



TO: Clerk, DC Court of Appeals

CC: Blackburne-Rigsby, CJ; Glickman, Fisher, Thompson, Beckwith, Easterly, McLeese, Deahl, Associate Judges

FROM: Deans Robert D. Dinerstein, American University, Washington College of Law; Danielle Holley-Walker, Howard University School of Law; Renée McDonald Hutchins, University of the District of Columbia David A. Clarke School of Law; Dayna Bowen Matthew, George Washington University Law School; Stephen C. Payne, Columbus School of Law, The Catholic University of America; William M. Treanor, Georgetown University Law Center

RE: Comments on Alternatives to the Bar Examination in Response to the Court’s Notice of July 29, 2020

DATE: August 12, 2020

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In response to the District of Columbia Court of Appeals’ Notice of July 29, 2020 (“Notice”), the undersigned deans of the District of Columbia’s law schools (“Deans”) file these Comments regarding the Court’s consideration of alternatives to the bar examination for 2020 law school graduates.

The Deans previously have written letters on this issue to the Committee on Admissions (on April 1, 2020) and to Chief Judge Blackburne-Rigsby (on July 13, 2020), respectively. We attach those letters to these Comments and incorporate them by reference.

In its Notice, the Court of Appeals (“Court”) wrote that it intended to proceed with the October online exam. Although, as explained below, we believe there are problems for some test-takers with the online exam as currently conceived, we support having the online exam available, as it increases the options for

those candidates who can conveniently take the examination and benefit from the reciprocity agreements into which the Court has entered with seven jurisdictions as of this writing.

In addition to those measures, the Deans believe that the Court should adopt the diploma privilege for 2020 law graduates. We set out the reasons for advocating that position in our letter of July 13, 2020. As an alternative, we also support the more temporary option of expanding the supervised practice alternative.

Our focus in these Comments is principally on the specific questions that the Court asked commenters to address in its Notice, and, in particular on the third question, which is directed specifically at the role of the law schools:

**1. What specific needs of prospective lawyers, clients, and employers would be addressed by granting a diploma privilege or expanding the scope of temporary practice? What specific concerns would be raised by taking either step?**

*Specific Needs of the Above Groups*

The extraordinary circumstances existing in society at present—the Covid-19 pandemic, its economic fallout, the police killings of citizens of color—have affected all of us. Our graduates—the prospective lawyers to which the Court refers—have been hit especially hard. After having to switch suddenly to online classes in the spring, and the inevitable dislocation that entailed, they have had to deal with the uncertainty surrounding the cancellation of the July in-person bar exam, the cancellation of the alternative in-person September bar exam, and now the adoption of the October online exam. Many of these prospective lawyers are dealing with their own health issues and those of family members and others with whom they live. Many are also having to manage other conditions in their homes that are not conducive to studying for, let alone taking, a high-stakes examination. Even if they are in a position to take the online examination, they will not receive their results until, presumably, some months afterwards, delaying their ability to obtain positions that require bar membership or to start positions that are predicated on that membership.

Conferring diploma privilege on these graduates would allow them to begin to practice immediately or after completion of a course or certification that the Court might require. This is a preferred outcome to simply extending the limited practice rules. While such an extension would also allow graduates to begin practicing under supervision almost immediately, the lack of true bar admission would continue to be a barrier to employment in positions that require licensure. Given the dislocations society is facing right now, and will continue to face in the foreseeable future, there is simply no way to have a bar examination, whether administered in person or online, truly identify those candidates, and only those candidates, who can demonstrate a level of knowledge consistent with admission to the bar. Diploma privilege would be the most effective additional means of leveling the playing field for prospective lawyers.

Potential clients would benefit from adoption of diploma privilege (or to a lesser degree extended supervised practice) by having readier access to legal talent that could represent them in various legal matters. Low-income and under-served clients are particularly in need of legal representation that the prospective lawyers could provide. If, for example, governmental entities fail to extend a moratorium on evictions, tenants in danger of being evicted will need legal representation. Parents of children who are supposed to receive special education and related services may need legal representation in obtaining

compensatory education for their children. We could cite many more examples of the kinds of clients who would benefit from an influx of newly minted lawyers who are well-trained and well-supervised but, through no fault of their own, are not otherwise admitted to the bar.

Employers, especially those in government, public interest, and legal services offices, would benefit from being able to bring on new lawyers to carry out the work that their clients need performed. Many legal offices function on the expected rhythm of having a new crop of entry-level lawyers join them each fall. The delay in admission caused by the online examination, or the even greater delay that would flow from not being able to take the bar until February 2021 at the earliest, could have deleterious consequences for those offices that are the most leanly staffed.

### *Specific Concerns of Adopting the Diploma Privilege or Expanded Temporary Practice.*

Neither adoption of the diploma privilege nor expanded temporary practice would present significant concerns for the above groups. Our law school graduates, as we discuss below, have completed a full course of study designed to fully prepare them to practice law responsibly. Indeed, because of the uncertainty of bar exam administration this summer and fall, many of them already have been studying intensively for the examination even if they are advocating for the alternative of diploma privilege or supervised practice. In doing so, they already have obtained a substantial portion of the benefits that an actual bar examination can provide. For clients, especially low-income and under-served clients, enthusiastic, motivated graduates can provide representation superior to pro se representation, which might well be their alternative. In specific practice areas (such as eviction), the new graduates could be counted on to learn the substantive law and procedural practices needed to practice law responsibly by consulting with the kinds of human and other resources that all lawyers learn to access. For employers, the availability of recent graduates, especially soon, would provide them with an expanded pool of talent from which to draw. The employer's ability to interview candidates and supervise their legal work would protect against hiring and retaining lawyers unable to provide an appropriate level of service to their clients.

## **2. What limits or conditions should be imposed on any diploma privilege or expanded temporary practice?**

It is reasonable for the Court to limit the offer of diploma privilege to the acute period of the COVID pandemic where in-person testing is not safe for examinees, and remote online exams do not yet seem to be fully and consistently supported with reliable technological platforms. The Court may wish to consider the prospect of diploma privilege for the 2020 and 2021 testing periods, or until such time as an effective vaccine is readily available on a widespread basis.

### *Qualifications to Apply for Diploma Privilege Status*

- a) Juris Doctor diploma earned in 2020 from an ABA-approved law school in the District of Columbia;
- b) Juris Doctor diploma earned in 2020 from an ABA-approved law school outside of the District of Columbia with proof of an offer of employment in the District of Columbia;
- c) Affidavit stating no other bar membership is pending test results or review;
- d) Successful NCBE and DC character and fitness review;
- e) Passing score of 75 on the Multistate Professional Responsibility Exam (MPRE);

- f) Prior minimum UBE score of 260 for those who registered in 2020 for a repeat exam;
- g) Completion of the course on DC Law *in advance* of securing diploma privilege;
- h) Agreement to participate in a potential study on diploma privilege.

### *Reciprocity*

Reciprocity for diploma privilege should only be offered to those from other diploma privilege states that would also allow admission of District of Columbia diploma-privilege licensees. This suggested reciprocity is based on the fact that the District of Columbia already offers the most expansive and accommodating options nationwide for admission to practice under Rule 46, regardless of reciprocity for its license. Truly reciprocal diploma privilege reciprocity would continue that tradition.

As we have suggested previously, the Court may wish to require that candidates seeking to take advantage of the diploma privilege complete an on-line introductory review course or have a period of mandatory supervised practice. The supervised practice could also serve as a condition for the alternative of the extension of the limited practice option. The Court could look to DCCA Rule 48, Legal Assistance by Law Students, for the kinds of limitations that might be appropriate. (Indeed, the Court might well conclude that a student who had practiced successfully under Rule 48 would be deemed to have satisfied a post-law school course requirement.) In addition, the Court could look to the highest courts of other jurisdictions, such as the Court of Appeals of New York, that have adopted temporary practice rules with supervision requirements. *See, e.g.*, In the Matter of The Amendment of the Rules of the Court of Appeals to add a new Part 524 thereof for the Temporary Authorization of Certain Law Graduates to Engage in the Supervised Practice of Law in New York, Order of July 1, 2020.

We, and our faculty colleagues, would be happy to work with the Court in devising the kinds of limitations and conditions that would be easy to administer and yet provide protection to the various stakeholders affected by admission to practice without passing a bar exam.

### **3. What role can or should law schools and the Bar play in addressing these issues?**

Here we focus on the first part of this question: what role can the law schools play in addressing these issues? As indicated above, the law schools can assist the Court in devising and implementing some of the conditions under which diploma privilege or temporary extended supervised practice might operate. Moreover, law schools can actively recruit alumni to serve as attorney-supervisors.

In addition, the Court (and the public) can take considerable comfort in the fact that all of the law schools in the District provide a first-rate education in the skills, values, and knowledge that a lawyer needs to be able to practice law in a competent and ethical matter. Every law school accredited by the American Bar Association must certify that each of its graduates has successfully completed at least six (6) credit hours of experiential courses, defined as an in-house clinic, externship or simulation course. ABA Standards 303(a)(3), 304(a). Standard 304(a), set out in the footnote, defines experiential education in a rigorous manner.<sup>1</sup> Moreover, ABA Standard 302, Learning Outcomes, requires all law schools to establish as

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<sup>1</sup> Standard 304 (a) provides that an experiential course must: (1) integrate theory, doctrine, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302; (2) develop the concepts underlying the professional skills being taught; (3) provide multiple opportunities for performance; (4) provide opportunities for student performance, self-evaluation, and feedback from a faculty member, or, for a field placement, a

learning outcomes competency in a number of areas important for the ethical and competent practice of law.<sup>2</sup> The DC law schools go well beyond these minimum requirements in the number and quality of their experiential offerings, and have delved deeply into the copious “other professional skills” category defined below.

Beyond our experiential courses, all of our law schools offer broad curricula that are essential to the education of the 21<sup>st</sup>-century lawyer. If anything, the move to online education last spring, and online or hybrid education this fall, has required our faculties to be even more intentional about their pedagogical practices.

The DC law schools and the District’s courts have worked collaboratively on many projects. None is more important than the one that the profession faces now. The law schools stand ready to offer their services to the Court to make adoption of diploma privilege, or, in the alternative, broadened temporary practice, as successful as possible.

### **Prospective Lawyers with Disabilities**

In addition to the questions on which the Court sought comments in its Notice, we would like to take this opportunity to share concerns that have come to our attention in connection with the administration of the online bar examination to test-takers with disabilities. We understand that the Memorandum of Understanding (“MOU”) between the National Conference of Bar Examiners (“NCBE”) and the jurisdictions administering the online exam would require test-takers who need certain reasonable modifications to take the examination in an office with in-person proctoring. For example, the MOU states that NCBE will provide tests in nonstandard formats, such as paper iterations, audio, and USB paired with assistive software, but requires these nonstandard materials to be proctored in-person. Applicants who need to use a scratch pad, or enter their answers in hand-written format, would be required to take the exam in an office. The test procedures require test-takers to make continuous eye contact with their screens, which may be difficult for some and expose them to the risk of being flagged for possible cheating.

We raise these issues in the current context not to question these procedures (though we have significant concerns about them) but rather to point out that test-takers with disabilities may have to face the Hobson’s Choice of taking the examination in-person, thereby potentially jeopardizing their health, taking the examination without some or all of their needed accommodations, or waiting to take the exam until February 2021 or beyond. For these prospective lawyers, a non-examination alternative to admission or practice is particularly important.

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site supervisor; (5) provide a classroom instructional component; or, for a field placement, a classroom instructional component, regularly scheduled tutorials, or other means of ongoing, contemporaneous, faculty-guided reflection; and (6) provide direct supervision of the student’s performance by the faculty member; or, for a field placement, provide direct supervision of the student’s performance by a faculty member or a site supervisor.”

<sup>2</sup> Standard 302 lists as required learning outcomes “competency in (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 in clients and the legal system; and (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.”

Interpretation 302-1 indicates that the last category “may include such skills as interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation.”

## Conclusion

Extraordinary times demand extraordinary responses. The once-in-a-lifetime confluence of natural and man-made epidemics compels the Court to consider alternatives to admission by bar examination. The Court's adoption of the online examination in October, notwithstanding its flaws, reflects the Court's recognition of this fact. But, we wish to work in partnership with the Court to do more to address the felt necessities of the moment. Diploma privilege and the lesser alternative of broadened access to temporary supervised practice are effective ways to meet the needs of all stakeholders—prospective lawyers, clients, lawyers, the law schools, and the Bar itself. We urge the Court to adopt one or both of these alternatives.

Thank you for the opportunity to comment on this important matter.

Sincerely,

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