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# Legal Uncertainties: COVID-19, Distance Learning, Bar Exams, and the Future of U.S. Legal Education

Christine A Corcos\*

*The COVID-19 pandemic forced the U.S. legal academy and legal profession to make changes to legal education and training very rapidly in order to accommodate the needs of students, graduates, practitioners, clients, and the public. Like most of the public, members of the profession assumed that most, if not all, of the changes would be temporary, and life would return to a pre-pandemic normal.*

*These assumed temporary changes included a rapid and massive shift to online teaching for legal education, to online administration of the bar exam in some jurisdictions, or the option to offer the diploma privilege in others. Many employers made efforts to accommodate new law graduates and employees who needed to work from home.*

*As legal educators and the legal profession shift back to 'normal', we are now discovering that some of these changes might be rather desirable. Thus, we can begin to look at the last two years as an opportunity to re-evaluate how we teach and learn law and how we might evaluate the competence of those entering the profession in different ways. As we move forward, instead of automatically readopting to the status quo, we can instead examine approaches that would allow us to make headway on solving problems that have been with us for decades.*

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## I. Introduction

In the United States calls for change and criticism of legal education are as old as legal education itself.<sup>1</sup> Some of the changes date from a few decades after Christopher Columbus Langdell initiated the first big change in the training of U.S. lawyers, the ‘Socratic method’, at Harvard Law School,<sup>2</sup> which transformed that training from apprenticeship to classroom learning, and from on the job training to the dreaded one-on-one questioning by a professor so familiar to many non-lawyers from films such as *The Paper Chase*<sup>3</sup> and *Legally*

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<sup>1</sup> For a history of legal education in the United States, see generally Anton Hermann Chroust, *The Rise of The Legal Profession in America* (Norman, Okla.: The University of Oklahoma Press, 1965); Robert Bocking Stevens, *Law School: Legal Education in America from the 1850's to the 1980's* (Chapel Hill, NC: University of North Carolina Press, 1983).

<sup>2</sup> See Cynthia G Hawkins-León, “The Socratic Method-Problem Method Dichotomy: The Debate Over Teaching Method Continues” (1998) 1:1 Brigham Young University Education & Law Journal 1 at 4.

<sup>3</sup> *The Paper Chase*, 1973, DVD (Beverly Hills, Cal: 20th Century Fox Home Entertainment, 2003). A television series followed (CBS, 1978-80; Showtime,

*Blonde*.<sup>4</sup> However, both students and faculty eventually objected to this type of training, and over the decades since the ‘Professor Kingsfield’ model of teaching held sway, more and more faculty moved away from it, adopting a lecture model or friendlier model of engagement.<sup>5</sup> Nevertheless, some law faculty continue to use the Socratic method, maintaining that such questioning prepares students for the rigorous world of law practice, particularly in the courtroom.<sup>6</sup> It also teaches students to think through the various alternatives to an answer that the professor poses, which is difficult with the lecture method. Some professors also suggest that ‘reframing’ the Socratic method by using questioning that emphasizes practice skills keeps the ‘good’ about the Socratic method and updates this traditional approach to the kind of engagement that allows the mingling of doctrine and skills teaching.<sup>7</sup>

Another innovation which faculty are increasingly adopting in the U.S. legal curriculum is the integration of the skills curriculum. The MacCrate Report<sup>8</sup> (“MacCrate Report”) was the first comprehensive overview of U.S. legal education to highlight the importance of skills in legal education, although many law schools took time to adopt the MacCrate Report’s recommendations.

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1983-86). John Housman played Professor Kingsfield in both the film and the television series.

<sup>4</sup> *Legally Blonde*, 2001, DVD (Beverly Hills, Cal: Metro-Goldwyn-Mayer Distributing Corporation (MGM), 2001).

<sup>5</sup> See e.g. Orin S Kerr, “The Decline of the Socratic Method at Harvard” (1999) 78:1 Nebraska Law Review 113.

<sup>6</sup> Law professors in other countries use versions of the Socratic method, as well. See e.g. Lowell Bautista, “The Socratic Method as a Pedagogical Method in Legal Education” (2014) 14:1 University of Wollongong, Faculty of Law, Humanities and the Arts – Papers 81. However, most lawyers never enter the courtroom. The percentage might be as low as 20 percent.

<sup>7</sup> See Jamie R Abrams, “Reframing the Socratic Method” (2015) 64:4 Journal of Legal Education 562.

<sup>8</sup> Robert MacCrate et al, *Legal Education and Professional Development – An Educational Continuum*, (Chicago: American Bar Association, 1992) [“MacCrate Report”].

As one might expect, one outcome of the MacCrate Report and subsequent reports<sup>9</sup> was the call for the hiring of additional instructors to teach skills (clinical, legal research, and writing). From the MacCrate Report flowed requests, then demands, from these instructors as well as doctrinal colleagues for employment that tracked that of doctrinal faculty, including salaries and eventually tenure.<sup>10</sup>

Progress on many of these changes has been slow until relatively recently. Some schools decided to try some online learning programs and obtained permission from the American Bar Association (“ABA”), the only official U.S. accreditor for law schools,<sup>11</sup> to set up such programs. However, these programs

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<sup>9</sup> These reports include William Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (San Francisco: Jossey-Bass/Wiley, 2007) and Roy Stuckey et al, *Best Practices for Legal Education* (Place of publication unknown: Clinical Legal Education Association, 2007).

<sup>10</sup> See e.g. Bryan L Adamson et al, “The Status of Clinical Faculty in the Legal Academy: Report of the Task Force on the Status of Clinicians and the Legal Academy” (2012) 36:2 *Journal of the Legal Profession* 353; Minna J Kotkin, “Clinical Legal Education and the Replication of Hierarchy” (2019) 26:1 *Clinical Law Review* 287; and Kristen K Robbins & Amy Vorenberg, “Podia and Pens: Dismantling the Two-Track System for Legal Research and Writing Faculty” (2015) 31:1 *Columbia Journal of Gender and Law* 47. Tenure status and benefits for law library faculty is another issue. Although more and more law librarians hold dual degrees (JD and MLS), usually only the law library director holds a tenure track appointment. If another law librarian carries out teaching duties, that individual might only hold a courtesy faculty appointment. But see James G Milles, “Legal Education in Crisis, and Why Law Libraries Are Doomed” (2014) 106:4 *Law Library Journal* 507; and Carol A Parker, “The Need for Faculty Status and Uniform Tenure Requirements for Law Librarians” (2011) 103:1 *Law Library Journal* 7.

<sup>11</sup> The US Department of Education recognizes the ABA under US, *Code of Federal Regulations*, c 34, s 602 (2022). See also US Department of Education, “Accreditation in the United States” (27 October 2009) online: *ED Gov* <[www2.ed.gov/admins/finaid/accred/accreditation\\_pg5.html](http://www2.ed.gov/admins/finaid/accred/accreditation_pg5.html)> [US Department of Education, “Accreditation”].

were limited in terms of scope and content.<sup>12</sup> Prior to 2020, only one law school in the United States offered a fully online program, and the ABA did not accredit it, although a regional accreditor did so.<sup>13</sup> In 2021, the ABA has accredited nine hybrid (partly online, partly in-person) programs.<sup>14</sup> However, the traditional path for most law school graduates has been to acquire traditional skills, including some ‘practice ready’ skills,<sup>15</sup> with an eye to practicing law, after passing the bar exam. Passing the bar is a separate exercise for all U.S. law

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- <sup>12</sup> See e.g. the University of Alabama “LLM Program in Tax” (2022) online: <[www.law.ua.edu/llmdegrees/taxation/](http://www.law.ua.edu/llmdegrees/taxation/)>.
- <sup>13</sup> See “Concord Law School: The First Online Law School and One of the First to Be State Accredited” (2021), online: *Concord Law School* <[www.concordlawschool.edu/about/accreditation/](http://www.concordlawschool.edu/about/accreditation/)>.
- <sup>14</sup> “University of Dayton: The ABA-Approved Online Hybrid J.D. Program” (2021), online: *University of Dayton* <[requestinfo.onlinelaw.udayton.edu/index-d.html?experimentid=18583661935&ts=onlinelawsite&cl=prog\\_jd\\_cta](http://requestinfo.onlinelaw.udayton.edu/index-d.html?experimentid=18583661935&ts=onlinelawsite&cl=prog_jd_cta)>; “Loyola University: Weekend JD” (2021), online: *Loyola University (Chicago) School of Law* <[www.luc.edu/law/academics/degreeprograms/jurisdoctor/weekendjd/](http://www.luc.edu/law/academics/degreeprograms/jurisdoctor/weekendjd/)>; “Mitchell Hamline School of Law: Earn your J.D. from your Hometown” (2021), online: *Mitchell Hamline School of Law* <[mitchellhamline.edu/admission/intro/earn-your-j-d-from-your-hometown/](http://mitchellhamline.edu/admission/intro/earn-your-j-d-from-your-hometown/)>; “Seton Hall Law: Part-time Law Degree” (2021), online: *Seton Hall Law* <[law.shu.edu/part-time-jd-degree/index.cfm](http://law.shu.edu/part-time-jd-degree/index.cfm)>; “Southwestern Law School: Part-Time Evening J.D.” (2021), online: *Southwestern Law School* <[www.swlaw.edu/jd-llm-programs/part-time-evening-jd](http://www.swlaw.edu/jd-llm-programs/part-time-evening-jd)>; “Syracuse University: JDinteractive” (2021), online: *Syracuse University* <[jdinteractive.syr.edu/](http://jdinteractive.syr.edu/)>; “Touro College: FlexTime JD Program” (2018), online: *Touro College* <[www.tourolaw.edu/Academics/Flextime-JD-Program](http://www.tourolaw.edu/Academics/Flextime-JD-Program)>; “Sturm College of Law: Professional Part-Time JD Program” (2021) online: *Sturm College of Law* <[www.law.du.edu/academics/degrees-certificates/jd-degrees/professional-part-time-jd-program](http://www.law.du.edu/academics/degrees-certificates/jd-degrees/professional-part-time-jd-program)>; “University of New Hampshire: Hybrid Juris Doctor (J.D.)” (2021) online: *University of New Hampshire* <[law.unh.edu/HybridJD](http://law.unh.edu/HybridJD)>.
- <sup>15</sup> See e.g. American Bar Association, *2021-2022 Standards and Rules of Procedure for Approval of Law Schools*, Chicago: ABA, 2021, ch 6, at 303, [“ABA Standards”].

graduates, except in one jurisdiction.<sup>16</sup> Over a specific set of days, new law graduates take a closed book examination that tests their knowledge of doctrine and purports to test some other areas of law. To pass this examination, graduates enroll for an additional, expensive course of study.<sup>17</sup> They might also have to acquire other credentials, depending on the jurisdiction.<sup>18</sup>

However, the COVID-19 pandemic has highlighted the need to focus on (1) the lack of consensus in many of these areas; (2) the need to change; (3) the need to decide which, if any, of the changes the pandemic has forced on legal education are worthy of permanence; and (4) what, if anything, legal academia should do to respond to the changes the bar examiners seem unwilling to undertake permanently to respond to claims that the bar exam itself does not adequately act as a test of lawyer competency, at least in its current form. The pandemic has forced upon members of the legal profession the necessity of making changes to legal education, and in some cases, the legal profession itself.<sup>19</sup> Because of the possibility that new graduates might need temporary bar

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<sup>16</sup> See Stephanie Francis Ward, “Bar Exam Does Little to Ensure Attorney Competence, Say Lawyers in Diploma Privilege State” (21 April 2020), online: *ABA Journal* <[www.abajournal.com/web/article/bar-exam-does-little-to-ensure-attorney-competence-say-lawyers-in-diploma-privilege-state](http://www.abajournal.com/web/article/bar-exam-does-little-to-ensure-attorney-competence-say-lawyers-in-diploma-privilege-state)>.

<sup>17</sup> For the steps see *e.g.* Harvard Law School, “Taking the Bar Exam” (2021) online: *Harvard Law* <[hls.harvard.edu/dept/dos/taking-the-bar-exam/](http://hls.harvard.edu/dept/dos/taking-the-bar-exam/)>. The various requirements depend on the jurisdiction.

<sup>18</sup> These normally include a character and fitness clearance and background check and can require a passing grade on a second-year exam called the Multistate Professional Responsibility Examination (“MPRE”). See National Conference of Bar Examiners, “Comprehensive Guide to Bar Admission Requirements: Chart 6” (2021), online: *Bar Admission Guide-NCBE* <[reports.ncbex.org/comp-guide/charts/chart-6/](http://reports.ncbex.org/comp-guide/charts/chart-6/)>.

<sup>19</sup> While legal employment is not the focus of this article, the pandemic has brought focus to some employment issues in the legal profession. Specifically, women, who traditionally carry the burden of childcare, have had to make more sacrifices than men in terms of making decisions about working from home and teaching children who were also staying at home but learning online during the pandemic. Yet they had no childcare during work meetings held on Zoom, for example. This sort of conflict was necessarily a real problem for

privileges, the legal profession and legal academia focused for a time on whether recent graduates were practice ready, and, in turn, on whether legal education provided a practice ready curriculum, and whether law schools had the responsibility, in three years, to train students to enter the work world ready to practice. These questions raised in turn serious inquiries over the questions of what the traditional three-year law school experience should provide. If it cannot provide practice ready graduates, then what responsibility does the legal profession have to guide new graduates through the profession? What responsibilities do lawyers themselves have to prepare and continue their training? What responsibilities do employers and employees together have to address questions of work/life balance? The pandemic did not create these questions, but it has exacerbated the need to find answers, even if some members of the profession might prefer to try to return to the way we were pre-COVID-19.

The pandemic focused attention most immediately on the question of bar exam administration and temporary bar privileges. However, problems with bar exam administration led, fairly quickly, to more substantive questions about the value of the bar exam generally. Once concerns arose about the value of the bar exam, those concerns led to the justifications for the bar exam; that it tests competency to practice, at least at a fixed point in time, in a way that a law school diploma might not, that law school education itself might continue to need some examination and overhaul, and that the legal profession itself might need to engage in some thoughtful reflection about what it expects from all its practitioners.

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them. See Avi Stadler, “The Legal Profession’s Child Care Problem” (2 March 2021), online: *Esquire* <[esquiresolutions.com/the-legal-professions-child-care-problem/](https://esquiresolutions.com/the-legal-professions-child-care-problem/)>.

## II. The Bar Exam and the Diploma Privilege Prior to the COVID-19 Pandemic

According to a short article from the mid-1990s, we know very little about the history of the bar exam.<sup>20</sup> The ABA endorsed the credential of the bar exam in the 1920s.<sup>21</sup> After that decision, the popularity of the diploma privilege dropped precipitously. As of today, Wisconsin is the only U.S. state that currently maintains a permanent diploma privilege for its law school graduates. Many champions of the diploma privilege hold it up as an example of an alternative to the bar exam, which has now taken hold in every other jurisdiction. A lawyer may not enter the practice of law anywhere else except by passing a bar exam, and might well have to pass more than one, unless she can be admitted through reciprocity. Reciprocity might or might not be an available means of admission. Some states do not allow it at all.<sup>22</sup>

Defenders of the diploma privilege argue that, on the whole, it is as likely to measure the competence of new law school graduates as well as the bar exam. Over the years, members of the Wisconsin Bar and members of the faculties of the two Wisconsin law schools have both criticized and defended the state's diploma privilege, leading to changes in its formulation, particularly in the weighting of coursework as well as articulated concerns about costs to students and the public.<sup>23</sup>

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<sup>20</sup> Robert M Jarvis, "An Anecdotal History of the Bar Exam" (1996) 9:2 *Georgetown Journal of Legal Ethics* 359.

<sup>21</sup> Stuart Duhl, *The Bar Examiners' Handbook*, 3d (Madison, Wis: National Conference of Bar Examiners, 1991).

<sup>22</sup> For an extensive list of reciprocity rules (including admission on motion), see the charts that the NCBE provides, updated regularly, at National Conference of Bar Examiners, "Comprehensive Guide to Bar Admission Requirements" (2021), online: *NCBE* <[www.ncbex.org/publications/bar-admissions-guide/](http://www.ncbex.org/publications/bar-admissions-guide/)> [NCBE, "Comprehensive Guide"]. Louisiana does not offer reciprocity with any state because of the state's unique legal system.

<sup>23</sup> See generally Peter K Rofes, "Mandatory Obsolescence: The Thirty Credit Rule and the Wisconsin Supreme Court" (1999) 82:4 *Marquette Law Review* 787.

At least one University of Wisconsin Law School law professor, Paul Horwitz, has some criticisms to make of the diploma privilege, however. While he does not dispute the likelihood that it measures relative competence of in-state law school graduates, he suggests that it provides a relative market advantage for those graduates over out-of-state graduates, who still must pass the in-state bar in order to practice:

[r]ather, it largely serves to provide the in-state law schools with a competitive advantage in the market for law students who wish to practice in Wisconsin. A student from La Crosse who wants to practice in his hometown and who has offers from Marquette and from the University of Minnesota will have to think long and hard about whether going to the better-ranked school is worth it when going to Marquette will save him the hassle, cost, and uncertainty of the bar exam. It is no wonder that the Wisconsin law schools advertise Diploma Privilege as a benefit of attending their schools. It is a substantial one, especially as prospective law students tend to view the bar exam with unreasonable dread.<sup>24</sup>

Further, Horwitz points out that diploma privilege, which allows in-state law graduates to practice in the state but nowhere else, also acts as an automatic barrier to exit. That is, any Wisconsin state law graduate wishing to practice elsewhere must pass a bar exam in that other jurisdiction:<sup>25</sup>

[s]econdarily, we can view Diploma Privilege as encouraging the graduates of in-state schools to stay in state after they graduate. A UW graduate may be less likely to take a law job in Chicago over one in Madison if doing so means that he has to take and pass the Illinois bar exam. In that way, Diploma Privilege

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<sup>24</sup> Paul Horwitz, “A Skeptical Comment on the Wisconsin Diploma Privilege” (16 May 2020), online (blog): *PrawfsBlawg* <[prawfsblawg.blogs.com/prawfsblawg/2020/05/a-skeptical-comment-on-the-wisconsin-diploma-privilege.html](http://prawfsblawg.blogs.com/prawfsblawg/2020/05/a-skeptical-comment-on-the-wisconsin-diploma-privilege.html)>.

<sup>25</sup> Other states may provide reciprocal admission for Wisconsin diploma privilege graduates based on admission on motion and/or length of practice. See NCBE, “Comprehensive Guide”, *supra* note 22; and NCBE, “Chart 15: Admission on Motion – Legal Education and Reciprocity Requirements (2021)”, online: *NCBE* <[reports.ncbex.org/comp-guide/charts/chart-15/](http://reports.ncbex.org/comp-guide/charts/chart-15/)>.

probably increases the supply of Wisconsin lawyers—good for Wisconsin’s consumers of legal services, but probably not so good for Wisconsin lawyer salaries.<sup>26</sup>

One could point out, though, that diploma privilege is an advantage only for in-state law graduates, as he acknowledges. Some have argued that the bar exam in some states seems to act as a gatekeeper for in state law graduates as well.<sup>27</sup> For example, some states do not offer reciprocity admission (admission for members of the bar of other states), either because the state has a legal regime that is quite different from the norm,<sup>28</sup> or because many attorneys perceive the state as an attractive venue for practice.<sup>29</sup> However, New York, which is an obvious attractive venue, offers admission on motion in certain cases.<sup>30</sup>

Eliminating the bar exam and returning to a pattern of diploma privilege in multiple jurisdictions would raise a number of issues. Those who defend the bar exam as a measure of competence to practice law make the following arguments against return to the diploma privilege.

One argument that supporters of the current bar exam method make is that the present law school curriculum<sup>31</sup> in many law schools does not test ‘to bar

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<sup>26</sup> Horwitz, *supra* note 24.

<sup>27</sup> See William C Kidder, “The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification” (2004) 29:3 Law & Social Inquiry 547.

<sup>28</sup> Louisiana is the obvious example.

<sup>29</sup> California and Hawaii are examples.

<sup>30</sup> New York State Board of Law Examiners, “The New York State Board of Law Examiners: Admission Information: Reciprocity/Motion Information” (2021), online: *The New York State Board of Law Examiners* <[www.nybarexam.org/AOM/AdmissiononMotion.htm](http://www.nybarexam.org/AOM/AdmissiononMotion.htm)>.

<sup>31</sup> I use ‘the law school curriculum’ to mean law school curricula generally in most law schools in the country. In this article, I cannot address the question of general or specific differences in curricula in law schools. Discussion of the law school curriculum generally, or what should constitute the core curriculum, is beyond the scope of this article, and is long-standing and extensive but for some recent examples see Adam Lamparello, “The Integrated Law School Curriculum” (2016) 8:2 *Elon Law Review* 407; and Anthony Niedwiecki,

standards'. That is, it does not test the skills that bar exams do, and supporters of the present bar exams assume that bar examinations test lawyering skills adequately or well, and that what they test are skills that lawyers actually use. Further, they maintain that law school exams do not test lawyering skills.<sup>32</sup> Another point they make is that bar exam questions integrated issues, whereas law school exams limit themselves by course.<sup>33</sup>

The debate over whether the bar exam actually tests lawyer competence is decades old. Over the years, various groups have attempted to add components or make changes in order to verify that the exam actually does test competence, on the assumption that a state bar exam provides some uniformity for graduates that successful completion of three years at law schools that offer varying experiences might not.<sup>34</sup> California included a closed book portion of the bar exam in 1983.<sup>35</sup> In 1997, the National Conference of Bar Examiners ("NCBE") added the component called the Multistate Performance Test ("MPT"), for example,<sup>36</sup> in its own effort to test non-doctrinal skills.

All of these criticisms may well be valid. What they fail to recognize is that law school curricula and law school exams do not overlap or take the place of the bar exam for a reason; the bar exam intentionally serves a different purpose from law school training. If the bar exam did not exist, law school education and law school exams would fill that gap. Before the existence of bar exams, the

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"Law Schools and Learning Outcomes: Developing a Coherent, Cohesive, and Comprehensive Law School Curriculum" (2016) 64:3 Cleveland State Law Review 661.

<sup>32</sup> Denise Riebe, "A Bar Review for Law Schools: Getting Students on Board to Pass Their Bar Exams" (2007) 45:2 Brandeis Law Journal 269 at 279.

<sup>33</sup> *Ibid* at 273–77. Riebe discusses various arguments for and against the bar exam.

<sup>34</sup> Stephanie Francis Ward, "A Better Bar Exam? Law Profs Weigh in on Whether Test Accurately Measures Skills Required for Law Practice" (8 January 2020), online: *ABA Journal* <[www.abajournal.com/web/article/building-a-better-bar-exam](http://www.abajournal.com/web/article/building-a-better-bar-exam)>.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid*.

legal profession tested lawyer competency in other ways. It could find ways to test lawyer competency in ways other than through the bar exam.

In addition, bar exams test skills that lawyers do not actually use in practice. A multiple-choice question on a closed-book bar exam does not replicate real life conditions.<sup>37</sup> Asking examinees to choose ‘the best answer’ to a hypothetical situation will rarely, if ever, replicate a real-life situation. While in non-pandemic or non-emergency situations, most examinees could manage to get through multiple-choice sections of such bar exams. During the pandemic, when examinees were alone in a testing situation, systems that monitored such online exams put examinees at a disadvantage, leading to allegations that the examiners unfairly accused bar exam candidates of cheating.<sup>38</sup>

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<sup>37</sup> Andrea A Curcio, “A Better Bar: Why and How the Existing Bar Exam Should Change” (2002) 81:1 Nebraska Law Review 362 at 376.

<sup>38</sup> See Sam Skolnik, “Third of California Online Bar Exams Cited for Possible Cheating” (22 December 2020), online: *Bloomberg Law* <[news.bloomberglaw.com/business-and-practice/third-of-california-online-bar-exams-cited-for-possible-cheating](https://news.bloomberglaw.com/business-and-practice/third-of-california-online-bar-exams-cited-for-possible-cheating)>.

Further, these criticisms assume that the bar exam actually does test lawyer competency, which some critics of the bar exam dispute.<sup>39</sup> That the profession and the public worry about unqualified lawyers is perfectly understandable.<sup>40</sup>

This assumption is actually what critics of the bar exam, including many practicing attorneys, put in doubt when discussing the bar exam.<sup>41</sup> They argue that what bar exams test are not really practice skills. Bar exams primarily test doctrine,<sup>42</sup> and they do so under artificial conditions. They do not replicate

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<sup>39</sup> See *e.g.* Deborah L Rhode, “Institutionalizing Ethics” (1994) 44:2 Case Western Reserve Law Review 665 at 690:

[n]o showing has ever been made that performance either on bar exams or in law school correlates with performance in practice. Although it is reasonable to infer some relationship, it is not self-evident that an inflexible three-year educational program plus a general knowledge test offer the best screening program for many specialties. Nor do states’ widely varying exam cut-off scores and procedures for admitting out-of-state lawyers bear any demonstrated relationship to competence. The limited data available indicates that legal education and standardized tests neglect skills that surveyed lawyers find most important, while disproportionately excluding low income and non-white applicants. Although some jurisdictions have begun to require continuing legal education, existing requirements (of ungraded participation for a minimal number of hours) are unlikely to improve performance among those most in need of improvement.

In a later article Andrea Curcio makes the same point, quoting Cecil J Hunt, “Guests in Another’s House: An Analysis of Racially Disparate Bar Performance” (1996) 23:3 Florida State University Law Review 721 at 764. See Curcio, *supra* note 37 at 370:

[c]learly, in order for a bar examination to be a legitimate test of minimum competence to practice law, it must be rooted in a reasonable definition of the very quality it professes to measure. However, not only have bar examiners noticeably failed to articulate a reasonable definition, but they have also failed to enunciate any definition at all.

For an updated list of jurisdictions that require CLE hours and how they calculate those hours, see The American Bar Association, “Mandatory CLE” (2022) online: [ABA <americanbar.org/events-cle/mcle/>](http://americanbar.org/events-cle/mcle/).

<sup>40</sup> Curcio addresses the public’s concerns about lawyers and the bar exam’s failure to address them in “A Better Bar”, see Curcio, *ibid* at 383–86.

<sup>41</sup> Rhode, *supra* note 39 at 690.

<sup>42</sup> Curcio, *supra* note 37 at 373–83.

actual working conditions for attorneys, who would normally have time to look up doctrine, as one would expect them to do.

One could respond that, first, assuming that the law school curriculum tests material other than overall competency at a specific point in time, that is because law schools and bar examiners agree that to the extent that such testing is necessary, the bar exam serves that purpose.<sup>43</sup> If the bar exam did not exist, however, law schools could create a comprehensive mechanism to measure competency at the end of the three-year period of study, for example written exams to cover agreed-upon core courses and skills. Or, they could test competencies through a series of yearly examinations, which teach core competencies and skills. Still another method might be to test doctrinal competencies and skills at set periods through law school, or at graduation; the exams and results comprising a portfolio of the graduate's competencies and representing the graduate's practice readiness. That readiness would represent whatever criteria the accredited law schools and the accrediting agency agree are appropriate. I am not suggesting that such a portfolio of criteria would be easy to determine, but I suggest the schools and agency could devise one if they agree upon the core courses, which schools generally already agree upon given the shared curriculum, and the sorts of skills schools and various reports are already discussing as necessary for the 'practice ready' graduate.<sup>44</sup>

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<sup>43</sup> Note that another test, with which nearly the entire U.S. population is familiar, is the driving licensure test. We generally assume that it tests, at least minimally, competence to drive. However, that might not be true. Georgia's governor suspended driving tests in 2020, allowing people to obtain licenses without taking the tests. Although this decision might seem counter-intuitive, in that we assume that drivers' tests actually assure competency, at least one article discusses the lack of relationship between drivers' tests and competency. See Aaron Gordon, "Abolish the Driving Test" (15 June 2021) *VICE*.

<sup>44</sup> I am not discussing such an approach in this article. That would be for another publication. However, I am suggesting that if the legal profession wanted to pursue such approach, simply abandoning it because the bar exam already exists is not a sufficient reason to do so, if most of the legal profession comes to the conclusion that the bar exam doesn't already test for competency. Curcio also suggests other methods of training the law student and graduate, including

One scholar points out why legal education and bar exams have widely different goals:

[l]aw schools do not train students to become experts in "the law." Instead, for decades, law schools have trained students to "think like lawyers." The "law" changes dramatically over time, and it is often (perhaps almost always) ambiguous. The trick for lawyers is to become proficient at gathering and looking at specific facts, determining legal issues arising out of those facts, ascertaining the rules that might apply to those facts (which generally requires research and review of various legal authorities), and predicting, persuading, or prescribing for third parties (whether clients, judges, juries, opposing advocates, or contractual participants) how those rules should govern the situation at hand. That is why it takes months to teach first year law students contracts when the same subject matter is covered in a matter of a few hours in a bar exam class. Law school classes are not as focused on teaching students the acceptable substitutes for consideration or the mechanics of the current statute of frauds as are bar preparation courses. Of course, the class may cover those issues, but not in a "here are the rules" fashion. Instead, law school (and particularly the first year curriculum at most institutions) focuses on basic skills like spotting legal issues, understanding multiple sides of those issues, separating the relevant facts from those facts that are not outcome-determinative, and deriving legal rules from complicated and often ambiguous statutes, regulations, and judicial opinions. Considerations like the evolution of legal doctrine and how public policy and economic considerations impact the development of law are also important in most classes, as these considerations do come into play when lawyers act as counselors and advocates.<sup>45</sup>

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importing the Canadian model and or adopting an apprenticeship approach, in "A Better Bar", see Curcio, *supra* note 37 at 398–411.

<sup>45</sup> Carol Goforth, "Why the Bar Examination Fails to Raise the Bar" (2015) 42:1 Ohio Northern University Law Review 47 at 59.

### III. The Law School Curriculum and Its Position with Regard to Competencies Prior to the Pandemic

One of the defenses supporters of bar exams raise is that they test competencies of law school graduates in a uniform way. This argument presupposes that the bar exam also tests skills that the law school curriculum does not. In effect, the argument is that the bar exam, through essays and multiple-choice questions, tests doctrine, critical thinking, and other skills in a closed book setting that about 200 accredited law schools with varying curricula might not, given that those schools have generally settled on a set of core courses but different goals and audiences. The asserted purpose of a state bar exam is to set legal standards to protect the consumers of a particular jurisdiction. The purpose of a law school, whether private or public, is to serve the school's mission, which includes educating the students, serving the school's faculty, and seeing to the needs of alumni and community.<sup>46</sup>

U.S. law schools today generally share a minimal set of core standards, based on ABA requirements.<sup>47</sup> Bar exams test general areas of law; thus, law graduates tend to have studied roughly the same doctrine. However, to the extent that specific jurisdictions might also decide to test certain areas of law, they specify those areas, and many law students (but not all) will have decided at some point that they want to take the bar exam in those jurisdictions and will have taken specific courses that prepare them for the bar exam in those jurisdictions.<sup>48</sup>

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<sup>46</sup> Law schools generally post their mission statements on their websites or in their catalogs. See Irene Scharf and Vanessa Merton, "Table of Law School Mission Statements" (2016), online: *Scholarship Repository at the University of Massachusetts School of Law* <[scholarship.law.umassd.edu/cgi/viewcontent.cgi?article=1174&context=fac\\_pubs](http://scholarship.law.umassd.edu/cgi/viewcontent.cgi?article=1174&context=fac_pubs)>.

<sup>47</sup> See ABA Standards, *supra* note 15 at 301–303.

<sup>48</sup> The ABA requires law students to complete 83 credits in order to graduate. See *ibid* at 311. LSU Law Center requires as many as 94 credits. Other standards

If students have not taken a particular area tested on the bar exam they plan to take, they rely on the bar exam review course they take in preparation for that bar exam. The bar exam for a particular jurisdiction thus tests all the examinees on the same material regardless of where they earned their law degrees.<sup>49</sup> Because of the ‘gatekeeping function’ that bar exams provide and the different missions of the exam and the law school, there can be a mismatch between what students learn in law school and what the bar examiners expect them to produce on the exam.<sup>50</sup> Faculty at a number of law schools admit that they struggle with whether they have a primary or substantial responsibility to ‘teach to the bar’, or whether they should be helping students and graduates prepare for life in practice.<sup>51</sup>

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govern how many and under which circumstances students may transfer credits or earn credits at other institutions.

- <sup>49</sup> Bar examiner websites indicate the areas that the exam for that jurisdiction covers. See e.g. “The Florida Bar Exam” (28 August 2020), online: *Florida Board of Bar Examiners* <[www.floridabarexam.org/web/website.nsf/52286AE9AD5D845185257C07005C3FE1/125BA5AFD5EB7D2385257C0B0067E748](http://www.floridabarexam.org/web/website.nsf/52286AE9AD5D845185257C07005C3FE1/125BA5AFD5EB7D2385257C0B0067E748)>.
- <sup>50</sup> One of the more scrutinized aspects of the bar exam is the ‘cut score’, or the passing score, on the exam. Some jurisdictions have maintained a relatively high score, which critics say reflects a desire to prevent a high number of successful applicants rather than an accurate measure of competency. See Debra Cassens Weiss, “Several States Consider Lowering Cut Scores on Bar Exams, Making It Easier to Pass” (29 March 2021), online: *ABA Journal* <[www.abajournal.com/news/article/several-states-consider-lowering-cut-scores-on-bar-exam-making-it-easier-to-pass](http://www.abajournal.com/news/article/several-states-consider-lowering-cut-scores-on-bar-exam-making-it-easier-to-pass)>. California’s cut score is one that attracts particular attention. See Joan W Howarth, “The Case For a Uniform Cut Score” (2018) 42:1 *The Journal of the Legal Profession* 69.
- <sup>51</sup> Most faculty at the top tier (T14) law schools do not have this worry. They assume that their students will pass any bar, and they consider that their mission is to train elite lawyers, future judges, and future scholars. Again, the debate over what law schools should be teaching is beyond the scope of this article, but it is a current one and could be more prominent if jurisdictions move to eliminate the bar exam. If the bar exam were to disappear wholly or partially, what law schools teach might become an issue for law graduates at various schools who cross geographic boundaries. On teaching to the bar, see Emmeline Paulette Reeves, “Teaching to the Test: The Incorporation of

Other changes that schools might consider include a move to change the law school curriculum to reflect not just doctrinal learning but also specific practice ready skills that lawyers need. To be fair, law schools have been making these changes for some time, as a response to the MacCrate Report and other studies of the traditional law school curriculum.<sup>52</sup> The bar exam does not really test practice ready skills, except to the extent that they assist examinees in answering doctrinal questions.<sup>53</sup> That is, it does not test in-person client negotiation or interviewing, for example. However, employers generally agree that they want recent graduates to have these ‘practice ready skills’, if only because one can look up doctrine. The practice of law itself is open book. As we practice law, we do learn the law. It does save time when we know the doctrine, and we are wise to learn the doctrine we are likely to use routinely. But, unless we are actually in court, we normally have some time to look up the law before pronouncing on it. It might be more helpful to create a curriculum that develops (1) critical thinking skills; (2) legal research skills; (3) legal writing skills; (4) dispute resolution skills; (5) client interviewing and counseling skills; and (6) law management skills. The shift to providing these skills began shortly after the ABA issued the MacCrate Report, which lists and emphasizes the importance of these skills.<sup>54</sup> One section of the MacCrate Report lists a Statement of Skills

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Elements of Bar Preparation in Legal Education” (2015) 64:4 *The Journal of Legal Education* 645.

<sup>52</sup> A large bibliography exists of materials devoted to reactions to the MacCrate Report. See for example as an early response the frequently cited John Costonis, “The MacCrate Report: Of Loaves, Fishes, and the Legal Education” (1993) 43:2 *The Journal of Legal Education* 157. See also Russell Engler, “From 10 to 20: A Guide to Utilizing the MacCrate Report Over the Next Decade” (2003) 23:2 *Pace Law Review* 519.

<sup>53</sup> See Curcio, *supra* note 37 at 371. Curcio is less generous:

[e]ven if one accepts the contention that the bar exam should test only for basic skills unique to lawyers, the existing bar exam still fails to test for the ability to do legal research and to read and comprehend judicial opinions, statutes, and other sources of the law, all skills also unique and critical to lawyers.

<sup>54</sup> MacCrate Report, *supra* note 8.

and Values “desirable for practitioners to have”.<sup>55</sup> However, the Task Force which put together the MacCrate Report noted that it does not purport to present a definitive list of those skills and values. Instead, the Task Force hoped that the profession itself will begin the process of discussing which skills and values lawyers should have.<sup>56</sup>

The Task Force lists a number of skills as fundamental for law schools to provide in the curriculum.<sup>57</sup> It also lists the following values as fundamental for law school students to acquire during their training: (1) “provision of competent representation”; (2) “striving to promote justice, fairness and morality”; (3) “striving to improve the profession”; and (4) “professional self-development”.<sup>58</sup> Law schools frequently recommend these skills for students interested in pursuing a law degree.<sup>59</sup>

As one could expect, members of the academy and the bar had strong opinions about the MacCrate Report. In an article published in 2002, Russell Engler assessed the MacCrate Report’s effects as well as reactions to it.<sup>60</sup> He pointed out that among the critics were law school deans (worried about cost

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<sup>55</sup> *Ibid* at 123.

<sup>56</sup> *Ibid* at 123–24.

<sup>57</sup> *Ibid* at 138–40. The MacCrate Report lists the following as skills: “problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute-resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas”.

<sup>58</sup> *Ibid* at 140–41.

<sup>59</sup> See e.g. Michigan State University College of Law, “Core Skills for Law School” (2021), online: <[perma.cc/3AZA-VKCM](https://perma.cc/3AZA-VKCM)>; University of California, Berkeley “Law School — Skills for Law School” (2021), online: <[career.berkeley.edu/Law/LawSkills](https://career.berkeley.edu/Law/LawSkills)>. See also American Bar Association, “Legal Education & Admissions to the Bar. Pre-Law: Preparing for Law School” (2021), online: *ABA* <[www.americanbar.org/groups/legal\\_education/resources/pre\\_law/](https://www.americanbar.org/groups/legal_education/resources/pre_law/)>.

<sup>60</sup> Russell Engler, “The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow” (2002) 8:1 *The Clinical Law Review* 109.

and perceived critiques of the academic model), doctrinal faculty (worried about constraints on academic freedom), and, somewhat surprisingly, clinical teachers (concerned that externships and simulation courses might displace clinics, and legal research and writing teachers ).<sup>61</sup> Some critics focused on the MacCrate Report's failure to identify whether the skills and values were those that a graduating student should possess at the point of graduation or whether they were those that a lawyer should have the means to acquire at some point, yet unidentified, after graduation.<sup>62</sup>

In 2007, another report, "Educating Lawyers: Preparation for the Profession of Law", appeared.<sup>63</sup> In 2013, the Committee on the Professional Educational Continuum, Section on Legal Education and Admissions to the Bar, issued a report assessing the MacCrate Report's influence.<sup>64</sup> Both of these reports amplified the MacCrate Report's suggestions that legal education should prepare for change in the legal profession in order to address the need for practice-ready law graduates.

One cannot doubt, however, that the MacCrate Report, discussion of the MacCrate Report, follow-up reports, and discussion of those reports have engendered lively discussion of the traditional law school curriculum and of the bar exam, and whether the exam truly tests readiness to practice. The pandemic, and the changes that it forced upon bar examiners to modify or eliminate the exam temporarily, have further focused attention on it as the last hurdle that

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<sup>61</sup> *Ibid* at 119.

<sup>62</sup> Jonathan Rose, "The MacCrate Report's Restatement of Legal Education: The Need for Reflection and Horse Sense" (1994) 44:4 *The Journal of Legal Education* 548 at 556–57.

<sup>63</sup> Sullivan, *supra* note 9.

<sup>64</sup> Dean Mary Lu Bilek et al, "Twenty Years After the MacCrate Report: A Review of the Current State of the Legal Education Continuum and the Challenges Facing the Academy, Bar, and Judiciary" (12 March 2013) *American Bar Association*.

would-be lawyers must clear in their initial search for admission to the bar in any jurisdiction in the United States.<sup>65</sup>

## IV. The Effects of the Pandemic

### A. The Impact of COVID-19 on In-Person Legal Education and Bar Exams

Law schools all over the United States shut down quite suddenly because of the rapid and unexpected spread of COVID-19, just as they did around the world.<sup>66</sup> Like their counterparts everywhere, U.S. law school administrators, faculty, staff, and students moved from the familiar in-person environment to an online environment, for which nearly all had some but not complete preparation.<sup>67</sup>

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<sup>65</sup> Again, the only exception is Wisconsin, and only for Wisconsin law school graduates.

<sup>66</sup> Zena Olijnyk, “Law Schools Adjust As COVID-19 Shifts Classes Online” (10 December 2020) *Canadian Lawyer Magazine*.

<sup>67</sup> Assessments and critiques of the types of online techniques that faculty decided to use began almost immediately, even though these faculty had little time to select such techniques and tools, and almost no training in them. See *e.g.* Alanna Gillis & Laura M Krull, “COVID-19 Remote Learning Transition in Spring 2020: Class Structures, Student Perceptions, and Inequality in College Courses” (2020) 48:4 *Teaching Sociology* 283.

Law schools, unlike other schools, have relatively few educational objectives that require in-person learning and performance. While in-person learning is preferable, faculty, staff, and students can adapt most types of classes to remote learning if they need to. Clinical programs and externships tend to be the exceptions. Some law faculty have begun to share their pedagogical techniques for making the most of remote teaching and technology. See *e.g.* Columbia Law School, “Socratic Zooming: Faculty Weigh In on Teaching Remotely” (27 April 2020), online: *Columbia Law School* <[www.law.columbia.edu/news/archive/socratic-zooming-faculty-weigh-teaching-remotely](http://www.law.columbia.edu/news/archive/socratic-zooming-faculty-weigh-teaching-remotely)>. Some faculty point out some positive attributes of remote learning, including the opportunity to have students participate in teaching and prepare hypotheticals outside of class. Note that faculty could have and could now use these techniques in traditional (in-person) classes, as well.

Film, dance, photography, and health (dentistry, medicine) are examples of educational programs that had more difficulty making the transition to remote

Although some U.S. law schools had a somewhat robust online presence because they had been developing online programs for some time,<sup>68</sup> even those schools struggled to expand their entire program in a few days to accommodate the demands of the spring 2020 semester.<sup>69</sup> In addition, the ABA, the accrediting agency which the U.S. Department of Education recognizes as the only one to accredit U.S. law schools, had to make decisions swiftly about its existing limitations on remote learning in order to make certain that law schools teaching through Zoom or another remote method<sup>70</sup> did not inadvertently put their students at risk of losing credit for those courses and themselves at risk of losing accreditation. The then current standard, ABA Standard 306, allowed accredited law schools to offer up to one-third of their credits online.<sup>71</sup>

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learning. See Lilah Burke, “The Big Transition” (31 March 2020) *Inside Higher Education*. What works more effectively for the student can depend on the goals of the student, the instructor, and the program. See Miranda Cyr, “Online vs In-Person Classes” (2021) *College Times*.

<sup>68</sup> A number of US law schools offer advanced degrees online. For example, the University of Alabama School of Law has offered an online LLM in tax for a number of years. See University of Alabama, “Online LLM Concentration in Taxation” (2021), online: *The University of Alabama* <[www.law.ua.edu/llmdegrees/taxation/](http://www.law.ua.edu/llmdegrees/taxation/)>.

<sup>69</sup> The US Department of Education recognizes the ABA under US, *Code of Federal Regulations*, c 34, s 602 (2022). See also US Department of Education, “Accreditation”, *supra* note 11.

<sup>70</sup> Note that law schools, as well as universities, were already discussing remote learning and asynchronous learning prior to the pandemic. Much of the discussion involved the ‘flipped classroom’. See *e.g.* William R Slomanson, “Blended Learning: A Flipped Classroom Experiment” (2015) 64:1 *Journal of Legal Education* 93.

<sup>71</sup> ABA Standards, *supra* note 15 at 306:

[d]istance Education.

- (a) A law school may offer credit toward the J.D. degree for study offered through distance education consistent with the provisions of this Standard and Interpretations of this Standard. Such credit shall be awarded only if the academic content, the method of course delivery, and the method of evaluating student performance are approved as part of the school’s regular curriculum approval process.

The ABA issued a guidance memo in February 2020 regarding emergencies and disasters that served as a precursor to its later decisions regarding Standard 306.<sup>72</sup> In the memo, the ABA noted that law schools could use distance learning:

as a good solution to emergencies or disasters that make the law school facilities unavailable or make it difficult or impossible for students to get to the law school. A law school that explores that way of delivering its J.D. program to accommodate students in response to an emergency or disaster must consider

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- (b) Distance education is an educational process characterized by the separation, in time or place, between instructor and student. It includes courses offered principally by means of:
    - (1) technological transmission, including Internet, open broadcast, closed circuit, cable, microwave, or satellite transmission;
    - (2) audio or computer referencing;
    - (3) video cassettes or discs; or
    - (4) correspondence.
  - (c) A law school may award credit for distance education and may count that credit toward the 45,000 minutes of instruction required by Standard 304(b) if:
    - (1) there is ample interaction with the instructor and other students both inside and outside the formal structure of the course throughout its duration; and
    - (2) there is ample monitoring of student effort and accomplishment as the course progresses.
  - (d) A law school shall not grant a student more than four credit hours in any term, nor more than a total of 12 credit hours, toward the J.D. degree for courses qualifying under this Standard.
  - (e) No student shall enroll in courses qualifying for credit under this Standard until that student has completed instruction equivalent to 28 credit hours toward the J.D. degree.
  - (f) No credit otherwise may be given toward the J.D. degree for any distance education course.

<sup>72</sup> See American Bar Association, “Managing Director’s Guidance Memo – Emergencies and Disasters February 2020” (2020), online (pdf): *ABA* <[www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_ro\\_the\\_bar/20-feb-guidance-on-disasters-and-emergencies.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_ro_the_bar/20-feb-guidance-on-disasters-and-emergencies.pdf)>.

whether the distance learning is appropriate for that course, whether the course was designed for or can easily be accommodated to that method or delivery, whether the faculty member has the experience and training needed to deliver a distance education course meeting the requirements of the Standards, whether the school has the technological capacity (in general and in the context of the disaster or emergency) to support that form of instruction, and whether students have or can be provided with the technology needed to access the course. Simply moving a classroom-based course to a video conference call or to a school's learning management system that supports other courses may be relatively easy, but unless factors such as those set out above have been considered, may not be an appropriate accommodation compared to, for example, adding extra days to the term when a regular schedule can be resumed.<sup>73</sup>

This memo offered guidance to schools facing temporary disruptions such as those caused by major winter storms or hurricanes. Those disruptions normally clear up in a few days or weeks.<sup>74</sup> Once it became clear that the

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<sup>73</sup> *Ibid.*

<sup>74</sup> Note, however, that Hurricane Katrina (2005) forced the New Orleans law schools, Tulane and Loyola, to close for the fall semester 2005; many faculty and students relocated from New Orleans for that semester to other parts of Louisiana or the country. The University of Houston Law Center took in most, if not all, Loyola students, although some relocated to LSU Law Center and Southern Law Center. Tulane Law students went to a number of law schools, including the University of California, Berkeley, School of Law (then called Boalt Hall), Boston University Law School, and various other law schools in California.

See "Hurricane Katrina: 20 Tulane Law Students Start Classes at Boalt" (7 September 2005), online: *Berkeley Law* <[www.law.berkeley.edu/article/hurricane-katrina-20-tulane-law-students-start-classes-at-boalt/](http://www.law.berkeley.edu/article/hurricane-katrina-20-tulane-law-students-start-classes-at-boalt/)>; Rebecca Lipchitz, "More Than 200 Tulane Students Register at BU" (8 September 2005), online: *BU Today* <[www.bu.edu/articles/2005/more-than-200-tulane-students-register-at-bu/](http://www.bu.edu/articles/2005/more-than-200-tulane-students-register-at-bu/)>; Diane Curtis, "Back to School at Tulane Law" (February 2006), online: *California Bar Journal* <[archive.calbar.ca.gov/archive/Archive.aspx?articleid=73755&categoryid=73746](http://archive.calbar.ca.gov/archive/Archive.aspx?articleid=73755&categoryid=73746)>

coronavirus pandemic would cause major disruptions in law school scheduling across the United States for months, the ABA revisited its distance learning guidelines. At its summer 2020 meeting, the ABA deleted Standard 306 and merged it with Standard 105.<sup>75</sup> It also changed the language of Rule 2, which permits the Council to “grant or deny applications for variances” to law schools, which the ABA accredits.<sup>76</sup>

In parallel, the NCBE moved to issue guidance to the various jurisdictions administering bar exams across the United States.<sup>77</sup> It issued a White Paper in April 2020, which looked at the possibilities open to 2020 law school graduates who could not take the July bar exam in-person.<sup>78</sup>

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&month=2&year=2006> (listing other schools which took in Tulane Law students including Stanford and UCLA).

For more about the effects of Hurricane Katrina on Loyola Law School (New Orleans), see Brian Huddleston, “A Semester in Exile; Experiences and Lessons Learned During Loyola University New Orleans Fall 2005 Hurricane Katrina Relocation” (2007) 57:3 *Journal of Legal Education* 319.

<sup>75</sup> See Stephanie Francis Ward, “Law Schools Should Have Flexibility In Responding To “Extraordinary Circumstances,” ABA House of Delegates Says” (3 August 2020), online: *ABA Journal* <[www.abajournal.com/news/article/various-legal-ed-proposals-approved-by-aba-house-of-delegates](http://www.abajournal.com/news/article/various-legal-ed-proposals-approved-by-aba-house-of-delegates)>. For the text of the new Standard 105, see ABA Standards, *supra* note 15 at 7.

<sup>76</sup> ABA Standards, *supra* note 15 at 51.

<sup>77</sup> As it indicates on its website, the staff of the NCBE:

[d]evelop and produce the licensing tests used by most US jurisdictions for admission to the bar: the Multistate Bar Examination (MBE), the Multistate Essay Examination (MEE), and the Multistate Performance Test (MPT); coordinate the Uniform Bar Examination (UBE), which results in score portability; develop the Multistate Professional Responsibility Examination (MPRE) required for admission to the bar by most US jurisdictions; score the MBE and the MPRE and report scores to the jurisdictions.

This is in addition to a range of other services provided by the NCBE. See National Conference of Bar Examiners, “About” (2021), online: *NCBE* <[www.ncbex.org/about/](http://www.ncbex.org/about/)>.

<sup>78</sup> See National Conference of Bar Examiners, “Bar Admissions During the COVID-19 Pandemic: Evaluating Options for the Class of 2020” (9 April

Several scholars moved to offer ways to assess possible responses to administration of the bar exam in a pandemic, as well:

[m]edical experts advise that at least some of these restraints will continue for 18 months or more—until a vaccine is developed, tested, and administered widely. It is possible that localities will be able to lift some of these restrictions (such as lockdowns and school closures) intermittently during those months, but other restraints (social distancing, limits on large gatherings) are likely to continue for a year or more.

Under these conditions, jurisdictions will not be able to administer the July 2020 bar exam in the usual manner. Even if some of the most rigorous restrictions have been lifted by July 28, prohibitions on large gatherings are likely to remain. Attempting to administer the bar exam to hundreds of test takers in a single room would endanger the test takers, staff administering the exam, and the public health. The variation in jurisdictional outbreaks and public health responses may also compromise the ability to set a single test date across the country.

At the same time, it is essential to continue licensing new lawyers. Each year, more than 24,000 graduates of ABA-accredited law schools begin jobs that require bar admission. The legal system depends on this yearly influx to maintain client service. The COVID-19 crisis, moreover, will dramatically increase the need for legal services, especially among those who can least afford those services. We cannot reduce entry to the profession at a time when client demand will be at an all-time high.<sup>79</sup>

The paper listed a number of options for bar examiners, most of which many jurisdictions adopted in some fashion: (1) postponement; (2) online exams; (3) small-group exam administration; (4) emergency diploma privilege; (5) emergency diploma privilege-plus (diploma privilege plus completion of some

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2020), online (pdf): *NCBE* <[thebarexaminer.ncbex.org/wp-content/uploads/Bar-Admissions-During-the-COVID-19-Pandemic\\_NCBE-white-paper.pdf](https://thebarexaminer.ncbex.org/wp-content/uploads/Bar-Admissions-During-the-COVID-19-Pandemic_NCBE-white-paper.pdf)>.

<sup>79</sup> Claudia Angelos et al, “The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action” (2020) 1:1 *Scholarly Works* 1284.

additional credentials); and (6) supervised practice.<sup>80</sup> In particular, the authors of the paper pointed out that supervised practice, the sixth option, could allow graduates from any state to practice across state lines.<sup>81</sup> These options include types of credentialing that put more emphasis on legal education, including skills acquired before graduation, and training acquired after graduation, and less on the bar exam credential. Thinking about relying less on the bar exam and its associated requirements<sup>82</sup> as the ultimate signifier of readiness for practice had entered the debate.

Quite naturally, state bar examiners and state supreme courts, responsible for administering bar exams and admitting new attorneys, did not want to overreact to the possibility that the virus was more out of control, as it ultimately turned out to be. In the months of March, April, and May, institutions and law schools wanted to take measures to prepare for the July bar exam period, and then see what follow-up, if any, might be necessary for the rest of the year. Early changes in some states included preparations to administer the bar at additional locations, thus cutting down on the possibility that many hundreds of candidates would be exposed in large venues and hotels as they stayed overnight for a traditionally multi-day exam.<sup>83</sup> As the extreme situation became clear, however, some bar examiners began to understand that cancelling or radically changing the nature of the administration of the bar exam were the only options to a traditional in-person bar exam.

Louisiana was the first state to cancel both in-person and online bar exams. On July 15, 2020, it canceled its modified one-day exam, which it had planned to administer on July 27.<sup>84</sup> It had already changed its traditional three-day exam

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<sup>80</sup> *Ibid* at 3–7.

<sup>81</sup> *Ibid* at 7.

<sup>82</sup> For example, the character and fitness examination.

<sup>83</sup> See e.g. Trina S Vincent, “Louisiana Court Update” (8 May 2020) *Louisiana Supreme Court News*.

<sup>84</sup> See Dana DiPiazza, “Louisiana Bar Exam Canceled Due to Increase in COVID-19 Cases Statewide” (15 July 2020) *WBRZ*. On September 24, 2020, the NCBE provided an updated list of canceled, remote, and in-person bar

to a one-day format; it abandoned that exam and offered a type of diploma privilege to graduates of the four Louisiana law schools instead.<sup>85</sup> The Court noted that it would admit otherwise “qualified candidates” if they completed 25 hours of continuing legal education and the Louisiana State Bar Association’s mentoring program by the end of December 2020.<sup>86</sup> Other states followed suit. Delaware cancelled its exam on July 24 and allowed 2020 graduates to practice under temporary licenses, with certain limitations.<sup>87</sup> Other states rescheduled their exams and moved to administer them online.<sup>88</sup> Florida offered its graduates the option of practicing under supervision<sup>89</sup> or taking the bar exam

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exam administrations by jurisdictions, and those which had refused or accepted requests for diploma privilege. See National Conference of Bar Examiners, “July 2020 Bar Exam: Jurisdiction Information” (24 September 2020), online: *NCBE* <[www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/](http://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/)> [NCBE, “July 2020”].

- <sup>85</sup> See US, Supreme Court of Louisiana, *Emergency Order* (By the Court, 22 July 2020), online: *LASC* <[www.lasc.org/COVID19/Orders/2020-07-22\\_LASC\\_BarExam.pdf](http://www.lasc.org/COVID19/Orders/2020-07-22_LASC_BarExam.pdf)>. The four Louisiana law schools are Louisiana State University Law School, Loyola University Law School, New Orleans, Southern University Law Center, and Tulane University School of Law. Washington, Utah, and Oregon had granted emergency diploma privileges in June. See Stephanie Francis Ward, “Oregon Is Third State To Grant Diploma Privilege, While Tennessee Cancels Its July UBE” (30 June 2020), online: *ABA Journal* <[www.abajournal.com/news/article/third-state-agrees-to-temporary-diploma-privilege-with-some-restrictions](http://www.abajournal.com/news/article/third-state-agrees-to-temporary-diploma-privilege-with-some-restrictions)>.
- <sup>86</sup> See US, Supreme Court of Louisiana, Press Release, “Louisiana Supreme Court Announcement Regarding 2020 Bar Examination” (22 July 2020), online: *Louisiana Supreme Court* <[www.lascba.org/news.aspx#:~:text=The%20Louisiana%20Supreme%20Court%20\(the,24%2C%202020%20has%20been%20cancelled.>](http://www.lascba.org/news.aspx#:~:text=The%20Louisiana%20Supreme%20Court%20(the,24%2C%202020%20has%20been%20cancelled.>)>.
- <sup>87</sup> US, Supreme Court of Delaware, *In Re Certified Limited Practice Privilege For 2020 Delaware Bar Applicants* (By the Court, 12 August 2020), online: <[courts.delaware.gov/rules/pdf/OrderCertifiedLimitedPracticePrivilege2020.pdf](http://courts.delaware.gov/rules/pdf/OrderCertifiedLimitedPracticePrivilege2020.pdf)>.
- <sup>88</sup> See NCBE, “July 2020”, *supra* note 84.
- <sup>89</sup> US, Supreme Court of Florida, *In Re: Covid-19 Emergency Measures Relating to the 2020 Bar Applicants—Creation of the Temporary Supervised Practice Program* (No. AOSC20-80) (By the Court, 24 August 2020), online:

online.<sup>90</sup> Other jurisdictions created other variations, but some states offered the traditional in-person exam.<sup>91</sup> Overall, law schools seem to have adjusted quickly, and fairly well, to pandemic challenges. Although online teaching is not the preferred environment, legal academics understood quite early that they needed to provide a continuous learning experience for their students, and they provided it within days of the decision to close down campuses in the spring of 2020.<sup>92</sup> However, bar examiners delayed decisions, repeatedly made changes, and left examinees with little certainty during the period from May through the fall.<sup>93</sup> As a result, thousands of law graduates failed to take the bar exam during the period as:

[t]he National Conference of Bar Examiners reports that about 38,000 candidates took one of the exams that states offered between July and October 2020. But 46,370 candidates took the July 2019 bar exam. Law schools conferred more JDs in 2020 than in 2019. So why did the number of bar takers plunge by almost one-fifth? Some graduates secured licenses through pandemic-based diploma privileges or supervised practice, but those numbers were small. Most of the missing bar takers are qualified candidates who could not overcome the obstacles that the pandemic and bar examiners placed in their way.<sup>94</sup>

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<[www.floridasupremecourt.org/content/download/643402/file/AOSC20-80.pdf](http://www.floridasupremecourt.org/content/download/643402/file/AOSC20-80.pdf)>.

<sup>90</sup> US, Supreme Court of Florida, “Florida Bar Exam Rescheduled for October 13th” (26 August 2020), online: *Florida Supreme Court* <[www.floridasupremecourt.org/News-Media/Court-News/Florida-Bar-Exam-rescheduled-for-October-13?\\_ga=2.209456978.1563396964.1598530659-2114326372.1598530655](http://www.floridasupremecourt.org/News-Media/Court-News/Florida-Bar-Exam-rescheduled-for-October-13?_ga=2.209456978.1563396964.1598530659-2114326372.1598530655)>.

<sup>91</sup> See NCBE, “July 2020”, *supra* note 84.

<sup>92</sup> Deborah Jones Merritt et al, “Pandemic Bar Exams Left Many Aspiring Lawyers Behind” (6 January 2021) *Bloomberg Daily Tax Report*.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

The NCBE did not indicate whether these potential candidates simply delayed sitting for the exam or abandoned plans altogether.<sup>95</sup>

The COVID-19 pandemic re-introduced the idea of using diploma privilege (albeit temporarily) to allow spring 2020 law graduates to practice law because of the recognized difficulty of administering in-person or online bar exams. It also brought into focus arguments about the efficacy and usefulness of the exam as a measure of competency.

## **B. Reactions of Some Spring 2020 Law School Graduates**

Recent graduates began to analyze the impact of COVID-19 on the delay of bar exam administrations quite early. Dillon Harris, then working at the Prince Law Offices, Bechtelsville, PA,<sup>96</sup> described the problems of young graduates attempting to qualify as lawyers in one jurisdiction and transfer passing scores to another jurisdiction that does not offer reciprocity for part or all of the first jurisdiction's exam.<sup>97</sup> In a second blog post, he described the emerging movement toward granting diploma privilege and made clear that he, like other recent graduates, thought this option was a good option given the disarray the pandemic had caused.<sup>98</sup>

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<sup>95</sup> *Ibid.*

<sup>96</sup> See Prince Law Offices PC (2021), online: *Prince Law Offices* <[www.princelaw.com/](http://www.princelaw.com/)>.

<sup>97</sup> Dillon Harris, "How COVID-19 Has Impacted New Attorney Licensing In PA" (25 June 2020), online: *Prince Law Offices Blog* <[blog.princelaw.com/2020/06/25/how-covid-19-has-impacted-new-attorney-licensing-in-pa/](http://blog.princelaw.com/2020/06/25/how-covid-19-has-impacted-new-attorney-licensing-in-pa/)>.

<sup>98</sup> Dillon Harris, "Impact of COVID-19 on New Attorney Licensing Part 2: Diploma Privilege" (2 August 2020), online: *Prince Law Offices Blog* <[blog.princelaw.com/2020/08/02/impact-of-covid-19-on-new-attorney-licensing-part-2-diploma-privilege/](http://blog.princelaw.com/2020/08/02/impact-of-covid-19-on-new-attorney-licensing-part-2-diploma-privilege/)>.

### C. Responses from Employers, Summer 2020

Legal employers responded to the pandemic by shifting to work from home and moving procedures online and, in particular, taking seriously the situation of recent law school graduates who had planned to take the July 2020 bar exam and who were now facing uncertainty. Generally, law firms, agencies, judges, and other employers for whom law licensure is the entry credential for a new hire give their new law graduates one chance to pass the bar exam. Normally, that chance comes with the first administration of the bar exam after new employees graduate. Many spring 2020 law graduates found that the pandemic disrupted their plans to take the July bar exam, and possibly administrations after July.

Understanding that incoming hires would be unable to take the bar exam prior to beginning work, beginning in the summer of 2020 a number of law firms made adjustments in their expectations with regard to when first year associates could take the bar exam. Depending on the jurisdiction, some firms initially relied on their states' Supreme Court guidance to make decisions. A number of firms shortened their summer clerkships. For example, Akin Gump Strauss Hauer & Feld cut its summer associate program from ten to five weeks and converted it to a remote program. It also paid associates for the entire originally scheduled ten-week program and indicated that it expected the participants would receive offers to return, either as summer associates the next year or as first year associates on graduation.<sup>99</sup> Other firms, such as Ropes & Gray and Schulte, Roth & Zabel, made equally generous arrangements.<sup>100</sup> Some firms, such as Thomson Hine, decided to push back the beginning of their summer associate program because they wanted to preserve an in-person program.<sup>101</sup> Such firms also made clear the situation was still evolving and they

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<sup>99</sup> ALM Staff, "Summer Associate Programs and COVID-19: How Law Firms Are Responding" (20 May 2020) *The Recorder*.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

wanted to see how it proceeded before making final plans for the summer.<sup>102</sup> Some firms continued to prefer bar licensure over diploma privilege, however, which put pressure on new graduates to take the bar exam, even if the local jurisdiction had offered the diploma privilege alternative.<sup>103</sup>

However, even by the end of July 2020, when many law firms had made offers to new law graduates, things were still chaotic because so many states had delayed or cancelled bar exams,<sup>104</sup> or substituted some kind of temporary diploma privilege to bridge the gap. On September 24, 2020, the NCBE provided an updated list of canceled, remote, and in-person bar exam administrations by jurisdictions, and those which had refused or accepted requests for diploma privilege.<sup>105</sup>

As the pandemic continued, various jurisdictions continued to issue delays or cancellations for their intended in-person exams. Others moved to administer online exams. Many of the online examinations have received criticism, particularly for technical glitches. Some test takers alleged that the first online

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<sup>102</sup> *Ibid.*

<sup>103</sup> Caroline Spiezio, “Despite Diploma Privilege in WA, Some Firms Want Grads to Take Bar Exam” (22 June 2020) *Reuters*.

<sup>104</sup> Louisiana was the first state to cancel both in-person and online bar exams. On July 15, 2020, it canceled its modified one-day exam, which it had planned to administer on July 27. See DiPiazza, *supra* note 84. On September 24, 2020, the NCBE provided an updated list of canceled, remote, and in-person bar exam administrations by jurisdictions, and those which had refused or accepted requests for diploma privilege. See NCBE, “July 2020”, *supra* note 84.

<sup>105</sup> See DiPiazza, *supra* note 84.

The present head of the NCBE, Judith Gundersen, has come in for a fair amount of criticism because, like her immediate predecessor, Erika Moeser, she is a graduate of a Wisconsin law school and has never taken a bar exam. See Paul Caron, “Queen of the Multistate Bar Exam Bids Adieu” (20 August 2017), online (blog): *TaxProfBlog* <[taxprof.typepad.com/taxprof\\_blog/2017/08/queen-of-the-multistate-bar-exam-bids-adieu.html](http://taxprof.typepad.com/taxprof_blog/2017/08/queen-of-the-multistate-bar-exam-bids-adieu.html)>; Henry Greenstein, “The Bar Exam and Its Impact on the Legal Business” (17 February 2021), online: *National Center for Business Journalism* <[businessjournalism.org/2021/02/the-bar-exam-and-its-impact-on-the-legal-business/](http://businessjournalism.org/2021/02/the-bar-exam-and-its-impact-on-the-legal-business/)>.

examination, in October 2020, presented problems during the second day of administration.<sup>106</sup> One candidate, who took the New York state bar exam, said he encountered repeated software crashes that day and believes that ExamSoft, the company providing the software, expected the problems, which the company denies.<sup>107</sup> Another issue that developed over the months that bar examiners administered bar exams online was the allegation that some candidates cheated on the exam. This allegation arose from the way that the software monitors candidates' presence during the exam. Briefly, candidates must ensure that they remain within strict view of their computer webcams; straying outside triggers alerts.<sup>108</sup> Candidates reported being unable, for example, to take bathroom breaks or attend to emergencies in private during the exam period.<sup>109</sup> In addition, the software uses facial recognition technology and tends to misidentify people of color, also triggering cheating allegations.<sup>110</sup>

Examinees from the July 2021 bar exam also reported problems, including “technical failures” and “blank screens”.<sup>111</sup> Many bar exam takers also reported frustration with a lack of response from ExamSoft, the company providing the software and testing.<sup>112</sup> The response from the NCBE was also interesting. “We

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<sup>106</sup> Stephanie Francis Ward, “Amid Claims That Online Bar Exam Went Well, Some Test-Takers Have a Different View” (20 October 2020), online: *ABA Journal* <[www.abajournal.com/web/article/amid-claims-that-online-bar-exam-went-well-some-test-takers-have-a-different-view](http://www.abajournal.com/web/article/amid-claims-that-online-bar-exam-went-well-some-test-takers-have-a-different-view)>.

<sup>107</sup> *Ibid.*

<sup>108</sup> Sam Skolnik & Jake Holland, “Cheating Scandal Aside, New Bar Exam Looks a Lot Like Old One” (1 February 2021) *Bloomberg Law* [Skolnik & Holland, “Cheating Scandal”].

<sup>109</sup> Sam Skolnik, “October Online Bar Exams Spark Technology, Privacy Concerns” (18 August 2020) *Bloomberg Law*.

<sup>110</sup> Skolnik & Holland, “Cheating Scandal”, *supra* note 108.

<sup>111</sup> Kathryn Tucker, “Remote Bar Examinees Report Blank Screens, Lost Time, Panic, and ‘Looking Death in the Eye’” (28 July 2021), online: *Law.com* <[www.law.com/2021/07/28/remote-bar-examinees-report-blank-screens-lost-time-panic-and-looking-death-in-the-eye/?sreturn=20220225191115](http://www.law.com/2021/07/28/remote-bar-examinees-report-blank-screens-lost-time-panic-and-looking-death-in-the-eye/?sreturn=20220225191115)>.

<sup>112</sup> *Ibid.*

are aware of the technical issues some examinees faced during today's administration", the group said in a Twitter post.<sup>113</sup> They continued, "[w]hile NCBE does not administer the exam, we are communicating with ExamSoft to seek solutions for those affected".<sup>114</sup>

The NCBE advised examinees to contact ExamSoft for problems with software and their jurisdictions for issues relating to "lost testing time",<sup>115</sup> although examinees might not be able to tell how and whether the latter issue correlated to the former.

As confusion and criticism over bar exam administration continued, the movement to dispense with the bar exam altogether and return to diploma privilege began to take hold. In the summer of 2020, a group called United For Diploma Privilege<sup>116</sup> asked a New York state appellate court to allow a hearing over allowing diploma privilege rather than the scheduled bar exam.<sup>117</sup>

On June 1, 2021, the NCBE announced that it expected state bar examiners to return to the practice of in-person bar exams in February 2022.<sup>118</sup> The NCBE noted that, "[t]he July 2021 bar exam is expected to be the last that includes a remote testing option; 29 jurisdictions plan to administer that exam remotely,

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<sup>113</sup> NCBE, "We are aware of the technical issues some examinees faced during today's administration. While NCBE does not administer the exam, we are communicating with ExamSoft to seek solutions for those affected" (27 July 2021 at 5:07pm), online: *Twitter* <[twitter.com/NCBEX/status/1420174150975463424?ctx=HHwWgJCtwbW3vLUnAAAA](https://twitter.com/NCBEX/status/1420174150975463424?ctx=HHwWgJCtwbW3vLUnAAAA)>.

<sup>114</sup> Tucker, *supra* note 111.

<sup>115</sup> *Ibid.*

<sup>116</sup> Now called National Association for Equity in the Legal Profession on Twitter as @NA4ELP.

<sup>117</sup> Valerie Strauss, "Why This Pandemic Is a Good Time To Stop Forcing Prospective Lawyers to Take Bar Exams" (13 July 2020) *The Washington Post*.

<sup>118</sup> National Conference of Bar Examiners, "NCBE Anticipates Return To In-Person Testing For February 2022 Bar Exam" (1 June 2021), online: *NCBE* <[www.ncbex.org/news/ncbe-anticipates-return-to-in-person-testing-for-february-2022-bar-exam/](https://www.ncbex.org/news/ncbe-anticipates-return-to-in-person-testing-for-february-2022-bar-exam/)>.

while 24 will administer it in-person”.<sup>119</sup> It pointed out, however, that public health authorities in each jurisdiction have the authority to determine that conditions might require that candidates take the exam remotely.<sup>120</sup>

Legal employers, both in the private and public sectors, have also had to contend with claims from women, people of color, and underserved employees about the extent to which their usual expectations about work output conflict with realities the pandemic imposes. In particular, women who usually handle the bulk of childcare and housework cannot meet the increased demands of both when children are learning online or regular childcare is not available, and cleaning services are not available, all due to the pandemic.<sup>121</sup> One report notes that employees do not want to reveal difficulties to their employers,<sup>122</sup> which suggests that employers need to make extra efforts to uncover these problems without prejudice to the more burdened members of their workforces.<sup>123</sup> If established employees reported these issues, beginning employees, like those just entering the workforce, found the problems even more daunting. In a podcast episode, judicial law clerk Graham Bryant noted that new graduates attempting to enter the legal profession in the summer of 2020 faced, among other problems, low or no hiring possibilities, difficulties in establishing networks, higher levels of stress due to loan payments, childcare issues, and loneliness.<sup>124</sup>

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<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> Cynthia L. Cooper, “Work-Life Imbalance: Pandemic Disruption Places New Stresses on Women Lawyers” (2020) 28:2 Perspectives 3; Liane Jackson, “How Pandemic Practice Left Lawyer Moms Facing Burnout” (1 August 2021), online: *ABA Journal* <[www.abajournal.com/magazine/article/how-pandemic-practice-left-lawyer-moms-on-the-verge](http://www.abajournal.com/magazine/article/how-pandemic-practice-left-lawyer-moms-on-the-verge)>.

<sup>122</sup> “The Impact of COVID-19 on Working Parents (Report)” (29 September 2020) online: *Catalyst* <[www.catalyst.org/research/impact-covid-working-parents/](http://www.catalyst.org/research/impact-covid-working-parents/)>.

<sup>123</sup> *Ibid.*

<sup>124</sup> Sharon Nelson et al, “COVID-19 Is Brutal To Young Lawyers” (27 August 2020), online (podcast): *Legal Talk Network*

## V. Enduring Effects of the Pandemic

### A. Replacing, Altering, or De-Emphasizing the Bar Exam

One of the concerns during the pandemic, as I note above, has been the difficulty of administering the bar exam remotely. Diploma privilege alleviates the problem of administering a bar exam. However, for those who criticize the diploma privilege option, the legal profession is at work formulating alternatives to the one-size-fits-all bar exam that takes into account the increasing demand that law school graduates show practice ready skills on completion at graduation or soon after.<sup>125</sup>

Some alternatives to taking multiple bar exams already exist. As I note above, some states offer reciprocity if an attorney has already been admitted in one jurisdiction.<sup>126</sup> Another alternative might be a uniform exam that tests each candidate on the same material in each jurisdiction. The Uniform Bar Exam (“UBE”) already exists and is an attempt to create this solution. However, not

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[legaltalknetwork.com/podcasts/digital-edge/2020/08/covid-19-is-brutal-to-young-lawyers/](http://legaltalknetwork.com/podcasts/digital-edge/2020/08/covid-19-is-brutal-to-young-lawyers/).

<sup>125</sup> One of the reasons law schools continue to feel such pressure that new graduates have such skills is that the old model that law school graduates have time acquire skills ‘on the job’ exists less than it did. In the past, law schools had the luxury of teaching doctrine, able to rely on the fact that employers would teach new graduates skills after licensure. That is no longer uniformly the case. While large law firms continue to guide young lawyers in the acquisition of practice skills, smaller law firms have neither the time nor the money to do so. See David Van Zandt, “Client Ready Law Graduates” (2009) 36:1 *Litigation* 11.

<sup>126</sup> See Kerr, *supra* note 5 and accompanying text.

all jurisdictions administer this exam,<sup>127</sup> and at least one jurisdiction that had adopted it is reconsidering that decision.<sup>128</sup>

In June 2021, a Task Force created by the Oregon Supreme Court forwarded its final recommendations concerning two alternatives to one of the current components of the total packages of requirements Oregon law graduates must complete in order to satisfy licensure.<sup>129</sup> One is the Oregon Experiential Pathway (“OEP”), and the other is a supervised pathway (“SPP”).<sup>130</sup> The Task Force noted:

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<sup>127</sup> See National Conference of Bar Examiners, “Uniform Bar Examination. Jurisdictions That Have Accepted the UBE” (2021), online: *NCBE* <[www.ncbex.org/exams/ube/](http://www.ncbex.org/exams/ube/)>.

<sup>128</sup> See Federation of State Medical Boards, “State Specific Requirements for Initial Medical Licensure” (2021), online: *FSMB* <[www.fsmb.org/step-3/state-licensure/#:~:text=2%20years-,Time%20Limit%20for%20Completing%20Licensing%20Examination%20Sequence,additional%20attempts%20at%20Step%203](http://www.fsmb.org/step-3/state-licensure/#:~:text=2%20years-,Time%20Limit%20for%20Completing%20Licensing%20Examination%20Sequence,additional%20attempts%20at%20Step%203)>.

Other alternatives include virtual practice, although virtual practice might raise disciplinary and ethical questions. See Eli Wald, “Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Professional in a Global Age” (2011) 48:1 *San Diego Law Review* 489.

Finally, lawyers who practice in the federal courts might be able to practice anywhere in the United States. Under 8 C.F.R. 292.1(a)(1) an immigration lawyer may represent clients in courts and agency proceedings anywhere. “A person entitled to representation may be represented by any of the following, subject to the limitations in 8 CFR 103.2(a)(3)”. 8 CFR §1.2 defines an attorney as:

*[a]ttorney* means any person who is eligible to practice law in, and is a member in good standing of the bar of, the highest court of any State, possession, territory, or Commonwealth of the United States, or of the District of Columbia, and is not under any order suspending, enjoining, restraining, disbaring, or otherwise restricting him or her in the practice of law.

<sup>129</sup> See Oregon State Board of Examiner, “Recommendation of the Alternatives to the Bar Exam Task Force” (18 June 2021), online (pdf): *Task Forces* <[taskforces.osbar.org/files/Bar-Exam-Alternatives-TFReport.pdf](http://taskforces.osbar.org/files/Bar-Exam-Alternatives-TFReport.pdf)>.

<sup>130</sup> *Ibid.*

[c]urrently, there are several components to admission in addition to sitting for and passing the bar examination, including graduating from an ABA accredited law school, passing a character and fitness review, and passing the Multistate Professional Responsibility Examination (MPRE). The proposed alternative pathways are intended to offer only an alternative to a single component of admission: sitting for and passing the Uniform Bar Examination (UBE). The other components of admission would remain unchanged by the adoption of these alternative pathways.<sup>131</sup>

The OEP would function during law school and relies on a set curriculum which Oregon law schools would make available. It relies heavily on the skills curriculum as:

[a]t the core of the OEP is recognition of the value of experiential learning. The experiential focus reinforces the curricular changes that have already begun at each of the Oregon schools. More specifically, law schools across the country are in a period of transformation—moving from traditional doctrinal-focused courses to an innovative and experiential legal education. Although this trend toward implementation of experiential learning in law schools has been happening for quite some time, in 2015, the ABA, for the first time, mandated that every law student complete at least six credit hours of experiential learning prior to graduation.<sup>132</sup>

The Oregon Task Force proposals have obviously taken into account not just the effects of the pandemic but also the much more long-term critique of legal education.

Another idea might be to test law students not just once, at the end of the three years of study, but periodically, for example, once a semester, or once a year, over several agreed-upon matters taken in the first, second, and third years. Such a scheme might be unpopular and expensive. But it might address questions about competency. Similarly, David Friedman, a professor at

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<sup>131</sup> *Ibid* at 2.

<sup>132</sup> *Ibid* at 8.

Willamette University School of Law, has suggested that lawyers undergo periodic retesting.<sup>133</sup>

If the legal profession wishes to keep the bar exam as a general test of competency, another approach might be to acknowledge that it measures competency only at one point and to require attorneys who plan to limit their practices to particular areas of the law to take exams only in those areas of the law at specific periods (every five years, or every eight, or every ten years, for example). One of the reasons for testing and re-testing is that a frequent claim for the bar exam's efficacy is that it preserves some guarantee that previously successful candidates continue to be competent, maintain their awareness of changes in the field, and are responsible and ethical members of the bar. If that is true, we would expect that successful bar exam passage correlates to lower rates of disciplinary sanctions. Statistics seem mixed on this point.<sup>134</sup> Retesting in some areas, both substantive and in areas of professional responsibility, might reinforce necessary messages. Currently, the profession delivers substantive updates, including professional responsibility and legal ethics information through the continuing legal education mechanism, which requires only that the admitted attorney attend an approved Continuing Legal Education ("CLE") session, submit the appropriate forms, and obtain credit through the approved CLE-granting institution.<sup>135</sup> The profession places great faith in its members by adopting this model. It is possible, however, that it should require some greater accountability. One scholar writes:

[t]he costs of the CLE system today are enormous, and its burdens fall most heavily on new lawyers, public interest lawyers, solo practitioners, and others in the profession with relatively high debt and lower incomes. Moreover, although the competence, ethics, and public relations justifications remain in

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<sup>133</sup> David A Friedman, "Do We Need a Bar Exam...For Experienced Lawyers?" (2022) 12 Irvine Law Review Working Paper, online: <[papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3803623](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3803623)>.

<sup>134</sup> See *e.g.* Goforth, *supra* note 45.

<sup>135</sup> American Bar Association, "Events and CLE Facts" (2021), online: *ABA* <[www.americanbar.org/groups/departments\\_offices/abacle/clefaqs/](https://www.americanbar.org/groups/departments_offices/abacle/clefaqs/)>.

heavy rotation, no evidence-based reason has emerged to support the conclusion that CLE bears any relationship — much less a causal one — to better lawyering.<sup>136</sup>

Whether we decide to maintain the bar exam as the accepted standard of competence for law graduates or choose to move to one or more alternatives, we should consider the difficulties that the pandemic has revealed to us. The most obvious is the difficulty of administering in-person or online one-time exams at a scheduled time for thousands of graduates.<sup>137</sup> Spreading competency over a series of months, for example, might address that problem. Perhaps looking at the bar exam as the first of a series of competency exams, instead of the only exam, would be a way to recalibrate the way we think about certifying practitioners. We could then require practitioners to take specialized exams, in whatever area of law they decide to practice (trusts and estates, family law, criminal law, securities law, patent and trademark, for example). To quote Justice Holmes:

[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the line of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and rule simply persists from blind imitation of the past.<sup>138</sup>

Some state regulators seem more interested in re-introducing the option of jurisdictionally specific exams, even though they had adopted the UBE. For example, New York had opted into use of the UBE. However, in June of 2021,

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<sup>136</sup> Rima Sirota, “Can Continuing Legal Education Pass the Test? Empirical Lessons From the Medical World” (2022) Notre Dame Journal of Law, Ethics & Public Policy Working Paper, online: <[papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3857997](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3857997)>.

<sup>137</sup> The bar exam is not the only exam that has encountered problems. Other online exams, previously administered in-person, have also been problematic. See *e.g.* Valerie Strauss, “College Board Changing How AP Test-takers Can Submit Answers after Complaints of Botched Online Exams” (17 May 2020) *The Washington Post*.

<sup>138</sup> Oliver Wendell Holmes Jr, “The Path of the Law” (1997) 110:5 *Harvard Law Review* 991 at 1001.

the New York State Bar Association's House of Delegates voted to approve a task force's recommendation that the state cease using the UBE and replace the exam with an exam that tests state-specific law, and is, in addition, "rigorous", in the words of the Task Force Chair.<sup>139</sup> As Chair Alan Scheinkman noted, the current two-day state-law specific exam, half of New York's current four-day exam, is open book and only requires candidates to pass 30 of 50 multiple-choice questions.<sup>140</sup> Scheinkman also said that another criticism concerns supervision of the exam as well as behavior of the examinees. He noted, "[i]t's also lent itself to cheating by groups of students taking the exam in the same room and comparing notes...".<sup>141</sup> Currently, states can and do administer state-law specific exams to out-of-state barred lawyers who ask for admission in their states. For example, California offers a one-day bar exam for out-of-state barred attorneys.<sup>142</sup>

Criticism of the bar exam and calls for its abandonment do not mean that such a radical step is the future. As the Oregon Task Force and various reports and analyses suggest, there are other approaches that could incorporate changed law school curricula that further reflects the integration of doctrine and skills. If those in charge of testing law graduates determine that the bar exam model needs some change, there will be some effect on the law school curriculum. Depending on the degree of change to the bar exam, the effects could be minor and selective, or they could be major. Some changes, including those that emphasize the acquisition of practice ready skills, were already underway before the pandemic. However, because so many graduates entered the legal market

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<sup>139</sup> Sam Skolnik, "N.Y. Should Withdraw from Uniform Bar Exam, State Bar Group Says" (14 June 2021) *Bloomberg Law*.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

<sup>142</sup> California administers a one-day exam to out of state attorneys who meet the criteria. See State Bar of California, "Changes to the California Bar Exam" (2021), online: <[www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/Changes-to-Bar-Exam](http://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/Changes-to-Bar-Exam)>.

without the bar exam credential and uncertain of when they might acquire them, those skills acquired more attention than they might otherwise have had.

One model that might be instructive is the medical school model, not because law schools should necessarily adopt all of the features of medical school education, but because medical education has already thought about integrating doctrine and skills for a long time. The idea that an examination of the medical education model might be useful in considering legal education is not new. In a 1981 article, Robert Hardaway suggested that the 1907 Flexner Report, an influential discussion of medical education, might be helpful in addressing some of the deficiencies critics have identified in existing legal education, even with the introduction of clinics, fieldwork, and more skills training.<sup>143</sup> Medical schools offer a different educational model from law school, and the medical profession uses a different testing model from the one used in the legal profession. Medical education has been shifting to competency-based testing for some time.<sup>144</sup> However, this testing includes written and oral communication, social skills, and critical thinking,<sup>145</sup> all of which are also necessary to lawyers.

The medical profession tests when medical school graduates begin practice, whether or not they continue on to residencies.<sup>146</sup> Physicians cannot obtain reciprocal licensing in various jurisdictions; they must request separate licensing

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<sup>143</sup> See Robert M Hardaway, “Legal and Medical Education Compared: Is It Time for a Flexner Report on Legal Education?” (1981) 59:3 Washington University Law Quarterly 687.

<sup>144</sup> AAMC Group on Student Affairs (“GSA”) Committee on Admissions (“COA”), “Core Competencies for Entering Medical Students” (2021), online: *AAMC* <[www.aamc.org/services/admissions-lifecycle/competencies-entering-medical-students](http://www.aamc.org/services/admissions-lifecycle/competencies-entering-medical-students)>. The movement may have started as far back as the 1970s. See William McGaghie et al, “Competency-based Curriculum Development in Medical Education: An Introduction” (1978) 68:1 World Health Organization Public Health Papers 91.

<sup>145</sup> McGaghie et al, *ibid.*

<sup>146</sup> American Medical Association, “Navigating State Medical Licensure” (2021), online: *AMA* <[www.ama-assn.org/residents-students/career-planning-resource/navigating-state-medical-licensure](http://www.ama-assn.org/residents-students/career-planning-resource/navigating-state-medical-licensure)>.

in each jurisdiction.<sup>147</sup> The Federation of State Medical Boards maintains a central database that holds physicians' credentials that state medical boards may check to verify physician credentials.<sup>148</sup> The licensing exams that physicians must complete can take years to finish, and there is some concern that young physicians could reach a time limit or attempt limit before finishing them.<sup>149</sup> In contrast, a few jurisdictions limit law school graduates to attempts to pass the bar.<sup>150</sup>

An obvious difference between medical and legal education is the length of time that practitioners take to complete formal education. The idea that law school should take a longer, rather than a shorter, amount of time to complete would undoubtedly be unpopular, given the current and likely continuing cost of legal education, and new legal graduates' difficulty in finding employment that allows the repayment of the cost of that education within a reasonable number of years. Yet the pandemic has forced legal academia to rethink the way it delivers the educational experience technologically and pedagogically for a temporary period, which could in turn offer us ways to rethink ways of delivering the law school experience long-term. Such a re-evaluation could also allow us to re-evaluate not just technology and pedagogy, but whether legal education needs to be as expensive and as stressful as it is right now.

For example, those of us in legal education might continue to think about recalibrating the doctrinal and skills mix throughout the usual three-year law school experience. If law schools concentrated on continuing to present doctrine and skills full-time during the first year, they might then think about splitting the educational day between doctrinal/skills classes and on the job training in

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<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> Some states limit attempts at three and years at seven, for example. See Federation of State Medical Boards, *supra* note 128.

<sup>150</sup> Judith A Gunderson & Claire J Guback, "Comprehensive Guide to Bar Admissions Requirements" (2020), online (pdf): *NCBE* <[www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020\\_021820\\_Online\\_Final.pdf](http://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020_021820_Online_Final.pdf)>.

the latter years. This arrangement would allow students to spend half the day in class and then half in externships or work in the second and third years. Students who opt to work could more easily earn money while in school to help them defray the cost of law school. Students could work in the morning (or afternoon) and attend class the rest of the day. Another approach might be to alter the current academic year to encompass the calendar year, allowing students to attend classes and work year-round. The physical plant and staff of a law school already exist. Faculty could select two out of the three semesters of the year to teach if the school is on a semester schedule, three of the four quarters, if the school is on the quarter system, or two of the three trimesters, if the school is on a trimester schedule. The ABA requires that a semester be 15 weeks,<sup>151</sup> but for schools that follow semester schedules it might also be possible to adjust semesters to fewer than 15 weeks to accommodate a change to three complete semesters a year (thus creating trimester schedules). Such suggestions obviously need some thought and flexibility, but there is nothing about the traditional three-year, nine-month schedule that requires that we keep it in place forever. For example, some critics of the current three-year program have already suggested that law school programs be cut to two years, in part to address questions of cost.<sup>152</sup> If we considered a year-round program that allowed students to attend school and work, some might choose to follow such a program and finish in roughly the same calendar amount of time. Others might want to borrow funds in order to finish law school in fewer than three calendar years. Now that law school faculty and staff have more facility with online courses and technology, they might be able to explore the possibility of offering part-time programs to students with full-time careers who have not been able to think seriously about pursuing law degrees, either because of cost or time.

Schools that offer courses year-round might also be able to explore the possibility of offering more flexibility to faculty. Faculty with children in school

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<sup>151</sup> Currently, the ABA requires that a semester be 15 weeks. See ABA Standards, *supra* note 15 at 310.

<sup>152</sup> Elizabeth Olsen, "The Two-Year Law Education Fails to Take Off" (26 December 2015) *The New York Times*.

might elect not to teach in the summer; faculty without childcare responsibilities but with other concerns might want to take a fall or spring semester off and teach in the summer. Faculty could teach online or in-person. Visiting faculty could teach from anywhere in the world. Students who would like to work for an entire semester could do that and return to school the next semester. Law schools would have to work at making curriculum accessible to some extent, and students would have to plan their schedules carefully and give their schools notice in order not to disrupt the income stream. Schools and employers would need to work together to find enough employment for students who wanted to pursue externships or clerkships. The traditional model, in which students often must look for employment on their own and try to fit work and classes into a 24 hour/7 day a week schedule, puts tremendous strain on students themselves. It leads to stress, students' lack of focus on some aspects of their training, and ultimately less practice ready graduates than legal academia and the legal profession would like. Students want practical training, employers want practice ready graduates, and law schools would like to integrate doctrine and skills. Note also that the ABA allows students more flexibility with regard to time to pursue their degrees than they normally take advantage of. Students might have up to seven years to complete their degree.<sup>153</sup>

I am not suggesting that any of these ideas would be easy to put into practice. But some of them might be interesting and advantageous for some schools to pursue and for the ABA to consider. Current law school educational costs are high and continue to rise, and unhappiness with some aspects of the existing model has been obvious for some time.<sup>154</sup>

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<sup>153</sup> ABA Standards, *supra* note 15 at 311.

<sup>154</sup> James E Moliterno, "The Future of Legal Education Reform" (2012) 40:2 Pepperdine Law Review 423; Deborah L Rhode, "Legal Education: Rethinking the Problem, Reimagining the Reforms" (2012) 40:2 Pepperdine Law Review 437.

## VI. Conclusion

The pandemic has focused attention on a number of issues that legal educators and practitioners have already been thinking about and evaluating for years. The need for rapid results has shown members of the legal profession that they can respond quickly, and to a great extent thoughtfully and competently to a long-term threat to the status quo. Cautious steps in a world in which it is easy to overlook disparities, particularly between white men and others, such as women and people of color, the wealthy and those of lower socioeconomic status, those with few or no childcare responsibilities and those with them, those with no problems to overcome in gaining access to legal education and those with disabilities. However, these disparities are no longer easy to overlook when legal education is suddenly remote and teaching is online, materials must be available in formats accessible to all students, and technology might still be available only to those with the money and space to accommodate it. Returning to the situation that existed before the pandemic, as the NCBE seems to expect, might not be so simple. Expectations are now much higher and many faculty, staff, and students seem more unwilling to return to the *status quo ante*,<sup>155</sup> but to carry some lessons forward. They seem willing instead to think about different approaches to delivering content, adapting technology to the classroom, rethinking how we integrate doctrine and skills, and recapturing the old

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<sup>155</sup> Certainly, some members of the legal profession think the pandemic has permanently changed legal practice. Some lawyers say clients seem less likely to contact them in the event of a legal problem, precisely because of fear of the virus, and the approaches developing out of COVID-19 claims might well apply to disputes arising out of similar disputes. See Abbas Poorhashemi, “Impacts of the Coronavirus COVID-19 on Legal Professionals” (24 September 2020) *Law Technology Today*. See also Randy Maniloff, “8 of the Nation’s Leading Lawyers Discuss Impacts of COVID-19 on their Practice Areas” (2 June 2020), online: *ABA Journal* <[www.abajournal.com/web/article/leading-lawyers-discuss-the-impact-of-the-pandemic-on-practice-areas](http://www.abajournal.com/web/article/leading-lawyers-discuss-the-impact-of-the-pandemic-on-practice-areas)>.

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