

DEAN PRESENTATIONS ON BEHALF OF CA ABA LAW SCHOOLS
Meeting of California Deans and the California Supreme Court and California State Bar
July 2, 2020

PRESENTATION OF DEAN SONG RICHARDSON

We speak with one voice when we recommend that the Court adopt an emergency diploma privilege for any graduate of an ABA accredited school seeking to practice in CA. The reason we limit our recommendation in this way is solely because **these** are the schools we represent. We don't express an opinion on behalf of other CA law schools.

Here's why we make this recommendation.

Since the Court issued its decision on the Bar exam in early June, we've learned even more about the devastating impacts of COVID 19 on our graduates. The public health situation continues to deteriorate, with no end in sight. In fact, it's worsening in CA. The emotional, financial, and physical toll of this global pandemic continues to wreak havoc on the lives of our graduates. This alone should be enough for the Court to take bold action in the form of an emergency diploma privilege.

However, coronavirus isn't the only challenge our graduates are facing. As if that wasn't enough, they are simultaneously dealing with our nation's long-overdue reckoning with issues of anti-blackness and racism.

Importantly, both of these issues -- COVID 19 and racial unrest -- are having a disproportionate impact on our graduates of color. Not only are they and their families at higher risk of contracting the virus, they are also disproportionately affected by the racial injustice and the activism that has followed the senseless killings of black individuals across the country.

For those of us who have taken the bar exam, we know that studying for the bar is difficult and stressful in the best of times. And we're not living in the best of times. We are living in the worst of times. And the stress, the uncertainty, and the fear are taking a severe mental and physical toll on our graduates. As Deans, we see this first-hand.

Let me share some examples of what our graduates have had to endure while attempting to study for this high stakes exam.

- they're caring for toddlers, sometimes as single parents with no alternative childcare
- they're home schooling their children, sometimes as single parents
- they're caring for sick and infirm family members
- some have no reliable internet, which means it is difficult to even complete their on-line bar prep courses
- some face housing insecurity
- some face food insecurity
- some have lost their jobs, or have family members who have lost their jobs leading to a lack of income for food and other essentials

--some are living in studio and 1 bdr apartments with large families and have no quiet place to study. And, given public health concerns arising from the pandemic, they have no other place where they can go to study

--some are personally impacted by the racial unrest that is sweeping the country

These are just some of the devastating challenges our graduates are facing. Many of these challenges are disproportionately borne by our graduates of color, and our first gen and low-income graduates.

Let us not add any more to the mental, emotional and physical toll our graduates are enduring. Let's not add to their suffering.

Let's not wreak more havoc on their lives when there's something that we can do, right now. And that's emergency diploma privilege.

As much as we might want to, we can't bury our heads in the sand and pretend that its business as usual.

The Court recently issued a powerful statement on equality and inclusion. A statement that acknowledged, to use the Court's own words, the legacy of injustice that has been inflicted on African Americans, and that persists powerfully and tragically to this day. In the statement, the Court also recognized its obligation to confront this injustice, and a duty make equality and inclusion an everyday reality for all.

So, now is the time for the Court to back up its powerful statement with bold leadership and unprecedented action for these unprecedented times.

Emergency diploma privilege is the equitable solution.

It's the fair solution.

It's the compassionate solution for these unprecedented times.

It provides an equitable pathway to practice for our graduates while also protecting vulnerable Californians who'll face acute needs for legal services during and in the aftermath of this global pandemic.

PRESENTATION OF DEAN DAVID FAIGMAN

I would like to begin by thanking the Court and the State Bar for this opportunity to discuss these important issues with you.

We are living in profoundly imperfect times. Struggling to find a perfect solution to the licensure of lawyers is doomed to fail. The California Supreme Court and the State Bar of California must have the vision and courage to meet the times we live in. This means making difficult decisions under extraordinary conditions and, more particularly, when knowledge about the next several months is exceedingly uncertain.

As Dean Richardson so eloquently mapped out, the deans of California's ABA schools believe that a diploma privilege is the right course of action. It is one that three other Western States—Utah, Washington and Oregon—have adopted, albeit in different forms. Others will follow. It provides immediate certainty regarding the path ahead, which, with or without this decision, is marked by doubt and insecurity.

We understand, of course, that a principal premise of the Bar exam is ensuring the minimum competency of law graduates to practice law. Although all law deans would likely maintain that anyone awarded a degree from their institution is, by that measure alone, qualified to practice law, the Bar Exam has provided a layer of extra protection for the public during ordinary times. And when ordinary times return, there will be opportunity enough to consider the many questions that have swirled around its administration in recent years.

But we are not living in ordinary times; indeed, far from it. The question, then, is whether a diploma privilege might be tailored in a way to ensure that the ultimate objective of the bar exam—ensuring the minimum competency of law graduates to practice law—is met. The ABA deans believe that what we have been calling a “diploma privilege with guardrails” provides this assurance.

In fact, I believe that such a course of action might be understood in very positive terms, notwithstanding the crisis-times we must all maneuver. I believe this is true for several reasons.

First, the guardrails mean that law graduates' interactions with the public will be overseen and guided by licensed attorneys. This, of course, is what usually happens when junior attorneys begin their careers in any case, but will be mandated, with whatever specificity the Court directs, in the case of July 2020 candidates for the Bar. The public is thus protected through the involvement, and the responsibility of, licensed attorneys. The Court can provide whatever conditions on this supervision it deems appropriate, including requiring some level of seniority for the designated supervising attorney.

Second, adopting the rule of a diploma privilege with guardrails has the benefit of involving the practicing bar in the solution to the current crisis. Lawyers have a duty to the profession and the public. The Preamble to the Model Rules of Professional Conduct provide that “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” The tumult of this moment requires a concerted response from the profession at-large. The diploma privilege with guardrails produces this result.

Third, the most common methods of studying law in the mid-eighteenth century were as an apprentice under a practicing lawyer. Historically, this practice involved doctrinal learning and an introduction into the practice of law. Today, attorneys receive this training through three years of rigorous study in law school. Law schools provide the foundation, but years of experience turn our graduates into effective advocates. This should begin, and historically has begun, with effective mentorship from more senior members of the profession. The diploma privilege with guardrails effectively formalizes this best practice.

Fourth, although the bar exam ensures that law graduates have the doctrinal knowledge, reasoning skills, and analytical ability to begin practicing, there is so much more to being a

lawyer. Aptitudes not tested on the Bar exam, but which are foundational to being a good lawyer, include the ability to research effectively, interpersonal skills, responsibility and responsiveness to client needs, negotiation, and good judgment. While not subjects on the Bar Exam, they would very much be part of any mentorship required under a diploma privilege with guardrails.

Finally, creating a diploma privilege does not preclude adoption of a modified Bar Exam for those unable to qualify under whatever standards are adopted for supervision. Indeed, the option of supervision might not be appropriate form, or desired by, all candidates for the 2020 Bar.

I leave discussion of options for administering some form of exam in the fall to my colleague, UCLA Dean Jennifer Mnookin.

PRESENTATION OF DEAN JENNIFER MNOOKIN

Thank you for this opportunity to speak to you about this important issue. I want to emphasize, first, something that has already been said but bear repeating: There is unanimity among the California ABA law deans to support what Deans Richardson and Chemerinsky have discussed. We all strongly believe that emergency diploma privilege for the graduates of ABA law schools – with appropriate guardrails that can protect the public – would be by far the best and most equitable solution in this unprecedented time and in this global pandemic. We certainly agree with the importance of public protection, but we are confident that with thoughtful design of an appropriate approach to supervision by attorneys, and additional MCLE, perhaps including MCLE specifically developed for this cohort and situation, those needs can be fully met. We would be pleased to participate in thinking through in further detail what those specifics could look like, were there interest in having us assist in that way.

While that is our uniform and strong preference, we also do have views and strong preferences among several of the other options that you have put forward as possibilities, and we would like to share some reactions to those as well. We also recognize that it is possible that even if there were an emergency diploma privilege, it might be defined in a way that does not cover all situations or all prospective bar-takers. So here are some thoughts on the bar exam this fall, if such a bar exam does proceed. Again, I speak now on behalf of all of my fellow California ABA law deans.

1. We do not believe an in-person exam in September is feasible and we believe that option should be altogether removed from consideration. It simply cannot be offered with adequate safety given the scale of the number of expected bar takers and the current reality of this pandemic.
2. If there is going to be an administration of the bar exam this fall, it therefore has to be online. We have significant concerns about this, both in terms of the risk of technical glitches and snafus and in terms of access to adequate technology and quiet spaces. It is far from risk free.

3. That said, if there is going to be an online California bar exam, we strongly favor a one-day essay/performance test exam on the original (delayed) dates in early September, rather than a two-day exam in early October.

A. The questions available for an October exam aren't even a full set of NCBE questions, nor will the NCBE equate or scale these results. That means that no matter what, this fall's bar exam will not be 'typical' in form, in addition to being online.

B. There is generally a quite high correlation between the two portions of the exam. Given the lack of support from NCBE for scaling and equating, we believe there is little benefit to including the multiple-choice portion, given the delay it creates and the additional challenges it causes.

C. A two-day exam creates that many more opportunities for internet problems and other technical glitches. If any glitch means the exam is forfeited, there should be a substantial interest in making the test as short as it can be to reduce the risks of internet outages, other problems, and to generate fewer chances of technical snafus.

D. MANY of those planning to take the July exam do not have home situations in which they can take an exam for two full days without interruption with high quality internet.

E. To be sure, many do not have such places for a single day. That said, it is easier to find solutions to these serious problems for one day than two.

F. As one example, some of our schools would wish to help to the best of our ability for bar-takers who need quiet spaces and reliable internet. It is easier for us to help create appropriate spaces for a one-day exam than a two day exam, and more generally, it is easier (though not necessarily easy) for candidates to find some way to access an appropriate place for testing for a single day.

4. There are several additional reasons why September is significantly better than October for a date for the exam if it does go forward.

A. Several universities and/or law schools on the quarter system will not yet be in session, so we can work to make more space available to candidates who need it.

B. Critically, recent graduates with employment cannot begin until after they've taken the bar. They are already greatly stretched by this situation, including financially. This point is even stronger for those currently looking for employment. A September bar lets them return to that search process sooner, and already poses significant delay compared to the typical timeline.

C. I wish to reiterate that many prospective bar takers are facing very significant financial challenges. They had budgeted assuming a July exam and now find themselves extremely stretched and stressed. Furthermore, these challenges are not evenly distributed, and have significantly disparate effects on many diverse and first generation graduates, many of whom have also been especially impacted by both Covid 19 and by the police violence, protests and their aftermath.

D. Grading delay exacerbates all these problems further. You have said today that you expect there to be a 14 or 15 week grading period. This makes the potential October dates even more problematic. (Massachusetts just announced that it does plan to use the October dates, but is committed to meeting a mid-December grading deadline. California is not committing to those dates even for a September exam.)

E. If an October exam is not graded until roughly January 21, as was indicated here today, that means that those who did not pass are left with wholly inadequate preparation time for the February bar. That seems like adding insult to injury given the totality of the circumstances.

5. There are only two reasons I can think of that could possibly support waiting until October (neither of which seems persuasive).

A. One would be to include a full MBE, with the typical equating and scaling, but that is not going to occur. Indeed, a number of other states are proceeding with a one-day essay/performance test exam, and so we strongly believe that such a test can be constructed with adequate validity and reliability and that the ability to make use of 100 'MBE-like' questions without scaling does not warrant the very serious costs and harms of further delay.

B. The second would be for more time for the Bar and Examssoft to prepare for the daunting task of administering an online exam at this scale. We grant that is daunting, but at the same time, there is little reason to believe that an extra few weeks of preparation time would make up for the double length, in terms of technical risk, that a two-day bar produces, and the harms that waiting until October will cause are many.

6. I return where I began: our strong preference would be a thoughtfully designed Diploma Privilege with guardrails. If there is to be a bar exam this fall, we very much hope you will design it to reduce harms instead of exacerbating them still further. We believe that a one day, September bar exam would be significantly better than holding a two-day exam in October.

PRESENTATION OF DEAN ERWIN CHEMERINSKY

I, too, thank the Bar Examiners and the California Supreme Court for their hard work on this important issue and for the opportunity to speak at this meeting. I echo the views of my colleagues Deans Richardson and Faigman in supporting diploma privilege and Dean Mnookin in urging that if there is going to be a bar exam, it be a one-day all-essay exam given in September.

I wanted to speak separately to urge that if there is not diploma privilege, that provisional licenses be accorded for a prescribed period of time for those who were scheduled to take the July 2020 bar exam. Like my colleagues, I am speaking only for graduates of ABA-accredited law schools. I do not feel sufficiently familiar with other schools to express an opinion. Unlike a diploma privilege, provisional licenses which would provide permanent admission to the bar,

this would allow these individuals to practice law under the supervision of a lawyer until they can take a bar exam and receive bar results.

Some because of illness or the illness of family members will not be able to take a bar exam in September or October. Illness obviously always can occur around the time of a bar exam, but we are in the midst of a pandemic that is getting worse. Many are going to be sick this summer and fall.

Some because of great hardships are not going to be able to study and prepare this summer and fall. Dean Richardson eloquently described these hardships that make this a unique time.

I was very distressed to hear that if there is an October test, results will not be provided until January 15. This will cause great hardship to many individuals. Many employers will not hire or will not allow individuals to begin work until there are bar results. This will leave individuals without income for additional months.

Provisional licenses, allowing practice under supervision, seems appropriate under these circumstances if there is not a diploma privilege. It could be, for example, for a year, or for whatever time the Court and the Bar deem appropriate.

I want to make one final point: whatever is decided, please decide quickly. The great uncertainty of when the bar will be held and how the bar will be conducted is causing great anxiety and harm to our graduates. All of us took the bar exam. Think about how we would have felt in early July not knowing when and how the bar would be conducted. I know I speak for all of the deans of ABA-accredited law schools in asking that this be resolved quickly.