



# Let's Set a New Bar

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Through the immense chaos created by the COVID-19 pandemic, one unanticipated opportunity stood out: a chance for licensing boards to re-think their established processes for professional licensing. Specifically, the Florida Supreme Court, through the Florida Board of Bar Examiners, had a rare opportunity to consider making progressive changes for a more efficient and more modern licensing process for Florida attorneys. However, in

the 11<sup>th</sup> hour the Court chose the option that most closely resembled the established tradition for professional licensing, fumbling the chance to make some good change and forfeiting some of the public's trust in the process.

The established licensing process for Florida attorneys generally includes the following components: (1) the Multistate Professional Responsibility Examination (MPRE), (2) the character and fitness

investigation, (3) Part A of the bar exam, which tests both general law and Florida law, and (4) Part B of the bar exam, called the Multistate Bar Examination (MBE).<sup>1</sup> Generally, law students apply for the bar in their first year of law school to initiate the character and fitness investigation. Students will then wait to take the MPRE until the months preceding or beginning their third year of law school, since MPRE scores are valid for only 25 months. Parts A and B of the bar exam are administered as a two-day examination in Tampa, Florida just twice a year: July and February. The bar exam has been criticized for several reasons, including but not limited to the relevancy and depth of the substantive subject areas tested, the relevancy of the laws tested (e.g. “general” law in addition to Florida law), and its closed book nature which does not resemble actual practice. However, there was neither a clear opportunity nor a pressing reason to rethink the licensing procedures until the COVID-19 pandemic called into question the safety of congregating all Florida test takers into one convention center for a two-day examination.

Although many stakeholders foresaw the issues related to administering an exam like the ones in years past and voiced opinions on viable solutions, the most notable suggestions were those of the deans of Florida’s 12 law schools. In an open letter dated April 7, 2020, the deans of Florida’s twelve law schools expressed “insights,” “observations,” and their “ideas for proposed solutions.” The letter outlined five well-researched solutions that balanced the need for a “rigorous process [...] to ensure the competency of new

attorneys” with the unprecedented impact of the COVID-19 pandemic. The solutions included:

Offering classrooms and logistical support at each of the twelve law school campuses at no cost to enable “simultaneous small-group testing with ample spacing between examinees.” This option would have reduced required travel, facilitated social distancing measures, and allowed the integrity of the exam to remain intact.

Offering two additional exam administrations in September, which would have allowed for more flexibility for testing as well as reduced the number of test takers at each test administration, thus lowering the risk of COVID-19 transmission and facilitating social distancing measures.

Allowing taking the bar exam in parts to be more efficient by (a) lowering the examination fee for those taking only one part of the exam, (b) refunding a portion of the examination fees for test takers who initially signed up for both parts but chose to take only one part, and (c) allowing test takers to take the parts in any order.

Expanding the Certified Legal Intern (CLI) program to allow candidates who pass the character and fitness investigation to begin practicing under the supervision of a licensed attorney until they have an opportunity to sit for and pass the bar examination. This would have allowed candidates to begin working more quickly after graduation even if the bar examination were delayed, therefore alleviating some financial burden.

Admission without examination. This solution would require graduates to complete a designated period of supervised

practice under a licensed attorney before gaining admission to the Florida Bar. Although this option would be the most drastic change, it would be the safest response to the COVID-19 pandemic and would be entirely possible due to the rigorous nature of Florida's character and fitness process. Note that this option unintentionally addressed long held concerns about the substance of the exam in addition to addressing issues with the logistical procedures.<sup>2</sup>

In response to the deans' letter, the board, with the permission of the court, decided to administer the July bar exam on the dates originally scheduled—on July 28-29—but in two locations (Tampa and Orlando) and while observing social distancing, mandatory masks, quarantining before and after, and other screening protocols. When asked about the reasoning behind this decision, the board stated concerns for waiting until September to administer the exam due to hurricane season. The board further explained that opting for more than two testing locations could compromise exam security and that all other safety requirements were approved by the Department of Health.

Once this decision was made, the board received heavy backlash characterizing the examination as a super-spreading event. After much advocacy by stakeholders including examinees, deans, and members of the state legislature, the court determined that an online examination on August 18 would be a better solution. Soon after, the court moved the date to August 19 to allow examinees to vote in the primary elections. The examination was set to be administered

through a software called ILG technologies, which included live proctoring through examinees' webcams as examinees took the exam in their homes. Interestingly, the logic used to dismiss the deans' proposal of various testing centers at the law schools was conveniently not applied to dismiss the idea of examinees taking the exam in their homes.

As the exam date approached, it became clear that the software was not ready. Examinees were repeatedly asked to download and test new versions of the software, which not only took time away from their studying but increased already high stress levels with each failure of the latest version of the software. As the versions of the software progressed, so did the issues experienced by the examinees/beta testers. Examinees who downloaded and tested the software as instructed reported hacking attempts into their bank accounts, iCloud keychains, email addresses and more as well as overheating and freezing on their computers. This was likely because examinees were required to disable and uninstall all antivirus protection off of their computers so that the software could function properly (although it never did). Amidst the board's silence on these issues, examinees took to social media to warn other test takers of the security issues with the software. Those who posted warnings were personally contacted and intimidated into removing the posts by none other than the founder of ILG Technologies. Still the board remained silent.

At about 11pm on Sunday, August 16<sup>th</sup> (less than four days before the exam), examinees received correspondence from

the board cancelling the exam due to the issues with the software. On August 19<sup>th</sup>, the Florida Supreme Court released an apology video by Chief Justice Canady acknowledging the criticisms received and admitting to their failures.<sup>3</sup> Finally, on August 26<sup>th</sup>, the board released a new date for the exam: October 13. Interestingly again, the logic for dismissing the deans' suggestion for a September exam—hurricane season—was conveniently not used to dismiss the idea of an October exam. Cherry-picking the applicability of certain excuses seems to be a trend. Furthermore, the board has allegedly dropped ILG Technologies as its software provider in favor of ExamSoft. Finally, the board created a provisional licensing scheme to come into effect in September which would allow examinees to practice under the supervision of a Florida barred attorney until the examinee receives his or her license. Unfortunately, this scheme is too little too late and will help only a fraction of examinees.

This debacle is a perfect example of

the dangers which result from allowing the elite of a profession to regulate themselves. It is the perfect cocktail of inefficient governmental bureaucracy with a splash of outdated views and a sprinkle of out-of-touch. The symptoms: gatekeeping the profession, extreme financial hardship, and hazing. The cure: deregulation, communication, and respect. Crossing the bridge from juris doctor to esquire should require a showing of competency that mirrors the work which an attorney truly does. The bar exam does not achieve this goal and therefore the fixation with its preservation is beyond comprehension.

Ultimately, the COVID-19 pandemic could have been an opportunity to rethink established licensing requirements and explore new, more efficient, and up-to-date options. However, the court, through the board, chose to cling to tradition at the expense of modernization of licensing procedures, rather than experimenting with innovation.

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## REFERENCES

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- 1 For more information on the bar exam, visit  
<https://www.floridabarexam.org/web/website.nsf/52286AE9AD5D845185257C07005C3FE1/125BA5AFD5EB7D2385257C0B0067E748>.
- 2 To read the letter from the deans, visit  
<https://images.law.com/contrib/content/uploads/documents/392/87706/Florida-Law-Deans-Letter-to-FL-S Ct-and-BBE-re-COVID-19-final-1.pdf>.