



SHANAHAN LAW GROUP, PLLC

TOUGH • SMART • PROVEN

July 16, 2020

(U.S. Mail & E-Mail)

(Roy.Cooper@nc.gov; William.McKinney@nc.gov)

The Honorable Governor Roy Cooper
c/o William McKinney, Legal Counsel
North Carolina Office of the Governor
20301 Mail Service Center
Raleigh, NC 27699-0301

***Re: Urgent Request for Clarity for Executive Order 151
NC Board of Law Examiners & Lack of Oversight for "High-Risk" Event***

Dear Governor Cooper:

We have been retained by Ms. Britni Prybol, a 2020 graduate of Campbell University Norman Adrian Wiggins School of Law and an applicant to sit for the North Carolina Bar Examination ("Bar Exam"), which is currently scheduled for July 28 & 29, 2020. Most jurisdictions have responded to the COVID-19 pandemic by cancelling or offering alternatives to an in-person examination; however, the North Carolina Board of Law Examiners ("NCBLE") have refused to offer applicants any alternative to an examination with over 750 other applicants and personnel when your office just reported ongoing concerns about the increasing new daily cases of COVID-19 in North Carolina.

Earlier today, Chief Justice Beasley reported that she does not have the authority to direct the NCBLE and that she had been advised that the NCBLE is consulting with the North Carolina Department of Health and Human Services ("NCDHHS"). While I do not question that the Chief Justice faithfully communicated what she has been told by the NCBLE, public records show that the NCBLE did not communicate with NCDHHS until two weeks ago: June 30, 2020. In every other context, you have exercised your powers as Governor of North Carolina to direct government agencies, businesses, and families to limit or stop their activities and slow the spread of COVID-19. The NCBLE created a substantial health risk by waiting until the last minute to consult with NCDHHS and, as Governor, you have a duty to confront this in your Executive Orders, which you silently updated through Executive Order 151 late this afternoon. We urgently need your action.

Ms. Prybol is among the nearly two-hundred applicants to the Bar Exam who, with the support of many more professors and professionals, implored your office to provide guidance on and relief from the NCBLE's unclear plan to hold an in-person two-day event for which over 750 individuals will travel from all parts of the State and elsewhere. We understand that other applicants share our client's concerns; however, they did not sign the letter to you, fearing retaliation from the NCBLE.

Although your office acknowledged the pleas from applicants and concerned citizens on July 7, 2020, we are unaware of any formal response from your office. This is particularly

troubling, as we received records from the North Carolina Department of Health and Human Services (“NCDHHS”) late yesterday indicating that – while NCBLE was in contact with your legal counsel, William McKinney – the NCBLE did not contact NCDHHS to start planning until June 30, 2020. Although NCBLE’s communications with NCDHHS were sparse, I am enclosing copies of the June 30, 2020 introductory emails that we received from NCDHHS with this letter. Preparing for the Bar Exam with only one month remaining may be typical for applicants, but it is wholly irresponsible for the public officials who decided to hold the exam in-person several months ago. While I understand that neither you nor anyone wants to take responsibility for the crisis that the NCBLE has created, as our courts have recently asked: “[w]ho watches the watchmen?”¹

The NCBLE should have involved NCDHHS long ago in determining whether it could safely administer the Bar Exam this summer. My client is a young mother who has survived cancer. Twice. While Ms. Prybol has persevered through extensive treatment and successfully graduated from law school, her battle with cancer has left her immune system significantly compromised. Due to her disability, Ms. Prybol respectfully requested that she be permitted to take the Bar Exam remotely, which was denied. It is unclear whether the NCBLE is providing Ms. Prybol a reasonable accommodation, but they have offered her a room at a testing site that may not be as densely-populated as the North Carolina State Fairgrounds site.

While you and I can recall the stress of preparing for the Bar Exam to unlock the value of our Juris Doctor degrees, our ability to sit for the Bar Exam was not made contingent on an express assumption of risk that we might get seriously ill or die if the NCBLE inadequately protected test-takers during a “high-risk event” in the middle of a pandemic. Specifically, the documents provided to the applicants by the NCBLE state that: “By proceeding to take the examination, each applicant acknowledges and voluntarily assumes all risk of exposure to or infection with COVID-19 by attending the July 2020 North Carolina bar examination, and the possibility that such exposure or infection may result in personal injury, illness, permanent disability, and death.” While this language resembles a prompt that one might expect on the Bar Exam, it is an unconscionable attempt by the NCBLE to abdicate responsibility for a mass gathering larger than the “super-spreading events” to which your office frequently cite when arguing that struggling businesses should remain shuttered over the past months. This is even more egregious when you stop to consider the fact that NCBLE asked our applicants to assume all of the risks of exposure to COVID-19 before NCBLE spoke to NCDHHS to understand what those risks might be.

Your office has repeatedly told our courts to rely on NCDHHS Secretary Mandy Cohen’s numerous sworn statements as a basis for prohibiting the re-opening of our economy, especially indoor gatherings.² According to Secretary Cohen and your office, one of the biggest dangers for

¹ *Boyce v. North Carolina State Bar*, 258 N.C. App. 567, 579, 814 S.E.2d 127, 135 (2018) (Dietz, J., concurring) (citing Plato, *Republic* 376c-376d; Juvenal, *Satires* 6.347-48).

² See, e.g., *N.C. Bowling Proprietors Ass’n v. Cooper*, Wake County Case No. 2020-CVS-6422, Business Court ECF No. 13 (June 17, 2020); *N.C. Bar & Tavern Ass’n v. Cooper*, Wake County Case No. 2020-CVS-6358, Business Court ECF No. 15 (June 17, 2020); *Talleywhacker, Inc., et al., v. Cooper*, Case No. 5-20-CV-00218-FL D.E. 25-1 (E.D.N.C. June 1, 2020); *Old Am. Fish, Inc., v. Cooper*, Wake County Case No. 2020CVS6036 Business Court ECF No. 9 (June 3, 2020).

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COVID-19 transmission is an indoor space with limited air circulation and large numbers of people in proximity with one another.³ Secretary Cohen has even opined that merely being next to someone for even 10 to 20 minutes can increase the risk of COVID-19 transmission.⁴ Most recently, in *North Carolina Bowling Proprietors Association, Inc. v. Roy A. Cooper, III*, Wake County Case No. 20-CVS-6422, your office argued that allowing bowling alleys to operate “at this time of COVID-19, even with safety precautions offered, presents an immediate danger to public health that undermines the ‘dimmer switch’ approach to re-opening the State’s economy currently in place.”

While I don’t agree that a local bowling alley presents an immediate health crisis for our State, I can only assume that your office is gravely concerned that the Bar Exam will be a “super-spreader” event that prevents our students and teachers from being able to return to class in the Fall. In fact, State Health Director Elizabeth Tilson recently advised against holding the approximately 600-person North Carolina GOP Convention, stating that it “could result in a large number of cases and severely ill people requiring hospitalizations and could jeopardize our ability to move forward in easing restrictions.”⁵

Unlike many businesses that have spent months working with experts to safely resume operations during this pandemic, the NCBLE is proceeding with a plan that was, apparently, set into motion without input from NCDHHS until mere weeks ago. Most other jurisdictions are implementing creative solutions to balance the health, safety, and economic expectations of recent graduates; however, the NCBLE is using a strained interpretation of your executive order to ignore outside input and require our graduates to chose between their health and their legal careers.

Since the NCBLE is relying on your Executive Orders to hold a mass gathering in blatant violation of NCDHHS and other health guidelines, they acknowledge your authority to limit their ill-informed decision to have hundreds of recent graduates sit in the same room for two days and risk infection, or worse. There are many options that have been successfully implemented in other jurisdictions. Unfortunately, the NCBLE has never been held accountable, as this crisis demonstrates. Now is the time to act.

Sincerely,

SHANAHAN LAW GROUP, PLLC


Kieran J. Shanahan

Enclosures

³ See, e.g., *Talleywhacker, Inc.*, D.E. 25-1, p. 13.

⁴ See, e.g., *id.* at p.8.

⁵ *North Carolina GOP Won't Hold In-Person Annual Convention*, Spectrum News (Jun. 30, 2020, 10:51 P.M.), <https://spectrumlocalnews.com/nc/charlotte/news/2020/07/01/north-carolina-gop-won-t-hold-in-person-annual-convention>.