August 12, 2020

BY E-MAIL
rules@dcappeals.gov

Julio A. Castillo
Clerk
District of Columbia Court of Appeals
430 E Street, N.W.
Washington, D.C. 20001

Re: Diploma Privilege and Temporary Practice Proposals, No. M-269-20

Dear Mr. Castillo:

We are partners in the Supreme Court and Appellate practice at Hogan Lovells and members of the District of Columbia Bar. In addition, Neal is the Paul and Patricia Saunders Professor of National Security Law at Georgetown University, and Sean is a member of the Hogan Lovells D.C. Summer Associate Committee. In these capacities, we have worked closely with both law students and recent law graduates. We write, however, solely in our personal capacities; our views should not be attributed to Hogan Lovells, Georgetown, or any organization of which we are a part.

We appreciate that the Court's rules for admission—including the bar examination—are "imposed for 'the protection of prospective clients, and the assurance of the ethical, orderly, and efficient administration of justice.' " *In re Bedi*, 917 A.2d 659, 663 (D.C. 2007) (quoting *In re Dortch*, 860 A.2d 346, 355 (D.C. 2004)). But the unprecedented circumstances presented by the COVID-19 emergency warrant unprecedented steps to aid both 2020 graduates and the public that they will serve.

The Court should grant plenary admission to graduates of American Bar Association-accredited schools who registered to take the bar examination for the first time by July 10, 2020, and who otherwise meet the Court's standards for admission.

The COVID-19 emergency presents the Court with a previously unthinkable set of trade-offs. The harms to graduates of delaying licensure—both financially and emotionally—have been well documented. Yet a diploma privilege may mean that

some new attorneys will not be minimally competent to practice law and may harm their clients through their incompetence. The question is how to strike an equitable balance.

In this calculus, the Court should bear in mind that denying a diploma privilege hurts employers, courts, and clients—not just graduates. Large law firms like ours will perhaps suffer the least if a diploma privilege is denied; recent graduates are supervised closely and can perform many law clerk tasks without a license. But our junior associates give back to the community by taking on court-appointed and pro bono representations for which they *do* need a plenary license. In our appellate group, for example, junior associates serve the courts by accepting appointments to represent Section 1983 plaintiffs and post-conviction-relief petitioners on appeal. And across Hogan Lovells (as at many law firms), junior associates help low-income clients by providing pro bono representation in civil-order-of-protection, Special Immigrant Juvenile Status, and eviction cases.

The impact for other employers is likely to be even greater. Delayed licensure doesn't mean just fewer private practice attorneys, but also fewer legal aid lawyers, civil rights attorneys, and public defenders—passionate new advocates that clients need by their sides.

The planned October 2020 remote bar examination plus a temporary, limited authorization to practice is not a superior approach to a diploma privilege. Recent technological difficulties in Michigan, Nevada, Indiana, and Florida suggest that a remote-proctored bar examination may not yet be sufficiently reliable. And delaying licensure until it is safe to take the bar at the Convention Center once more is untenable.

Even if temporary licensure is allowed in the interim, firms and clients will be ill-served by temporarily licensed attorneys needing to take leave to study for the bar exam. For example, we pride ourselves on our leanly staffed cases. An appeal with one partner and one junior associate or law clerk —as many of ours are—will be derailed if the law clerk has to take leave to study for the bar. We would muddle through. But other employers, with fewer available resources, might not. And new law school graduates will be pulled off cases where they are receiving training and experience that will prepare them for practice better than the bar.

We nonetheless agree a diploma privilege could allow some number of incompetent attorneys to enter practice. In July 2019, 309 first-time test-takers from ABA-accredited schools failed the District's bar examination. Many of these

309 will pass a second or subsequent examination. But some will not. And assuming similar bar-taker performance in July 2020, an unqualified diploma privilege may lead to lawyers lacking minimal competence being allowed to practice law.

But a few unqualified lawyers should not deny the vast majority of the Class of 2020 a diploma privilege. The Court can instead take targeted steps to protect clients from potentially unqualified lawyers. The Court can limit the diploma privilege to first-time examinees so as to exclude those most likely to never pass the bar examination. And the Court can expand the current Mandatory Course on the D.C. Rules of Professional Conduct and D.C. Practice to encompass substantive aspects of District law, or impose a new continuing legal education requirement for diploma-privilege admitted lawyers to ensure they have the legal knowledge necessary to competently serve their clients.

In the alternative, the Court should grant graduates of American Bar Association-accredited schools who registered to take the bar examination for the first time by July 10, 2020, and who otherwise meet the Court's admission standards, broad supervised-practice privileges, including the right to counsel clients, negotiate with opposing counsel, and appear in Court without direct supervision.

If the Court opts to offer an expanded supervised-practice privilege in lieu of a diploma privilege, the Court should ensure that it is sufficiently robust to allow recent legal graduates to practice *as lawyers* until they can obtain a plenary license.

The expanded temporary practice privilege should allow the graduate to act fully as a lawyer—including counseling clients, negotiating with opposing counsel, and appearing in Court. In our view, the limited practice allowed by Rule 49(c)(8) is not sufficiently broad and should not serve as a model for a supervised-practice privilege. In our practice, we have had to remain mindful of law clerks' bar status and ensure, for instance, that they do not counsel clients without direct supervision or do not contact opposing counsel directly. Although we have the resources to navigate the "direct supervision" requirement of Rule 49(c)(8), smaller employers may decide to forego hiring a new graduate rather than constantly monitor what they are doing and whether it constitutes the practice of law under Rule 49.

Any supervised practice privilege granted to new graduates should require only that (1) any documents they prepare be reviewed and signed by an attorney licensed to practice in the District and (2) an attorney licensed to practice in the

District be readily available for advice and assistance, such as by telephone. By loosening the "direct supervision" requirement of Rule 49(c)(8) and allowing court appearances, new graduates will be permitted to practice as true junior lawyers until receiving their plenary license.

We appreciate the Court's consideration, and hope for an equitable solution for the very real harm that the COVID-19 emergency has created for the Class of 2020, clients, and the profession.

Sincerely,

/s/ Neal Kumar Katyal
Neal Kumar Katyal

/s/ Sean Marotta
Sean Marotta