

MAY 11 2020

To the Justices of the Nevada Supreme Court and the Board of Bar Examiners,

"There is a Chinese curse which says, 'May he live in interesting times.' Like it or not, we live in interesting times."

—Robert Kennedy in his Day of Affirmation Speech, June 6, 1966.

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
CHIEF DEPUTY CLERK

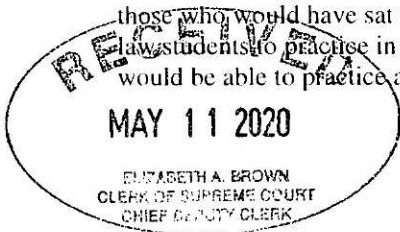
These are, indeed, interesting times. In the midst of a worldwide pandemic, the nation has adapted as best it can. The State Bar of Nevada is no exception. However, I write to express my concern with the proposed adaptation of the July 2020 bar exam. I took—and thankfully passed—the July 2019 bar exam. With the experience fresh in my mind, I admit my first reaction was a visceral one: *if I had to take the three-day, MBE-included exam, they should as well.* But I also considered my thoughts on the bar exam in May through July of 2019. In particular, I remembered my qualms with the impracticality of the bar exam vis-à-vis the actual practice of law. In doing so, I have come to a simple conclusion. Either the bar exam as it is and has been administered is a worthwhile way to ensure only those who are minimally competent may practice in this jurisdiction, or it is not.

Beginning from that premise, I do not believe that a blanket¹ diploma privilege is in the best interest of the Nevada Bar. The idea of "cancelling the exam and affording a diploma privilege to all ABA law school graduates" presents a host of problems. First, a global pandemic does not somehow make those who would sit for the exam more capable or competent. Those who have sat for and failed the exam are given a windfall. Next, I foresee any number of federal lawsuits alleging equal protection claims: those who graduated at the top of their class do not receive the privilege, while those who graduate at the bottom of their class do, all contingent on whether their law school was accredited. If the diploma privilege is limited only to 2020 graduates, then suddenly those who have failed the exam in past years have an equal protection claim.

Finally, allowing diploma privilege fundamentally undermines the idea that the bar exam is a meaningful way to measure attorney competence. If diploma privilege is extended solely because of a pandemic, what is the normative justification for refusing reciprocity with other states? Barred attorneys have been deemed competent in their home jurisdictions and have, by virtue of not being disbarred, proven their continued competence. If minimum competence is somehow unimportant in the face of a global pandemic, why is it necessary in times of tranquility? Why not simply extend diploma privilege every year?

I now turn to the Court's inclined proposal: remotely administering a Nevada-exam-only bar exam. This option is more palatable because it does not undermine the idea that the State Bar of Nevada is invested in ensuring its attorneys are minimally competent in general. However, this course of action nonetheless undermines the idea that the bar exam as it is and has been administered is a worthwhile way to ensure only those who are minimally competent may practice in this jurisdiction. Why administer the MBE portion of the bar exam at all? Exhibit A

¹ There is, perhaps, a middle ground that makes diploma privilege viable. Cancel the July 2020 bar exam and offer those who would have sat for it a temporary diploma privilege akin to Supreme Court Rule 49.3, which authorizes law students to practice in a limited capacity. The would-be July 2020 bar takers who intend to join firms in the fall would be able to practice and would simply take the exam in February.



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of the ADKT evinces that the MBE is important to “reliability” such that abolishing that portion of the exam, once again, calls the merit of the bar exam generally, and the July 2020 administration particularly, into question. I also see further equal protection claims: will those who sat for prior administrations of the exam and failed due to a deficient MBE score be allowed to practice? Those who took the essay-only version of the exam are arguably no more competent than those who scored highly on their essays but fell short only on the multiple choice.

Similarly, why not allow each and every future administration of the bar exam to be open note? If the applicants do not have time to look up answers while they are taking the exam remotely, the applicants sitting for the exam in person do not either.

Further, as a matter of logistics and as Exhibit A acknowledges, there are a number of security-related concerns. The exam, in its current form, is a tightly-run ship with an emphasis on security. Cell phones are prohibited and even food and drink labels are heavily regulated. The remotely-administered iteration of the exam, while laudable for an on-the-fly adaptation, is ripe for abuse. These applicants may have access to other lawyers or law students. These applicants may have access to other electronic devices. Try as the Board may, exam takers whose admittance to the bar is predicated on this exam have an incentive to find a way to skirt the rules and regulations. There are any number of unforeseen variables and hurdles to overcome if the exam were to be administered remotely.

These comments are only a starting point. As I am sure this Court and the Board of Bar Examiners have already considered, each approach is accompanied by its own myriad of problems and challenges. Indeed, Exhibit A lays out several proposals necessary for the bar exam to be reliable and the numerous Supreme Court Rules that bar takers would require relief from.

Accordingly, I think the final option is the least problematic. Simply postpone the exam. Postponing the exam reinforces, rather than undermines, the appearance and belief that the bar exam as it is and has been administered is a worthwhile way to ensure only those who are minimally competent may practice in this jurisdiction. Other states have done so, seemingly without major controversy.

While the global pandemic is properly cause for concern, it is not a reason to abandon the principles that have warranted administering the bar exam year after year. I believe that future administration of the bar exam will be judged and criticized based on the administration of the July 2020 exam. Either the bar exam as it is and has been administered is a worthwhile way to ensure only those who are minimally competent may practice in this jurisdiction, or it is not. If it is, then I believe as little should be done to change its administration. Postponing the exam does precisely that.

Warmest Regards,

Steven E. Kish III