

## A NEW ERA: COVID FORCES CHANGE IN THE BAR AND THE BAR EXAM

BY: CAROL M. LANGFORD\*

A new day is dawning, and change is in the air for both lawyers and future lawyers. Prior to COVID we could all hear the drum beats of clients wanting more – more work for less fees, more of our time, even on weekends; and more high maintenance, or risk losing their business. At the same time, law students were struggling, and inflation was hitting the typical American so hard that they could barely pay for college, much less a lawyer. Forget the Consumer Price Index – ask any law student, solo practitioner or public interest lawyer about their struggle to pay costs to live and eat, especially in large urban areas.

It was easy then to push off really looking at how to make legal services cheaper, or working to figure out a way to unburden law students of their hefty tuition. After all, we struggled as new lawyers to pay off our student loans and make a path in life that, if not extremely lucrative, was at least a very good living. And we had our own businesses and families to deal with. Who had time to really sit down and address these issues?

And then COVID struck, and nothing in the teaching of future lawyers or in the practice of law will ever be the same again. Ever, even with a vaccine. Does all this change mean that we have thrown out the baby with the bathwater? Well, let's look at some of the changes, and see if we can discern the future forest for the trees.

First, I do not think the term “law professor” will ever mean the same thing again. That is because the old business model of charging a fortune for an adjunct professor to come to class and ponder torts and contracts like Socrates might have done is no longer viable. Well, it might still be viable for some schools like Harvard and Stanford with “ginormous” – as the students would say – endowments. Law schools used to get away with their fees because there were always lenders willing to pony up a loan to a future lawyer. Schools profited tremendously until around 2008, when the foreclosure crisis hit, demand for legal jobs declined and students were less inclined to take on law school debt. Schools started dipping into the pool of less qualified students to make their nut.

This had disastrous consequences for some schools, as their Bar exam pass rates took a nose dive. As an adjunct professor of ethics I was what I call a “soldier of fortune” – I taught and still teach professional responsibility at various law schools. I saw a change over these years in exam writing and analysis. Good enough writing is essential to the practice of law. I could see early on some students would struggle with the Bar exam. Good law schools hired tutors and exam writing specialists to help the students develop the skills needed to pass the Bar. Yet, if anything, in some schools the scores got worse. It was not entirely clear how to deal with the problem as the scores in some schools would go up, only to go back down again on the next exam.

When COVID came on the scene, the already struggling student was forced to go home or try to finish classes in a two bedroom house with five roommates. I quickly learned to teach on Zoom, as law schools - even law schools with hospitals annexed to the school – had no testing or PPE. Most wisely decided that putting young people without fully developed prefrontal cortexes in classrooms together would not end well.

I could not fail to miss the new Zoom “classrooms” of these students - tiny spaces with curtain room dividers, dogs and cats with big chew toys roaming into the Zoom student gallery, and children reaching out to be hugged while dad was taking lecture notes. My own classroom became my kitchen, where I could lean over my computer and conveniently grab a Starbucks cold brew during class breaks. I called my class “Ethics from Professor Langford’s Kitchen.” We got the job done, but I am certain the students wondered at the price they were paying to not get all the tangible and intangible benefits of a physical school. Law students like to interact; they still want to argue over the jurisdictional implications of Pennoyer vs. Neff and chat about their boring professional responsibility professors.

What do I see in the future for law schools? First, I see the rise of online schools at half the cost, in every state. The State Bar of California recently accredited three fully online schools to allow multiple pathways to the practice of law. And I see even the top tier schools creating a hybrid teaching platform wherein some professors are told to teach online and some in person. Or, to teach both online and in person. My guess is that tenured professional professors will be the first to be brought back to the classrooms, and adjuncts will stay online. Tenured professors, though, might become as hard to find as a rare spotted yellow bellied sap sucker. And tuition costs will likely go down.

There is no ABA accredited law school in California – my state – where tuition is less than \$30,000 a year. We have 18 ABA accredited law schools, and 23 that are not ABA accredited. Graduates of either are eligible to take the Bar exam, unlike in other states. However, the dropout rate in the non-ABA accredited schools is extremely high. An LA Times investigation revealed that nine out of ten students drop out of unaccredited schools overall. The benefit of an unaccredited school: it offers flexibility in scheduling, lower admission standards and lower fees.

I do think more students will embrace this model in the future, as the face of the California lawyer is changing. Unlike in the past where the typical law school graduate was a single Caucasian male from a middle class or monied family, graduates now represent all ethnic groups and many are in their 30s, and even 40s. They have lived a little, and that means that some have criminal histories and have had substance abuse issues. A few have children. In short, these are people who did not follow a traditional path to law school, and gravitate to schools that offer night programs and schedule flexibility.

Second, the Bar exam has changed, and I do not think it is a temporary change. A survey of how individual states are modifying their Bar exams is a real eye opener. While some states like

Alabama allowed their July Bar to go forward as usual but with safety protocols like social distancing and health screenings, states like Alaska made out-of-state applicants follow Alaska's travel-related requirements before they would be allowed into the exam site, including quarantining or a negative COVID test right before entering the state. Other states, like California, cancelled their July Bar exam and re-scheduled for the fall, with an online only option. Still others cancelled the exam entirely for 2020, looking instead to 2021 for another exam. And a few brave souls granted what is known as "diploma privilege," meaning their graduates need not take any exam at all.

Diploma privilege is a hotly debated topic. Currently Washington, Oregon and Utah allow it due to the pandemic. Essentially it means students would not have to take a Bar exam at all. This privilege has historical precedent; prior to 1870 a lawyer was trained purely by apprenticeship. There were not a lot of law schools back then, and the lucky few with friends in high places secured positions where they could draft up contracts and wills while studying treatises. Law schools were later started to give the middle class a path into the law, and around 1900 a formal written Bar exam began to replace apprenticeships.

Will we eliminate the Bar exam altogether even after the COVID crisis is over? I hope not, at least in California. The Bar exam gave me a bedrock of knowledge that alerts me to issues outside of my specialty. However, during the pandemic I could see the usefulness of diploma privilege in a state where law schools are sparse, and all fully ABA accredited.

We do not yet know how this crisis will play out and until we do I think most states will be reluctant to scrap the entire exam. Many states will hesitate to treat unaccredited and accredited schools differently, especially in this time of upheaval, making the privilege harder to support. However, with regard to people coming from other states where they are already licensed – my crystal ball indicates that they will one day not have to take another Bar exam at all. In other words, reciprocity will be the norm.

This means that regional State Bars will be less powerful and we will have one big "National Bar." A lawyer in Texas could practice in New York, as he would have a sort of "National Bar License" to do so. Why not? We already have California lawyers working remotely from many other states, advising California clients on California law. This is the logical step forward. Individual states would still handle the admission and disciplining of lawyers.

In most countries around the world, there exists a type of national license and no need for a state or regional license. So, a lawyer in France can work anywhere in France. And it gets even better than this! A lawyer licensed in any EU country can work in any EU country. Here, lawyers for the federal government generally only need a state license for federal employment in all 50 states, which shows that there might not really be a need for licenses in all states a lawyer will practice in her lifetime. Also, federal practice areas like immigration law only require the attorney be licensed and in good standing in one state. That is very similar to a "National Bar" license.

The third big change is the provisional licensing of lawyers. Where this would once have been seen as a curveball from deep left field, I now see it as the future of lawyering. What exactly is provisional licensing? Well, it's complicated, and can mean different things in different states. But in California, it means that any student graduating in 2020 by order of our Supreme Court can practice law under the supervision of a lawyer before passing the Bar exam, and even before clearing moral character. To me, it is a hybrid of the old apprenticeship model of training lawyers. Why do we even need provisional licensing? Well, mainly because students could not take the July Bar exam, and when they do take it are likely to fail at alarming rates. Unless they are provisionally licensed, they will have job offers revoked as law firms tried to figure out what the pandemic might really mean for their business models. Graduates are universally broke, and need to work as full-fledged lawyers fast. They are caring for their parents and families while wondering how they will pass the Bar exam in a house full of people forced to stay inside.

Let's face it – the pandemic was and is a debacle, and the California Supreme Court was wise enough to see that. Lest anyone think we are “letting the camel's nose into the tent” at great risk of having the camel make our provisional licensing tent home, rest assured that this camel cannot handle trust accounts nor practice law without supervision. The provisionally licensed lawyer must identify him or herself as provisionally licensed. And if they do not clear moral character, they are on the sidelines until they can do so. Since very few applicants get denied or abated for moral character reasons, there will be few who have to warm the bench for a season.

I am unsure about the MPRE exam at this point and whether they will have to pass it before being cleared to be provisionally licensed, but I think it is a good idea if they do.

Do I see this program as continuing past its expiration date? I do. Not just because we have no vaccine yet, but because even if we get one it would have to be low cost or free to assist in developing herd immunity, and even then still many would not get it. But also because I see the next ten years bringing much social upheaval, and an economic rollercoaster that will leave us all breathless (buy gold). Law students will *have* to work early, because inflation will mean they cannot survive if they do not. And lawyers will support it, as they can get a provisionally licensed lawyer at a lower price, increasing their profit margins, and allowing them to charge less to clients who have a lower ability to pay.

I see this as a societal good. It is not like it has not been tested in some form already – in Mexico students major in law while in college and graduate in four years, instead of four years of college and four years of law school. But, in Mexico they might work throughout the school year in a law firm and every summer, so that by the time they graduate they are ready enough to work in a law firm. This gives international students an advantage over the typical American law student, as the foreign student will spend about 1/3 the cost of what our students pay. The

foreign student can then come to the U.S. and graduate at our law schools with an LLM, and sit for our Bar exam in select states.

All these changes will be reflected in changes in our ethics Rules. I see states like Arizona already seeking to change their Rules to allow non-lawyer participation in law firms. States are also right now considering various licensure levels of what I call legal aides; like legal document assistants and paralegals who can do the work once relegated to first year associates at law firms.

At first my concern was that these “sort of lawyers” would eat the lunch of the practicing lawyers. But I do not see that happening. Paralegals in some firms already do the work of lawyers even if sub silencio. Many good legal secretaries have always filled out draft pleadings. And there will always – always – be a need for a bright lawyer who really understands a complicated area of law. I do not see that changing.

Last, I look in my crystal ball and see the rise in online mediation. I recall years ago advising my clients to mediate, only to have them refuse and urge me to gird my loins and do battle. But who can afford a discovery war now? Not the average client. We already see this change coming in the decline in the rate of depositions that are being taken in civil cases.

All this change is coming at a fast pace. But really, with the rise of computers and AI, how long could this be put off? We already had computerized research, and Nolo Press offering online blank pleading documents. There is even a computer that can offer up traffic ticket defenses. Next on the horizon is BCI – Brain Computer Interface where lawyers might one day be able to *think* their computer should send a document and the computer will pull it up and send it. Celebrity engineer Elon Musk is already testing this on a pig, to see if it can speed recovery from strokes and injuries. And the military is testing it to see if it can enhance the intellectual abilities of its troops.

As Elon Musk would say “The future is going to be weird.” I say “Accept these changes, embrace them, and even cheer them.” Work to make this all better by sitting on a Bar committee that writes the law in these areas.

To do otherwise is to rapidly – at the speed of sound - be left behind.

\*When Carol M. Langford is not looking into her crystal ball she is a lawyer specializing in ethics advice, Bar admissions and attorney discipline. She is an adjunct professor of professional responsibility at the University of San Francisco School of Law and Hastings College of the Law. She assisted in the drafting of the Rules of Professional Conduct, the Disciplinary Standards and the provisional licensing rules for California.





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Overall Teaching Effectiveness

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Knowledge of Subject Matter

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