

September 21, 2020

The Honorable Harold B. Melton
The Honorable David E. Nahmias
The Honorable Keith R. Blackwell
The Honorable Michael P. Boggs
The Honorable Nels S.D. Peterson
The Honorable Sarah H. Warren
The Honorable Charles J. Bethel
The Honorable John J. Ellington
The Honorable Carla Wong McMillian
Ms. Heidi Faenza

Supreme Court of Georgia
Nathan Deal Judicial Center
330 Capitol Avenue, S.E.
1st Floor, Suite 1100
Atlanta, Georgia 30334

Dear Chief Justice Melton, Presiding Justice Nahmias, Justices, and Ms. Faenza:

As faculty from the Georgia law schools, we recognize that this Court and the Board of Bar Examiners have worked hard to think creatively and to adapt Georgia's law licensing processes in light of the extraordinary circumstances we face this year. However, bar exam validity issues, potential software crashes, the disparate circumstances of this year's test-takers, as well as exam grading and cut score reliability issues, suggest that the current licensing solution, an online exam, is simply not a good way to determine if this year's graduates have the skills necessary to competently represent clients.

We have a justice crisis looming in response to the global pandemic.¹ This crisis is particularly acute in under-served communities, the communities most often represented by new graduates.² The lack of newly licensed lawyers also presents an additional burden for already overburdened public defenders' and prosecutors' offices.³ Simply put, this year, more than ever, Georgia citizens need access to new attorneys. This year's graduates, as so eloquently explained in their impact statements,⁴ need to be licensed.

We write this letter in support of the Georgia Law School Association for Diploma Privilege's request that the Court adopt an emergency diploma privilege in lieu of the October 2020 Online Bar Exam. Alternatively, we ask that you consider additional pathways to law licensure beyond

¹ ABA Public Health Feature, *The High Demand for Lawyers Amid Coronavirus Pandemic*, (March 25, 2020), available at: https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2020/march-2020/the-high-demand-for-lawyers-amid-coronavirus-pandemic/

² The Collaboratory On Legal Education and Licensing for Practice, *Covid-19 Legal Needs*, (undated) available at: <https://barcovid19.org/covid-19-legal-needs/>

³ *Id.*

⁴ Graduate impact statements are appended to the letter from the Georgia Law School Association for Diploma Privilege September 16, 2020 Letter to the Georgia Supreme Court.

the October Online Bar Exam. We also ask that you develop, and are prepared to move forward with, a “Plan B” should the October exam fail.

The pandemic is forcing us to consider what we do, how we do it, and why we do it that way. When it comes to the bar exam as the sole pathway to licensure, we must address those questions both immediately and in the long-term. In this letter, we suggest a number of short-term options for licensure for this year’s graduates, including: a J.D. diploma privilege; a supervised practice pathway to licensure; a clinical legal education pathway to licensure; and an open-book emailed exam that consists solely of Georgia essay questions. We also suggest the Court set up a task force to examine and propose long-range alternative licensing options.

I. Issues with the Bar Exam

While this letter addresses problems with reliance on the October Online Bar Exam as the sole pathway to licensure, we cannot adequately address those problems without also acknowledging the underlying issues with the currently constructed bar exam. The purpose of law licensure is to ensure that, to the extent possible, we protect the public from incompetent lawyers. Little empirical data suggests that the current exam, even in “normal times,” achieves that purpose. *Building a Better Bar*⁵ is a forthcoming study based on data from over 50 focus groups around the country, including five from Georgia. That study provides data that supports what many have long argued: the current exam’s static fact patterns, multiple choice questions with 1.8 minutes/question, and memorization of thousands of doctrinal legal rules do not relate to the exam’s stated purpose of ensuring competence to practice law.

To the extent we seek to test the skills new lawyers need to competently represent clients, both the National Conference on Bar Examiners’ [NCBE’s]⁶ own research as well as the *Building a Better Bar* study suggest we should be looking beyond the content, format, and methodology of the existing bar exam and should also be assessing graduates’ ability to perform legal research and to interact effectively with clients. Simply put, the current exam has significant validity issues.

Those validity issues are all the more important when we look at the exam’s historical and long-standing disparate impact on test-takers of color.⁷ In an era when issues of the legal system’s structural racism and inequality have once again come to the forefront, we have a professional responsibility to not ignore those issues.⁸ The NCBE argues that the exam’s disparate impact is just a continuation of standardized test-taking seen earlier in the educational pipeline.⁹ We respectfully suggest that rather than justifying why we have disparities with the current exam, we

⁵ Deborah Jones Merritt and Logan Cornett, *Building a Better Bar; The Twelve Building Blocks of Minimum Competence*, forthcoming October 2020. This report will be available on the Institute for Advancement of the American Legal System website: <https://iaals.du.edu/projects/building-a-better-bar>.

⁶ NCBE TESTING TASK FORCE, PHASE 2 REPORT: 2019 PRACTICE ANALYSIS (March 2020).

⁷ Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 *Georgetown J of Legal Ethics* 931 (2020).

⁸ *Id.*

⁹ National Conference of Bar Examiners, *Bar Admissions During the Covid-19 Pandemic: Evaluating Options for the Class of 2020*, 6 (April 9, 2020) available at: <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F239>

focus on developing better ways to assess the skills necessary for competent lawyering without replicating disparities resulting from systemic racism in education.

II. Issues with the October Online Exam

A. Reliability Issues

This year, we have unprecedented, dramatic differences in test preparation conditions. Some examinees have been relatively shielded from illness and have access to financial support and quiet places to study. Others have had to deal with their own or family members' illness and death, financial hardships, and the toll taken by the racial injustices that have been front and center this summer and fall. Some examinees are home-schooling their children and have no place or time to study. These hardships have the most severe, albeit not exclusive, impact on examinees of color and women. The student impact statements attached to this letter poignantly illustrate the issues many of this year's graduates face. Due to these extreme differences in circumstances, the exam may measure privilege more than it measures legal knowledge and analytical abilities. The exam's reliability as a measure of minimum competence is severely compromised by the widely disparate experiences of this year's graduates.

In addition, the 2020 exam is not comparable to any exam given in recent history, and it will be harder to pass than any other bar exam.¹⁰ This year's graduates will not have had the ability to spend weeks practicing exam questions in the same format as they will be given. Additionally, the NCBE has prohibited test-takers from using scratch paper for the MBE multiple choice questions. Professor Deborah Merritt, in a letter to the Maryland Appellate Court, explains how that restriction alters exam-taking conditions.¹¹ As she notes, the lack of ability to annotate questions, sketch out parties and claims and diagram answers, especially in light of the MBE's significant time constraints, is a major change in testing conditions that makes this exam harder than other bar exams.¹²

Reliability issues also pervade the scoring of this exam. Normally, the NCBE scales and equates exam questions between exam administrations to ensure that the exam has an equivalent level of difficulty across administrations. This year, the NCBE has refused to help states scale or equate the online exam because it recognizes that it is impossible to do so with any level of reliability.¹³ The lack of equivalency between this year's online exam and prior exams means that the reliability that comes from giving the same exam year in and year out simply does not exist.

¹⁰ Letter from Deborah Jones Merritt, Distinguished Law Professor, Moritz College of Law, to Chief Judge Barbera and Associate Judges, Maryland Court of Appeals (August 23, 2020), available at: <https://www.dropbox.com/s/rdzionvhr42ibvw/Merritt%20to%20Maryland%20Ct%20of%20Appeals.pdf?dl=0>

¹¹ *Id.*

¹² *Id.*

¹³ "Administering an abbreviated version of the MBE by remote testing is a significant departure from standard administration conditions. For scores on different versions of an exam to be accurately equated, the research-based standards for professional licensure exams require that the exams be administered under comparable conditions. Due to potential differences in the remote test-taking experience and to the shortened nature of the abbreviated test compared to the standard in-person bar exam, scores on the remote test cannot be equated to scores from the standard, full-length bar exam." National Conference of Bar Examiners, *Covid-19 FAQs, Scores* (Sept. 9, 2020), available at: <https://www.ncbex.org/ncbe-covid-19-updates/faqs/>

Finally, this exam also raises significant issues when it comes to cut score [minimum passing score] decisions. Cut scores from prior administrations cannot reliably be used for this exam, and any attempt to do so would create significant psychometric reliability issues.¹⁴

Thus, the lack of equivalency between test-takers' ability to prepare, the lack of equivalency in content, and the lack of equivalency in testing methodology, create significant reliability concerns and make grading and determining cut scores so problematic that the results of this year's exam will be difficult to defend.

B. Software Concerns

The online exam also comes with the serious and predictable potential for significant software issues. The likelihood of glitches, crashes, and other problems caused one of the three online bar exam vendors to withdraw from the process.¹⁵ ExamSoft, the Georgia vendor, has experienced problems during the Michigan Bar Exam¹⁶ – an online exam on a much smaller scale than the national October exam. Test-takers in Pennsylvania have reported that shortly after downloading the ExamSoft software on their computers, they saw attempts from third parties to use their personal information.¹⁷ Software concerns in Georgia are significant enough that the Board of Bar Examiners is requiring examinees to sign a waiver recognizing that there may be software glitches, crashes, and other issues that will result in the loss of some or part of the examinees' answers.

This year's graduates already are suffering the financial consequences of having an exam pushed back from July to October. They are currently expected to take an exam in an unfamiliar format, and one for which they cannot fully and adequately prepare, while dealing with the stress of pandemic-related physical and mental health issues. Despite being required to study in conditions unlike those experienced by any other year's bar takers, they are now also being told: "you need to be aware that all of this may be for naught because there may be a technology glitch that will result in the loss or destruction of your exam answers."

C. Privacy Concerns – Particularly for Marginalized Communities

Online exam security also raises significant privacy and civil rights concerns. As the ACLU explains in a letter to the California Supreme Court, Exam Soft's Exam ID/Exam Monitor facial recognition technology presents significant risks — particularly to people from marginalized communities because of race, gender, disability and other biases built into facial recognition

¹⁴ Merritt letter, *supra* note 10.

¹⁵ Stephanie Francis Ward, *Software Provider Pulls Out of Remotely Proctored Bar Exams Because of Technology Concerns*, ABA Journal (August 18, 2020) available at: <https://www.abajournal.com/web/article/dueto-technology-concerns-software-provider-pulls-out-of-remotely-proctored-bar-exams>

¹⁶ Stephanie Francis Ward, *State's Online Bar Exam Is Delayed After Tech Glitch*, ABA Journal (July 28, 2020) available at: <https://www.abajournal.com/news/article/michigans-tuesday-online-bar-exam-has-a-delay>

¹⁷ Mathew Santoni, *PA AG Asked to Investigate Online Bar Exam Security*, Law 360 (Sept. 8, 2020) available at: <https://www.law360.com/articles/1308239/pa-ag-asked-to-investigate-online-bar-exam-security>

algorithms, and because of the ongoing surveillance risks that stem from having their biometric information enrolled in a facial recognition database.¹⁸

D. ADA concerns

The online exam also presents significant ADA concerns as explained in great length in a statement in the National Disabled Law Students Association Report on Concerns Regarding Online Administration of Bar Exams.¹⁹ Among the many issues that report discusses is the fact that many test-takers did not have the time, or immediately available financial resources, to obtain the documentation necessary to qualify for accommodations for a high-stakes online exam. Many examinees will be unable to gather that documentation in time to receive accommodations to which they would otherwise be entitled. Additionally, those receiving accommodations must agree to an in-person exam, putting themselves, their loved ones, and communities at risk. This is especially problematic given that some accommodated graduates have accommodations because they are immuno-compromised. These are only two areas of the many concerns the report raises — concerns that are particularly salient in light of the fact that this exam is the only gateway to entry into the legal profession. Lawsuits have already been filed due to these, and other, ADA issues.²⁰

III. Alternative Options

A. Diploma Privilege

Given all the issues with the October exam, we believe that three years of a rigorous J.D. education are at least as valid and reliable as the October online exam. Like Washington, Oregon, and Louisiana recognized, this year, a diploma privilege simply makes sense. We thus support the request for a diploma privilege for this year's J.D. class. If the Court is uncomfortable with a pure diploma privilege, it could supplement by requiring additional CLE credits, including CLEs with embedded assessments.

If the Court and Board of Bar Examiners are unwilling to grant a pure diploma privilege, other avenues to licensure exist. These pathways could be made available in addition to the October exam, or, if the October exam fails, these solutions at least provide an alternative beyond waiting until February 2021 (or longer) to allow for licensure of 2020 graduates.

B. Supervised Practice Pathway

The Court could follow the Utah approach and allow licensure by supervised practice. The Court could implement this pathway by modifying the rule authorizing temporary supervised

¹⁸ Letter from the ACLU California to The Supreme Court of California, (July 16, 2020) available at: https://www.aclunc.org/sites/default/files/ACLU_Advocacy_Letter_re_Online_Bar_Exam.pdf

¹⁹ National Disabled Law Students Association, *Report on Concerns Regarding Online Administration of Bar Exams* (July 29, 2020) available at: https://ndlsa.org/wp-content/uploads/2020/08/NDLSA_Online-Exam-Concerns-Report1.pdf

²⁰ Cheryl Miller, *Law Grads With Disabilities Sue State Bar Over Exam Accommodations*, National Law Journal (Sept. 15, 2020) available at: <https://www.law.com/nationallawjournal/2020/09/15/law-grads-with-disabilities-sue-state-bar-over-exam-accommodations>

practice to include a subsection that would allow J.D. graduates of ABA-accredited law schools to be licensed after (a) completing 320 hours of supervised practice under one or more supervisors; (b) submitting a sworn affidavit from that supervisor detailing the candidate's work and attesting that all work was performed in accord with Georgia's Rules of Professional Conduct (including Rule 1.1, Competence); and (c) satisfying all conditions for admission other than taking the bar exam.

C. Clinical Education Route to Licensing

Scholars have suggested another pathway to licensure: completion of significant law school credit hours in a clinic or well-supervised externship program.²¹ Law schools could certify that the applicant has successfully completed the requisite number of credit hours²² in a faculty-supervised clinic or externship in which faculty use clinical pedagogical methodologies to foster student learning.

During the pandemic, supervised practice or extensive clinical education experiences are at least as reliable as the bar exam in demonstrating minimum competence to practice law in Georgia. Supervised practice and extensive clinical education experience are comprehensive performance tests. Both require application of legal knowledge to real client situations, rather than in response to limited hypotheticals. Both assess a far greater range of skills than those assessed on the bar exam, and, given that most Georgia examinees attended Georgia schools and engaged in clinics and externships in this state, both the supervised practice and clinical education pathways ensure familiarity with Georgia's law, rules of procedure, and court system.

Supervised practice and significant clinical experience test the knowledge and skills needed for law practice, which the exam overlooks, while avoiding the memorization of thousands of rules unrelated to a candidate's law practice field. New lawyers who successfully complete 320 hours of supervised practice, or significant clinical legal education credit hours during law school, will have proved themselves at least as competent to serve clients as those who pass a written exam, and probably more so. We would encourage the Court to adopt both these pathways, providing alternatives and options for this year's class.

D. Open-Book Email Essay Exam

Finally, to the extent the Court believes an examination of some sort is necessary, it could eliminate the problems with the NCBE online exam by following Nevada and Indiana's example, using an email option for Georgia open book essay exam questions. This Court has already demonstrated its forward-thinking approach to licensing by recognizing that an open book essay exam more closely replicates the skills competent new lawyers need than a closed book exam. While this type of exam does not address the disparities in test-takers' ability to prepare, it is no

²¹ Claudia Angelos, et al., *Insight: Clinical Education- A Safe and Sure Pathway to Law Licensure*, Bloomberg Law, (July 8, 2020) available at: <https://news.bloomberglaw.com/us-law-week/insight-clinical-education-a-safe-and-sure-pathway-to-law-licensure>

²² The exact number of credit hours would need to be determined. Scholars suggest that in normal times, the minimum credit hour requirement be 15. See Angelos, *supra* note 21. But given the extraordinary circumstances and the lack of advance warning to allow for preparation under this pathway, the Court might consider half that number for this year's graduates.

less reliable than the October online exam. Particularly should the October exam fail, and should the Court believe some sort of exam is necessary, an email open book exam circumvents many of the problems presented by the currently scheduled online exam.

IV. Need for Long-Range Planning

Beyond the need for an immediate pathway to licensure for 2020 graduates, it is time to examine the entire licensing process. The options above are just a few suggestions for law licensure that may protect the public at least as well, and maybe better, than the current bar exam. The pandemic and the call to examine and remediate structural racism have surfaced issues with law licensure that need to be addressed. Legal services organizations have long been unable to meet the vast demand for civil legal assistance, and the pandemic has only increased that need.²³ Conducting the bar exam in a way that will unfairly exclude many potential attorneys merely because they lack the resources to adequately prepare for the exam will further exacerbate the existing justice gap. Thus, we urge this Court to provide an appropriate alternative to the online bar exam currently scheduled for October and also, looking beyond this year, to join supreme courts around the country that have established commissions to examine law licensure and propose alternatives.

Sincerely,²⁴

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²³ Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* (June 2017) available at: <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>

²⁴ Institutional affiliations are for identification purposes only.

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