



November 2, 2020

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Certified Mail R.R.R. and e-mail to Lisa Drury, Esq.

New York State Court of Appeals
Attention: Mr. John P. Asiello, Chief Clerk
20 Eagle Street
Albany, New York 12207

New York State Board of Law Examiners
Att: Mr. John J. McAlary, Executive Director
Corporate Plaza, Building 3
254 Washington Avenue Extension
Albany, New York 12203-5195

Re: Amicus Curiae Letter of the American Foreign Law Association, Inc. in Support of the Application by Luana Bijaoui Dahan, a foreign citizen residing outside the United States, for Waiver of Certain Rules on admission of attorneys to practice law under Covid-19 emergency

Dear Honorable Ladies and Gentlemen:

This letter is submitted in support of the request by Ms. Luana Bijaoui Dahan (Ms. Bijaoui), a resident of France, for waivers and other actions by both the Court of Appeals and the Board of Law Examiners.

We urge special accommodations permitting testing of all New York bar-exams (not just the MPRE) during Covid-19, for offsite testing nationwide and abroad, to avoid discrimination on the basis of national origin or other Covid-19 travel “disability.”

The Petition

On information and belief, we are advised of the following circumstances relating to Ms. Bijaoui’s petition dated October 13, 2020.

Application to Court of Appeals. Pursuant to Section 520.14 of the Rules (“Rules”) of the New York Court of Appeals (“Court”), Ms. Bijaoui is petitioning the Court in its discretion to vary the application of or waive those provisions of its rules on the admission of attorneys to practice law

in New York, where strict compliance will cause undue hardship to the applicant and many other applicants. Such rules relate to the three-year deadline for completion of the Multistate Professional Responsibility Examination (“MPRE”) under Rule 520.12(d). 22 NYCRR 520.14 and 520.12(d). The hardship applies to all candidates for admission who reside in a foreign country and have no legal means to enter the United States, or whose access is severely restricted by U.S., New York and/or foreign legal and medical rules. The undue hardship will cause a forfeiture of validly obtained passing grades on the bar examination and an obligation to retake the exam, due solely to pandemic restrictions.

Further, to the extent that the Board of Law Examiners Rules (“BLE Rules”) do not permit waivers (see Rule 6000.15 as to the application and re-application for test accommodations filing deadlines contained in Section 6000.7 or otherwise), her petition is made to the Court so that the Court directs the Board of Law Examiners to take appropriate remedial accommodation.

Application to New York Board of Law Examiners. Pursuant to Section 5.15 of the Court’s Rules and Rule 6000.15 of the Board of Law Examiners’ Rules, Ms. Bijaoui is also requesting that the New York State Board of Law Examiners establish an interim rule, during the global Covid-19 pandemic as recognized under New York and/or U.S. federal law, modifying Section 5.09(a)(1)(ii) to adopt a rule enabling foreign nationals to take the MPRE outside the United States due to international travel restrictions since March 2020 that have prevented, and continue to prevent, foreign applicants from taking the examination in person and in the United States.

About the Amicus Curiae

The American Foreign Law Association, Inc. (AFLA) is a New York not-for-profit corporation that has existed since 1925. Through 95 or so years, its mission is to promote the mutual understanding by American lawyers of foreign law, of American law by foreign lawyers, and the interchange of ideas, culture, education and professional information between American and foreign lawyers. More generally, the AFLA promotes the understanding and application of foreign, comparative and international law. The AFLA seeks to cooperate with other professional organizations involved in such fields and to support relevant legal research and writing.

The AFLA normally holds 10 meetings per year to discuss and debate legal issues. Such meetings are attended by both American and foreign citizens who are lawyers. The members include foreign lawyers (admitted abroad), New York lawyers (who may be domestic or foreign citizens) and foreign legal consultants in New York.

The AFLA has seen how New York and our country benefit from having foreign citizens participate actively in the practice of New York law. Such benefits include:

- A better cultural and legal understanding that reduces friction and promotes cross-border business, cultural exchange, investment, dispute resolution and career development, both for attorneys and their clients.
- Foreign respect for New York and American federal laws through education, training, admission to the New York bar and practicing as New York lawyers.
- Mutual economic benefits from cross-border trade and investment.

Amicus Support for the Petition and Relief beyond the Relief Sought Therein

Summary. The AFLA supports Ms. Bijaoui’s petition to avoid undue hardships. Ms. Bijaoui’s situation highlights the need for a much broader Court order covering all applicants to the New York bar at whatever stage in their completion of the “normal” New York standards.

Beyond her focus on the MPRE, we propose to enlarge the scope of relief so as to create a general exemption to afford all New York bar candidates (in particular non-U.S. resident applicants) the opportunity to take any and all necessary New York bar-related tests offsite. By “offsite,” we would include locations (1) in the United States and outside New York and (2) outside the United States. Covid-19 is a pandemic affecting the global population, so a globally applicable general exemption is merited, not just for the MPRE, but also for the other bar-related exams.

Hardship Impact of Covid-19 on a Large and Growing Class of Adversely Affected Applicants.

Ms. Bijaoui’s petition is made for her and all others similarly situated who are applicants for admission to the New York bar but who cannot travel to New York or otherwise take the MPRE due to governmentally imposed travel restrictions and, even without such restrictions, exigent healthcare circumstances caused by the Covid-19 coronavirus. This Court and/or the Board of Law Examiners know how many individuals are affected from their lists of applicants based on foreign residence, whether with an LL.M. (or JD) from a U.S. law school or based on a satisfactory foreign legal education under Rule 520.6. This class could double or triple in size if no Covid-19 vaccine is discovered and available worldwide before 2021, 2022 or even 2023. In short, the legal rights and future careers of many foreign individuals (as well as the educational services of American law schools) will be adversely affected unless you grant appropriate waivers.

Your waivers should consider the probability of a continued medical emergency for another few years. For example, beyond the MPRE accommodation requested by Ms. Bijaoui, your waivers should cover Bar Exam and Law Exam timing and U.S. location requirements. You might even an accommodation of instructional requirements by expansion of possible distance learning beyond the one-third ceiling permitted under Court Rule 503.3(c)(6) (U.S. law schools).

This Court’s Acknowledgment of Hardship and Exigent Circumstances. In its July 29, 2020 order granting certain waivers as to pre-admission bar exams, this Court acknowledged the impossibility of conducting bar examinations under normal conditions.¹ We are gratified by the Court’s sensitivity to the circumstances, but it is not enough.

The Need for Broader Relief to Avoid Forfeitures. The Court’s relief was limited to:

- permit testing only within the United States, and as a practical matter this has been limited to only certain states;
- address only the bar examination, not all bar-requisite examinations including the MPRE; and
- not provide any remedy for interim employment.

¹ NY Court of Appeals, Temporary Waiver, available at <https://www.nycourts.gov/ctapps/news/nottobar/TemporaryWaiverofStrictCompliance-Order.pdf> (July 29, 2020).

We object to these limitations. We propose that you amend or extend your July 29, 2020 order to:

- permit bar-related testing outside the United States;
- cover all bar-requisite exams, not just the bar examination but also the MPRE and anything else where personal presence is required; and
- enable interim licensure and interim employment, limited and supervised, pending termination of the Covid-based travel restrictions.

Our objection is based on public policy, law and equity.

- As to public policy, Article XIV, Section 1 of the U.S. Constitution provides: “... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” New York’s Human Rights Law, Section 291, adopts a policy of non-discrimination in employment based on national origin. Similarly, N.Y. Executive Law, Section 296-c, adopts a policy of non-discrimination in internships based on national origin.
- As to law, we contend the July 29, 2020 order would appear to violate U.S. federal and state law on civil rights relating to discrimination based on protected classes (nationality, national origin and foreign residence). Ms. Bijaoui’s petition cites certain such legislation, but our purpose here is to focus on policy and equity as well as law.
- As to equity, the July 29, 2020 order is inequitable as to candidates who otherwise might take and pass the examinations but who are stranded abroad, or outside New York.

We contend that the federal Constitution, New York’s Human Rights Law and Executive Law and federal civil rights laws should be read to protect such bar licensure applicants based on national origin. We believe that the Court’s omission of additional pandemic-related protections for any foreign-citizen and/or foreign-resident applicants from its June 29, 2020 order was undoubtedly inadvertent and unintentional. We are confident that this Court never intended to discriminate against bar applicants on the basis of nationality, national origin or foreign residence and will make suitable accommodations for the affected class of bar applicants. “We are all in this together”...worldwide.

Executive Branch Public Policy: Governor Cuomo’s Leadership. We are inspired by Governor Andrew M. Cuomo’s leadership during this pandemic. We acknowledge with gratitude his sympathy and emergency relief for all affected, regardless of nationality or national origin. He has issued several orders under the New York Executive Law, Section 29-a of Article 2-B, that acknowledge the need to make adjustments “to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action **necessary to cope with the disaster emergency** or if necessary to assist or aid in **copng with such disaster**, or to provide any directive necessary to respond to the disaster.”²

² Gov. Andrew M. Cuomo, Executive Order 202.65 (Sept. 23, 2020), available at <https://www.governor.ny.gov/news/no-20265-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.


Legislative Branch Public Policy Favoring New York as an International Hub for International Commerce and Legal Rights; Comity. “Welcome to New York.” Several New York statutes promote the adoption of New York law and New York courts as the venue for dispute resolution even without a nexus to New York under principles of conflicts of law. See, e.g., NY General Obligations Law, §§5-1401 (right of contractual choice of New York law) and 5-1402 (right of contractual choice of forum in New York) as well as NYCRR §520.6 (fulfillment of educational requirements by study in a foreign law school). This Court’s and the Board of Law Examiners’ action to grant appropriate waivers of time deadlines and other pre-conditions to bar admission will continue New York’s well-deserved reputation and legislative policy for serving as a hub for international business. Such waivers will also reinforce reciprocity and comity in foreign legal treatment of Americans abroad under foreign local laws. Conversely, failure to grant accommodations could invite foreign rules adverse to New Yorkers and other Americans.

Judicial Branch Public Policy: Draft of Waivers by this Court. Respectfully, we urge you to provide immediate appropriate broad waivers that take into consideration the probability of a continuing “disaster emergency” for at least two or three years and the ongoing undue hardships now suffered by Ms. Bijaoui and similarly situated individuals. Attached as **Exhibit A** is a draft new Order for amending your July 29, 2020 order. The draft concerns all New York bar-related examinations, not merely the MPRE. It restores equity to foreign resident applicants. We propose more general relief for the class of foreign applicants who might be precluded from taking the New York bar examination, the Uniform Bar Examination or other pre-requisite for admission to become a New York lawyer. And we suggest interim employability subject to reasonable supervision, to prevent impoverishment, loss of earning capacity (arguably a property right) and society’s loss of skilled workers in the field of law.

Your favorable response will reinforce the Rule of Law and enhance the respect for New York law. Thank you.

Respectfully submitted,

AMERICAN FOREIGN LAW ASSOCIATION, INC.

By: 
Raymond J. Dowd, President
rdowd@dunnington.com

Ex. A Proposed Order relating to Foreign Applicants

cc: Lisa Drury, Esq., advisor to Court of Appeals (by e-mail) ldrury@nycourts.gov
Ms. Luana Bijaoui Dahan, petitioner (by e-mail) bijaouidahan.luana@gmail.com
William B. Bierce, Esq. (by e-mail) wbierce@biercekenerson.com

EXHIBIT A

PROPOSED TEMPORARY WAIVER BY COURT OF APPEALS

WHEREAS, on January 31, 2020, U.S. Health and Human Services Secretary Alex M. Azar II declared a public health emergency for the entire United States to aid the nation's healthcare community in responding to 2019 novel coronavirus; and

WHEREAS, the Court of Appeals issued an order on July 29, 2020, that recognizes that ongoing public health and safety concerns resulting from the coronavirus health emergency, which precluded the in-person administration of the New York State Bar Examination originally scheduled for July 2020; and

WHEREAS, that order did not address the impact of such emergency on the related Multistate Professional Responsibility Examination (MPRE) that must be taken within three years after the New York State bar examination (or Uniform Bar Examination) in order to validate the applicant's right to be admitted to practice law in New York; nor did that order consider the potential impact of travel and health restrictions upon the fairness and inclusiveness of the existing rules of this Court and the Board of Law Examiners relating to bar admission procedures; and

WHEREAS, many candidates for the MPRE reside outside the United States and, since approximately March 1, 2020, have been legally prohibited from travel to New York or other United States locations to take the MPRE examination; and their inability to travel to the United States (or New York in particular) indefinitely poses a risk of forfeiture of their qualifications to be admitted to practice law in New York due to the indefinite nature of the travel restrictions; and such a forfeiture will impose an undue hardship upon such candidates; and

WHEREAS, the Court of Appeals seeks to provide an expeditious pathway to licensure for law graduates, regardless of race, nationality, national origin, residency, marital status and temporary disability due to legally mandated or legal warnings on health and travel restrictions, while ensuring public protection and preserving the integrity of the legal profession, it is

ORDERED, that strict compliance with the requirements of sections 520.8, 509(a)(3) and 520.12 of the Rules for the Admission of Attorneys and Counselors at Law (22 NYCRR 520.8, 509(a)(3) and 520.12) is hereby waived to the extent that the New York State Board of Law Examiners shall be permitted to replace the Uniform Bar Examination with the Emergency Remote Testing Option to be offered by the National Conference of Law Examiners on dates after the tests that took place on October 5-6, 2020 or any subsequent date; and it is further

ORDERED, that the Time to File Admission Application requirements of section 520.12 are hereby waived to the extent that an applicant who passes the Emergency Remote Testing Option would otherwise be required under such section to file a complete application for admission within one year from the date when such applicant sits for the second day of the Emergency Remote Testing Option; and it is further

ORDERED, that the Time to Take the MPRE requirements of section 520.12 are hereby waived to the extent that an applicant who passes the Emergency Remote Testing Option would otherwise be required to file a complete application for admission within the three-year period under section 520.12(d) within three years from the reference date applicable to such applicant under such section; and such waiver of three-year deadline shall hereby be extended indefinitely until the end of “Covid Travel Restrictions,” defined as the period ending on the later of

- (1) one year after the expiration of restrictions on unlimited travel or of other health-based travel warnings (or Covid-19 related medical testing requirements) established by the State of New York or the United States government or any airline serving the applicant’s residence country, as applicable to such individuals based on the health emergency known as Covid-19 or
- (2) one year after the administration by the National Conference of Law Examiners (or its agent) of an Emergency Remote Test in the foreign country of the candidate’s residence;

and it is further

ORDERED, that the New York Board of Law Examiners is directed to develop and implement a blanket Emergency Remote Testing procedure to administer the New York bar examination, the New York law examination, the MPRE and any other bar-qualifying examination in foreign countries, under such an Emergency Remote Testing Option at least three times per calendar year during the period of such Covid Travel Restrictions and for a period of one year thereafter; and it is further

ORDERED, that the New York Board of Law Examiners is directed to develop and implement such a procedure in association, if possible, with the National Conference of Law Examiners; and it is further

[FOR CONSIDERATION: a Covid-based accommodation of instructional requirements by expansion of possible distance learning beyond the one-third ceiling permitted under Court Rule 503.3(c)(6) (U.S. law schools), given that distance learning may be mandatory so long as the Covid Travel Restriction applies]

ORDERED, that the New York Board of Law Examiners is directed to develop and implement a procedure to administer the New York Bar Examination (and the Uniform Bar Examination, in association with the National Conference of Law Examiners), the New York law examination and/or the MPRE in foreign countries under an Emergency Remote Testing Option at least three times per calendar year during the period of such travel restrictions and for a period of one year thereafter; and it is further

ORDERED, that a new category of New York-qualified attorney is hereby established, namely, an “Attorney Pending Admission under Covid-19 Emergency”, which classification shall afford to individuals who have passed the New York Bar Examination (or, to the extent permitted under New York rules, the Uniform Bar Examination) and New York Law Examination the rights and privileges of a New York-qualified attorney for a period of 365 days after an application (to

be extended during the period of Covid Travel Restrictions upon further application); provided that such attorneys shall not be permitted to practice in their own name but must be employed by, and act under the name of, a lawyer or law firm that undertakes to ensure the compliance by such “Pending Admission” attorneys with the New York Code of Professional Conduct, including without limitation its Rules 5.1, 5.2 and 5.3; and it is further

ORDERED, that this Order shall be retroactively effective as of January 31, 2020, the date of the federal declaration of the coronavirus emergency, so as to grant relief to any applicant who failed to take and pass the MPRE examination during the three years after passing the New York Bar Examination (or Uniform Bar Examination) and New York Law Examination on or after January 31, 2017; and it is further

ORDERED, that upon satisfying the Rules of this Court in all other respects, failure to comply with the above referenced provisions shall not bar any such applicant from being admitted to practice New York law.