should have passed—and those candidates will disproportionately be people of color.

The Need for Alternatives

By working to offer a licensing method this fall, the Court has already recognized the need to continue some system of licensing. I agree that is of paramount importance. I recently completed a nationwide study that used 50 focus groups in 18 different locations to identify the work that new lawyers do, as well as the knowledge and skills they need for that work.¹ One of the clear findings in this study, which is consistent with other reports, is that government agencies, nonprofits, and small law firms rely heavily on new lawyers to do their work. New lawyers in these settings begin communicating directly with clients, appearing in court, and handling other legal work as soon as they are licensed.

Nationwide, almost *half* (49.5%) of new lawyers working in jobs that require a law license work in one of these settings.² The percentage may be even higher in the District of Columbia, given the prevalence of government agencies and nonprofits in your jurisdiction. These employers, who depend so heavily on new lawyers to do their work, serve the most vulnerable clients in our population. Halting the licensing of new lawyers, even for six months, would be devastating to those clients and our commitment to access to justice.

Temporary licensing, unfortunately, will not work for these lawyers or their clients. Government agencies, nonprofits, and small firms operate with lean budgets and staffs—even more so during this pandemic. They do not have the ability to supervise new lawyers with the closeness that temporary licenses require; these employers and their clients need lawyers who can practice law under more general mentoring and supervision. Similarly, these employers and their clients cannot allow temporarily licensed lawyers to take off 6-8 weeks to study for a bar exam sometime in the future. New prosecutors, public defenders, legal aid lawyers, and others handle their own caseloads. What will happen to their cases if they take leaves of absence to study? And how will these lawyers support themselves financially during those undoubtedly unpaid leaves, given how much they already sacrifice to serve the public or needy clients? Temporary licensing is a solution for lawyers working at mid-sized or large law firms, but not for those who serve the less advantaged.

Alternative Paths to Licensure

My research, including the national study mentioned above, suggests several paths to licensure that would protect the public as well as (or better than) the October online exam:

1. License all JD graduates of ABA-accredited law schools who are currently registered to take the DC bar exam and are able to satisfy all requirements for admission other than passing the Uniform Bar Exam (“diploma-based pathway”).³

¹ *Building a Better Bar*, <https://iaals.du.edu/projects/building-a-better-bar>. Data collection in the study is complete; with Logan Cornett (IAALS), I am drafting a formal report that will be published later this year.

² 21,051 members of the Class of 2018 (the most recent class for which data are available) took jobs that required bar admission. Of those lawyers, 10,416 worked for government, nonprofits, or firms with no more than 10 lawyers. These figures exclude judicial law clerks, who do not serve clients and are not always required to be licensed for their work. See NALP, Class of 2018 Summary Report, https://www.nalp.org/uploads/NationalSummaryReport_Classof2018_FINAL.pdf (reporting jobs held 10 months after graduation).

³ My research does not address LLM graduates, so I do not offer any suggestions for their licensing.

2. License all JD graduates of ABA-accredited law schools who are currently registered to take the DC bar exam, are able to satisfy all requirements for admission other than passing the Uniform Bar Exam, *and* who satisfactorily completed at least 8 credits of clinical or externship work as part of their degree program (“clinical pathway”).
3. License all JD graduates of ABA-accredited law schools who are currently registered to take the DC bar exam, are able to satisfy all requirements for admission other than passing the Uniform Bar Exam, and who *either* (a) satisfactorily completed at least 8 credits of clinical or externship work as part of their degree program or (b) satisfactorily complete at least 360 hours of practice supervised by an attorney licensed by the District of Columbia (“clinical or supervised practice pathway”).

These are the reasons why I believe these paths are equal to or better than the October online exam for establishing minimum competence:

- My research establishes that the current bar exam only weakly corresponds to the knowledge and skills that new attorneys need during their early years of practice. The current exam does not test either research skills or the ability to communicate effectively with clients, two skills that research shows are essential for new lawyers. Conversely, the exam focuses heavily on memorization of legal rules and unrealistically rapid analysis of client problems—approaches that may actually impair competence. When the defects of an online exam are added to these underlying flaws, the current bar exam becomes a very poor test of minimum competence. Notably, NCBE’s recent practice analysis agrees with my research on some of these points.⁴
- Although much could be improved in JD education, that education at an ABA-accredited school comes closer than the online bar exam to establishing minimum competence. ABA accreditation standards now require schools to:⁵
 - Establish explicit learning outcomes related to (a) Knowledge and understanding of substantive and procedural law; (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context; (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and (d) Other professional skills needed for competent and ethical participation as a member of the legal profession. Standard 302.
 - Conduct ongoing evaluation of success in meeting those outcomes. Standard 315.

⁴ See NCBE TESTING TASK FORCE, PHASE 2 REPORT: 2019 PRACTICE ANALYSIS, https://testingtaskforce.org/wp-content/uploads/2020/03/TestingTaskForce_Phase_2_Report_031020.pdf, at 42 (2020) (More than 90% of the lawyers responding to the NCBE survey reported that new lawyers responded to client inquiries, identified goals and objectives in client matters, conducted factual investigations, and informed clients about the status of matters. 89% percent interviewed clients, client representatives, or witnesses. Respondents rated all of these tasks as equally or more important than any knowledge area tested on the bar exam); *id.* (respondents to NCBE survey designated three different types of research as among the most frequent and critical tasks performed by new lawyers).

⁵ The Standards are available online at: https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf.

- Mandate that each student complete at least 2 credit hours of work in professional responsibility; two faculty-supervised writing experiences; at least 6 credit hours of experiential coursework; and at least 83 credit hours of work overall. Standards 303 & 311.

In the current emergency, these requirements provide substantial assurance that graduates possess the minimum competence needed to practice law. An abbreviated, online exam without a reliable cut score will not add to those assurances.

- Clinical education and supervised practice, the pathways suggested as options (2) and (3) above, can provide substantial additional guarantees of minimum competence. These experiences educate and assess students in their abilities to interact with clients, conduct research, apply legal rules to client problems, and handle other aspects of entry-level practice. Indeed, these experiences often replicate entry-level practice for the employers who serve the most vulnerable clients. My research strongly supports requiring clinical experience as a permanent part of licensing systems. Certainly in this emergency, those experiences are more likely to assure minimum competence than the October online exam.

I urge the Court, therefore, to adopt one of these pathways as an alternative to the October online exam. That exam may provide a useful route for licensing some attorneys, especially those who want their license to be portable. These other avenues, however, will much more effectively protect the public while continuing to offer access to the profession. Reducing the number of candidates registered for the online exam will also help the District administer that exam more smoothly.

Thank you for your attention and willingness to support access to our profession during these very difficult times. If I can provide more information, please let me know.

Sincerely yours,



Deborah Jones Merritt
Distinguished University Professor
John Deaver Drinko/Baker & Hostetler
Chair in Law