Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, we're thrilled to have with us Dean Jackie Gardina of the Colleges of Law in Santa Barbara and Ventura, to talk about the history and future of the bar exam. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the law school and early legal career experience, so you'll be the best law student and lawyer you can be. We're the co-creators of the Law School Toolbox, the Bar Exam Toolbox, and the career-related website CareerDicta. Alison also runs The Girl's Guide to Law School. If you enjoy the show, please leave a review or rating on your favorite listening app. And if you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on LawSchoolToolBox.com, and we'd love to hear from you. And with that, let's get started.

Welcome to the Law School Toolbox podcast. I'm your host, Lee Burgess, co-founder of the Law School Toolbox and Bar Exam Toolbox, and today we are thrilled to have with us Dean Jackie Gardina of the Santa Barbara and Ventura Colleges of Law. Dean Gardina is a visionary in legal education, dedicated to making it more accessible and affordable through innovative teaching and learning models. She's also deeply involved in shaping the future of legal licensing in California. Dean Gardina, welcome to the show. Thanks for coming.

Jackie Gardina: Thank you so much for inviting me. I'm excited to be here.

Lee Burgess: We're excited to have you, because who doesn't like talking about the bar exam? Everyone. Everyone loves it, just as much as we do.

Jackie Gardina: If you've already taken it and passed it, I think it's a great topic to discuss.

Lee Burgess: That's true. Fair point, fair point. Okay, before we dive into all the things you have to chat with us about today, could you give us a brief overview on your career path, how you got to where you are today, and then we'll dive into the bar exam?

Jackie Gardina: Sure. So, I, probably like a lot of your listeners were told from a very young age that I should be an attorney, mostly because I liked to say the opposite of whatever anyone else was saying. So, I went to undergrad with the idea that I was going to go to law school, and I did take the LSAT and I did apply to law school, but then started to have second thoughts about whether or not that's really what I wanted or whether I'd just been told that's what I should do. So, I hit "Pause" and I got a job out of undergrad and I ended up instead getting a master's in social work. And I did clinical outpatient therapy with kids and

families for about six years. And during that time, I had an opportunity to be in the courtroom as an expert witness, and I also had the opportunity to help change some laws in the state where I was working, specifically laws affecting children and adult survivors of childhood sexual abuse. And both those experiences really reignited my interest in law school again. And I feel like that delay really helped me better understand who I was and why I wanted to go to law school. And so, it worked well for me to hit "Pause" and do it that way. So I ended up going to law school, and I remember in my personal statement writing about how I was going to use my MSW and my JD together. And then it turns out that's not at all the way my career went. So, I always tell students you need to be prepared for a class igniting your interest, or an opportunity emerging you didn't even know existed, and you end up walking through a door and other doors open. And that's exactly what happened to me. So, I was in law school and I wasn't the top 10%. I didn't grade or write onto Law Review. My first year I was still trying to figure things out, so I really didn't grasp what I was supposed to be doing until my second year and my grades reflected that. I was a middle of the pack person. So, when it came time for career services to talk about potential clerkships, I wasn't in one of the invitation lists. But I was working with a professor as a research assistant and she said, "Why don't you apply to a clerkship?" And I said, "Well, I'm not really clerkship material." And she said, "Well, if you don't apply, you won't get one. And if you apply, you might get one. So why don't you apply?" So I did. And I think in large part because of the letter that she wrote – which she never let me read – I was able to get an interview. And I clerked for Chief Judge William G. Young right out of law school, and then for the First Circuit Court of Appeals, Levin Campbell. Again, opportunities I never even knew about or understood when I went to law school. And then, when I was clerking for Judge Young, he had a room full of nine-year-olds there to visit the court. And he was explaining what lawyers do, and he said, "Lawyers are teachers, that's what we do. We teach clients, we teach juries, we teach judges, we teach legislators." And I thought, "Wow, what a great way to practice law." So I started adjunct teaching in Boston while I was working at Choate Hall & Stewart, and then ended up applying for a full-time job at Vermont Law School, among other places, but ended up at Vermont Law School for about 15 years before I came out here.

Lee Burgess: Well, that was a meandering career path, which are my favorite types of career paths.

Jackie Gardina: Yeah. And that's why I think it's always important for law students to know that whatever you think you want to do, it's likely that your path will have several twists and turns along the way.

Lee Burgess: So, so true. Well, today, we are coming together to talk about the bar exam. And when we were getting together to meet about this podcast, you posed such a great question, which was, "Do you know the history of the bar exam, Lee?" And then I realized my answer was "No", which is a little embarrassing, considering what I do. So, will you please educate me about the bar exam?

Jackie Gardina: Yeah. Well, I mean, obviously the history of the bar exam isn't important to know when you're trying to prepare students for what currently exists.

Lee Burgess: True. Thanks for giving me that little bit of a bonus right there. That was very kind.

Jackie Gardina: Absolutely. But I think understanding the history is also helping to understand what kind of changes are being discussed at the state level now. And I think part of what's driving these conversations was COVID, in part, is the disparities in bar exam performance across socioeconomic status, age, race, ethnicity, etcetera. And a real question of whether or not it's the most effective way to actually figure out who's competent to practice law. So, if you look back at how we have licensed attorneys since the Constitutional Convention or even before that, you'll find that it was done in a lot of very diverse ways, and not with any kind of rigor or necessarily substantive knowledge. When you look back early on, people simply read for the law, worked in a law office, and then local courts and attorneys would interview them. So it was called an "oral bar exam", but it was much more of an interview, like five to 10 minutes, much more based on who you knew and how to get access to the court and the bar, than necessarily what you knew. And that was the case for I'd say most of the 16th century and into the 17th century. And then in the 18th century things started to change. And I don't think that you can untie the bar exam from legal education, because as we know in the United States right now, you don't become eligible to sit for the bar in the majority of states – in fact many of them, except maybe California, Vermont, Tennessee, Massachusetts, where there are state-accredited schools, unless you graduate from an ABA-accredited law school. So, where did that come from? Why did we go from reading for the law, as you can still do in a couple of states, where you just studied and worked in a law office, to requiring people to not just have an undergrad degree, but actually have a graduate degree as well, before they're even eligible to sit for the bar? So, I think it's really difficult to talk about licensing and the bar exam without talking about legal education. I don't know how far you want me to go down that rabbit hole, but the current test didn't really have its iteration until the 1970s. So, there was no MBE until the 1970s. There were written exams. They were often done at the local level, written and graded locally, not just even at the state level, but sometimes court by court or jurisdiction by jurisdiction. And it wasn't until really

the 1920s or '30s that they started to formalize both the educational pathways, and the NCBE was created to try to standardize testing across the United States. But all this gets tied up with also creating a profession that's exclusive. If you look back at the history of the bar exam, at no point was it identified that a particular pathway to licensure was necessarily better for the public, but rather it was better for excluding people that were considered to be undesirable. How do you make it more challenging for people to actually enter the legal profession? You require them to have an undergraduate degree and a graduate degree. That's obviously going to limit dramatically who's going to be able to follow that pathway. And that's true for a number of steps that were taken and the licensing decisions that were made at times when the legal profession was starting to grow and become very diverse, and then the licensing pathways were narrowed and made more difficult to traverse. And so, it's hard to untangle it from the Jim Crow era in the '20s and '30s, and the segregation of higher education at that time. Black and indigenous people weren't getting access to undergrad and graduate school, and so they couldn't ever have access to the legal profession. And so it has a very, I think, challenged history when we think about why we put these licensing pieces in place. And it's important for people to step back and ask the question, what's licensing supposed to achieve? Well, it's supposed to tell us who has minimum competence to practice law to protect the public. And as the bar exam, as it currently consists, is that the best and/or only way to achieve that?

Lee Burgess: Yeah, that's a lot of stuff I didn't know. That's so fascinating. And it makes so much sense when you really sit with it, about all these gateways to the profession and how these stumbling blocks dressed up as this idea of protecting the public end up just being an exclusionary arm of the profession.

Jackie Gardina: Yeah, and I think that the idea about standardized tests was when psychometrics came around and people became really invested in is, "This is going to be a fair way to do it." But there's an underbelly to it that's also about exclusion. I mean, the SAT and the LSAT were created around the same time in the 1940s, late '40s and '50s, when they were really starting to think about, "How can we better tell who has merit?" And as we know, standardized tests have a very, I think, difficult history when it comes to cultural differences, race and ethnic differences, socioeconomic status, and all of that. So, it's hard to untangle it from all of that.

Lee Burgess: Okay, that's a lot. So the bar exam is really loaded. It's got a challenging history. And now we're here in the present day, where there's been a lot of discussion about the effectiveness of the bar exam in assessing lawyer competency, which is what you said was the goal, right? Or the stated goal, whether there was an

underbelly goal; but the stated goal. So, in today's current debate that's happening, do you think it's effective?

Jackie Gardina: Well, I'll give you two things based on my experience in California specifically, but I think it's true in other states as well. In 2015, the executive director of the State Bar of California was invited to a hearing at the Assembly Judiciary Committee, California. She was asked a very specific question: "How did the State of California choose 1440 as the cut score, the passing score in California?" She didn't know. They had been asked that question beforehand and they went back through all of their records. They had absolutely no basis for choosing 1440.

Lee Burgess: This is not a surprise to me. This story does not surprise me, especially because we're going to get to what California is doing right now, but this doesn't surprise me. My bar dollars at work. Okay, here we go. Keep going.

Jackie Gardina: So, there should have been what's called a "standard setting study" that kind of figures out what's the right passing score, because it seems somewhat odd that you can be competent to practice law in New York at a 1330, or a median 1350 across the entire country, but 1390 or 1440 you need to be competent in California. So, what's the basis for that? So, already you're questioning, what's the effectiveness of 1440? The other thing that came up is obviously what we're trying to test is what a new attorney needs to know, understand, and value to be effective and to protect the public. No one had done a practice analysis study, ever, to ask the question, well, what does a new attorney need to know, do, and understand? And are we testing the right things? Because if we're not testing the right things, then we're not actually setting a minimum competence for new attorneys, because we don't actually know what they need to know, do, and value. So, California went about, and that was the California Attorney Practice Analysis Working Group, and also the NCBE partnered with California to do a national job study, so that we'd actually have the information of, are we testing the right subjects, are we identifying the right skills, etcetera. Both those things to me raised questions of, no one really asked the question of, are we testing the right thing and are we setting the right passing score? So, off the bat, I'm already skeptical.

Lee Burgess: Yeah, that story is just really special. I am a child of the 1440 era. I did pass my bar on the first time, but you put so much weight in these numbers because they are held up as, this is what it means to be a lawyer here in California. And now, I was just having a talk with a bar applicant about kind of forum shopping for the right bar around the country, because you can be less competent in one

jurisdiction than in another, which is also a little hard to balance when you start really thinking about it.

Jackie Gardina: Yeah. Well, and even that you defined it as "less competent" rather than just…

Lee Burgess: Fair point.

Jackie Gardina: There's no evidence that person is less competent at all.

Lee Burgess: That's so true, because I know amazing lawyers who have multiple bar exam failures on their resume. So, I know from personal experience, we've all read all of the stories, but we know, all of us know wonderful, brilliant lawyers who have struggled with this test, or who have not been able to practice because they were not able to move past this test.

Jackie Gardina: Yeah, and that's why I think it's important to ask the question, is it the right mechanism to determine who's going to be a skilled, competent, and ethical attorney? Or is there a better or different mechanism that's more inclusive? I mean, even for people with disabilities. The challenges that they have in getting accommodations at the bar exam level makes it really difficult for them to be successful at that stage. Is there a more inclusive way for them to establish competence than needing to sit for a two-day timed, standardized exam?

Lee Burgess: Yeah. And those accommodations can be expensive and time-consuming, and require appeals and all sorts of stuff. So, this all makes me think about how in COVID days, they just changed the passing score. And all of a sudden it was 1390, and now you could pass with this new score. This was all under the idea of it being a bit more inclusive, that's what I remember reading, or creating less barriers to entry in the profession, yet the pass rates didn't really change.

Jackie Gardina: No. And so, 1390 actually had evidence to support it. So that came out of the standard setting study that the State Bar did finally do after they were called out by the Assembly for not knowing why they chose 1440.

Lee Burgess: I'm glad they have an answer to that question now. That makes me feel better.

Jackie Gardina: But I think what's interesting is California Bar applicants will do better than the national average on the MBE. Even my school will meet or exceed the MBE. And the MBE is used for scaling the written portion, so that there's validity to it. So it's always hard for me to understand why we could do so well on the MBE as a

state, and yet have a pass rate that is so dramatically lower than other states using the exact same MBE questions that do more poorly.

Lee Burgess: Well, I mean, thank goodness they're just throwing that MBE out the window, so we can just start with a whole new crop of data. I mean, this just makes it more fun, and terrifying for those whose futures are all wrapped up in this. Okay, so there's a lot here. Where do we even go? So there are some open questions about whether or not this is an effective way to determine minimum competency. It sounds like people have been asking this question, that they did these kind of national studies, and some new stuff has bubbled up out of that. I think the NextGen bar exam is probably what most people have heard of. So, what do you think is coming in the future of the bar exam? We know the NextGen is coming, because they're going to stop giving the MBE at some point, so everyone's going to need to adopt it. So it's coming down the pipe in the next few years. But what's different about these tests, and how is it a reaction to what was being discussed in all of these studies?

Jackie Gardina: Yeah. So first, not every state has...

Lee Burgess: I know they're tripling it out.

Jackie Gardina: ...said that they're going to adopt the NextGen.

Lee Burgess: But I love getting those little... I mean, I have licenses from the NCBE, so I get the little, like, "Flash! Breaking news! Wisconsin..." I'm not sure if Wisconsin has signed on, but every few weeks, I just get a big email, very exciting.

Jackie Gardina: Right, yeah. So, right now California's not, and that's a pretty big loss for the NCBE because of the amount of takers that are in California. Nevada hasn't. They're developing their own kind of exam plus supervised pathway, with the exam portion being able to be completed in law school.

Lee Burgess: Didn't I just see something that they're thinking of licensing the Kaplan questions from California?

Jackie Gardina: Potentially.

Lee Burgess: Yes, interesting.

Jackie Gardina: Yeah.

Lee Burgess: Okay, well, hope they're good questions. We wouldn't know, we haven't seen them, but I hope they're good.

Jackie Gardina: And they have plenty of time to create them, test them, and validate them. So I think we'll be fine by February 2025.

Lee Burgess: Totally. It's October 15th, everyone, that we're recording this, and they have not yet, I think, finished drafting the questions.

Jackie Gardina: Well, the Supreme Court has not yet approved the contract after it went back down to the Committee of Bar Examiners to get approved, and then back up to the Supreme Court. They haven't issued a final decision. I'm assuming they will. But one of the things we asked the State Bar when they were first considering this is, okay, what happens if it turns out they can't create 300 valid, reliable, and fair test questions in less than six months? Will you be able to pivot back to the NCBE and get the MBE? They didn't have a backup plan. It was just Kaplan or nothing.

Lee Burgess: I know, there's no backup plan, because they're going to use these testing centers and they will not allow the multiple-choice questions from the NCBE to be given in this format. Yeah, and they've got these experiments, we'll link to some of our other podcasts on that. So they have to have questions for that. And then they have to have these other questions. And if nobody listening has ever tried to write a multiple-choice question, they're really hard. They're really hard to write! They're really hard to write.

Jackie Gardina: That's why the NCBE does test questions in every bar exam, because they're testing about 25 questions to check it for that fairness, reliability, validity, and all of that. And Kaplan's not going to have any ability to test that. We're not even necessarily going to know the scaling or anything until after the exam is completed, because they have to do all that afterwards.

Lee Burgess: In real time. Which is just what you want to hear when comes to something like this.

Jackie Gardina: I feel so worried for your listeners that are like, "I was going to sit for the February 2025 bar exam."

Lee Burgess: I talk to students about this all the time, and I'm still telling folks if they want to sit, they should sit. I'm sure that you're giving guidance at your school too. It is

all about time, and we also don't have a great idea what July will look like either. And so, I do believe that you have to play the hand that you're dealt. And unfortunately, you're getting dealt this hand, just as students who took that October 2020 exam were dealt a bit of a wild hand too.

Jackie Gardina: Yeah, I think that's a good point. And I think what is really telling about the State Bar's decision to move on this so quickly – they really tout that their primary mission is protecting the public. And we say that the bar exam is supposed to protect the public, but this decision was made entirely based on budgetary resources.

Lee Burgess: I feel like all they complain about is how broke they are. And then they raised our bar fees. I think I got that notice while I was recording some of these podcasts about the choices the Bar were making, and it's not making it easier for me to pay my bar fees. I mean, I will, because what choice do I have if I want to keep my license up and running? But yeah, you're kind of like, "Huh, okay."

Jackie Gardina: Yeah.

Lee Burgess: Yeah. Alright, so we've got the NextGen out there. And in your perspective and the committees and the studies you've been a part of, do you think the NextGen is moving in the right direction? Are we moving towards something that may be a better test of what it means to be competent?

Jackie Gardina: So, I was on the Blue Ribbon Commission for the Future of the California Bar Exam and we did have NCBE presentations on what they thought the NextGen was going to look like, but there wasn't enough information for the committee to feel confident that it could say, "Yes, we should go with NextGen." And I think there was also some backlash about COVID and NCBE's unwillingness to allow for remote exam options and being tied to the NCBE's rules around even having the bar exam more frequently or whatever the case may be. So, I think there was a desire for a little bit more freedom. I could see after the NextGen's been out there for a little bit for states to take a second look at it and say, "How's it working? How's it going?" I think what both the Cal Bar Exam recommendation and NextGen are trying to do is incorporate skills a little bit more effectively into the bar exam. I think one of the things that has been missing is, it's memorization of a large number of rules, many of which you'll forget the moment you leave the bar exam and are not relevant to you in any way. Some of them aren't even good law in the state in which you're going to be practicing. So, it just felt unnecessary, in terms of the memorization and the amount of topics that were being tested. Did they need to be tested in all this? And that

goes back to that question of, what does a new attorney need to do and know? And so, it is trying to use the job analysis study to actually be reflected in the test itself. So, I do think it's a step forward. Whether or not it can effectively test skills, I think is something that they've been working on it for five years, so I think they probably had lots of time to think and develop those kinds of things. But I think that's the big question. We know that legal research is one of the primary skills that attorneys need. It comes out in so many different studies. But it's not something that can be easily tested in a timed environment, with a closed computer.

Lee Burgess: No. I mean, the performance test does it a little bit, but it's not the same as making judgment calls, because I think that's one of the things that is so difficult to ask. It's not, "Can I find the cases?" but, "How do I know if it's good law, or how do I know if I found the most recent case, or is this the best precedent?" I think there are those questions, and how do you test that in a closed universe? That's very tricky.

Jackie Gardina: Yeah, and I think the drafting piece is also tricky, just because drafting a 90-minute answer doesn't necessarily reflect the realities of the kind of research and editing and changes that take place in the practice environment. But I'll be curious to see. They're doing their tests, practice tests around the country, coming up. So, they'll get some information from that and I'm sure they'll make some changes before July 2026.

Lee Burgess: Okay, but wait a minute. So, they're testing these tests before they get them out? They're multiple rounds, not just one a few weeks before the bar?

Jackie Gardina: They're kind of crazy that way. Yeah.

Lee Burgess: It's almost like they have a plan, and they're implementing a plan. Not that everything has happened on time with the NCBE, because they have promised full exams and things that have not come out yet. However, they have at least been working on it for years and they are making progress. And I do know people who have sat for those practice tests and can verify that they are giving practice tests. So, we have seen it. So, outside of the NextGen and whatever California is doing – we'll just talk about that in a few minutes – other states are getting a little more creative. They are creating new paths to licensure without a bar exam. I think Oregon is one of the states that has come up with something pretty quickly. I believe California just rejected this idea. I saw your LinkedIn post about that. Thank you very much for it. Everybody should follow you on LinkedIn. So, what's going on here? Why are some states considering it? Why

does it seem that California is not ready to consider this? Do you think this is really the next wave that's coming, with this idea of a different bar exam?

Jackie Gardina: So, let's talk about alternative pathways to licensure. Obviously when we talked about the history of the bar exam, it didn't exist until 50 years ago in its current iteration. So, there were always alternative pathways to licensure throughout history, so this isn't a new idea. But Wisconsin kept diploma privilege. So, when there used to be diploma privilege in all 50 states, and in fact that was considered the prestige of going to a law school when it wasn't required, you got diploma privilege versus those who studied for the law, who still had to take the written exam. And so, diploma privilege disappeared, but Wisconsin still has diploma privilege. And it offers a nice kind of study ground for, what does it mean not to take the bar exam? Does it protect the public? Does it not protect the public? Are there higher instances of malpractice and ethical issues among those who receive diploma privilege versus those who sat for the bar exam? And the answer to that is "No". So, Wisconsin has been a study for us since diploma privilege existed. New Hampshire has had what they call the Daniel Webster program, which is a very specific set of courses and a program that if you go through it, it's been approved by the State Bar of New Hampshire and the Supreme Court, to actually lead to licensure. You don't have to sit for the bar exam in New Hampshire. And that's been around for decades. And they came and spoke to the Blue Ribbon Commission on the Future of the California Bar Exam. Oregon has just developed what's called a "portfolio bar exam", which is a supervised practice pathway. And then Washington has indicated that it would like to move forward with an alternative pathway. And then Nevada has created a hybrid, which is about a 100-question test followed by supervised practice after law school, in order to kind of meld the two. And I think that'd be interesting. So, when we talk about laboratories of democracy or laboratories of autocracy, depending upon your viewpoint of states right now, I think it's going to offer us some really interesting insights. And we've got smaller states like Wisconsin that has two law schools, or like Oregon that has a limited number of law schools, where they can experiment without the bureaucratic nightmare that it would be for a state like California that has 50 law schools and 10,000 people sitting for the bar. So, there are challenges in California that don't exist in states that are much smaller, but we can learn from them and find out more about how they're working. I think what excites me about it is that right now it feels like the bar exam tail wags the law school curriculum dog, and I am preparing people to sit for a bar exam and not preparing people to practice law. And I would love to set up a curriculum that actually prepares them to practice law. And they'll want to be prepared to practice law because the supervised practice pathway, they're going to have to prove that they've got the skills and the knowledge to be successful and to protect their clients. But right now, we're teaching to a test and to test-taking skills, not necessarily the practice of law.

And students are sometimes loath to load up on courses, "Is this going to help me on the bar? Is this on the bar?" Understandably so. And so, they lose out on opportunities that could be really fulfilling, and also help them develop professionally and personally in more meaningful ways than scoring a 1440.

Lee Burgess: Or a 1390. Haha, they switched it on you.

Jackie Gardina: Yes, they did.

Lee Burgess: Although you should go for the 1440, because then you leap over the 1390 and then you are in the safe zone.

Jackie Gardina: Yes. But I think the experiments that are happening in other states are going to be an interesting lens into, does it become more inclusive? I think in rural states... South Dakota is considering something. You could really get kind of practice in rural states or in rural areas that are legal deserts right now through a supervised practice pathway program. So I think there're benefits on the access to justice side of it, as well as to having a more meaningful entry into the practice of law.

Lee Burgess: Do you think this decision from the California Supreme Court saying that this is not for California right now will have negative ramifications on what's happening around the country, or is at this point everybody looking at California and saying, "You're so big, you have all these law schools, you have all of these lawyers. I can't really compare myself to you right now."

Jackie Gardina: Yeah, I don't think that California is necessarily seen as a leader in innovation…

Lee Burgess: That's shocking. That's shocking to me right now.

Jackie Gardina: …when it comes to the legal profession. So, while I think their decision to jettison the NCBE garnered attention, I don't know that their decision not to move forward with a portfolio bar exam pathway, or at least a pilot of it, is going to necessarily make big waves.

Lee Burgess: Okay. Well, that's good, because I think it's an interesting point that you can practice this in smaller marketplaces. In California's tiny defense – because we've been ragging on the California Bar for most of this podcast episode – we are like a country. We have so many people and so many lawyers that they're trying to manage. It is a very different thing. And for those of you who are

listening to this, who wonder what it's like to take the bar in California – well, you used to go to these huge convention centers and you would just sit with thousands upon thousands of people, and the din of the typing is just... I mean, it's immense. It's a very unique experience. It is very different than the stories I have heard from jurisdictions which just are trying to manage the volume of applicants. So, I'll give California that little bit of credit that they have something very hard. Alright, before we dive into thinking about what law students should be thinking about if you're a 1L or a 2L, I do feel like we have to spend a minute talking about this mess in California, because we've referenced it a number of times. So, as we both know, and anyone who listens to our podcast knows, California has taken a left turn over the summer and said they are not going to use the MBE portion of the bar exam anymore and they hired Kaplan Bar Review to write questions. There's something called the California Bar Experiment, which we are calling the reality TV show of the bar exam, because that sounds like Love Is Blind. That's what they also call it, "experiment". But anyway. Students are welcome to take this, and if they do well enough on this practice test, they may or may not get a score boost, because the California Supreme Court has not made a decision about that as of this recording, and we don't know when they will. So, it's feeling a bit of a mess. It's created a lot of chaos, and chaos just in the people I talk to. And you're, I'm sure, talking to all the other law school deans, who are, I'm sure, displeased with the chaos, because you all want all of your students to be able to become licensed. So, let's start with California law students. We mentioned if you're nervous, we still think you should probably sit for the bar, but what are you telling students about the situation in California?

Jackie Gardina: Yeah, so I think you're right.

Lee Burgess: I think that's the best. I think that's just it. "Yeah" – that's all we got.

Jackie Gardina: I think you're right. Not having their plans and lives derailed because of changes the State Bar is making is definitely something... I work primarily with working adults who have gone to school in the evening and they plan their lives pretty carefully. And waiting nine months instead of... A lot of our students finish in December because it's a three and a half year, so February is a much more common test-taking time. I think what is nervous for those of our faculty who specifically work on bar preparation is, the State Bar of California by law is supposed to give law schools a two-year head start when they make changes to the bar exam. So, we made the argument that, "You didn't give us two years to prepare students for a new bar exam" and they said, "Well, that's not substantively changing. These are going to be MBE-like questions, so therefore it's just almost a formatter or contractor change." But as you pointed out,

writing and preparing multiple-choice questions is very challenging, and doing it within six months is, I think, even more challenging. And doing it well in that timeframe. And not having any practice questions for students to use, is, I think, going to make people go into the exam not necessarily less prepared, but more anxious, because they're not going to be sure they're prepared. And I think that's the hardest thing.

Lee Burgess: Yeah, don't forget California also hired a bar prep company and a test prep company, not a company that writes tests – which I also thought was an interesting choice – that until recently, like recently as of a week or so ago, was still selling California bar prep.

Jackie Gardina: Yeah. And when they wrote that contract, I don't know if you saw when this played out, but it's announced that they wrote the contract and then the NCBE says, "We've got some copyright problems with what you're doing."

Lee Burgess: Yeah, "Copying what we did, I don't know if you all went to law school."

Jackie Gardina: What does MBE mean exactly?

Lee Burgess: Did you take copyrights? I mean, I feel like an IP class, maybe that should be required for folks to have minimum competency.

Jackie Gardina: Yeah. So, when they sent that letter to the State Bar, and then it got worse from there. So, my hope is for those sitting for the February bar exam is that this behind the scenes – well, not so much behind the scenes, but this stuff that is on the front end of preparing for the bar exam, we'll still have a bar exam that is as smoothly running as one can hope. I mean, I think being able to take it remotely will absolutely help, especially with people with disabilities, be able to create the space that they need to be successful. And there could be some upsides to it, but there's so much unknown and it's so nerve-racking for students in preparing for the bar that... So, what if I do 1800 MBE questions that are based off of what we thought the NCBE questions were going to look like? I'm now going to have a different vendor doing questions. And they can't look like the MBE questions, because there's a copyright issue. So, it's a mess.

Lee Burgess: I do think the one tiny thing that students and bar takers can hold on to is, everyone's in the same boat.

Jackie Gardina: Yes.

Lee Burgess: And I think that that was important during those COVID exams too around the country. It's like, yes, this feels rushed, and they moved the exam and you're now taking it at home. But at least everyone is in the same boat. Everyone's just doing the best with the information they have and we all have the same information.

Jackie Gardina: Right, right. I think that's a good point. In fact, I think California students are probably going to be better situated than out-of-state students, simply because they're closer. They'll be able to participate in that November 8th and 9th practice exam more easily than someone from out of state.

Lee Burgess: Yes, that's true. I know, I can't wait to hear about how the experiment goes. I really want like a vlog or something of someone. And that's never going to be allowed, but I feel like it's all been so put together at the last minute and, "What's it going to be like?" I don't know.

Jackie Gardina: I think they also switched... They're not using ExamSoft anymore. ProctorU I think is doing it.

Lee Burgess: I think it's a different one. I actually think they changed it again.

Jackie Gardina: Is it?

Lee Burgess: I think so.

Jackie Gardina: Oh, okay.

Lee Burgess: Okay, we'll put it in the show notes. I know it's Meazure Learning. That's what it is. But with a Z, like Meazure Learning, out of Atlanta.

Jackie Gardina: Yeah, which is the corporate name that houses ProctorU.

Lee Burgess: Oh, see, I didn't know that.

Jackie Gardina: If you go in Google, you'll see that ProctorU is within it as one of its divisions.

Lee Burgess: Okay.

Jackie Gardina: Yeah. And I know from schools that have used ProctorU that they haven't been satisfied, and in fact have exited the contract early because of their dissatisfaction. So, I feel like I really need to be more positive, because...

Lee Burgess: We're all in the same boat. We're going to get through it together, we're going to be here. But yes, exam software has been known to fail. And trying a new exam software is tricky, but we're all going to learn how to try to manage it and do all of our practice tests that we assume they'll let us do to log in. I think there is an honesty about it of just like, this is a mess. Life can be messy, and as a lawyer, you've got to pivot and make the best of the situation you've got. This is what you're being dealt. And lawyers love to tell bar stories, right? "Oh, when I took the bar exam..." Think about the bar story you're going to have.

Jackie Gardina: I do hope that if there are issues, that people are not going to be required to pay for a July bar exam. They've raised the prices for the bar applicants as well, so the cost of failing the first time is going to be even more significant. And if it's the result of just a bad set of circumstances, I really hope the State Bar respects that and allows the retake to happen for free.

Lee Burgess: Yeah, I think that's a really good idea. Okay, enough with California. We could talk about California forever, and we're just going to will something positive to happen. I mean, it may not, but we're going to send out some positive energy. So, I'm a 1L or a 2L and I've made it to this point in the podcast, and I'm getting a little nervous. I'm wondering to myself, what if I don't know what bar exam I should even be studying for? Because I think there are a lot of law students in the country right now who are not sure, will they be taking the NextGen, will they be doing one of these new alternative paths to licensure, will they be doing some sort of hybrid, will they still have the UBE or parts of the UBE? So, how do you think law students should kind of look at the future?

Jackie Gardina: It's really interesting, because we've been having this conversation about California's February bar exam and the uncertainty around it, and I think a lot of the same thinking about what the bar exam is going to be in the future when I graduate and I'm ready to get licensed carries with it the same kind of ideas. And even that we're having to have this conversation. So, it seems like if it's about testing for minimum competence, and legal education is geared towards minimum competence, then it doesn't matter what the licensing scheme is – students should be prepared to take it. But It's just, for me, another example of why the bar exam is not an adequate measure or an appropriate measure for competence. But putting that aside, I tell students, "I don't care what your GPA is. And you just have to pass the bar exam, you don't have to get the highest score on it. I want you to exit law school skilled, competent, and ethical." And I

put an emphasis on ethical. So, I really think students should prepare for the profession, and in preparing for the profession, they'll develop the foundational skills that they need and can build on to prepare for the bar exam. I mean, what we know right now is, often students take only the bar exam prep course and can be successful on the bar. We know people have not gone to law school, taken a bar exam prep course, sat for the bar exam and passed. So, it's not necessarily that it reflects everything that you did in law school, but it's about spending that time, that energy, and that effort post-graduate to really put the time into studying for whatever it is you're going to be doing.

Lee Burgess: Yeah, I think that's so true. And there're so many discussions about what you should be taking in law school, and I'm sure many 1Ls are very angsty about that. I really do believe that you should think about what kind of lawyer you should be. I am of the camp that I think that if you're going to hold yourself out as a lawyer, you should have some basic understandings of law that comes up in everyday life. And then I also think you really want to engage in the classes that are going to help you be that great practitioner, engage with the professors that really excite you. I took some classes that were on some really different topics, not at all what my academic interests were, but I learned the most from those professors and the research I did in that. And so, that is really who made me the lawyer I was when I was practicing. And I think that keeping an open mind and not getting too tied up in this, "Should I take Trusts, or should I take Wills, or should I take this?" I think you've got to think about the lawyer you want to be and let that help guide you. And talk to the deans. The schools are on the front lines, they know what is going on the most in the jurisdictions where their students go. So, just make sure you read your school emails, which I feel like doesn't always happen. So I'm just going to put a plug out for their deans sending emails, and your bar offices that I know are sending emails. You should read them and respond to them and go to their workshops, because they're the ones who are going to help make sure that you are as prepared as you can be for whatever comes down the pipe. And who knows, maybe next year you can be back and we'll have a whole new conversation, because who knows at this point?

Jackie Gardina: Right. Well, I think the other advice I would give about courses in school is, law school is probably the end of your education path. Some people might go on for an LLM or might do something else, but for most people it's going to be the last time when they're in school. It's the last time you're going to be able to sit around and think just really big thoughts. So, I took Gender in the Law, and I was able to sit and think about things that weren't necessarily going to be part of my practice skill set. But boy, did it really train my brain to challenge myself, to think outside the box, to understand systems and how they work or don't work,

so that I could challenge things on the outside in a much better way. So, take something that excites you, not just because it's on the bar exam, but because you want to learn more about it.

Lee Burgess: Yeah. Mine was Bioethics, was what they called the class, but we joked that it was Grey's Anatomy, because it was a Friday morning class and Grey's Anatomy was on Thursday night. And we basically would talk about whatever legal crisis was reflected in Grey's Anatomy. But Professor Adler, I still talk about this class all these years later. I don't think he listens to my podcast, and that's okay. But the paper I wrote for that class stayed with me, the research and the conversations and the real-world applications of the law on everyday life. I think those are really powerful lessons.

Jackie Gardina: Absolutely.

Lee Burgess: So, all is not lost. There is so much to learn. It's still a great profession. We need some really good lawyers out there, clearly. So, we need folks to go to law school and become licensed, so you can be the advocates that we need. Well, Dean Gardina, thank you so much for sharing your insights with us today. Your perspective on the evolution of the bar exam and legal licensing has really been invaluable. I've learned a lot, which is humbling to say. But before we wrap up, how can students learn more about your work in scholarship? Like I said, you're posting stuff on LinkedIn – I learned from it. So, other than LinkedIn.

Jackie Gardina: Oh, I appreciate that. So, my scholarship has been limited in the last eight years since I came to the Colleges of Law, but you could certainly look me up on Westlaw, my work is in there. I did a lot of work on LGBTQ research, as it intersected. I was involved with the "Don't Ask, Don't Tell" repeal effort at the time that it was going on. I feel very fortunate to have been a part of that. I have some op eds, Washington Post, I have several things in the Huffington Post if you want to go back and look those up. But most of my work right now has been centered on the work that I'm doing at Colleges of Law to improve student outcomes and student success. And I said law school was the end of the line for many, but I went on and got an EDD in higher education management and wrote a dissertation that you might be able to find out there as well. But it was on innovative curriculum.

Lee Burgess: Oh, very cool. Well, amazing. To our listeners, thank you for tuning in. If you found this conversation helpful, please don't forget to subscribe and leave us a review. For more resources on law school success and bar exam preparation,

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RESOURCES:

LinkedIn: Jackie Gardina
NextGen bar exam
California Bar Exam Experiment
Kaplan
Meazure Learning
Bar Exam Toolbox Podcast Episode 277: California Is Outsourcing the Bar Exam to Kaplan?!?
The Future of the Bar Exam: What to Expect with the NextGen Exam