

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two horizontal blue bars.

NEW YORK
CITY BAR

COUNCIL ON THE PROFESSION

MATTHEW DILLER
CO-CHAIR
diller@fordham.edu

July 17, 2020

MELISSA COLÓN-BOSOLET
CO-CHAIR
bosolet@sidley.com

Via E-mail

The Honorable Janet DiFiore
The Honorable Michael Garcia
The Honorable Howard A. Levine
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: 2020 Administration of the Bar Examination: Recommendations

Dear Chief Judge DiFiore, Judge Garcia and Judge Levine:

We write on behalf of the New York City Bar Association's Council on the Profession – the committee of the City Bar charged with broad policy questions facing the legal profession. The Council includes law firm partners, law school deans, legal services attorneys, and chairs of numerous City Bar committees.

We write in connection with the 2020 administration of the bar examination. 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.

However, the Court's announcement did not address many *critically* important questions. No decision has been made on whether an in-person examination will be held, or whether to adopt an online examination, or whether to grant any form of permanent diploma privilege. These questions now hang over the heads of thousands of new law school graduates, to say nothing of countless private and public sector employers who are trying to make critical staffing decisions and run their organizations. This ongoing uncertainty creates chaos for our profession. That chaos is felt most acutely by the newest generation of lawyers, many of whom face significant debt, a difficult job market, and ambiguous licensure. Given the hazy implications of the Court's announcement, 2020 law school graduates are now deeply worried about their ability to attain (or retain) employment, support themselves, and continue to study indefinitely for an exam that continues to recede into the horizon.

The time has come for certainty.

Over the past several weeks, our Council has spoken with the relevant stakeholders and constituents. Considering the difficult issues facing the State and the profession, we respectfully recommend that the Court of Appeals take the following actions:

1. Either (a) adopt the national online multiple-choice examination offered by the National Conference of Bar Examiners (NCBE) for October 2020, which serves as a safe and appropriate testing alternative for this historic moment; or (b) grant permanent diploma privilege to admit to practice all 2020 graduates of ABA-accredited law schools who meet all other qualifications for admission. It is essential to announce this decision by August 1 to create certainty for test-takers and employers.
2. Regardless of which option is chosen, implement an expanded continuing legal education requirement for those who are granted a diploma privilege or take the online NCBE examination. Of course, to be admitted to the bar, applicants would still need to go through the normal Character and Fitness review process.
3. Create clarity by announcing, in unambiguous terms, that graduates of the class of 2020 will not be required to sit for an in-person bar examination given the unprecedented uncertainty in when such an exam could be safely administered.
4. Convene an advisory Task Force from across the State, representative of our profession, to discuss the implementation of these policies and to ensure proper deliberation, accurate communication, expedited attorney admissions, and careful attention to the effects on test-takers, particularly international and underrepresented populations.

With the latest information on public health risks in mind, and with due consideration for the various burdens and trade-offs, the above approach balances the interests as best as possible under historically challenging circumstances. These interests include: (a) consumer protection for future clients and legal employers; (b) the health and safety of all test-takers, bar administration staff, and New Yorkers generally; and (c) accessibility to the profession for all test-takers regardless of socioeconomic status, caregiving responsibilities, or nationality.

EXECUTIVE SUMMARY

New York State plays a disproportionately large role in producing the Nation's lawyers. Over 14,000 applicants take the New York Bar Examination each year, more than any other state in the country. Accordingly, the Court of Appeals plays an outsized role in ensuring consumer protection for the legal industry overall. This is a significant and important function. Traditionally, the bar examination plays a central role in allowing the Court to carry out that gatekeeping function fairly and equitably.

At the same time, holding an in-person examination anytime in the foreseeable future – including during the normal February administration – is uncertain at best. As the number of COVID-19 cases has surged in June and July, no one can predict when it will be either safe or

permissible to gather large groups of strangers from across the country and from abroad together, along with proctors and other staff, for two straight days. 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.

While New York may be the largest jurisdiction, it is hardly the only one facing these problems. Jurisdictions across the United States are responding to the crisis in different ways. For example, California Kentucky, Maryland, Massachusetts, New Jersey, Pennsylvania, and Washington, D.C. and have elected to cancel their in-person examinations in favor of the online examination being offered in October 2020 by the NCBE. Others – Oregon, Utah and Washington – have elected to grant their 2020 graduates diploma privilege, admitting them to practice permanently without an examination. Some states, such as Louisiana and Tennessee, have elected to delay their in-person examinations to uncertain future dates.

None of these solutions is perfect. But as we explain in this letter, our recommendations represent the best possible compromise. We also explain why we strongly oppose certain half-measures that smaller jurisdictions have enacted in response to the pandemic – continued delays of in-person examinations, along with temporary practice orders – are not appropriate for New York. These band-aid fixes merely cause delay and cause enormous financial and professional burdens, as well as needless uncertainty, for both test-takers and employers. Neither recent graduates nor legal employers should be forced to endure months of indecision.

In New York State, notice is being taken of the manifest injustice that would result from any in-person examination. As the Court is no doubt aware, on July 7, 2020, State Senator Brad Hoylman introduced S.8682 and State Assemblywoman Jo Anne Simon introduced companion legislation (A.10794) in the State Assembly on July 10, 2020. That legislation would effectively grant diploma privilege to would-be test-takers. Such a move would be a highly unusual intrusion of the Legislature into the regulation of the legal profession. That role is traditionally – and, we believe, properly – left to the sound judgment of the Court of Appeals. The City Bar declines to support this legislation publicly at this time, because we believe that it can be mooted through an appropriate compromise solution such as one of the proposals described herein.

RECOMMENDATIONS

With the historic nature of this year in mind, and the long-term interests of our profession close to our heart, the City Bar recommends as follows:

- 1. Either Adopt the NCBE Online Examination for October 2020 or Grant Diploma Privilege to Otherwise-Qualified Applicants**

Yesterday's decision to cancel the September 2020 in-person examination was wise. But the Court's announcement left New York's test-takers mired in more uncertainty than ever before. When can they actually get admitted to the bar? Should they be studying? If so, for what? Should they be applying for jobs? Can they represent themselves to prospective employers as having provisional law licenses? If they have already secured jobs, should they be contacting their employers to ask for particular accommodations? Employers are left with many burning questions of their own. Should they hire a 2020 graduate? Can they rely on that individual to perform legal

work? If they hire a 2020 graduate, does that mean the graduate will require weeks or months of “vacation” sometime in the fall, winter, or spring to study for an exam? If so, how can that graduate be staffed on legal matters? These questions cannot be permitted to linger indefinitely.

As discussed above, New York State is not the only jurisdiction grappling with these concerns. At present, one of two alternatives to administering the traditional bar exam are being chosen by most jurisdictions: First, seven states have decided to administer the NCBE’s online examination, which is being offered in October 2020 and covers the same substantive subjects as the Uniform Bar Exam that New York had planned to administer in-person in September 2020. Second, some states have elected to grant diploma privilege to otherwise-qualified applicants.

The City Bar believes that either of these options could be workable, fair, and appropriate, if properly implemented. Each has benefits and drawbacks, and we recognize that the Court has expressed concerns about both in its recent correspondence with the New York State Assembly. However, both options are vastly preferable to forcing 2020 applicants to risk their health through an in-person examination or requiring them to wait an indefinite period until an in-person exam can be administered safely. May 2020 law graduates *cannot* be kept waiting for a hypothetical February 2021 administration that realistically may not occur.

With respect to the NCBE examination in October 2020, we acknowledge that it is not a substitute for the traditional bar examination. It is not as comprehensive as the “full” New York exam in terms of breadth of subject matter, nor is it as lengthy, meaning that assessment value is more limited. Additionally, concerns have been voiced about testing integrity given that each test-taker is not individually proctored. Many law students live with other individuals, including with other recent law school graduates, and the testing environment will not be nearly as secure as an in-person examination with live proctors.¹ In recent correspondence with the New York State Assembly, the Court has noted that exams that have pivoted to online administration, such as the Advanced Placement tests, have experienced technical glitches and allegations of candidate impropriety.

All of these concerns are valid. Yet the goal for 2020 is not a perfect solution, but rather the least imperfect solution. The NCBE is surely well-aware of technical glitches that have impaired other online tests, and they are best-positioned to prepare for, and hopefully avoid, such problems. They have more than three months to do so. The fact that many other major jurisdictions adopted the NCBE online administration – including, most recently, California² and New Jersey³ – shows that there is widespread faith that the exam can be administered fairly. Moreover, the Board of Law Examiners (BOLE) already allows the New York Law Examination (NYLE) to be taken online at test-takers’ homes, thus undercutting concerns of cheating or administration. On

¹ The City Bar would be pleased to assist in coordinating law firms, law schools, and legal associations to secure space for test-takers who lack appropriate locations to take the online multi-day examination. We suspect many test-takers will have roommates, children, pets, and other distractions in their homes that will certainly create disparity.

² “California Bar Exam Letter,” July 16, 2020, C.A. SUPREME COURT, available at https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20206/SB_BOT_7162020_FINAL.pdf (last visited July 17, 2020).

³ “Order of the Supreme Court of New Jersey,” July 15, 2020, N.J. BOARD OF BAR EXAMINERS, available at <https://www.njbarexams.org/remote-exam-order> (last visited July 16, 2020).

balance, the NCBE’s online examination ensures that test-takers master substantially the same content and have general familiarity with critical areas of common law. Given the historic nature of this year and the alternatives, this imperfect solution should be deemed acceptable.⁴ Don’t let the perfect be the enemy of the good.

Diploma privilege is another viable alternative that the Court should strongly consider in light of the pandemic. It would surely be the least burdensome solution from an administrative perspective. Otherwise-qualified graduates would be able to begin their careers without ongoing concerns about the looming specter of the bar examination. Employers could safely hire these graduates without the fear of future “study time” that would be deeply disruptive to the practice of law. And the Court and BOLE could refocus their efforts on planning for future applicants.

The modifier “otherwise-qualified” is important. We do not suggest that *anyone* be granted a law license. The diploma privilege we suggest is limited to graduates of ABA-accredited institutions who meet all other admission requirements. These include passage of the Multistate Professional Responsibility Examination (MPRE) and the NYLE, as well as successfully meeting the standard Character and Fitness portions of the bar application. These substantial requirements provide assurance to the public and legal employers that quality control remains in place for those seeking law licenses.

To be sure, outright diploma privilege presents issues of consumer protection. If the Court is concerned about taking this broader step, we believe its concerns can be substantially mitigated through an added requirement of supervised practice for a one-year period. Any individual who wishes to practice law pursuant to this diploma privilege could be required to obtain an affidavit from an admitted attorney who agrees to be their supervisor.⁵ The affidavit should place an affirmative obligation onto the supervising attorney to examine the new attorney’s work product, provide general professional guidance and mentorship, and also to immediately report any material concerns about the new attorney’s fitness to practice to BOLE. The details of supervised practice would need careful consideration – an ideal role for the Task Force proposed in Section 4 herein.⁶ As a general concept, though, supervision combined with our other recommendations provides a significant degree of consumer protection.

Certainly, long-time critics of the bar exam have used the pandemic to advance arguments in favor of permanent diploma privilege. To be clear, the City Bar does not endorse the permanent

⁴ An important advantage of the NCBE examination is the possibility that 2020 test-takers may be able to receive reciprocity with other jurisdictions that administer the October online exam, which can confer practical and professional benefits. Employers often prefer candidates who can practice in multiple jurisdictions.

⁵ While we anticipate most supervisors will be employers, the supervisor may also be any member of the bar willing to supervise the new attorney’s work in a *pro bono* capacity. Some individuals may not work for lawyers (e.g., business roles, administrative roles, etc.) or may still be job-seeking at this point, and therefore not in a position to ask an employer. Accordingly, the supervision requirement should be flexible enough to allow members of the bar in good standing to offer their mentorship on a *pro bono* basis. We also understand that in some instances, a single supervisor will not be available for the full one-year period, and that individuals may switch supervisors as positions change. The City Bar and other bar associations could play a coordinating role in this effort.

⁶ Undoubtedly, the details of supervised practice require further discussion. We do not intend to suggest a comprehensive solution, but merely a general approach. The Task Force discussed in Section 4, below, is the ideal body to evaluate proper methods of implementation in concert with the Court and BOLE.

use of diploma privilege even with supervised practice. Indeed, we agree with the concerns that this Court has expressed about suddenly admitting the nearly 6,000 applicants who fail the exam each year. BOLE's 2019 exam data shows that 59% of all test-takers (combining first-time test-takers and repeat test-takers) passed the exam.⁷ This means that 5,820 individuals failed. Importantly, however, the data for graduates of ABA-accredited law schools is markedly better: an overall pass rate of 71%, which represents 2,542 individuals who failed, and most of those who fail pass the bar when they retake it. Moreover, if the diploma privilege is limited to first-time test-takers from ABA-accredited schools, the number who fail the exam decreases to about 1,000; within two years, that group has a 91% pass rate.⁸ Our proposal for diploma privilege is limited to JD and LL.M graduates of ABA-accredited schools. Again, the goal for 2020 is not a perfect solution; no perfect solution exists. Rather, the goal is a careful balancing of competing interests. In this unique situation, we feel confident that New York State can rely upon the standards imposed by ABA-accredited institutions in conferring degrees, along with passage of the MPRE, NYLE, and Character and Fitness, to provide sufficient consumer protection. This is particularly true if the diploma privilege includes the one-year requirement of supervised practice (discussed above) and enhanced CLE attendance (discussed below). Will some number of individuals be admitted to practice in 2020 who otherwise would not be? Yes. Is this outcome nevertheless preferable to the alternatives for those individuals, the profession, and the State? We believe it is.

Over the longer term, we believe the methods of examination and admission require further study and evaluation. We applaud the work of the Chief Judge and the Court in already assembling such a group. However, that long-term evaluation should *not* take place in the midst of an international public health crisis. We need not determine what New York State should do in 2021, 2022, or beyond; our concern is only the present. And right now, the trade-off is clear: No person should be asked to choose between their place in the legal profession and their physical safety or that of their loved ones.⁹ Accordingly, the City Bar supports the adoption of the NCBE or diploma privilege for otherwise-qualified applicants.

Regardless of which path the Court chooses – the NCBE or diploma privilege – we reiterate that time is of the essence. Following the Court's July 16 announcement, the lives of thousands of applicants and countless employers are now in holding pattern. The Court should announce a final decision no later than August 1.

2. Implement Expanded CLE Requirements for 2020 Test-Takers

To be sure, neither the diploma privilege nor the online NCBE examination are complete substitutes for the “full” bar examination. Neither path provides the same level of reliability or

⁷ “NYS Bar Exam Statistics,” N.Y. STATE BOARD OF LAW EXAMINERS, available at <https://www.nybarexam.org/ExamStats/Estats.htm> (last visited July 16, 2020).

⁸ While these statistics apply to only JD graduates from ABA-accredited schools, we recommend that the diploma privilege be extended to both JD and LL.M graduates from such schools. The Court has already extended its temporary practice authorization to LL.M graduates through its July 17 order, and we urge that they be included encourage that they be included in any application of diploma privilege.

⁹ 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.

consumer protection. Fortunately, there is another lever that the Court can pull to mitigate against the loss of a less comprehensive examination. New York already has a robust continuing legal education system in place, and already requires new graduates to complete 16 CLE credits within each of their first two years of practice. We recommend that this requirement be increased by 50% – to 48 total credits over their first two years of practice.

Expanding the CLE requirement represents a significant opportunity. We have the chance to have our most recent set of attorneys engage in deeper expertise-building through a more diverse collection of CLE programs. Law schools and the practicing bar could collaborate on innovative new types of programs, perhaps more practical or experiential than traditional CLE lectures. Moreover, this would create additional opportunity for CLEs in the category of Diversity, Inclusion, and Elimination of Bias – a category that New York recently added in 2018 and that is undoubtedly more important for new attorneys than ever before.

While CLEs certainly cannot replace the consumer protection function of a “full” bar examination, they can mitigate the concerns by ensuring that new attorneys receive extensive ongoing professional education during their first two years of practice. And if the heightened CLE requirements are handled creatively, we have a pedagogical opportunity to truly engage new lawyers to bridge the gap to practice. The City Bar itself would be happy to take a leading role in devising and implementing appropriate CLE programming for this purpose.

3. Announce that New York Will Not Require In-Person Bar Examinations While the Pandemic Continues to Create Health and Safety Concerns

When the Court of Appeals initially announced the September 2020 examination this past April, the entire profession – including the test-takers – remained hopeful that it could be safely administered. Unfortunately, this is no longer the case. While infection rates in New York State remain relatively low compared to April and May, the disease is surging dramatically in many other states including California, Florida, Ohio, Texas and Wisconsin. Simply put, the United States has not contained COVID-19. It should now be apparent that no in-person examination is feasible until the pandemic is under control. It should also be clear that an in-person administration in February 2021 is far from certain.

Until the announcement that the September 2020 examination was cancelled on July 16, the plans promulgated by the Court of Appeals and BOLE called for test-takers to sit in rooms potentially with hundreds of others. Such efforts to hold an administration approximating the “normal” bar, while well-intentioned, are simply not feasible. Test-takers normally come to New York State from around the country and around the world. Each year, approximately 3,000 out-of-state candidates sit for the examination. Under current Executive Orders, residents of multiple states would need to self-quarantine for two weeks upon their arrival in New York.¹⁰ Needless to say, such a requirement puts inordinate financial pressure on out-of-state and foreign candidates

¹⁰ Governor Cuomo’s Executive Order 205, issued June 25, 2020, subjects travelers from the following states to a two-week quarantine upon their arrival in New York: Alabama, Arkansas, Arizona, California, Florida, Georgia, Iowa, Idaho, Kansas, Louisiana, Minnesota, Mississippi, New Mexico, North Carolina, Nevada, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, and Wisconsin. This Executive Order is based upon a 7-day rolling average of positive tests in excess of 10 of those tested, or number of positive cases exceeding 10 per 100,000 residents.

who will need to scramble to find accommodations to safely take the exam. At least some test-takers may enter the State without following this self-quarantining requirement, thereby putting hundreds of other test-takers and bar examination staff at risk.

Bar examiners around the country have obviously noticed the risks they are asking test-takers to assume. The City Bar is deeply troubled by news of so-called “COVID-19 liability waivers” designed to protect examiners from liability if test-takers or proctors get sick. Such contracts of adhesion might make good hypotheticals for bar exam essay questions, but they are an inappropriate mechanism to shift liability to test-takers who lack any meaningful choice. New York State should model the ethical and responsible use of legal authority; these liability waivers do just the opposite. Yet their existence makes apparent that those administering the exam appreciate the public health risks involved with a bar administration.

Simply put, it is needlessly risky to have many test-takers together in enclosed spaces for hours on end. Even with cleaning, moderate distancing, and other precautions planned by BOLE, there is no guarantee of safety. Even if health professionals permit the exam to go forward, test-takers will not be able to focus on torts and contracts. Instead, they will be anxious about the risks to their health. Concerns about ingress and egress, restroom access, and lunchtime protocols have not been addressed in any way that has been communicated to test-takers. Every cough, every sneeze, and every sniffle will cause wholly understandable worry. For these reasons, the Court of Appeals should immediately announce that it will not put New York candidates in unsafe positions while the pandemic continues to rage. There is no reason that applicants should continue to worry about in-person exams in 2020. They are not going to happen. The Court should say so, clearly, to remove the cloud of uncertainty.

Normally, there would be an in-person bar administration in February 2021. While no one truly knows what the world will look like in February 2021, the Court should not wait until the last minute to make a decision regarding that administration. It seems incredibly unlikely that an in-person examination would be advisable by that point. The Court should make this decision no later than October 1. There is no reason to keep thousands of February test-takers in suspense. In urging the Court to act quickly, it is worth noting that the City Bar respectfully, but forcefully, disagrees with the more optimistic approach of the New York State Bar Association (NYSBA), which wrote to Senator Hoylman as recently as July 14, 2020 “recommend[ing] that the September 2020 examination proceed.” The NYSBA assured Senator Hoylman that it “will continue to evaluate options” further “[a]s events develop” in the weeks ahead. In our judgment, the worst possible case scenario for New York’s test-takers would be another last-minute cancellation of a scheduled examination. In Louisiana, for example, the state’s Supreme Court announced the cancellation of the July 2020 examination on July 15, just two weeks prior to its scheduled administration.¹¹ Louisiana’s short press release indicated that information on rescheduling the exam would be forthcoming at some future date. Needless to say, this sort of process throws the personal and professional lives of test-takers into chaos and uncertainty. It is grossly unfair to those who seek to join our profession. We should not allow this approach in New York.

¹¹ “Announcement Regarding the July 27, 2020 Bar Examination,” July 15, 2020, L.A. SUPREME COURT, available at <https://www.lascba.org/docs/AnnouncementJulyBarExam2020-07-15.pdf> (last visited July 16, 2020).

In sum, the Court should announce no in-person exams will be held while the pandemic continues to rage. It should further announce, no later than October 1, whether the February 2021 bar administration will be online.

4. Create a Representative Advisory Task Force

Needless to say, the complexity of these issues will have significant consequences for many members of the legal profession in the coming months. Given the uncertainties and challenges that 2020 test-takers have already faced, our profession should attempt to make their path as smooth as possible from this point forward.

To accomplish this goal, the Court of Appeals and BOLE would benefit from a single advisory group with deep and diverse experience in legal education, legal hiring, and legal practice. We understand that Judge Howard A. Levine has been tasked with running such a group. At the moment, however, it is unclear what the composition of that advisory group will be. No membership list has been published. We would strongly encourage Judge Levine to include representatives from broadly-defined sectors of the profession: academia, the judiciary, and attorneys working at private firms, in-house, for government, and non-profit organizations. More specifically, including voices from 2020 graduates is essential given that these will be the individuals affected by these policies. A broad representation from these different constituencies is critical to ensuring that the Court of Appeals and BOLE can develop appropriate and workable policies. Transparency is key. Test-takers deserve to know, at the very least, who is making recommendations to the Court.

Issues that this group should immediately consider could include: (a) the extent, scope, and management of supervised practice if the Court adopts this requirement as a condition of a diploma privilege; (b) ways of expediting the normal process for attorney admissions to ensure that recent graduates are fully admitted to the bar with all due haste; (c) the types of CLE programming that would best ensure consumer protection and added educational value for new attorneys, as well as the most effective ways of delivering that programming during the pandemic; and (d) any accommodations that should be made for particular categories of bar applicants in light of their circumstances.

The City Bar would be pleased to propose a list of names of potential candidates for this Task Force, though the membership should of course be representative of the entire State.

TEMPORARY PRACTICE ORDERS AND CONTINUED DELAYS ARE UNFAIR AND UNWORKABLE

Now that we have outlined our recommendations, we wish to briefly address our concerns with alternative approaches. As noted above, some jurisdictions have implemented a “wait and see” policy of delaying their 2020 in-person bar examination while granting temporary practice orders. States justify this approach by arguing that it gives would-be test-takers the temporary ability to appear in court and perform other legal tasks, while still preserving the ultimate requirement of the bar examination.

For the following reasons, the City Bar opposes this type of half-measure in New York, which would only create needless additional hardship for both test-takers and employers:

- Continued uncertainty is unfair to everyone involved. The examination should not be postponed to a future date that neither the Court nor BOLE can predict. It is entirely unclear when it will be safe to gather large groups in interior spaces and when quarantine requirements for those coming from other states will be lifted. To announce yet another delay of New York's examination (*e.g.*, to February 2021 or July 2021) creates no certainty for the thousands of individuals who are literally arranging their personal and professional lives around these dates. These individuals would face the burdens of remaining perpetually enrolled in bar preparation courses while also worrying about attaining full-time employment. These burdens would be exponentially higher on those test-takers who are parents, caregivers, or economically disadvantaged.¹²
- Any delay in the administration of the examination would severely disadvantage test-takers on the job market. Employers will be understandably hesitant to hire an individual who will need to take the bar exam several months into their employment and have to take time off to finish preparing for the exam. Implementing a temporary practice order and delayed in-person exam will result in significant employment hardship for 2020 test-takers – a group that has already graduated into a national recession.
- Legal employers will be severely burdened if they must give new employees significant time off to study for an examination at some future date (*e.g.*, February 2021). While large law firms may be able to handle this sort of staffing interruption, the majority of the profession cannot. Small and mid-sized firms, busy government offices, and underfunded nonprofits cannot simply hire a new attorney, have them begin to work on legal matters, and then have that person leave for full-time bar study at an indeterminate date.

In short, the Court of Appeals should avoid the “solution” implemented by other jurisdictions of kicking the proverbial can down the road. While cancelling the September 2020 exam was the right decision, the lack of certainty will now wreak havoc on the thousands of individuals who seek to join our profession.¹³ A Hamlet-like approach may seem prudent, but in fact, it is damaging to applicants' professional, personal, and psychological well-being.

¹² The Court should consider the economic burdens that bar examination delays mean for many test-takers. Normally, the majority of law graduates do not work full-time during June and July following their graduation in order to study for the bar exam. Legal jobs normally expect them to begin in August or September. This year, most graduates will be unemployed for an additional two months, given the delay to September. Creating further delay, even until February 2021, makes it virtually impossible for graduates to support themselves unless they have independent means or family resources. This is precisely the type of disparate impact that New York State should avoid.

¹³ Admittedly, our recommendation to adopt the NCBE online examination, scheduled for October, does have this negative consequence. However, the harm of pushing the examination from in-person in September to online in October is significantly less than the harm of pushing the examination to some undefined date in the future.

CONCLUSION

We appreciate the Court of Appeals' attention to these important issues and we are highly cognizant of the Court's crucial role in ensuring the quality of those seeking to enter our profession. To say the least, we are living in extraordinary times that require creative solutions and a careful weighing of trade-offs. The recommendations outlined herein are the most appropriate way of balancing the interests of the legal profession and the public. We are available to speak about these recommendations in greater detail at your convenience.

When it comes to the administration of the bar examination, the newest members of our profession deserve both safety and finality. They have graduated into social, economic, and political chaos. Many have personally faced the horrors of the pandemic themselves or have had friends, family members, or professors who have succumbed to it. The Court of Appeals cannot solve the complicated and manifold national problems facing this newest generation of attorneys. But the Court can remind them that our profession, at its best, melds the timeless values of rigor and tradition with pragmatism and compassion.

Respectfully,

COUNCIL ON THE PROFESSION

Subcommittee on the New York Bar Examination

The Honorable Elizabeth S. Stong
United States Bankruptcy Judge for the Eastern District of New York

David Keyko
Chair, Lawyer Referral Service Committee
Partner, Pillsbury Winthrop Shaw Pittman LLP

Mary Lu Bilek
Dean and Professor of Law, City University of New York (CUNY) School of Law

Brian Farkas
Chair, New Lawyer Institute
Associate Attorney, Arent Fox LLP
Adjunct Professor of Law, Cardozo School of Law

Council Co-Chairs
Melissa Colón-Bosolet
Partner, Sidley Austin LLP

Matthew Diller
Dean and Paul Fuller Professor of Law, Fordham University School of Law

Council Secretary

Heidi Savabi

Council Members

Laurie Berke-Weiss

Laura Bicks

Mary Lu Bilek

Michael A. Cardozo

Miriam Davidson

Samantha DiValentino

Brian Farkas

Taa Grays

Byron Huang

L. Alejandra Irazoque

Bomopregha Julius

Gary M. Kaufman

David Keyko

Wallace Larson

Marcia Levy

Tyler Maulsby

Danial Rothschild

Rhonda K. Singer

Michael S. Solender

Hon. Elizabeth S. Stong

Andrew Tobel

Mira B. Weiss

Kaylin L. Whittingham