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Recommended Citation

Michael S. Ariens. Texas Supreme Court's Failure to Offer Alternative Licensure Option Unnecessarily Hinders Our State's Future Lawyers, Texas Lawyer Online (July 7, 2020).

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Texas Supreme Court's Failure to Offer Alternative Licensure Option Unnecessarily Hinders Our State's Future Lawyers

On July 3, the Supreme Court of Texas canceled the July 2020 bar examination, kept a September in-person bar examination, ordered the creation of an...

By **Michael Ariens** | July 07, 2020 at 05:10 PM



On July 3, the Supreme Court of Texas canceled the July 2020 bar examination, kept a September in-person bar examination, ordered the creation of an October remote bar examination and somehow failed to offer an alternative licensure option despite five justices calling for one. The court correctly noted that “[i]n recent weeks, the state of the COVID-19 pandemic in Texas has changed significantly.” Despite understanding the unprecedented nature of the pandemic, the court failed to meet the challenge of re-thinking how to assess minimum competency in the practice of law.

When the COVID-19 pandemic first struck, the Texas Supreme Court on April 29 decided to keep the July administration and add a September administration. This decision, while debatable, was defensible. It assumed the pandemic would ease between its decision in late April and the end of July. In case it didn't, a September back up was made available to examinees. While this meant that successful September examinees might lose about two months or so of time in the practice of law, that might be worth the ease of mind for those who chose a slight delay.

Unfortunately, the number of coronavirus cases in Texas exploded in June. The court acted correctly in canceling the July administration. It is simply too difficult for the BLE to guarantee the safety of examinees. Additionally, the physical distraction of wearing a mask (or having someone nearby not wearing one), the anxiety of remaining in a closed building in the Texas summer for over six hours a day over two days, and the logistical issues confronting examinees all suggest success on the bar exam will be affected by factors well beyond preparation and competency.

These difficulties are why offering the September bar exam is problematic, and why the Board of Law Examiners suggested cancellation. No one knows what the course of the coronavirus will be in two months. The uncertainty of our state's situation makes it inadvisable for the Supreme court to test some or most of the summer 2020 examinee pool, again in indoor buildings, again for more than six hours per day over two days, again having to work out logistical problems in taking the exam.

The Texas bar exam has never been given online. It may work; on the other hand, we have recent experience with failed online LSAT exams. There exist a number of daunting technological issues. For starters, what happens when a person's internet connection is lost? How do you ensure exam security or, more prosaically, prevent cheating? If some examinees are offered a hotel room to use "better" internet connections than exist at home, how are those examinees protected from one another during breaks? Even more importantly, how do you make sure that a remote, internet-based examination will be valid and reliable in light of the very different economic and other circumstances bar examinees find themselves in? Is there any basis for assuming that an online examination will not adversely affect examinees based on class, race, or ethnicity?

Finally, how do you compare scores when the bar exams are not the same? The September bar will include 200 Multistate Bar Examination questions and six Texas essay questions. The October bar will include 100 MBE questions and 12 Texas essays. The validity and reliability of passing scores on such disparate exams is uncertain. One should be wary of concluding the results will certify minimum competency in the practice of law.

But what is inexplicable is how five members of the court agreed that some alternative to the bar exam was necessary, but 2020 applicants *must take a bar exam!* Chief Justice Nathan Hecht and Justices Paul Green and Jeffrey Boyd agreed that a diploma privilege should be offered. Justices Brett Busby and Jane Bland (and Boyd again) agreed that an apprenticeship program leading to licensure after a period of supervised practice should be offered. That's a majority. The details are unimportant; those can be worked out with the 10 Texas law school deans who suggested an alternative to the bar exam. And yet bar applicants are left twisting in the wind.

There is a human tendency to believe we are exceptions to any rule. This has a pernicious effect during a pandemic because they are so rare it is difficult to comprehend its impact.

A majority of the court understands the uncertainty the pandemic has wrought. They understand that no one knows whether a September bar exam will take place. They also understand that no one knows how an October online exam will work. It is now incumbent on that majority to work together to reach an acceptable alternative to a bar exam.

As lawyers, we search for precedents to help make our case. What do you do as a lawyer when faced with an unprecedented situation? Re-think your case.

Michael Ariens is a professor of law at the [St. Mary's University School of Law](#). He has extensively studied the history and role of the bar exam. The opinions expressed here are his alone.