
THE CORONAVIRUS CRISIS PROVIDES AN OPPORTUNITY TO ADOPT BETTER SYSTEMS FOR LICENSING LAWYERS THAN THE BAR EXAM

APRIL 29, 2020 | JOHN LANDE | LEAVE A COMMENT

The ABA Journal recently published an article entitled *Bar Exam Does Little to Ensure Attorney Competence, Say Lawyers in Diploma Privilege State*, describing the experience in Wisconsin, the only state that currently has the “diploma privilege.” Under the Wisconsin rules, in-state law school graduates can become licensed without taking a bar exam. These graduates must satisfy character and fitness requirements and complete at least 60 semester credits, including “at least 30 credits in courses including constitutional law, criminal law and procedure, jurisdiction of courts, pleadings and practice, and ethics and legal responsibilities of the profession.”

At one point, 34 states had diploma privilege rules but then the “ABA Code of Recommended Standards for Bar Examiners stated individuals should not be admitted to practice without passing a written bar exam.”

The issue of diploma privilege arises now because this year’s graduates may not be able to take bar exams due to the coronavirus crisis.

The article quotes former Wisconsin State Bar President Franklyn M. Gimbel saying that “whether [Wisconsin law school graduates] passed a bar exam ... has no bearing on their lawyering abilities or character.” He rejects the claim that bar exams ensure competency, arguing that this idea is “baloney.”

Keith L. Sellen, director of Wisconsin’s Office of Lawyer Regulation said, “My experience in 20 years of disciplinary regulation informs me that the causes of professional misconduct have little to do with whether the lawyer took a bar exam or was admitted by diploma privilege. These causes are, in general, a poor or nonexistent mentor; anxiety, depression and chemical dependency; inadequate organizational skills; character issues; and a lack of business acumen.” Obviously, none of these factors are measured on bar exams. Of course, they are not in legal curricula very much either.

Predictably, the National Conference of Bar Examiners, which develops and produces attorney licensing tests, likes the system of bar exams and sees problems with a diploma privilege system. It published a white paper identifying problems of reduced mobility, inconsistency between states, subjectivity, and conflicts of interest for law schools being both educators and licensing authorities. Many of these problems are even greater, however, in a system of state bar exams.

Adverse Impact on Legal Education and Practice

The ABA Journal article doesn't address distortions of legal education caused by bar exam requirements. For one thing, bar exams entrench a pedagogy based on memorization of a lot of complex legal rules. They are swords of Damocles hanging over schools' and students' heads. They privilege some doctrinal courses and discourage students from taking practice-oriented courses because those courses will not help them pass the bar exam. They also help feed the *US News* monster.

Bar exams produce one-shot high-stakes summative assessments of dubious validity based on answering hypothetical exam questions. Bar exams provide binary results – pass or fail – and we can't have confidence in the validity of results within a range above and below the threshold for passing.

Bar exam pass rates are part of the certification requirements for law schools. Some law schools have low bar passage rates which may reflect low-quality education. These schools generally admit students with the poorest academic credentials, so bar pass rates are not necessarily valid indicators of the quality of instruction.

The bar exam system requires a massive, costly infrastructure in law schools, bar review courses, and state bar bureaucracies. In addition to the financial cost of the status quo, bar exams impose a huge intangible cost on graduates in terms of anxiety in studying, taking, and waiting for results of bar exams. Test-takers who fail and re-take the exam lose confidence, time, and money. Critics argue that bar exams improperly discriminate and have other flaws.

Better Ways to License Lawyers

We need mechanisms to protect law students and legal clients, and there may be better ways to do this than by perpetuating the bar exam infrastructure. Redirecting resources from this infrastructure could produce better results at less cost.

Wisconsin, New Hampshire, and some countries have developed alternatives worth considering.

New Hampshire licenses some students through the University of New Hampshire's [Daniel Webster Scholar Honors Program](#).

Students are accepted into the program prior to their second year of law school and discover first-hand what it takes to succeed in today's legal marketplace. They hone their skills in both simulated and real settings – counseling clients, working with practicing lawyers, taking depositions, appearing before judges, negotiating, mediating, drafting business documents – while creating portfolios of written and oral work for bar examiners to assess every semester. ... Successful Webster Scholars pass a variant of the New Hampshire Bar exam during their last two years of law school and are sworn into the New Hampshire bar the day before graduation. They are also eligible to sit for the bar exam in any jurisdiction outside New Hampshire for which they would qualify having graduated from an ABA-accredited law school.

In some countries, law school graduates are required to do post-graduate apprenticeships, sometimes called “[articling](#)” or “[pupillage](#).” In apprenticeship systems, graduates develop practical legal skills by performing legal tasks and getting formative feedback from mentors.

Inevitably, alternative mechanisms are imperfect and need to be designed well to produce good results. Considering the dysfunctions of the bar exam system, alternatives are worth considering. States could offer multiple paths to licensing lawyers within their states.

When routines are in flux during and after major crises, institutions sometimes initiate major changes in their systems. The disruption caused by the current crisis could prompt substantial changes in the system of licensing American lawyers in the [new normal for lawyers after the crisis recedes](#).

To adopt alternative systems, there would need to be substantial concerted efforts to overcome resistance from principled defenses, vested interests, tradition, and inertia.

Normally, these forces preserving the status quo would be insuperable. The current crisis could provide the impetus for change – but don't bet the farm on it.

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