

A Letter About the 2020 New Jersey Bar Examination
Written By 112 New Jersey Law School Faculty, Administrators, and Staff

July 29, 2020

Chief Justice Stuart Rabner,
New Jersey Supreme Court
R.J. Hughes Justice Complex, P.O. Box 970, Trenton, NJ 08625-0970
Via electronic mail

Dear Chief Justice Rabner,

We write in support of abandoning the announced October online bar examination and the temporary supervised practice of law option, and instead creating a one-time emergency “diploma privilege” to practice law in New Jersey for any graduate of the Class of 2020 or other appropriate New Jersey bar applicant otherwise meeting the requirements for admission to practice in in the state.¹ The 112 undersigned faculty, administrators, and staff members from Rutgers Law School and Seton Hall Law School write in our individual capacities. The undersigned faculty teach across all legal disciplines. We note that each of our schools has had experience in providing education during the coronavirus pandemic and moving in-person classes online—experience relevant to the path forward we urge in this letter.

A number of states, including Louisiana, Oregon, Utah, and Washington have already adopted an emergency diploma privilege, licensing candidates without a bar examination.² Authorizing an emergency diploma privilege for this year’s bar candidates provides the most prudent and equitable solution to the calamity of both the unprecedented financial, family, and medical hardships and the daily logistical difficulties caused by the COVID-19 pandemic, in New Jersey and in this region.

The general burdens of the online examination and the lawyer-supervision option are significant

Although an online bar examination addresses the health risks involved with an in-person exam, other problems replace those benefits. In normal years, most candidates for the New Jersey bar spend the two months following law school graduation studying for a July examination. By October, they learn the results of the test and after undergoing a character and fitness review may begin practicing law. This year, instead,

¹ A diploma privilege might also be appropriate for applicants other than those who graduated in 2020; for example, a 2019 graduate who postponed the bar exam for medical or personal reasons.

² The website of the National Conference of Bar Examiners provides updated information about status in each state. <http://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/>

the applicants—having just completed a tumultuous end to their law school careers—have had the added hardship of seeing the bar exam postponed to September and then canceled with the announcement of an online exam to take place in October. The bar exam study period has now been extended six full months after their graduation (currently, bar preparation providers themselves are unsure about how to advise students on pacing their preparations over this extended pre-exam period). By the time the exam grading is completed, the 2020 graduates may not receive their licenses until well into 2021.

The 2020 graduates already are suffering significant financial hardships and losses or postponements of employment offers. Many have been unable to work during this extended period because of the state of the economy and because of the demands of studying for the bar exam. Others have scrambled to find new sources of employment after quitting jobs in anticipation of studying for and taking the bar exam in July. Continuing with plans for a bar examination that has already been delayed twice significantly adds to these graduates' already-considerable financial and personal hardships.

While we appreciate the work the Court has done to create a temporary license option involving supervision until an in-person bar exam can be administered, that process creates problems as well, problems that a diploma privilege would solve. First, there are significant logistical difficulties in finding attorneys who are able to take time away from their schedules to supervise another attorney's appearances in the manner of an extended clinical legal education or externship experience (but for an uncertain period of time). Second, this option repeats the issue of candidates needing eventually to disrupt their practice and livelihood at some later, unspecified date to study for the bar exam. Such a disruption would incur more financial setbacks.

The burdens of an online examination and a lawyer-supervision option will fall unequally on certain groups

The burdens that the online examination or supervision option will place on the 2020 graduates do not fall equally. We commend the New Jersey Supreme Court for its statement last week committing to a one-year action plan to eliminate barriers to equal justice based on statistical racial inequities in our justice system. The current options for this year's bar examination involve inequities that inure to the detriment of persons at lower-resource levels, people of color, women, and those with disabilities.

To take the bar exam online, applicants must have access to reliable internet access in a

private space for an extended period free from childcare and family obligations. The instructions issued by the bar examiners recommend that others in the exam-taker's household refrain from using the internet during the examination hours to allow the candidate the full bandwidth needed for the examination. These conditions are simply not possible for many applicants, particularly Black, Latinx, and other marginalized applicants, per the statistics collected by the New Jersey Coalition for Diploma Privilege and published in *Jurist* last week.³

The same statistics show that applicants of color are less likely than white candidates to have access to an adequate test-taking space and likewise do not have adequate space for the studying required to prepare for the exam. Study spaces outside of the home are much harder to find during the pandemic. College and law school libraries have not yet re-opened. When they do, they will have only limited seating and hours, similar to the limitations occurring in local public libraries. Coffee houses, of course, remained closed. Even if libraries and coffee houses are open, those at high risk of COVID complications (disproportionately Black and Latinx applicants, as well as pregnant women) should not be expected to put themselves at risk to be able to take the bar exam.⁴ Women are also disproportionately affected by the requirement that they must be alone in the room during the test-taking, because women are more likely to be the primary caretakers of young or school-age children who are at home during this time. Moreover, it is unclear how, or whether, the online bar exam will be adjusted to accommodate those with disabilities.⁵

The statistics also show that applicants of color in New Jersey are less likely than their white peers to have reliable internet service, the very condition the bar examiners stress in the instruction letter. The specifics of the bar exam's anti-cheating facial-recognition software are as yet unannounced. However, we are aware that the software widely

³ Claire Newsome and Catherine Perrone, *The Inequity and Technology Behind an Online Bar Exam*, *Jurist* (July 18, 2020), available at <https://www.jurist.org/commentary/2020/07/newsome-perrone-online-bar-exams/>

⁴ We acknowledge that our schools have offered to make space available for our graduates taking the exam online; however, not everyone taking the exam has access to the two law schools' buildings and the same pressures that caused the cancellation of the in-person exam are still part of any equation when talking about study space and examination space for a large number of people. Accordingly, we view the diploma privilege as the most just option.

⁵ For example, we are wary of the rules that test-takers not use scrap paper to outline or diagram questions, which are techniques taught to law students as part of deep-reading. We are also concerned with the advice that test-takers not fidget, which is impossible for many people and particularly for those people with certain disabilities.

used for anti-cheating purposes in other state bar exams and in higher education has been criticized as having an ineffectual diversity algorithm, making it more likely that the people of color will be flagged for cheating.⁶

The online bar exam also assumes that all applicants have access to computers with webcams and certain amounts of memory. Not all applicants have computers that meet these requirements. Many of the law school faculty can personally attest to this fact—several of us needed to purchase equipment to hold online classes this spring. Any law graduate who now must purchase additional computer hardware just to take the bar exam will be spending money during precisely the time they are suffering financial burdens of unemployment.

Relatedly, the statistics demonstrate that candidates of color report greater levels of financial insecurity during this time prior to their licensing.

Thus, the timing and nature of the online bar exam is creating barriers to licensing that have a disparate impact fundamentally antithetical to the laudable goals of addressing issues of race in our justice system adopted by this Court just this month.

Conclusion

In normal times, the bar examination is a stressful professional event, perhaps the most stressful professional event that a law graduate faces prior to embarking upon the practice of law. This year that anxiety has been increased exponentially. The cost this year to the newest members of our field outweighs the benefit the bar examination normally provides in proving a candidate's mettle to practice law. The time has come for New Jersey to join other states in turning to more a humane response to what this year has become a protracted, costly, and painful professional examination process—one that is disproportionately affecting women candidates and candidates of color.

An emergency diploma privilege for these applicants is the pathway forward in New Jersey, a state that prides itself in acting responsibly and compassionately. Ensuring that licensed attorneys are competent to represent their clients can be fulfilled without a bar examination this year. New Jersey already requires significant Continuing Legal Education training for its newest members and more could be added to that program

⁶ Shea Swauger, *Our Bodies Encoded: Algorithmic Test Proctoring in Higher Education*, Hybrid Pedagogy: Ed-Tech, (April 2, 2020), available at <https://hybridpedagogy.org/our-bodies-encoded-algorithmic-test-proctoring-in-higher-education/>

for the Class of 2020. Law school graduates today are required to complete six credits in experiential courses and multiple writing courses, beyond their studies of doctrinal materials and professional responsibility. Already, candidates must be certified by their law school and undergo a character and fitness analysis—something we understand and agree should continue as a condition of licensing even with a diploma privilege.

The graduates of the Class of 2020 want to begin their legal careers after having spent months studying for postponed bar exams and otherwise being in limbo; we cannot fail them by denying them an equitable way forward.

Thank you very much for considering our letter.

Respectfully,

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