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Fla. Board of Bar Examiners' Inability to Structure a Sensible Bar Exam Is Indefensible

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The Florida Board of Bar Examiners' (FBBE) inability to structure a sensible and predictable bar examination for the thousands of as-yet-unadmitted lawyers who have been studying for the last few months is indefensible. It harms the recent graduates, who are subjected to uncertainty and heightened levels of stress during an already difficult time; it harms law firms who are waiting for their new attorneys to show up and begin working; but most importantly it harms the clients of lawyers and law firms throughout Florida—the very people the FBBE is supposed to protect.

All barriers to professional entry, such as the bar exam, are predicated upon a fundamental "truth"—that a uniform, standardized testing protocol ensures a baseline of professional competence and also provides value to the consumers of those professionals who receive that certification. Even if both of those are in fact true, the focus is where it should be—on the general public. Sadly, this has been completely lost in the current testing debacle.

It is important to note that the FBBE is a not-for-profit organization. Members of the FBBE are unpaid volunteers, working to ensure a high standard for attorneys practicing in Florida, and serving a valuable function. They have been confronted with an impossible situation and been forced to adjust. Unfortunately, the FBBE's adaptations have not been in the best interests of anyone.

Initially, and despite being in the midst of one of the worst COVID-19 outbreaks in the country, the FBBE insisted that testing would go forward in

person, in Tampa, as originally planned. When it realized that this was a logistical nightmare, the FBBE made some cosmetic adjustments and proclaimed that an in-person exam was still going to take place in late July, with examinees split between Tampa and Orlando. Next, mere weeks out from the scheduled testing dates, the FBBE announced that, in fact, it was going to transition to an online exam in mid-August. Florida examinees would no longer take the Multistate Bar Exam, for which they had already studied, but would only be taking a Florida-specific exam. As of last week, just days from the mid-August test date, the software intended to provide a "secure" exam was not functioning. No dry runs had performed as expected—which prompted Indiana and Louisiana to abandon the software. Many applicants who had downloaded the software reported that they were the victims of identity theft and fraud. Nonetheless, the FBBE was still driving full-steam ahead.

Then, at about 11 p.m. on Aug. 16, less than three days from the biggest test in the applicants' lives, the FBBE moved the goal posts again. The test has been postponed to "a date to be determined in October." There is no indication whether it will be in early October or late October. There is also no indication whether the software program will be fixed by then. In other words, the FBBE has chosen the worst of all possible solutions for the problem that the examiners themselves created.

Certainly, the test-takers have been through the ringer. Studying for the bar

exam, in the best of circumstances, is a challenging and expensive undertaking. While many larger firms pay thousands of dollars for bar prep courses on behalf of their incoming attorneys, many new lawyers are on the hook for those costs themselves. Given the herculean task of studying for the bar and work at the same time, this cost comes without an opportunity to make money—until the exam is over. And given that the FBBE has already extended the date for the exam twice, who is to say a third extension is not in the future? Do applicants who have spent the last three months studying now show up to work? Will they be given an additional leave of absence in advance of the test?

The bar exam requires months of dedicated studying; for applicants who have already given up three months of their lives to study, this can-kicking puts them in an untenable position. Should they begin to work and run the risk of failing the test if they cannot put in a sufficient amount of time to study? Or should they ask their employers for an additional two months off? If nothing else, this delay will surely exacerbate economic disparities among applicants, many of whom are already saddled with enormous student debt. Presumably the students who have the means to study for an additional two months without needing a paycheck will do so, while students who were anticipating only three months without a salary (and not five) will have to find some source of income, which will inevitably impact their ability to prepare for the exam.

Law firms have also been harmed by the bar examiners' missteps. Many law firms rely on incoming associates to do needed work; while very few first-year attorneys are capable of handling substantial matters on their own, large cases require large teams, and younger (and cheaper) lawyers are necessary and irreplaceable parts of those teams. Hiring and staffing decisions are made months in advance, and firms rely on a hard-and-fast start date (agreed to by the incoming attorney) when extending offers. If the FBBE is unwilling to provide certainty and clarity in the testing process, law firms are left to deal with the mess.

Of course, when law firms are adversely affected, the ultimate victims are their clients. When first-year associates are not available, more expensive lawyers have to do the work, costing clients more. Sometimes, at smaller firms, it may mean that the work will not be done in a timely manner—thus delaying clients' hoped-for outcomes. Worst of all, in public interest and government jobs, many junior attorneys are the lawyers providing needed legal counseling for disadvantaged and underprivileged citizens, or are the attorneys prosecuting crime and defending the accused. Every day or week that goes by means more and more Floridians are not able to receive the legal services they need and deserve.

Tragically, none of this is necessary. There is, and has always been, a reasonable and acceptable alternative to the bar exam. Diploma privilege, which allows any recent graduate of an American Bar Association-accredited

law school to be immediately eligible to practice law, is an obvious answer. While it is not a common practice (currently, only Wisconsin routinely allows diploma privilege), it has great roots in history: until the early part of the 20th century, diploma privilege was, in fact, the norm. Washington, Utah, Oregon and Louisiana have granted diploma privilege this year as a necessary and practical exception to their normal licensing practices. Surely, in the unprecedented time of COVID-19, the FBBE can likewise make an exception that is deeply rooted in American history.

There is no reason why the current situation should be seen as anything other than an outlier. Instituting diploma privilege for the current applicants need not usher in a sea-change in the licensing protocol for Florida attorneys. The COVID-19 pandemic is unique in American history; as such, a unique response is appropriate. While the debate over the value of the bar exam is a worthy one, and one that can be had in the coming years, there should be no debate about the current test: the FBBE needs to cancel the exam and institute diploma privilege for pending applicants.

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