

**AMERICAN BAR ASSOCIATION**  
**VIRGIN ISLANDS BAR ASSOCIATION**  
**SECTION OF STATE AND LOCAL GOVERNMENT LAW**  
**LAW STUDENT DIVISION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association urges the highest court or bar admission  
2 authority of each jurisdiction to temporarily cancel in-person administrations of the bar  
3 examination and to not administer any other in-person bar examination during the  
4 COVID-19 pandemic until and unless public health authorities determine that the  
5 examination can be administered in a manner that ensures the health and safety of bar  
6 applicants, proctors, other staff, and local communities.

7 FURTHER RESOLVED, That the American Bar Association urges the highest court or  
8 bar admission authority of each jurisdiction to establish temporary emergency measures  
9 to expeditiously license recent law school graduates and other bar applicants when public  
10 health and safety concerns preclude safe administration of an in-person bar examination,  
11 including but not necessarily limited to administration of a remote bar examination,  
12 creation or expansion of certified legal intern programs, supervised practice programs  
13 leading directly to licensure, or a form of diploma privilege, and encourages jurisdictions  
14 to collect and report demographic data on applicants for licensure via such emergency  
15 measures.

16 FURTHER RESOLVED, That the American Bar Association urges the highest court or  
17 bar admissions authority of a jurisdiction electing to administer a remote bar examination  
18 to, sufficiently in advance of the examination date,

19 (1) complete all testing of the reliability and security of the online platform;

20 (2) provide reasonable accommodations, consistent with public health and safety  
21 guidelines, to applicants for whom taking a remote examination would create a substantial  
22 hardship—including but not necessarily limited to applicants with disabilities, applicants  
23 who serve as caregivers to children or other family members, applicants who lack access  
24 to an appropriate computer or reliable internet access, and applicants who lack a quiet  
25 place to take a remote bar examination—and, if such accommodations are not possible,  
26 establish alternate methods to ensure the expeditious licensing of such applicants;

27 (3) disclose what data will be collected as part of the remote proctoring process,  
28 who will have access to such data, how long such data will be preserved, and what

29 measures will be implemented to prevent the abuse or unauthorized disclosure of such  
30 data;

31 (4) disclose the protocols for remote proctored exams to applicants, as opposed  
32 to non-proctored exams, taking into account methods for not penalizing applicants for  
33 human eye and body movements (e.g., looking up or down as a natural movement), lip  
34 movement while reading, and other natural movements that applicants might normally  
35 make while taking in-person exams; and

36 (5) well in advance of the exam disclose to applicants and the profession  
37 information about exam coverage, scoring or grading of the exam, measures adopted to  
38 assure reliability of the cut score, and potential portability or not of the exam.

DRAFT

## REPORT

The novel coronavirus, COVID-19, has created unprecedented challenges across all sectors within the United States and the world. The legal profession has been no exception. Although federal, state, territorial, tribal, and local courts have done the best they can to continue operations while complying with social distancing and other public health guidelines, nearly every aspect of how the courts conduct business has been disrupted.

This includes the system for licensing new attorneys. While the fifty states, the five territories, the District of Columbia, and Native American tribes exercise independent authority to control admission to the practice of law within their respective jurisdictions, with relatively few exceptions, most individuals first become admitted to the practice of law by sitting for, and successfully passing, the bar examination. Although bar admissions remains a decentralized process in most respects, the jurisdictions utilizing the bar examination, with the assistance of the National Conference of Bar Examiners, have largely come to a consensus to administer the bar examination during the same two-day period in both July and February.

The COVID-19 pandemic, however, has turned what is normally an orderly process into chaos. While the July 2020 bar examination had originally been scheduled to be administered in all jurisdictions from July 28-29, 2020, as of this writing there are at least seven different date permutations for this exam, including as late as October 5-6, 2020.<sup>1</sup> Although a growing number of jurisdictions have announced the cancellation of the in-person bar examination in favor of a remote bar examination administered online, as of this writing a majority of jurisdictions are still holding in-person bar examinations.<sup>2</sup> And while some jurisdictions have created or expanded certified legal intern programs or enacted a diploma privilege rule in order to permit some or all bar applicants to practice notwithstanding any delays in the bar examination date, others have delayed the bar examination without providing such accommodations. Nevertheless, as of this writing, only nine jurisdictions have proceeded with an exclusively in-person bar examination on July 28-29, 2020, without adopting or expanding some sort of provisional practice rule.<sup>3</sup>

During the early stages of the COVID-19 pandemic, the ABA Board of Governors exercised its authority to establish policy between meetings of the ABA House of Delegates to enact Resolution No. 77, which urged the highest court or bar admissions authority of each jurisdiction to immediately adopt emergency rules to permit certain 2019 and 2020 law graduates, as well as certain judicial law clerks, to engage in the limited practice of law if the July 2020 bar examination in their jurisdiction was cancelled or postponed due to COVID-19. When the Board adopted the resolution on April 7, 2020, only four jurisdictions had announced the cancellation or postponement of the July 2020

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<sup>1</sup> *July 2020 Bar Exam Status by Jurisdiction*, NAT'L CONF. OF BAR EXAM'RS, <http://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/> (last visited July 27, 2020).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

bar examination, and none had announced that the bar examination would be administered remotely.

This Resolution builds on the foundation laid by Resolution No. 77 to address the new developments in the bar admissions landscape over the last four months. First, it urges that the highest court or bar admissions authority in each jurisdiction cancel the in-person bar examinations currently scheduled for September 9-10, 2020, and September 30-October 1, 2020, and not administer any other in-person bar examination until and unless public health authorities determine that the examination can be administered in a manner that ensures the health and safety of bar applicants, proctors, other staff, and local communities. The Resolution further urges the highest court or bar admission authority of each jurisdiction to establish temporary emergency measures to expeditiously license recent law school graduates and other bar applicants when public health and safety concerns preclude safe administration of an in-person bar examination. Finally, the resolution urges that jurisdictions electing to administer a remote bar examination implement appropriate safeguards with respect to the reliability and security of the online software; provide reasonable accommodations to all applicants; and disclose plans related to data collection, security protocols, exam coverage, scoring or grading, and portability.

At the beginning of the COVID-19 pandemic, there was some optimism that the public health emergency would be behind us by the summer and that administration of the July 2020 bar examination would not be affected. Unfortunately, that has not been the case. On the contrary, 18 states set single-day records of COVID-19 cases the week before the July 2020 bar examination was set to be administered,<sup>4</sup> with cases declining in only two states.<sup>5</sup> There is no indication that circumstances will meaningfully change prior to the administration of the in-person bar examinations currently scheduled for September 9-10, 2020, and September 30-October 1, 2020.

No one should have to choose between their long-term health—or life—and a licensing examination. However, bar applicants in jurisdictions scheduled to administer an in-person bar examination are being required to do so. And given the state of the legal employment market combined with the need to repay student loans and otherwise earn a living, many bar applicants feel they truly have no choice at all. As one bar applicant stated in an impact statement filed with the Supreme Court of Missouri in support of a petition to postpone the in-person bar examination scheduled for July 28-29, 2020:

I'm immunocompromised. I don't mean I get a lot of colds. I mean it takes me four complete sets of oral antibiotics and 10 months to get over a minor toenail infection. If I get coronavirus, I will die. But I financially cannot wait till the later date to take the bar, and nobody will hire me without the bar or diploma privilege because I'm under qualified for everything related

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<sup>4</sup> Phillip Cheung, *U.S. Coronavirus Cases Soar as 18 States Set Single-Day Record*, N.Y. TIMES, <https://www.nytimes.com/2020/07/25/world/coronavirus-covid-19.html> (last visited July 27, 2020).

<sup>5</sup> Univ. of Minnesota, Center for Infectious Disease Research, *US COVID-19 Case Counts Rise in 39 States, Decline in Only 2*, <https://www.cidrap.umn.edu/news-perspective/2020/07/us-covid-19-case-counts-rise-39-states-decline-only-2> (July 16, 2020).

to law and overqualified for everything not related to law. Facing student loan payments and medical bills, I don't have a choice. **I am planning to sit for the July bar and, to be frank, if I die I die.** That's the position I am in right now.<sup>6</sup>

In apparent recognition of the health and safety risks, several jurisdictions administering an in-person bar examination required applicants to sign COVID-19 liability waivers as a condition for sitting for the examination.<sup>7</sup>

The cancellation or postponement of in-person bar examinations, however, is not sufficient. Rather, courts and bar admissions authorities must provide alternate and expeditious methods to ensure that the licensing of new attorneys continues despite the COVID-19 pandemic. Such methods include, but are not necessarily limited to, administration of remote bar examinations, creation or expansion of certified legal intern or supervised practice programs, or the diploma privilege. As previously recognized in the report accompanying Resolution No. 77:

Yet there also can be no doubt that canceling or postponing a bar exam will significantly affect the lives, careers, and immediate personal plans of law graduates, their families, and the lawyers or other organizations with whom they might otherwise practice. Every law graduate in this country has planned and worked for years toward the goal not only of graduation from law school, but admission to the bar and licensure. The inability of a law graduate to take the bar examination in July 2020 would mean a delay, at the very least, of months in their ability to begin the practice of law. This delay may lead not only to tangible financial and family hardship, but disruption in the plans and operations of the organization and clients for whom these law graduates may already be planning to work.

Cancelling or postponing a bar examination for public health and safety reasons is not without consequence. The livelihoods, families, and careers of 2019 and 2020 law graduates may be uprooted, and financial security immediately threatened, with even a delayed exam. Upon graduation, the average 2020 law graduate will bear a debt load of \$142,870.4 That debt load remains unchanged while their job prospects disappear or diminish in part were their jurisdiction to deny them the opportunity to take the exam in July 2020 and begin to practice law. Public health and safety and the professional and financial security of law graduates need not be mutually exclusive.

The temporary measures encouraged by Resolution No. 77 were an excellent initial response to the pandemic but, as the pandemic has worsened, those measures are no longer sufficient. Small law firms, legal aid offices, other nonprofits, public defenders, and

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<sup>6</sup> Copies of the 31 impact statements filed with the Supreme Court of Missouri can be found at [https://docs.google.com/document/d/1\\_cWIJxiFEgdiOQfflIIVm0rRifV2DRTWk8tWI2GHdQ/edit](https://docs.google.com/document/d/1_cWIJxiFEgdiOQfflIIVm0rRifV2DRTWk8tWI2GHdQ/edit) (last visited July 27, 2020).

<sup>7</sup> See Andrea Boyack, *Abuse of Contract and the July 2020 Bar Exam*, N.U. L. REV. OF NOTE, <https://blog.northwesternlaw.review/?p=1506> (July 15, 2020).

other government agencies do not have sufficient staff to supervise temporarily licensed lawyers until an in-person bar exam is possible. These organizations rely upon new lawyers, usually licensed by November, to serve clients directly. Nor can these organizations and their clients afford to release—or pay—temporarily licensed lawyers for six or more weeks to study for a bar exam offered sometime in the future. Maintaining temporary licensure as our profession’s only response to the pandemic will worsen access to justice—at the same time that the pandemic is increasing legal needs among the vulnerable.

The current Resolution does not recommend a “one-size-fits-all” approach to licensing attorneys during the COVID-19 crisis. Every jurisdiction has its own unique legal system and has been affected by and responded to COVID-19 in a different way. It goes without saying that what may be appropriate for Utah may not be appropriate for New York, and what works in the U.S. Virgin Islands might not work in Kansas. Which particular methods should be utilized to license attorneys on an emergency basis is, and should remain, vested in the sound discretion of the highest court or bar admissions authority in each jurisdiction, exercised after due consideration of all relevant factors. However, given the substantial and unprecedented effect on not just law graduates and the organizations that employ them, but on individuals and businesses both large and small, no court or bar admissions authority should exercise its discretion to simply do nothing and/or hold back licensure until an in-person exam is possible which could be more than a year down the road.

Jurisdictions who elect to proceed with a remote bar examination should administer such an examination with appropriate safeguards in place sufficiently in advance of the examination date. Shortly after the first two states announced the transition to a remote bar examination in April 2020, one law professor expressed skepticism that what would ordinarily be “a years-long project” could be successfully implemented in just four months.<sup>8</sup> Such skepticism proved prescient: Indiana and Nevada, which had scheduled remote bar examinations to occur, respectively, on July 28, 2020, and July 28-29, 2020, both cancelled those examinations four days before they were set to occur, due to substantial technology problems with the software utilized by their vendor, ILG Technologies.<sup>9</sup> The cancellation of the Indiana and Nevada remote bar examinations occurred days after the online General Surgery Qualifying Exam administered by the American Board of Surgery was cancelled on the day of the exam due to technical and security failures.<sup>10</sup> Moreover, the Michigan remote bar examination crashed in the middle of testing on July 28, 2020, when the software utilized by its vendor,

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<sup>8</sup> Derek Muller, *Blockchain and the Bar Exam*, <https://excessofdemocracy.com/blog/2020/4/blockchain-and-the-bar-exam> (Apr. 28, 2020).

<sup>9</sup> Debra Cassens Weiss, *Online bar exams delayed in 2 states because of issues with testing software*, ABA JOURNAL, <https://www.abajournal.com/news/article/online-bar-exams-delayed-in-two-states-due-to-issues-with-testing-software> (July 27, 2020).

<sup>10</sup> American Board of Surgery, *ABS Issuing Refunds, Launching Security Investigation for Virtual 2020 General Surgery QE*, [http://www.absurgery.org/default.jsp?news\\_virtualgsqe07.17](http://www.absurgery.org/default.jsp?news_virtualgsqe07.17) (July 17, 2020).

ExamSoft, locked applicants out of the exam after completing the first module.<sup>11</sup>

The administration of a remote bar examination also raises serious disparate impact concerns. To sit for a remote bar examination, an applicant must have access to an appropriate computer<sup>12</sup> with reliable internet access, as well as the ability to take the exam uninterrupted for several hours in a quiet place. One recent survey has shown that a majority of bar applicants do not believe they have reliable internet access, and that white applicants are about 71 percent more likely to have such access when compared to black applicants.<sup>13</sup> The same survey found that a majority of applicants do not have access to a quiet space to take a remote bar examination, with white applicants again being substantially more likely to have access to a quiet place than an applicant of color.<sup>14</sup> And with schools and daycares closed in many parts of the United States, parents—and particularly mothers—cannot guarantee that they will not have to leave the room to attend to their young children.<sup>15</sup>

The remote bar examination necessarily requires the collection of substantial amounts of data, including video footage of the applicant's home obtained through the remote proctoring process.<sup>16</sup> Although as of this writing no jurisdiction has yet administered a remote bar examination, there are numerous reports of vendors retained to provide remote proctoring services for colleges and universities during the COVID-19 pandemic requiring test-takers to provide biometric data, or granting the proctor actual remote control of the computer.<sup>17</sup> Some of these vendors assert the right to retain this information, and even share it with third parties.<sup>18</sup> Courts and bar admissions authorities should ensure that applicants know how their information will be used and that vendors only use and retain applicant data only to the extent necessary.

Last, but not least, the online bar exam offered by NCBE on October 5-6 differs significantly from the paper exams offered on July 28-29, September 9-10, and September 30-October 1. The online exam will be half the length of the paper exams and, for the essay and performance test portions of the exam, candidates will not be able to

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<sup>11</sup> David Jesse, *Michigan Online Bar Exam Crashes in Middle of Test*, DETROIT FREE PRESS, <https://www.freep.com/story/news/education/2020/07/28/michigan-online-bar-exam-crashes-test-examsoft/5526919002/> (July 28, 2020).

<sup>12</sup> For example, Indiana requires those sitting for its remote bar examination to use external webcams rather than the webcams built-in to their laptop, in order to “give the proctors a better view than the camera that comes standard on many laptop computers.” Marilyn Odendahl, *External webcams, quiet rooms among details for first-ever remote bar exam in July*, THE INDIANA LAWYER, <https://www.theindianalawyer.com/articles/external-webcams-quiet-rooms-needed-for-first-ever-remote-bar-exam-in-july> (May 29, 2020).

<sup>13</sup> Claire Newsome & Catherine Perrone, *The Inequity and Technology Behind an Online Bar Exam*, JURIST, <https://www.jurist.org/commentary/2020/07/newsome-perrone-online-bar-exams/> (July 18, 2020).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Maggie Miller, *Law school graduates worried about security, privacy of online bar exam*, The Hill, <https://thehill.com/policy/technology/507381-law-school-graduates-worried-about-security-privacy-of-online-bar-exam> (July 14, 2020).

<sup>17</sup> See Monica Chin, *Exam Anxiety: How Remote Test-Proctoring is Creeping Students Out*, THE VERGE, <https://thehill.com/policy/technology/507381-law-school-graduates-worried-about-security-privacy-of-online-bar-exam> (Apr. 29, 2020).

<sup>18</sup> *Id.*

compose answers while referring directly to exam materials; they will have to flip between screens. Perhaps for these reasons, NCBE has announced that it will not be able to scale raw scores from this exam. The lack of scaling, combined with the differences in exam administration, will make each state's existing cut score unreliable. States should make and announce plans, well before the exam date, about how they intend to handle scoring, cut scores, and portability of the exam.

In acknowledgment of the many problems possible with a remote exam – technical and access-related, as described above – and also knowing that the stress upon 2020 graduates who have been studying for the bar exam under incredibly difficult circumstances, a small number of states have opted for a diploma privilege, some with and some without a supervised practice component,<sup>19</sup> thus giving law school graduates a practice license without the necessity of a bar exam.<sup>20</sup> This privilege has existed in Wisconsin for a number of years, albeit limited to graduates of the two in-state law schools and conditioned on completing specified coursework in Wisconsin law.

The issues with respect to a diploma privilege, supervised practice programs leading to licensure, and other alternate methods of licensing attorneys without a bar examination are complex. While there has been much discussion over the years, accelerated in the last few months, about the advantages of a permanent diploma privilege or supervised practice admission over the current bar exam scheme in the states, the matter at hand here is more narrow and, of course, more urgent. Granting a diploma privilege or admission through supervised practice to 2020 graduates of ABA-accredited law schools will provide an immediate and permanent pathway to this cadre of young people and enable them to pursue their careers without the serious impediments that come from a bar exam administered either in-person (soon or at an uncertain later date) or remotely. This solution has been endorsed by a large and growing number of deans and other legal educators. And, importantly, this idea has been pushed forward by a very active and passionate group of students and graduates, all of whom have organized in the midst of this pandemic to advocate for the most straightforward, and compassionate, approach.

This resolution does not recommend specifically the diploma privilege over supervised practice, certified legal intern programs, or other alternatives, nor does it suggest a uniform approach to this privilege, if a jurisdiction granted it. But we note the

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<sup>19</sup> The jurisdictions that have enacted an emergency diploma privilege have not done so under the same terms. For example, Utah—the first jurisdiction to adopt an emergency diploma privilege—has limited it only to applicants who had already applied for the Utah bar exam prior to April 1, who graduated from ABA-accredited law schools with an average first-time taker bar examination passage rate in 2019 of 86%, and who first perform 360 hours of supervised practice. *In re Matter of Emergency Modifications to Utah Supreme Court Rules of Professional Practice* (Utah Apr. 21, 2020). Oregon, in contrast, adopted similar eligibility requirements, but declined to adopt a supervised-practice requirement. *In re Order Approving 2020 Attorney Admissions Process* (Or. June 30, 2020).

<sup>20</sup> In response to the COVID-19 pandemic, numerous jurisdictions have created, or expanded existing, certified legal intern programs, which permit law students and law graduates to practice under the supervision of a licensed attorney. A certified legal intern program differs from admission by supervised practice, however, in that a certified legal intern license is temporary and full admission to the Bar of the jurisdiction cannot be obtained without passing the bar exam.

advantages of this approach over the remote exam option – which, frankly, has already encountered obstacles, even as recently as July 28, 2020, in Michigan – in providing a mechanism for licensing these new graduates.

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It is the mission of the American Bar Association “[t]o serve equally our members, our profession and the public by defending liberty and defending justice as the national representative of the legal profession.”<sup>21</sup> As one commenter succinctly stated, “We owe the newest members of our profession the most protection, not the least.”<sup>22</sup> Tens of thousands of law school graduates have worked their entire lives towards the goal of becoming licensed attorneys, but have had the misfortune to graduate during the worst pandemic in a century. Simply put, a once-in-a-century pandemic warrants a once-in-a-century solution. We urge the highest courts or bar admissions authorities of each jurisdiction to take these modest but necessary steps to safeguard public health and safety without closing the doors to our shared profession.

Respectfully submitted,

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August 2020.

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<sup>21</sup> Am. Bar Ass’n, Mission Statement, [https://www.americanbar.org/about\\_the\\_aba/aba-mission-goals/](https://www.americanbar.org/about_the_aba/aba-mission-goals/) (last visited July 27, 2020).

<sup>22</sup> @ProfAMLondon Twitter (June 16, 2020, 6:46 PM), <https://publish.twitter.com/?query=https%3A%2F%2Ftwitter.com%2FProfAMLondon1%2Fstatus%2F1273039225890443264&widget=Tweet>