

Emergency diploma privileges are not the solution to coronavirus-caused bar exam delays

As the number of states electing to delay the July bar exam in response to the coronavirus pandemic increases, so too have the calls for state bar associations to waive the exam requirement altogether.[1] Such an “emergency diploma privilege” would allow new graduates to practice law without first passing a state-administered bar examination. As the explanation goes, allowing a law degree to substitute for a bar exam this year would not only resolve current uncertainty over when bar exams can be safely administered (especially in harder-hit states like California and New York), but also allow these new attorneys to offer immediate legal assistance to their communities in a time of urgent need. I’m not so sure.

The diploma privilege is not unprecedented. Early on, it was the norm in the United States, including California.[2] And although it largely died out as the legal and other professions grew more restrictive, diploma privilege lives on in Wisconsin and New Hampshire. In Wisconsin, a graduate of one of the states’ two law schools (University of Wisconsin Law School and Marquette University Law School) is permitted to practice law upon the school’s endorsement of their legal competence and the Board of Bar Examiners’ certification of their character and fitness to practice law.[3] New Hampshire’s “Daniel Webster Scholar Honors Program” employs a slightly more rigorous approach.[4] Offered exclusively to University of New Hampshire School of Law students, participants may avoid taking the state’s bar examination after completing additional coursework and examinations during law school, including “a two-day assessment process, consisting of interviews, testing and simulations.”[5] But such time-consuming features are unlikely to meet the urgency of the moment.

Recent rumblings in the medical profession likewise suggest that emergency action in certain professions may be necessary to address the current crisis. In fact, several institutions, including Harvard Medical School and UCLA’s Geffen School of

Medicine, have already started offering early graduation options to students wishing to jumpstart their residencies.[6] Combined with other stopgap maneuvers, such as Massachusetts' allowance of provisional 90-day limited licenses to practice medicine,[7] these measures promise to send much-needed reinforcements to the front lines of a pandemic in which there is a human cost for every moment lost.

Yet for the legal profession to allow an entire class of graduates to skip the bar exam altogether scarcely seems a proportionate response. An emergency diploma privilege for 2020 law graduates takes an axe to a problem best addressed by a scalpel.

There are various motives behind the calls for adopting a law diploma privilege this year:

- Economic uncertainty (will a firm still hire me if I haven't taken, much less passed, the bar exam?);
- Temporal volatility (do we know when I will have a chance to take the bar exam?);
- Perhaps a bit of the usual exam aversion (I just finished three years of law exams; do I really need to take another one under these circumstances?);
- An eagerness, if not an outright need, to help those affected by the crisis (patients, consumers, immigrants, the unemployed, etc.).

Though the first three reasons are undoubtedly prone to cause anxiety, only the fourth explains the medical profession's decision to accelerate medical students' advancement to their awaiting residencies. Nobody is suggesting that the state medical boards would have adopted such measures absent the present pandemic. Indeed, the absence of similar action in 2008 suggests they wouldn't.

It seems appropriate, then, to ask just how much the first three reasons are motivating these calls for the legal profession to similarly permit students to skip their licensing exams. Quite a lot, I suspect.

One indication can be found in the letters, petitions, and papers raising the idea to state bars. For instance, the student letter to the New York State Bar Association[8] raises entirely legitimate concerns about COVID-19's disproportionate impact on

infected, immunocompromised, low-income, and other students affected by the crisis. But it does not explain how other, less sweeping measures — issuing short-term licenses to practice or expanding existing programs that currently allow law students to perform legal work under a licensed attorney’s supervision to include recent graduates[9] — might suffice. Though a working paper by law professors and education policy experts floats the latter as a more modest option,[10] the student letter rejects it as unaccommodating to public interest-minded law graduates. Their reason: legal services organizations and other non-firm practice options generally lack the supervisory and technological bandwidth to effectively supervise large numbers of first-year attorneys. Fair enough. But therein lies the blunderbuss nature of this solution.

Less than ten percent of law students (myself included) typically enter public interest work immediately upon graduation.[11] That category includes both nonprofit and government jobs. For comparison, according to a 2015 NALP study, only 63 percent of graduates even obtained full-time employment requiring a law license.[12] Meanwhile, a majority of law graduates head to private firms — where many will begin working before they even receive their bar exam results, and have been known to continue working in the unfortunate event they have to retake it. Thus, even if February 2021 becomes the next available test date, most 2020 law graduates’ employment prospects will remain unchanged, at least insofar as licensing is a factor. If a license is truly necessary, a provisional licensing regime that allows such graduates to practice law until the next available examination date would readily fill that void. The only uncertainty for those graduates is an economic one — that is, whether firms will still make good on their offers — something that neither a temporary licensing measure nor an emergency diploma privilege is equipped to solve. Simply put, immediate licensure upon graduation promises very little for the overwhelming majority of law students graduating into this crisis. Provisional licenses or expanded attorney-supervised practice regimes will be enough to get them through until bar exam can be safely administered.

Besides being a small segment of each class, a public-interest-minded graduate’s immediate access to a law license is not the most pressing need. Much like their private practice peers, the most ominous threat is the uncertainty around hiring. Cash-strapped government agencies and nonprofits are often the first and hardest

hit in recessionary times. Law licenses will not fix that. (Especially if that license is issued without a bar exam, which may only compound an employer's reluctance to fill one of few openings with a new attorney.) Other measures — public interest grants, student loan forgiveness, housing assistance — might. And the student letter highlights a more prominent concern: comparatively less supervisory and technological bandwidth. Providing graduates with law licenses does little to mitigate this problem. Measures to expand these employers' remote capabilities might help more, like tax credits and zero-interest loans for technology upgrades, increased room in agency budgets for information technology, and remote supervision. Such measures also promise to do more to protect immunodeficient, infected, and low-income graduates than simply issuing them a license. And they almost certainly offer both graduates and the wider legal profession greater support as they do their part to assist those affected by the pandemic.

The simplest solution is usually the best. At first blush, an emergency diploma privilege seems to check this box. It's a one-size-fits-all answer that would likely require minimal administrative bandwidth, especially compared with the massive undertaking involved with administering bar exams. But simple is not the same as easy. Though perhaps easier than instituting some combination of temporary licenses, expanded financial support for graduates (especially those in the public interest sector), and assistance to technology-poor nonprofits and government agencies, an emergency diploma privilege is not a solution tailored to this moment. It is at once both an overcorrection and an inadequate response — a panacea for legitimate, pre-pandemic criticisms of bar examinations that does nothing to address those financial, economic, and technological deficits that the pandemic actually has wrought on the legal profession.

There has long been a small legal profession segment advocating for abandoning bar examinations and shortening law school programs and replacing them with a transition-to-practice training program. The current pandemic crisis is neither the best time nor the best reason to make fundamental, permanent changes to law licensing. Maybe diploma privilege should be the future. In fact, with certain stipulations, I would be a fervent advocate. But right now, it offers only fleeting relief to a class of attorneys whose first day at the office may well be on a laptop at the kitchen table.

Matthew Stanford is an attorney and senior research fellow at the California Constitution Center.

[1] Sloan, *Amid More Bar Exam Delays, Push for Diploma Privilege Grows*, Law.com(Mar. 30, 2020).

[2] Goldman, *Use of the Diploma Privilege in the United States* (2014) 10 Tulsa L.Rev. 36.

[3] Wis. Supreme Ct. Rules, rule 40.03.

[4] Rules of the Supreme Ct. of the State of N.H., rule 42, XII.

[5] N.H. Jud. Branch, N.H. Bar Admissions - General Information, IV: Daniel Webster Scholar Honors Program (as of Apr. 5, 2020).

[6] Cannon, *As Coronavirus Patients Surge, Medical Students Rushed Into Practice to Fight Pandemic*, ABC News (Apr. 1, 2020).

[7] Buckley, *An Option to Serve In COVID-19 Fight*, Harvard Gazette (Mar. 30, 2020).

[8] Class of 2020 Law Students, Letter to New York State Bar Association's Task Force on the New York Bar Examination, Mar. 26, 2020.

[9] See, e.g., Cal. Rules of Court, rule 9.42.

[10] Angelos et. al, Center for Interdisciplinary Law and Policy Studies, Moritz College of Law, *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action* (Mar 22. 2020).

[11] Karp, *Are Law Students Helping Students Who Want to Help Others?*, Law360 (Mar. 31, 2019).

[12] Nat. Assn. for Law Placement, *Class of 2015 National Summary Report* (2015).