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August 18, 2020

The Honorable, The Judges of the
Court of Appeals of Maryland
361 Rowe Boulevard
Annapolis, MD 21401

Re: October 2020 Remote Bar Examination Update

The Maryland State Board of Law Examiners (“SBLE”) submits, at the request of the Court by letter of August 13, 2020, this update on SBLE’s preparations to administer a remotely delivered bar exam on October 5-6, 2020.

Decision to give a remote bar exam in October 2020

The July 2020 Uniform Bar Examination (UBE) in Maryland was scheduled for July 28 and 29, 2020 at the Baltimore Convention Center. The SBLE received bar applications from approximately 1,100 applicants in at least 38 U.S. states (including states where rates of COVID-19 infections continued to rise) and at least two foreign countries seeking to take the July 2020 UBE in Maryland. An in-person UBE would have required approximately 55% of applicants to travel from out-of-state to attend the examination. Due to uncertainty about the trajectory of the COVID-19 pandemic, the SBLE recommended to the Court of Appeals in late May 2020 that the July 2020 UBE in Maryland be postponed to September 9-10, 2020.

On June 1, 2020, the National Conference of Bar Examiners (NCBE) announced that it would provide exam materials for a remotely administered bar exam to be administered October 5-6, 2020. The District of Columbia Committee on Admissions announced on Monday, June 8, 2020 that it would give a remotely administered exam using the NCBE-offered materials in lieu of an in-person UBE. Recognizing the likelihood that a September in-person exam could not be safely administered, the SBLE spent the week of June 8 investigating the pros and cons of using a remote bar exam, including the potential for developing portability agreements with other states using a remote test. The SBLE discussed use of a remote bar exam with the deans of the UM and UB law schools, who were generally supportive. By Friday, June 12, 2020, the SBLE had developed a recommendation to the Court that Maryland shift to an October 5-6, 2020 remotely administered bar exam and seek portability with the District of Columbia and other states making the same decision. On June 17, 2020, the Court of Appeals authorized the SBLE to announce that the September 9-10 in-person exam would be cancelled and replaced by the October 5-6, 2020 remotely administered examination.

Portability

SBLE initiated discussions on the possible portability of remote exam scores with admissions officials in the District of Columbia on June 8, 2020, the same day that DC announced it would use the remote exam. The potential for portability of scores on a remote bar exam was integral to the SBLE's decision to recommend the remote option to the Court. Following Maryland's June 17 announcement, those discussions continued through July 1, 2020 when Massachusetts announced cancellation of its September 2020 in-person UBE in favor of the October 2020 remote exam. Upon that announcement, Massachusetts, DC and Maryland engaged in three-way discussions that resulted in a Memorandum of Understanding for portability of remote exam scores, which all three jurisdictions announced on July 8, 2020. Since then, additional states have joined the portability group – Tennessee (on 7/14), New Jersey (7/16), Kentucky (7/17), Connecticut (7/27), Ohio (7/28), Vermont (7/31), New Hampshire (7/31), Oregon (8/6), Illinois (8/12), and New York (8/17). The portability group currently stands at thirteen members.

These portability agreements provide significant flexibility for many applicants. An applicant's exam score achieved in any member-jurisdiction will be transferrable to all States within the portability group. In particular, portability allows successful examinees to seek admission in another state immediately, and without requiring the applicant/new attorney to develop a work history in the practice of law to meet the experience requirements that underpin most states' rules for admission without examination. This advantage would not exist for applicants admitted by diploma privilege.

Selection of technology vendor

The NCBE's June 1, 2020 announcement of the availability of exam materials for a remotely administered bar exam specified that the materials were restricted to delivery by three technology vendors – ExamSoft Worldwide, Extegrity, and ILG Technologies – that among them provide the technology to every U.S. bar admissions jurisdiction to allow use of laptop computers on in-person bar examinations. The SBLE attended webinars given by all three technology vendors where their technology products were demonstrated.

There are two basic models for remote exam proctoring. The first model is “live proctoring,” in which the examinee is observed taking the examination by a live human in real time through the examinee's webcam and microphone. The second model is “record and review proctoring,” in which the software records the examinee through the examinee's webcam and microphone; then after the exam, the recordings are computer-reviewed using artificial intelligence (AI) algorithms. The AI “flags” unusual or suspicious examinee behavior, and the flags are subsequently subjected to one or more levels of review by a human proctor.

Live proctoring has one significant advantage over AI proctoring – the real time nature of the proctoring, which can allow non-permitted behavior to be curtailed during the examination, including the protection of valuable examination content. Live proctoring has significant downsides as well – it requires a continuous, robust internet connection for the duration of the exam (in the case of the October remote bar exam 6+ hours over 2 days) and it requires a large number of well-trained human proctors who can reliably monitor multiple applicants simultaneously displayed on a gallery-style computer screen. The requirement of engaging trained human proctors for real time monitoring significantly increases the cost of live proctoring. Of the three technology vendors approved by NCBE for the October 2020 Remote Exam, only ILG

Technologies utilizes a live-proctoring system. In addition, ILG's live proctoring requires the client jurisdiction to engage and train its own proctors. The SBLE saw the requirements of applicants ensuring a continuous high-speed internet connection throughout the exam and of retaining and adequately train human proctors to provide high quality, online exam monitoring as a complete barrier to using ILG's system.

AI proctoring has two significant advantages over live proctoring. First, AI proctoring does not require a continuous internet connection during testing; instead AI proctoring only requires a brief connection at the beginning of the session to allow the applicant to check-in to the exam session and then a longer connection at the end of the exam to allow for the upload of exam files and video proctoring files. Second, because the AI computer system performs the first round of "flagging" of applicant behavior, the amount of time for human review of examinee videos is substantially reduced. The attendant disadvantage of AI proctoring is that all review of examinee behavior occurs after the fact.

The SBLE determined that AI proctoring offers the best balance of robust proctoring, usability, and economy. On July 27, 2020, Extegrity announced that it would opt-out of participation in the October 2020 remote exam. With the departure of Extegrity, the SBLE began the process of contracting with ExamSoft for its remote proctoring and exam delivery software. The SBLE's choice of ExamSoft was announced in an August 3, 2020 "FAQ" document distributed by email to all registered examinees and posted to the SBLE's website. Also announced in those FAQs was that the SBLE will pay the software licensing fees for all applicants to use the ExamSoft software for the October remote exam.

Remote bar exam experiences in other jurisdictions

To date, four non-UBE states have administered remotely delivered bar examinations in 2020. Each state has experienced challenges, ranging from inconvenience to software failure, which are described below:

Indiana intended to administer a one-day bar examination on July 28, 2020, consisting of essay and short answer questions, to about 350 examinees using ILG's remote administration software. As described above, ILG's system is based on live video proctoring and requires each examinee and each proctor to maintain a robust high-speed internet connection during the check-in process and throughout the exam sessions. ILG and Indiana officials attempted to run a live test of the system with all registered examinees on the Friday before the Tuesday bar exam, but the system failed entirely. The failure prompted Indiana officials to postpone the exam by a week to August 4, 2020. The ILG system failed a second live test prior to the postponed exam date. The second failure prompted Indiana officials to abandon use of the ILG system and to proceed with a remote, open-book examination using the same test questions that were to be used in the proctored exam. Indiana bar admission officials delivered the questions to applicants by email and applicants returned the answers by email by a set deadline. The exam was open book, but applicants were required to pledge that they would not collaborate with other applicants or receive other outside assistance on the exam. Officials reported good compliance with the deadlines to return the examination answers and reported anecdotal indications that examinees took seriously the pledge not to collaborate.

Nevada intended to deliver a two-day open book bar examination on July 28 and 29 using ILG's live proctoring. Following issues connectivity issues discovered in live testing, similar to

those in Indiana, Nevada postponed its exam to August 11 and 12. The postponed Nevada exam was delivered using the ILG software but without remote proctoring or online ID verification. ILG emailed the password to all applicants five minutes before the scheduled exam start time. Under the modified conditions, media reports including Twitter indicate the administration went smoothly, including the functioning of the testing software.

Florida intended to administer a one-day closed book bar examination to approximately 3,000 examinees on August 19, 2020 using ILG's software with full live proctoring. Florida intended to have a live trial of the exam software on Monday, August 17. Bar admissions administrators in several states, including Mr. Shipley, volunteered to proctor the August 19 exam in Florida to gain first-hand insight into that model. Despite repeated attempts to fix flaws in the ILG live-proctoring software, Florida officials announced on Sunday, August 16 that the August 17 live trial was cancelled and that the August 19 examination would be postponed until October. Florida officials have not yet announced how they intend to proceed in October.

On June 23, 2020, the State Bar of California administered the California First Year Law Student's Exam¹ to approximately 350 examinees using ExamSoft's remote proctoring option. California bar exam admissions officials reported to other states bar admissions administrators that they were generally satisfied with the performance of ExamSoft's software. Officials did report that the start of the exam was delayed for some applicants because those applicants did not promptly locate the start-up password required to access the exam. Prior to the dates of the FYLSE, bar admissions officials notified applicants regarding the online site where ExamSoft would publish the start-up password, but some applicants overlooked that announcement and did not have the password at hand for the start of the exam. ExamSoft's tech support and California bar officials fielded numerous calls and emails regarding the location of the password, and all applicants were able to access and complete the exam, albeit with some delay. There is no report or indication that access to the website listing the password was technically compromised or otherwise unavailable in any way. This appears largely to have been a failure of applicants to heed communications sent by bar admissions officials and ExamSoft.

Michigan administered its one-day remote bar examination to about 500 examinees on July 28, 2020 using ExamSoft's remote delivery and proctoring software. Like California, Michigan bar exam admissions officials reported to other states bar admissions administrators that they were generally satisfied with the performance of ExamSoft's software. Like California, however, Michigan also experienced problems related to applicants' ability to access the start-up password. In Michigan's case, the website displaying the start-up password was the target of a distributed denial of service (DDOS) attack, a sophisticated form of cyberattack where an attacker or attackers direct a large volume of traffic to a particular website with the intention of preventing legitimate use of the site. Importantly, ExamSoft's internet service provider fought off the DDOS attack and access to the website hosting the start-up password was restored within 20-30 minutes. During the attack, ExamSoft and Michigan bar admissions officials pushed the password to applicants by email and social media. As a result of the attack, some applicants were delayed in beginning the second session of the examination by 35-40 minutes. ExamSoft and Michigan officials compensated by extending the testing day and all applicants were able to complete the exam with a maximum delay of about 40 minutes. Critically, reports on Twitter and other outlets that the

¹ The FYLSE is an exam for students attending California-accredited law schools or pursuing legal education by other means outside the context of enrollment at an ABA-approved law school, which those students must pass in order to be permitted to continue their legal studies and qualify to take the California bar exam after graduation.

“exam was hacked” or otherwise compromised were false. The integrity of the exam questions and applicant answers was not compromised. Only the availability of the start-up password for one session of the examination was affected.

Test taker concerns about the viability of remote delivery, data privacy, and exam day conduct

Viability of remote delivery

The July 31, 2020 Emergency Petition for Temporary Suspension of UBE Requirement and Order Granting Emergency Diploma Privilege Plus (“the Diploma Privilege Petition”) sets forth numerous concerns about the viability of remote testing for bar admission, the safety and privacy of online information, and the requirements for examinee conduct during the exam. The SBLE takes all of the petitioners’ concerns seriously. The SBLE has worked and will continue to work to mitigate these concerns and to deliver an exam that is a fair, reliable and valid measure of applicants’ legal competence.

The petitioners’ arguments on pages 6-8 of the Diploma Privilege Petition concern the issues encountered by Indiana and Nevada in administering their bar exams using ILG’s software platform. Following the failed attempt in Indiana, Nevada, and Florida to use ILG’s platform, the concerns expressed by the petitioners appear warranted. As described above, however, the SBLE has never considered using ILG’s software solution due to its own concerns about the viability of live remote proctoring. As such, the Court may set aside those concerns that are specific to the ILG platform.

The petitioners’ concerns, expressed on pages 8-9 of the Diploma Privilege Petition, regarding the delivery of the Michigan bar exam via ExamSoft would be of great concern if they were factual and not subject to procedural mitigation. As described above, the cyber-attack that impacted the Michigan exam was directed at disrupting the website where applicants were to retrieve the start-up password for the second session of the exam. The SBLE along with the other jurisdictions giving the October remote exam are planning for a multilayered system of distributing the start-up passwords to applicants, including simultaneous or near simultaneous distribution of passwords on ExamSoft web pages and Maryland Judiciary web pages, and by separate emails sent by ExamSoft and by the SBLE. Applicants may be able to opt-in to also receiving the passwords by text message. ExamSoft’s technical support staff and the SBLE’s office staff will also have the passwords to be provided by telephone. These steps are expected to mitigate the risk that any one avenue for retrieving the exam password would be compromised or that any examinee’s access to the exam would be delayed or denied.

Data privacy

There was no attempt, much less any successful attempt, to penetrate, corrupt, or destroy the exam delivery and proctoring software or ExamSoft’s database system. As such, there appears to be no credible threat that use of ExamSoft’s platform to remotely deliver the October 2020 bar exam to applicants presents any greater risk of compromise to applicants’ personal data than any other online transaction in which those applicants might engage. Moreover, because the SBLE will pay the software fee for each applicant who registers for the online exam, there is no risk of exposure of credit card information that could be attributed to registration for the October 2020 remote exam by any Maryland applicant. Despite the fact that there is no indication that the July 28 cyber-attack penetrated or was even directed at any ExamSoft servers housing applicants’ personal information, the Department of Homeland Security and FBI are conducting a criminal

investigation into the incident.

The data collected by ExamSoft will consist largely of identifying data provided to ExamSoft by the SBLE for purposes of registering the applicant to use the exam software, including each applicants' name, email address, examination seat number, and internal bar admissions registration number. The SBLE does not provide ExamSoft with the applicant's address, phone number, date of birth, or any portion of the applicant's Social Security Number. During the registration process, ExamSoft will collect information on the applicant's computer operating system for purposes of confirming that the registered computer meets the minimum system requirements to operate the software. For an in-person examination, the applicant would be required to pay a fee to ExamSoft for a license to use the software, but as set forth above, applicants will not be required to pay any licensing fee for the October 2020 remote exam. As such, no credit card information will be collected.

After registration, all applicants will be required to participate in at least two "mock exams" which will confirm the applicant's ability to access the exam software and confirm the applicant's identity. The identity of the examinee will be reconfirmed at the start-up of the live exam. Importantly, any question about identity will NOT prevent the applicant from accessing and completing the examination. Instead, identity issues will be flagged for follow-up by the SBLE after the exam. That procedure duplicates the SBLE's policy for the in-person bar exam, where questions over photo IDs, along with almost all other exam conduct issues, are documented during the exam, then investigated and resolved after the exam in order to avoid interrupting the examinee and detracting from their test performance.

The petitioners worry that "applicants can look forward to . . . potentially being added on social media by proctors who watched them for hours while they took the exam," and cite to an situation that was reported to have occurred during and after the American Board of Surgery attempted an online exam with live-proctoring in July 2020. (Diploma Privilege Petition, p. 10.) There is scant information available about the specific policies that the software vendor for that exam employed with regard to the availability of personal identifying information to human exam proctors, but as expressed in the FAQ document the SBLE sent to applicants, the human proctors who review the video footage of the October 2020 remote bar exam will not have access to the name or any other personally identifying information on the applicant. The point at which any video or photographic information would be tied to an applicant by name or other identifying information would only occur at the SBLE.

Exam day conduct

Citing information on exam day tips and protocols posted by bar admissions officials in Tennessee, the petitioners wonder "whether any applicant could successfully take the exam under these or similar conditions." Diploma Privilege Petition at p. 11. In particular, the petitioners are concerned that use or presence of a cell phone, among other electronic devices aside from the computer used for the exam, in the testing space during the test session might result in cancellation of test scores. In fact, use and possession of such items are strictly prohibited at the in-person bar exam, as well. With regard to use of a phone for technical support, raised by petitioners in a footnote, situations such as that which occurred in Michigan would necessarily arise at a point where the applicant had not yet accessed the secure exam materials and where use of a phone would likely be appropriate. As it does for the in-person UBE, the SBLE will provide applicants with specific policies regarding permitted and prohibited use of electronic devices, including cell

phones, before, during, and after each exam session. Exam day procedures will prohibit the use of physical scratch paper and, for obvious test security reasons, books and other written materials will not be permitted in the examination space. The same prohibitions on books and written materials other than the test questions apply to an in-person exam.

As stated in the SBLE's FAQs, the mere fact that a particular behavior, including some of the seemingly innocuous actions cited in the Diploma Privilege Petition such as touching one's face or twirling one's hair or extraneous noises such as a dog barking, might trigger a flag by the initial AI review does not necessarily mean that SBLE would formally investigate or take any action. Other behaviors cited in the Diploma Privilege Brief will likely trigger varying levels of scrutiny after the exam. For an applicant to entirely leave the view of the camera would, of course, be of significant concern. Standing, stretching, or other movements in view of the camera would likely be flagged by the AI proctor and potentially escalated for review by the SBLE, but such behavior would not necessarily result in cancellation of exam scores. Similarly, talking or other noise in the exam space would be flagged and possibly reviewed, but mere "extraneous" noise would not result in sanction.

The SBLE expects to gain more insight into the review of proctoring videos through discussions with officials in Michigan and California as they move through that process following their prior exams.

Applicant access to suitable technology and test-taking space

The petitioners express concern that a remote bar exam will become a test of "resources" rather than of "competency," because "many" applicants cannot or may be unable to obtain reliable and consistent internet service or a quiet space to take the exam. Although the petitioners cite, in footnote 68, to a compilation of survey results they state support this assertion, the SBLE is not able to access the survey results, as no link is provided in the footnote. The SBLE also cannot independently determine whether the petitioner's characterization of the population of applicants lacking internet access or suitable exam space as "many" is an appropriate one. Since announcing that Maryland would administer the October 2020 remote bar exam, the SBLE has received only a handful of emails from applicants expressing concerns over exam space and access to technology. Based on the paucity of emails the SBLE has received on these subjects, it cannot conclude that the lack of access to technology or appropriate testing space are widespread. The SBLE also notes that for each of the last several bar exams, more than 95% of applicants used a laptop to take the in-person bar exam. Earlier this month, California bar exam officials surveyed their applicants for ability to comply with the testing condition requirements and only 261 of approximately 12,000 California applicants (2%) reported inability to meet the required conditions.

As announced in SBLE's FAQs, examinees may take the October remote bar exam at home, at work, or any other quiet space of their choice. When initially discussing the remote bar exam with the SBLE, the deans of the law schools at the University of Maryland and the University of Baltimore suggested that they might make testing space available for their alumni. The SBLE expects that other law schools may make similar arrangements for their alumni. Upon information, the DP4MD movement, and likely other diploma privilege advocacy groups, have independently solicited law firms to provide available testing space for applicants. The Maryland State Bar Association also may be a resource for those examinees who need assistance in locating an

appropriate space. The SBLE believes that applicants have adequate opportunity to secure a quiet space to prepare for and take the on-line exam.

Timing of bar admission

The petitioners express concerns about delays to some applicants' entry to practice caused by the postponement of the exam first from July to September, then to October. The SBLE recognizes that the COVID-19 pandemic has caused employment hardships in many sectors, including legal employment. Some applicants with employment opportunities already in place may unfortunately be delayed in starting work. Other applicants work throughout the process of preparing for the bar exam. It is important to recognize, however, that granting "diploma privilege plus" to bar applicants would not result in immediate licensure for the majority of applicants. The Diploma Privilege Petition recognizes that applicants admitted by that route would still be required to complete the character and fitness process, report a qualifying MPRE score, and complete the Maryland law component. Maryland's character and fitness process occurs on a track whereby the majority of applicants who pass the bar exam receive a decision on their character and fitness investigation shortly before the time when exam results are traditionally announced and are admitted to the bar in ceremonies scheduled for December of each year. The SBLE expects that most character investigations will be complete in the expected time frame. Moreover, the SBLE intends to release the results of the October 2020 remote bar exam on or about November 25, 2020, which is expected to allow the Court to schedule bar admissions ceremonies at or near the traditional dates in December.

Diploma privilege in other jurisdictions as a response to COVID-19

Four states – Utah, Washington, Oregon, and Louisiana – have implemented some form of diploma privilege in response to the COVID-19 pandemic emergency. Only Washington has a relatively unrestricted emergency diploma privilege policy. The other three states place significant conditions on diploma privilege in order to filter applicants for minimum competence in the admissions process:

- Utah's emergency diploma privilege is restricted to candidates who graduated from ABA-approved law schools that had first-time taker bar exam pass rate of 86% or higher in 2019. (Should Maryland impose a similar requirement, graduates of the University of Baltimore and three of the six law schools in District of Columbia would be excluded.) Also, to qualify for diploma privilege admission in Utah, candidates must complete 360 hours of supervised practice by December 31, 2020. Under the Utah Supreme Court's Order, the candidate is required to secure a supervisor and none of the supervised practice hours may be obtained in solo practice. Those candidates who failed to secure a supervisor or complete the required hours would not become admitted by diploma privilege.
- Oregon's emergency diploma privilege is limited to 2020 graduates of ABA approved law schools located in Oregon, and to 2020 graduates of ABA-approved schools outside Oregon meeting the 86% pass rate threshold for first time takers in 2019. Limiting the pool of applicants to 2020 graduates eliminates from consideration for diploma privilege most applicants seeking to retake the exam after a prior unsuccessful attempt.
- Louisiana's emergency diploma privilege is restricted to applicants taking the exam for the first time in any jurisdiction, excluding all applicants seeking to retake the exam after a

prior unsuccessful attempt. Candidates admitted by diploma privilege in Louisiana must complete 24 hours of CLE and the Louisiana Bar Association's Transition to Practice mentoring program by the end of 2021.

Recently, bar admission officials in Delaware cancelled that state's bar exam due to COVID-19 concerns, and as an emergency measure, created a temporary Certified Limited Practice License. Eligibility for the Certified Limited Practice License is limited to candidates registered to take the Delaware bar exam for the first or second time, and most critically, candidates who qualify for the Certified Limited Practice License are still required to take and pass the 2021 Delaware bar exam to gain permanent licensure. Other states have extended similar, existing limited or supervised practice programs to permit new law school graduates to practice pending law pending a future bar exam.

Conclusion

For the foregoing reasons, the State Board of Law Examiners believes that administering an October 2020 remote bar exam using materials supplied by the NCBE and software provided by ExamSoft will best serve the entire population of 2020 Maryland bar exam candidates by yielding widely portable examination scores for successful examinees leading to unconditional licensure in Maryland, and providing assurance that successful candidates are competent to practice law in Maryland.

Respectfully submitted,



Maryland State Board of Law Examiners
Jonathan A. Azrael, Chair
Jeffrey C. Shipley, Secretary and Director