May 3, 2020

Hon. Janet DiFiore Chief Judge
The New York Court of Appeals
20 Eagle Street Albany, New York 12207

Dear Chief Judge DiFiore:

This letter is in response to the order announced by the New York State Board of Law Examiners ("the Board") on April 30, 2020. In relevant part, the order expressly privileges for limited available seating the application of "any J.D. or LL.M. candidate who is sitting for the bar examination for the first time and who has graduated (or will graduate in Spring 2020) from one of the fifteen law schools located in New York State." We believe this order is misguided, and we urge the Board to reconsider.

The Board's order imposes great hardship on students attending out-of-state law schools who plan to take the New York bar this fall—over 4,000 students representing nearly one-third of last year's test takers according to the New York Bar Exam 2019 Statistics. The order's stated objective is to protect the "health and safety of applicants, staff, and the proctors who administer the bar exam," but there is no reason to believe out-of-state law students pose a greater health and safety risk to those groups than in-state law students. If the order's aim is to ration fewer available seats, there is no reason in-state law students should be privileged at the expense of out-of-state students.

While the Board's prescription may not treat the harm it seeks to remedy, it will have severe repercussions for out-of-state New York bar applicants. The order leaves non-New York law students in a lurch, forced to find other UBE jurisdictions that will permit them to sit for their bar exam. In effect, the Board's order deflects responsibility from New York onto a small number of sister states, forcing them to accommodate an inordinately large number of students at a time when their resources are most constrained. If this dynamic, catalyzed by the Board's order, compels UBE states to follow New York's lead in adopting a policy prioritizing in-state law students, then out-of-state students attending law schools in non-UBE states may have no option but to defer taking the bar; this may impact their employment or, in the case of many LL.M students, their immigration status.

The order does more, however, than incentivize a pernicious form of interstate competition among jurisdictions at the expense of out-of-state law students: it imposes significant and potentially irreparable harm on out-of-state law students even if provisional licenses are awarded to them in the interim. Due to the Board's order, out-of-state law students must scramble to sign up to take the bar in an unfamiliar jurisdiction. In their haste to fill out extensive and exacting character and fitness forms to get increasingly limited courtesy seats, it becomes more likely that some students incorrectly fill out forms or fail to accurately check their records for prejudicial information they

ought to disclose. This would be understandable given that these students are rushing to fill out these forms during the stress of finals week, while fearing for their livelihood, in the throes of a global pandemic. And yet, a mistake could cost them their ability to practice law. Moreover, the registration window in many of these jurisdictions has closed, and those that remain open will subject out-of-state applicants to substantial late fees. Out-of-state law students planning to reside in New York before the bar exam with friends and family will be forced to spend their limited money and resources further to find lodging in other states for the bar exam; this cost could be significant because many states are imposing a mandatory two-week quarantine period on out-of-state travelers.

No substantial reason justifies differential treatment, given that alternative, nondiscriminatory solutions exist to protect the "health and safety of applicants, staff, and the proctors who administer the bar exam." The Board could offer a second set of dates for test takers, with multiple sittings for the same exam; the Board could find more seating in New York beyond the halls of its in-state law schools; the Board could allow for more seating in other states; the Board could adopt a pure lottery system to replace its discriminatory one; the Board could explore the possibility of administering an online bar exam. All of these options would equally protect the health and safety of those involved in the exam-taking process, without unduly discriminating against out-of-state law students.

We recognize that unprecedented circumstances have created unprecedented challenges to administering the bar exam. That should not serve as an excuse, however, for the Board to disregard the interests of bar applicants that attended out-of-state law schools. Their exclusion bears no relation to the public health concerns articulated by the Board as justification for its order, especially when there are so many viable alternatives. We ask that you reconsider your solution for the bar examination and pursue a nondiscriminatory alternative that abides by the law and befits the standards and ideals that the New York Bar has traditionally upheld.

Thank you for your time and immediate attention to this matter.

Sincerely,

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