



February 15, 2022

Via E-mail

The Honorable Janet DiFiore
Chief Judge of the State of New York

The Honorable Michael Garcia
Associate Judge of the Court of Appeals

The Honorable Howard A. Levine
Chair, Working Group on the Future of the New York Bar Examination

Members of the New York Board of Law Examiners

Re: Recommendations on COVID Safety Protocols for February 2022 Bar Exam

Dear Chief Judge DiFiore, Judge Garcia, Judge Levine, and Members of the New York Board of Law Examiners:

In light of the New York Board of Law Examiners' (NYBOLE) announcement that the bar exam on February 22-23, 2022 is to be conducted fully in-person, we write to express our concern for the health and safety of the examinees. The undersigned Committees of the New York City Bar Association call on you to strengthen the safety protocols for the exam. As representatives of the Council on the Profession, Civil Rights, Women in the Legal Profession, and Disability Law Committees, we also wish to highlight the degree to which the safety risk of an in-person exam is borne disproportionately by examinees who are people of color and people with disabilities. It is of the utmost importance to the profession that the admissions process be equitable, and not create disparities in opportunity for marginalized groups. Doing so is consistent with our duty as attorneys to promote access to the legal system.¹ For all these reasons, we offer a list of essential additional

¹ New York State Bar Association's Preamble to the New York Rules of Professional Conduct (Effective Apr. 1, 2009, as amended through June 24, 2020), <https://nycourts.gov/ad3/AGC/Forms/Rules/Rules%20of%20Professional%20Conduct%2022NYCRR%20Part%201200.pdf> (all websites last visited Feb. 10, 2022).

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has approximately 24,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

safety protocols to provide protection to those who sit for the exam in-person.

We write in particular to amplify the voices of those we look forward to welcoming as the newest members of our profession. The examinees, our future colleagues, write compellingly of their legitimate, visceral, and urgent concerns for their safety during and after the bar exam, and the safety of their loved ones. As reflected in the National Disabled Law Students Association's (NDLSA's) recent public letter,² it would be safest for examinees—particularly those who are themselves at unusually high risk of serious complications of COVID or live with someone who is—to be able to take the exam without being exposed to other test takers. It is critical that the considerations and demands of examinees be addressed. As the New York City Bar Association's Council on the Profession noted in July, 2020, “It is unreasonable to ask test-takers to focus on a difficult examination while simultaneously worrying about their health and the health of their loved ones with whom they may cohabitate or provide care. . . . No person should be asked to choose between their place in the legal profession and their physical safety or that of their loved ones.”³ While the NDLSA's letter is specific to this coming exam, the legitimate frustrations of law students and recent graduates are not new.⁴

Ensuring rigorous safety protocols would be important for any in-person administration of the bar exam during a pandemic, but this obligation takes on even greater significance to diversity and equity in our profession because this is a February exam. The February bar examinees include Pro Bono Scholars, who are taking the bar exam early in order to assist people who cannot afford legal representation.⁵ National data indicate both that law students of color are more likely to enter the government and public interest roles that align with the Pro Bono Scholars Program,⁶ and that bar examinees of color experience a lower first-time bar passage rate than white test takers.⁷ Taken together, these indicate that examinees of color are thus more likely to be sitting for the February exam, either because they are taking the exam early to enter public interest as Pro Bono Scholars,

² Letter from the National Disabled Law Students Association to Gov. Kathy Hochul, Sen. Brad Hoylman, Judith Gunderson, Hon. Janet DiFiore, T. Andrew Brown, and Members of the New York Board of Law Examiners (Feb. 3, 2022), <https://ndlsa.org/2022/02/03/ndlsa-correspondence-about-the-in-person-new-york-state-bar-exam-february-2022/>.

³ Letter from New York City Bar Association Council on the Profession to Hons. DiFiore, Garcia and Levine (July 17, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/2020-bar-exam-covid-19-rescheduling>.

⁴ “The plain truth is that many [recent graduates] felt that they were not heard by the Board of Law Examiners, the Court of Appeals, or the organized bar more generally.” Letter from New York City Bar Association Council on the Profession to Hon. Howard A. Levine (Oct. 23, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/examining-the-future-of-the-new-york-bar-examination>.

⁵ Hon. Janet DiFiore, Pro Bono Scholars Program: A Legal Education Initiative, Program Guide (2021), https://ww2.nycourts.gov/sites/default/files/document/files/2021-03/21_Pro_Bono-Scholars_Program_Guide_Cover.pdf.

⁶ Gita Z. Wilder, *Race and Ethnicity in the Legal Profession* Table 5, pg. 16 (National Association for Law Placement, Inc. 2008), https://www.nalp.org/assets/1064_ajdraceethnicitymonograph.pdf.

⁷ Stephanie Francis Ward, *New ABA Data Parses out Bar Exam Pass Rates by Race and Ethnicity*, ABA Journal, June, 22, 2021, available at <https://www.abajournal.com/news/article/new-aba-data-parses-out-bar-exam-pass-rates-by-ethnicity>.

or because they are re-taking the exam. While these considerations are heightened in the context of the February exam, our attention to considerations of diversity and equity in bar examination during COVID is longstanding. As the New York City Bar Association’s Council on the Profession stated in July, 2020, “Given the well-documented disparate impacts of the pandemic on communities of color and people with underlying conditions and disabilities, we note that requiring an in-person examination carries greater risk for some test-takers than others. That risk falls heaviest on those who would add diversity to our profession.”⁸ These disparities continue in our latest Omicron surge.⁹

Assembling a large number of test takers, staff, and proctors in person for two whole days presents a significant public health risk, especially without a vaccination or booster mandate.¹⁰ As much as we all would like to be “past” this pandemic, it has not passed. New daily reported COVID cases and hospitalizations in New York state remain significantly above the levels in July 2021, when New York provided a fully remote bar exam, or July of 2020, when the decision was made to cancel the in-person exam scheduled for September 2020.¹¹ In 2020, the New York City Bar Association’s Council on the Profession wrote praising the cancellation of the scheduled September, 2020 in-person exam.¹² In light of the continuing danger posed by COVID in New York state, to the extent NYBOLE does not offer an examinee a remote option, it is incumbent on NYBOLE to strengthen the safety protocols it has outlined to date for test takers who sit in person

⁸ Letter from New York City Bar Association Council on the Profession to Hons. DiFiore, Garcia and Levine (July 17, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/2020-bar-exam-covid-19-rescheduling>.

⁹ See, e.g., Racial, Ethnic COVID-19 Disparities Re-Emerge in Omicron Surge, NCDHHS Data Shows (Jan. 20, 2022), <https://www.ncdhhs.gov/news/press-releases/2022/01/20/racial-ethnic-covid-19-disparities-re-emerge-omicron-surge-ncdhhs-data-shows>; Sign-on Letter from the National Disability Community to the Director of the CDC, Rochelle Walensky (Jan. 13, 2022), <https://www.disabilityrightsca.org/latest-news/national-disability-community-signs-on-to-a-letter-to-the-director-of-the-cdc-rochelle>.

¹⁰ According to the COVID protocols currently listed on the NYBOLE website, *no* testing sites require boosters, and only the New York City and Westchester general population test sites require full vaccination as defined by the CDC. NYBOLE, General and Site Specific Covid Policies for the February 2022 New York State Bar Examination (Updated Jan. 7, 2022), https://www.nybarexam.org/Docs/COVID-19%20Policy%20for%20February%202022%20Bar%20Exam_01.07.2022.pdf.

¹¹ According to the New York Times COVID Tracker, New York State’s rates of both new cases *and* new hospitalizations (including specifically hospitalizations for the whole population *and* specifically for young adults most likely to take the bar exam) on February 9, 2022 were more than twice as high as they were on either July 27, 2021, when the last bar exam was conducted remotely, or in October, 2020, when the first remote exam was conducted during the pandemic. *Tracking Coronavirus in New York: Latest Map and Case Count*, N.Y. Times, <https://www.nytimes.com/interactive/2021/us/new-york-covid-cases.html>. We are mindful also that New York State hosts numerous test-takers from out of state, and many will arrive from jurisdictions with even higher rates of transmission, where the recent decline in Omicron cases is not as far along.

¹² “We were relieved to see that yesterday you announced the cancellation of the September 2020 in-person examination. That exam administration could have endangered the health and safety of test-takers, bar administration staff, and the general public. Cancelling it was the right decision.” Letter from New York City Bar Association Council on the Profession to Hons. DiFiore, Garcia and Levine, (July 17, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/2020-bar-exam-covid-19-rescheduling>.

for the exam.¹³ At a bare minimum, we implore NYBOLE to institute the following additional, rigorous health standards for the February bar exam:

1. Facilities:

- a) Allow all examinees to request a private testing room, in advance of the exam. During the pandemic, other states have provided private rooms to test takers beyond those who are entitled to a private room as a reasonable accommodation of their disability.¹⁴ It is insufficient to provide private testing rooms only within a traditional accommodations process under the Americans with Disabilities Act (ADA).¹⁵ As evidenced by NYBOLE's accommodation handbook and accommodation application form, the ADA does not mandate accommodations for people who are at high risk but do not have a disability, nor does NYBOLE provide a mechanism to request an accommodation where a household member is at high risk.¹⁶ Instead of a narrow ADA approach, we advocate for an approach that is

¹³ NYBOLE, General and Site Specific Covid Policies for the February 2022 New York State Bar Examination (Updated Jan. 7, 2022), https://www.nybarexam.org/Docs/COVID-19%20Policy%20for%20February%202022%20Bar%20Exam_01.07.2022.pdf.

¹⁴ Reasons states have provided private rooms on request include:

- To reduce transmission of COVID (Texas). Stephanie Francis Ward, *Bar Exam in Hotel Rooms Offered Test-Takers Social Distancing and Private Bathrooms* ABA Journal, September 22, 2020, available at <https://www.abajournal.com/web/article/bar-exam-in-hotel-rooms-offered-test-takers-social-distancing-and-private-bathrooms>;
- To enable the provision of disability accommodations that are not compatible with remote test taking (Nevada). State Bar of Nevada Testing Accommodations, available at <https://nvbar.org/licensing-compliance/admissions/bar-exam/testing-accomodations/>; and
- To provide the space to express breast milk (New Jersey). Notably, New Jersey is also a UBE state, providing semi-private rooms during its February, 2022 bar administration, and requiring only a few weeks' advance requests. New Jersey Board of Bar Examiners Frequently Asked Questions "Can I apply for testing accommodations for non-ADA related medical situations such as breastfeeding? . . . Applicants who wish to test at a non-ADA site can complete the medical authorization form available online a couple of weeks prior to the exam . . . Applicants may also complete the Non-ADA Accommodations Request Form available under the Exam Forms tab and will typically receive a semi-private room along with a proctored non-testing room for pumping and a refrigerator or space to store a cooler" available at <https://www.njbarexams.org/faq.action#720>.

¹⁵ See *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, Question D13, U.S. Equal Opportunity Employment Commission (updated Dec. 14, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

¹⁶ The New York State Board of Law Examiners' Test Accommodations Handbook, which was revised in May 2021, over a year into the pandemic states, "Applications for test accommodations should be completed only by those individuals with disabilities under the ADA who require test accommodations on the bar examination." It does not, of course, note any accommodations available to reduce an examinee's exposure to COVID during in-person administrations of bar exam because, up until this month, no such exam has occurred, <https://www.nybarexam.org/Docs/NTAHandBook.pdf> (pg. 6); <https://www.nybarexam.org/Docs/NTAApplication.pdf>.

consistent with universal design principles.¹⁷ NYBOLE should immediately move to secure private rooms—or additional rooms if it has already done so for applicants with disabilities who received accommodations. NYBOLE should email all applicants in the coming days to notify them of this offering. Test takers should then be able to respond (via email, web-based sign up, or similar) requesting a private room by certifying that a private testing room is appropriate in their individual circumstances, because either they or someone they anticipate being in close contact with in the days after the exam is at high risk of serious complications from COVID.

- b) Provide hand sanitizer and disinfectant wipes at all testing locations and ensure they are available for all examinees throughout the exam. Ensure bathrooms have adequate soap.

2. Reducing the possibility of COVID exposure within facilities:

- a) Require all examinees to provide evidence of a recent negative COVID test before entering the exam, regardless of vaccination status. It is likely most effective to provide free rapid tests at every testing location on the day of the exam. \
- b) For examinees who are not provided a private testing location, divide examinees based upon vaccination status (Boosted, “Fully Vaccinated in accordance with CDC guidelines,” and Not Vaccinated). No examinee who has chosen to be vaccinated should be required to take the exam in proximity to someone who has not done so.
- c) For all examinees, require and provide masks that are of adequate quality to significantly reduce the risk of transmission. While KN95 or N95 masks are relatively effective, studies indicated that cloth masks are not as effective at preventing the spread of Omicron.¹⁸ Masking protects not only the wearer, but those around them, so we commend the universal masking mandate NYBOLE has in place, but advocate for a more robust standard.

3. Protocols: Have clear, equitable policies, shared with staff, proctors, and examinees, in advance.

- a) Direct staff and proctors to enforce the mask mandate.
- b) Ensure that exam breaks are of a sufficient length for examinees to safely eat and

¹⁷ Universal design has been defined as: “The design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design.” Bettye Rose Connell, et. al., *The Principles of Universal Design, Version 2.0* (NC State University, The Center for Universal Design, 1997), available at https://projects.ncsu.edu/ncsu/design/cud/about_ud/udprinciplestext.htm.

¹⁸ Rachel Tillman, *Growing Data Shows Cloth Masks May Not Be As Effective Against Omicron*, Spectrum News NY1, Jan. 7, 2022, <https://www.nyl.com/nyc/all-boroughs/news/2022/01/06/cloth-surgical-mask-omicron-effectiveness-covid-cdc>.

drink away from other individuals, including outside if necessary.

- c) For examinees who begin to exhibit symptoms consistent with COVID or have a close COVID exposure in the days before or during the exam, the policy must both ensure the safety of other examinees as well as staff and proctors, and not create an undue hardship on an examinee who honestly reports that they have been exposed or are experiencing symptoms consistent with COVID. Requiring such examinees to take the exam in a private testing location seems like an equitable approach.

To conclude, with the safety protocols NYBOLE has outlined to date, requiring examinees to sit for the February exam in-person represents an inequitable burden on test-takers at high risk for serious complications from COVID, including many people with disabilities. Requiring an in-person exam for the first time during the pandemic at a February sitting means these risks will be borne disproportionately by people of color and those entering public service. Strengthening safety protocols along the lines outlined above is essential for the health and safety of all examinees taking the exam in person, those with whom they live and to whom they provide care, and the broader public.

Respectfully,

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Council on the Profession

Kevin Eli Jason, Co-Chair
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