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Hon. Tani G. Cantil-Sakauye, Chief Justice of California
Associate Justices of the California Supreme Court
350 McAllister Street, 5th Floor
San Francisco, CA 94102-4797

Sent via email

Re: Thoughts on the California Bar Examination for the Supreme Court's Consideration

Dear Chief Justice Cantil-Sakauye and Associate Justices of the California Supreme Court:

This is a moment for creative, forward-thinking leadership. Just as state and local governments are taking unprecedented action to deal with the COVID-19 pandemic, the California Supreme Court should take bold action that creates an equitable pathway to licensed practice for our recent graduates and protects vulnerable Californians who will face acute needs for legal services during and in the aftermath of this global pandemic. In order to craft the best possible response for this unprecedented time, the Court should (1) involve stakeholders in its decision-making, (2) seriously consider proposals to create a diploma privilege or a provisional licensing scheme, (3) weigh considerations of access, equity, fairness, and bias, and (4) promote access to justice.

1. *Stakeholders must have a seat at the table and participate in crafting a solution.*

On March 29, 2020, the deans from 20 California law schools asked the California Supreme Court and the California State Bar to involve us in the decision-making about the future of the July 2020 Bar examination. To date, we have not received a response. Stakeholder involvement is key to any proposal issued by the Court, both to enhance legitimacy and to ensure the decision is based on complete and accurate information about the likely consequences of the decision.

In its April 15th letter to the Court, the State Bar of California Board of Trustees proposed creating a Task Force to determine next steps for 2020 graduates. Because a timely decision is so critical, I urge the Court to convene such a Task Force immediately. The Task Force should include representatives from a) law schools, including representation from a diverse selection of schools, b) legal employers, including state and local public interest legal organizations who rely on recent graduates to provide representation to California's most vulnerable communities, and c) 2020 graduates from California law schools.

2. Alternative pathways to licensure, including eliminating the bar exam, should be considered.

Given public health concerns, the Court should quickly and definitively decide not to hold a bar exam in 2020. Our graduates should not be required to spend hundreds of hours studying for a tentatively scheduled examination that is likely to be cancelled when they could use those hours working and caring for their families, their communities, and themselves.

The inevitable cancellation of the bar exam based on public health concerns presents a rare opportunity for the Court to consider new alternatives to licensure for this cohort of bar applicants that might not have seemed conceivable in a non-emergency situation. The two proposals that have garnered the most attention are diploma privilege and provisional licensing. An important question for either approach is whether graduates should be required to pass the bar examination at all.

The Court should carefully consider the long-standing, serious and nuanced critiques of the bar exam as a fair, accurate, and equitable means of measuring attorney competence.[1] These concerns are exacerbated by the disparate impact that COVID-19 is having and will continue to have on the communities of certain law graduates — the same graduates who statistically face higher barriers to bar licensure even in ordinary times.[2] Regardless of whether the Court chooses either of these options or some other solution, it should use this moment to experiment with innovative and creative alternatives to the bar exam as a measure of attorney competence while protecting vulnerable Californians who will face an acute need for legal services during and in the aftermath of COVID-19.

Like most policy decisions, any substitution for the normal licensure process risks being under- or over-inclusive. Eliminating the bar exam will allow graduates affected by the global pandemic to practice law. Those admittees, at first glance, may appear less thoroughly vetted than newly admitted attorneys of years past. Some may be concerned at the prospect of less qualified attorneys working with vulnerable populations. However, many lawyers and scholars, including me, are not convinced that the bar examination is an accurate measure of an attorney's qualification to practice law. Furthermore, California already has stringent vetting mechanisms in place to guard against immoral or unethical practices in the legal profession.

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[1] *See, e.g.,* Deborah L. Rhode, *The Future of the Legal Profession: Institutionalizing Ethcis*, 44 Case W. Res. L. Rev. 665, 690 (1994)("No showing has ever been made that performance either on bar exams or in law school correlates with performance in practice."); Andrea A. Curcio, *Society of American Law Teachers Statement on the Bar Exam*, 52 J. Legal Educ.446 (2002); Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 Neb. L. Rev. 363 (2002); George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient* Racism *of the ABA's Accreditation of Law Schools*, 53 J. Legal Education 103, 109-110 (2003); William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 Law & Soc. Inquiry 547 (2004); Elizabeth Olson, *Bar Exam, the Standard to Become a Lawyer, Comes under Fire*, NY Times, Mar. 19, 2015; Allen Mendenhallon, *The Bar Exam Is Unfair and* Undemocratic, Newsweek, April 15, 2015; Stephanie Francis Ward, *A Better Bar Exam?*, ABA Journal, Jan. 8, 2020.

[2] Andre M. Perry, David Harshbarger, & Carl Romer, *Mapping Racial Inequity Amid COVID-19 Underscores Policy Discriminations Against Black Americans,* Brookings, Apr. 16, 2020; Chris Wilson, *These Graphs Show How COVID-19 Is Ravaging New York City's Low Income Neighborhoods*, Time, Apr. 15, 2020; Stephania Taladrid, *The Risks Undocumented Workers Are Facing During the COVID-19 Pandemic*, The New Yorker, Apr. 13, 2020; Juana Summers, *Racial Disparities in COVID-19 Impact Emerge as Data Is Slowly Released*, NPR, April 9, 2020;, *Outcry Over Racial Data Grows as Virus Slams Black Americans*" The Associated Press, Apr. 8, 2020.

The Court's response to this global pandemic could be the start of making something better rather than simply replicating as closely as possible the existing bar exam-based licensure process that research suggests is unreliable and biased. With input from key stakeholders, the Court could craft a new solution that is fair and equitable for all of our graduates, and that provides Californians with much needed access to critical legal services.

3. Concerns regarding attorney supervision must be addressed.

Should the Court adopt a scheme that requires attorney supervision as a pre-requisite to licensing, there are a number of important questions and concerns that can and must be answered. For instance, research on implicit bias, including my own, highlights the importance of looking critically at how any licensure solution may negatively impact Black, Indigenous, Latinx, and other graduates of color, women graduates, LGBTQ graduates, undocumented and noncitizen graduates, and graduates from low-income communities. Some questions that must be addressed include the following: How will the State ensure that implicit biases will not negatively impact whether graduates are able to find supervising attorneys? If the power to determine whether graduates are competent attorneys will be placed in the hands of supervising attorneys, how will the State ensure that implicit biases do not impact the views of these supervising attorneys?

Additional questions that the Court should consider include (1) Will there be sufficient numbers of qualified, barred attorneys willing to personally supervise each 2020 law school graduate? (2) Will provisional licensing requirements create substantially more onerous burdens on supervisors than those typically involved in the normal supervision of a junior attorney? (3) Will there be a requirement that 2020 graduates practicing on a provisional basis be paid? And if not, how will the State protect provisionally licensed attorneys from exploitation and enable them to service their student debt?

As a law school dean, I am wary of granting individual supervisors unrestricted power over a graduate's ability to practice law. As demonstrated by the recent exposure of abuses within the federal judiciary, when stark power imbalances exist between supervisors and junior staff dependent on supervisors for career advancement, there is a high risk of exploitation. Any solution requiring sponsorship or supervision must grapple with the need for safeguards and oversight.

4. Addressing access to justice.

The COVID-19 crisis demands more, not fewer, attorneys. Our communities are facing unprecedented challenges, such as skyrocketing unemployment, fear of impending mass evictions, public health nightmares in carceral settings, and the precarious futures of many small businesses. In the face of this imminent humanitarian crisis, the Court must not adopt any policy that would limit the availability of legal services to Californians. The members of the class of 2020 include future housing attorneys, public defenders, anti-poverty advocates, attorneys working under Measure H to address California's homelessness crisis, LGBTQ rights litigators, immigration law experts, advocates fighting to protect rural communities, and many more. By every measure, the legal needs in the communities served by these advocates will increase after COVID-19, not decrease. The Court and the Bar have an obligation to all Californians to ensure that these needs are met. Providing a clear, ethical, and reasonable path to licensed practice that results in as many qualified graduates gaining licensure as soon as possible is

critical.

Conclusion

As the Court considers how to proceed, it should include stakeholder voices, seriously explore alternatives to the bar examination, and consider key questions about equity, fairness, and bias. Above all else, the Court and the Bar should ground any solution in the imperative to provide Californians with access to critical legal services during an unprecedented historical moment. Our graduates can play a critical part in helping clients who are struggling under the life-changing consequences of the pandemic. These future attorneys can save people from economic ruin, address the access to justice problem, and contribute to the economic and social health of California and our nation. Thank you for your consideration and I am available to answer any questions you may have.

Sincerely,

L. Song Richardson

And UCI Law Alumni representing every
graduating class (2012 - 2019):

Crystal Adams, '15	Cristen Fletcher, '19
Melissa Adams, '18	Sean Garcia-Leys, '16
Nassim Alisobhani, '17	Vanessa Gomez, '18
James Altamirano, '17	Ginger L. Grimes, '15
Emile G Ayoub, '16	Justin Hanassab, '17
Ava Badiee, '16	Jason Hartlage, '17
Francisco Balderrama, '13	Julie Hartlé, '17
Kevin Barnes, '18	Janet Hsu, '17
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Jacob Berezin, '18	Anjana Joshi, '17
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