

**IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

74 WM 2020

LAW STUDENTS FOR EQUITABLE RESPONSES TO COVID-19, et al.,

Petitioners

v.

PENNSYLVANIA BOARD OF LAW EXAMINERS

Respondent

**RESPONSE OF PENNSYLVANIA BOARD OF LAW EXAMINERS TO
PETITIONERS' "PETITION OF REVIEW UNDER THE COURT'S
EXCLUSIVE JURISDICTION AND FOR EXTRAORDINARY RELIEF
UNDER THE COURT'S KING'S BENCH JURISDICTION"**

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I. INTRODUCTION

The Pennsylvania Board of Law Examiners (“Board”) offers this response to the petition requesting that the Court suspend Pennsylvania Bar Admission Rule 203(b)(1) and allow current applicants to gain their law licenses by what is known as the “diploma privilege” and without taking the bar exam.

The Board is and has been sympathetic to the concerns Petitioners raise. In the best of circumstances, the time an applicant spends preparing for and taking the bar exam is stressful and, often, difficult financially and otherwise. These are not the best of circumstances, of course, and the COVID-19 pandemic heightens the stress and difficulty for those who would otherwise have taken the Pennsylvania bar exam in person in July of this year.

As described below, the Board has taken steps to address the safety, health and logistical needs of applicants. The Board has, with the Court’s approval, decided to administer the exam remotely rather than in person. The Court has, at the Board’s recommendation, issued a supervised-practice order to allow many applicants to begin practice notwithstanding the delay in exam administration. The Pennsylvania Bar Association, at the Board’s request, has agreed to match applicants who need quiet places with stable Wi-Fi signals to take the remote bar

exam with law firms around Pennsylvania willing and able to provide such places.¹ And the Board is, as it does for each bar exam, evaluating requests for testing accommodations from those applicants who have disabilities. Certainly those steps have not obviated all of the concerns, but the Board believes it has appropriately balanced the needs of applicants and the public, and it will in the weeks until the scheduled October 5-7, 2020, remote bar exam continue to work to improve the process.

The Board, however, cannot lose sight of its mission:

The Board of Law Examiners is empowered by the Supreme Court of Pennsylvania to recommend for admission only those individuals who have demonstrated at least minimum competency and the requisite character necessary to become a member of the bar of this Commonwealth. This mission preserves the integrity of the legal system, and protects all individuals seeking legal representation from unethical or incompetent lawyers. The Board emphasizes the importance of professional responsibility and character in the legal profession, and evaluates the likelihood of an aspiring lawyer's ability to uphold, and commit to, the standards of the profession.²

Petitioners now before the Court build an argument that the Board's plan to hold a remote bar exam in October violates Article I, Section 1 of the Pennsylvania Constitution. They ask the Court to suspend the applicable rule and permit current

¹ The Bar Association included a notice on Monday, August 17, 2020, in its bimonthly electronic newsletter asking for members to provide this assistance to candidates and published this notice on its website. See <https://www.pabar.org/site/Get-Involved/Volunteer/Bar-Exam-Testing-Space> (last visited August 21, 2020).

² *Mission Statement*, Pa. Bd. Law Exam'rs, https://www.pabarexam.org/board_information/mission.htm (last updated Aug. 14, 2020).

applicants to gain licensure by diploma privilege “subject to conditions this Court deems sufficient, but no more than necessary, to protect the public from incompetent legal representation.” (Petition, 1).

The Board demonstrates below that Petitioners rely on errors of fact and a too-broad interpretation of the constitutional provision on which they focus. Nevertheless, even if that were not the case, Petitioners ignore a considerable analytical gap between their challenge to the bar exam and their proposed remedy. If Petitioners’ challenge to the bar exam’s adequacy, reliability and fairness were correct, the remedy would be a detailed study to determine if the bar exam should be changed or abandoned and to find an appropriate alternative means to protect the public. But that would be a far cry from simply doing away with any process other than confirming an applicant’s having received a diploma from an ABA-accredited law school—especially since Petitioners make no meaningful effort to demonstrate that such a diploma itself sufficiently ensures minimal competence.

The Board believes the best course would be for the Court to deny the petition and allow the Board to administer the remote bar exam in October 2020 as currently planned.

II. COUNTERSTATEMENT OF FACTS

As set forth above, this Court has granted the Board authority “to recommend for admission only those individuals who have demonstrated the minimum competency and requisite character necessary to become a member of the bar of this Commonwealth.”³ While present circumstances obviously require the Board to revisit the manner in which it accomplishes this central mission, the mission itself remains inviolate: to ensure that only those that have demonstrated a minimum level of competency are granted the privilege of practicing law in the Commonwealth.

Petitioners argue that, despite the fact that “minimum competency” in Pennsylvania has for many decades equated to a degree from an ABA-accredited law school *plus* successful completion of the bar examination (Pa. B.A.R. 203), current circumstances mandate that the entire class of 2020 be granted diploma privilege, foregoing the need for a competency evaluation entirely. This argument is premised almost entirely upon the supposed shortcomings of the remote procedure that will be used for the October exam and not on the efficacy of generally using an examination as a tool for measuring competency. Indeed, while Petitioners go to great lengths to highlight the potential shortcomings of a remote examination, they do little to address how the Court will ensure that applicants to

³ *Id.*

the bar will possess the minimum competency necessary to practice law. This is no small issue; on the July 2019 test, for example, the passage rate for first time test takers was 80.60 per cent.⁴ In demanding a wholesale diploma privilege, Petitioners ignore the fact that, in previous years, a significant number of applicants would *not* have been deemed competent to practice after taking the bar for the first time. Statistically, passing rates for those who take the bar a second or third time are dramatically lower.⁵

The Board has determined that, even under the present circumstances, an examination is necessary to meet its mission, and it has altered its typical exam format so that testing can be conducted on an entirely remote basis. While the Board understands that a remote examination is far from perfect, it has nevertheless determined that the procedure set forth below is the best method of ensuring minimal competency in the legal profession while simultaneously adapting to the present need to protect the safety of applicants.

A. Format of the October 2020 Exam

The general format of the October 2020 bar exam will remain the same as the format of previous exams in that it will be comprised of three sections: (i) a series of six

⁴ *July 2019 Pennsylvania Bar Examination, Examination Statistics*, Pa. Bd. Law Exam'rs, <https://www.pabarexam.org/pdf/statistics/july/j2019.pdf> (last visited Aug. 21, 2020).

⁵ For example, on the July 2019 bar exam, second time test takers passed at a rate of 28.85 per cent. *Id.*

essay questions; (ii) a performance test; and (iii) a series of multiple-choice questions provided by the National Conference of Bar Examiners (NCBE), the part of the exam traditionally known as the Multistate Bar Exam (MBE).⁶ The exam will also be administered using ExamSoft, a software vendor that Pennsylvania has successfully used for many years.⁷

However, given the remote nature of this year's exam, the Board has naturally had to make some adjustments to its standard procedures. For example, rather than verifying applicants' identities in person prior to the start of the exam, applicants will be required to verify their identification using ExamSoft's facial-recognition software. As a precaution, no one will be barred from taking the exam due to identity verification issues, and any issues with verifying identification will be addressed after the exam is completed.

Further, there will not be any remote proctors for the exam. Instead, no one will watch applicants live during the exam, but the ExamSoft software will monitor applicants using ExamMonitor, an "AI-driven remote proctoring solution that continuously observes exam takers with video and audio monitoring throughout

⁶ *October 2020 Bar Exam Frequently Asked Questions*, Pa. Bd. Law Exam'rs, https://www.pabarexam.org/bar_exam_information/CBTRemoteExamFAQ.htm (last updated Aug. 14, 2020).

⁷ *Id.*

the entire exam.”⁸ While applicants will eventually need to upload the ExamMonitor files created during the exam, the uploading of audio-video files will be suspended while an applicant is testing. Applicants will complete the file uploading after the exam is completed, so that process will not affect applicants’ access or experience during the exam itself. The Board will be giving applicants an extended period of time for uploading these files.⁹

In addition, the October 2020 exam will be split into three days, as opposed to the traditional two, since “security measures attendant to a remote exam will require that [the Board] test in 45- or 90-minute segments with more breaks than in a usual, in-person exam.”¹⁰ Unlike some other jurisdictions, Pennsylvania has not scaled back the essay and performance test sections of the exam. The only section that will be shortened is the MBE, which at the discretion of the NCBE has been decreased from 200 questions down to 100.¹¹ As in previous years, the

⁸ *Exam Integrity and Authentication Streamlined to Make Exam Day More Secure*, ExamSoft, https://examsoft.com/wp-content/uploads/2020/03/ES_onepager_ExamID_2.pdf (last visited Aug. 20, 2020).

⁹ Answer files must be uploaded by 11:00 p.m. each day of the test. However, applicants will have an extended timeframe within which to upload audio/video files.

¹⁰ *Letter to Pennsylvania Bar Exam Stakeholders*, https://www.pabarexam.org/pdf/203_205/PABLELtrToStakeholders7-8-20.pdf (July 8, 2020).

¹¹ *Id.*

performance test and essay sections will account for 55 per cent of an applicant's score, while the MBE will account for 45 per cent.¹²

Notably, while applicants will need Internet access in order to verify their identities at the beginning of each section, to learn necessary passwords and to upload their exam answers after the exam is completed, the exam will *not* be conducted online. Rather, the portion of the software that is active during the exam is the same software that has been used during in-person Pennsylvania exams for years; and, as in previous years, test takers will upload their exam responses *after* the exam has already been completed.

Naturally, given the changes to the structure of the exam, questions have arisen regarding the test's ability to accurately gauge competency as effectively as the traditional in-person exam. The Board has enlisted the services of a psychometrician to evaluate this issue, and he has determined that Pennsylvania's system is more reliable than the "half exam" used in other jurisdictions. The Board has put in place further measures to ensure reliability as well, including an expanded re-read pool.¹³

¹² *October 2020 Bar Exam Frequently Asked Questions*, Pa. Bd. Law Exam'rs, https://www.pabarexam.org/bar_exam_information/CBTRemoteExamFAQ.htm (last updated Aug. 14, 2020).

¹³ *Id.* (explaining the cutoff and parameters of the new re-read process).

B. Accommodations and Accessibility

Petitioners raise several concerns regarding the accessibility of the exam in its remote format. For example, Petitioners set forth data from a survey they conducted purportedly showing that a significant number of applicants will not have an appropriate physical space in which to take the exam. (Petition, 27). This survey also determined that some applicants would need reasonable accommodations for a home-based exam that they would not have needed for an in-person exam, or that they would need different accommodations than ones they had previously requested. (Petition, 27). Petitioners also express concern that ExamSoft's Artificial Intelligence (AI) is incapable of verifying identification and monitoring test takers for cheating in a non-discriminatory manner. (Petition, 9-10).

While the nuances of determining and providing appropriate accommodations can cause frustration for applicants with this new testing format, it is far from an impossible task. The Board is still processing requests for accommodations pursuant to its established policy,¹⁴ and it is reaching out to examinees to discuss their individualized needs. The Board complies with the Americans with Disabilities Act and provides reasonable accommodations each

¹⁴ *Nonstandard Testing Accommodations Request Form and Documentation Packet for the July 2020 Bar Examination*, Pa. Bd. Law Exam'rs, https://www.pabarexam.org/pdf/203_205/NTAApp.pdf (last visited Aug. 21, 2020).

year to applicants. In fact, a few test takers for the October exam have been granted the opportunity to take an in-person version of the exam (with appropriate health safeguards) based on their individualized circumstances. Accordingly, the Board does not believe the remote nature of the October exam poses any threat to the fair administration of the test to applicants with disabilities.

With respect to Petitioners' concerns regarding ExamSoft's ability to verify identities and track potential cheating in a non-discriminatory manner, the primary cause of failure for facial recognition is poor frontal face lighting or extreme lighting behind a subject, such as a window or ceiling light.¹⁵ The Board's testing instructions will help applicants avoid those issues. Moreover, to ensure that these issues do not alter the examinee's experience, ExamSoft utilizes the deferred identification procedure referred to above. Importantly, the AI in question does not make any decisions itself; rather, ExamSoft flags behavior that it deems questionable, and that behavior is then passed to Board staff for review. Any decisions the Board makes based on this information that would result in a credit reduction or disqualification are subject to appeal. Accordingly, Petitioners' contention that "errors attributable to algorithmic bias would go uncorrected" (Petition, 10) is itself incorrect. Moreover, at least some of the concern seems to

¹⁵ See *ExamID: Problems with taking a photo for your baseline*, ExamSoft, <https://examsoft.force.com/emcommunity/s/article/ExamID-Problems-with-taking-a-photo-for-your-baseline> (providing tips for taking your picture for an exam) (Mar. 19, 2020).

presume that the Board's staff will in all events disqualify applicants whose behavior is flagged by the software. The Board's staff has significant experience with monitoring those taking the bar exam in person, and they can generally distinguish between innocuous behavior and actual cheating.

Finally, Petitioners argue that the unique financial hardships this group of applicants have had to face could pose hurdles to their successful completion of the exam. For example, they note that applicants will now require a computer that meets certain specifications in order to sit for the exam, whereas before exams could have been taken by hand. (Petition, 16-17). They further note several applicants have lost job opportunities or have had difficulty securing work because the exam has been pushed back, thus compounding these financial hardships. (Petition, 25-28).

Addressing hardship concerns in the administration of the bar exam is a challenging balancing act under the best of circumstances, and there can be no question that this particular pool of applicants has been dealt a uniquely difficult hand. The Board is conscious of this, and it continues to put measures in place to mitigate potential disparities. For example, as Petitioners admit, the Board has set up a partnership with the Pennsylvania Bar Association through which member firms can donate conference rooms and offices for test takers to use if their homes

are not suitable for the task.¹⁶ In addition, in order to mitigate the potential economic hardship, the Board successfully petitioned this Court in April to allow recent law school graduates to practice in a limited capacity under the supervision of accredited attorneys.¹⁷

C. Technological Failures and Cybersecurity Concerns

As with any remote testing software, the use of remote testing through ExamSoft raises questions of technological sufficiency and cybersecurity. In their Petition, Petitioners cite a number of instances in which the remote interface used to administer an exam was either faulty or presented security threats, and they argue that such concerns justify a wholesale rejection of remote testing in October. While the Board acknowledges and understands that technological sufficiency and cybersecurity are valid concerns, under the present circumstances, Petitioners' worries do not justify the relief they seek.

Petitioners cite the following instances in which the use of remote testing software posed problems for examinees:

¹⁶ See *Remote Bar Exam: Connecting Bar Applicants with Testing Spaces*, Pennsylvania Bar Association, <https://www.pabar.org/site/Get-Involved/Volunteer/Bar-Exam-Testing-Space> (last visited Aug. 21, 2020).

¹⁷ See Order dated April 28, 2020, at <http://www.pacourts.us/assets/opinions/Supreme/out/Order%20Entered%20-%2010440511699969315.pdf?cb=1>.

- On July 24, 2020, both the Indiana Supreme Court and the State Bar of Nevada postponed their anticipated online bar exams due to technological issues with their software vendor, ILG Technologies, Inc. (Petition, 17-18). Both states were ultimately forced to alter their anticipated exam format as a result of these issues. (Petition, 18).
- On July 28, 2020, ExamSoft experienced a cyberattack during the administration of the Michigan bar exam, which briefly prevented test takers from accessing a particular module. (Petition, 18). The issue was eventually resolved and the exam proceeded as planned.
- In August 2020, both Florida and Louisiana canceled their online bar exams due to technological and security issues with ILG Technologies' online bar examination platform. (Petition, 19-20).
- In July 2014, exam takers experienced delays and failures in uploading their completed exams using ExamSoft that were attributed to software failures. (Petition, 20).
- In July 2017, an attorney sued ExamSoft after its records indicated that he had cheated on the 2017 Florida bar exam. The Ethics Committee of the Florida Bar, upon hearing this attorney's appeal,

determined that it was “highly probable” ExamSoft’s system had made this determination in error. (Petition, 21).

Certainly, these examples illustrate the need for careful planning and thoughtful administration of this October’s remote exam. But the suggestion that these examples are guaranteed harbingers of things to come takes the argument a step too far. For one thing, the technological issues that prevented Indiana, Nevada, Florida, and Louisiana from effectively administering their bar exams arose from the use of ILG Technologies, a platform that Pennsylvania will not be using in October. As such, ILG’s technological failures cannot predict the outcome of Pennsylvania’s impending exam.

Instead, Pennsylvania will be using ExamSoft, a product that it has utilized in past exams with success. ExamSoft’s remote testing software is neither new nor untested. For example, in June 2020, Saudi Arabia successfully administered the equivalent of the SAT to more than 300,000 students - 167,000 of them simultaneously - using ExamSoft remotely and in testing centers.¹⁸

¹⁸ See *AI technology to enable 350,000 students to take remote SAAT in Saudi Arabia*, Saudi Gazette, <https://saudigazette.com.sa/article/593951/SAUDI-ARABIA/AI-technology-to-enable-350000-students-to-take-remote-SAAT-in-Saudi-Arabia> (June 7, 2020); *ETEC: Standard Achievement Admission Test to Be Conducted Online and at Computerized Testing Centers Tomorrow*, Saudi Press Agency, <https://www.spa.gov.sa/viewfullstory.php?lang=en&newsid=2095734> (June 7, 2020); *More Than 203 Thousand Students Successfully Complete Remote SAAT*, Education & Training Evaluation Commission <https://etec.gov.sa/en/Media/News/Pages/Achievement-test2.aspx> (June 9, 2020); *ETEC Announces SAAT Results Through Tawakkalna Application*, Education & Training

The Board acknowledges that no technological interface is completely risk-free, and ExamSoft is no exception. However, past instances of technological and cybersecurity issues with ExamSoft were minimal and, notably, did not prevent the successful completion of the exam. For example, Petitioners cite to a “hack” that ExamSoft experienced during Michigan’s July 2020 bar exam. But the effects of this incident were minimal; test takers were able to resume their exams shortly after the system began experiencing problems, and no personal data were compromised as a result.¹⁹ Further, the issues that arose during the 2014 incident revolved around uploading exams after they had already been completed; it did not involve any security breach and the administration of the exam itself was not hindered by the subsequent software problems.²⁰

Privacy concerns with the remote exam are also minimal. Those who take the exam at home will not be showing more of their homes than they would in a typical web conference that law schools have already been hosting as the pandemic

Evaluation Commission, <https://etec.gov.sa/en/Media/News/Pages/Achievement-test-results.aspx> (July 11, 2020).

¹⁹ See **Exhibit A**, August 24, 2020, Letter from Maribeth Graff, Executive Director, Michigan Board of Law Examiners; see also *Michigan Supreme Court Chief Justice Bridget M. McCormack Statement Regarding the Bar Exam*, https://courts.michigan.gov/News-Events/press_releases/Documents/Chief%20Justice%20Statement%20on%20MI%20Bar%20Exam.pdf (July 29, 2020).

²⁰ Carl Straumsheim, *Single Point of Failure*, Inside Higher Ed., <https://www.insidehighered.com/news/2014/08/05/glitches-aside-boards-law-examiners-still-depend-examsoft> (August 5, 2014).

has progressed. In fact, many law schools have used the same Examsoft software for their finals that the Board has used in previous in-person exams.²¹ Thus, most applicants will already be familiar with the remote procedure.

In terms of data, the audio and video files will not have applicants' names and addresses attached to them, so the applicants will retain their anonymity. The collection of biometric information is governed by ExamSoft's privacy policy, which mandates that the information gathered be used only for purposes of providing the remote exam.²²

²¹ Five Pennsylvania law schools use ExamSoft for their exams: <https://www.law.temple.edu/academics/exams/examsoft/> (Temple University Beasley School of Law instructions for using ExamSoft); <https://www.law.pitt.edu/student-resources/registration-services/exams/exam-laptop-information> (University of Pittsburgh School of Law exam laptop information discussing use of ExamSoft); <https://commonwealthlaw.widener.edu/current-students/enrollment-services/registrar-office/examsoft-information/> (Widener University Commonwealth Law School ExamSoft information for students); <https://www.duq.edu/academics/schools/law/academics/registrar/exams/laptop-exams> (Duquesne University School of Law laptop and ExamSoft information); <https://www.law.upenn.edu/its/docs/exams/prepare.php> (University of Pennsylvania Carey School of Law laptop instructions to prepare for exams) (last visited August 22, 2020).

²² *Privacy Policy*, ExamSoft, <https://examsoft.com/privacy-policy> (May 15, 2020).

III. ARGUMENT

A. As applied to October Candidates, the licensure requirement set forth in Pa. B.A.R. 203(b)(1) does not violate the individual right to pursue one’s chosen lawful occupation.

When analyzed against this factual backdrop, the Board’s application of Pa. B.A.R. 203(b)(1) to October bar candidates clearly does not violate the individual right to pursue one’s chosen lawful occupation. Rather, the application serves the Board’s “legitimate policy objective”—its mission—and is not “unreasonable, unduly oppressive, or patently beyond the necessities of the case.” *Ladd v. Real Estate Comm’n*, No. 33 MAP 2018, 2020 WL 2532285, at *9 (Pa. May 19, 2020). The October virtual exam has a “real and substantial relation” to the Board’s mission of ensuring that members of the bar have at least minimal competency and that individuals seeking legal representation are protected from incompetent lawyers.

In *Ladd*, this Court recently explained the rational-basis test for reviewing as-applied due process challenges to a rule:

[A] law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained. Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations.

Id. (quoting *Shoul v. Pa. Dep't of Transp., Bureau of Driver Licensing*, 173 A.3d 669, 677–78 (Pa. 2017)(citations omitted)). Petitioners assert the requirement to sit virtually in October for the Pennsylvania Bar Exam is “unduly oppressive” and “patently unnecessary because a well-regulated scheme offering emergency licensure is a ‘less drastic and intrusive alternative’ sufficient to protect the public’s interest in competent legal representation.” (Petition, 36). However, Petitioners’ application of the rational-basis test to the present matter is faulty.

In *Ladd*, this Court considered an as-applied challenge to the broker-licensing requirements under the Real Estate Licensing and Registration Act (RELRA). *Id.* at *1. The petitioner in that case worked as a “short-term vacation property manager” assisting several individuals to earn rental income while renting properties on Airbnb for short-term rentals. The Commonwealth Court rejected an as-applied challenge to the RELRA requirements based on Article 1, Section 1 of the Pennsylvania Constitution. This Court reversed. *Id.* However, unlike *Ladd*, Petitioners here are not seeking certification for a limited practice of law or for a temporary admission.²³ They are asking this Court to allow October exam

²³ Pursuant to this Court’s April 28, 2020, order, recent law school graduates are already permitted to practice on a limited basis under appropriate supervision. *See* Order dated April 28, 2020, at <http://www.pacourts.us/assets/opinions/Supreme/out/Order%20Entered%20-%2010440511699969315.pdf?cb=1>.

candidates permanent admission to practice law in Pennsylvania. *Ladd* is inapposite.

1. The October 2020 exam

As discussed above, the October exam will consist of the normal three components: an MBE (shortened to 100 questions from the usual 200 questions); six essay questions; and the performance test. As always, all three pieces will be used to determine whether someone passes the exam. Petitioners state that “administering a remote, reduced question bar exam” is an unreliable metric for determining “minimum competency.” (Petition, 39). However, the Board is administering all of its essay questions and the performance test.²⁴ The bar exam will be weighted as it usually is: 55 per cent for the performance test/essay section and 45 per cent for the MBE multiple-choice section.²⁵ Further, as discussed above, the Board has put other measures in place to increase reliability, including an expanded re-read pool.

There is nothing “unreasonable” or “unduly oppressive” in the Board’s maintaining its testing format in a way mostly consistent with past exams. Rather, it serves to continue to meet the “legitimate policy objective” of the Board: to

²⁴See *October 2020 Bar Exam Frequently Asked Questions*, Pa. Bd. Law Exam’rs, https://www.pabarexam.org/bar_exam_information/CBTRemoteExamFAQ.htm (last visited Aug. 21, 2020).

²⁵ *Id.*

ensure that those practicing law in Pennsylvania meet a minimum-competency standard and to protect individuals who seek legal representation.

The technological concerns Petitioners cite do not change this fact. Initially, as explained in Section II, many of their concerns are premised on a misunderstanding of the facts. Contrary to Petitioners' assertions, the October exam will not be an online exam, and it will only require Internet access for limited purposes. The software that will run during the exam itself is the same that has been used for in-person exams for years and that several law schools plan to use for their exams. Past technological issues with ExamSoft have not precluded the full administration of prior exams. Under this set of facts, the use of ExamSoft for remote examinations is not "unreasonable" or "unduly oppressive."

B. The diploma privilege is not an adequate and more reliable alternative to the bar exam.

As Petitioners note, only four states have altered their bar-admission processes to allow the diploma privilege. (Petition, 52). Most states have declined to follow this path. As the Supreme Court of Ohio recently stated in rejecting a petition seeking a diploma privilege:

The court agrees with our colleagues in other jurisdictions who have recently denied similar petitions. 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. With the aforementioned orders, the court has taken steps to

minimize the concerns raised by the petition while continuing to carry out its responsibility to promote the integrity of the legal profession.

In re Petition to Amend Rule I of Supreme Court Rules for Gov't of Bar of Ohio, 2020-Ohio-3860, 159 Ohio St.3d 1458 (July 28, 2020). This Court has taken those same steps.

The Board, with the Court's approval, has taken steps to address the safety, health and logistical needs of applicants. The Board is administering the test remotely. The Pennsylvania Bar Association, at the Board's request, has agreed to match applicants who need quiet places with stable Wi-Fi signals to take the remote bar exam with law firms around Pennsylvania willing and able to provide such places. Finally, the Board is evaluating requests for testing accommodations from those applicants who have disabilities, having already engaged in the interactive process with numerous candidates to provide needed accommodations for the upcoming October exam.

As this Court has stated:

To practice law a person must demonstrate a reasonable mastery of legal skills and principles, be a person of high moral character and maintain a continuing allegiance to a strict code of professional conduct. *See, e.g.*, Rules 7, 8, 9, 12, 14 and 17-3 of the Rules of the Supreme Court of Pennsylvania. These stringent requirements are intended to protect and secure the public's interest in competent legal representation.

Dauphin County Bar Ass'n v. Mazzacaro, 351 A.2d 229, 232-33 (Pa. 1976). The Court's April 28, 2020, order "protect[s] and secures[s] the public's interest in competent legal representation" and aids those who are trying to enter the practice of law by providing a means to carry on in these difficult times. The well-

established needs to set minimal standards and to protect the public would not be adequately met were the Court to simply abandon the bar exam in response to an emergency petition and without careful consideration of the efficacy of the exam and what reasonable alternatives there might be to satisfy those needs.

IV. CONCLUSION

While there are no measures that can completely eradicate the unique hardships this group of examinees face, the Board's current plan for a remote bar examination is no more burdensome than necessary to ensure the protection of the public and the continued stability of the legal profession. The Board, with this Court's approval, has enacted a plan to protect the constitutional interests of individuals while at the same time safeguarding the integrity of the legal system by ensuring those who provide legal representation are competent lawyers. As applied to the October bar exam candidates, Pa. B.A.R. 203(b)(1) is constitutional, and the October 2020 bar examination should move forward as planned.

Respectfully submitted:

s/Geri Romanello St. Joseph
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EXHIBIT A



**Michigan Supreme Court
BOARD OF LAW EXAMINERS**

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August 24, 2020

Gicine P. Brignola, Executive Director
Pennsylvania Board of Law Examiners
601 Commonwealth Ave., Suite 3600
P.O. Box 62535
Harrisburg, PA 17106-2535601

Re: July 2020 Michigan Bar Examination

Ms. Brignola:

The Michigan bar examination was administered as a one-day only essay exam on July 28, 2020. ExamSoft provided the software for the exam. The exam was scheduled in five modules, with each containing three essay questions and each lasting one hour. By the day of the exam, 723 individuals who had registered for the exam took the exam. All 723 applicants completed the exam.

The password for the first module was posted at 7:55 a.m. (35 minutes before to the posted start time) to allow applicants additional time for the log-in process in the event they experienced internet or computer issues. The first module, the one expected to cause the most "traffic" went very smoothly. Both ExamSoft and the Board received few calls from applicants and all applicants started module 1 within the start window. Module 2 was set to commence at 10:00 a.m., and as planned the password was made available at 9:55 a.m. on ExamSoft's website. At approximately that time, a "distributed denial of service" (a/k/a "DDOS") cyber-attack was commenced on the ExamSoft website. As explained by ExamSoft:

On July 28th at 8:55 a.m. Central Time, we [ExamSoft] experienced a sophisticated distributed denial of service (DDOS) attack. A distributed denial of service attack occurs when legitimate users are unable to access information systems, devices, or other network resources due to the actions of a malicious cyber threat actor. This attack was different from normal DDOS which target public facing interfaces.

ExamSoft has protections in place to protect against public interface DDOS attacks. However, the attack on the 28th targeted our network infrastructure. The network protection software that our network servers have in place shut down access to the targeted portion of the network to defend against the attack, in this case the ability to log into our portal. This protective shut down of access caused the noted delays, but also served its purpose in defending against the attack.

Thus, ExamSoft's network protection software effectively responded to defend its website against the attack, which did not allow certain applicants (who had not yet entered the website) to enter the website in order to procure the password that would allow access to module 2. While jointly working on a solution, the BLE and ExamSoft support staff began providing the password over the phone to applicants who were calling both entities. To remedy the situation, at 10:23 a.m. (23 minutes after the scheduled start of module 2) ExamSoft emailed the password to all applicants and informed them that the time to complete module 2 had "been extended to accommodate for the delay." An identical email from a different ExamSoft email address was sent to all applicants at 10:28 a.m. By 10:35 a.m. (when more than 96% had already started module 2), the ExamSoft website was back up. The website contained a revised testing time-schedule and informed applicants that they had the full hour to answer the module 2 questions. The subsequent passwords for modules 3 through 5 were then both emailed and posted ten minutes prior to the module start time to provide applicants a broader window and ease any concern.

The ExamSoft software performed as anticipated. The delay caused at the Michigan bar examination was due to a malicious criminal act, not a failure of the software. No personal data was compromised nor were the question or answer files or video proctor monitoring files. As referenced, the cyber-attack did not prevent examinees from completing the exam.

Regards,



Maribeth Graff
Executive Director

CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 127

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

s/Geri Romanello St. Joseph
GERI ROMANELLO ST. JOSEPH

CERTIFICATE OF SERVICE

The undersigned certifies that on August 25, 2020, she caused the foregoing brief to be served via PACFile and first class U.S. mail where applicable to:

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