

# Pandemic Lays Bare The Inequities Inherent In The Bar Exam

By **Naomi Shatz and Katherine Dullea**

The bar examination has recently been the topic of significant discussion and activism, as bar examiners around the country try to figure out how to administer the exam — usually a two- to three-day event at the end of July, given in person in large, crowded rooms — during the COVID-19 pandemic. Many states have postponed the exam until the fall or later, wreaking havoc on exam takers' ability to earn a living in the coming months, and causing some to lose the jobs they had lined up.[1]



Naomi Shatz

On July 16, New York canceled its planned September exam with no new plan in place. For those exams that are scheduled to go forward next week in person,[2] examinees have to choose between gaining entry into a profession they have invested years and thousands of dollars into preparing for, and their own and family members' health.



Katherine Dullea

Would-be lawyers are forced to decide whether to forgo the exam in order to protect a parent or child from COVID-19. Those examinees who do not currently live in the jurisdiction where they will sit for the exam may be required to travel to the exam location two weeks early, and pay for hotels in which to quarantine for 14 days before the exam.

Many boards of bar examiners are requiring examinees to sign waivers immunizing the boards from liability should the examinees contract COVID-19 during the exam. Because people of color have been shown to be at a heightened risk of contracting COVID-19, the risks inherent in sitting for an in-person bar examination will not fall equally on all examinees.

While some bar examinations are being administered online, in California at least, disabled examinees who require special accommodations have been informed by the State Bar of California that certain accommodations may only be available to those who take the exam in-person, one test taker told us.[3] As a result, disabled prospective lawyers will be forced to put themselves at risk of exposure to COVID-19 in order to access the accommodations to which they are legally entitled.

The outrage over the life-altering consequences of decisions being made around the bar exam and COVID-19 has highlighted the long-standing inequities built into the bar exam.

The exam itself costs thousands of dollars, and most examinees take prep courses that cost additional thousands of dollars. Large law firms will generally pay these expenses, and living expenses for the months spent studying, for their incoming lawyers. Examinees who are not going to work at large law firms have to foot those bills themselves, often taking out loans — where they qualify — to cover the fees and two months spent not working in order to study.

With this privilege given to well-off students and those who are going to work in BigLaw, lower-income examinees or those who are going to work solo or for the government, legal aid organizations or small firms start their careers at an immediate disadvantage. The division between the haves and the have-nots is only exacerbated by the changes being made to the bar exam due to COVID-19.

Many examinees who have been taking time off work and studying for the past two months are suddenly being told they need to keep studying, and not earning a living, until an exam is administered in the fall. For those exams that are being administered remotely, examinees who do not have access to reliable computers, high-speed internet, or a quiet place to take the examination will be at an extreme disadvantage. Because of the intersection of race and poverty, barriers to meaningfully accessing an online bar exam will disproportionately impact examinees of color.

In recent days, examinees have also raised concerns about arbitrary bar examination policies that discriminate on the basis of gender.

Certain states' policies, including those prohibiting examinees from bringing their own menstrual supplies with them to the exam<sup>[3]</sup> and denying nursing parents extra break time to pump milk,<sup>[4]</sup> express open hostility to women as well as transgender and nonbinary people trying to enter the legal profession, a hostility that these lawyers — particularly of color — may face throughout their careers.

Online discourse and activism around these issues has brought some immediate improvements. A few days after Arizona's no-menstrual products policy first gained national attention, the state's board of bar examiners rescinded the policy.

In other states, examinees and even Texas Justice Eva Guzman are advocating against similar policies. Yet even when mass outrage works, it requires those examinees impacted by the discriminatory regulations to devote time and energy they should have available for studying to advocate for a fair exam.

Finally, and perhaps most importantly, there is a growing recognition that the bar exam may not be a particularly useful predictor of an aspiring attorney's abilities. The test does nothing to ensure that new lawyers have any information on how to do the jobs they will take on; it tests only whether they can memorize substantive legal information.

In the day-to-day practice of law, a lawyer is almost never called upon to provide legal information and analysis in a "closed book," setting. Indeed, given how rapidly the law can change based on judicial interpretations, it would be incredibly poor practice for a lawyer to rely on his or her memory of any given legal principle in advising a client, rather than doing the legal research to support the advice.

The bar exam requires examinees to spend months studying and memorizing principles from areas of the law they never practice, and that may quickly become outdated as the law evolves, but fails to require new lawyers to learn practical information relevant to the practice of law.

Young lawyers meet their first clients without ever having had instruction on how to build lawyer-client relationships. Mid-level attorneys chair their first trials without ever having been required to take a trial practice course. Senior lawyers become partners in law firms with no education on business management, finance, or how to best manage employees.

The legal profession is long overdue for a reckoning with the bar exam's role in perpetuating a profession permeated with classism and discrimination. COVID-19 did not create these problems, but it has propelled them into the public legal discussion.

This is not a moment to simply look for Band-Aids to address the urgent public health crises

surrounding administering the bar. The profession should take this moment to reevaluate how we create and license new attorneys. It is up to those of us already established in this profession to consider why we use a gatekeeping tool as problematic as the bar exam, and what alternatives there might be to ensure our profession is welcoming, accessible and nondiscriminatory to those who are ready and eager to join it.

In reassessing whether the bar examination is a necessary or useful tool, states should think broadly about what competencies new lawyers need in order to protect their clients' interests and the interests of justice. Other countries, like Canada, offer an example of how lawyers can be licensed for practice through a combination of practical work experience and law practice courses.

There are significant benefits to a system that relies more heavily on apprenticeship and practical education than on a single closed-book exam. Most importantly, a professional education course can provide new lawyers with education on those practical lawyering topics that are rarely required by law schools.

Our current legal education and licensing system churns out tens of thousands of lawyers a year who have managed to (briefly) memorize the rule against perpetuities, but who may never have learned how to examine a witness or negotiate a settlement.

The current outcry about the bar exam raises important concerns about the risks and burdens we ask examinees to assume to join our profession this year. We should use this moment to think more broadly about legal licensing, and identify a path for the training and licensing of attorneys that does not discriminate on the basis of race, gender, disability or socioeconomic status — a path that produces new attorneys with the necessary information and skills to effectively practice law.

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*Naomi R. Shatz is a partner at [Zalkind Duncan & Bernstein LLP](#).*

*Katherine Dullea is an associate at the firm and plans to take the Massachusetts bar examination this fall.*

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[1] [https://www.nalp.org/uploads/PressReleases/NALP\\_PULSE2\\_surveys\\_PressRel\\_July2020.pdf](https://www.nalp.org/uploads/PressReleases/NALP_PULSE2_surveys_PressRel_July2020.pdf).

[2] <http://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/status-table/>.

[3] Also see [FAQs](#) about the bar exam that the California State Bar shared with test takers.

[3] <https://ble.texas.gov/bar-exam-general-instructions>; <http://www.courtswv.gov/legal-community/Bd-of-Law/FAQs-Exam-Applicants.pdf>.

[4] See [ACLU tracker here](#). Some bar exams [make clear](#) that accommodations are only given to people with disabilities, which may not cover nursing parents at all.

