

# NACJ

ADKT 558

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## Nevada Attorneys for Criminal Justice

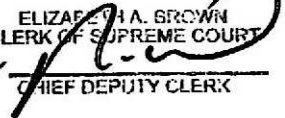
August 5, 2020

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AUG 05 2020

ELIZABETH A. BROWN  
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BY   
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### Re: **Comment for Reconsideration of ADKT 0558 and Recommendation for Emergency Diploma Privilege**

Dear Chief Justice Pickering & Justices of the Supreme Court of Nevada:

Nevada Attorneys for Criminal Justice ("NACJ") is a non-profit organization representing criminal defense attorneys throughout the state of Nevada. NACJ is writing this response in support of Ms. Megan Ortiz's Motion to Reconsider the July 24, 2020 Order postponing the July 2020 bar examination and to recommend that the Court grant an emergency diploma privilege to qualified applicants.

These extraordinary times must be confronted with courage, a fresh perspective, and sensible solutions. Therefore, NACJ stands with our colleague's from the Las Vegas Latino Bar Association ("LBA") and the Las Vegas National Bar Association ("LVNBA"), to speak out about the financial, physical, and emotional toll of the COVID-19 pandemic on our community, and how postponement will affect aspiring attorneys.

#### 1. The Bar Exam Does Not Measure the Ability to Practice Law.

Like other standardized tests, the bar exam primarily tests an examinee's ability to take tests. It does not test the ability to practice law; thus, it is not the best measure of minimum attorney competence.<sup>1</sup>

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Students who do well in law school almost always pass the bar exam; thus, for years, critics have called the test an outdated, expensive, and unnecessary rite of passage.<sup>2</sup> In addition, ABA data shows that 9 out of 10 recent graduates of accredited law schools pass the bar within two years.<sup>3</sup> Critics also point out that the bar exam was designed and continues to operate as a barrier to exclude minorities, immigrants, and applicants who lacked rank and class from entering the legal profession.<sup>4</sup>

## 2. The Pandemic has Not Only Laid Bare Structural Inequalities in American Life but has Also Exposed Structural Barriers Aspiring Attorneys Face When Trying to Join Our Ranks.

The pandemic has shed new light on the numerous structural barriers to entry for law students of color and strengthened calls for a diploma privilege.<sup>5</sup> Although, Nevada has not conducted its own study, a revealing survey of 1,424 California law graduates in early July 2020, sought to measure the impact of California's planned fall 2020 bar exam amidst the COVID-19 pandemic, as well as, a period of intense national racial upheaval.<sup>6</sup> The results of this study should not be ignored because Nevada is a similarly situated western state suffering greatly under the strain of the COVID-19 pandemic.

The California study revealed that 72% of respondents either will not have, or are unsure of whether they will have, access to reliable and consistent internet to take a remote bar exam. This statistic is particularly concerning given that Nevada intends to administer the bar exam remotely, which will require a reliable internet connection. Over 80% of respondents also said they are experiencing financial insecurity and emotional struggles and 20% have at least one ill family member. Nearly 50% live in a household with a person at "high-risk" for contracting COVID-19 and 15% are high-risk themselves.

Moreover, the survey showed that students of color carry disproportionate law school debt compared to Caucasian survey respondents. For example, approximately 20% of Latinx and Hispanic students indicated they have between \$100k–150k in debt, 20% have \$150k–200k in debt, and 35% have over \$200k. Among Caucasian respondents, 14% said they have between \$100k–150k in debt, 16% have \$150k–200k in debt, and 21% have over \$200k. Survey results were similarly skewed for Black and Native American respondents. Postponing the exam will exacerbate problems for many students and lead to unprecedented job and wage losses as 87% reported having job offers that are contingent upon passing the bar exam.

## 3. An Emergency Diploma Privilege is a Sensible Solution in These Uncommon Times.

The National Conference of Bar Examiners acknowledges criticisms that the exam disproportionately burdens and disadvantages people of color and women, but contends that critics ignore "the bigger picture of the educational pipeline-related differences in performance that are observed in law school and prior to law school" and are the result of "deeply rooted societal problems that create unequal educational (and other) experiences and opportunities."<sup>7</sup>

NACJ members along with our LBA and LVNBA Colleagues believe it is not enough to acknowledge that structural inequalities exist and point to other potential causes, especially because the COVID-19 pandemic has exacerbated inequalities for aspiring attorneys. Therefore, an emergency diploma privilege is a sensible solution for this unprecedented time.

Prior to 2020, Wisconsin was the only jurisdiction in the United States to offer a diploma privilege.<sup>8</sup> Studies comparing the rates of disciplinary complaints across jurisdictions show that Wisconsin attorneys do not receive bar complaints at higher rates than jurisdictions requiring bar exam passage.<sup>9</sup> Thus, fears of unethical or unqualified practitioners are not well founded. In response to the ongoing nationwide public health crisis caused by the COVID-19 pandemic, four states have implemented an emergency diploma privilege: Utah, Oregon, Washington, and Louisiana.<sup>10</sup> Nevada should follow their lead.

### Conclusion

In order to maintain the quality and professionalism required of new Nevada practitioners, yet ameliorate the extraordinary circumstances presented by the COVID-19 pandemic, NACJ asserts that an emergency diploma privilege is warranted.

Our legal community has the opportunity and a moral obligation to confront these unprecedented challenges with courage, a fresh perspective, and sensible solutions. We should not let this historic opportunity to take action and do the right thing slip through our grasp. We believe the stated recommendation below for emergency diploma privilege furthers the Court's interest in ensuring public safety while also attempting to remedy the disparate impact the pandemic is imposing on many law graduates.

Accordingly, NACJ submits the following recommendation of model language for an emergency diploma privilege, which is based on those privileges already implemented in neighboring jurisdictions. However, this recommendation is narrowly tailored to Nevada's legal community:

- I. "Qualified Candidate" means a person who:
  - A. Registered for the July 2020 bar examination;
  - B. Passes the Multi-State Professional Responsibility Examination (MPRE) by December 31, 2020;
  - C. Meets all character and fitness requirements; and
  - D. Either:
    1. Graduated after December 1, 2019, from an ABA-accredited law school; or
    2. Is an attorney licensed in any U.S. state or territory.



- II. Any person who graduated from the UNLV William S. Boyd School of Law after December 1, 2019, who did not register for the July 2020 exam but is otherwise qualified for diploma privilege may request admission in writing under the emergency diploma privilege by October 31, 2020.
- III. Qualified Candidates must complete 400 hours of supervised legal practice under the supervision of a “Supervising Attorney” by December 31, 2020.
- IV. A Supervising Attorney means a person (or persons) who supervises a Qualified Candidate under this order and is either:
  - A. An attorney who has an active Nevada bar license with:
    - 1. A minimum of five years as a licensed attorney in any U.S. state or territory,
    - 2. A minimum of two years as a licensed attorney in the State of Nevada, and
    - 3. No record of public discipline; or
  - B. A state or federal judge.
- V. “Supervised Practice” means all time spent on any activity related to developing the Qualified Candidate’s legal competence (whether paid, unpaid, pro bono, or low bono) and shall be counted toward the 400-hour requirement, except that CLE courses and other professional training courses may not exceed 5% of the candidate’s total hours.

Respectfully Submitted,

/s/ Randolph M. Fiedler, Esq.  
President

/s/ Sarah K. Hawkins, Esq.  
Vice-President—South

/s/ Martin H. Wiener, Esq.  
Vice President—North

/s/ Caitlyn McAmis, Esq.  
Secretary

/s/ Maizie Pusich, Esq.  
Treasurer

/s/ John J. Piro, Esq.  
Past President

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<sup>1</sup> Ward, Stephanie Francis, *Bar exam does little to ensure attorney competence, say lawyers in diploma privilege state*, ABA JOURNAL, April 21, 2020, <https://www.abajournal.com/web/article/bar-exam-does-little-to-ensure-attorney-competence-say-lawyers-in-diploma-privilege-state> (last visited Aug. 1, 2020); Olson, Elizabeth, *Bar Exam, the Standard to Become a Lawyer, Comes Under Fire*, NEW YORK TIMES, Mar. 19, 2015, [https://www.nytimes.com/2015/03/20/business/dealbook/bar-exam-the-standard-to-become-a-lawyer-comes-under-fire.html?\\_r=1](https://www.nytimes.com/2015/03/20/business/dealbook/bar-exam-the-standard-to-become-a-lawyer-comes-under-fire.html?_r=1) (last visited Aug. 1, 2020).

<sup>2</sup> Allard, Nicholas W., Dean, Brooklyn Law School, *The Bar Exam Is Not the Best Test of a Good Lawyer*, NEW YORK TIMES, Sept. 24, 2015, <https://www.nytimes.com/roomfordebate/2015/09/24/is-the-bar-too-low-to-get-into-law-school/the-bar-exam-is-not-the-best-test-of-a-good-lawyer> (last visited Aug. 1, 2020).

<sup>3</sup> *Bar passage rates improve for ABA-approved law schools*, ABA Section of Legal Education and Admissions to the Bar, Feb. 24 2020, <https://www.americanbar.org/news/abanews/aba-news-archives/2020/02/bar-passage-rates-improve/> (last visited Aug. 2, 2020).

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<sup>4</sup> Shephard, George B., *No African American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools* (Mar. 2001), Emory Univ. School of Law Working Paper, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=263211](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=263211); Mendenhall, Allen, *The Bar Exam is Unfair and Undemocratic*, NEWSWEEK, Apr. 15, 2015, <https://www.newsweek.com/bar-exam-unfair-and-undemocratic-322606> (last visited Aug. 1, 2020).

<sup>5</sup> Hernández Escontrías, Pilar Margarita, *The Pandemic Is Proving the Bar Exam Is Unjust and Unnecessary*, SLATE, July 23, 2020, <https://slate.com/news-and-politics/2020/07/pandemic-bar-exam-inequality.html> (last visited Aug. 1, 2020); Somin, Ilya, *The Case for Replacing the Bar Exam With "Diploma Privilege"*, <https://reason.com/2020/07/29/the-case-for-replacing-the-bar-exam-with-diploma-privilege/> (last visited Aug. 1, 2020).

<sup>6</sup> July 7, 2020 Survey, United for Diploma Privilege, <https://forms.gle/qUvvLg5sKjzYAaZh7> (last visited Aug. 1, 2020); see also Hernández Escontrías, Pilar Margarita, *The Pandemic Is Proving the Bar Exam Is Unjust and Unnecessary*, SLATE, July 23, 2020, <https://slate.com/news-and-politics/2020/07/pandemic-bar-exam-inequality.html> (last visited Aug. 1, 2020).

<sup>7</sup> NCBE *Bar Admissions During the COVID-19 Pandemic: Evaluating Options for the Class of 2020* (Apr. 9, 2020) at 6–7, available at <http://www.ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F239> (last visited Aug. 1, 2020).

<sup>8</sup> Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 Wis. L. Rev. 645 (2000).

<sup>9</sup> 2018 Survey on Lawyer Discipline Systems (S.O.L.D.), ABA Center for Professional Responsibility, Standing Committee on Professional Regulation, available at [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2018sold-results.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2018sold-results.pdf) (last visited Aug. 1, 2020).

<sup>10</sup> Motion Exhibits A–D; see also Angelos, Claudio, et al., *The Bar Exam and the Covid-19 Pandemic: The Need For Immediate Action*, The Ohio State Univ. Moritz College of Law, Legal Studies Working Paper Series No. 537, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3559060](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559060); Sloan, Karen, *ABA Resolution Calls on States to Pull The Plug on In-Person Bar Exams Amid Pandemic*, Law.com, July 30, 2020, <https://www.law.com/2020/07/30/aba-resolution-calls-on-states-to-pull-the-plug-on-in-person-bar-exams-amid-pandemic/> (last visited Aug. 1, 2020).