

December 2022

COVID and Bar Admissions

Steven R. Smith

California Western School of Law

Follow this and additional works at: <https://scholarworks.uark.edu/alr>



Part of the [Legal Education Commons](#), [Legal Profession Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Steven R. Smith, *COVID and Bar Admissions*, 75 Ark. L. Rev. (2022).

Available at: <https://scholarworks.uark.edu/alr/vol75/iss3/4>

This Article is brought to you for free and open access by ScholarWorks@UARK. It has been accepted for inclusion in Arkansas Law Review by an authorized editor of ScholarWorks@UARK. For more information, please contact scholar@uark.edu.

COVID AND BAR ADMISSIONS

Steven R. Smith*

INTRODUCTION

The COVID-19 pandemic, killings of George Floyd and others, and civil unrest created dislocation, hardship, and uncertainty. For millions of people, it included deaths in family, unemployment, and serious mental and physical illness.¹ Graduates of professional schools preparing to take licensing examinations faced unexpected obstacles in meeting licensing standards for their chosen professions. It quickly became apparent, for example, that the usual licensing examination arrangements were problematic.² The question for licensing authorities in 2020 was what accommodations would be appropriate to take account of the disruptions applicants faced while fully protecting the public's interest in careful licensing.

The core purpose of licensing is public protection, so the public interest appropriately plays the central role in licensing.³ The public appears to overwhelmingly support a licensing examination before admission to the bar, even during a

* Dean Emeritus and Professor Emeritus, California Western School of Law. Comments are most welcome SRS@CWSL.edu. © Steven R. Smith. I am grateful to William Aceves, Michael Ariens, Laura Padilla, Laura Rothstein, and Lera Smith, and others for their helpful suggestions, and to Greg Schneiders, and the staff and members of the National Conference of Bar Examiners for their information and assistance in obtaining data used in the Article. I am also grateful for the encouragement of James White, Antonio Garcia, and John O'Brien.

1. See *Grieving Family Members Reflect on 2 Million Deaths from COVID-19: Interviews with Those Who Lost Fathers During the Pandemic*, WHO (May 11, 2020), [<https://perma.cc/V66H-K3W6>]; see also EMILY HEWLETT ET AL., TACKLING THE MENTAL HEALTH IMPACT OF THE COVID-19 CRISIS 2 (2021), [<https://perma.cc/4ZGB-D8GP>].

2. Elinor Aspegren, *Want to Be a Doctor? A Lawyer? COVID-19 Cases Are Rising, but These High-stakes Exams Are In-person Only*, USA TODAY (July 28, 2020, 2:31 PM), [<https://perma.cc/Z8GN-BUTL>].

3. See SUZANNE HULTIN, THE STATE OF OCCUPATIONAL LICENSING: RESEARCH, STATE POLICIES AND TRENDS 5 (Oct. 11, 2017), [<https://perma.cc/FS42-HS7V>].

pandemic.⁴ Almost every jurisdiction in the United States⁵ has determined that passing a bar examination is a standard of public protection.⁶ The broader issues of the appropriateness of a bar examination are legitimate but not the issue for the COVID emergency.

The options for states included canceling the summer examination, adjusting the test to avoid the risk of COVID, delaying it, or giving it in a different format (e.g., online).⁷ States could also allow short-term, supervised practice before a delayed test.⁸ Finally, they might grant one class of students a license without examination, the diploma privilege.⁹

Part I of this Article provides background on the bar admission problems raised by COVID and social unrest. Part II reviews the several bases for testing alterations in 2020. Part III describes what states did in summer 2020, and Part IV focuses on one of those accommodations, the diploma privilege. Part V

4. For example, only 5% of participants, in what appears to be a solid public opinion poll, supported a diploma privilege, and it increased to only 6% even as an accommodation for the COVID problems. GREG SCHNEIDERS & WEN-TSING CHOI, PRIME GRP., BAR EXAM OMNIBUS SURVEY 3, 6 (2020), [<https://perma.cc/38BA-YCGV>].

5. “States” or “jurisdictions” in this Article to refer to all of the fifty states plus the District of Columbia. They do not include Guam, Northern Mariana Islands, Palau, Puerto Rico or Virgin Islands (“Off-shore Jurisdictions”), which the NCBE often includes in its data.

6. Wisconsin for many years has had a diploma privilege, limited to graduates of the two Wisconsin law schools. Even Wisconsin, however, requires bar passage for graduates of other law schools. See *Diploma Privilege*, UNIV. OF WIS.-MADISON L. SCH., [<https://perma.cc/8SSU-Z8AF>] (last visited Oct. 6, 2022). New Hampshire also has a relatively small number of students in the “Daniel Webster Scholar Honors Program” who are excused from taking the examination. A portion (about twenty students) of the University of New Hampshire class is selected during the first year based on a holistic evaluation and a minimum three-point grade average. There is an ongoing evaluation of the students in the program. *Daniel Webster Scholar Honors Program*, UNIV. OF N.H. FRANKLIN PIERCE SCH. OF L., [<https://perma.cc/23C8-35GU>] (last visited Oct. 6, 2022). Because this is limited to a relatively small portion of a single law school, I do not refer to New Hampshire as having a diploma privilege. See also Michael T. Kane & Joanne Kane, *Standard Setting 101: Background and Basics for the Bar Admissions Community*, BAR EXAM’R, Fall 2018, at 9, 9-17.

7. *Bar Exam Modifications During COVID-19: 50-State Resources*, JUSTIA (Oct. 2020), [<https://perma.cc/QPP6-UDAE>].

8. See, e.g., *Supervised Practice Program Begins for Bar Exam Applicants After Pandemic Exam Delays*, FLA. SUP. CT. (Aug. 28, 2020, 8:50 AM), [<https://perma.cc/K7YR-GMYF>].

9. See Sam Skolnik, *D.C. Allows Law School Grads to Skip Exam During Pandemic*, BLOOMBERG L. (Sept. 24, 2020, 1:51 PM), [<https://perma.cc/JV5K-L9PP>].

analyzes the 2020 accommodations in terms of the public interest. Part VI examines the outcomes of those accommodations, and Part VII describes the 2021 bar admissions. Part VIII considers the impact of law schools' participation in the bar testing debates and the "disconnect" between some law schools and bar admission authorities.

I. COVID, DISRUPTION, AND LICENSING

The first-known case of COVID in the United States was in mid-January 2020, with the first non-travel-related infection diagnosed at the end of February.¹⁰ By then, it was clear that the pandemic was spreading quickly. The President declared a national emergency on March 13.¹¹ Law schools and other educational institutions closed regular operations and moved to online instruction.¹² The concern was justified, as illustrated below in Figure 1 demonstrating the level of infection during March. "Total" refers to cumulative cases, hospitalizations, and deaths. The following data is as of March 6 (the first day the government reported data from all states), March 13 (declaration of emergency), and the end of March:¹³

Figure 1

Date	Total Cases	Total Hospitalizations	Total Deaths
3/6/2020	445	N/A	26
3/13/2020	3,450	N/A	57
3/31/2020	196,965	18,155	4,331

Figure 1: The level of COVID infection during March.

10. Michelle A. Jorden et al., *Evidence for Limited Early Spread of COVID-19 Within the United States, January-February 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 680, 680 (2020).

11. Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

12. See Pradeep Sahu, *Closure of Universities Due to Coronavirus Disease 2019 (COVID-19): Impact on Education and Mental Health of Students and Academic Staff*, CUREUS (Apr. 4, 2020), [<https://perma.cc/CGT5-VCSZ>].

13. *Totals for the U.S.*, ATL.: THE COVID TRACKING PROJECT, [<https://perma.cc/2WKY-2C72>] (last visited Oct. 6, 2022).

The pandemic interfered with bar preparations.¹⁴ National bar preparation services provided online instruction in place of some in-person lectures.¹⁵ The final semester of study was, of course, also disrupted as law schools completed the semester online.¹⁶ Closing law school libraries, for example, was a problem for some bar applicants in finding space conducive to productive study. Graduation and final semester celebrations were virtual or scrapped.

The murder of George Floyd on May 26, 2020, ignited demonstrations and protests that spread nationwide.¹⁷ Throughout the summer, the Black Lives Matter movement and many other groups carried a call for reforming the police and for social justice.¹⁸ For many bar applicants, these events, coupled with the unknowns of COVID, interfered with summer bar preparation.¹⁹

Uncertainty was a significant challenge both for students and bar examiners preparing for bar examinations. The February 2020 examination was held as scheduled, but it became apparent that the July 2020 examination would require modifications.²⁰ The virus, and understanding of it, ebbed and flowed over time and location, and the accommodations for the summer examination shifted, which was disruptive and frustrating for applicants.²¹

14. See Abigail Johnson Hess, 'Literal Hell'—How the Pandemic Made the Bar Exam Even More Excruciating for Future Lawyers, CNBC (Aug. 19, 2020, 5:40 PM), [https://perma.cc/U4LE-DDC5].

15. For example, BARBRI provided updates beginning in March announcing adjustments that included its bar preparation instruction online, beginning on March 11, 2020. Mike Sims, *COVID-19 Summer 2020 Update*, BARBRI (Mar. 11, 2020), [https://perma.cc/TXB6-5TWK] ("The entire BARBRI course will be available online and on-demand this summer, as it has in the past. You won't need to attend a classroom.")

16. See *New Research: Law Schools and the Global Pandemic*, THOMSON REUTERS INST. (Dec. 16, 2020), [https://perma.cc/NMA3-G2ET].

17. Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), [https://perma.cc/XR94-C42U].

18. See, e.g., Haley Byrd & Devan Cole, *Movement for Black Lives Unveils Sweeping Police Reform Proposal*, CNN (July 7, 2020, 3:30 PM), [https://perma.cc/M4GW-XPZC].

19. See Beth Kaimowitz, *Black Lives Matter and the Bar Exam*, L. SCH. ACAD. SUPPORT BLOG (June 14, 2020), [https://perma.cc/G2HA-45WE].

20. See *Bar Exam Modifications During COVID-19: 50-State Resources*, *supra* note 7.

21. See *COVID-19 Information Continues to Evolve: What's New and What Has Changed?*, UC DAVIS HEALTH (Aug. 26, 2020), [https://perma.cc/P6Q3-JRNZ]; Craig

The first concern affecting the Summer 2020 examination was the safety of test takers.²² Theoretically, it was possible to make an examination safe through rigorous social distancing, separate facilities, filtration, and cleaning. However, bar examiners and courts in several states determined it had become practically impossible to administer a safe, in-person July test.²³

The second concern was with preparation for the examination.²⁴ Because bar preparation courses and study facilities were disrupted, it could take many applicants longer than usual to prepare for the test. Of course, preparation was delayed considerably for those applicants who became ill. In addition, the emotional and psychological disruption of the virus, social unrest, and uncertainty about the bar examination disrupted bar study.²⁵

There were also financial concerns. Postponing the examination could delay employment for some applicants. There would likely be an immediate loss of income for those who already had a job beginning upon bar passage. For others, it might delay the process of looking for a job. Fortunately, the federal government suspended loan repayments.²⁶ No payments were

Kopp, *Online Bar Exam Delay Causing Lawsuits, Frustration*, THE LEGAL EXAM’R (Sept. 15, 2020), [https://perma.cc/52XX-XXY7].

22. See, e.g., *Chief Judge Approves Temporary Authorization Program*, N.Y. CTS. (Apr. 28, 2020), [https://perma.cc/8MCD-JWEK].

23. At one time, several states said that they were limiting, or might limit, the number of test takers in the July exam. *July 2020 Bar Exam: Jurisdiction Information*, NAT’L CONF. OF BAR EXAM’RS (June 18, 2020), [https://perma.cc/NQ9G-MEB5]. This is an earlier form of the status reports of NCBE. See also Claudia Angelos et al., *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action*, UNLV WILLIAM S. BOYD SCH. OF L. (Mar. 22, 2020), [https://perma.cc/S2MQ-SVVA].

24. The Multistate Bar Examination (“MBE”) is an anchor of the bar examination in all the admitting American jurisdictions except Louisiana. For test security and psychometric reasons, it is ordinarily administered nationally on the same days in July and February. Deviating from that practice could pose significant challenges in maintaining examination reliability. See Sam Skolnik, *Covid-19 Forces Bar Exam Prep Companies to Alter Courses*, BLOOMBERG L. (June 24, 2020, 3:50 AM), [https://perma.cc/WTW9-VRAT].

25. See *supra* text accompanying notes 19 and 21.

26. Zack Friedman, *Federal Student Loan Payments Will Be Suspended Through September 30*, FORBES (Mar. 28, 2020, 12:09 PM), [https://perma.cc/2AM9-SN2X].

due, and no interest accrued on most federal student loans from March 20, 2020 to December 31, 2022.²⁷

Finally, some advocates argued graduates were urgently needed to fill positions in the legal profession.²⁸ Postponing the examination would delay licensing, not reduce the number of graduates licensed. Thus, the argument was that even a brief delay in licensing would leave critical legal positions unfilled.²⁹

II. LICENSING AND BAR ADMISSIONS EXIST TO PROTECT THE PUBLIC

A. Protecting the Public

States have long relied on an examination in bar admissions as an essential protection for the public.³⁰ The bar examination, legal education, and character and fitness requirements have been the standard.³¹ Ideally, COVID accommodations could be

27. The Department of Education, Congress, and the President suspended loan federal student payments, stopped collections on defaulted loans, and set a zero-interest rate for loans. See *COVID-19 Emergency Relief and Federal Student Aid*, FED. STUDENT AID, [https://perma.cc/757Z-MWE3] (last visited Oct. 7, 2022).

28. A group of scholars suggests that “it is urgent to maintain the flow of new lawyers into the legal system.” Angelos et al., *supra* note 23. Similar points are made in letters to state courts. Letter from Annette E. Clark, Dean, Seattle Univ. L. Sch., to Debra L. Stephens, C.J., Washington Sup. Ct. (June 10, 2020) [hereinafter Seattle Letter], [https://perma.cc/4PXS-7MYB]; Petition for Emergency Rule Waiver at 17, 19-20, *In re Temp. Waiver of the Bar Exam Requirement for Admission to the Bar and Provision of Emergency Diploma Privilege* (No. ADM10-8008) (Minn. June 22, 2020) [hereinafter Minnesota Petition], [https://perma.cc/3L47-Y223]; *An Open Letter from Public Interest Legal Organizations Supporting Diploma Privilege*, MEDIUM: PUB. RTS. PROJECT (Aug. 11, 2020), [https://perma.cc/4V45-3NTZ] (showing the signatures of individual public interest organizations).

29. See Angelos et al., *supra* note 23.

30. The traditional argument for licensing lawyers is that bad lawyers hurt clients, and that it is often difficult for members of the public to know the competency of a lawyer. An even stronger argument is that when someone selects a bad lawyer, it may very well impose significant harms (negative externalities) on others—clients, the courts, and society. Poorly constructed transactions and documents, or badly handled litigation, for example, result in opposing parties having additional risks of things going wrong and additional costs of time or their own lawyers’ time to correct the mistakes of the other party’s lawyer. In addition, courts, administrative agencies, and the legal system pay a price when inept lawyers submit unnecessary or badly constructed materials and arguments. See HULTIN, *supra* note 3.

31. Lawyer licensing in the United States almost universally includes these three parts: character and fitness review, education, and testing. Although there have been arguments about each of these three elements of licensing, they are consistent with the other licensed,

narrowly tailored to deal with the exigencies of 2020 without reducing the protection for the public.

There are, of course, debates about licensing—whether there should be licensing of lawyers,³² how the bar examination protects the public interest,³³ and how the bar examination should be structured to maximize the public interest.³⁴ These are important questions, but they are not the right ones for the 2020-2021 examinations. The courts and other bar admission authorities have determined for decades that the bar examination process is an integral part of the commitment to the public to ensure basic competence.³⁵ Even in accommodating for disabilities,³⁶ the examination is virtually never waived. The relevant question for COVID accommodations was only what short-term modifications (consistent with the obligations to the public) were necessary considering the pandemic, with larger issues of the bar examination relevant for another day.

learned professions. See NAT'L CONF. OF BAR EXAM'RS & AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, at vii-viii, ix-x (Judith A. Gundersen & Claire J. Guback eds., 2022).

32. See CLIFFORD WINSTON ET AL., FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS 5 (2011); Deborah Jones Merritt & Daniel C. Merritt, *Unleashing Market Forces in Legal Education and the Legal Profession*, 26 GEO. J. LEGAL ETHICS 367, 383 (2013).

33. See Jeffrey S. Kinsler, *Is Bar Exam Failure a Harbinger of Professional Discipline?*, 91 ST. JOHN'S L. REV. 883, 922 (2017); Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RESV. L. REV. 1191, 1231 (1995); Carol Goforth, *Why the Bar Examination Fails to Raise the Bar*, 42 OHIO N.U. L. REV. 47, 50-51 (2015).

34. See Andrea A. Curcio et al., *How to Build a Better Bar Exam*, N.Y. STATE BAR ASS'N J., Sept. 2018, at 37, 37, 41; Joan W. Howarth & Judith Welch Wegner, *Ringing Changes: Systems Thinking About Legal Licensing*, 13 FIU L. REV. 383, 398 (2019); Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 3-4 (2019).

35. See Curcio et al., *supra* note 34, at 38.

36. See LAURA F. ROTHSTEIN & JULIA IRZYK, *DISABILITIES AND THE LAW* 322 (4th ed. 2020).

B. The Public's View

The public polling organization, Prime Group,³⁷ with the assistance of YouGov,³⁸ conducted a public-opinion survey regarding the bar examination and pandemic accommodations in September 2020.³⁹ It was part of an omnibus survey in which a polling company combined questions from many clients and administered it to a panel of participants selected to represent the U.S. population.⁴⁰ In the 2020 survey, of which bar examination questions were a part, there were 1,135 U.S. adult participants.⁴¹

The National Conference of Bar Examiners (“NCBE”) commissioned the survey.⁴² A commissioned survey raises the possibility that the funding source manipulated the sample, questions, or results.⁴³ With the permission of NCBE, Mr. Greg Schneiders, the CEO of Prime Group, agreed to a telephone conversation about the survey.⁴⁴ The following summarizes that conversation. NCBE paid for the survey and participated in the

37. *What We Do*, PRIME GRP., [https://perma.cc/2XBZ-THSA] (last visited Oct. 7, 2022). Prime Group is an experienced provider of commercial and governmental survey research. See also *Online vs. Telephone: A Tale of Two Survey Methodologies*, PRIME GRP., [https://perma.cc/8MB7-VMVP] (last visited Oct. 7, 2022). It is primarily involved with developing questions for surveys and interpreting the results. It generally does not actually conduct the survey itself. Because telephone surveys have proven to be increasingly limited, Prime Group primarily relies on online surveys.

38. *RealTime Omnibus*, YOUNG, [https://perma.cc/4AQC-4G8D] (last visited Oct. 7, 2022). YouGov conducts the actual public opinion surveys (generally omnibus surveys) as described on its website. In the case of the NCBE survey, it took the questions to be asked and imbedded those questions in a longer survey on several different topics and multiple clients and gave the survey to a panel of participants. See *infra* notes 44-48 and accompanying text.

39. SCHNEIDERS & CHOI, *supra* note 4, at 1.

40. *Our Panel*, YOUNG, [https://perma.cc/DMG8-3DMM] (last visited Oct. 7, 2022). YouGov indicates that it has more than 17 million people worldwide who have agreed to participate in its panels. I understood that the U.S. panel, from which the 1,135 were selected, had between 2 and 3 million participants. SCHNEIDERS & CHOI, *supra* note 4, at 2.

41. SCHNEIDERS & CHOI, *supra* note 4, at 2.

42. *National Survey Finds Support for Bar Exam*, NAT'L CONF. OF BAR EXAM'RS (Sept. 30, 2020), [https://perma.cc/EK4G-5SJD].

43. Alice Fabbri et al., *The Influence of Industry Sponsorship on the Research Agenda: A Scoping Review*, 108 AM. J. PUB. HEALTH 9, 9 (2018).

44. Telephone Interview with Greg Schneiders, CEO, Prime Grp. (Oct. 5, 2020). Mr. Schneiders was very direct in answering my questions. I am most grateful to Mr. Schneiders as well as the NCBE for the opportunity to learn more about the process of developing the questions and conducting the survey.

construction of the questions.⁴⁵ It did not, however, have any role in the selection of the panel or know who was in the panel.⁴⁶ Because it was an omnibus survey, the bar examination questions were embedded in an extensive survey with questions from many different clients of YouGov.⁴⁷ Mr. Schneiders indicated that it would have been impossible for NCBE to influence the outcome of the survey in any way that is not apparent from the face of the questions and the introduction to the questions.⁴⁸ Thus, this survey appeared to be a straightforward use of opinion polling as it is routinely practiced today by many educational, business-oriented, and governmental organizations.

The bar examination survey had two substantive questions plus one demographic question.⁴⁹ The questions were introduced by a brief statement (set out in the notes) that a bar examination is generally required for a license but that the health and safety challenges of COVID caused states to consider other options.⁵⁰

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. SCHNEIDERS & CHOI, *supra* note 4, at 2, 5, 8.

50. The survey stated:

Until the Coronavirus (COVID-19) outbreak, every state, except one, required lawyers to pass a bar exam before being licensed to practice law. Bar exams have traditionally been held in person and supervised. But the health and safety challenges brought on by the outbreak have caused some states to consider allowing law school graduates to become licensed to practice law without taking and passing a bar exam.

See infra Appendix I. Question One:

Which of the following options would you favor to deal with the challenges brought on by the Coronavirus (COVID-19) outbreak?

- a. Continue to require supervised in-person bar exams with masks and social distancing, and compliance with all other local health guidelines
- b. Require a bar exam but allow for online or other remote testing even if it cannot be supervised
- c. Eliminate the bar exam requirement and allow anyone who graduates from an accredited law school to be licensed to practice law
- d. Don't know.

Id. at 2. Question Two:

[O]nce the Coronavirus (COVID-19) outbreak has passed and social distancing rules no longer apply, which of the following options would you favor?

The first question sought participants' preference on what bar admissions should require in light of COVID.⁵¹ There were three substantive options (require an in-person bar exam,⁵² allow remote testing even if not supervised,⁵³ and permit licensing without a bar exam for accredited law school graduates)⁵⁴ in addition to a "[d]on't know" option.⁵⁵ A second question asked for the preferred bar admission option following the pandemic.⁵⁶

The major results are presented in Figure 2 and in more demographic detail in Appendix I.⁵⁷ The results unequivocally favored requiring a bar examination.⁵⁸ Only 6% preferred the diploma privilege accommodation, with approximately 80% preferring a bar examination, either in-person (60%) or online (19%).⁵⁹ If "[d]on't know" responses are removed, those

-
- a. Return to the traditional practice of requiring lawyers to take the bar exam in-person and supervised
 - b. Require the bar exam but allow lawyers to take it online or through other remote testing even if it cannot be supervised
 - c. Eliminate the bar exam requirement and allow anyone who graduates from an accredited law school to be licensed to practice law
 - d. Don't know.

Id. at 5. Question Three (demographic):

Which, if any, of the following apply to you? Please select all that apply.

- a. I teach or have taught law
- b. I am a practicing lawyer
- c. I am a lawyer not currently practicing
- d. I am not a lawyer but am employed in the field of law
- e. I am currently a law student
- f. None of these.

Id. at 8.

51. SCHNEIDERS & CHOI, *supra* note 4, at 2.

52. "Continue to require supervised in-person bar exams with masks and social distancing, and compliance with all other local health guidelines[.]" *Id.*

53. "Require a bar exam but allow for online or other remote testing even if it cannot be supervised[.]" *Id.*

54. "Eliminate the bar exam requirement and allow anyone who graduates from an accredited law school to be licensed to practice law[.]" *Id.*

55. *Id.*

56. SCHNEIDERS & CHOI, *supra* note 4, at 5.

57. *Id.* at 3, 4, 6-8; *see also infra* Appendix I.

58. *Id.* at 2, 5.

59. *Id.* (approximately 15% responded "[d]on't know").

preferring a bar examination were 93% and those favoring a license without testing were 7%.⁶⁰

Some differences can be observed among the nineteen demographic factors in the table in Appendix I.⁶¹ It was especially apparent that the acceptability of the online examination, which ranged from 10% to 38% as the preferred option, depended on the age cohort.⁶² Part of that range may be attributed to a complication in the “online” option. That option stated, “Require a bar exam but allow for online or other remote testing *even if it cannot be supervised*[.]”⁶³ Thus, the option required both acceptance of an online test and accepting it unsupervised. It is impossible to tell whether the absence of supervision was unacceptable to the public or whether the concept of an online test itself was objectionable (even if well supervised). A second issue is the ambiguity of “cannot be supervised,” which was likely unclear to some participants. It probably meant reasonable measures to avoid cheating, but it may mean something more chaotic for people who do not follow testing.

One conclusion, however, was clear. Among all demographic groups, there was little enthusiasm for a diploma privilege even during COVID.⁶⁴ Support for that option was 3% to 13% among demographic groups, with 6% for all participants.⁶⁵ The support for a diploma privilege as the post-COVID preferred option dropped slightly to 5%.⁶⁶

All surveys have limitations. This was the opinion of the public at a point in time; it did not include every possible option (e.g., apprenticeship-supervised practice); the introduction was only a very brief statement of the issues and could not describe the considerations in detail; 12% to 15% of responses were “[d]on’t know”; and of course, like most surveys, people might change their minds if given more information. Nonetheless, the

60. *See id.*

61. *See* SCHNEIDERS & CHOI, *supra* note 4, at 3-4; *see also infra* Appendix I.

62. *See id.*

63. *Id.* at 2-4 (emphasis added).

64. *See id.* at 2, 5 (The option was to “[e]liminate the bar exam requirement and allow anyone who graduates from an accredited law school to be licensed.”).

65. *Id.* at 3-4.

66. SCHNEIDERS & CHOI, *supra* note 4, at 5 (showing that the online examination without supervision fell to 13.5%).

public sentiment about the importance of the bar examination was clear. The public's expectations are that a well-supervised bar examination is a necessary assurance of licensing. Which of the following options found below, in Figure 2, would you favor to deal with the challenges brought on by the Coronavirus (COVID-19) outbreak?

Figure 2

OPTIONS TO DEAL WITH COVID CHALLENGES				
	Total	Age		
	All	18-34	35-44	55+
Continue to require supervised in-person bar exams with masks and social distancing, and compliance with all other local health guidelines	60%	42%	58%	74%
Require a bar exam but allow for online or other remote testing even if it cannot be supervised	19%	32%	20%	10%
Eliminate the bar exam requirement and allow anyone who graduates from an accredited law school to be licensed to practice law	6%	7%	7%	4%
Don't know	15%	19%	15%	12%

Figure 2: Taken from the table in Appendix I.⁶⁷ All tables are from the Prime Group Bar Exam Omnibus Survey.⁶⁸

III. WHAT STATES DID: ANALYSIS OF ACCOMODATIONS

A. This Time It's Different

There are severe disruptions for some individuals during every administration of the bar examination. An applicant may have appendicitis or the flu just before the exam; others have

67. See *infra* Appendix I.

68. See SCHNEIDERS & CHOI, *supra* note 4.

family members who are ill, dying, or who may have been involved in a serious car accident; and some have severe emotional disruptions, unexpected delays, or interruptions in studying and taking the examination—all beyond their control. There is strong compassion for each of these, as there was for 2020 test takers. There can be no significant accommodation for these individual circumstances, and applicants are often delayed from taking the examination until the next administration.⁶⁹ It was different this time because so many applicants were all adversely affected in a similar way, so practical options were uniquely available.⁷⁰

There were several ways of accommodating the 2020 bar exam difficulties. From the public's perspective, the bar admissions process should not have been meaningfully less protective of the public interest in 2020 than in 2019 or 2023. Consistent with that principle, states were generally cautious about tailoring accommodations narrowly to the circumstances of the pandemic.⁷¹ We next turn to the six categories of 2020 bar accommodations: cancellation, special arrangements for social distancing and safety, change of dates (including multiple dates), remotely administered examinations, limited supervised practice rules, and the diploma privilege.⁷² A handful of states provided a reduction in the minimum bar passage score.⁷³

In considering the alternatives, applicants, states, and the NCBE faced rapidly changing circumstances that required some states to shift the accommodations based on new data about COVID and the options for testing.⁷⁴ That made it difficult for

69. See, e.g., STATE BAR OF CAL., REQUEST FOR REFUND OF FEES PURSUANT TO COMMITTEE OF BAR EXAMINERS REFUND POLICY (n.d.), [<https://perma.cc/9QA8-92VK>]; TEX. RULES GOVERNING ADMISSION TO THE BAR, R. 18.

70. See Angelos et al., *supra* note 23, at 2-5 (noting that an early list of options included postponing the examination, giving an online examination, administering the examination in small groups, emergency diploma privilege, the diploma privilege “[p]lus” (additional courses, externship, CLE, or the like), and supervised practice).

71. See *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23.

72. See *Bar Exam Modifications During COVID-19: 50-State Resources*, *supra* note 7, for additional information and links to court orders.

73. See Leslie C. Levin, *The Politics of Bar Admission: Lessons from the Pandemic*, 50 HOFSTRA L. REV. 81, 106, 122, 126 (2021).

74. See *id.* at 98-99.

applicants,⁷⁵ of course, but it was also a trying time for anyone involved in the examination process.

B. Cancel the Summer 2020 Exam

Because of the rapidly changing circumstances and difficulty giving an examination, one possibility was to cancel the Summer 2020 examination. The cancellation would maintain the usual quality assurance practices, and the consequences to the public of a six-month delay in licensing would probably not be significant. A well-supervised, temporary practice rule could ameliorate a potential shortage of new legal talent. For many bar applicants, however, the delay of six months would be a serious disruption. It would mean preparing for a 2021 examination, and a delay in receiving results, beginning their careers, starting to receive earnings, and getting on with life. It is worth noting that nearly every state gave applicants a cancellation *option* by eliminating fees for postponing the test until a later administration.⁷⁶

Cancellation would have had the advantage of being the safest option regarding the health of applicants and staff. From an examination perspective, a single, uniform-date, in-person test provides the most reliable, scalable, and secure examination. It reduces the likelihood of cheating, loss of question security, and statistical anomalies. It would provide substantial time for preparation, study, and calming the situation. From the NCBE and examiners' standpoint, it would be the most inexpensive and administratively simple solution. It would not require multiple sets of questions and would avoid the risks of nonstandard examinations.

One state did cancel the 2020 examination. On July 24, the Delaware Supreme Court announced that the September examination was canceled and would not be rescheduled.⁷⁷ The

75. See Marsha Griggs, *An Epic Fail*, 64 HOW. L.J. 1, 14 (2020) (providing an especially vivid description of the dislocations and problems encountered by students planning to take the bar in summer 2020, although less understanding of the problems faced by those responsible for the bar admissions process).

76. *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23.

77. Press Release, Delaware Sup. Ct., Delaware Supreme Court Cancels In-person 2020 Bar Exam (July 24, 2020), [<https://perma.cc/5AEY-6PU8>].

court noted that as of July, it was “unclear” what the state of the pandemic would be in September, and that uncertainty led to the cancelation.⁷⁸ It said that “[i]n lieu” of the examination, it had instructed the bar examiners to develop a temporary limited practice rule (which the court adopted on August 12).⁷⁹ One irony of Delaware canceling the July examination was that it is the only state that does not have a February test, so its cancelation was for a year.⁸⁰ Strangely, there was relatively little negative comment about the Delaware decision.⁸¹ Somehow, canceling the test seemed more acceptable than offering a delayed or online test.⁸²

As other states demonstrated, however, this least accommodating approach was unnecessary to protect the public interest. Fifty other jurisdictions found reasonable ways of providing a test consistent with usual public protection while allowing applicants the opportunity to be admitted reasonably close to the regular schedule.⁸³

C. Facilities Safety Arrangements

Thirty states gave in-person examinations in the summer or fall.⁸⁴ Of the thirty, thirteen gave it exclusively in July, and six exclusively in September or October.⁸⁵ Seven gave in-person examinations on two dates, and four gave an online test as an additional option to the in-person exam.⁸⁶ In many of these states, applicants also had the option of waiting for a 2021

78. *Id.* (noting that about 60% of Delaware applicants are from out of state).

79. *Id.*

80. *Bar Exam Results by Jurisdiction*, NAT'L CONF. OF BAR EXAM'RS (Sept. 30, 2022, 11:50 AM), [<https://perma.cc/YG2S-FWQX>].

81. *See* Levin, *supra* note 73, at 117-18.

82. *See id.* *But see* AM. BAR ASS'N, RESOLUTION 10G 6 n.10 (Aug. 3-4, 2020), [<https://perma.cc/6GHH-KWHL>] (“[T]here is concern that bar applicants in Delaware may be ‘in limbo’ for an extended period of time due to the cancellation of the July 2020 in-person bar examination . . .”).

83. *See Persons Taking and Passing the 2020 Bar Examination*, BAR EXAM'R, Spring 2021, at 24, 24-25.

84. *See July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23.

85. *See id.*

86. *See id.*

examination.⁸⁷ States giving in-person tests took special precautions regarding sanitation and social distancing.⁸⁸

D. Dates of Examinations

Most states with in-person tests offered examinations in September or October as the only testing date or as an alternative to July.⁸⁹ The multiple dates were possible because NCBE provided additional tests for September 9-10 and September 30-October 1, as well as the NCBE online examination.⁹⁰

Providing for a summer date plus two fall dates was a vital accommodation. It took some time pressure off applicants and allowed options for states. Multiple tests required considerable time and expense to produce and administer.⁹¹ It also required that the NCBE have sufficient examination questions to provide additional sets of reliable testing components.⁹²

E. Online (Remote) Examination—The Backup Called Upon

The most intriguing accommodation (and risky, from a testing standpoint) was the online examination. NCBE constructed an online test for states to use October 5-6, 2020, as “an emergency option should administering the in-person bar exam not be possible.”⁹³ A total of twenty-four states gave online examinations; nineteen gave the NCBE October 5-6 examination (four were an option to the in-person examination).⁹⁴ Five states gave their own online tests on various dates from July through October.⁹⁵

87. *Id.*

88. *Bar Exam Modifications During COVID-19: 50-State Resources*, *supra* note 7.

89. *See July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23.

90. Levin, *supra* note 73, at 92.

91. *See* Joanne Kane & April Southwick, *The Testing Column: Writing, Selecting MBE Items: A Coordinated and Collaborative Effort*, BAR EXAM’R, Spring 2019, at 46, 46-47.

92. Levin, *supra* note 73, at 89 nn.56-57.

93. *NCBE COVID-19 Updates*, NAT’L CONF. OF BAR EXAM’RS (June 1, 2020, 4:00 PM), [<https://perma.cc/7C47-UC9Y>].

94. *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23.

95. *Id.*

The NCBE online test was shorter than the standard test.⁹⁶ It had only 100 multiple choice, three essays, and one performance question in four, ninety-minute testing sessions.⁹⁷ States could use all these NCBE tests or use only some of them. A risk of this test included the possibility of cheating. States tried to prevent cheating by, among other things, conducting remote video monitoring of test takers, often assisted by artificial intelligence.⁹⁸ It was these functions that created some of the problems with remote administration.⁹⁹

The online option raised some additional considerations, including helping some applicants find reliable web access. A few courts specifically requested that law schools assist applicants with those arrangements.¹⁰⁰

One day in the not-too-distant future, bar examinations will be given online, but they will not be the examinations of 2020.¹⁰¹ It turned out to be a practical option in the 2020 pinch.

F. Limited or Supervised Practice

Delaware was not alone in granting a temporary limited practice rule.¹⁰² Thirty states, including most states that did not offer a July examination, adopted some form of supervised

96. NCBE COVID-19 Updates, *supra* note 93.

97. July 2020 Bar Exam: Jurisdiction Information, *supra* note 23.

98. Sam Skolnik & Jake Holland, *Cheating Scandal Aside, New Remote Bar Looks a Lot Like Old One*, BLOOMBERG L. (Feb. 1, 2021 5:30 AM), [<https://perma.cc/NPB3-BJEL>].

99. Jason Kelley, *ExamSoft Flags One-Third of California Bar Exam Test Takers for Cheating*, ELEC. FRONTIER FOUND. (Dec. 22, 2020), [<https://perma.cc/VYR4-PD32>]; Gabriel H. Teninbaum, *Report on ExamSoft's ExamID Feature (and a Method to Bypass It)*, 4 J. ROBOTICS A.I. & L. 293, 293 (2021).

100. Letter from Jorge E. Navarrete, Clerk & Exec. Officer, California Sup. Ct., to Alan K. Steinbrecher, Tr., State Bar of California (July 16, 2020) [hereinafter California Letter], [<https://perma.cc/U88H-ALSG>]; Administrative Order at 5-6, *In re* the Oct. 2020 Md. Bar Examination & Option for Temp. Supervised Prac. of L. (Md. Aug. 28, 2020) [hereinafter Maryland Order], [<https://perma.cc/2J6Z-BPUG>].

101. See TESTING TASK FORCE, NAT'L CONF. OF BAR EXAM'RS, OVERVIEW OF PRELIMINARY RECOMMENDATIONS FOR THE NEXT GENERATION OF THE BAR EXAMINATION 3-5 (2020), [<https://perma.cc/8WR2-7HGE>] (the examination given in 2020 did not take advantage of the advanced testing techniques that technology currently allows; however, serious proposals have been made to move toward a more technologically savvy testing platform).

102. See Order at 1, *In re* Certified Ltd. Prac. Privilege for 2020 Del. Bar Applicants (Del. Aug. 12, 2020), [<https://perma.cc/7NU6-KYAB>].

practice.¹⁰³ Ten states that gave a July in-person examination also provided a temporary practice rule.¹⁰⁴ Temporary practice had the advantage of reducing pressure on those applicants who chose to wait until 2021 to take the test.

The rules varied among the temporary practice states.¹⁰⁵ One version relied on the existing student practice rules of the state.¹⁰⁶ These rules generally provided some form of supervision by a licensed attorney.¹⁰⁷ They also usually required that the applicant had registered to take the bar in the state.¹⁰⁸ Most rules provided that the temporary license ended after a defined period or if the graduate did not take, or failed, the bar examination.¹⁰⁹

Well-supervised temporary practice made applicants available to firms and organizations faster than if they took the examination and had to wait for results or delayed taking the examination. A key to protecting the public was ensuring careful supervision.

G. Accommodations by Law Schools

In seeking extraordinary accommodations from courts and bar examiners, many law schools and faculty spoke movingly about the complex emotional and personal circumstances and

103. See *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23 (the only states with no July bar examination or diploma privilege that did not offer a limited practice privilege were Hawaii, New Mexico, Maine, and New Hampshire).

104. *See id.*

105. See *Bar Exam Modifications During COVID-19: 50-State Resources*, *supra* note 7.

106. *See id.*

107. *Id.*

108. *Id.*

109. See Rebecca White Berch & Ruth V. McGregor, *COVID-19 and Bar Exams—ABA's Proposal Strikes a Needed Balance*, BLOOMBERG L.: INSIGHTS (May 21, 2020, 3:01 AM), [<https://perma.cc/MU4H-4XQ5>]; see also Erwin Chemerinsky & Jennifer Mnookin, *Making the Case for Provisional Bar Licenses in the Coronavirus Pandemic*, LAW.COM (Apr. 8, 2020, 7:11 PM), [<https://perma.cc/63Y5-RCAQ>]. Apparently, Dean Chemerinsky and other deans later changed their minds; he is quoted in June as emailing 2020 Berkeley law graduates that “[W]e support diploma privilege for all graduates of ABA-accredited law schools . . . without ever needing to take the bar exam.” Sam Skolnik, *States Pressured to Waive Bar Exam for New Lawyers in Pandemic*, BLOOMBERG L. (June 30, 2020, 8:28 AM), [<https://perma.cc/C99B-MZ69>]. Of course, circumstances changed over time.

financial burdens 2020 graduates faced.¹¹⁰ Given the extraordinary problems they described, it was reasonable for schools to take dramatic steps to support their 2020 graduates. They might, for example, have done a combination of any of the following: (1) made counseling and therapy available, stayed constantly connected with graduates preparing for the bar, and ensured that each graduate had good places to study; (2) provided individual financial counseling, student loan guidance, and short-term loan assistance; (3) helped students find temporary supervised practice; (4) provided intensive placement services to connect students with employers.

A few courts noted that law schools have facilities and connections that could assist students, especially in studying for and taking online examinations.¹¹¹ Some law schools provided substantial assistance to their graduates,¹¹² but it would have been better if more law schools had publicly offered to undertake such aid. Law schools are seldom shy about announcing good deeds, so the absence of more public information about their assistance to graduates is surprising. Law schools, of course, had financial challenges and were busy planning for current students and getting an entering class for the fall. Nonetheless, the intensity of the emergency they have described to the courts suggests that helping recent graduates should have been a priority.

110. See Stephanie Francis Ward, *Jurisdictions with COVID-19 Related Diploma Privilege Are Going Back to Bar Exam Admissions*, ABA J. (Dec. 10, 2020, 3:16 PM) [<https://perma.cc/W94Q-LHJG>].

111. See Maryland Order, *supra* note 100, at 1. The Maryland Court of Appeals, for example, noted that “law schools and other entities have space that can provide a quiet location without distraction for those taking a remote examination” and ordered the board of bar examiners to assist “law schools . . . to provide testing locations for those applicants” who need quiet, connected locations and “to develop protocols for such test locations, publicize the availability of those locations to applicants, and facilitate, to the extent practicable, the ability of applicants to take the examination at such locations.” *Id.* at 5-6. The California Supreme Court also urged law schools to help students who might struggle with the facilities to take the remote exam. California Letter, *supra* note 100, at 1-2 (“The court strongly encourages law schools to assist those graduates who lack internet access at home, or who have home environments not amenable to two days of uninterrupted examination, by employing the same and similar measures, including the use of school facilities and equipment, that schools have utilized to allow students to complete the Spring 2020 semester.”).

112. Gabriel Kuris, *The Impact of the Coronavirus on Legal Education*, U.S. NEWS & WORLD REP. (June 14, 2021, 9:01 AM), [<https://perma.cc/FGC6-PVPN>].

H. Diploma Privilege¹¹³

Five states adopted a July 2020 diploma privilege as an accommodation.¹¹⁴ The privilege allowed graduates a permanent license to practice law without formal post-law school testing.¹¹⁵ Given the divergence from what the standard licensing process has long considered an essential element of public protection, we will look at this accommodation in detail below.

IV. DIPLOMA PRIVILEGE

The diploma privilege became popular in America in the nineteenth century and declined in the twentieth century,¹¹⁶ leaving Wisconsin as the only state with the privilege.¹¹⁷

113. “Diploma privilege” means that a state offers a broadly based admission to the bar without examination because an applicant has graduated from an approved law school. *Diploma Privilege: What Is It & Which States Offer It?*, UWORLD LEGAL, [https://perma.cc/5KPQ-5UWV] (last visited Oct. 7, 2022). Under this definition, the New Hampshire Daniel Webster program is not a broad-based program (it applies to only a relatively small proportion of a single law school). See *Daniel Webster Scholar Honors Program*, *supra* note 6. Most diploma-privilege states have a variety of requirements beyond graduation. See *Diploma Privilege: What Is It & Which States Offer It?*, *supra*. Utah is included as a 2020 diploma privilege state even though it requires 360 hours of supervised practice (instead of the bar examination). See *infra* notes 124, 127 and accompanying text. Louisiana has a modest CLE and mentoring requirement. See *infra* notes 173-74 and accompanying text. D.C.’s program is admission without examination, again substituting a much longer supervised practice (three years) without a specific number of hours. *Diploma Privilege: What Is It & Which States Offer It?*, *supra*.

114. The five states are those that provided a diploma privilege as an accommodation for the 2020 examination. A sixth state, Wisconsin, offers the diploma privilege, but it was not an accommodation for COVID. See *Diploma Privilege: What Is It & Which States Offer It?*, *supra* note 113.

115. *Id.* Initial licensing in law is, for most lawyers, realistically the only opportunity to ensure basic competency. Much of what lawyers do is not publicly visible. It is difficult for licensing authorities to know about, and act against, practitioners providing inadequate legal services. There is no re-testing throughout a lawyer’s career. Disbarment or other significant licensing discipline in law is rare. The initial law license is, for all practical purposes, for life. See David Barnhizer, *Abandoning an “Unethical” System of Legal Ethics*, 2012 MICH. ST. L. REV. 347, 380.

116. The diploma privilege began in Virginia in 1842, and by 1890 it was adopted in 16 states. After 1920, however, the privilege was increasingly discredited. Only a few states still had it by the 1950s, and in the 1980s four states dropped the privilege, leaving only Wisconsin since then. See Thomas W. Goldman, *Use of the Diploma Privilege in the United States*, 10 TULSA L.J. 36, 39-42 (1974); see also *infra* note 117 and accompanying text.

117. *Diploma Privilege, What Is It & Which States Offer It?*, *supra* note 113. Wisconsin Supreme Court Rule 40.03 applies only to applicants receiving a J.D. “from a law

Wisconsin limits its privilege to in-state schools, raising some unresolved constitutional issues.¹¹⁸ The diploma privilege is popular with law schools and graduates and was their preferred pandemic accommodation.¹¹⁹

A. The Five States Offering the Diploma Privilege as an Accommodation

Five jurisdictions adopted “temporary”¹²⁰ diploma privileges for 2020.¹²¹ Wisconsin, of course, has an ongoing diploma privilege.¹²²

All five states require applicants to complete all requirements for licensing except the bar examination (e.g., complete law school, character and fitness evaluations, and professional responsibility examination).¹²³ All of these states require something other than a diploma, so all are “diploma plus” in some way. The five rules were quite different and are described (in the author’s view) approximately in descending order of protection for the public.

Several courts and justices estimated the effect of a diploma privilege in granting licenses to applicants who would have failed the licensing examination. This Article has added estimates for some other states. These are rough estimates based on failure rates from past examinations, usually the Summer 2019

school in this state that is fully, not provisionally, approved” by the ABA. WIS. SUP. CT. R. § 40.03. Wisconsin has only two law schools. *Wisconsin Law Schools*, JUSTIA, [https://perma.cc/7ZFG-7QCE] (last visited Oct. 7, 2022).

118. Vikram David Amar, *Why It Is Unconstitutional for State Bars, When Doling out Bar-Exam Seats, to Favor In-State Law Schools*, JUSTIA: VERDICT (May 21, 2020), [https://perma.cc/85D8-ZDGF] (“This diploma privilege is unconstitutional; it is facially discriminatory without any non-parochial justification.”); Claudia Angelos et al., *Diploma Privilege and the Constitution*, 73 SMU L. REV. F. 168, 168, 185 (2020) (“[A] diploma privilege limited to graduates of in-state schools raises serious Dormant Commerce Clause questions.”).

119. Skolnik, *supra* note 109.

120. *Diploma Privilege: What Is It & Which States Offer It?*, *supra* note 113 (the reference to these as “temporary” diploma privileges may be confusing; these applicants are granted permanent licenses to practice law, and “temporary” means only that other years’ applicants will not have the same privilege).

121. *Id.*

122. *Id.*

123. See *id.* for a summary of the requirements for licensing.

examination. For a variety of reasons, the estimates should be taken as approximations.

1. Utah

The Utah Supreme Court adopted a Utah diploma privilege on April 22, 2020, the first court to provide the privilege and perhaps the only court to do so without dissent.¹²⁴ The rule provided that Qualified Candidates “shall be admitted to the Utah Bar without passing the Utah Bar Examination.”¹²⁵ Qualified Candidates were those who graduated by June 30, 2020, and completed an application for the Utah bar by April 1, 2020.¹²⁶ They also were required to do 360 hours of “[s]upervised [p]ractice” by the end of 2020.¹²⁷

The rule did several things to narrow the potential risk to the public. First, it provided that only graduates of law schools with a 2019 first-time bar passage rate of 86% “(rounded to the nearest whole number)” or higher were eligible.¹²⁸ This avoided an in-state-related preference problem noted with Wisconsin.¹²⁹ The two Utah law schools in 2019 had pass rates near or above 90%, and Utah’s total first-time passing rate for 2019 was 85.88% (86% rounded up).¹³⁰ Most American Bar Association (“ABA”) law

124. See Levin, *supra* note 73, at 118-120 (providing an account of the deliberations in Utah).

125. Order for Temporary Amendments to Bar Admission Procedures During COVID-19 Outbreak at 1, 3, *In re* Emergency Modifications to Utah Sup. Ct. Rules of Prof. Prac., Rules Governing Admission to the Utah State Bar (Utah Apr. 21, 2020) [hereinafter Utah Order], [<https://perma.cc/93JG-DAL7>].

126. *Id.* at 1-2 (“Late or incomplete applications will not be accepted.”).

127. *Id.* at 2-4 (there is a lengthy description of the “Supervised Practice” requirement in Section III of the rule. The basic description is: “All time spent in any activity related to developing the Qualified Candidate’s legal competence (whether paid, unpaid, pro bono, or low bono) shall be counted toward the 360-hour requirement . . .”).

128. *Id.* at 1.

129. See Amar, *supra* note 118 (providing a benefit limited only to in-state residents or in-state law schools raises a serious constitutional question which, I noted earlier, has been raised with the Wisconsin diploma privilege).

130. *Individual School Bar Passage Reports*, AM. BAR ASS’N, [<https://perma.cc/NW86-EQU8>] (last visited Oct. 7, 2022) (select “Brigham Young University” in the “Select School” box; then select “2020” in the “Select Year” box, which will have 2019’s data; lastly, select “Generate Report”; repeat these same steps, but change to “Utah, University of” in the “Select School” box). ABA 509 data indicates that the 2019 pass rate (February and July examinations combined for all jurisdictions) was 89.523% for BYU and 90.41% for the University of Utah. *Id.*

schools would not have met the 86% standard.¹³¹ Projecting only from 2019 results, it may be that ten to fifteen applicants¹³² who would have failed the Utah bar examination were instead admitted because of the privilege.

An additional protection was that repeat takers were not eligible.¹³³ By requiring that registration be completed before the court announced the privilege, it avoided the possibility of applying for a license knowing there was a privilege. Finally, the rule required 360 hours of supervised practice *before* the license was granted, which must have been completed in 2020.¹³⁴

2. Oregon

At the request of the deans of three Oregon law schools, the Oregon Supreme Court, by a margin of 4-3, adopted a diploma privilege for summer 2020 bar admission.¹³⁵ The order's (whereas clauses) explanation is that "the spread of the COVID-19 virus represents an extraordinary burden to applicants

131. The 86% bar-passage rate standard poses its own internal inconsistency because of the variability of minimum passing scores around the country. A school located in a jurisdiction with a relatively low minimum passing score likely has a passing rate that would differ from what it would be if the school's bar passage rate were measured by the relatively high minimum passing score of another jurisdiction. See *id.* to compare other minimum passing scores around the country. See also Utah Order, *supra* note 125, at 1, for a general understanding of the Utah 86% standard.

132. See *Individual School Bar Passage Reports*, *supra* note 130. The total number of failures (first-time takers) from the two Utah law schools on both administrations of the Utah bar in 2019 was nine applicants. See *id.* (subtract the total of number of passers from total takers for each school in the "Details 2019" box and combine the two numbers (five for University of Utah, and four for Brigham Young University) to show the nine total failures). A total of thirty-eight non-Utah law schools' first-time takers failed the bar in 2018 (out of approximately 170 non-Utah takers), but many of these probably came from law schools that would not qualify for the privilege because of the 86% passage rule.

133. Utah Order, *supra* note 125, at 1-2. In addition, the candidate cannot be taking any other bar examination in July 2020. *Id.*

134. *Id.* at 3. Both the applicant and the attorney must certify the hours worked in fulfilling this requirement. *Id.* at 8.

135. Order Approving 2020 Attorney Admissions Process at 1-2, *In re 2020 Att'y Admissions Process* (Or. June 30, 2020) (No. 20-012) [hereinafter Oregon Order], [<https://perma.cc/28VL-3AU3>]. Stephanie Francis Ward, *Oregon Is Third State to Grant Diploma Privilege, While Tennessee Cancels Its July UBE*, ABA J. (June 30, 2020, 10:40 AM), [<https://perma.cc/A2LF-84A6>].

registered for the July 2020 Oregon Bar examination and that burden has had a significantly unequal impact on applicants.”¹³⁶

The diploma privilege applied to the 2020 graduates from the three Oregon law schools (regardless of their bar passage rates), and out-of-state schools with 2019 passage rates of “86[%] (rounded to the nearest whole number).”¹³⁷ The 2019 total first-time pass rates for Oregon schools were: University of Oregon 86%, Willamette 82%, and Lewis & Clark 81%—thus, two of the three would not meet the 86% requirement.¹³⁸ About one-third of the ABA law schools nationally would qualify for the diploma privilege under the 86% rule.¹³⁹ The substantial benefit to in-state schools may raise a constitutional problem as noted in Wisconsin.¹⁴⁰ The privilege did not include repeat takers.¹⁴¹ From the perspective of the public, that is a good thing. The July 2019 repeater pass rate was only 27%.¹⁴²

The court also lowered the minimum passing score, only for the July 2020 exam, from 137 to 133 (on the 200-point scale),¹⁴³ moving Oregon from high-average to low-average range nationally.¹⁴⁴ The rule did not require any form of supervised practice.¹⁴⁵ An applicant meeting the conditions was “a fully

136. Oregon Order, *supra* note 135, at 1.

137. *Id.* at 2.

138. See *Individual School Bar Passage Reports*, *supra* note 130 (choose “Bar Passage Outcomes” from the menu; then select “University of Oregon” as the school and “2020” as the year; then click the “Generate Report” icon to download a PDF report of the 2019 data; repeat the process and select “Willamette” and “Lewis & Clark”).

139. The Oregon Bar posted a list of the law schools meeting the 86% rule. *Changes to the OSB Admissions Process for 2020*, OR. STATE BAR (July 1, 2020), [https://perma.cc/9TY9-4UBJ]; see also *List of ABA-Approved Law Schools*, AM. BAR ASS’N, [https://perma.cc/T274-Q7TM] (last visited Oct. 7, 2022). Ironically, it counted the Wisconsin and Marquette graduates admitted via the diploma privilege as “persons taking a bar examination for the first time in 2019.” Oregon Order, *supra* note 135, at 2.

140. Amar, *supra* note 118, at 168; Angelos et al., *supra* note 118, at 168.

141. The rule requires that applicants have “[g]raduated in 2020,” and February 2020 examination takers would have graduated in December 2019 at the latest. See Oregon Order, *supra* note 135, at 2.

142. *2019 First-Time Exam Takers and Repeaters from ABA-Approved Law Schools*, NAT’L CONF. OF BAR EXAM’RS [hereinafter *2019 First-Time Takers and Repeaters from ABA Schools*], [https://perma.cc/CJ6A-UHQW] (last visited Oct. 7, 2022).

143. COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, *supra* note 31, at 32 (technically, the rule reduces the passing score from 274 to 266 on NCBE’s 400-point scale.).

144. See *id.* at 20.

145. See Oregon Order, *supra* note 135, at 2.

licensed member of the Bar with the same rights and responsibilities as other Bar members.”¹⁴⁶

This combination of accommodations is puzzling. The “whereas clause” explanation was that COVID-19 imposed an enormous burden on applicants, some more than others.¹⁴⁷ That, along with possible oversubscription for the July examination, would explain offering multiple testing dates or the October remote examination as an option to any taker (Oregon offered an in-person examination in July and an online examination in October.)¹⁴⁸ Nor is it clear why out-of-state law schools needed to meet the 86% standard, but in-state schools did not (and two of the three did not).¹⁴⁹ The reason for the temporary reduction in the minimum pass score is also unclear, that is, why it was needed in addition to the diploma privilege. Oregon did not require any supervised practice before licensing.¹⁵⁰

Projected from 2019 results, perhaps forty applicants¹⁵¹ would not have passed the July 2019 examination and would have become “a fully licensed member of the Bar.”¹⁵² However, that number should be reduced somewhat to reflect the temporary lowered minimum passing score.

146. *Id.* at 3.

147. *Id.* at 1.

148. The order says that those “currently registered for the July 2020 Oregon Bar examination may . . . [s]it for the July 2020 Oregon Bar examination.” *Id.* at 3.

149. Derek T. Muller, *Three Curiosities of Oregon’s Diploma Privilege Rule for the 2020 Bar Exam*, EXCESS OF DEMOCRACY (June 30, 2020), [<https://perma.cc/TJ65-7SJ7>].

150. See Oregon Order, *supra* note 135, at 2.

151. See *2019 First-Time Takers and Repeaters from ABA Schools*, *supra* note 142, at 22. About fifty first-time takers from ABA schools failed the bar examination in July 2019, but some of these would have been from out-of-state schools without the 86% bar passage rate (and those would not be admitted via the diploma privilege), leading to an estimate of forty applicants who would have failed the examination, but will instead be admitted to practice.

152. Oregon Order, *supra* note 135, at 3.

3. District of Columbia¹⁵³

The District of Columbia Court of Appeals, in a 4-3 decision, created a diploma privilege with supervised practice on September 24, 2020.¹⁵⁴ The rule also established a temporary practice rule.¹⁵⁵ The court determined that a temporary practice rule “will not address all of the difficulties that applicants face in light of the pandemic.”¹⁵⁶ It suggested that its diploma privilege rule had some “conditions intended to safeguard the public’s interest in the competence and good character of those [admitted] to practice.”¹⁵⁷

The diploma privilege applied to applicants who received a J.D. degree from an ABA school in 2019 or 2020, completed an application to take “a bar examination . . . to be administered in this jurisdiction in 2020 or 2021,”¹⁵⁸ had not taken the bar examination or been admitted elsewhere (precluding retakers), demonstrated character and fitness, and passed the professional responsibility examination.¹⁵⁹ Significantly, anyone admitted under the rule must practice for three years “under the direct supervision” of a member of the D.C. bar.¹⁶⁰ The supervisor must “take[] responsibility for the quality of the person’s work and

153. Some argue that D.C. should not be included in this list of diploma privilege because it has a substantial supervised practice requirement, which replaces a bar examination. See Derek T. Muller, *Would You Rather Take the Bar Exam, or Work 6000 Hours as an Apprentice?*, EXCESS OF DEMOCRACY (Sept. 28, 2020), [<https://perma.cc/6KS4-6668>]. I do include it as a diploma privilege because it has a broad-based admission without examination.

154. Order at 2 (No. M269-20) (D.C. Cir. Sept. 24, 2020) [hereinafter D.C. Order], [<https://perma.cc/6E5G-PBX8>].

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 4.

159. D.C. Order, *supra* note 154, at 4.

160. *Id.* at 6. There are a number of requirements for the supervising attorney. The attorney must be an:

[E]nrolled, active member of the D.C. Bar who (a) has practiced law in the District of Columbia for at least five years; (b) is in good standing . . . (c) is the person’s employer, works for the person’s employer or law firm, or works for a non-profit organization in the District of Columbia that provides legal services to people of limited means . . . and (d) takes responsibility for the quality of the person’s work and complaints concerning that work.

Id.

complaints concerning that work.”¹⁶¹ In addition, those admitted via the diploma privilege must “for three years after admission, [provide] prominent notice in all business documents that the person’s practice is supervised by one or more D.C. Bar members and that the person was ‘admitted to the Bar under D.C. App. R. 46-A (Emergency Examination Waiver).’”¹⁶²

The lengthy supervision requirement, with another attorney “tak[ing] responsibility” for the quality of work,¹⁶³ was a meaningful quality assurance mechanism. In addition, the notice of special admission provision is a partial response to the question of “how is the public to know” that a diploma privilege attorney did not go through the usual testing procedures.¹⁶⁴ These provisions are significantly beyond the supervision required by other diploma privilege jurisdictions.

Three judges issued a separate statement, essentially in dissent.¹⁶⁵ They felt that the remote examination and expanded practice privilege were sufficient accommodations.¹⁶⁶ They also noted that the court’s rule did not require admittees to attest that they completed the three years of practice under supervision.¹⁶⁷

The D.C. bar admissions office indicates that 114 applications were “received by the initial deadline of April 30, 2021,” for participation in the Emergency Examination Waiver (with the supervised practice).¹⁶⁸ After three years of supervised practice, that number might decrease.

161. *Id.*

162. *Id.* at 7.

163. *Id.* at 6.

164. A question about this public information rule is what “business documents” refers to in the rule (“prominent notice in all business documents”). See D.C. Order, *supra* note 154, at 2, 4.

165. Chief Judge Blackburne-Rigsby, and Judges Glickman and Thompson filed this “Separate Statement.” In addition to saying that the case had not been made for a diploma privilege, they also indicated that if there were to be such a privilege, “it should be for those applicants who certify that they have experienced significant hardship relating to the pandemic that has made taking the October 2020 remote bar examination infeasible.” *Id.* at 7 (separate statement of Blackburne-Rigsby, Glickman, and Thompson, JJ.).

166. *Id.*

167. D.C. Order, *supra* note 154, at 6-7. *But see* Utah Order, *supra* note 125, at 8 (requiring both the bar applicant and the supervising attorney to certify the successful completion of the supervised-practice requirement).

168. Email from Doug Buchanan, Dir. of Media and Pub. Rels., D.C. Cts., to Steven R. Smith, Author (Oct. 27, 2022, 11:58 AM) (on file with author).

4. Louisiana

On July 22, 2020, the Louisiana Supreme Court, in a 4-3 decision, granted the diploma privilege to graduates of ABA law schools registered for the Summer/Fall exam.¹⁶⁹ The court had earlier scheduled remote examinations for August 24 and October 10.¹⁷⁰ There was no formal opinion, but there were clauses that noted COVID placed extraordinary burdens on applicants and made in-person examinations impractical.¹⁷¹ A news release provided additional information. It recounted the problems with an in-person examination and that “the [c]ourt considered but rejected issuing a mandate that the bar examination be taken remotely for first-time test takers.”¹⁷²

The order allowed graduates to be licensed as soon as practicable. It required that, by the end of 2021, applicants take twenty-five Continuing Legal Education (“CLE”) credits (the 12.5 credits required for all newly admitted attorneys, plus 12.5 in any area).¹⁷³ Participation in a mentoring program was also required.¹⁷⁴ The news release said that the CLE hours and mentoring program “will serve as guardrails to ensure the competency and integrity of the newly-admitted attorneys during their first year of practice.”¹⁷⁵ Chief Justice Johnson acknowledged the court’s “responsibility to ensure the competency and integrity of the legal profession. In my opinion, today’s limited one-time Order . . . fulfills this responsibility.”¹⁷⁶ The court thanked the Louisiana law deans, bar examiners, and state bar association for “bringing this solution to fruition.”¹⁷⁷

169. Order at 2 (La. July 22, 2020) [hereinafter Louisiana Order], [<https://perma.cc/6PYC-BSGQ>]; Levin, *supra* note 73, at 128-29.

170. Louisiana Order, *supra* note 169, at 3; *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23.

171. Louisiana Order, *supra* note 169, at 1.

172. Press Release, Louisiana Sup. Ct., Louisiana Supreme Court Announcement Regarding 2020 Bar Examination (July 22, 2020) [hereinafter Louisiana Press Release], [<https://perma.cc/46TZ-5XHQ>].

173. Louisiana Order, *supra* note 169, at 2-3.

174. *See id.*

175. Louisiana Press Release, *supra* note 172, at 1.

176. *Id.* at 2.

177. *Id.* at 3.

Each of the three dissenting justices wrote opinions. Justice Hughes, “respectfully” dissenting, noted that the court had “ignored [the] objective recommendations” of the bar examiners but expects the examiners to “oversee the window dressing for automatic admission.”¹⁷⁸ Justice Genovese “vehemently” dissented.¹⁷⁹ He noted that an examination should be required “to insure competency in the practice [of] law and for the protection of the public in general,” and that “over 100 bar applicants will be given a license to practice law when they should not have been. What other professions are allowing a professional license without testing?”¹⁸⁰ Justice Crain also dissented, writing: “Today we follow ‘the deans of the four Louisiana Law Schools’ whose students, for the first time, would have been tested by someone other than their respective law schools.”¹⁸¹ He noted that “[t]he bar examination acts to protect the public from basic incompetency,” and asked whether the medical and accounting professions are “handing out licenses . . . without testing competency.”¹⁸² He concluded, “we have done an incalculable disservice to the public, [and] our profession.”¹⁸³

The Louisiana order applied to any ABA law graduate.¹⁸⁴ It did not have limits, as Utah and Oregon’s orders did for out-of-state schools, based on 2019 passing rates.¹⁸⁵ Such a provision may have been problematic in Louisiana, where, in 2018 and 2019, one in-state school had first-time total passing rates of only

178. Louisiana Order, *supra* note 169, at 5 (Hughes, J., dissenting).

179. *Id.* at 6 (Genovese, J., dissenting).

180. *Id.* at 7.

181. *Id.* at 8 (Crain, J., dissenting).

182. *Id.*

183. Louisiana Order, *supra* note 169, at 9.

184. *Id.* at 2 (majority opinion).

185. Oregon Order, *supra* note 135, at 2; Utah Order, *supra* note 125, at 1.

60% to 64%.¹⁸⁶ The order did, however, preclude repeat takers from receiving the diploma privilege.¹⁸⁷

At the time of the decision, one justice on the Louisiana court had resigned, so the chief justice had appointed a retired judge as a justice *pro tempore* who voted for the diploma privilege.¹⁸⁸ The news media noted that the fourth justice voting to grant the diploma privilege had a daughter scheduled to take the bar examination who became eligible for the diploma privilege because of the rule.¹⁸⁹

5. Washington

The Washington Supreme Court, “by majority” vote, adopted a rule allowing the diploma privilege for those registered for the Summer 2020 exam.¹⁹⁰ The broad rule applied to anyone who graduated from any ABA law school regardless of its bar

186. See *Individual School Bar Passage Reports*, *supra* note 130 (choose “Bar Passage Outcomes” from the menu; then select “Louisiana State University” as the school and “2020” as the year; then click the “Generate Report” icon to download a PDF report of the 2019 data; repeat and select “2019” as the year for the 2018 data; repeat the process and select “Tulane University,” “Loyola University-New Orleans” and “Southern University” as the school). The national passing rates for first-time takers from law schools in the district in 2018 (and 2019): LSU 89% (83%), Tulane 74% (76%), Loyola 76% (65%), and Southern 60% (63%). *Id.*

187. Louisiana Order, *supra* note 169, at 2.

188. Levin, *supra* note 73, at 128-29 n.367 (“The Chief Justice appointed a retired judge, James Boddie . . .”); see also Josh Blackman, *Louisiana Supreme Court Justice Who Cast Deciding Vote for Diploma Privilege Has Daughter Who Will Receive Diploma Privilege*, VOLOKH CONSPIRACY (Aug. 7, 2020, 6:45 PM), [https://perma.cc/AB8J-DU4N].

189. Andrea Gallo & John Simerman, *A Supreme Court Justice Voted to Let Law Grads Forgo the Bar Exam. Among Them: His Daughter*, NOLA.COM (Aug. 7, 2020, 2:23 PM), [https://perma.cc/2PV4-M22P]. This was Justice John Weimer. *Our Views: Justice John Weimer’s Decision on Bar Exam Helps Daughter, but Doesn’t Help Court’s Reputation*, ADVOC. (Aug. 16, 2020, 6:00 AM), [https://perma.cc/J6TC-GQDN] (“Weimer said in a statement that his vote was not affected by personal considerations, and that he ‘disclosed the fact my daughter is a law school graduate to anyone I spoke to regarding the exam.’ The statement did not say with whom he had spoken.”).

190. Order Granting Diploma Privilege & Temporarily Modifying Admission & Practice Rules at 1-2, *In re* Statewide Response by Wash. State Cts. to the COVID-19 Pub. Health Emergency (Wash. June 12, 2020) (No. 25700-B-630) [hereinafter Washington Order], [https://perma.cc/79MZ-ZSMD]. The vote was not announced. The rule provides that it applies to those “who are currently registered for either the July or September 2020 bar examination and who have received a Juris Doctorate degree from an ABA accredited law school.”

passage rate.¹⁹¹ Most significantly, it applied to repeaters.¹⁹² Washington was the only state to apply the privilege to repeat takers.¹⁹³ There was no supervised practice requirement. Thus, it did not have the public protection built into the Utah rule or even the more modest protections of the Oregon rule. Washington gave in-person examinations in July and September for those who chose to take the test or did not meet the criteria stated in the rule.¹⁹⁴

In addition, Washington also lowered the minimum passing score from 270 to 266.¹⁹⁵ It later extended the change to February and July 2021.¹⁹⁶

Based on 2019 bar results, Washington may have licensed nearly 150 attorneys who would have failed the bar exam.¹⁹⁷ Most of those (over 100) would be first-time takers,¹⁹⁸ but perhaps forty-five had failed the bar examination at least once and then would have failed it again in 2020.¹⁹⁹ Albeit, due to the lowered minimum passing score, these projections should be lowered somewhat. The three in-state schools had first-time Washington (and national) bar passing rates as follows: University of Washington, 88% (84%); Gonzaga, 77% (76%); and Seattle, 73% (71%).²⁰⁰ The Washington rule allowed graduates from some very weak out-of-state schools to use the

191. *See id.*

192. *Id.* (“The diploma privilege option will be available to applicants currently registered to take the examinations who are taking the tests for the first time and those who are repeating the tests.”).

193. *Compare* Washington Order, *supra* note 190, at 1-2, with Utah Order, *supra* note 125, at 1-2, and Oregon Order, *supra* note 135, at 1-2, and D.C. Order, *supra* note 154, at 3-4, and Louisiana Order, *supra* note 169, at 2.

194. *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23.

195. *Id.*

196. *Minimum Scores: Minimum Passing UBE Score by Jurisdiction*, NAT’L CONF. OF BAR EXAM’RS, [https://perma.cc/GW7M-97MY] (last visited Oct. 8, 2022).

197. *See 2019 First-Time Takers and Repeaters from ABA Schools*, *supra* note 151.

198. *See id.* The 2019 July results for Washington were that out of 486 takers, 103 did not pass.

199. *See id.* In 2019 in Washington, there were seventy-three repeat takers, of whom twenty-nine did pass and forty-four did not pass. This is a pass rate of 40%. That is, 60% of repeat takers would have failed the bar examination again but will be admitted through the diploma privilege.

200. *Bar Passage Outcomes*, AM. BAR ASS’N, [https://perma.cc/7XUW-KWQD] (last visited Oct. 8, 2022).

privilege.²⁰¹ And—most puzzling—it allowed those who had already failed the bar one or more times to be admitted through the privilege (repeat takers had about a 40% probability of passing the examination, based on 2019).²⁰² The rule limited the privilege to ABA-accredited graduates and precluded new registrants after the court adopted the rule.²⁰³

All five states gave at least one examination.²⁰⁴ Each thus expected bar examiners would be able to offer testing and applicants would be ready and able to take the examination.

B. Examples of Opinions Declining the Diploma Privilege

Many states received requests or formal motions for a 2020 diploma privilege.²⁰⁵ Of the forty-five states that did not adopt a diploma privilege for 2020, seventeen courts provided some statement denying the requests for a privilege.²⁰⁶ Many of the courts that denied requests for a diploma privilege did not issue formal orders with opinions.²⁰⁷ The following are examples of courts describing the reasons for their decisions.

1. Montana

On July 14, 2020, the Montana Supreme Court unanimously issued an order and opinion responding to requests to grant a diploma privilege to 2020 graduates.²⁰⁸ The court reviewed the steps the bar examiners had taken to provide for a reasonably safe

201. See Washington Order, *supra* note 190, at 1-2.

202. *Id.*; 2019 First-Time Takers and Repeaters from ABA Schools, *supra* note 151.

203. See Washington Order, *supra* note 190, at 1-2.

204. July 2020 Bar Exam: Jurisdiction Information, *supra* note 23.

205. NAT'L CONF. OF BAR EXAM'RS, BAR ADMISSIONS DURING THE COVID-19 PANDEMIC: EVALUATING OPTIONS FOR THE CLASS OF 2020, at 2 (2020), [<https://perma.cc/B76N-QBTY>].

206. The NCBE tabulates the states with formal action as Alaska, California, Connecticut, Florida, Idaho, Illinois, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, Ohio, Pennsylvania, and Tennessee. July 2020 Bar Exam: Jurisdiction Information, *supra* note 23.

207. *Id.* An example is Texas. See *infra* text accompanying notes 273-78.

208. *In re* Rules for Admission to the Bar of Mont., No. AF 11-0244, 2020 Mont. LEXIS 2083, at *1 (Mont. July 14, 2020).

test and the fact that it had provided for “a one-year provisional license to recent law school graduates” with supervision.²⁰⁹

The court also recounted the history of Montana dropping the diploma privilege in 1980, when it found that the “public [was] not being properly protected” by the privilege.²¹⁰ In reviewing the interests of the public, the court noted that a diploma privilege would result in fourteen or fifteen applicants being “admitted to the practice of law in this State who would otherwise not be admitted.”²¹¹ The Montana court focused on other examination accommodations that would protect applicants and the public.²¹²

2. Minnesota

The Minnesota court asked for public comments on requests from graduating law students that the court adopt a diploma privilege for summer 2020.²¹³ Minnesota had already developed several accommodations for the examination and a supervised practice rule at the time.²¹⁴ Minnesota has (is tied for) the lowest minimum pass score in the country, at 130.²¹⁵

In a 6-1 decision, the court recognized the special challenges facing 2020 bar applicants and accommodations the bar

209. *Id.* at 2-3. The court noted that one commenter “argued that the personal presence of a supervising attorney was an unachievable requirement” to the Office of Public Defender.

210. *Id.* at 3-4 (quoting *In re Proposed Amends. Concerning Bar Examination*, 609 P.2d 263, 265 (Mont. 1980)).

211. *Id.* at 5.

212. *Id.*

213. Minnesota Petition, *supra* note 28, at 3. See Levin, *supra* note 73, at 107-09 for a discussion of events in Minnesota.

214. *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23. It had announced that it would offer the Summer examination both in July and September, and applicants were able to delay a summer bar registration to February or July 2021 (without additional fee).

215. This is on a 200-point scale (260 on the 400-point UBE scale). COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, *supra* note 31, at 32. Technically, Wisconsin has a minimum score one point lower, 129, but it is primarily a diploma privilege state. In July 2019, it had a total of only eighty-one first-time takers.

examiners had made.²¹⁶ The dissent by Justice Thissen²¹⁷ was the only formal dissent found by the author in the states denying the diploma privilege request. Her dissent did not include a statement of reasons.²¹⁸

The court concluded that a diploma privilege could “unintentionally[] exacerbate some challenges. Further, we conclude that now more than ever public confidence and trust in the competency of Minnesota’s lawyers must be honored, and thus we decline to discard a longstanding requirement for admission to the Minnesota bar, even temporarily.”²¹⁹

3. Nebraska

The Nebraska Supreme Court, in a *per curiam* opinion, without dissent, on July 11, 2020, denied the request for a diploma privilege for 2020.²²⁰ The court recognized the challenges of the pandemic and noted it had extended the “senior certified law student status” (temporary practice).²²¹

The court considered the petition for a diploma privilege and its “obligation to protect the public.”²²² It noted: “The purpose of the bar examination is to ensure minimum competence of those admitted to the practice of law.”²²³ It then estimated what a

216. Order Denying Petition for Proposed Temporary Waiver of Bar Examination Requirements & Provision of Emergency Diploma Privilege at 3 (No. ADM10-8008) (Minn. July 14, 2020) [hereinafter Minnesota Order], [<https://perma.cc/83NS-J22P>]. Justice Thissen dissented and would have allowed the diploma privilege for those who graduated “from an accredited law school by June 2020.” *Id.* at D-1 (Thissen, J., dissenting). Minnesota had already made several accommodations to the circumstances, including changes in the examination, permitting delays in the examination, and special individual accommodations. In addition, a temporary practice rule had been adopted.

217. *Id.*

218. *Id.*

219. *Id.* at 3. The court cited an earlier decision in which it discussed bar admission: “We use a two pronged test—graduation from an accredited law school plus passage of the bar examination—to determine whether an attorney should be admitted to practice.” Minnesota Order, *supra* note 216, at 1 (quoting *In re Hansen*, 275 N.W.2d 790, 798 (Minn. 1978)).

220. Order at 4, *In re* Petition for Waiver of the Bar Examination Requirement for Admission to the Bar & Provision of Emergency Diploma Privilege (No. S-20-0495) (Neb. July 11, 2020) [hereinafter Nebraska Order], [<https://perma.cc/VL2R-9BN7>].

221. *Id.* at 2.

222. *Id.* at 3.

223. *Id.*

diploma privilege would mean, saying that “the average pass rate for the last two Nebraska Bar Examinations was 63[%] overall, with an average pass rate of 72.2[%] for those who obtained diplomas from Nebraska’s law schools.”²²⁴ Essentially, this meant that 37% of the bar applicants failed the examination, and a diploma privilege would have had the effect of granting them a license to practice.²²⁵ “Granting the diploma privilege would place the public at risk from lawyers who did not meet the minimum qualifications.”²²⁶

4. California

The California Supreme Court received many calls for a diploma privilege, which would be even more complicated than in most states because California allows a wide range of groups to take the bar examination. In addition to ABA schools, state-accredited and even unaccredited schools can do so, as can those reading law and some graduates of foreign law schools.²²⁷ The court cited this as one reason not to grant a diploma privilege.²²⁸ As adopted in other states (applying the privilege to ABA law schools), it would exclude “nearly four dozen California law schools.”²²⁹ The court provided for an October online examination and permanently lowered the minimum passing score from 1430 to 1390 (approximately 139 on the NCBE 200-

224. *Id.*

225. Nebraska Order, *supra* note 220, at 3.

226. *Id.* at 3.

227. Education, THE STATE BAR OF CAL., [<https://perma.cc/DDE5-9XWR>] (last visited Oct. 8, 2022).

228. California Letter, *supra* note 100.

229. *Id.* The California Supreme Court issued a brief order, without opinion, in September. *In re* Temp. Waiver of the Bar Exam Requirement for Admission to the State Bar of Cal. & Provision of Emergency Diploma Privilege, No. S264358, 2020 Cal. LEXIS 6777, at *1 (Cal. Sept. 23, 2020).

point scale).²³⁰ It also directed the state bar to establish a temporary supervised provisional license program.²³¹

An emergency is generally no time to make permanent changes to such complex things as minimum scores. However, the court and a Blue-Ribbon Commission had been studying the minimum-score issue for some time.²³²

5. Florida

On September 3, 2020, the Supreme Court of Florida issued a *per curiam* decision rejecting the request for a diploma privilege,²³³ with Justice Labarga recused.²³⁴ The court noted that inadequate attorneys cause “extreme harm” to members of the public and undermine the legal system’s foundations.²³⁵ The court restated that it has determined that graduation from law school is insufficient to protect the public and, therefore, has long required a passing score on the bar examination.²³⁶ It also rejected the diploma privilege plus the supervised-practice proposal.²³⁷

This Court also does not believe that the completion of six months of supervised practice can sufficiently substitute for the passage of a comprehensive Bar examination that would allow the Court to fulfill its constitutional duty to evaluate a

230. The California Supreme Court later decided to apply the new passing score retroactively to those who received the new passing score (1390) or above between July 2015 and February 2020. To be licensed, applicants are required to complete 300 hours of supervised practice. Administrative Order 2021-01-20, *In re* Request for Approval of Proposed Amends. to the Cal. Rules of Ct. (No. S266547) (Cal. Jan. 28, 2021) [hereinafter California Order] (en banc), [<https://perma.cc/455F-CBR4>].

231. *Id.* at 6.

232. *Blue Ribbon Commission on the Future of the Bar Exam*, THE STATE BAR OF CAL., [<https://perma.cc/7QE8-KGYW>] (last visited Oct. 8, 2022).

233. *In re* Petition to Amend the Rules of the Sup. Ct. Relating to Admissions to the Bar & the Rules Regulating the Fla. Bar, 301 S.W.3d 854, 857 (Fla. 2020).

234. *Id.* at 856; Dara Kam, *Florida Supreme Court Refuses to Drop Bar Exam Requirement*, NEWS 4 JAX (Sept. 4, 2020, 5:00 AM), [<https://perma.cc/Y5MS-DPP7>]. Justice Labarga did not give any reason for his recusal, and I found no press report explaining the reasons for it.

235. *In re* Petition to Amend the Rules of the Sup. Ct. Relating to Admissions to the Bar & the Rules Regulating the Fla. Bar, 301 S.W.3d 854, 854 (Fla. 2020).

236. *Id.* at 855.

237. *Id.*

Bar applicant's knowledge and skill before admitting the applicant to the unrestricted practice of law.²³⁸

Although joining the court's opinion, Justice Lawson also issued a concurring opinion to recognize the extraordinary work of the state's Board of Bar Examiners.²³⁹ He noted the difficult circumstances in which these volunteers worked hundreds of hours to provide a safe and effective testing opportunity for all applicants.²⁴⁰ There had been some harsh criticism of the Board²⁴¹ and Justice Lawson may have been responding to that criticism.

6. Alaska

On November 6, 2020, in a unanimous opinion, the Alaska Supreme Court issued an opinion explaining the basis for its earlier denial of a request for a diploma privilege.²⁴² The court noted that the bar examination is meant to ensure that admittees "service the public well and avoid harm" to the public.²⁴³ It reported that "[a]pproximately 45% of applicants of the last two bar examinations in Alaska failed to pass the examination; all of them are graduates of accredited law schools."²⁴⁴ This suggested that granting a diploma privilege would not protect the public from those applicants who have not "demonstrated minimum competency to practice law."²⁴⁵

238. *Id.*

239. *Id.* at 856-57 (Lawson, J. concurring).

240. *In re* Petition to Amend the Rules of the Sup. Ct. Relating to Admissions to the Bar & the Rules Regulating the Fla. Bar, 301 S.W.3d 854, 856-57 (Fla. 2020).

241. *Id.* at 856.

242. *Carr v. Alaska Bar Ass'n*, 475 P.3d 269, 269 (Alaska 2020) ("On August 28, 2020 we denied applicants' request to be admitted to practice law in Alaska without passing a bar examination. We now explain the basis of our decision.").

243. *Id.* at 270.

244. *Id.*

245. *Id.* (quoting Press Release, Betsy AuBuchon, Clerk, Missouri Sup. Ct., Clerk of Court's Statement Regarding July Bar Examination (July 9, 2020), [<https://perma.cc/WRU5-TKP7>]).

7. Other States

In most states, there was no formal court opinion responding to diploma privilege requests. Because the existing rules of all states (except Wisconsin) required bar passage, maintaining the status quo of the bar examination required no action. There were many orders from bar examiners and courts adjusting the examination dates, providing for the online test, and the like.²⁴⁶ However, there were relatively few specific orders regarding diploma privilege requests, and even fewer formal opinions.²⁴⁷

In a few states, the court's decision was delivered by a statement of the clerk of the court, the bar examiners, or the state's chief justice.²⁴⁸ The most interesting of the letters was Chief Justice Burdick's letter to the "Members of the Idaho State Bar," rather than petitioners or applicants.²⁴⁹ It read like an opinion, except for the salutation and the "[s]incerely" in place of "it is so ordered."²⁵⁰ It clearly represented the decision of the Idaho court.²⁵¹ It addressed the argument for a diploma privilege made by "[s]ome students and law faculty."²⁵² It noted that:

[T]he Idaho bar exam typically has a pass rate of approximately 70[%]. A diploma privilege program would mean approximately 30[%] of those who could not pass this basic hurdle of competency would be allowed to practice law. We do not believe that granting diploma privilege under such circumstances upholds our duty to the citizens of Idaho.²⁵³

246. *Bar Exam Modifications During COVID-19: 50-State Resources*, *supra* note 7.

247. *See, e.g.*, Order at 1, *In re Diploma Privilege for 2020 Ill. Bar Applicants* (No. M.R. 030451) (Ill. July 16, 2020), [<https://perma.cc/3XUC-4GDM>].

248. *See, e.g.*, Press Release, AuBuchon, *supra* note 245; Letter from Roger Burdick, C.J., Idaho Sup. Ct., to Members of the Idaho State Bar (July 20, 2020) [hereinafter Idaho Letter], [<https://perma.cc/T35W-VCDC>].

249. Idaho Letter, *supra* note 248, at 1.

250. *Id.* at 1-2.

251. The letter referred to various actions of the court and noted, "After deliberation, . . . the Court has made the decision" to administer the examination in July. "The Court . . . understands some graduates" have safety concerns, so the online examination will also be given. *Id.* at 2.

252. *Id.*

253. *Id.* The chief justice also noted the importance of the Uniform Bar Examination and the ability to transfer scores among states. The diploma privilege would interfere with the UBE.

Connecticut Chief Justice Richard Robinson wrote a decision letter to Glenn Holmes, an applicant (with copies to other interested parties, including the law school deans) regarding the diploma privilege for Connecticut.²⁵⁴ It seemed to reflect only the chief justice's decision, not the whole court's. The chief justice concluded: "Based on all of the information I have reviewed, I cannot at this time conclude the online process . . . along with the accommodations that are and will be offered, will not be sufficient to produce a fair and equitable examination process" ²⁵⁵

The Clerk of the Supreme Court of Missouri issued a statement on July 9, 2020 describing the decision of the court.²⁵⁶ That statement noted that the Missouri Supreme Court had concluded that the diploma privilege would not adequately ensure "the core function of licensure, which is to protect the integrity of the profession and the public from those who have not demonstrated minimum competency to practice law."²⁵⁷ While it was not a formal decision, the court apparently intended this to be a statement of reasons by a unanimous court.²⁵⁸

In Tennessee, the deans of the law schools supported the privilege, while the Board of Law Examiners and Board of Professional Responsibility opposed it.²⁵⁹ In a *per curiam* (apparently unanimous) opinion, the Tennessee court noted its "duty to protect the interests of the public and the administration of justice."²⁶⁰ It, therefore, "respectfully denied" the petition for a diploma privilege.²⁶¹

In rejecting the diploma privilege, the Maryland Court of Appeals called on law schools to help with problems identified

254. Letter from Richard A. Robinson, C.J., Connecticut Sup. Ct., to Glenn Holmes (Aug. 31, 2020), [<https://perma.cc/NQT8-B75B>].

255. *Id.* at 1.

256. Press Release, AuBuchon, *supra* note 245.

257. *Id.* The July 11, 2020, Nebraska opinion noted above was apparently the first *formal* opinion of the year denying the diploma privilege. Nebraska Order, *supra* note 220.

258. *Id.*

259. Order at 1-2, *In re* Petition for Emergency Rule Waiver (No. M2020-00894-SC-BAR-BLE) (Tenn. July 21, 2020) [hereinafter Tennessee Order], [<https://perma.cc/5VQD-8GV7>].

260. *Id.* at 3.

261. *Id.*

with remote examinations.²⁶² “[L]aw schools . . . have space that can provide a quiet location without distraction for those taking a remote examination.”²⁶³ It ordered the bar examiners to assist law schools in “provid[ing] testing locations” for applicants “who lack a quiet location without distraction.”²⁶⁴

Finally, the Ohio Supreme Court unanimously summarized the two points commonly made by courts declining the requests for a diploma privilege in a short statement.²⁶⁵ First is the duty to the public interest.²⁶⁶ “It is the court’s obligation to protect the public and the integrity of the profession through oversight of the profession and its practitioners. The purpose of the bar examination is to ensure minimum competence of those admitted to the practice of law.”²⁶⁷ Second, with the changes in testing procedures, an online opinion, and a temporary practice rule, “the court has taken steps to minimize the concerns raised [about the examination] while continuing to carry out its responsibility to promote the integrity of the legal profession.”²⁶⁸

Two states, Hawaii²⁶⁹ and North Carolina,²⁷⁰ that denied the diploma privilege did provide for a temporary reduction in the usual minimum passing score on the bar examination. Neither released an opinion explaining the basis for a temporary reduction in the score. Perhaps the reason was an assumption that the disruption might artificially lower the scores on the bar examination, and the lower minimum score would account for that. Two diploma-privilege states (Oregon and Washington)

262. Maryland Order, *supra* note 100, at 4-5.

263. *Id.* at 5.

264. *Id.* at 5-6.

265. *In re* Petition to Amend Rule I of the Sup. Ct. Rules for the Gov’t of the Bar of Ohio, 2020-Ohio-3860, 150 N.E.3d 103, 103 (Ohio 2020).

266. *Id.*

267. *Id.*

268. *Id.* at 2.

269. *Supreme Court Announces Further Adjustments to Bar Exam in Response to COVID-19 Pandemic*, HAW. STATE JUDICIARY (July 24, 2020), [<https://perma.cc/XG4C-AS5Q>].

270. The bar examiners announced, on July 24, 2020, that the minimum passing score for the July 2020 and February 2021 North Carolina Bar Examinations was reduced from 270 to 268. N.C. BD. OF L. EXAM’RS, PASSING SCORE REDUCED FOR JULY 2020 AND FEBRUARY 2021 NORTH CAROLINA BAR EXAMINATIONS 1 (n.d.), [<https://perma.cc/DV9U-SLAQ>].

also had temporary reductions in the minimum passing score.²⁷¹ As well, recall California's permanent reduction discussed earlier in this Article.²⁷²

8. *The Strange Case of Texas*

Texas is not listed as among the states to have formally considered the diploma privilege. Still, as Michael Ariens has documented, Texas had a challenging time working through the request.²⁷³ Texas canceled the Summer examination and offered applicants two options—an in-person test and a remote test.²⁷⁴ Professor Ariens noted that two members of the court favored a diploma privilege, and two favored an apprenticeship leading to licensure.²⁷⁵ A fifth justice favored either of those two options.²⁷⁶ The majority of the court did not agree on an option, so the court adopted neither of the non-examination admission options.²⁷⁷

Of course, that decision had consequences for the applicants—but it also had implications for the public. Based on the 2020 actual bar results for Texas, 352 applicants who failed the examination (first time) would instead have been licensed with a diploma privilege, and 334 more if repeaters were included (as in Washington).²⁷⁸

271. Washington Order, *supra* note 190, at 2; Oregon Order, *supra* note 135, at 3.

272. See *supra* note 230 and accompanying text.

273. Michael Ariens, *Texas Supreme Court's Failure to Offer Alternative Licensure Option Unnecessarily Hinders Our State's Future Lawyers*, TEX. LAW. (July 7, 2020, 5:10 PM), [<https://perma.cc/X5PC-E2NB>].

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. See *2019 First-Time Takers and Repeaters from ABA Schools*, *supra* note 151; *2020 First-Time Exam Takers and Repeaters from ABA-Approved Law Schools*, BAR EXAM'R, Spring 2021, at 36, 36. Of course, if some applicants (who would have been eligible for a diploma privilege had it been offered) did not take the test in 2020, these numbers would likely be higher.

V. THE ARGUMENTS AND THE CONSEQUENCES

A. The Pandemic Arguments for a Diploma Privilege

Most of the courts providing COVID diploma privileges did not write formal explanations. Therefore, the bases of the actions of the five courts are sketchy: “the extraordinary barriers facing applicants”²⁷⁹ and “in consideration of the public health threat currently posed by the novel infectious coronavirus.”²⁸⁰ The statements of advocates suggest additional bases for the privilege:²⁸¹ the examination could not be given safely, the pandemic and social upheaval interfered with concentration and study (especially true for disadvantaged graduates), delays were expensive for some graduates,²⁸² new attorneys were necessary to

279. Washington Order, *supra* note 190, at 1 (“WHEREAS, the court recognizes the extraordinary barriers facing applicants currently registered to take the bar examination in either July or September 2020, or the limited license legal technician (LLLT) examination in July 2020.”).

280. Utah Order, *supra* note 125, at 1.

281. Among these is the advocacy letter by Dean Annette Clark (Seattle, to the Washington Supreme Court on behalf of that faculty). Seattle Letter, *supra* note 28, at 1-3. While they requested the diploma privilege for their students, they did not recommend or request a broad rule applying to out-of-state students or to those who had previously failed the bar exam. *Id.* at 2. The petition of students in Minnesota seeking the diploma privilege is another example of the advocacy for the privilege. Minnesota Petition, *supra* note 28, at Exhibit A. The petition includes thirteen individual statements from applicants describing the disruption, emotional trauma, and difficulties concentrating and studying that they faced. A third example is the three Oregon deans who wrote to the Oregon Supreme Court making similar points. Letter from Marcilynn A. Burke, Dean, Univ. of Oregon Sch. of L., Brian Gallini, Dean, Willamette Univ. Coll. of L., and Jennifer J. Johnson, Dean, Lewis & Clark L. Sch., to the Oregon Sup. Ct. (June 15, 2020) [hereinafter Oregon Letter], [<https://perma.cc/TY9J-HCNA>].

282. See, e.g., *An Open Letter from Public Interest Legal Organizations Supporting Diploma Privilege*, *supra* note 28, at 1-4; Minnesota Petition, *supra* note 28, at 3-4; Oregon Letter, *supra* note 281, at 1-3.

“address . . . immediate legal needs,”²⁸³ and “graduates are ready and able to be excellent practitioners.”²⁸⁴

1. Safety, Preparing, and Loss of Income

The first concern—safety—was addressed by bar examiners in several ways, including canceling the bar examination, strictly following health guidelines, making special arrangements for vulnerable applicants, giving the examination on multiple dates, and providing an online test.²⁸⁵ These accommodations had the advantages of reducing the physical risk to applicants but still protecting the public by continuing the regular assessment of basic preparation to begin law practice. Bar examiners, courts, and the NCBE were often roundly criticized for going ahead with the bar examination.²⁸⁶ As we will see, the results of the Summer examination seem to suggest that examiners were able to provide reasonably safe and successful tests both in person and online.²⁸⁷

The second concern was that the current environment was such that some students could not study effectively, recognizing that the difficulty affected some students more than others. The basic accommodation adopted by many states was to allow applicants to delay the examination or give the option of a delay for two or three months.²⁸⁸ In the alternative, states generally allowed an applicant to roll over their application to February.²⁸⁹

283. Minnesota Petition, *supra* note 28, at 16. These graduates are also needed to “assist communities most affected by the pandemic and civil unrest.” *Id.* 19. For example, regarding the third point, “Our state needs well-trained, compassionate lawyer-leaders—now. Each day that passes in this new reality uncovers a host of exacerbated and novel legal issues. Our graduates can assist on the front lines of helping to address the complex and evolving legal needs of Oregon’s citizens.” Oregon Letter, *supra* note 281, at 3; *see also* Minnesota Petition, *supra* note 28, at 16; *An Open Letter from Public Interest Legal Organizations Supporting Diploma Privilege*, *supra* note 28, at 2-3.

284. Seattle Letter, *supra* note 28, at 2 (“Our graduates are ready and able to be excellent practitioners.”); Oregon Letter, *supra* note 281, at 3 (“As Oregon law school deans, we are confident that our graduates are practice ready.”).

285. *Bar Exam Modifications During COVID-19: 50-State Resources*, *supra* note 7.

286. *See, e.g.*, NAT’L CONF. OF BAR EXAM’RS, *supra* note 205, at 1, 6-8.

287. *See infra* note 338 and accompanying text.

288. Sam Skolnik, *States Pressured to Waive Bar Exam for New Lawyers in Pandemic*, BLOOMBERG L. (June 30, 2020, 8:28 AM), [<https://perma.cc/AA7E-U4AV>].

289. *Bar Exam Modifications During COVID-19: 50-State Resources*, *supra* note 7 (for example, Alabama, Florida, Iowa, Minnesota, Mississippi, and Virginia allowed for a rollover).

In short, in most states, there were accommodations that, in effect, allowed additional time for study and some of the distractions of the spring and summer to diminish.

The third concern was that applicants might lose income because of delays in taking the bar or receiving results. A decision (by the applicant or state) to delay the test could result in a loss of income. Most states not offering a July examination made accommodations for this issue by implementing temporary supervised practice rules.²⁹⁰ Applicants with positions lined up could start the job early because finding a supervisor was relatively easy.²⁹¹ Law schools may have helped find supervisors for those without a job arrangement. Many of those taking a bar examination in September or October undoubtedly used the additional time to study. With the student practice rule, even they could consider starting supervised work earlier than typical years. The temporary practice rule was imperfect but provided some accommodation for financial concerns. With solid supervision, there should be limited risk to the public. The suspension of student loan payments and interest accumulation was a significant economic benefit to graduates.²⁹²

Law schools concerned about the financial distress of potential delays in the bar examination may have offered 2020 graduates help to find appropriate supervised positions. There were surprisingly few public reports of schools aggressively undertaking these steps.²⁹³

2. *Immediate Need for New Lawyers*

Some scholars, applicants, and advocates argued that there was an additional concern—that 2020 graduates were needed

290. Skolnik, *supra* note 288.

291. See, e.g., Jim Ash, *Supervised Practice Program Ground Rules Explained*, FLA. BAR (Sept. 3, 2020), [<https://perma.cc/4SZQ-6RK2>].

292. See *COVID-19 Loan Payment Pause and 0% Interest*, FED. STUDENT AID, [<https://perma.cc/R4WB-35QK>] (last visited Oct. 8, 2022).

293. See *COVID-19: How Law Schools Are Adapting*, NAT'L JURIST (Oct. 22, 2020, 8:22 AM), [<https://perma.cc/8BNW-GMDE>].

immediately to fill legal positions.²⁹⁴ The need for new lawyers is most acute among government, public interest organizations, and small firms (having either ten or less lawyers or twenty-five or less lawyers).²⁹⁵ In granting a diploma privilege, the D.C. Court of Appeals noted that “many commenters argue that emergency changes to the bar-admission process are needed to increase the number of attorneys who can provide pro bono representation to help deal with legal problems created or worsened by the COVID-19 pandemic.”²⁹⁶

Of course, this concern referred only to a temporary delay in licensing graduates, not a permanent reduction in the number of attorneys. The brief effect on licensing would have been between the usual licensing schedule (about November 2020) and when 2020-delayed licensing occurred (depending on the state, between November 2020 and early 2021).²⁹⁷

Neither the immediate supply nor the effective demand for new attorneys suggested a significant new-attorney deficiency.²⁹⁸ In addition to the attorneys licensed by examination or diploma privilege in the summer 2020 bar-admissions cycle, temporary

294. Those seeking the diploma privilege “throughout the nation said lawyers were needed more than ever.” Mike Stetz, *Bar Exam Blues*, NAT’L JURIST, Jan./Feb. 2021, at 12, 12-15; Griggs, *supra* note 75, at 19-20.

295. Claudia Angelos et al., *Licensing Lawyers in a Pandemic: Proving Competence*, HARV. L. REV. BLOG (Apr. 7, 2020), [<https://perma.cc/4W5Q-U43Z>].

296. D.C. Order, *supra* note 154, at 3. The court turned the argument into an expectation of those obtaining the diploma privilege: “[t]he court expects those who are permitted to practice law under these emergency rules to make a concerted effort to provide such pro bono assistance.” *Id.* It would be an interesting study to compare the level of pro bono service by newly admitted attorneys in 2020 with 2018-2019.

297. See *ABA Urges States that Cancel Bar Exam Due to COVID-19 to Consider Alternatives for Law Grads*, AM. BAR ASS’N (Apr. 7, 2020), [<https://perma.cc/ZQP9-5QTF>].

298. Some shortages of attorneys, especially in larger firms, occurred generally later in 2021 and 2022 after any delay in licensing from summer 2020 was past and in some cases was in the lateral hiring market. See Stephanie Francis Ward, *2020 Law School Grads Having Harder Time Finding Jobs, Data Shows*, ABA J. (Apr. 20, 2021, 3:57 PM), [<https://perma.cc/RVA6-RHEB>].

practice rules provided legal talent.²⁹⁹ Law firms that temporarily downsized increased the pool of available lawyers.³⁰⁰

In 2020 and early 2021, there did not appear to be a shortage of new lawyers. The ABA placement data show that 2020 graduates had a lower employment rate in “law jobs” (77.4%) than 2019 graduates (80.6%).³⁰¹ There was little indication that nonprofit organizations, governments, or small and medium sized law firms seeking new lawyers could not fill those roles because of delayed licensing.³⁰²

Proponents also suggested that during COVID, the disadvantaged would have increased legal needs.³⁰³ That was likely true. However, unless new graduates were primarily involved in pro bono work, their presence in the legal workforce would not have had much impact on that increased need. There must be an “effective demand” for legal services.³⁰⁴ Legal assistance to the disadvantaged generally requires funded-lawyer positions (e.g., government-funded or nonprofits), substantial pro bono, or very low-bono services.³⁰⁵ Significant unmet legal needs

299. With such a rule, even those who would have failed the bar examination were instead eligible for temporary practice under supervision. This supply of legal talent came with limitations in that some applicants would have been studying for a later examination, and stae temporary practice rules required supervision. See Teresa J. Schmid, *Guide to Supervising 2020 Bar Applicants*, AM. BAR ASS’N: STUDENT LAW. (June 1, 2020), [https://perma.cc/4ENU-DBP5].

300. Felicia M. Hamilton, *How Recent Law School Graduates Can Earn Money During COVID-19*, AM. BAR ASS’N (Oct. 9, 2020), [https://perma.cc/UN98-2KZV]; *Pay Cuts, Layoffs, and More: How Law Firms Are Managing the Pandemic*, AM. LAW. (July 31, 2020, 05:00 AM), [https://perma.cc/9PPZ-J2H9] (providing a firm-by-firm response of law firms to the economic challenges of COVID-19).

301. Ward, *supra* note 298.

302. In 2020, “Many firms have reduced pay, have eliminated and furloughed employees due to shutdowns, and have decreased the demand for new associates. Firms once positioned to welcome new associates have now deferred and rescinded offers.” Over the course of 2021, however, there was increased demand for legal services, and for lawyers. JAMES W. JONES & MILTON C. REGAN, JR., 2022 REPORT ON THE STATE OF THE LEGAL MARKET (2022) [https://perma.cc/24J7-9C4W] (last visited Oct. 19, 2022); Sara Merken, *New Law Firm Data Shows ‘Skyrocketing’ Demand for U.S. Lawyers*, REUTERS (May 19, 2021), [https://perma.cc/A2UE-ADJJ] (last visited Nov. 2, 2022).

303. Brett Milano, *HLS Clinics and Students Fight for the Most Vulnerable Amid Covid-19*, HARVARD L. SCH. (Apr. 11, 2020), [https://perma.cc/9V49-8B3U].

304. “Effective demand” essentially requires the ability to pay for a demanded service or good. That would include paid-for legal services or pro bono services. Tejvan Pettinger, *Effective Demand*, ECON. HELP (Dec. 23, 2018), [https://perma.cc/44E6-Y49X].

305. *Free Legal Help*, AM. BAR ASS’N, [https://perma.cc/2FM9-E7SB] (last visited Oct. 8, 2022).

have been documented for decades,³⁰⁶ despite the regular bar admission of new graduates each year.³⁰⁷ Regrettably, there were few reports of states with the diploma privilege (compared with other states) enjoying an outpouring of immediate pro bono due to the speedy admission of applicants.³⁰⁸

3. “Practice Ready”

The claim that the diploma privilege is warranted because, upon graduation, “graduates are ready and able to be excellent practitioners,”³⁰⁹ goes to the heart of a problem. Presumably, law schools do not (or should not) graduate many students unless they demonstrably have the basic skills to start in the profession. However, bar examiners disagree that all graduates from law schools are ready, as evidenced by the fact that too many students who graduate do not pass the bar examination a couple of months later.³¹⁰ This disconnect will further be analyzed later.³¹¹

306. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 12 (2017), [<https://perma.cc/5L95-29LK>].

307. *New Report Shows Most Law School Grads Passing Bar*, AM. BAR ASS’N, [<https://perma.cc/7RHJ-XARM>] (last visited Oct. 8, 2022). High quality automated legal services will become a way of providing low-cost advice (not necessarily lawyers). Christian Sundquist, *The Future of Law Schools: COVID-19, Technology, and Social Justice*, 53 CONN. L. REV. ONLINE, Dec. 2020, at 1, 16-19. An example of such services is SixFifty, a collaboration between BYU and a Silicon Valley law firm (Wilson Sonsini), that in response to the COVID challenges developed a free online program to help homeowners with mortgage relief (“Hello Lender”) and a paid online program to help businesses safely reopen in COVID (“Return to Work”). SIXFIFTY, [<https://perma.cc/9BLV-6QED>] (last visited Oct. 8, 2022).

308. Stephanie Francis Ward, *How are Things Working Out for 3 Utah Law Grads Seeking Diploma Privilege?*, ABA J. (Sept. 1, 2020, 9:08 AM), [<https://perma.cc/N6WW-TNM2>].

309. Seattle Letter, *supra* note 28, at 2; Oregon Letter, *supra* note 281, at 3.

310. Karen Sloan, *Bar Exam Pass Rate Dropped Last Year for First-time Testers*, REUTERS (Apr. 26, 2022 12:46 PM), [<https://perma.cc/U7NA-5D32>]. Using Seattle University School of Law as an example, in 2019, its nation-wide bar passage rate was 71.27% (72.73% in Washington State). See *Individual School Bar Passage Reports*, *supra* note 130 (choose “Bar Passage Outcomes” from the menu; then select “Seattle University” as the school and “2020” as the year; then click the “Generate Report” icon to download a PDF report of the 2019 data). That means that bar examiners found more than a quarter of these graduates did not meet admissions standards (were not yet ready).

311. See discussion *infra* Section III.B.2.

B. Unintended Consequences

Dropping a diploma privilege island into the sea of traditional bar passage requirements has consequences. Those seeking the privilege identified the intended benefits, but the unintended consequences of the privilege were not always recognized. We look at three of those consequences.

1. Competence and Public Confidence

An unintended risk of the diploma privilege is licensing attorneys who have not demonstrated minimum competency. With a diploma privilege, those who would not have passed the bar examination (the usual measure of basic readiness) were granted a license to practice law.³¹² A “spot” (single year) diploma privilege may present an additional risk to the public. The public generally relies on the standard bar admissions process (including bar passage) as part of basic quality assurance.³¹³ That process, however, was not applied to diploma privilege admittees. Those seeking legal services in Washington, Louisiana, or Oregon, for example, will have no way of knowing that these applicants were not subject to the usual quality assurance mechanism in the state.³¹⁴

312. For example, in Washington State 21% of ABA graduates did not pass the July bar examination on the first attempt. REGUL. SERVS. DEP'T, WASH. STATE BAR ASS'N, 430 CANDIDATES PASS SUMMER 2019 WASHINGTON STATE BAR EXAM 1 (2019), [<https://perma.cc/F6D9-AZVL>]. Beyond that, the Washington rule allows those who have already failed the examination (and 40% to 50% of ABA repeat-takers fail the bar examination again) to be admitted to practice law. Joe Patrice, *State Retreats From Diploma Privilege Policy Despite EVERYTHING WORSE NOW!*, ABOVE THE L. (Feb. 2, 2021, 1:13 PM), [<https://perma.cc/63XQ-CQ9G>]; Curcio et al., *Bar Exam Repeaters Shouldn't Be Pushed to Back of the Line*, BLOOMBERG L.: INSIGHTS (June 1, 2020, 3:01 AM), [<https://perma.cc/8SFE-HCQP>]. In Louisiana, 24% of takers did not pass the July bar on the first attempt, and in D.C. it was 22% (based on 2019 data.) *LSU Law Students Achieve Louisiana's Highest Pass Rate on July 2019 Bar Exam*, LSU L. (Oct. 4, 2019), [<https://perma.cc/42VU-C4YN>]; *First-Time Exam Takers and Repeaters in 2019*, BAR EXAM'R, [<https://perma.cc/JD39-Z2AL>] (last visited Oct. 8, 2022).

313. *Bar Admission*, YALE L. SCH., [<https://perma.cc/4T6K-8FTB>] (last visited Oct. 8, 2022).

314. See, e.g., *No Bar Exam, No Problem—Except for the Public*, OREGONIAN (July 1, 2020 6:57 AM), [<https://perma.cc/RN7B-7CLD>]. There, a newspaper urged the Oregon State Bar to inform the public:

The public may understand the risks of a diploma privilege. In the 2020 polling data described earlier, only 6% of the respondents approved granting a law license without a bar examination, even during the pandemic disruption.³¹⁵

2. Outcomes and Accreditation

Bar passage is an important form of outcome assessment in American legal education. The public, the profession, law school applicants, accrediting agencies, the Department of Education, and law schools themselves take account of bar passage.³¹⁶ For accreditation, bar passage can also be an important check on poor academic programs.³¹⁷

The issue created by the diploma privilege was complicated by the Section of Legal Education and Admissions to the Bar's puzzling application of the bar-passage standard to the diploma privilege. The bar-passage standard is the primary outcome measure in ABA accreditation.³¹⁸ The standards require that 75% of graduates of a law school sitting for a bar examination must pass a bar examination within two years of graduation.³¹⁹ The

With this decision, the court and the Oregon State Bar should at the very least ensure transparency surrounding this change. Lawyers who are admitted to the bar based on their diploma should have to disclose to clients that they did not take the bar exam. In addition, the Oregon State Bar should include a notation in its public membership directory indicating whether someone has been admitted to the bar based on their diploma.

Id.

315. SCHNEIDERS & CHOI, *supra* note 4.

316. U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-314, HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL ACCREDITATION 2-4, 9-10, 14 (2007); Gabriel Kuris, *Law School Applicants and the Bar Exam*, U.S. NEWS & WORLD REP. (Aug. 22, 2022), [<https://perma.cc/4NSM-SBA5>].

317. *Council Enacts New Bar Passage Standard for Law Schools*, AM. BAR ASS'N, [<https://perma.cc/4M75-RP8V>] (last visited Oct. 8, 2022).

318. Cassandra Sneed Ogden & E. Christopher Johnson Jr., *The ABA Bar Passage Standard, One Year Later*, DIVERSITY & BAR, May/June 2009, at 1, 2.

319. On its face, Standard 316, the bar passage standard, is clear that diploma privilege should not be included in those taking or passing the bar examination. Standard 316 provides, "At least 75[%] of a law school's graduates in a calendar year *who sat for a bar examination* must have *passed a bar examination* administered within two years of their date of graduation." AM. BAR ASS'N, 2022-2023 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 27 (2022) (emphasis added). Both the numerator and denominator of the three-fourths requirement are, therefore, clearly set out, as "who sat for a bar examination" (denominator) and "passed a bar examination" within two years (numerator). It is not clear that the Council took formal action to grant what amounted to a

informal interpretation significantly advantaged schools with bar passage problems which had students take the bar in diploma-privilege states (described in the notes).³²⁰ The consequence of these decisions might well turn a law school with a (2019) 50% state (38% national) first-time passage into a (2020) 90% local (70% nationwide) rate.

This was not a hypothetical issue. In two of the five jurisdictions granting the diploma privilege, a law school was at risk of failing the 75% two-year requirement.³²¹ In a third state, there was a law school with a *first-time* bar passage rate of 71%, although it clearly complied with the two-year provision of Standard 316.³²²

variance from Standard 316. The provisions for variances are outlined in Standard 107. *Id.* at 9. However, it also appears that the Section has treated the Wisconsin diploma privilege (for Marquette and the University of Wisconsin) as having “sat for a bar examination” and “passed a bar examination.” See *Individual School Bar Passage Reports*, *supra* note 130 (choose “Bar Passage Outcomes” from the menu; then select “University of Wisconsin” as the school and “2020” as the year; then click the “Generate Report” icon to download a PDF report of the 2019 data; repeat the process and select “Marquette University” as the school).

320. Although there is apparently no official Council action to grant a variance to Standard 316, the ABA seems to be enforcing the Standard much differently than it is written by counting diploma privilege admittees as “bar examination takers” and “bar examination passers.” Melissa Heelan, *Diploma Privilege Award Counts as Bar Passage*, *ABA Says*, BLOOMBERG L. (Dec. 23, 2020, 10:56 AM), [<https://perma.cc/TR6Z-AECW>] (“The District of Columbia, Washington state, Oregon, Louisiana, and Utah admitted 2020 law school graduates to the bar without having passed the bar exam. They had to meet certain qualifications and will be counted as having passed, Adams said,” referring to William Adams, the Managing Director of the Section of Legal Education and Admissions to the Bar); Stephanie Francis Ward, *Pandemic Problems May Be Defense for Law Schools Not Meeting Bar Passage Standard*, *ABA J.* (Nov. 23, 2020, 8:53 AM), [<https://perma.cc/P4P3-XMYU>] (“Mary Lu Bilek, a council member who is on the committee and is dean of the City University of New York School of Law, clarified that recent graduates admitted by diploma privilege will be viewed as having passed a bar exam.”).

321. In D.C., the University of the District of Columbia had a first-time bar passage rate of 38% and an “ultimate” bar passing rate of 64%. In Louisiana, Southern University had a first-time passing rate of 63% and an ultimate passing rate of 76%. These data are from the ABA 509 information reported in 2020. See *Individual School Bar Passage Reports*, *supra* note 130 (choose “Bar Passage Outcomes” from the menu; then select “District of Columbia” as the school and “2020” as the year; then click the “Generate Report” icon to download a PDF report of the 2019 data; repeat the process and select “Southern University” as the school).

322. Seattle University had a 71% overall first-time passing rate, but an ultimate (two-year) passing rate of 92%. See *id.* (choose “Bar Passage Outcomes” from the menu; then select “District of Columbia” as the school and “2020” as the year; then click the “Generate Report” icon to download a PDF report of the 2019 data).

3. Precedents

A diploma privilege is extremely valuable to applicants (ask third-year students).³²³ Of course, they cannot pay for it, but there is a powerful incentive to seek it. It is likely that, in some of the five jurisdictions granting a 2020 variance, the precedent of giving the privilege, partly based on disruption and difficulty studying and concentrating, will be back. Bar examiners would, of course, claim that the 2020 accommodation was based on other things, notably the problem with in-person examinations and a desire to reduce the number of in-person test takers. No court granting a diploma privilege for summer 2020 considered it a precedent for a similar privilege in the Winter or Summer 2021 examinations, although COVID disruptions continued.³²⁴

It is hard to argue that a bar examination could not have been given in 2020. In fact, every state except Delaware gave a summer test.³²⁵ The bases for the privilege were disruption, difficulty studying for and taking the examination, and emotional upset. Courts should be able to sort out precedent claims, but that may be difficult.

In every bar examination cycle, some applicants suffer events with terrible disruption to their lives. These problems have an emotional impact like the level described by students in 2020. In other cases, the pressure of a high-stakes test triggers significant emotional issues. In states offering the diploma privilege, the question may arise of whether individual students in the same position, as a practical matter, as many applicants in 2020, should be treated the same way—offered the diploma privilege as an option.

Students with some disabilities may, in those states offering the 2020 diploma privilege, raise the issue of whether the privilege is a legitimate accommodation to be considered under

323. A website, “United for Diploma Privilege: Fighting for Diploma Privilege for All,” provides resources for organizing for the diploma privilege. Its position is that the emergency diploma privilege should be available for J.D. and LL.M. graduates, including those who have previously failed. It provides some resources for those seeking the privilege. UNITED FOR DIPLOMA PRIVILEGE, [<https://perma.cc/8JY5-6A73>] (last visited Oct. 8, 2022).

324. Sam Skolnik, *Over 1,000 New Lawyers Get Licenses Without Taking Bar Exam*, BLOOMBERG L. (Jan. 4, 2021, 5:50 AM), [<https://perma.cc/TM94-3GRC>].

325. *Bar Exam Modifications During Covid-19: 50 State Resources*, *supra* note 7.

federal and state disability laws (including the Americans with Disabilities Act). Those laws require individualized consideration.³²⁶ The claim might be that in 2020, the state bar admissions process determined that the diploma privilege is an appropriate accommodation. The state granted licenses to hundreds of applicants based primarily on uncertainty, distraction, and emotional reaction to the circumstances, all of which made studying for and taking the examination more difficult.

Imagine a bar applicant in 2024 who has an emotional condition everyone agrees qualifies as a disability. There is strong expert evidence the condition involves unusual emotional distress, intensely aggravated by anxiety-producing situations, particularly preparing for and taking high-stakes examinations. The condition causes difficulty in concentrating, studying, and writing. Experts believe this condition is even more severe than was the case with the typical applicant during the Summer 2020 test. Because the state offered the diploma privilege in 2020, the applicant argues (and the experts agree) that the privilege would be a better accommodation than extra time, a separate room, a later examination, or the like.

Bar examiners and possibly state courts would have to decide how to address such requests on the merits. Should it become a federal court disability case, the applicant would suggest that the state had already given the diploma privilege to “hundreds of applicants” based partly on emotional upset that made preparing for and taking the examination difficult. The state did not have to offer the diploma privilege for mental distress and upset. Having chosen to offer the privilege, however, the state cannot now apply the privilege in a discriminatory manner by refusing to grant it when a disability causes intense emotional upset. Therefore, the state established the privilege as an acceptable accommodation in extreme circumstances.

The examiners would probably claim that granting the diploma privilege was a one-time emergency measure (not hundreds of times, just hundreds of people) and was related to the

326. *A Guide to Disability Rights Law*, ADA.GOV (Feb. 2020), [<https://perma.cc/4QR2-JM87>].

test's safety and the disruption. Therefore, the state did not establish the privilege as an available accommodation any more than working from home during COVID made it an accommodation.

Considering both the reluctance of courts to require extraordinary accommodations³²⁷ and deference to licensing agencies,³²⁸ federal courts might not be inclined to favor the applicant. Given the value of obtaining the privilege, those hoping to achieve it might well raise it. The precedent of a diploma privilege in response to extreme circumstances could trouble the bar admissions process, in a few states, for some time. The unintended consequences invite a focus more clearly on *why* less dramatic options than the diploma privilege would not meet the specific goals in the current circumstance.

VI. WHAT HAPPENED: OUTCOMES IN THE SUMMER 2020 EXAMINATIONS

A. Examinations

In summer and fall 2020, fifty jurisdictions, even those with diploma privileges, offered examinations of some sort.³²⁹ Virtually all states allowed applicants to roll over their applications to a later date without penalty.³³⁰ Here is a summary of the 2020 Fall examinations: one state (Delaware) canceled the examination; thirty-six jurisdictions delayed the examination, either by offering multiple testing dates or by postponing the testing date for all test takers; thirty jurisdictions gave at least one in-person examination; twenty-six states gave *only* in-person examinations (some multiple dates); and nineteen jurisdictions gave *only* online examinations.³³¹

327. See ROTHSTEIN & IRZYK, *supra* note 36, at 322.

328. Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty-Year Retrospective*, 36 J. COLL. & UNIV. L. 843, 857-59 (2010).

329. *July 2020 Bar Exam Status by Jurisdiction*, NAT'L CONF. OF BAR EXAM'RS. (Oct. 7, 2020, 2:53 PM), [<https://perma.cc/5ZVR-ANQZ>]. In these calculations, only the fifty states plus D.C. are included. "Off-shore jurisdictions" are not included in these numbers.

330. *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23.

331. *July 2020 Bar Exam Status by Jurisdiction*, *supra* note 329.

There was some reduction in the number of test-takers in summer 2020 compared with summer 2019. This Article estimates that there were almost 5,000 fewer bar takers (from ABA schools) in summer 2020 than in summer 2019.³³² That difference was likely made up of an estimated 3,600 non-U.S. law degrees (because of the COVID limitations by summer), and perhaps 1,400 diploma privilege (2020) graduates.³³³ Interestingly, the February 2020 examination (before COVID issues) had more than 2,000 fewer takers than the February 2019 examination.³³⁴ Each year a significant number of J.D. graduates do not take the bar examination immediately after graduation.³³⁵

1. In-Person Examinations

Given predictions of substantial COVID transmission and related illness in 2020 tests, there were surprisingly few reports of health problems,³³⁶ and no confirmed COVID transmission resulted from the 2020 in-person tests.³³⁷ It is impossible to know whether there were unknown or unreported transmissions, either because of symptomless infections or attribution to another

332. There were 46,370 people who sat for the bar in July 2019, while there were 41,375 people who sat for the bar in July 2020. *2019 Statistics*, BAR EXAM'R (Fall 2020), [<https://perma.cc/68MN-E5AG>]; *2020 Statistics*, BAR EXAM'R (Spring 2021), [<https://perma.cc/3BTV-GN9X>].

333. Skolnik, *supra* note 324.

334. There were 21,935 people who sat for the bar in February 2019. *2019 Statistics*, *supra* note 332. There were 19,409 people who sat for the bar in February 2020. *2020 Statistics*, *supra* note 332.

335. *Why Do People Skip the Bar Exam After Graduation*, JD ADVISING, [<https://perma.cc/H4T9-XTQT>]. For most schools there are graduates who do not take the bar examination in the same year in which they graduate, or perhaps not at all. Graduation in December does not account for all of the delayed takers. The ABA reports the number of non-takers from each graduating class in the 509 Required Disclosures Bar Passage Outcomes. See *Individual School Bar Passage Reports*, *supra* note 130.

336. Derek T. Muller, *It Appears the July 2020 Bar Exam Did Not Spread Covid-19 Among Any Test-takers*, EXCESS OF DEMOCRACY (Sept. 3, 2020), [<https://perma.cc/Q3GG-VGRG>]. North Carolina apparently had some testing personnel not following safety protocols. In Colorado, one test-taker who had a normal temperature during the bar examination tested positive shortly after the examination. It was not publicly reported that anyone was infected with COVID following either of these incidents. Stephanie Francis Ward, *Test-Takers Express Safety Concerns, Fears from In-Person Bar Exam—Including Lack of Masks, Unclean Bathrooms*, ABA J. (Aug. 10, 2020 8:57 AM), [<https://perma.cc/ZXE7-ZMRQ>].

337. Muller, *supra* note 336.

source of infection. The information available suggests that the in-person safety accommodations were generally implemented successfully.³³⁸

2. Online Examination

The online bar examination (at least the one offered by NCBE) turned out to have the largest number of takers for the 2020 Summer/Fall bar.³³⁹ Nearly 30,000 applicants sat for the NCBE online bar.³⁴⁰ There were some problems with this examination, including lost internet connections, various computer issues,³⁴¹ some health issues (including a delivery during the test),³⁴² and problems with the artificial intelligence software used in some places to detect cheating.³⁴³ Except for the last of these, it appears that difficulties were not out of the range of the usual number of issues during an in-person examination or were handled with dispatch.³⁴⁴ Of course, dealing with

338. For example, Derek Muller noted many responses to his earlier column and followed up acknowledging that existing data could not prove that there was no transmission related to the in-person tests. Derek T. Muller, *What We Don't Know About the July 2020 Bar Exam and Covid-19: A Lot*, EXCESS OF DEMOCRACY (Sept. 8, 2020), [<https://perma.cc/RJ6H-YKQE>].

339. *2020 Bar Exam Process Comes to an End: Approximately 38,000 Applicants Took Bar Exam in July, September, or October*, NAT'L CONF. OF BAR EXAM'RS (Oct. 7, 2020), [<https://perma.cc/2P46-TQWQ>].

340. This does not include takers from the five states that gave their own online examinations. *Id.*; see also *COVID-19: Implications for 2020 Statistics*, BAR EXAM'R, [<https://perma.cc/5RXP-BLBV>] (last visited Oct. 8, 2022).

341. The NCBE indicated that ExamSoft reported that customer support requests were mostly routine and “those actually dealing with technical issues were proportionately low.” *2020 Bar Exam Process Comes to an End: Approximately 38,000 Applicants Took Bar Exam in July, September, or October*, *supra* note 339.

342. Marie Innarelli, *Technical Difficulties: Mixed Reviews of First Ever Online Bar Exam*, J. HIGH TECH. L.: BLOG (Nov. 23, 2020), [<https://perma.cc/VN4D-EKC3>] (“Brianna Hill, a recent law graduate living in Chicago, continued taking the exam despite her water breaking as to not be disqualified for moving outside the vision of artificial intelligence. A mere 24 hours after giving birth she finished the remaining section of the exam in a hospital bed.”).

343. See Kelley, *supra* note 99; Teninbaum, *supra* note 99.

344. The NCBE summarized the online examination as follows: 98% of applicants who had downloaded the exam files started their exams as planned. Of the 2% who did not start the exam, less than 0.3% had technical issues that required additional action, with the most common technical issue being user devices that did not meet the published minimum system requirements. The other 1.7% were either ‘no-shows’ (didn’t

examination problems remotely is likely to be more complicated than in-person resolution. In any event, the examination appeared to be essentially a “success,” with glitches.”³⁴⁵ Because NCBE could not equate the remote test with the usual NCBE tests,³⁴⁶ it seemed likely that the transfer of test scores from state to state would not be allowed for the online test. This was mostly resolved when fourteen states (including D.C.) agreed to accept score transfers from the NCBE online test among themselves.³⁴⁷

In three states that gave both online and in-person exams, those taking the in-person exams had higher pass rates than online takers.³⁴⁸ This was perhaps because the academically stronger students had an incentive (jobs) to take the earlier (in-person) exams.

Many seeking a diploma privilege argued that an online examination was not a legitimate alternative because it was

attempt to launch the exam), chose not to take the exam prior to test day, or were determined to be ineligible to test by their jurisdiction.

2020 Bar Exam Process Comes to an End: Approximately 38,000 Applicants Took Bar Exam in July, September, or October, *supra* note 338.

345. Karen Sloan, *States Say the Online Bar Exam Was a Success. The Test-Taker Who Peed in His Seat Disagrees*, LAW.COM (Oct. 7, 2020, 3:40 PM), [<https://perma.cc/8FC6-DH3U>] (suggesting that the answer to the question of whether the “online bar exam [was] a rousing success, or an epic failure” is it “depends on whom you ask”).

346. The equating from exam to exam is a statistical method of standardizing the scaling of tests so that the passing score remains the same across test administrations. One test is not “harder” or “easier” than another in terms of the passing score. NCBE routinely uses it to maintain an even scoring required across tests. So, for example, it does not matter whether an applicant takes the test in 2016 or 2018, in the spring or in the fall—the same level of performance is required on all of those tests. The NCBE explains this process as follows:

This statistical process adjusts raw scores on the current examination to account for differences in difficulty as compared with past examinations. Equating makes it possible to compare scaled scores across test administrations because any particular scaled score will represent the same level of knowledge/performance from one test date to another. Equating helps to ensure that no examinee is unfairly penalized or rewarded for taking a more or less difficult form of the test. Because the adjustment of scores during equating is examination-specific (i.e., based on the level of difficulty of the current examination as compared to previous examinations), it is not possible to determine in advance of the test how many questions an examinee must answer correctly to achieve a specific scaled score.

Multistate Bar Examination, NAT’L CONF. OF BAR EXAM’RS, [<https://perma.cc/N4PB-XVKP>] (last visited Oct. 8, 2022).

347. *COVID-19: Implications for 2020 Statistics*, *supra* note 340.

348. Stephanie Francis Ward, *Did Bar Candidates Who Had a Choice Do Better on In-Person or Remote Exams?*, ABA J. (Feb. 9, 2021 9:58 AM), [<https://perma.cc/G9U2-L8SQ>].

untried and would not work.³⁴⁹ Others said that many applicants would not have adequate access to internet connections to take the test or even to study, which would likely result in failing the bar examination.³⁵⁰

Thus, the online bar examination was a bold undertaking. It was new, and in addition to testing issues (question quality, scaling problems, the potential for remote cheating), there were significant potential technical problems of simultaneously giving the examination to tens of thousands of takers. That there were as few problems as there apparently were was a great tribute to NCBE, bar examiners, and the flexibility and patience of applicants.

There were, however, real problems with some of the five³⁵¹ state-developed online tests.³⁵² State-written questions generally do not undergo the development and quality-check processes that NCBE employs.³⁵³ Other issues were evident in Michigan's first online bar examination, administered in July.³⁵⁴ A cyberattack or glitch in the ExamSoft program running the online test caused some takers to be locked out of the test for a short time.³⁵⁵ Indiana, scheduled to offer an online examination shortly after Michigan, changed its plans and instead opted to email questions to applicants for an open-book (without proctoring) test.³⁵⁶

349. *Diploma Privilege: What Is It & Which States Offer It?*, *supra* note 113.

350. Claire Newsome & Catherine Perrone, *The Inequity and Technology Behind an Online Bar Exam*, JURIST (July 18, 2020, 2:41 PM), [<https://perma.cc/5G74-MNVV>].

351. The five states were Michigan (July 28), Indiana (August 4), Nevada (August 11-12), Louisiana (August 24 and October 20), and Florida (October 13). *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23.

352. See Stephanie Francis Ward, *State's Online Bar Exam Is Delayed After Tech Glitch*, ABA J. (July 28, 2020, 2:05 PM), [<https://perma.cc/E2ZR-28CC>]; Stephanie Francis Ward, *Indiana Changes Online Bar Exam Again After 'Repeated and Unforeseen Technical Complications'*, ABA J. (July 29, 2020, 2:37 PM), [<https://perma.cc/UFD5-2GEP>]; Alan Gassman, *Over 1,000 Young Lawyers Are Stranded As Florida Bar Exam Is Canceled On 72 Hours Notice*, FORBES (Aug. 17, 2020, 8:47 PM), [<https://perma.cc/6FHP-7NSB>].

353. *NCBE COVID-19 Updates*, *supra* note 93.

354. See Karen Sloan, *Michigan Blames Cyberattack for Online Bar Exam Woes*, LAW.COM (July 29, 2020), [<https://perma.cc/8C8W-SY2H>].

355. *Id.* (Test-takers could not access their passwords to start the second part of the examination).

356. *Id.*

3. Testing Results

There was concern that the disruptions of the spring and summer would preclude many students from preparing well for the bar examination, and those burdens would fall especially hard on disadvantaged and minority applicants. As a result, commentators expected pass rates to decline.³⁵⁷ In fact, in forty-one states, passing rates increased in 2020 compared with 2019.³⁵⁸ Rates remained the same in two states and fell in seven states.³⁵⁹ Detailed data is available online and in Appendix II.³⁶⁰

There are several possible explanations for this increase. For one thing, for the online and state-developed tests, it was impossible for NCBE to scale the scores³⁶¹ and, therefore, impossible for NCBE to equate the Summer 2020 test to earlier tests.

NCBE was, however, able to scale and equate the three standard NCBE in-person examinations.³⁶² Those equated scores should represent equivalent standards for comparing 2020 exams with other years. The Summer MBE national means were meaningfully higher than the previous four years.³⁶³ Most in-person takers sat in July 2020 (5,678 takers) when the mean score was 146.1 (compared to 141.1 in 2019).³⁶⁴ In September, there were fewer takers (1,811), and the mean score was 142.7; and in October, an even smaller number (417), with a low mean score of 137.2.³⁶⁵ That would calculate the collective mean to be approximately between 144 and 145 compared with 141 in 2019, according to the author's back-of-an-envelope calculation.

357. Muller, *supra* note 336.

358. *See infra* Appendix II.

359. *Id.*

360. *See infra* Appendix II.

361. See Susan C. Chase et al., *The Testing Column: Scaling, Revisited*, BAR EXAM'R, Fall 2020, at 68, 68 for a good review of the importance and nature of scaling.

362. *The Multistate Bar Examination (MBE)*, BAR EXAM'R, [<https://perma.cc/TG3P-CTRT>] (last visited Oct. 8, 2022).

363. *Id.*

364. *Facts & Figures*, BAR EXAM'R, Fall 2020, at 10, 10-11.

365. *Id.*; *see also Statistics: July, September, and October 2020 MBE*, BAR EXAM'R, [<https://perma.cc/M8ZE-TJDD>] (last visited Oct. 8, 2022) (explaining the small number of takers, especially in October, may limit the comparability to earlier years).

Five jurisdictions formally lowered their minimum passing score. California's change was permanent.³⁶⁶ Hawaii and North Carolina had temporary reductions,³⁶⁷ and two states (Oregon and Washington) not only had diploma privileges but also temporarily reduced the passing score for those who took the test.³⁶⁸ It is hard to know the effect of these reductions in comparing summer 2020 to 2019 passing rates, but they almost certainly made a difference, as California illustrates.³⁶⁹ Rhode Island did not lower its score until 2021.³⁷⁰

The passing data do not demonstrate that the greater-than-usual stress applicants undoubtedly faced through the summer substantially reduced their bar examination performance. That seems true both for the in-person (equated) and online (not equated by NCBE) examinations.

B. Temporary Practice and the Concern About a Shortage of New Lawyers

Another accommodation, in about thirty jurisdictions, was permitting temporary supervised practice. There is limited national data on the details of the practice rules.

C. Diploma Privilege

The number of applicants accepting the diploma privilege was as follows: Louisiana 409, Oregon 240, Utah 130, and Washington 498, for a total of 1,277 (plus D.C.).³⁷¹ All states granting the diploma privilege gave examinations.³⁷² Some

366. Sam Skolnik, *Bar Exams May Soon Be Easier to Pass, as States Eye Changes*, BLOOMBERG L. (Mar. 29, 2021, 5:01 AM), [<https://perma.cc/N74V-CD3R>].

367. Debra Cassens Weiss, *Several States Consider Lowering Cut Scores on Bar Exam, Making It Easier to Pass*, ABA J. (Mar. 21, 2021, 11:37 AM), [<https://perma.cc/S7VD-TMUD>].

368. *COVID-19: Implications for 2020 Statistics*, *supra* note 340.

369. See Stephanie Francis Ward, *California Releases Bar Exam Results, and Like Many Jurisdictions Sees Increase in Pass Rates*, ABA J. (Jan. 11, 2021 12:49 PM), [<https://perma.cc/ZU53-RJMF>] for additional detail for several states.

370. See *supra* text accompanying note 366.

371. *Admissions to the Bar by Examination and Transferred UBE Score, 2016-2020*, BAR EXAM'R, Spring 2021, at 44,

372. See *id.* at 44-45.

applicants likely chose to take the test because of portability or personal or employment concerns. Privilege states collectively might have tended toward higher scores because applicants likely to fail the exam would sensibly have been most likely to accept the privilege. On the other hand, a significant number of repeaters would tend to pull down the passing percentage. Washington gave the diploma privilege to repeat takers,³⁷³ which would have increased the passage rate by excluding repeaters from those taking the test.

D. Bar Admissions

In 2020, the number of new bar admissions increased from the 2019 level. In 2019, 38,464 candidates were admitted by examination.³⁷⁴ In 2020, there were 39,324 admitted by examination, and 1,277 admitted via the diploma privilege, for a total of 40,601 (plus the D.C. diploma privilege).³⁷⁵ There were, however, substantial variations among states in the increase or decrease in admittees.³⁷⁶ A significant part of the increase in those admitted by examination related to a change in the minimum passing score in California.³⁷⁷

The number of attorneys admitted by UBE score transfer increased from 3,434 in 2019 to approximately 5,000 in 2020.³⁷⁸ This was not generally an increase in the total number of attorneys, however, because virtually all of the score-transfer admittees passed a bar examination and were accounted for by the state in which they took the test.³⁷⁹ Thus, the problems and accommodations did not decrease the number of newly admitted attorneys, including those admitted by examination.

373. Washington Order, *supra* note 190, at 2.

374. *Admissions to the Bar by Examination and Transferred UBE Score, 2016-2020*, *supra* note 371, at 44. The figures do not include the five jurisdiction the NCBE reports noted earlier.

375. *Id.* at 44-45. The figures for 2019 and 2020 both exclude diploma privilege admission in Wisconsin. In Wisconsin, 327 applicants in 2019 and 299 applicants in 2020 were admitted via the diploma privilege.

376. *See id.* at 44-45.

377. *See id.*

378. *Id.* at 45.

379. *COVID-19: Implications for 2020 Statistics*, *supra* note 340.

The results reported in this section suggest that neither outlier accommodation was necessary. Courts did not need to cancel the test for a year, nor did courts need to displace the examination with the diploma privilege. The former unnecessarily harmed applicants; the latter unnecessarily removed a standard protection for the public. Forty-four states demonstrated that there were difficult but workable alternatives (but some alternatives were better than others).³⁸⁰

VII. THE 2021 EXAMINATIONS

The Spring 2021 examination (February 23-24) was administered under circumstances that were in some ways more challenging than the July exam. The weeks leading up to the February dates had substantially higher COVID infections and COVID-related deaths than in the weeks before the July dates.³⁸¹ Although COVID vaccines became available before the end of 2020, few potential February test-takers received a vaccination before that examination.³⁸² Mutations in the virus made matters worse.³⁸³ Studying for the February examination was upended by COVID and by the election and post-election events, demonstrations, Capitol violence, and the political/social circumstances.³⁸⁴

States' potential accommodation options remained about the same as they were in the summer: canceling the test, social distancing/safe-testing in-person arrangements, delaying the test, giving a remote-online test, using multiple dates for the

380. *Admissions to the Bar by Examination and Transferred UBE Score, 2016-2020*, *supra* note 371, at 44-45. The forty-four include all the states except the five diploma privilege states and Delaware, the one state that canceled the test. *See Persons Taking and Passing the 2020 Bar Examination*, *supra* note 83. Wisconsin is not included in the count because it did not disrupt its ordinary admission process (the diploma privilege) but did not have an examination either. *Admissions to the Bar by Examination and Transferred UBE Score, 2016-2020*, *supra* note 371, at 44-45.

381. *See Trends in Number of COVID-19 Cases & Deaths in the US Reported to CDC, by State/Territory*, CTRS. FOR DISEASE CONTROL AND PREVENTION, [<https://perma.cc/T6RB-QB7U>] (last visited Oct. 9, 2022).

382. *See CDC Museum COVID-19 Timeline*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Aug. 16, 2022), [<https://perma.cc/KQE6-P28S>].

383. *See id.*

384. *See Lisa Mascaro & Matthew Daly, Capitol Siege by Pro-Trump Mob Forces Questions, Ousters*, ASSOCIATED PRESS (Jan. 7, 2021), [<https://perma.cc/FS8X-SDU6>].

examination, providing temporary limited practice rules, and offering a diploma privilege.

However, unlike the summer, states focused on safe practices for in-person and online examinations as accommodations.³⁸⁵ All jurisdictions, except Delaware, offered a February test.³⁸⁶ Sixteen jurisdictions gave in-person examinations,³⁸⁷ and thirty-four gave remote, online tests.³⁸⁸ Both the in-person and online examinations were on February 23-24.³⁸⁹

The number of test takers in the winter examination is usually less than half the number in summer.³⁹⁰ This made social distancing, sanitation, and facilities arrangements more manageable for the February test. The logistics of the online examination were somewhat easier as well. And, of course, NCBE and many states had the experience of the October online examination to help guide the February online testing. There were still many challenges for test takers and test givers, but there were no published reports suggesting large-scale problems with the February tests.

There was little public discussion of delaying the administration of the February examination or proving multiple examination dates,³⁹¹ which may reflect the success of both the

385. *February 2021 Bar Exam Status by Jurisdiction*, NAT'L CONF. OF BAR EXAM'RS (Jan. 12, 2021), [<https://perma.cc/V82B-8TGK>].

386. *Id.* Delaware does not offer a winter test. When it announced that it was not offering the Summer examination, it essentially canceled for a full year. *COVID-19: Implications for 2020 Statistics*, *supra* note 340.

387. *February 2021 Bar Exam Status by Jurisdiction*, *supra* note 385 (Those states were Alabama, Alaska, Arkansas, Hawaii, Kansas, Minnesota, Mississippi, Missouri, Montana, New Mexico, Oklahoma, South Carolina, South Dakota, Virginia, West Virginia, and Wyoming).

388. *Id.* (Those jurisdictions were Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana (February 9), Maine, Maryland, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, and Wisconsin).

389. *Id.* Louisiana set its date as February 9. Several states have examinations lasting two-and-a-half or three days, including Nevada, Ohio, and Pennsylvania, all of which used February 25, 2021, for the extended test.

390. *See 2019 Statistics Snapshot*, BAR EXAM'R, [<https://perma.cc/J88U-8EPW>] (last visited Oct. 9, 2022). For the 2019 examinations, the numbers were 21,935 takers in February and 46,370 takers in July. *Id.*

391. *February 2021 Bar Exam Status by Jurisdiction*, *supra* note 385.

in-person and online administrations in summer and fall 2020. Those states that were going to offer a temporary, limited practice rule had done so earlier. Three jurisdictions, Hawaii, North Carolina, and Washington, continued temporary reductions in the minimum passing score announced in the summer.³⁹² Rhode Island reduced its minimum score to 270 beginning with the February test.³⁹³

Some called for the possibility of a diploma privilege as an accommodation,³⁹⁴ but there was little serious discussion of it for the February examination. The five jurisdictions that offered the privilege in the summer did so only for that examination and did not extend it for the February takers.³⁹⁵

In July 2021, all states gave bar examinations.³⁹⁶ Twenty-two jurisdictions gave in-person examinations, and twenty-nine gave remote examinations.³⁹⁷ Bar examiners and courts were familiar with the steps necessary to provide relatively safe in-person and remote (online) tests. The in-person examinations, by all accounts, were a relatively routine administration apart from the COVID protocols that were in place, designed to comply with

392. *COVID-19: Implications for 2020 Statistics*, *supra* note 340.

393. Order at 1-2, *In re the Rhode Island Bar Examination (Reduction of Minimum Passing Score)* (R.I. Mar. 25, 2021), [<https://perma.cc/EP6P-E6WQ>] (reducing the minimum passing score from 276 to 270, on the 400-point scale, beginning with the February 2021 examination). This is a permanent reduction. *Id.* California permanently reduced its minimum passing score in 2020 with some retroactive application of the new score. California Order, *supra* note 230, at 1.

394. For example, the Washington ACLU asked the Washington Supreme Court to allow the diploma privilege because of the ExamSoft monitoring and face recognition technology. Letter from Michele Storms, Exec. Dir., Washington ACLU, and Jennifer Lee, Tech. & Liberty Manager, Washington ACLU, to Steven C. Gonzalez, C.J., Washington Sup. Ct., and others (Jan. 19, 2021), [<https://perma.cc/CU6W-255K>]. The University of Washington School of Law dean and others had requested the renewal of the diploma privilege for February. Letter from Mario L. Barnes, Dean, Univ. of Washington Sch. of L., to Steven C. Gonzalez, C.J., Washington Sup. Ct. (Feb. 1, 2021), [<https://perma.cc/GF2R-G469>].

395. Stephanie Francis Ward, *Jurisdictions with COVID-19-Related Diploma Privilege are Going Back to Bar Exam Admissions*, ABA J. (Dec. 10, 2020 3:16 PM), [<https://perma.cc/W94Q-LHJG>].

396. The figures reported in this section do not include “Off-Shore Jurisdictions” which are included in NCBE data.

397. *July 2021 Bar Exam Status by Jurisdiction*, NAT’L CONF. OF BAR EXAM’RS (May 18, 2021), [<https://perma.cc/NX42-2MZA>].

the medical and public health guidelines.³⁹⁸ There were no publicly reported examples of COVID transmission from those examinations.

The online examinations, however, were problematic nationwide, primarily because ExamSoft-based software shut down or did not upload properly for some users.³⁹⁹ The California State Bar did a careful study of the problems. It concluded that approximately 2% of California takers had “meaningful” loss of time or content because of technology, and 31% of takers “experienced one or more technical issues related to the software memory utilization.”⁴⁰⁰ However, 99% of test takers reported no problems being able to restart a section without losing time or content.⁴⁰¹ Ultimately, California adjusted the scores of those negatively impacted by the problem.⁴⁰² It also allowed those who had technical issues and did not pass the exam to waive the fee for a future examination.⁴⁰³ Most states did not adopt a similar adjustment process.⁴⁰⁴

The July 2021 examination outcomes are generally comparable with Summer 2019 examinations (the last “normal” or pre-COVID year).⁴⁰⁵ However, there were substantial variations in a few states.⁴⁰⁶ There were approximately 500 more

398. *NCBE Anticipates Return to In-Person Testing for February 2022 Bar Exam*, NAT'L CONF. OF BAR EXAM'RS (June 1, 2021), [<https://perma.cc/AW55-R64U>].

399. Stephanie Francis Ward, *Technical Problems Again Plague Remote Bar Examinees, Who Blame Software Provider*, ABA J. (Aug. 5, 2021 11:27 AM), [<https://perma.cc/YT7V-T4GR>].

400. *State Bar Concludes Investigation on July Bar Exam Technological Issues*, THE STATE BAR OF CAL. (Sept. 27, 2021), [<https://perma.cc/5CRM-REB6>].

401. *Id.*

402. THE STATE BAR OF CAL., SCORING ADJUSTMENTS FOR APPLICANTS NEGATIVELY AFFECTED DURING THE JULY 2021 CALIFORNIA BAR EXAM 1-2 (2021), [<https://perma.cc/JRQ8-NQB9>]. The examiners determined that 2,429 “examinees experienced negative impacts” and rescored their examinations. *Id.* at 1.

403. *Id.* at 2.

404. *See Bar Exam Modifications During COVID-19: 50 State Resources*, *supra* note 7.

405. Stephanie Francis Ward, *Are Remote Learning and Burnout to Blame for Declining Bar Pass Rates?*, ABA J. (Nov. 16, 2021, 3:37 PM), [<https://perma.cc/FK5N-GJAP>].

406. In seven states, for example, the passing rate increased five or more percentage points (for all takers in a state), and in eleven states, the passing rate dropped by five percentage points or more. These data are calculated by comparing the Summer 2019 NCBE passage data with the preliminary passing data for Summer 2021. *Compare Persons Taking and Passing the 2019 Bar Examination*, NAT'L CONF. OF BAR EXAM'RS,

takers in 2021 (45,334 in 2019 and 45,872 in 2021).⁴⁰⁷ In July 2021, seventeen states had the same passage rates or within one percentage point of July 2019; seventeen had increased passage rates of greater than 1%; seventeen had decreased passage rates of greater than 1%.⁴⁰⁸ The Multistate Bar Examination mean scores were slightly lower in 2021, going from 141.1 in 2019 to 140.4 in 2021.⁴⁰⁹

The NCBE announced on June 1, 2021, that it was not planning to offer an online examination after the Summer 2021 test.⁴¹⁰ That was with the expectation that COVID was declining. With the success of in-person jurisdictions, an online test was not essential. But COVID again proved unpredictable, and by early 2022, there was an extraordinary surge, especially with the Omicron variant.⁴¹¹ In announcing that it would not provide an online test, NCBE did recognize that things could change and indicated “restrictions by . . . public health authorit[ies]” could require adjustments again.⁴¹² In that case, it was “committed to working with that jurisdiction on a solution that will enable its candidates to take the bar exam.”⁴¹³ By January 15, 2022, Nevada announced that it was moving to a remote test consisting of “seven Nevada essay questions and two Nevada performance test questions.”⁴¹⁴ That is, not NCBE or multiple-choice questions.⁴¹⁵

[<https://perma.cc/5BTU-MUEH>] (last visited Oct. 9, 2022), with *Bar Exam Results by Jurisdiction*, *supra* note 80.

407. *Statistics*, BAR EXAM’R, [<https://perma.cc/2RYS-UXLW>] (last visited Oct. 9, 2022).

408. These data were derived from the data described in the previous footnote. *Id.* Three states are counted as no change because the 2021 rates were not available from NCBE (Hawaii, Kansas, and Michigan). *Id.*

409. *NCBE Releases National Means for July MBE, August MPRE*, NAT’L CONF. OF BAR EXAM’RS (Sept. 15, 2021), [<https://perma.cc/G27G-TXDB>].

410. *NCBE Anticipates Return to In-Person Testing for February 2022 Bar Exam*, NAT’L CONF. OF BAR EXAM’RS (June 1, 2021), [<https://perma.cc/BZ57-BYPL>].

411. Julie Bosman et al., *Covid Rises Across U.S. Amid Muted Warnings and Murky Data*, N.Y. TIMES (July 18, 2022), [<https://perma.cc/W8VF-G3ZB>].

412. *NCBE Anticipates Return to In-Person Testing for February 2022 Bar Exam*, *supra* note 410.

413. *Id.*

414. Steven Lerner, *COVID Concerns Force Nevada’s February Bar Exam Online*, LAW360 (Jan. 7, 2022, 3:37 PM), [<https://perma.cc/LT9J-V9QH>].

415. *Id.*

VIII. LAW SCHOOLS, THE COVID ACCOMMODATIONS, AND THE FUTURE

A. Active Participation

Law schools were active participants in the discussions of the diploma privilege and other accommodations for the Summer 2020 bar examinations. They filed petitions, letters, statements, and comments to state supreme courts and bar examiners.⁴¹⁶ Some sought to involve state legislators and governors.⁴¹⁷ Deans, faculties, and faculty members (and, of course, students) provided input.⁴¹⁸ Some national organizations and a handful of bar associations also advocated for alternative licensing.⁴¹⁹ The AALS and Section of Legal Education and Admissions to the Bar did not formally do so. Thousands of individual students and recent graduates also signed motions, petitions, and comments.

Overwhelmingly, the law school advocacy favored the diploma privilege option.⁴²⁰ Although the emphases varied, the arguments were essentially those outlined earlier. Few statements seriously dealt with the core purpose of the bar examination in protecting the public.

416. See *infra* note 417 and accompanying text; Levin, *supra* note 73, at 95-96.

417. Such was the case in the State of New York, where the fifteen law school deans signed a letter to the governor, legislative leaders, and others, seeking action beyond the court of appeals. Letter from Deans of New York Law Schools to Andrew Cuomo, Governor, and others (July 17, 2020), [<https://perma.cc/6HCS-FPAJ>]. They wrote that they “urge that New York adopt a diploma privilege in the swiftest way possible. . . . We have repeatedly advocated on behalf of our graduates before the Court of Appeals [T]he excessive delay in making a final determination on such an exam places an undue burden on our graduates” *Id.* This was taken by some quarters to be a “[D]emand,” which may have represented journalistic excess. Staci Zaretsky, *New York Law Deans Demand Diploma Privilege for Law School Graduates Instead of Bar Exam*, ABOVE THE L. (July 20, 2020, 2:32 PM), [<https://perma.cc/QC4V-V58S>]; see also Levin, *supra* note 73, at 110-15 (detailing the political struggle in New York).

418. Levin, *supra* note 73, at 95-97.

419. Several organizations collectively promoted the diploma privilege for 2020. See *An Open Letter from Public Interest Legal Organizations Supporting Diploma Privilege*, *supra* note 28. The ABA House of Delegates, in August 2020 (after the July in-person examination), did recommend that states “establish temporary emergency measures to expeditiously license recent law school graduates” and included among the options “a form of diploma privilege.” RESOLUTION 10G, *supra* note 82.

420. *An Open Letter from Public Interest Legal Organizations Supporting Diploma Privilege*, *supra* note 28.

B. Impact

It is difficult to know what impact the law schools' participation had in the accommodation discussions. In some respect, the direct effects appear to be limited—only five (10%) of the jurisdictions adopted a diploma privilege accommodation for the 2020 Summer examination and none for more than that one examination.⁴²¹

The indirect impacts are impossible to determine. The description of the difficulties facing applicants may have made examiners and courts more inclined to adopt such accommodations as temporary practice rules, multiple examination dates, or (in a few states) a lowered passing score. Several courts went out of their way to acknowledge discussions with deans and others.⁴²²

On the negative side, some examiners or courts might have seen law schools' efforts as ignoring the public interest and essentially lobbying for students and institutional interests. They may have seen the arguments as opportunistic or inconsistent with the bar examiners' experience. Bar examiners who feel a strong obligation to the public may dislike being the “bad guys” in arguing against law schools' sympathetic portrayal of applicants. During the most challenging testing situation they had ever faced, some state bar examiners and their staffs may have felt that law schools or faculty were taking unnecessary swipes at them.

Among other audiences, the reaction was probably mixed. Most students in the 2020 Spring graduating class likely appreciated their law schools' efforts to promote the diploma privilege, although the efforts were generally unsuccessful. Law schools that went the extra mile to support graduates who needed assistance during preparing for and taking the bar—finding internet connections, places to study, counseling, and the like—may be the most appreciated.

421. Skolnik, *supra* note 324.

422. *E.g.*, Louisiana Order, *supra* note 169, at 1; Louisiana Press Release, *supra* note 172, at 3.; Nebraska Order, *supra* note 220, at 2; Tennessee Order, *supra* note 259, at 1.

C. The Future of Bar Admissions

An especially optimistic note is the interest in improving the bar admissions process. The issues include whether there should be licensing, what kind of licensing there should be, where a bar examination should be required, and what role supervised apprenticeships might play. These discussions may have been partially encouraged by the debate about accommodations associated with COVID. In addition, there are broader concerns about bar admissions, including the significant issue of racial-ethnic disparities in first-time bar passage.⁴²³ The reform efforts include a thorough ongoing reform study of NCBE to create a substantially revised bar examination (NextGen Bar Exam).⁴²⁴ Many scholars are making interesting suggestions regarding bar admission.⁴²⁵ In addition, preparation for the test may be improving. AccessLex is experimenting with a comprehensive,

423. For example, ABA bar passage data demonstrate meaningful differences among ethnic groups in bar passage. The 2019 testing (first-time takers), for example, showed 85% pass rates for white applicants; 79% for applicants of two or more races; 74% for Asian applicants, 72% for Hawaiian applicants, 69% for Hispanic applicants, and 61% for Black applicants. AM. BAR ASS'N, SUMMARY BAR PASS DATA 1 (2021), [<https://perma.cc/XB3D-K6VB>]. These differences call for considerable effort to understand and seek to correct the underlying causes of them. Some of that work is underway, but it is only a beginning. See, e.g., ACCESSLEX INST., ANALYZING FIRST-TIME BAR EXAM PASSAGE ON THE UBE IN NEW YORK STATE 7 (2021), [<https://perma.cc/V857-E2P3>].

424. The NCBE has had a task force for several years working on the future of the bar examination. The task force has recently made its recommendations. TESTING TASK FORCE, NAT'L CONF. OF BAR EXAM'RS, OVERVIEW OF PRELIMINARY RECOMMENDATIONS FOR THE NEXT GENERATION OF THE BAR EXAMINATION 2 (2020), [<https://perma.cc/8WR2-7HGE>]. The NCBE website has details about the various stages of this lengthy and complex effort. See *NextGen Bar Exam of the Future*, NAT'L CONF. OF BAR EXAM'RS, [<https://perma.cc/F7NU-CDLD>] (last visited Oct. 9, 2022). At the core of the recommendations are an “[i]ntegrated exam that assesses both knowledge and skills holistically”; a single, combined score (not different scores on different parts); eight foundations concepts (essentially course areas, e.g., torts, evidence, and business associations) and seven skills (e.g., issue spotting and analysis, legal writing, investigation and evaluation); and a computer-based test. The NCBE Board has adopted those principles. *NCBE Board of Trustees Votes to Approve Testing Task Force Recommendations*, NAT'L CONF. OF BAR EXAM'RS (Jan. 28, 2021), [<https://perma.cc/YX2T-7DZR>].

425. E.g., DEBORAH JONES MERRITT & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE 4-5, 8 (2020), [<https://perma.cc/CL3N-V7ZK>]; Joan W. Howarth, *What Law Must Lawyers Know?*, 19 CONN. PUB. INT. L.J. 1, 12-13 (2019); Griggs, *supra* note 34, at 61-64.

inexpensive bar review system,⁴²⁶ and many schools are creating increasingly sophisticated academic support services.

The range of discussion is promising and productive, at least to the extent the proposals genuinely begin from the proposition that it is the public interest that is the primary purpose of licensing and bar admissions. The process must ensure that the public has good-quality lawyers and is protected from inadequate legal practitioners. The process is also intended to ensure the public that it can rely on the bar admission process. The public opinion survey discussed earlier suggests there would be a long road to travel to provide that assurance without a bar examination.⁴²⁷

D. Addressing the Disconnect

Law schools, bar examiners, and courts should not wait for the NextGen process. They should consider the “disconnect” between some law schools and bar admissions authorities. The disconnect is an apparent disagreement between law schools and bar examiners regarding who is adequately prepared to begin law practice. Law schools presumably graduate only students they believe are ready to enter the profession. Yet, a couple of months after graduation, when graduates take the bar examination, bar admissions authorities find many of them are not ready. It varies significantly from school to school, but on average, 25% of law graduates do not pass the bar examination on the first attempt.⁴²⁸

Examinations given in law school and by bar examiners are in many ways similar—a range of multiple choice and essays.⁴²⁹ NCBE is undoubtedly better technically at creating and testing reliable examinations than faculty, but that likely does not explain the difference.⁴³⁰ Nonetheless, law schools and bar examiners

426. *Our Story*, HELIX BAR REV., [<https://perma.cc/727H-7EMF>] (last visited Oct. 9, 2022); Karen Sloan, *A Longer, Cheaper Bar Exam Prep Program Looks to Upend the Industry*, REUTERS (Sep. 7, 2021), [<https://perma.cc/D59W-TNKS>].

427. SCHNEIDERS & CHOI, *supra* note 4.

428. *New Report Shows Most Law School Grads Passing Bar*, *supra* note 307.

429. *Bar Exams*, AM. BAR ASS'N, [<https://perma.cc/NA5T-87GK>] (last visited Oct. 9, 2022).

430. Bar examiners note that the purposes and validation of law school examinations and bar examinations differ. For example, NCBE notes that it does validation studies related to practice and also says, “No such validation process is done on law school curricula or course work, and the purpose of law schools is to educate, not to protect the public by

generally rank students roughly in a similar order. That is, bar passage in most law schools is correlated with law school relative GPA or class rank.⁴³¹

Complaints about the bar exam's reliance on memorization are probably not the answer to the disconnect. For example, Stanford students do significantly better on the California bar than Golden Gate students,⁴³² but probably not because Stanford students memorize so much more law. Furthermore, law school examinations commonly depend on doctrinal detail. Nor is it likely that the different outcomes can be explained by the fact that the bar examination is a comprehensive examination (multiple subjects), and law schools generally give single-subject tests.

The difference in law school bar outcomes may be where to draw the passing line. In effect, some law schools may draw the basic competency line (appropriate to enter the profession) lower than examiners. For some schools, less than 10% of graduates fail on the first attempt, while for others, 30%, or even 50% of graduates initially fail the bar exam. The latter schools might work with bar examiners to determine why, shortly after graduation, bar examiners determine that so many of their graduates are not yet ready to be admitted to practice. National legal education, NCBE, and others might productively prepare studies and reports on the different expectations of some schools

ensuring competence to practice under a general license." NAT'L CONF. OF BAR EXAM'RS, *supra* note 205, at 5-6.

431. This applies to law schools in which there are a meaningful number of bar failures. In a school with a very high passage rate (e.g., if 90% first-time takers pass, there may not be a sufficiently large number of failures for the strong correlation to hold). For most schools, however, there is a strong correlation. Nicholas L. Georgakopoulos, Bar Passage: GPA and LSAT, Not Bar Reviews 4 (Aug. 10, 2013) (unpublished manuscript), [<https://perma.cc/M9R5-65YC>] ("The finding here that law school grades relate strongly to bar passage is consistent with some prior findings that law school grades relate strongly with bar passage and career success."). LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 24 (1998), [<https://perma.cc/6W2Q-4GAK>] (law school GPA had the highest correlation with bar passage). Dozens of law schools have done local bar studies. In my experience, they commonly find a strong correlation (usually the strongest correlation of the factors examined) between bar passage and law school grade point average.

432. See *Individual School Bar Passage Reports*, *supra* note 130 (choose "Bar Passage Outcomes" from the menu; then select "Stanford" as the school and "2020" as the year; then click the "Generate Report" icon to download a PDF report of the 2019 data); Lyle Moran, *2 Law Schools Found to Be out of Compliance With ABA's Bar Passage Standard*, ABA J. (Dec. 20, 2021, 12:43 PM), [<https://perma.cc/9A4G-VR5G>].

and bar examiners about the minimum qualifications to obtain a law degree and be licensed.

Law schools and the bar admissions process share the task of providing society with the next generation of the legal profession. Changing technology, globalization, and innovation make providing for society's legal needs more challenging. Law schools and bar authorities have a great challenge of creating for society a profession that is well-educated, technically solid, sophisticated, diverse, creative, and compassionate. The disconnect interferes with meeting that challenge.

CONCLUSION

Several themes emerged from the pandemic bar examinations that were not initially obvious as the debate was raging. First, there were many heroes. Many graduates prepared carefully and successfully for the bar under challenging conditions. Because of rapidly changing circumstances, states sometimes delayed decisions, and more than once changed directions on how they would give the examination.

Bar examiners (the many volunteers and staff) and state high courts also deserve credit for their extraordinary efforts in searching for the right accommodations. Because of rapidly changing circumstances, many states had to adjust plans in midstream. They sometimes came in for undue criticism. States might have taken the Delaware approach—simply canceling the bar examination—but they did not and too often received harsh words for their efforts. At the national level, NCBE in summer/fall 2020 gave three in-person bar examinations equated to earlier ones.⁴³³ It also developed and delivered the first online bar examination.⁴³⁴ In summer 2022, all of 2021, and winter 2022, NCBE offered both the usual in-person and online tests.⁴³⁵ All of this took great effort, used a vast number of questions, and (in the case of the online test) was surrounded by risks.

Heroic law schools helped their students find study spots before the examination, Wi-Fi connections for the online test,

433. See *supra* notes 89-90 and accompanying text.

434. *NCBE COVID-19 Updates*, *supra* note 93.

435. See *supra* discussion Section III.C. and Section V.II.

exceptional support in finding temporary practice jobs, counseling, and the like. Schools that undertook substantial support in the face of their other problems from COVID are heroes.

If there were heroes, there were also some unfortunate moments in the COVID discussion. Too often, there was not a genuine focus on the primary reason for the licensure of attorneys: protecting the public and assuring the public of the quality of new attorneys.⁴³⁶ Regrettably, the courts offering a COVID diploma privilege generally did not write opinions explaining how the public purpose of licensing was being protected. The public opinion survey suggests that the public is unenthusiastic about bar admission without testing.⁴³⁷ Perhaps they feel as many of us would if state agencies gave lifetime licenses, without testing, to new dentists, electrical contractors, financial advisors, optometrists, and truckers.

Beyond COVID is the broader policy question of how the public interest in bar admission can be best promoted in the future. Fortunately, many parts of the profession have been considering that question. The expertise of legal educators can be of great benefit in the licensing process, with the recognition that the primary purpose of licensing is genuinely the public's best interest.

436. *See supra* discussion Part V.

437. SCHNEIDERS & CHOI, *supra* note 4.

APPENDIX I: OPINION SURVEY ON THE BAR EXAMINATION⁴³⁸

The following statement provided an introduction to the two questions:

Until the Coronavirus (COVID-19) outbreak, every state, except one, required lawyers to pass a bar exam before being licensed to practice law. Bar exams have traditionally been held in person and supervised. But the health and safety challenges brought on by the outbreak have caused some states to consider allowing law school graduates to become licensed to practice law without taking and passing a bar exam.⁴³⁹

Options to Deal With COVID Challenges

Which of the following options would you favor to deal with the challenges brought on by the Coronavirus (COVID-19) outbreak?

	Gender			Age			Region			
	Total	M	F	18-34	35-44	55+	NE	MW	S	W
Continue to require supervised in-person bar exams with masks and social distancing, and compliance with all other local health guidelines	60%	59%	61%	42%	58%	74%	50%	63%	60%	64%
Require a bar exam but allow for online or	19%	20%	19%	32%	20%	10%	21%	20%	18%	20%

438. SCHNEIDERS & CHOI, *supra* note 4.

439. Greg Schneiders provided the wording of the introduction as well as the questions. E-mail from Greg Schneiders, CEO, Prime Grp., to author (Feb. 11, 2021, 2:24 EST) (on file with author).

other remote testing even if it cannot be supervised											
Eliminate the bar exam requirement and allow anyone who graduates from an accredited law school to be licensed to practice law	6%	7%	5%	7%	7%	4%	11%	4%	6%	3%	
Don't know	15%	14%	16%	19%	15%	12%	18%	13%	16%	13%	

	Race/Ethnicity					Education				Law Connection	
	Total	Wh.	Bl.	His.	Oth-er	No HS/HS grad	Some Col-lege, 2-yr	4-yr	Post grad	N	Y
Continue to require supervised in-person bar exams with masks and social distancing, and compliance with all other local health guidelines	60%	66%	49%	54%	47%	56%	61%	65%	62%	62%	43%
Require a bar exam but allow for online or other remote testing even if it cannot	19%	18%	20%	21%	26%	17%	19%	22%	24%	17%	38%

be supervised												
Eliminate the bar exam requirement and allow anyone who graduates from an accredited law school to be licensed to practice law	6%	5%	3%	10%	10%	6%	7%	6%	5%	5%	13%	
Don't know	15%	12%	27%	15%	17%	21%	13%	8%	9%	16%	6%	

Options for When Outbreak Passed

[O]nce the Coronavirus (COVID-19) outbreak has passed and social distancing rules no longer apply, which of the following opinions would you favor?

	Gender			Age			Region			
	Total	M	F	18-34	35-44	55+	NE	MW	S	W
Return to the traditional practice of requiring lawyers to take the bar exam in-person and supervised	70%	69%	70%	51%	68%	83%	62%	75%	68%	72%
Require a bar exam but allow lawyers to take it online or through other remote testing even if it cannot be supervised	13%	14%	13%	25%	14%	5%	16%	13%	13%	13%

Eliminate the bar exam requirement and allow anyone who graduates from an accredited law school to be licensed to practice law	5%	6%	4%	7%	6%	3%	8%	2%	6%	4%
Don't know	12%	11%	13%	17%	12%	9%	14%	10%	13%	11%

	Race/Ethnicity					Education				Law Connection	
	Total	Wh.	Bl.	His.	Oth-er	No HS/HS grad	Some College, 2-yr	4-yr	Post grad	N	Y
Continue to require supervised in-person bar exams with masks and social distancing, and compliance with all other local health guidelines	70%	79%	51%	61%	51%	61%	72%	79%	78%	72%	48%
Require a bar exam but allow for online or other remote testing even if it cannot be supervised	13%	9%	22%	18%	24%	14%	13%	12%	12%	11%	33%
Eliminate the bar exam requirement	5%	4%	3%	7%	12%	5%	6%	4%	4%	4%	11%

and allow anyone who graduates from an accredited law school to be licensed to practice law												
Don't know	12%	9%	24%	15%	13%	19%	9%	4%	6%	13%	7%	

A third question sought the demographic information report in the charts above. That question stated as follows:

Which, if any, of the following apply to you? Please select all that apply.

- a. I teach or have taught law
- b. I am currently a law student
- c. I am a practicing lawyer
- d. I am a lawyer not currently practicing
- e. I am not a lawyer but am employed in the field of law
- f. None of these

The third question, in which participants were asked whether they had any involvement with the law, produced the following results. Approximately 90% indicated no involvement with the law. Those reporting some involvement with the law were as follows (in order of frequency):

- a. I am not a lawyer but am employed in the field of law [3.1%]
- b. I am a lawyer not currently practicing [2.5%]
- c. I teach or have taught law [2.5%]
- d. I am a practicing lawyer [1.6%]
- e. I am currently a law student [1.6%]

It is important to note that applicants were asked to “select all that apply.” Therefore, a single participant could mark more than one kind of involvement. For example, a practicing lawyer might once have been an adjunct teacher and an LL.M. student. For that reason, the number of individuals “involve[d] with the

law” cannot be determined by adding the numbers for each of the responses in the question.

Several of these subgroups of “involvement with law” seem high. That is particularly true of the answer choice “I am currently a law student.” With a U.S. population of about 210 million for individuals 18 and older, even the most generous definition of a law student would struggle to reach 1.6% of the general population. Prime Group speculated this inflated number is in part due to the possibility those invited to participate in this part of the omnibus survey may have been especially attractive to law students.

**APPENDIX II: PASSING RATES SUMMER 2020
COMPARED WITH SUMMER 2019⁴⁴⁰**

Juris-diction	Taking 2020	Passing 2020	% Passing 2020	Taking 2019	Passing 2019	% Passing 2019	2020 v. 2019
ME	125	108	86%	130	67	52%	34%
AK	50	40	80%	57	32	56%	24%
AR	220	177	80%	210	127	60%	20%
NY	5,150	4,320	84%	10,071	6,536	65%	19%
NM	337	301	89%	212	152	72%	17%
HI	111	88	79%	167	104	62%	17%
IN	511	398	78%	457	296	65%	13%
WY	47	40	85%	59	43	73%	12%
NH	88	66	75%	105	66	63%	12%
OR	281	243	86%	367	277	75%	11%
MS	117	91	78%	156	105	67%	11%
CA	8,723	5,292	61%	7,764	3,889	50%	11%
WV	150	116	77%	168	113	67%	10%
NC	668	555	83%	783	568	73%	10%
VA	600	508	85%	637	479	75%	10%
MI	723	508	70%	641	394	61%	9%
DC	1,682	1,290	77%	1,799	1,241	69%	8%
CT	400	270	68%	303	182	60%	8%
KY	323	240	74%	357	238	67%	7%
RI	72	48	67%	72	43	60%	7%
MO	601	506	84%	670	523	78%	6%

440. Data are listed in order of percentage passage increase from 2019 to 2020 Summer Exam scores.

CO	642	499	78%	731	525	72%	6%
WI	132	91	69%	121	78	64%	5%
MN	546	452	83%	557	435	78%	5%
NE	166	139	84%	156	124	79%	5%
MA	1,323	1,015	77%	1,377	985	72%	5%
MT	83	71	86%	99	80	81%	5%
OH	958	741	77%	885	647	73%	4%
TN	677	507	75%	700	497	71%	4%
SC	384	276	72%	444	303	68%	4%
IL	2,157	1,615	75%	1,963	1,392	71%	4%
ID	144	99	69%	142	93	65%	4%
OK	268	215	80%	308	238	77%	3%
AZ	584	404	69%	521	345	66%	3%
NV	304	195	64%	313	191	61%	3%
ND	58	44	76%	82	60	73%	3%
PA	1,252	949	76%	1,270	928	73%	3%
IA	162	134	83%	190	152	80%	3%
GA	1,234	829	67%	1,178	769	65%	2%
MD	804	564	70%	838	573	68%	2%
WA	108	75	69%	628	430	68%	1%
NJ	1,407	931	66%	787	521	66%	0%
TX	2,152	1,466	68%	2,898	1,985	68%	0%
KS	134	113	84%	100	85	85%	-1%
AL	473	273	58%	486	298	61%	-3%
VT	56	32	57%	76	46	61%	-4%
FL	3,137	1,801	57%	2,688	1,662	62%	-5%
SD	61	43	70%	65	52	80%	-10%
UT	59	41	69%	228	187	82%	-13%
LA	270	147	54%	503	344	68%	-14%
Total July Results	40,714	28,966	71%	45,519	29,500	65%	Median +7

These data were calculated using NCBE data for the Summer 2020 and Summer 2019 exams. In states with multiple tests in 2020, the number of takers and passers are combined in a single score. Because Delaware did not give any Summer 2022 examinations, its data are not included for either year. The five NCBE “off-shore” jurisdictions are not included.⁴⁴¹

441. Data from *Persons Taking and Passing the 2019 Bar Examination*, NAT'L CONF. OF BAR EXAM'RS, [<https://perma.cc/5BTU-MUEH>] (last visited Oct. 9, 2022) and *Persons Taking and Passing the 2020 Bar Examination*, BAR EXAM'R, Spring 2021, at 24, 24-25.