



July 13, 2020

Dean Richard Bierschbach  
Dean's Office  
Wayne State University Law School  
471 W. Palmer Street  
Detroit, Michigan 48202

*Sent via Electronic Mail (rbierschbach@wayne.edu)*

Dear Dean Bierschbach:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is concerned by reports that Wayne State University Law School recently sent an email to the school's 2020 graduating class suggesting that students should avoid advocacy for, in light of the ongoing pandemic, a diploma privilege option in lieu of taking the Michigan Bar Examination, lest they jeopardize their ability to pass their character and fitness screening.

The published excerpt of the email in question reads:

[W]hile you have every right to criticize the bar exam, the Board of Law Examiners, or the State Bar of Michigan online, it may not be a smart strategy for passing Character & Fitness with ease.

This is an extremely frustrating and stressful time for everyone, and I understand wanting to air concerns and thoughts through the only means we have to socialize anymore – i.e., social media. But, please be careful of what you say and remember that your

comments – even if made on a completely private page – can still be easily copied and shared with others.<sup>1</sup>

This admonition is troubling for a number of reasons. First, and foremost, it sends the message to students that the law school’s administration has reason to believe that criticism of the State Bar of Michigan may yield consequences for a law student’s eventual ability to obtain a license to practice law. Even if that belief is unfounded, its perpetuation by a law school administrator will have a chilling effect on students’ discussions on matters of public health and policy that bear directly upon them. That inhibition of discourse is an unacceptable result at an institution of higher education, particularly one that prepares its students to be zealous advocates for others.

Second, if that belief has some basis, it raises alarming implications about the state of law students’ First Amendment rights. The State Bar of Michigan requires each applicant to obtain a letter from their law school certifying that there are “no facts reflected” within the “knowledge” of the law school that would “negate the conclusion” that the applicant has the “requisite character and fitness” to practice law.<sup>2</sup> If it is the law school’s sincere belief that advocacy on diploma privilege is an issue that may be of concern to character and fitness examiners, it would presumably have a duty to describe that advocacy in response to an applicant’s certification request.

However, as public institutions, Wayne State and the State Bar of Michigan are bound by the First Amendment to respect students’ expressive rights.<sup>3</sup> Accordingly, the actions of the Law School and State Bar in ascertaining a student’s character and fitness must be consistent with the First Amendment. As the Supreme Court explained in holding unconstitutional questions about whether a bar applicant had ever been a member of the Communist Party, the First Amendment “prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs.”<sup>4</sup> That remains true whether the advocacy is, as in the aforementioned case, for the overthrow of the United States Government or merely for a waiver of the bar examination.

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<sup>1</sup> Joe Patrice, *Law School Implies Diploma Privilege Advocates Could Get Dinged On Character & Fitness*, ABOVE THE LAW, July 6, 2020, <https://abovethelaw.com/2020/07/law-school-implies-diploma-privilege-advocates-could-get-dinged-on-character-fitness/>.

<sup>2</sup> STATE BAR OF MICH., MICHIGAN BAR APPLICANT REQUEST FOR LAW SCHOOL CHARACTER & FITNESS CERTIFICATION (rev. Jan. 8, 2014), <https://www.michbar.org/file/professional/pdfs/f11.pdf>.

<sup>3</sup> *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted).

<sup>4</sup> *Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971).

Professional codes, such as the ones imposed on lawyers by the State Bar of Michigan and the Michigan Board of Law Examiners, may validly regulate professional conduct.<sup>5</sup> The Law School arguably has a duty to ready law students to adhere to these kinds of professional mandates. However, such requirements may not be read to provide public university administrators or bar officials with *carte blanche* to deem expression on matters of public concern to be “unprofessional” and therefore a basis to deny certification or licensure. A contrary rule would impose an orthodoxy at Wayne State and create a chilling effect over student speech that would render discussions impermissibly one-sided: students could praise the State Bar’s decision, but dissent would yield professional consequences meted out by the state. This kind of censorship is not only unlawful at a public institution like Wayne State, but is also a particularly curious imposition at a school of law, where constructive engagement with disagreement is not only *de rigeur*, but a compulsory aspect of training to be an advocate.

Contrary to the Law School’s implication that debate over diploma privilege might violate professional standards, the State Bar has enshrined protections for precisely this kind of zealous advocacy. The State Bar notes that the Character and Fitness is an inquiry limited to “whether an applicant possesses the ‘good moral character’ needed to practice law.”<sup>6</sup>

Applicants are examined based on a number of factors, such as past criminal conduct, academic misconduct, violations of court orders, employment misconduct, and drug and alcohol dependency. Political statements and **opinions are not considered in determining an applicant’s fitness to practice law.**<sup>7</sup>

Additionally, the Michigan Rules of Professional Conduct provide that advocacy intended to improve the legal profession, and even the regulation of the bar itself, is not merely permitted, but strongly *encouraged*:<sup>8</sup>

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education . . . A lawyer should aid the legal

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<sup>5</sup> See, e.g., MICHIGAN RULES OF PROFESSIONAL CONDUCT, MICH. SUP. CT. (last updated Jan. 2, 2020), <https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan%20Rules%20of%20Professional%20Conduct.pdf>.

<sup>6</sup> STATE BAR OF MICHIGAN, BOARD OF LAW EXAMINERS—FREQUENTLY ASKED QUESTIONS: WHAT DOES THE CHARACTER AND FITNESS REVIEW CONSIDER?, <https://www.michbar.org/professional/step2>.

<sup>7</sup> *Id.* (emphasis added.)

<sup>8</sup> Michigan Rules of Professional Conduct, *supra* note 5, at 2–3.

profession in pursuing these objectives and should help the bar regulate itself in the public interest.

The Law School's message to its students threatens to cast a chilling pall over students' participation in the profession they seek to enter, suggesting that students should censor themselves to avoid retaliation by the state. Uncorrected, this misguided and cynical advice will also create an impermissible chilling effect prohibiting not only criticism of Michigan's professional standards for lawyers, but any speech Law School administrators subjectively deem "unprofessional."


FIRE calls on you to publicly clarify that the Law School supports and will actively defend its students' expressive rights. The First Amendment requires it to do so. And, to the extent that your law students hope to improve the regulation of the bar to which they seek admission, such advocacy is not only permitted, but roundly endorsed by Michigan's professional standards governing the state's legal professionals.

We respectfully request receipt of a response to this letter no later than the close of business on Friday, July 17, 2020.

Sincerely,



Alexandria Morey  
Program Officer, Individual Rights Defense Program



Azhar Majeed  
Vice President of Policy Reform  
State Bar of Michigan Bar No. P71739

Cc: M. Roy Wilson, Wayne State University President  
Louis Lessem, Wayne State University Vice President and General Counsel  
Dennis M. Barnes, State Bar of Michigan Board of Commissioners President  
Maribeth Graff, Michigan Board of Law Examiners Executive Director