

## Let them cheat

By Matthew Stanford and Brandon V. Stracener | November 30, 2021

New lawyers are subjected to rigorous vetting and testing because integrity is a core legal profession value. That's why initial integrity checks like moral character evaluations serve important filtering and consumer safety goals. But the modern trend of using software to monitor remote bar examination takers poses problems: it captures so many false positives that everyone appears to be cheating. Worse, accused examinees must prove that they were *not* cheating. That perverts the integrity values the system is intended to preserve and to instill in new lawyers. It's time to abandon monitoring software and the traditional closed-book bar examination model itself.

Our context is taking recent California and Arizona bar examinations. Both required applicants to install software that accesses their computer's microphone and camera to monitor every movement and sound to detect cheating. The Arizona exam resulted in an ominous letter from the state's high court with an accusation of violating the code of conduct by using a phone, demanding a "response and explanation" within a week.

That accusation was false and easily proved to be so after examining the video record. And it was absurd, coming as it did after passing a professional responsibility class, passing the Multistate Professional Responsibility Exam, clearing a character and fitness investigation, remaining current on continuing legal education obligations, and taking multiple oaths both as a lawyer and a judicial law clerk. The worst part is that rebutting the accusation requires proving a negative — reversing the burden of proof and presuming guilt rather than innocence.

Such false accusations are a common experience. Several news outlets have already criticized proctoring software's overinclusive criteria for flagging suspected cheaters, including a [Bloomberg article](#) that observed: "In California, the exam 'flagged' more than 3,000 of the 9,000 test takers for problems, and after a closer look, the bar sent 429 of those people 'Chapter 6' notices that they were being investigated for possible rule breaking. In the end, only 47 test-takers were implicated."

All this is unnecessary. The most common types of cheating on the bar exam [remain quite analog](#): copying from nearby test-takers, sneaking cheat sheets into testing facilities, and examinee impersonation. (Cf. *Suits*.) This reality makes remote exams already well-suited to preventing cheating because they isolate test-takers. The monitoring software serves its primary purpose merely by confirming examinee identities, ensuring examinees remain seated throughout each test segment, and allowing only one examinee per IP address. All that's needed is a means to ensure that test-takers stay isolated, but the current monitoring software goes far beyond that.

Add to that the scope and time constraints of the exam itself — there simply isn't time to prepare a cheat sheet for every possible exam topic, and attempting to do that is called *studying*. In the first half of the Uniform Bar Exam's first day, for example, examinees complete six 30-minute essays, each of which can test on any of twelve broad subjects. Thirty minutes is barely enough time to write a coherent answer about a well-known subject; an applicant who wastes a third of

their time leafing through their torts outline will fail anyway. That suffices to filter out cheaters, or at least those who can be pursued without accusing ten times as many innocent examinees.

Most concerns about bar exam cheating are irrelevant to testing practical ability. Attorneys rarely need to remember all 66 exceptions to the hearsay rule on the fly — on the contrary, it's usually malpractice to *not* do research. (And yes, we had to look up how many hearsay exceptions there are.) Protecting the public does not require memorization exercises. It certainly doesn't require wrongly accusing a host of honest new attorneys.

Much like the practice of law itself, ethical lawyering is more about developing and maintaining a mindset, and less about memorizing rules. Every ABA-accredited law school conditions graduation on taking a professional responsibility course, and every bar licensee (except those in Wisconsin and Puerto Rico) must pass the Multistate Professional Responsibility Examination and clear a character and fitness investigation. California always includes a professional responsibility essay on its bar exam. Even after gaining admission to the bar, all licensed attorneys must take continuing legal education courses in ethics and professional responsibility. With so many waypoints for ethical checks and training, reducing just one of these checks to an appropriate scope will not collapse a house of cards — especially when that check is so ineffective that it can't tell an honest person from a window.

The underlying concern here is that admitting dishonest people to the bar risks undermining public confidence in our legal system. That's a worthy goal, and the bar examination is an important part of the process. But no system will exclude every cheater, and over-compensating by casting the net so wide as to falsely accuse honest applicants en masse and forcing them to prove their innocence reverses basic due process principles and starts legal careers on the wrong foot. These costs of preemptive enforcement outweigh any minimal benefits catching a few, if any, actual cheaters. And this preemptive enforcement model teaches new lawyers the opposite of the lessons they should be absorbing: that research is responsible and that process should facilitate justice. This profession is about pursuing due process, not about being pursued by its absence.

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