



Diploma Privilege and the Future of the Bar Exam

By Annette Clark

The COVID-19 pandemic has disrupted our lives and work in ways that were unimaginable only six months ago, as we've been faced with illness and death within our families and communities, a health care system that has been strained beyond capacity, the loss of jobs and increasing economic insecurity, anxiety and depression brought on by the fear of contracting the virus and the isolation imposed by our governments in trying to combat its spread, and so much more. For recent law school graduates, add to this demoralizing list the need to take and pass a bar exam in the middle of a public health crisis. What follows is the story of how Washington State responded by granting a diploma privilege.

LICENSURE AND THE BAR EXAM

Attorney licensing has historically been a function of individual state regulatory processes, but as lawyering has become increasingly global, licensing reciprocity across states has taken on greater importance. As a result, 35 states have moved in recent years to administering the Uniform Bar Examination (UBE), developed and offered by the National Conference of Bar Examiners (NCBE). The UBE consists of the Multistate Essay Examination (MEE, six 30-minute essays, seven different subjects tested), the Multistate Bar Examination (MBE, 200 multiple-choice questions over six hours, 12 subjects tested), and the Multistate Performance Test (MPT, two case files in three hours); see generally [\[www.ncbex.org/exams/ube\]\(https://www.ncbex.org/exams/ube\).](https://</p></div><div data-bbox=)

Rather than testing state-specific knowledge, the UBE is designed to assess a test taker's knowledge of general principles of law, legal analysis, and reasoning, with a passing score intended to indicate minimum competence and readiness to practice in any state. Scores are portable from one UBE state to another, with each state able to set its own passing score (currently ranging from a low of 260 to a high of 280). UBE states continue to administer their own character and fitness processes and set other licensing eligibility requirements, such as graduating from an ABA-accredited law school and passing the Multistate Professional Responsibility Examination (MPRE). UBE states may also require completion of a course or test separate from the

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UBE that is designed to teach or test its own state-specific laws.

While the move to the UBE by many states can be seen as an effort to modernize the bar exam, two important attributes haven't changed: The UBE is designed to be taken as an in-person, two-day exam within the state that is administering it, and the exam is offered only twice per year, in July and February. As it turned out, these two tradition-bound characteristics of the exam loomed large as the COVID-19 pandemic erupted in the United States in February 2020, and virtually all of higher education, including law schools, were forced to move to remote operations and instruction.

WASHINGTON STATE CONSIDERS DIPLOMA PRIVILEGE

Soon-to-be graduates of the three law schools in Washington State (Seattle University, University of Washington, and Gonzaga University) were quick to foresee the concerning implications for administration of the July bar exam, and the student bar leaders began to organize and collaborate on a strategy in March. At the same time, as dean of Seattle University School of Law, I followed the lead of some of my fellow deans across the country by reaching out to the body that administers the UBE in my state—the Chief Regulatory Counsel for the Washington State Bar Association (WSBA)—to request a joint meeting with the bar and the deans of the other two law schools. What followed over the next few months was a collaborative process in which we focused on ensuring that our recent graduates, and indeed all registrants for the July UBE in Washington,

had a reasonable, safe, and timely pathway to achieving licensure in the midst of the pandemic.

As we were discussing plans and sharing ideas, the student bar leaders quickly reached the conclusion that the July exam was likely to be postponed or canceled due to the COVID-19 outbreak, so they began preparing a joint letter to the WSBA and Washington Supreme Court outlining the health risks of an in-person exam, the challenges they were facing in trying to study for the exam while being subject to our state's stay-at-home orders, and the reasons why a one-time emergency diploma privilege was the safest and most expedient path to licensure. On their own, the students sought and obtained permission to present their arguments to the WSBA Board of

They also backed up their arguments with data regarding the risks of COVID-19 and the results of an impact survey they had conducted among bar exam registrants showing the severity of the hardships they were facing. Specifically, the survey of primarily graduates of the three law schools revealed that 40 percent reported they were at high risk for COVID-19 or were living with someone at risk, or both; three-quarters of them would face financial hardship if the bar exam was postponed or canceled; almost 60 percent would need to find temporary employment and 5 percent would need to find permanent employment outside the practice of law; and graduates of color were being disproportionately impacted across all categories of hardship.

Forty percent of graduates were at high risk for COVID-19 or were living with someone at risk.



Governors at a regularly scheduled meeting on April 17, and I could not have been prouder of their professionalism and reasoned advocacy in what was a high-stakes meeting. They built their position on the fact that the state of Wisconsin has, for many years, operated a successful system of diploma privilege (licensure without the requirement of taking and passing a bar exam) for qualified graduates of the two law schools in that state—the University of Wisconsin and Marquette University.

Perhaps predictably given the traditional nature of our profession, the outcome of the presentation and discussion was a 12–1 vote by the WSBA Board of Governors recommending against adoption of an emergency diploma privilege. That recommendation was transmitted to the Washington Supreme Court, which has ultimate authority over licensure in Washington.

The WSBA had submitted its own proposal to the Court, which was to administer the UBE in July in multiple remote

locations across the state under state-sanctioned safety protocols, and with an additional exam date in September, an option that the NCBE had recently made available to UBE states in response to the pandemic. The Court requested that other stakeholders weigh in on the proposals, including the three Washington deans. We submitted a joint letter suggesting that the emergency

the passing score be temporarily reduced to 266. The student bar leaders were disappointed that the diploma privilege option had been rejected, but they had the foresight and litigation savvy to understand that this wasn't over, and they vowed to stay prepared and seek reconsideration if the situation worsened and/or the WSBA was not able to deliver on its assurances of a safe exam.

that sought to amplify the voices and experiences of our graduates, particularly graduates of color. An opportunity for such advocacy had presented itself in early June when the justices issued a bold statement about the Court's own role in systemic racism and their willingness to reconsider precedents. In a letter dated June 4, 2020, they wrote: "Too often in the legal profession, we feel bound by tradition and the way things have 'always' been. We must remember that even the most venerable precedent must be struck down when it is incorrect and harmful" (<https://tinyurl.com/y2d9rznc>).

In our faculty letter, we encouraged the Court to reconsider its earlier decision in light of its commitment to racial equity:



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diploma privilege idea was not yet ripe, given the apparent ability of the WSBA to offer the UBE in both July and September under safe conditions. We focused our attention on offering our law schools as locations for the exam and asking that the Court consider reducing the passing score from 270 to 266 for the July and September exams. In our view, such an action would operate as a meaningful acknowledgment by the Court that, despite the WSBA's considerable efforts, there would be nothing routine about the July and September exam administrations, and that many of the registrants would face obstacles and challenges in preparing for and taking the exam that might negatively impact their performance.

The Court issued a unanimous order on May 15 adopting the WSBA's proposal for two exam dates and multiple locations across the state, as well as ordering that

RECONSIDERATION AND ADOPTION

No one could have predicted what happened next, which was the unprovoked killing of George Floyd in Minneapolis by law enforcement. Following as it did on the deaths of Ahmaud Arbery and Breonna Taylor, Black Lives Matter protests against racial injustice and police brutality swept across the country, with Seattle as one of the epicenters. Two of my Seattle University Law faculty members were regularly checking in with our graduates during this time, and what they heard caused them to propose at our June faculty meeting that we ask the Washington Supreme Court to reconsider its earlier denial of diploma privilege.

The faculty voted unanimously (which almost never happens!) in favor of the motion, and we immediately drafted and submitted a letter to the Court

While the challenges posed by the pandemic were at least somewhat known at the time of the Court's decision in May, what we didn't know was that the world would be turned upside down again as our communities and country have reacted to the senseless killings of George Floyd, Ahmaud Arbery, and Breonna Taylor. These recent racial killings and the resulting unrest and social action and activism have further affected our graduates, particularly those of color. . . . What we once described as an unprecedented situation with the pandemic has become almost surreal. We believe that the exponential impact of this crisis on top of the already stressful pandemic warrants re-looking at the decision to require bar

exam passage for this set of graduates. . . . All of us who have passed one or more bar examinations know the significant challenge that two months of constant study poses in “normal” times. For those who have spent the final months of law school going to class online, who have had their living and working conditions disrupted, who have coped with supervising home-schooling for their children, and who have helped family members who have become gravely ill from the virus and/or lost their jobs, the public health emergency has increased that challenge exponentially. With the tragedies of the past two weeks and the societal response to them, the stresses for some of our graduates have become overwhelming.

Much to our collective surprise, on June 12, a mere two days after we had submitted our letter, the Court issued an order granting a broad emergency diploma privilege to registrants for the July and September UBE in Washington who were JD graduates of an ABA-accredited law school and who were otherwise eligible for licensure. This outcome was a testament to the thoughtful and responsive nature of our Court, but also to the earlier advocacy by student leaders, including their submission of a comprehensive brief in support of diploma privilege, which helped carry the day. Since then, the Court has announced that it will appoint a task force to study whether the current bar exam is the best way to determine admission to the bar in Washington in the future.

The grant of emergency diploma privilege has been an overall positive experience in Washington, particularly in comparison to the chaos that has reigned in other states as in-person exams have been repeatedly postponed and canceled and online administrations have been hit by cyberattacks. Of the 700-plus registrants for the July and September exam administrations in our state,

Washington’s adoption of diploma privilege has not been without controversy.



approximately 550 were able to obtain licensure through diploma privilege. Most have completed the regulatory processes and have been sworn in virtually before family and friends, so they are now licensed to practice in the state. Those who already had offers have begun their positions sooner than originally planned, and many who did not have job offers have now found employment and are supporting themselves and their families despite the recessionary market. I am also proud to say that a number of Seattle University Law graduates are using some of their “found time” to participate in pro bono projects and access-to-justice work for the benefit of the citizenry they have sworn to serve.

THE FUTURE OF LICENSURE

The many positives aside, the grant of diploma privilege has not been without controversy.

Two primary concerns have been expressed by some members of our bar: (1) employers need the information regarding bar passage to be able to make informed decisions before extending employment offers to new graduates; and (2) the bar exam operates to protect the public from those who are not qualified or ready to practice law, and granting diploma privilege removes that protection. I

do not have much patience with the first concern in that employers have a multiyear record of law school performance and work experience (via clinics, externships, internships, and pro bono opportunities), as well as references, letters of recommendation, and interviews, on which to base their employment decisions. In contrast to the first concern, the second concern is both real and deserving of consideration as we think about the future of the bar exam in a post-pandemic world.

In that context, I am pondering the impact of Washington’s emergency diploma privilege and what it might mean for the future of the bar exam. Here are just a few of my initial thoughts and questions:

- I do not share the view of some in our profession that those currently advocating in other states for a diploma privilege are “shirkers” or seeking a free pass into the

profession. Aren't these graduates doing precisely what we in legal education have taught them to do, which is to be zealous advocates by using available legal processes to obtain an alternative pathway to licensure that will not subject them to the health risks of taking an in-person exam during an uncontrolled viral pandemic? I firmly believe that those of us who had the benefit of being able to take the bar exam under safe conditions would do the same were we in their positions.

- It is a reality that some individuals are now licensed in Washington who would not have been otherwise, and some smaller percentage of them may not be ready to practice law. I would hope that, as members of a profession, we would offer to assist them post-licensure to enhance their knowledge base and skills (we are, after all, training our students to be lifelong learners) rather than suggesting they are not worthy of the license.
- I continue to be surprised by the number of experienced attorneys who express certainty that passing a bar exam is essential to ensure competency to practice law and to protect the public. I am an academic rather than a practitioner, so I cannot say from experience, but I have heard very few graduates who have completed the bar exam and begun their professional careers express the view that the exam itself had any relevance other than as a rite of passage and an obstacle they had to overcome. Over

time, however, bar passage seems to acquire a meaning of almost mythical proportions for the profession such that lawyers cannot imagine any other way of doing things. Why is this?

Is a high-stress, timed exam the best or only way to measure competency to practice?

- It is a paradox that the UBE is designed to measure minimum competence and yet states adopt differing passing scores. It causes me to wonder how the same person can be deemed competent to practice law in Washington (passing score of 270) but not competent in Alaska (passing score of 280).
- Is a timed, high-stress, closed-book exam that primarily tests the ability to memorize doctrine and spot issues the best or only way to measure competency to practice? I would think it is at least possible that successfully graduating from an accredited law school and having completed a mix of required and elective doctrinal courses and practical clinics and

externships is a better or at least suitable measure.

- If the primary reason for the bar exam is to protect the public, I wonder that we do not mandatorily assess competence at other times over the course of an attorney's career.

CONCLUSION

In expressing these thoughts, I want to emphasize that I did not go into this experience as an opponent of the bar exam, but as I'm in the business of education, I want to be open to learning from it. When I teach Civil Procedure to my students, I encourage them to discard their seemingly automatic assumptions that the Federal Rules of Civil Procedure are preordained or perfect merely because they exist, and to instead imagine better ways of doing things. And having had the opportunity to view the bar exam through a racial justice lens during the COVID-19 pandemic and seeing the inequities for individuals of color and those of lesser economic means, I wonder whether I now have a particular obligation to participate in this work myself.

I honestly don't know where I'll end up in my thinking, but observing the considerable benefits of the diploma privilege in Washington this summer has me imagining and wanting to explore whether there might be a better way to license our attorneys of the future. ■



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