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COURT OF APPEALS

STATE OF NEW YORK

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UNIFORM BAR EXAM PUBLIC HEARING

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50 East Avenue  
Rochester, New York 14604  
February 26, 2015

Panel Members:

HONORABLE JENNY RIVERA

Associate Judge, New York Court of Appeals

DIANE BOSSE, ESQ.

Chair, New York State Board of Law Examiners

SEYMOUR JAMES, JR., ESQ.

Attorney-in-Chief, The Legal Aid Society of  
New York City

HANNAH ARTERIAN, ESQ.

Dean, Syracuse University College of Law

HON. E. LEO MILONAS

New York State Board of Law Examiners

Reported by: Joony Lomenzo, RPR, CRR

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Appearances:

CHRISTOPHER JENNISON

2L, Syracuse College of Law; Second Circuit  
Governor, ABA Law Student Division

HON. REBECCA WHITE BERCH

Justice, Arizona Supreme Court

GREGORY G. MURPHY, ESQ.

Vice Chair of the ABA Council of the Section of  
Legal Education and Mission to the Bar

JUSTIN L. VIGDOR, ESQ.

Member, New York State Uniform Law Commissioners

DAVID SCHRAVER, ESQ.

Immediate Past President of the New York State Bar  
Association

1                   HON. RIVERA: Good afternoon. Welcome to  
2 this public hearing of the Advisory Committee,  
3 established by New York State Court of Appeals Chief  
4 Judge Jonathan Lippman to study New York's proposed  
5 adoption of the essay component of the Uniform Bar  
6 Examination.

7                   I'm Associate Judge Jenny Rivera of the Court  
8 of Appeals and Chair of this committee.

9                   Last year Chief Judge Lippman submitted for  
10 public comment a proposal from the New York State  
11 Board of Law Examiners to adopt the entirety of the  
12 Uniform Bar Examination, commonly referred to as the  
13 UBE, and replace the essay component of the current  
14 New York State bar exam with the UBE's multistate  
15 essay examination.

16                   The UBE is prepared and scored by the  
17 National Conference of Bar Examiners, the same  
18 entity that currently prepares and administers other  
19 exams required for admission to the New York State  
20 Bar, specifically the Multistate Bar Exam, commonly  
21 referred to as the MBE.

22                   The proposal also includes adoption of a New  
23 York Law Examination, the NYLE, consisting of fifty  
24 New York law specific multiple choice questions.  
25 This test would ensure proper evaluation of New York

1 law not otherwise fully tested on the UBE.

2 Based on several comments and requests for  
3 extended time for consideration of the proposal, in  
4 November of last year Chief Judge Lippman appointed  
5 this Advisory Committee to study and prepare a  
6 report for the Court's consideration in early 2015  
7 on the proposed adoption and implementation of the  
8 UBE and NYLE.

9 The committee consists of representatives of  
10 law schools, the judiciary, the State Board of Law  
11 Examiners and the bar. Several members of the  
12 committee are here with me today.

13 So we have to my right the Honorable E. Leo  
14 Milonas, former presiding justice of the First  
15 Department and current partner at Pillsbury Winthrop  
16 Shaw Pittman, and a member of the New York State  
17 Board of Law Examiners.

18 To my left is Dianne Bosse, Chair of the New  
19 York State Board of Law Examiners.

20 To her left, Seymour James, Jr.,  
21 Attorney-in-Chief of the Legal Aid Society of New  
22 York City and past president of the New York State  
23 bar.

24 And all the way to my right, Hannah Arterian,  
25 Dean of Syracuse University College of Law.

1           Each member of our committee has a  
2           well-deserved reputation for excellence and brings a  
3           wealth of knowledge concerning matters involving the  
4           proper licensure and preparation of New York State  
5           lawyers and we are really, really pleased to have  
6           them working on this committee, and I on behalf of  
7           the chief judge and the rest of the Court of Appeals  
8           again thank them for their service and their work on  
9           this committee.

10           As part of our mandate the committee  
11           considers comments on the proposal from interested  
12           individuals, organizations and entities, and as part  
13           of our outreach to the legal profession and broader  
14           community the committee strives to communicate by  
15           providing information about the current New York  
16           State bar examination and the details of the  
17           proposed adoption of the UBE and the New York law  
18           exam. In furtherance of our mandate we are hosting  
19           a series of public hearings across the state to  
20           receive and consider testimony from members within  
21           our profession.

22           Today is our third public hearing and the  
23           hearing will proceed as follows: Each person  
24           testifying has a preset time to speak uninterrupted,  
25           which will be followed by brief questions from

1 members of the committee.

2 We begin today with Christopher Jennison, a  
3 second-year law student from Syracuse College of Law  
4 and the Second Circuit governor of the ABA Law  
5 Student Division. We're very pleased to have you  
6 here. Thank you.

7 MR. JENNISON: Thank you.

8 HON. RIVERA: Thank you for coming here  
9 today. Mr. Jennison.

10 MR. JENNISON: Good afternoon. Thank you for  
11 allowing me to speak today. Adopting the Uniform  
12 Bar Exam is important to New York State, and  
13 carefully studying applications and adopting the  
14 exam is essential.

15 As I said, my name is Christopher Jennison,  
16 and I am a second year student at Syracuse  
17 University College of Law. Even though I am not  
18 reflecting official policy of the American Bar  
19 Association, I would like to note that I am  
20 currently the Second Circuit governor of the ABA's  
21 Law Student Division, where I represent all New York  
22 law students in ABA related matters.

23 I also serve on the Law Student Division  
24 Board of Governors, which is composed of  
25 twenty-three law students of varying geographic and

1 demographic backgrounds, each of whom are elected by  
2 our approximately thirty-five thousand law student  
3 members. It is the task of this group to create and  
4 suggest policy and initiatives on behalf of law  
5 students nationally.

6 After speaking to many law students within  
7 New York and elsewhere on the subject I drafted a  
8 resolution that urged all jurisdictions to  
9 expeditiously adopt the Uniform Bar Exam. In  
10 October 2014 the resolution passed unanimously in  
11 the ABA Law Student Division Board of Governors.

12 I urge New York to adopt the Uniform Bar Exam  
13 as soon as possible. New York's preeminence in the  
14 legal field requires that this committee and this  
15 judiciary consider not only implications in New York  
16 of current attorneys, but implications for the  
17 entire legal profession, including future attorneys.

18 In August 2002 the ABA's Commission on  
19 Multi-Jurisdictional Practice found that no -- found  
20 that geography no longer dictates the substantive  
21 law a lawyer practices, nor the location which that  
22 practice takes place. That was thirteen years ago.  
23 The need for a portable law license for  
24 multi-jurisdictional practice has only grown.

25 Though I currently attend law school in New

1           York, I grew up in Maryland and attended graduate  
2           school at University of Pennsylvania. As you know,  
3           most jurisdictions require an individual to have  
4           practiced for more than five years before admission  
5           through motion. Even still, as a result of  
6           reciprocity rules, admission after five years isn't  
7           guaranteed.

8                         New York is not a reciprocal state with  
9           Maryland, where my family resides, and as such I  
10          couldn't move for admission after five years of  
11          practice in New York. As a result of this tangled  
12          web, and as Chief Judge Lippman has noted, law  
13          students who take the exam in one state, such as New  
14          York, but must move to another state for employment  
15          or other reasons must study for, pay for, wait for,  
16          and take multiple bar exams with uncertain results.

17                        Judge Lippman continues saying the employment  
18          rate for fresh law graduates has fallen for the  
19          sixth year in a row and dependable avenues of  
20          postgraduate employment have continued to erode in  
21          the face of economic pressures.

22                        While I may have a preference and idea of  
23          where I hope to practice after law school, the  
24          reality for law students today is that we go where  
25          the market demands or suffer from decreased job

1           prospects. Administering duplicative exams serves  
2           to increase the expense of a test taken mostly by  
3           recent law school graduates, already saddled with  
4           student loans, facing poor hiring prospects.  
5           Adopting the Uniform Bar Exam allows current law  
6           students and future lawyers the flexibility to go  
7           where their circumstances dictate.

8                        I understand the desire to protect the value  
9           of a New York State law license and ultimately to  
10          protect clients. The UBE allows each state to set  
11          the passing score for their own jurisdiction. In  
12          the current proposal New York would set the passing  
13          score at two sixty-six, a score lower than ten of  
14          the fourteen current UBE jurisdictions.

15                      I understand the need to maintain the quality  
16          of attorneys in New York. I really do. If that is  
17          the concern, New York has flexibility to set the  
18          passing score at two seventy-six, as in Colorado;  
19          two seventy-three, as in Arizona; or two eighty, as  
20          in Idaho. Setting a higher pass score than other  
21          Uniform Bar Exam jurisdictions would allow those who  
22          sit for and pass the UBE to transfer their scores  
23          elsewhere. Through a higher pass score, a state  
24          specific multiple choice component and continuing  
25          legal education, New York can maintain rigorous

1 licensure requirements.

2 The adoption of the UBE in New York would set  
3 the legal profession on a course toward a uniform  
4 licensing structure while maintaining attorney  
5 quality. At the same time it would also provide  
6 better options for law students who face an  
7 unprecedented legal employment market.

8 I urge this committee and this judiciary as a  
9 whole to consider the benefits of the UBE for  
10 current and future law Students, and to adopt the  
11 UBE as quickly as possible.

12 Thank you for your time.

13 HON. RIVERA: Thank you so much. Thank you  
14 for both your testimony this afternoon and for your  
15 written testimony. It's very helpful and very  
16 thoughtful.

17 I wanted to ask you about -- you had spoken  
18 about the UBE, about the proposal to include the New  
19 York Law Examination and what comments you may have  
20 on the benefits or the disadvantages of doing so.

21 At the moment there have been comments that  
22 if we do indeed adopt this proposal including the  
23 New York Law Exam that we also consider allowing  
24 students to take the New York Law Exam portion on  
25 additional occasions other than just the July and

1 February administration so that there's greater  
2 opportunity --

3 MR. JENNISON: Sure.

4 HON. RIVERA: -- to focus on those New York  
5 specific questions.

6 I was wondering if you had had an opportunity  
7 to think about that --

8 MR. JENNISON: Yes. We --

9 HON. RIVERA: -- and your own thoughts about  
10 decoupling the New York Law Exam from the February  
11 and July administrations.

12 MR. JENNISON: I will say that in our board  
13 meeting for the Law Student Division in October we  
14 did discuss the New York Law Examination and there  
15 was concern about the fact that it was only fifty  
16 questions and whether that really substantively  
17 tests the specifics of New York State law or if any  
18 other jurisdiction adopted a similar measure.

19 That being said, the whole board was very in  
20 favor of the fact that at least a proposal was  
21 suggested that it would be offered two other times a  
22 year because that does allow the flexibility to go  
23 to those other jurisdictions and if other  
24 jurisdictions adopt a state specific component we  
25 would hope that they would also allow that test --

1 offer that test more than just twice a year.

2 HON. RIVERA: Thank you. Any other  
3 questions?

4 MR. MILONAS: When would you think it would  
5 be an appropriate time if we did implement the UBE  
6 to do it?

7 MR. JENNISON: As I said in my comments, as  
8 the law student division has said in our resolution,  
9 we believe it should be adopted as expeditiously as  
10 possible.

11 I'm currently a second year law student at  
12 Syracuse University, and I believe that I and my  
13 classmates would be prepared to take it should it be  
14 implemented by the time we are studying for the bar,  
15 but that's obviously the prerogative of the  
16 judiciary.

17 MR. MILONAS: Minus the impact on studying  
18 for the exam, do you need notice? Do the students  
19 need notice of some kind? What kind of period do  
20 you think is appropriate?

21 MR. JENNISON: Sure. I believe it would be  
22 appropriate to implement for 2016, for July 2016  
23 when -- pardon me?

24 MR. MILONAS: Which?

25 MR. JENNISON: For July 2016. There is going

1 to be a concern for students or potential students  
2 regardless of when it's implemented as to whether  
3 the school or the bar prep companies are going to be  
4 prepared for it.

5 (Court reporter interruption.)

6 MR. MILONAS: There's not a reporter in the  
7 Appellate Division, but there's a reporter here  
8 today.

9 MR. JENNISON: There is going to be a concern  
10 for law students who are currently in law school or  
11 prospective law students or law students heading  
12 there in the fall regardless of when the UBE may be  
13 adopted that their school and the bar prep companies  
14 will adequately prepare them, but I believe that the  
15 schools and the bar prep companies will adequately  
16 prepare them regardless of when it's implemented.

17 MR. MILONAS: That's their business.

18 MR. JENNISON: It is.

19 MR. JAMES: That really -- Judge Milonas  
20 asked the question I was going to pose.

21 MS. ARTERIAN: I have ome brief follow-up on  
22 that because you represent all the law students in  
23 New York State who are members of the law student  
24 division as well as being on the board of governors.

25 We've had and the department has had some of

1 the comments any way. You may have heard some of  
2 the testimony. There were concerns expressed that  
3 the law schools would not be able to adjust for  
4 their -- in their curriculum so that they could be  
5 appropriate in their instruction on the students if  
6 it was moved away, if the exam changed.

7 Either from your own experience or what  
8 you've heard from other law students, do you have  
9 any thoughts about that? We've heard it might  
10 take -- that some schools feel it would take three  
11 years to change their curriculum.

12 MR. JENNISON: Sure. And from my own  
13 experience I would say Syracuse University has a DC  
14 program. And so I did that this past fall. So I  
15 was removed from the traditional academic curriculum  
16 first semester.

17 And to be honest I believe that even if you  
18 are taking all the bar classes in a school, the bar  
19 prep company and the first year curriculum at most  
20 schools will adequately prepare you even if it's  
21 testing more generally applicable concepts than New  
22 York specific concepts.

23 Does that answer your question?

24 MS. ARTERIAN: Yes. It's helpful. Thank  
25 you.

1                   HON. RIVERA: I have one last question if no  
2 one else has a question. I was curious, what were  
3 the nature of the dissent from the resolution?

4                   MR. JENNISON: So it passed unanimously, but  
5 the only concern was as to whether those fifty  
6 questions for the New York State specific component  
7 would adequately test it compared to the current bar  
8 exam. It's a question of whether fifty multiple  
9 choice questions would adequately test, and I  
10 believe that can -- that that's dependent on the  
11 nature of the test itself.

12                   You can -- you can prepare for a test based  
13 off of how the -- the outline has been proposed and,  
14 you know, I believe and the dissent believe that  
15 fifty questions -- fifty multiple choice questions  
16 may not adequately prepare you as well as some New  
17 York specific essays or other methods, but that  
18 being said, it still passed unanimously. So I  
19 believe that's more indicative of the feeling of the  
20 Board.

21                   HON. RIVERA: Just to clarify -- --

22                   MR. JENNISON: Sure.

23                   HON. RIVERA: Those who had a concern about  
24 the New York Law Exam, their concern was about the  
25 format, the multiple choice --

1 MR. JENNISON: Yes.

2 HON. RIVERA: -- test or that there weren't  
3 enough multiple choice questions --

4 MR. JENNISON: I think --

5 HON. RIVERA: -- or both?

6 MR. JENNISON: I think it's a combination,  
7 but more that it was a multiple choice test. You  
8 know, it's fifty multiple choice questions. It's  
9 possible that that might adequately test depending  
10 on the structure of the questions, you know, as  
11 opposed to adding more or less questions. The  
12 concern I believe was more so about a multiple  
13 choice test versus some other factor.

14 HON. RIVERA: Thank you so much.

15 MR. JENNISON: Thank you.

16 HON. RIVERA: Next we have the Honorable  
17 Rebecca White Berch, Justice of the Arizona Supreme  
18 Court. Thank you for joining us today. The weather  
19 is of course much different from what you're used  
20 to. We appreciated you joining us here.

21 HON. WHITE BERCH: The weather was delightful  
22 when the wind wasn't blowing.

23 HON. RIVERA: True in Arizona, too.

24 HON. WHITE BERCH: It is true in Arizona at  
25 this time of year.

1                   Judge Rivera and members of the Advisory  
2                   Committee, good afternoon and thank you for letting  
3                   me appear here this afternoon. This is the third  
4                   hearing you've had, so I assume you've heard quite a  
5                   bit about the UBE itself, and I read some of the  
6                   comments that have been made on the website, so I'm  
7                   familiar with some of the things you've heard. And  
8                   as I was preparing for this I was trying to think  
9                   what can I say that will be helpful and not  
10                  repetitive of things you've already heard.

11                  I thought what I might share with you is  
12                  Arizona's experience in adopting the UBE. I was  
13                  chief justice during the time that we adopted the  
14                  UBE and I'm familiar with concerns that were raised  
15                  there which seem to be echoed in the comments that  
16                  have been made to you.

17                  We're a smaller jurisdiction. We're a mid  
18                  size state, but the concerns of the lawyers and  
19                  concerns of those who might take it seem to be the  
20                  same.

21                  Arizona already had what we thought was a  
22                  good test. I know this because when I was a  
23                  practicing lawyer I served as a bar examiner for - I  
24                  want to pull a Brian Williams here - nearly seven  
25                  years. So it wasn't quite a full term. I was

1           kicked off the committee when I became Justice of  
2           the Arizona Supreme Court.

3                       We procured our essay questions by working  
4           with an out of state law professor because we didn't  
5           want any instate law school to have an advantage.  
6           We would work with the professor to get a question.  
7           We would vet it with our committee and we would  
8           sometimes try to add an Arizona law twist. And  
9           sometimes we did and sometimes we didn't, but I'll  
10          tell you very frankly one could take the Arizona bar  
11          examination, miss every nuance of Arizona law that  
12          we put in our Arizona bar exam and still pass the  
13          test, sometimes with flying colors. We had a lot of  
14          students that went to schools out of state who did  
15          very well.

16                      When we proposed going to the UBE I was  
17          familiar -- I was familiar with it because I worked  
18          with the National Conference of Bar Examiners. I  
19          became familiar with how they procured their  
20          questions, how they put them together with  
21          committees made up of law professors, practitioners,  
22          judges, how they reviewed the questions, sent them  
23          out for professional editing, how they vetted them,  
24          how they had law students take a practice test, how  
25          they had psychometricians look at the answers to try

1 to determine whether the questions were testing what  
2 they purported to be testing.

3 We didn't do any of that in Arizona. You're  
4 New York. I assume in terms of resources you have  
5 more than anyone else, but I'd suggest that almost  
6 no one can put those kinds of resources into testing  
7 questions.

8 Our law school strongly supported the UBE for  
9 the reasons that you heard from Mr. Jennison. It  
10 allows them to take a portable score and move from  
11 state to state.

12 Our state bar was recalcitrant, as you might  
13 expect, until we explained to them that we were  
14 giving quite a bit of a uniform bar already. We'd  
15 been giving the Multistate Bar, the two hundred  
16 question multiple choice, since the seventies. We  
17 were giving one MPT, and the rest we were giving  
18 half hour essay Arizona exam questions.

19 So we decided before we went to the UBE in  
20 February of 2012 we would switch over, give a second  
21 MPT, and we had started using MEE questions before  
22 that time, but we would go to what really looked  
23 like the UBE, but we wouldn't call it that in case  
24 it was a bomb and we had to, you know, retrench. We  
25 gave it and there was zero effect - none. Our pass

1 rates remained constant with prior February bar pass  
2 rates.

3 So we began in July of 2012 giving the UBE.  
4 Again, the sky didn't fall. The result was zero.  
5 That is there was no change in the rates from prior  
6 years. Frankly, I think most lawyers in Arizona  
7 have no idea that there was even a change in the bar  
8 exam.

9 So the bar was opposed, came around. The law  
10 schools were supportive. My court. We have the  
11 concerns that regulators have when you talk about  
12 changing entry into the practice of law in your  
13 jurisdiction. We were protected, but we became  
14 convinced that it was a better test for the reasons  
15 that I've just said.

16 We also realized that our state test even  
17 though we thought it was a good test of Arizona law  
18 really contained very little Arizona law, that we  
19 could much better educate lawyers that were going to  
20 practice in Arizona on Arizona law by having a  
21 course.

22 We gave a six hour course, half an hour  
23 modules on each of several subject matters --  
24 subject matters, and we found that they came, they  
25 saw, they answered the questions, they took the

1 course and they liked it. It was so popular we were  
2 having Arizona lawyers ask if they could take it for  
3 CLE credit.

4 We think it's so far superior a vehicle for  
5 teaching local Arizona law than having a component  
6 on a bar exam that we require every lawyer who is  
7 admitted in Arizona by UBE to take this Arizona law  
8 course even if they went to an Arizona law school.

9 I was on the faculty at Arizona State Law  
10 School from 1986 to 1995. My husband is a law  
11 professor and my daughter is now teaching law and  
12 generally familiar with what goes on at law schools  
13 and it has been my experience that by and large they  
14 don't teach the law of a state. They teach law  
15 according to the general principles that are  
16 contained in textbooks published by Foundation,  
17 Little Brown, Thompson West and the like, but they  
18 teach general principles of law.

19 That's why law students from Arizona can go  
20 to other states and pass their bar exams. That's  
21 why my daughter who went to law school in New York -  
22 Columbia - and all of her friends who took bar exams  
23 with her who went to other states all passed bar  
24 exams just fine.

25 Law schools are not really the place where

1           they're learning most of their local law. They can  
2           learn enough to pass a component on a bar exam by a  
3           review course.

4                        Mostly though my court was simply convinced  
5           as regulators that this was a better vetted more  
6           professional put together test, and that as  
7           regulators if we're going to stand -- have a test  
8           that stands as a barrier to entry to the practice of  
9           law in our jurisdiction, then we want to give the  
10          best most fair test we can possibly give so that  
11          everybody has a fair chance of passing. So we  
12          changed.

13                      It also helped persuade me that every  
14          professional regulated group that I know of uses a  
15          national test. And it's fine to say well, you know,  
16          the body doesn't change from jurisdiction to  
17          jurisdiction, you know, the federal tax code doesn't  
18          change for CPA's from jurisdiction to jurisdiction,  
19          but, you know, in all regulated professions there  
20          are local laws.

21                      If you're a CPA, you had best know Arizona  
22          state law if you're going to be advising  
23          corporations on law in Arizona. So if other  
24          professions can learn the local law that they need  
25          to know, we can do it, too.

1           The question was raised to Mr. Jennison  
2           should the test be given more than twice a year. I  
3           think it should. We've migrated our course online.  
4           We've embedded questions in it to make sure that  
5           they're not just turning it on and walking away.  
6           We've embedded questions in it. They have to answer  
7           them correctly before they're entitled to move on.

8           We think that provides a good system, and we  
9           found that those who were going to work in say  
10          family law might relisten to the family law half  
11          hour or if they're going to do criminal law they  
12          might relisten to that half hour.

13          The final point I'll make since I'm almost  
14          out of time is that many of the professional groups  
15          to which I belong have endorsed adoption of either  
16          the UBE by name or a uniform bar. The Conference of  
17          Chief Justices of America in 2009 or 2010 when I was  
18          on the conference adopted a resolution encouraging  
19          states to adopt or to consider adoption of the  
20          uniform bar. The council of the section of legal  
21          education and admissions to the bar, I believe you  
22          have a letter from Barry Courier giving the  
23          council's position on adoption of the UBE.

24          The young lawyers division is strongly in  
25          support of adopting the UBE. And there was a recent

1           commission on the future of legal education chaired  
2           by retired Indiana Supreme Court Chief Justice Randy  
3           Shepherd, and as one of its recommendations it  
4           recommends this.

5           The nation has always looked to New York as a  
6           leader in innovation, in the practice of law and in  
7           processes. I'm surprised that New York hasn't been  
8           on the forefront of this one, but we look forward to  
9           having you join the rest of us.

10          I never thought I would say that Arizona was  
11          ahead of New York, but here I am.

12          HON. RIVERA: And on the record, too.

13          Thank you so much, Judge Berch. I wanted to  
14          ask you about the online course.

15          HON. WHITE BERCH: Yes.

16          HON. RIVERA: So the online course if I'm  
17          understanding you correctly -- and I understand the  
18          point about giving it in steps. You've got to sort  
19          of complete one section before you can move on.  
20          It's the building blocks of that comprehension. So  
21          I understand that point.

22          So can you take the course at any time or is  
23          it offered at particular times during the year?

24          HON. WHITE BERCH: It's online. You can take  
25          it at midnight on Sunday.

1 HON. RIVERA: At any time. Is it open book?

2 HON. WHITE BERCH: There really is no book.  
3 There's a study guide that goes along with it, but  
4 yes.

5 HON. RIVERA: So I could have anything in  
6 front of me while I'm taking the exam.

7 HON. WHITE BERCH: There's no exam.

8 HON. RIVERA: I'm sorry. Because it's a  
9 course.

10 HON. WHITE BERCH: We want you to just study.  
11 We want you to be exposed to these concepts.

12 HON. RIVERA: I'm sorry. I'm sorry to  
13 interrupt you. There's not any point where you're  
14 evaluating the comprehension. I thought you said  
15 you move -- you just have to complete a model to go  
16 to the next. You don't have any testing.

17 HON. WHITE BERCH: That's correct, but there  
18 are questions embedded within each half hour module.  
19 Every ten minutes or so there's a question that you  
20 must answer correctly which will keep you -- I  
21 should interpret this.

22 So it will keep you seated there and looking  
23 at the questions making sure you're paying  
24 attention.

25 HON. RIVERA: I see.

1                   HON. WHITE BERCH: If you don't answer it  
2 correctly, you go back, listen to it. If you answer  
3 correctly, you move on.

4                   HON. RIVERA: You're not going to score from  
5 that. You've got to answer that correctly before  
6 you move on to the next?

7                   HON. WHITE BERCH: Yes.

8                   HON. RIVERA: And they can stop at any time?

9                   HON. WHITE BERCH: That's correct, and come  
10 back and get up and leave. Get up, leave, have  
11 lunch, come back. It allows us to cover things  
12 like -- we have continuing legal education  
13 requirements in Arizona and it will tell you how  
14 many, what kind and when to file your affidavit, and  
15 these are things that not only wouldn't you cover,  
16 you really shouldn't cover on a bar exam, that kind  
17 of detail and memorization, but we can convey those  
18 kinds of things.

19                   The other thing I've found is that a lot of  
20 what we think of as nuances in Arizona law really  
21 are just general law. It's just that we're used to  
22 citing Arizona cases and statutes for those  
23 propositions, but they're really standard  
24 propositions of law.

25                   HON. RIVERA: Do you have to have completed

1 and passed the UBE to take the online course?

2 HON. WHITE BERCH: No. You can take the  
3 online course at any time. You just have to submit  
4 your packet together. You have -- we thought about  
5 doing the course after you had completed the exam  
6 within six months or a year, but frankly after  
7 talking to our committee members they didn't want to  
8 have to do the follow-up.

9 Now we make them submit their certificate  
10 with their other papers.

11 HON. RIVERA: Okay. Thank you.

12 MR. MILONAS: Do you keep track of the  
13 different test takers and the impact on them,  
14 minorities, et cetera?

15 HON. WHITE BERCH: I wish we did. I was the  
16 Director of the Academic Support Program at Arizona  
17 State. So this is an area that's near and dear to  
18 my heart.

19 There has been no discernible impact on pass  
20 rates of minorities. There's really no data because  
21 we can't do research on human subjects and you can't  
22 know how they would have done if they hadn't taken a  
23 bar exam if they take another kind.

24 I do understand that in Missouri - I was  
25 speaking to Judge Cindy Martin - that there may be a

1 small sample of data from UMKC that shows that not  
2 only was there no difference -- it was slight -- I'm  
3 not sure statistically significant increase in  
4 passage of diverse candidates.

5 MR. MILONAS: Do you keep track of the people  
6 being admitted to the state?

7 HON. WHITE BERCH: We certainly keep track.

8 MR. MILONAS: I know. You know what I mean.  
9 Color, et cetera.

10 HON. WHITE BERCH: I don't know.

11 MR. MILONAS: Okay.

12 MR. JAMES: The online course, I know you  
13 said you can stop it, you know, have lunch. Is it  
14 to be taken in a day or over a period of time that  
15 you want?

16 HON. WHITE BERCH: Over any period of time  
17 that you want. It tracks. It knows -- you get an  
18 identifier of some sort and it will track you. So  
19 if you come back in a week and you finish it then --

20 MS. BOSSE: You mentioned that your state bar  
21 had concerns, the practicing bar had concerns.

22 HON. WHITE BERCH: Yes.

23 MS. BOSSE: What were those concerns?

24 HON. WHITE BERCH: We all love our homes. We  
25 all think everybody wants to come to our homes. And

1           really the threat was that if you have this uniform  
2           bar, people are going to flood Arizona to practice  
3           law here -- there. I guess there. I'm here now.  
4           There. Especially in the winter.

5                     I think a lot of their concerns were  
6           alleviated when it was pointed out to me, you know,  
7           this is really for entering lawyers. It's really  
8           the law students who are going to be most concerned  
9           about this now. So that was their concern.

10                    Data wise more -- we expected again to see  
11           people transferring in. Our data showed that more  
12           people are transferring out than are transferring  
13           in. Being a westerner we were assuming that they  
14           would transfer to Colorado or Washington or hiking  
15           kind of states, and what we found instead was that  
16           they are going to Alabama and Minnesota. And for  
17           the life of me I couldn't figure that one out.

18                    And I was speaking to a member of our board,  
19           and she said don't you get it. I said apparently  
20           not. She said their passing score is below ours.  
21           So a few people who had not passed in Arizona -- who  
22           did not pass in Arizona were able to take their  
23           scores. We tracked a few of them, and at least  
24           seven of them are working for the federal government  
25           now.

1                   So these are people who are able to have a  
2 professional job because they have a UBE score that  
3 they could take to a jurisdiction in which their  
4 score was passing and they're now working.

5                   MR. MILONAS: They're all going to come to  
6 New York now.

7                   HON. WHITE BERCH: Not quite yet, but perhaps  
8 after 2016. We'll see. I'm sure they'd love to.

9                   HON. RIVERA: Any other questions? No.

10                  Thank you so much. We very much appreciate  
11 you sharing with us your experience and concerns and  
12 how you addressed them.

13                  HON. WHITE BERCH: Thank you, Judge Rivera,  
14 and members of commission. Thank you so much.

15                  HON. RIVERA: Safe travels home.

16                  We will now hear testimony from Gregory G.  
17 Murphy, Vice Chair of the ABA Council of the Section  
18 of Legal Education and Admissions to the Bar, and  
19 Cochair of the National Conference of Bar Examiners  
20 Committee on the Uniform Bar Exam.

21                  Thank you for being here today.

22                  MR. MURPHY: Well, thank you, Judge Rivera,  
23 and members of the advisory committee. It's a real  
24 privilege to be here. It's a delight.

25                  I was harking back to my introduction to New

1           York. It was in 1960 when my family -- my parents  
2           packed us into the Oldsmobile and we drove across to  
3           take my older brother to West Point on the Hudson,  
4           and ever since I've been enamored of the Empire  
5           State.

6           (Court reporter interruption.)

7           MR. MURPHY: I am enamored of the Empire  
8           state. I'll say it again. I am enamored of the  
9           Empire State.

10           I remind -- I'll borrow from John Steinbeck  
11           who said -- well, I'm going to change it a little  
12           bit, but New York seems to me what a small boy would  
13           think Texas is like from here in Texas.

14           I enjoy it every time I've come to New York.  
15           I'm looking forward to coming back in the fall. I  
16           think -- thanks to a suggestion by nomination first  
17           by Diane Bosse that Cornell University has invited  
18           me to teach for a semester. So it's going to be a  
19           real privilege to be here.

20           I come here today not to critique the New  
21           York Bar Exam. As a matter of fact, the  
22           leadership -- the exam has been administered and  
23           under the leadership of Richard Bartlett from Glens  
24           Falls and Diane Bosse for many years, and I have to  
25           believe that anything under their leadership is a

1 good product.

2 The question before the committee and  
3 ultimately the Court of Appeals, of course, is  
4 whether you can prove your bar admissions process by  
5 adopting the UBE and grant the kind of advantages  
6 that -- that Justice Berch and Mr. Jennison have  
7 mentioned.

8 I don't wear the hat today of the -- of the  
9 council or the ABA or of the NCBE. I understand  
10 you'll be hearing from Erica Moser. I just come  
11 from somebody who got involved in bar admissions  
12 very early in my career.

13 Five years out of law school I was appointed  
14 to the Montana Board of Bar Examiners. I was truly  
15 wet behind the ears. I was the young boy along the  
16 lines of the bar, and -- but it's been an important  
17 part of my career for thirty years, and in that  
18 process I have been -- I chaired the MBE Committee.  
19 I just completed about a decade of service on the  
20 MPT Committee. I got involved and I chaired the ABA  
21 Law School Accreditation Committee, and now I'm on  
22 the Council of the Section of Legal Education.

23 So it's important to me. Bar admission is  
24 important to me and improving the process, and we've  
25 certainly seen many improvements over the years. I

1 think the UBE is the next step.

2 I thought I'd offer you the perspective of  
3 how the UBE came about -- truly came about because I  
4 was in on the ground floor.

5 (Inaudible.)

6 THE REPORTER: I'm sorry. I'm having a hard  
7 time hearing you over here.

8 MR. MURPHY: Okay. Well, I think they're  
9 getting it, and I don't really care about the  
10 record.

11 The UBE really came about because there was a  
12 recognition that so many jurisdictions were using  
13 the same or nearly the same testing instruments to  
14 make their bar admission evaluations.

15 The next point was if that's the case why  
16 should we be requiring people to take multiple bar  
17 examinations to be admitted into the practice if  
18 they wanted to move to a different jurisdiction. So  
19 we began looking at it.

20 And now, of course, we have -- well, we just  
21 added -- Kansas has announced that they're not  
22 administering it, but now we have fifteen states  
23 that have adopted the UBE.

24 The UBE does not impose a threat to the  
25 practicing bar in New York. As Justice Birch said,

1           it really applies and affects those people who are  
2           newly graduated from law school, and that's because  
3           most of the jurisdictions typically limit the  
4           transferability of the scores from two years to five  
5           years. So those are the people who are really  
6           affected.

7                         It's -- just yesterday the United States  
8           Supreme Court -- (inaudible) -- decision involving  
9           the North Carolina Board of Dentistry. It's not  
10          directly relevant to bar admissions, but it's an  
11          antitrust case.

12                        But the Court reminds us that the market  
13          participants are not the best evaluators of who  
14          ought to be playing in the market. They have  
15          certain interests -- structural interests even if  
16          they're acting in good faith.

17                        So it's not surprising that an Arizona -- the  
18          bar was recalcitrant to the idea of UBE. The same  
19          is true of Montana. The great weight of comment in  
20          Montana from the practicing bar --

21                                 (Court reporter interruption.)

22                        MR. MURPHY: The great weight of comment was  
23          against the UBE because they feared people coming to  
24          Montana and flooding the market. Well, of course it  
25          hasn't happened.

1                   Now, we've only been administering the UBE  
2                   for two years but it's not likely to happen. The  
3                   people go where the jobs are if the jobs are  
4                   available. And for every person leaving New York,  
5                   you know, there might be a person coming in. But I  
6                   think it will have very little effect on people  
7                   flooding into New York to practice law because they  
8                   come here if there is a job.

9                   Montana adopted the UBE because it was  
10                  already using the components. So it was an easy  
11                  decision.

12                 Frankly I went to the Board and said you  
13                 ought to think about this. The Supreme Court  
14                 agreed, took the public comment and made a decision.

15                 Now, Montana was -- administered for the  
16                 first time in 2013. There was no controversy.  
17                 There wasn't much change in the passing percentage  
18                 and the like.

19                 You may have heard that there was some  
20                 controversy recently because in 2014 the bar passing  
21                 rate in Montana went down from its historical  
22                 features. That's not a function of the UBE. That's  
23                 the function of probably a number of factors.

24                 One is that Montana raised its minimum  
25                 passing score from -- well, on a one hundred point

1 scale from sixty-seven and a half to seventy or from  
2 on a two hundred point scale from one thirty to one  
3 thirty-five or on the UBE scale from two sixty to  
4 two seventy.

5 Now, it didn't show up the first time in  
6 2013, but, you know, we know that nationally in 2013  
7 the class graduating was one of the largest classes  
8 to ever come through law schools, and their  
9 credentials were pretty darn good.

10 Now, I can't tell you the credentials of the  
11 Montana class that graduated in 2013, particularly  
12 the lower quartile of the graduates of the  
13 University of Montana, and most of the people that  
14 take the exam in Montana went to the University of  
15 Montana was, but I suspect there's been some decline  
16 in that.

17 It's -- another interesting thing is there's  
18 been studies that show that if you raise the bar  
19 reasonably it actually has an effect. One of my  
20 good friends is the President of the Montana bar  
21 this year and visits the University of Montana Law  
22 School on a regular basis and he tells me there's a  
23 whole new attitude in that law school right now with  
24 people preparing for the bar exam.

25 I don't think it was some problem with the

1           UBE.  Nationally we had a decline in the MBE score  
2           mean.  It was two point eight points, which is  
3           statistically significant.

4                       (Court reporter interruption.)

5           MR. MURPHY:  It was two point eight points,  
6           which is statistically significant.

7                       We're likely to see the decline nationally  
8           over the next couple weeks, and that's the truth.  
9           Because we are seeing what's happening to the bar  
10          admissions profiles over the years.  You may have  
11          read about it.  It's been in the press.  There will  
12          be more controversy, but it's not the UBE that's  
13          driving that.

14                      So if you adopt the UBE it probably won't  
15          make any difference in your bar passing rates next  
16          summer whether you keep -- whether you adopt the UBE  
17          or not.

18                      There's -- one of the concerns that's been  
19          raised is about diversity.  That's not one that's  
20          been raised in Montana.  We don't have a very  
21          diverse population in Montana.

22                      In January we had a meeting of the Uniform  
23          Bar Examination Committee, and on the committee are  
24          representatives of all the states.  They're not as  
25          diverse as New York, although there are -- there is

1           some diversity, but I specifically asked have any of  
2           you heard anything about -- (inaudible) -- and there  
3           wasn't -- no one expressed anything. I can't say  
4           that there was -- there's been a study done.

5                     I was thinking about maybe in New York if  
6           you -- do you keep track of your profiles?

7                     MS. ARTERIAN: Yes.

8                     MR. MURPHY: You could do a model. You could  
9           take a look at just the MBE and the MPT and to see  
10          how just using that national conference testing  
11          products alone and compare it to -- (inaudible).  
12          You could do methodic experiments to see if that  
13          would make any difference. That is something I  
14          would be interested in doing --

15                    (Court reporter interruption.)

16                    MR. MURPHY: That is something I would be  
17          interested in doing if I were in your shoes, to do  
18          that experiment to see if that experiment showed any  
19          differences or adverse impact.

20                    The other thing is remember that adopting the  
21          UBE is not a forever thing. It's not like it's  
22          carved in stone on the courthouse. The Court of  
23          Appeals will retain jurisdiction.

24                    If you adopt the UBE and decide that it  
25          really wasn't working, that it had some adverse

1           impacts and it was due to the UBE as opposed to the  
2           capability of the applicants, you could change your  
3           mind. You could go back to the old system.

4                     It's still a federal system in our country.  
5           Every state has the prerogative to decide who will  
6           be admitted and what the conditions are.

7                     But Justice Berch was right. Law schools  
8           around the country teach out of casebooks. They're  
9           national casebooks. This isn't going to require  
10          changes in law school curriculum. People who are  
11          telling you that are blowing smoke.

12                    (Inaudible.)

13                    (Court reporter interruption.)

14                    MR. MURPHY: Torts, duty, breach, causation,  
15          damages. We shouldn't be examining on idiosyncratic  
16          rules of a law in a particular state. Not that  
17          those rules aren't important. They are important,  
18          and you can accomplish that through the kind of  
19          mechanisms that have been suggested here.

20                    Online course. In my state it's a seminar.  
21          In Missouri it's an online test. You've got your  
22          multiple choice test. All perfectly acceptable. I  
23          have my preferences which I'd be happy to talk to  
24          you about, but you can do a good job testing basic  
25          principles with the UBE, and that's the critical

1 test.

2 What do we need to do to test the minimum  
3 competency? Do we really need to test idiosyncratic  
4 rules of New York law to determine whether a  
5 person's is minimally competent? Don't you think  
6 that a person that has gone through law school and  
7 is able to perform well on the MBE and MBE and MPT  
8 likely has the scoots to look up the New York law  
9 when it matters?

10 My time is up.

11 HON. RIVERA: Thank you so much. Thank you  
12 for your testimony.

13 I wanted to ask you about a comment and a  
14 recommendation that has been made to us. I would  
15 assume that you have heard it before.

16 It's been suggested to us that we could make  
17 as an option - not mandatory - the opportunity for a  
18 student to accumulate fifteen credits of clinical  
19 time or experiential time in law school that would  
20 then replace one of the essays.

21 I was wondering if in any of the committees  
22 you've worked on whether you had come across this.  
23 I'm assuming you have, but even if you have not, if  
24 you could share with us your thoughts about -- in  
25 that way swapping out one essay for actual

1 experiential work completed in law school.

2 MR. MURPHY: That was recommended by a  
3 clinical professor I assume?

4 HON. RIVERA: Yes.

5 MR. MURPHY: All right.

6 HON. RIVERA: And -- yes.

7 MR. MURPHY: Yeah.

8 HON. RIVERA: I will say from legal  
9 Educators. I would agree that's true.

10 MR. MURPHY: I think we're talking about two  
11 different things here because assessing essentially  
12 knowledge of the law on one hand and then clinical  
13 experience may be a little bit different. And it  
14 strikes me that the variability in clinical  
15 experiences are so wide I'm not sure how you would  
16 legitimately make the judgments about whether the  
17 clinical experience was equivalent whereas if you're  
18 doing the examination I think you can -- well, if  
19 everybody takes the same examination, then you make  
20 fair judgments.

21 So, I mean, it's an interesting concept. Of  
22 course, there is a push toward more clinical  
23 experiences. The standards of the accreditation  
24 have just been amended --

25 (Court reporter interruption.)

1                   MR. MURPHY: The standards on accreditation  
2 of law schools have been amended to require more  
3 opportunity in that regard.

4                   But I think you're doing two different things  
5 with essay examination and clinical experience.

6                   HON. RIVERA: Thank you.

7                   MR. MILONAS: How long have you been giving  
8 the UBE now?

9                   MR. MURPHY: Good question. Missouri was the  
10 first, and I think it was in about 2010, nine.

11                   HON. WHITE BERCH: Eleven?

12                   HON. RIVERA: Eleven.

13                   MR. MURPHY: Yeah. The council adopted its  
14 resolution in 2010, and it seems to me that Missouri  
15 was administrating it by that time. It was Missouri  
16 first and then North Dakota, and then other states  
17 followed.

18                   MR. MILONAS: Did anything go wrong with --  
19 what was the feedback from the students and the bar?

20                   MR. MURPHY: At our meeting in January of the  
21 UBE committee which has represented UBE  
22 jurisdictions I went around and asked, you know,  
23 tell us if there are any issues or any problems, and  
24 there just were none.

25                   One state had a problem but it was internal

1 to them and that they had made a clerical error on  
2 who passed and who didn't.

3 MR. MILONAS: That's a problem.

4 MR. MURPHY: It was a public announcement.  
5 They found out the day before the admissions  
6 ceremony, but it had nothing to do with the UBE.

7 HON. RIVERA: So not about the substance?

8 MR. MURPHY: It had nothing to do with the  
9 UBE.

10 There are just urban myths out there. There  
11 are urban myths about the UBE.

12 For example, there are people who think that  
13 oh, my goodness, this is focused on uniform laws.  
14 Well, that's not true. I mean, the MPT you give all  
15 the components of the -- all of the law necessary to  
16 answer the question in the item itself. Otherwise  
17 it's basic principles.

18 And, you know, really the uniform commercial  
19 code after all doesn't change the law of contracts  
20 that much, the basic law of contracts.

21 So New York may have it's idiosyncratic  
22 rules, but they're not all that idiosyncratic. Many  
23 of them -- I know I've cited New York law in briefs  
24 I've submitted to the Montana Supreme Court. So --

25 MR. MILONAS: Was it an Oldsmobile '88 or

1 '98?

2 MR. MURPHY: Pardon me?

3 MR. MILONAS: Was it an Oldsmobile '88 or  
4 '98?

5 MR. MURPHY: It was -- it was a '98 actually.

6 MR. MILONAS: That's a great car.

7 MR. MURPHY: There were no interstate  
8 highways in those days. So it was quite an  
9 adventurous trip.

10 MR. MILONAS: Good car.

11 MR. MURPHY: I felt like John Steinbeck.

12 MS. BOSSE: Can I ask a question about --  
13 Mr. Jennison mentioned there was some concern at the  
14 student division of the ABA about whether or not  
15 multiple choice questions were an appropriate  
16 vehicle for testing knowledge. And could you  
17 comment on the comparative ability of essays and  
18 multiple choice questions to assess knowledge?

19 MR. MURPHY: Sure. I'd be happy to do that  
20 because I was a skeptic. I became involved in the  
21 bar exam because -- I remember a question when I  
22 took the UBE -- or not the UBE -- the MBE and I  
23 clerked for a ninth circuit judge --

24 (Court reporter interruption.)

25 MR. MURPHY: I clerked for a ninth circuit

1 judge after law school and I took the bar  
2 examination in Oregon and I remembered a question on  
3 the MBE that I thought was just ridiculous, and so  
4 that generated my interest in the bar exam,  
5 and -- but I came to learn that the multiple choice  
6 format is favored by psychometricians as a fair  
7 evaluation of applicants because you can test a  
8 broader area of knowledge in multiple choice  
9 examination than you can in essay examination. The  
10 MBE has two hundred questions. So you get a better  
11 picture than five essays, all right, a better  
12 overall picture.

13 It's also a myth that -- that multiple choice  
14 exams are all about guessing if you're a good test  
15 taker. Years ago -- I think it was in the  
16 eighties -- there was that certain about the MBE.

17 So an experiment was done in California  
18 giving the MBE to the recent graduates of the  
19 ABA-accredited schools and to the first year  
20 students, and the -- the least able of the graduates  
21 did better than the ablest of the first year  
22 students.

23 Now, that's not -- that's a pretty  
24 correlation. It's not a necessarily positive fact,  
25 but people --

1 MS. ARTERIAN: That's always --

2 MR. MURPHY: -- tend to do --

3 MS. ARTERIAN: That's always good to know  
4 that if you're at a law school that it means  
5 something. It means people go to law school.

6 MR. MURPHY: People tend to do well across  
7 subject areas. In other words, if you do well on  
8 torts, you tend to do as well on contracts on the  
9 MBE, and the great weakness of essays -- the truth  
10 is the great weakness of essays is the subjective  
11 evaluation. All right?

12 You can do all you can, put systems in place  
13 for correlation and calibration and all that, but it  
14 isn't the objective evaluation that multiple choice  
15 examination is. I've actually come to believe that  
16 over the long haul it might be good to think about  
17 longer multiple choice questions and even replacing  
18 essays.

19 People think we test essays -- we test  
20 writing on essays, writing ability. That's  
21 typically the justification. I can tell you as a  
22 bar examiner -- and I've talked to other bar  
23 examiners around the country -- it's really hard to  
24 grade on the quality of writing.

25 You can see -- you know it when you see it,

1 but how many points do you give, and then when the  
2 person is only answering a question that's forty  
3 minutes long as opposed to having the chance to sit  
4 down and write a brief over a day or two, you know,  
5 it's -- essays hang on because lawyers are  
6 traditionalists. We love precedent.

7 The problem is -- well, Diane Bosse will  
8 remember John Reed. I think he was a former dean.  
9 He said the problem with the status quo is that the  
10 quo has lost its status.

11 And, you know, I always remember that when I  
12 think about something that somebody suggests  
13 something as a change, and I say is this a good idea  
14 or not. You know, just because we've always done it  
15 this way doesn't mean we always should, and I think  
16 if you try the UBE I think you'll have very little  
17 ripple effect. I do not think the bar will be up in  
18 arms and disappointed and I think you'll be happy  
19 with the result.

20 The quality of the products and the kind of  
21 vetting that goes into building these tests are so  
22 much better than any jurisdiction. You don't have  
23 to wait for a bar exam member who is late with  
24 submitting his bar questions to evaluate.

25 MS. BOSSE: That never happens.

1                   MR. MURPHY: That never happens in New York I  
2 know, but it happens all the time.

3                   HON. RIVERA: I'd be shocked.

4                   MR. MURPHY: Thank you very much.

5                   HON. RIVERA: I'm sorry.

6 MR. MURPHY: Oh, I'm sorry.

7                   HON. RIVERA: I have one more -- I'm sorry.  
8 Did you have a question?

9                   MR. JAMES: You mentioned a new attitude in  
10 the law school, the bar passage rate decline. What  
11 have you --

12                   MR. MURPHY: This is hearsay. I want to make  
13 sure --

14                   MR. JAMES: Okay. What do they -- what is  
15 the hearsay about and was there any change in how  
16 the law schools approached their teaching after the  
17 adoption of the UBE?

18                   MR. MURPHY: This -- I was speaking  
19 specifically, Mr. James, about the University of  
20 Montana, and the decline of bar passage rate was a  
21 significant concern to that school and to the  
22 interim dean. They were very upset about it. They  
23 had eighty-four graduates take the examination and  
24 they had sixty-four pass, and that was a much lower  
25 experience than they ever had before.

1                   And I'm told that they had a few people who  
2                   were not -- you wouldn't think they were at risk of  
3                   failing the bar examination. So people said what's  
4                   wrong here. Is it the examination?

5                   And I can tell you -- I can tell you the  
6                   complete profile in that class, what was the -- the  
7                   LSAT and their undergraduate -- their law school  
8                   grades. It's hard to evaluate with certainty what  
9                   happened.

10                  I was relating the story about my friend who  
11                  is the president of the bar who gets over to the  
12                  school on a regular basis and he just told me  
13                  anecdotally that he had gone into the -- the law  
14                  school and recently there were many more people in  
15                  the library studying harder and paying -- than there  
16                  ever have before and it's his experience.

17                  Now, he attributed it to the bar exam. I  
18                  don't know whether that's the case. Maybe there's a  
19                  particular test or not, but I can tell you that fear  
20                  is a terrific motivator for studying, and -- but I  
21                  don't think -- maybe that wasn't an appropriate  
22                  story to tell here on the record. Certainly you  
23                  shouldn't rely upon it in making your decisions.

24                  But I'm curious what happened in Montana. I  
25                  am convinced it was not the examination. The MBE

1 had a reliability factor of point nine two in the  
2 summer of 2014 and psychometrically the goal  
3 standard is point nine zero. So we're really  
4 talking about the MBE and the MBE is an equated  
5 examination, and so it is a witness.

6 Frankly if we didn't see some declines in bar  
7 passage around the country over for the next few  
8 years I'd wonder about the MBE because we know that  
9 the LSAT and first year law school grades correlate  
10 with bar performance. It's not a perfect  
11 correlation. You wouldn't want it to be a perfect  
12 correlation.

13 HON. RIVERA: But to the extent the law  
14 schools do not respond right to the extent that -- I  
15 understand the argument you're making.

16 To the extent that there is arguably a change  
17 in the profile of the students and the law schools  
18 do not adopt to the profile of the students to  
19 better prepare them and to identify whatever might  
20 be challenges that exist with the prior classes  
21 based on their profiles, then you would make this  
22 next assumption, which is you would see a drop  
23 because the law schools have not addressed the  
24 difference in the profile.

25 MR. MURPHY: I would agree with you, and

1           that's right. I went to Notre Dame, right, and the  
2           places -- the movie Rudy -- I love the movie Rudy  
3           because it's the under dog.

4                   HON. RIVERA: It's a nice film.

5                   MR. MURPHY: Yeah. He did it all on his own.  
6           I'd like to see the school have done more, right,  
7           but, that -- you know, we do want to have an  
8           opportunity for people who have faced challenges and  
9           an opportunity to be members of the bar. And it is  
10          up to the law schools to do both kind of resources  
11          and programs to train them up so they have a chance  
12          to pass the bar examination.

13                   I personally believe that one of the issues  
14          we have in the country is that I believe there are  
15          some law schools who are admitting students not  
16          likely to be admitted to the bar and they're not  
17          telling them. They should tell them their profiles  
18          and what it means and put that fear into them that I  
19          mentioned before.

20                   HON. RIVERA: So of the UBE states how many  
21          require something in addition to the UBE?

22                   MR. MURPHY: Five or six. That's  
23          interesting. For example, Alabama used to require a  
24          separate test on Alabama procedure because they felt  
25          their Alabama procedure was -- they actually

1 removed --

2 HON. WHITE BERCH: They adopted the  
3 Arizona --

4 MR. MURPHY: Yeah. They removed that  
5 separate test, and they now have an online program.  
6 I can supplement the record on that.

7 HON. RIVERA: Thank you. That will be very  
8 good.

9 MR. MURPHY: It's five or six. North Dakota  
10 is not requiring anything else. Well, I'll  
11 submit --

12 HON. RIVERA: No. That's very helpful.

13 So let me just close with this unless someone  
14 else has another question. I don't think they do,  
15 but from your perspective -- you've been focusing on  
16 the UBE, and from your perspective and your  
17 experience and your testimony today is that whether  
18 or not we have the New York Law Exam, the UBE from  
19 your perspective would be enough to give us  
20 confidence in the competence --

21 MR. MURPHY: Yes.

22 HON. RIVERA: -- of the test taker?

23 MR. MURPHY: I think so. I'm not -- I  
24 personally would not be in favor of a fifty multiple  
25 question choice exam standing alone because I think

1           you want to -- I don't agree with it. I don't even  
2           know whether you're applying a scale to that or  
3           combining it with the score or not.

4                        I think the programs that -- that Arizona has  
5           and Alabama has adopted and even Missouri is  
6           important because when you have that basic  
7           assessment of the UBE at some level you have to --  
8           at some point you come to the view of the confidence  
9           that the person is skilled enough that they're going  
10          to look up the law when they need to look up the  
11          law, and the purpose of these other programs is to  
12          say look, here's what the practicing bar and  
13          judiciary thinks, which is really important in this  
14          state. It's a little different than elsewhere.

15                       For example, in Montana if you want to bring  
16          a discrimination case -- state law discrimination  
17          case you've got to bring it in the human rights  
18          commission within six months, and if you don't,  
19          you're out.

20                       Well, that's important, but you wouldn't put  
21          it on a bar examination, right? Or the statute of  
22          limitations on a particular claim. A fraud claim is  
23          two years, you know, those sorts of things, but is  
24          it really -- (inaudible) -- we're talking about or  
25          is it really memorization of idiosyncratic rules.

1           Those are judgment calls of what are -- and I don't  
2           mean to dissuade you and say that your New York  
3           multiple choice exam would not be a good  
4           examination.

5                       As I said before, if it's under Diane Bosse's  
6           leadership, I'm very confident it's going to be a  
7           terrific multiple choice exam. I just -- I just  
8           favor the idea that you can incorporate more. You  
9           can incorporate things about professionalism in a  
10          course that you don't do in a bar examination.

11                       (Court reporter interruption.)

12                       MR. MURPHY: You can incorporate things about  
13          professionalism in a course that you don't do in a  
14          bar examination. You would incorporate things about  
15          the structure of the judiciary and the way the  
16          system works. The highest state in the New York is  
17          the Court of Appeals, not the Supreme Court.

18                       HON. RIVERA: Learned that the first day of  
19          law school. Thank you so much. Much appreciated.

20                       (Recess taken.)

21                       HON. RIVERA: Next we have testimony from  
22          Justin Vigdor, a member of the New York State  
23          Uniform Law Commissioners.

24                       Thank you for coming today and addressing the  
25          commission.

1                   MR. VIGDOR: Thank you. It is my pleasure.  
2 Thank you, Judge Rivera, members of the committee.

3                   I should start with a disclaimer, which is a  
4 bad thing to do. I know very little about what is  
5 actually being taught in law schools. It's been  
6 sixty-four years since I was admitted to practice.  
7 I'm sure they're on top of all of the trends in  
8 legal education. I know very little about how the  
9 bar exams are currently being written.

10                  The narrow focus that I have is the fact that  
11 for -- I'm a past president of the state bar, but  
12 for twenty-six years I've been one of New York's  
13 five Uniform Law commissioners. As most of you  
14 know, the Uniform Law Conference was actually  
15 founded in New York about one hundred fifteen years  
16 ago, and we're the first state. We convened a few  
17 other states that now involves commissions from  
18 every one of these -- every one of the states plus  
19 some of the territories - the Virgin Islands, Puerto  
20 Rico. And the conference meets in preliminary  
21 session once a year to draft uniform acts.

22                  The acts go through an extensive period of  
23 draftsmanship and vetting. Usually to get an act  
24 approved by the conference requires at least three  
25 years, three readings, and it's read line for line,

1 word for word and debated in the preliminary session  
2 with several hundred commissioners present free to  
3 speak, free to amend, free to add, subtract before  
4 the conference adopts it. Once it adopts an act it  
5 goes to the American Bar Association.

6 Most of you know this, and I'm probably  
7 telling you what you already know. It goes to the  
8 American Bar Association for its approval. Certain  
9 acts also go to the American Law Institute, and then  
10 when it's adopted by a vote of the states the  
11 commissioners from the respective states have the  
12 sworn obligation to get those acts adopted in their  
13 states.

14 Now, that's the source of my frustration  
15 because for years we were obligated in New York to  
16 get New York to adopt uniform acts, and our  
17 commissioners traveled to Albany during the  
18 legislative session and lobbied for the adoption of  
19 uniform acts with -- I'm sorry to say -- very little  
20 success for the most part.

21 We -- when the state bar committee was  
22 reporting on the UBE I made the mistake of rising on  
23 an impromptu basis to say that I was very concerned  
24 about testing students on uniform acts when New York  
25 has failed to adopt many of the uniform acts, and

1           some what I regard to be more important uniform  
2           acts.

3                       We are the premier if not the premier  
4           commercial state, and yet it was only this past  
5           session that we were the last state in the United  
6           States to adopt certain modern sections of the  
7           Uniform Commercial Code, which is absolutely a basic  
8           part of practice for most lawyers around the  
9           country.

10                      Articles 3 and 4 of the code we still have  
11           not adopted. We adopted this past year Article --  
12           amendments to Article 1 and Article 7 and Article 9,  
13           Article 9 being the article dealing with secure  
14           transactions.

15                      But even when we adopt these, we frequently  
16           adopt them with nonuniform provisions so that the  
17           law in New York State is sometimes less hospitable  
18           to practitioners who decide that they will do deals  
19           under the law of the state that they select and  
20           choose, frequently Delaware and some other states.

21                      We have -- as I say, we are operating under  
22           the nineteen -- 1960 versions of Article 3 and  
23           Article 4. The recent versions adopting an article  
24           in 2002 have not been adopted.

25                      We have -- when we do adopt, for example, an

1 Article 9 we just make changes in them which -- I  
2 don't know to what extent the examiners are going to  
3 test on these things, but just for example, the  
4 uniform acts have a -- now have a -- an objective  
5 test for honesty and good faith, which is reasonable  
6 commercial standards of fair dealing. In New York  
7 even with the new adoption we've preserved the  
8 subject definition, which is honesty in fact in the  
9 transaction or conduct concerned.

10 The uniform acts have defined conspicuous,  
11 which is important in certain -- in certain matters,  
12 as the safe harbor being capital letters used as  
13 distinguished from lowercase letters. New York has  
14 declined in its new versions adopted to built  
15 definition in. I could go on at great length about  
16 that.

17 In Article 9 one of the great changes made  
18 several years ago, which we were the last to adopt,  
19 provided that you could be safe in filing a security  
20 statement using the name on a person's driver's  
21 license. New York did not adopt that When it  
22 adopted Article 9 finally as the last state to do so  
23 this past year.

24 I understand that there is now in the  
25 legislature some corrective bill that would cure

1           that. We would be aligned with the rest of the  
2           country on that.

3                     And I could go on about commercial practices  
4           at great length, but I'd like to talk for a minute  
5           about entity acts because I have worked on a number  
6           of those acts. I've served as drafting commissioner  
7           and been on drafting commissions on some of those  
8           acts.

9                     We have a partnership act in New York -- and  
10          I assume that partnerships are tested on the bar  
11          exam. I may be wrong about that. We have a  
12          partnership act that goes back actually to 1914  
13          despite revised uniform partnership acts that have  
14          been revised in 1994 and in 1997 and which exist in  
15          over forty states.

16                    Our Limited Partnership Act dates back to  
17          1916, and there's bear bones sort of things. For  
18          many things you have to refer to the partnership act  
19          to answer questions about the limited partnership  
20          act.

21                    The -- probably -- I don't have the figures.  
22          Probably the most common form of entity formation  
23          now is the LLC, the limited liability company, and  
24          our Limited Liability Company Act was enacted in  
25          1994. It was revised -- the uniform act was revised

1 in 2013, and when these acts are revised there is a  
2 panel of nationally recognized experts on the  
3 subject who are thoroughly knowledgeable. They have  
4 experience in the field. They're invariably  
5 academics as well who teach it.

6 The act is far more user friendly and far  
7 more advanced, and we did not adopt the provision.  
8 We're still working with this old LLC act, although  
9 it's the most common form of entity formation now  
10 for ordinary businesses.

11 And we are the only state in the union that  
12 still requires you to publish for six weeks in two  
13 newspapers to make the LLC effective, an utterly  
14 useless -- in my opinion an utterly useless thing to  
15 do, but people go to Delaware for that reason, and  
16 Delaware then gains additional tax revenue on a  
17 regular basis and attracts things in a number of  
18 areas. I could go on in other areas, but I won't --  
19 I won't burden you with that.

20 So beyond that, beyond the -- just these two,  
21 the commercial code and the entity laws that we have  
22 we have for various reasons, and the legislature has  
23 reasons. There are reasons by reason of New York's  
24 disparate population and by reason of the strength  
25 of New York's lobbies in certain areas, some of the

1           lobbies being lawyer lobbies.

2                       We have not adopted the Uniform Arbitration  
3           Act. We have not adopted the Uniform Mediation Act.  
4           We have not adopted the Uniform Condominium Act. We  
5           have not adopted the Uniform Probate Act. We have  
6           not adopted the Uniform Real Property Transfer and  
7           Death Act. We have not adopted the Uniform  
8           Securities Act, the Uniform Trade Secrets Act, and I  
9           could go on about the number of acts that we haven't  
10          adopted.

11                      Now, I don't know what you folks as law  
12          examiners put on the law exams. Maybe none of that  
13          stuff goes into a law examination today, but it  
14          seems to me that unless the law schools are up to  
15          speed on teaching uniform laws as well as New York  
16          laws, law students in New York will be prejudiced.

17                      Another factor is that we have -- about  
18          thirty percent of the applicants of the bar in New  
19          York are foreigners, foreign educated students, and  
20          they are interested in really in a New York license.  
21          They really do not have any interest in uniform acts  
22          because very few of them intend to practice anywhere  
23          but in New York on rare occasions, and this will  
24          prejudice such applicants.

25                      If and when the schools can come around to

1 teaching this -- and maybe it can be done by 1916 --  
2 by 2016, which I rather doubt -- you would know  
3 better certainly, but I rather doubt that by -- that  
4 in time for the 2016 exam it will be taught and it  
5 will be accommodated. I think the adoption should  
6 be delayed until we're confident about that.

7 Our committee brought a lengthy report which  
8 I'm sure you're familiar with in which they raised  
9 other concerns - expense, the disparate effect on  
10 minorities. And we have -- unlike Montana and  
11 Arizona, we do have a very large minority population  
12 in New York and minority bar passage is an important  
13 consideration.

14 So for these reasons I think more study is  
15 needed. Ultimately I'm in favor of uniformity.  
16 I've been working for uniformity for twenty-six  
17 years and I favor uniformity and I favor  
18 portability. I think they're wonderful ideas, but I  
19 think that we've got to consider all of those  
20 fairness issues and deal with that before we jump  
21 into it.

22 I thank you for your attention. I'll be  
23 happy to respond to any questions that you have.

24 HON. RIVERA: Thank you so much.

25 I want to clarify your testimony regarding

1 the fairness aspect to the extent that the proposal  
2 anticipates the administration of the New York Law  
3 Exam, which would be an exam that focuses on the  
4 particularities of New York law where those rules  
5 are significant for any individual to be admitted to  
6 the New York bar, but I take your position that it's  
7 unfair for an applicant to have to know not only  
8 these New York specific rules but also a rule that  
9 is different from the New York rule?

10 MR. VIGDOR: I don't mean that, Judge. First  
11 of all, let me emphasize again -- which I should  
12 have emphasized in the beginning -- I'm speaking  
13 only for myself.

14 HON. RIVERA: Yes.

15 MR. VIGDOR: Not for the commission and not  
16 for the state bar and not for anyone else.

17 I don't -- I think it might be fair to  
18 require that, but then it has to be taught, and I'm  
19 not sure that it is taught. I just don't know what  
20 is happening in law schools.

21 My guess is that some are teaching the  
22 uniform acts and some are not, and those that are  
23 not are not preparing students for an exam on the  
24 uniform acts.

25 HON. RIVERA: Okay. To the extent though,

1           some of the areas that you're describing are areas  
2           that are electives. In any event, it might be an  
3           area that a student is not being taught at all. It  
4           might be an area that they would learn in  
5           preparation for the bar.

6                     MR. VIGDOR: Sure.

7                     HON. RIVERA: And, also, to the extent that  
8           the UBE is not focused on uniform laws per se, but  
9           on general principles, we've heard testimony that  
10          that strikes a fair balance, that if you're focusing  
11          on general principles of law as opposed to any  
12          particular nuance of law with respect to the UBE --  
13          not the New York Law Exam -- that you are then using  
14          an exam -- as you may have heard from some of the  
15          testimony -- that indeed measures a minimum level of  
16          competence to practice law.

17                    MR. VIGDOR: I think that would be fine if  
18          that's what's being tested.

19                    HON. RIVERA: That's okay.

20                    MR. VIGDOR: But if you have an essay  
21          question that involves a statute of frauds -- and we  
22          have a different statute of frauds on personal  
23          property than in the uniform statute frauds. If  
24          you're being tested on that you are at a  
25          disadvantage unless you've been taught that or had

1 an opportunity to learn that.

2 And I think the same is true with certain  
3 other -- you know, our Article 3 deals with  
4 negotiable instruments and it is way out of date  
5 with the uniform act. And if you're being tested on  
6 general principles, it may be fine, but if you are  
7 being testified -- tested on the current state of  
8 the uniform acts and you haven't been taught that or  
9 exposed to it, it's not fine in my opinion.

10 And I shouldn't worry about young students.  
11 They'll do all right I'm sure. I'm way past that.  
12 But to me and I spoke again from a personal point of  
13 view -- that seemed to me to be an element of  
14 premature adoption which would result in unfairness.

15 MR. MILONAS: Has anyone documented and  
16 recorded the specific differences between the UBE  
17 and New York law in all of these areas; in other  
18 words, compared -- the statute of frauds for this  
19 particular matter is two years, but UBE it may --  
20 the uniform law it's different and in what areas?  
21 Is there a catalog of these differences? Is there a  
22 listing of them anywhere? Has anyone done --

23 MR. VIGDOR: I don't know of such a list. I  
24 do know that the conference has analyzed every  
25 state's laws in comparison with the uniform laws

1           which they have or have not adopted, and we do have  
2           that analysis for New York. I don't have --

3                   MR. MILONAS: Could we get a copy of that?

4                   MR. VIGDOR: I can -- yeah. If you tell me  
5           exactly which --

6                   MR. MILONAS: All of the above.

7                   MR. VIGDOR: All of the above.

8                   MR. MILONAS: Whatever. The tort law,  
9           contract law, real estate law, whatever it is.

10                   MR. VIGDOR: I'm sorry, Dean.

11                   MS. ARTERIAN: One of the things that I think  
12           I've noticed is that there are concerns that somehow  
13           get caught up in the word uniform -- UBE, Uniform  
14           Bar Exam, and that people can be assuming that --  
15           that there is -- that there is a high correlation  
16           with the uniform bar exam and the uniform -- you  
17           know, the uniform laws, you know, like the UCC or  
18           whatever, and it's not my sense that that's the  
19           case.

20                   I think that in fact what that is -- if the  
21           uniform law part of it, the uniformity natural -- I  
22           think for most people who went to law school or are  
23           lawyers or both -- I'd like to think that most  
24           lawyers went to law school or are on law  
25           faculties -- it can be confusing.

1           I mean, your uniform -- and it's almost  
2           automatic for some of us. We're thinking about the  
3           uniform laws, the commission on them, how they get  
4           adopted and that there are state differences and  
5           that it may be in New York State there are many  
6           differences, but it's not my understanding that what  
7           happens in the uniform essay exams -- that the  
8           uniform essay exams are testing on the uniform laws.  
9           They're trying to I think lift out what are the  
10          general principles that are generally applicable in  
11          certain areas.

12                 MR. VIGDOR: Well, that --

13                 MS. ARTERIAN: I would assume, too, that if  
14           there's some huge variation on what is the generally  
15           acceptable or generally understood -- as described  
16           by -- I think Justice Berch did a very good job of  
17           that.

18                 These things that are extraordinarily  
19           different about the law in the State of New York,  
20           that -- it's not just things that are odd, but  
21           things that are different and have a meaningful  
22           impact, particularly for the beginning lawyer  
23           that -- it's my understanding that that's what this  
24           New York portion -- the New York portion of the bar  
25           would be very directed at, and that, in fact,

1 students -- I keep saying students because I'm  
2 thinking about our graduates, but anybody who took  
3 the New York bar if this proposal moved forward in  
4 the structure that's proposed, every one of those  
5 people has to pass this freestanding New York  
6 portion.

7 Now, all parts of our bar exam in the State  
8 of New York have kind of come together, and I think  
9 as Justice Berch described, what could happen in  
10 Arizona on a prior structure, you could know very  
11 little about the law of Arizona.

12 And by the way, Professor Berch was on the  
13 faculty of Arizona State while I was the Associate  
14 Dean there. So I know her from her teaching days.  
15 I actually know her from her student days.

16 You know, her description of that I think  
17 is -- is fair, that is you didn't have to know --  
18 just by the Arizona bar, you really didn't have to  
19 know much or maybe anything about Arizona law to  
20 kind of get yourself through that bar exam and do  
21 very well.

22 I'm not saying that exactly the same thing is  
23 true in New York State, but having taken the New  
24 York State Bar exam, you know, when you go back and  
25 you look at the questions that are being asked,

1           they're set in New York, they have New York, you  
2           know, lawyers and whatever. That's not to say that  
3           there may not be a twist of New York law in there,  
4           but what really is being tested is this more  
5           general -- the more general sense of what is the  
6           law.

7                       MR. VIGDOR: Well, to that extent, I'm  
8           obviously off base if that is the case. I just  
9           don't know what is on these tests.

10                      But if, for example, you have in the  
11           sixth uniform -- in the MB -- in UBE six essays, if  
12           you get one test that involves accord and  
13           satisfaction, for example -- and that I would think  
14           might very well come into a bar exam.

15                      Our New York law accord and satisfaction is  
16           different than the rest of them. You can write on a  
17           check, you know, without prejudice, and it's not an  
18           accord and satisfaction, but under the uniform act  
19           it would be still an accord and satisfaction. It  
20           doesn't matter what you've written on a check.

21                      So there are things like that, and there are  
22           a number of them. I don't know what's on the test.  
23           My only concern is that until the law schools have  
24           considered that in due course and have satisfied  
25           themselves that the general testing which probably

1 is excellent and adequate is indeed adequate and  
2 that New York students and foreign students are not  
3 disproportionately prejudiced. I think it ought to  
4 be the lead.

5 Now, it may be that we're there. It may be  
6 that the law schools have already done that.

7 MS. ARTERIAN: Well, I don't want to speak  
8 for all law schools, but the other thing I think is  
9 actually very, very evident in the State of New York  
10 is that we have, you know, a lot of law schools and  
11 there are -- of course, there's similarities. There  
12 have to be. They're accredited law schools. But  
13 there are differences in emphasis in what is taught  
14 in those law schools. But, for example, anybody who  
15 is taking a commercial transaction course is going  
16 to be looking at the Uniform Commercial Code.

17 And I would also say generally if you're  
18 going to teach the Uniform Commercial Code and  
19 you're aware of differences in the state you're in,  
20 that's part of what you do in comparison. Like in  
21 the State of New York, X. Well, I wonder why  
22 that --

23 MR. VIGDOR: Then what I'm saying has really  
24 very little merit if that's the case. My assumption  
25 is that CUNY's curriculum -- and I picked CUNY on a

1 random basis -- is not the same as Syracuse.

2 MS. ARTERIAN: I'm sure it isn't, but I bet  
3 it's more similar than people would think.

4 MR. VIGDOR: It's probably most similar in  
5 many areas, but whether it is most similar in some  
6 of these commercial areas or entity matters -- if  
7 those appear on bar exams -- I don't know.

8 MS. ARTERIAN: Yeah.

9 MR. VIGDOR: I think that's something that  
10 ought to be answered or studied. If we are there,  
11 if we're ready with it, if the schools are confident  
12 with that, then that's fine because I do favor  
13 uniformity and I do favor portability. I think  
14 those are very good concepts.

15 I'm admitted in other bars, too, and I worked  
16 hard to get there. I'd rather not have worked that  
17 hard to get there.

18 HON. RIVERA: Maybe the fates will change in  
19 the future.

20 MR. VIGDOR: Well, maybe. Well, maybe.

21 By the way, we're indebted to Arizona for  
22 giving us Joe Salomon (ph). It has been great for  
23 Rochester.

24 MS. ARTERIAN: That's right. I remember when  
25 he was a dean at the University there.

1                   MR. VIGDOR: I worked with him for five years  
2 on drafting the revised Uniform Securities Act.

3                   MS. ARTERIAN: Right.

4                   MR. VIGDOR: And New York has never had a  
5 securities act. Certainly not the revised  
6 securities act or the Uniform Securities Act and  
7 never will, never being a very long time.

8                   HON. RIVERA: Let me say since you mentioned  
9 CUNY having spent almost fifteen years teaching in  
10 the law school, the -- there are certainly, as it's  
11 true in all law schools, particular courses that are  
12 specific to the jurisdiction.

13                   New York practice is the obvious one we all  
14 think of, the procedure, of course, but there are  
15 other kinds of courses that focus specifically on  
16 New York law, but the first year is a survey course  
17 year. Those are courses that depend on national  
18 textbooks and you teach across the board these  
19 general principles. You might mention the courses I  
20 often had and as my colleagues often do find New  
21 York specific rules and you point to them.

22                   But I think as a matter of course  
23 pedagogically it is difficult to only teach one  
24 concept without teaching the scope of the entire  
25 concept. You can't understand the difference

1 without understanding whether it was a general rule  
2 or that you're in the majority trend without  
3 understanding what might be the policy or the choice  
4 that drives the minority view.

5 So in many ways I understand your concern,  
6 and I think it is one that you're not incorrect to  
7 say that schools have to grapple with, what is the  
8 best way for students to learn not only the skills  
9 that a lawyer needs but to think critically and  
10 analytically and in many ways to find out what is  
11 New York doing and why is it doing it that way so  
12 they can better understand that particular rule  
13 should they ever end up at the Court of Appeals  
14 arguing how that rule applies to their particular  
15 client.

16 MR. VIGDOR: I'm sure that I do not have the  
17 broader vision in all of this or the background or  
18 knowledge to be accurate in my comments, but I've  
19 raised the point, and that's exactly the point that  
20 I'm raising.

21 HON. RIVERA: Yes, yes.

22 MR. VIGDOR: It's a personal point.

23 MS. BOSSE: Just briefly -- thank you very  
24 much for your testimony, Mr. Vigdor. And I did want  
25 to emphasize what Dean Arterian said.

1                   In terms of the sources for questions on the  
2                   Uniform Bar Exam, it's not uniform laws and acts  
3                   exclusively. There are obviously some because there  
4                   are some areas like entities and like commercial law  
5                   where there are these uniform laws or uniform acts  
6                   that are out there, but restatements of the law in  
7                   those basic courses and national case books and  
8                   things like Am Jur and so forth.

9                   Article 3 isn't tested anywhere anymore.  
10                  It's not tested on the Uniform Bar Exam. It's not  
11                  tested in New York anymore, but would you think it  
12                  appropriate -- for example, you mentioned the  
13                  publication requirement for LLC's in New York. So  
14                  even though we don't have the uniform act, we have  
15                  the structure, right? We have the same kind of a  
16                  structure.

17                  MR. VIGDOR: Yes, we do. And it's not as  
18                  flexible as Delaware and so forth, but we do have a  
19                  structure.

20                  MS. BOSSE: So maybe that publication  
21                  requirement is something that might be appropriate  
22                  to test on an independent test of New York law.

23                  MR. VIGDOR: It may be so.

24                  MS. BOSSE: Is that the kind of -- that's  
25                  where those kinds of differences --

1                   MR. VIGDOR: That very well may be. Many  
2 times the reasons why we're not uniform are  
3 represented by that publication requirement. There  
4 is a strong newspaper lobby who has absolutely  
5 insisted that publication is necessary, and they are  
6 very powerful in the legislature.

7                   HON. RIVERA: That's one perspective on the  
8 policy that drives that difference.

9                   MR. VIGDOR: And I can tell you about some  
10 other very strong lobbying interests that have  
11 accounted for some of the other deviations that we  
12 have. We know where they are. We know who they  
13 are. We know what they do and we know how effective  
14 they are.

15                   We are just not that effective. We have no  
16 clout, whatever, but there are reasons why we're  
17 different in many cases. I know the reasons. I was  
18 just concerned that the difference may give rise to  
19 some inequities.

20                   HON. RIVERA: Yes. Sure.

21                   MS. BOSSE: And there are many uniform acts  
22 that New York has adopted or has not adopted in the  
23 uniform fashion that aren't part of the bar exam at  
24 all, and you mentioned several of them.

25                   MR. VIGDOR: I'm sure that's also true.

1                   I'd rather doubt that you've got questions on  
2 mediation. I'd rather doubt that you have questions  
3 on trade secrets and so forth and so on. I don't  
4 know what you have, but I know that you probably are  
5 largely torts and contracts and some of the bread  
6 and butter things that make up for the general body  
7 of law.

8                   MS. BOSSE: It is a test of minimum  
9 competence in the general practice of law.

10                  MR. VIGDOR: Right, right. I'm sure that you  
11 will do it, and I'm sure that the UBE will do it.  
12 My only concern was that we want to be sure that the  
13 law schools have caught up with it.

14                  MS. BOSSE: Thank you very much.

15                  MR. VIGDOR: It's my pleasure. Thank you.

16                  HON. RIVERA: Thank you.

17                  All right. Our final testimony is from David  
18 Schraver, the immediate past president of the New  
19 York State Bar Association. We seem to be in your  
20 home court today.

21                  MR. SCHRAVER: Welcome to Rochester.

22                  HON. RIVERA: Yes.

23                  MR. SCHRAVER: Good afternoon. May it please  
24 the Court and the members of the panel:

25                  I am David Schraver, the immediate past

1 president of the New York State bar association, and  
2 I have been asked to testify this afternoon on  
3 behalf of the association.

4 Thanks to you, Judge Rivera, and to the  
5 committee for inviting me to testify at this public  
6 hearing. I am aware that David Miranda, Eileen  
7 Millett and Sara Gold testified in Albany on  
8 February 3, and I do not intend to repeat their  
9 testimony, although I do affirm it.

10 My testimony this afternoon will cover three  
11 topics:

12 First, an update on the association's  
13 activities and response to the Board of Law  
14 Examiners' request for comments regarding the  
15 January 2015 draft "Content Outline for the Proposed  
16 New York State Specific Law Examination:  
17 Significant Distinctions, Laws and Rules," and a few  
18 preliminary comments on the draft content outline;

19 Second, a brief summary of concerns expressed  
20 by International Section of the State Bar about the  
21 proposed adoption of the UBE in New York;

22 And third, the efforts the state bar has made  
23 to ascertain whether there has been a disparate  
24 impact on minorities where the UBE has been adopted.

25 As you know, the association has a number of

1 significant concerns about the proposal to adopt the  
2 UBE in New York. Nevertheless, in response to the  
3 Board of Law Examiners' request for comments on the  
4 draft content outline, President Glenn Lau-Kee  
5 circulated Ms. Bosse's e-mail and the attached  
6 content outline to all section and committee chairs  
7 as well as our committee on legal education and  
8 admission to the bar and asked that they consider  
9 the board's request with respect to their areas of  
10 expertise, noting the short deadline for comments.

11 As a preliminary matter, we note that the  
12 draft content outline is twelve pages covering  
13 twelve general subject areas, with varying numbers  
14 of sections and subsections in each area, and  
15 numerous case citations and a glossary of thirty  
16 state statutes and rules, all subject to the  
17 expressed caution that the outline is intended to  
18 indicate in summary fashion the examination's  
19 potential scope of coverage and that the citations  
20 to cases, statutes and rules do not mean that the  
21 cited statute or court rule includes all of the  
22 relevant legal principles regarding that entry.

23 The scope of the content outline reinforces  
24 the association's concern that a one-hour, fifty  
25 multiple choice New York Law Exam is not adequate to

1 test New York's specific law, as well as the concern  
2 that New York's specific law differs in a great many  
3 areas from uniform acts as indicated not only by the  
4 scope of the content outline but also by its  
5 subtitle, "Significant Distinctions, Laws and  
6 Rules."

7 We also note that the draft content outline  
8 does not include important topics such as the  
9 commercial divisions of the Supreme Court and their  
10 particular or special practices and procedures or  
11 New York trade secret law, which has been mentioned,  
12 or other areas in which New York law differs from  
13 uniform acts.

14 As Mr. Vigdor has pointed out in some detail,  
15 the New York legislature has been resistant to the  
16 adoption of uniform acts and has not adopted a very  
17 large number of significant uniform acts. There is  
18 no indication that its attitude is likely to change.  
19 In fact, as one recent example of this attitude,  
20 while the uniform law conference adopted a new  
21 uniform act on fiduciary access to digital assets in  
22 2014, the state legislature has asked State Bar  
23 Association to draft a New York-centric bill on the  
24 topic.

25 We urge the Advisory Committee to take the

1 time to consider carefully how testing on uniform  
2 laws will serve the purposes of better preparing New  
3 York law students and other bar exam candidates to  
4 be more practice ready or profession ready or of  
5 testing for minimal competence to practice law in  
6 New York.

7 Second, I will briefly summarize the concerns  
8 of the State Bar's International Section in response  
9 to the reduction of New York law content on the bar  
10 exam if New York should adopt the UBE proposal. The  
11 Section has now prepared a letter which will explain  
12 its concerns in more detail, and just today I  
13 received that letter which I would like to hand up  
14 at the conclusion of my testimony.

15 In 2014, four thousand eight hundred thirteen  
16 foreign-educated candidates took the New York bar  
17 exam comprising over thirty-one percent of the 2014  
18 candidate pool. The trend is that both the number  
19 of foreign educated candidates and the percentage of  
20 the pool of candidates they comprise are increasing.

21 Foreign educated candidates want to be able  
22 to hold themselves out as lawyers admitted in New  
23 York. They are not seeking portability. I have met  
24 with the executive committee of the international  
25 section as they discussed their concern that the UBE

1           proposal would, if adopted, lead to the admission of  
2           foreign educated candidates who have an inadequate  
3           competency in New York law and over time would  
4           lessen the internationally recognized value of New  
5           York licensure and the primacy of New York law as  
6           the choice for international transactions and of New  
7           York as a forum for international dispute  
8           resolution.

9                         Finally, the association continues to be  
10           concerned that the adoption of the UBE proposal may  
11           have a disparate impact on minority candidates.

12                        Over the past couple of months senior staff  
13           of the association have surveyed the fourteen UBE  
14           states that have administered it and have asked  
15           whether they have seen a disproportionate impact on  
16           minority bar exam candidates since adopting the UBE.  
17           The responses indicate that there are no meaningful  
18           data in these states regarding the impact on  
19           minority bar exam candidates. Relative to most of  
20           the states that have so far adopted the UBE, New  
21           York has a significantly larger and more diverse  
22           minority population and pool of minority bar exam  
23           candidates.

24                        Before the UBE proposal is adopted in New  
25           York we urge that the potential impact on minority

1 bar exam candidates be evaluated. To adopt the UBE  
2 without a meaningful effort to do so and to plan to  
3 evaluate the impact on minority candidates after  
4 three years is not a risk this state should take.  
5 And I was pleased to hear Mr. Murphy indicate in his  
6 testimony, at least as I heard it, that he would be  
7 inclined to try to evaluate that before we adopt the  
8 proposal.

9 In conclusion, the issues that the New York  
10 State Bar Association has raised are serious issues  
11 based in large part on the fact that New York law  
12 and New York State are different from the states  
13 that have so far adopted the UBE. We urge the  
14 Advisory Committee and the Court of Appeals in  
15 recognition of these differences to consider these  
16 issues carefully and to delay any decision to adopt  
17 the UBE proposal until these issues have been  
18 thoroughly investigated and an informed decision can  
19 be made based on the best available information.

20 Thank you for the opportunity to testify here  
21 today.

22 And if I may, I'd like to hand up the  
23 international section's letter.

24 HON. RIVERA: Oh, yes. Thank you so much.  
25 Thank you.

1                   I wanted to ask a question regarding the  
2                   concern that foreign-trained candidates would not  
3                   be -- would not be well-educated in New York law if  
4                   New York adopted the proposal.

5                   Why isn't then -- maybe it's really a  
6                   question about your first area you were talking  
7                   about. Why doesn't the requirement of a  
8                   separately -- of separately passing the New York Law  
9                   Exam address that question? Because as it now  
10                  stands, as was mentioned by Judge Berch regarding  
11                  Arizona, it's certainly possible for someone under  
12                  the currently administered New York bar exam to mask  
13                  your weaknesses and lack of familiarity of New York  
14                  law by doing very well on other portions of the  
15                  exam.

16                  And in this way by having the requirement  
17                  that you not only take this New York Law Exam but  
18                  that you must pass it separate and independent from  
19                  whatever score you get on the UBE, why doesn't that  
20                  address the concern? Is it because that fifty  
21                  multiple choice question format is not good enough  
22                  or there's something else?

23                  MR. SCHRAVER: Well, I was interested to hear  
24                  that Arizona and apparently several other states  
25                  have a requirement that you complete a separate

1 course in the state's specific law in order to be  
2 admitted. That's not something that we've  
3 considered and have any position on. I don't know  
4 that -- of course, it's not part of the current  
5 proposal.

6 As to your question, I think the concern is  
7 that whereas now we have fifty percent weighted on  
8 New York related questions, the five exam -- essay  
9 questions which include elements of New York law  
10 plus a fifty question multiple choice of New York  
11 specific law. And I understand that there may be  
12 some overlap between the general principles that are  
13 tested in the essays that we now have and the  
14 proposed six essays under the UBE, but I think the  
15 concern is that by reducing the focus on New York  
16 law from fifty percent to the general principles in  
17 the UBE and then having a separate New York Law Exam  
18 of only fifty multiple choice questions, it seems  
19 inevitably to reduce the content of New York law.

20 Now, I understand that the proposed content  
21 outline is very broad and includes a lot of things  
22 that people presumably would have to study in order  
23 to prepare for just the fifty multiple choice  
24 questions, but again, I think the concern is that by  
25 limiting the New York Law Exam to a one-hour exam

1           that that is much shorter of where we are now, and  
2           the question is whether that is sufficient to test  
3           on New York specific law.

4           I know -- I note that in this morning's Wall  
5           Street Journal there apparently was an opinion piece  
6           by a law professor who thinks, you know, there  
7           shouldn't be any memory component to the bar  
8           examination and the whole thing should be  
9           reevaluated. And I think to some degree the State  
10          Bar Association's Committee on Legal Education and  
11          Admission to the Bar share the view that this is an  
12          opportunity to really take a hard look at what we  
13          are trying to test for minimal competency and  
14          whether there ought to be more changes considered.

15          You know, I'm not going to go into details on  
16          all that today. And you're aware I think of some of  
17          those proposals.

18          HON. RIVERA: Thank you. It's a perfect  
19          segway though to my next question.

20          We -- we have heard some comments from,  
21          again, foreign-educated applicants to the bar who  
22          have concerns about the MPT, that it might be more  
23          challenging and so forth and put them at a  
24          disadvantage, but to the extent that the MPT is an  
25          effort to try and test not memorization -- because

1           it's a closed universe. You intentionally would  
2           have all of the materials you would need to answer  
3           that question. It would seem to address some of  
4           those concerns.

5                        So I was wondering if the -- if the  
6           international section of the New York State Bar that  
7           the committee had addressed -- I don't know what's  
8           in the letter -- had addressed the MPT specifically.  
9           As I say, it's just comments we've heard from some  
10          students, not from a representative body from that  
11          particular population.

12                       MR. SCHRAVER: I just got it shortly before I  
13          came over here. So I can't say --

14                       HON. RIVERA: Okay.

15                       MR. SCHRAVER: I think it does express some  
16          concerns about the MPT insofar as it may  
17          disadvantage people whose first language is not  
18          English and the need for them to assimilate  
19          information and then to answer multiple choice  
20          questions, and it would, as I understand it, be  
21          doubled in weight from ten percent to twenty  
22          percent.

23                       HON. RIVERA: Yes. Two questions instead of  
24          one.

25                       MR. SCHRAVER: So to the extent it

1           disadvantages foreign applicants, the disadvantage  
2           is doubled.

3           HON. RIVERA:   The argument being that it's  
4           not about competency, it's about the language --  
5           challenges based on the language ability, not about  
6           their competence.

7           MR. SCHRAVER:   On other skills.

8           HON. RIVERA:   Thank you so much.

9           MR. MILONAS:   How would you evaluate  
10          disparate impact?  What are you -- pragmatically how  
11          would you go about doing it?  You said delay the  
12          exam and evaluate it --

13          MR. SCHRAVER:   New York does keep track of  
14          the information about the applicants, and one  
15          suggestion has been to take some of these proposed  
16          questions that would be part of the New York Law  
17          Exam and over the next three or four applications of  
18          the New York State Bar exam to work those in and try  
19          to evaluate how -- whether there is any disparate  
20          impact.

21          MR. MILONAS:   What do you mean by work those  
22          in?

23          MR. SCHRAVER:   Include those in multiple  
24          choice questions that are part of the New York bar  
25          exam now, and without actually adopting the Uniform

1 Bar Exam to try to test some of the questions that  
2 would be included if we were to adopt the UBE  
3 proposal before we do it because it -- it just seems  
4 unlikely that if we actually adopt the UBE proposal  
5 now and then try to evaluate the disparate impact  
6 three years down the road both the people who have  
7 taken it in the mean time may have been  
8 disadvantaged, and it's unlikely that we would  
9 reverse course after three years.

10 MS. BOSSE: Can I ask you a question about  
11 the comment on the content outline where you said  
12 that you note that the draft content outline doesn't  
13 include important topics such as the commercial  
14 divisions of the Supreme Court and their special  
15 practices and procedures.

16 MR. SCHRAVER: Uhm-uhm.

17 MS. BOSSE: We don't test those kinds of  
18 things now.

19 Is it your -- is it the position of the bar  
20 association that we ought to be testing the uniform  
21 rules for the trial courts and then commercial  
22 division and those -- I mean, we've looked at that  
23 and wondered if that is testable content or if those  
24 are the kinds of practice rules that you would learn  
25 in practice or through a CLE, and we've never tested

1           those kinds of things.

2                       So I'm curious if you're saying that you  
3 think we ought to be testing those kinds of things.

4           MR. SCHRAVER: Well, that was a comment that  
5 came from the commercial and federal litigation  
6 section, and I noted when I reviewed the content  
7 outline that the various New York courts were  
8 included as part of the outline.

9                       The commercial divisions are an important  
10 part of the Supreme Court. People that are doing  
11 litigation ought to be aware at least that there are  
12 commercial divisions, maybe what the criteria are  
13 for getting into the commercial divisions, what  
14 kinds of cases have to go there, that they do have  
15 special practices and procedures.

16                      I don't know how much would be testable  
17 content or whether it's a good idea, but that was  
18 one that -- it seems to me is one important area  
19 that people who are engaged in litigation and  
20 obviously particularly commercial litigation ought  
21 to be aware of if they're going to be practicing law  
22 in the State of New York.

23                      MS. BOSSE: But do you think that's a matter  
24 of minimum competence for everybody who is taking  
25 the bar exam to learn those rules about the --

1 MR. SCHRAVER: Well, I don't know.

2 MS. BOSSE: -- division in terms of the  
3 limitations on interrogatories and the e-filing  
4 requirements and the monetary thresholds and the  
5 kinds of cases that get assigned to a commercial  
6 part? Is that something that should be on the bar  
7 exam?

8 MR. SCHRAVER: I don't know. I would think  
9 that a litigator in New York as a matter of minimal  
10 competence should be aware of a good number of those  
11 things.

12 Now, whether the fifty multiple choice on the  
13 New York bar example is the best way to test that or  
14 whether having a special course that people have to  
15 take whether it's online or otherwise before they  
16 can be admitted to practice law, but those are  
17 pretty basic things in my view.

18 MS. BOSSE: Uhm-uhm.

19 MR. MILONAS: What about the asbestos cases?  
20 There are more asbestos cases in New York than  
21 commercial division cases and there are thousands  
22 apparently going through those courts and they have  
23 their own specific rules. You get to the point of  
24 where do you stop.

25 MR. SCHRAVER: Right.

1 MS. ARTERIAN: I mean, I just want to go back  
2 to the point that I feel I've learned a tremendous  
3 amount by having this -- you know, this really --  
4 it's an honor and an opportunity to be on this task  
5 force.

6 And what -- what I learned before the task  
7 force when this proposal was first put forward was,  
8 again, that my memory of the New York bar exam, the  
9 nightmare or whatever, but at least I only lived --  
10 I had only one nightmare to live really was -- you  
11 know, you went into it thinking it was going to be  
12 this thing -- it was going to have all these little  
13 New York things, but it didn't. I mean, the New  
14 York -- the New York Essays, they're to trying  
15 figure out whether you have the general competence  
16 because if you did those questions and all you had  
17 was well, New York is this and New York is that I  
18 don't think you would pass it.

19 And so that -- my concern is that it seems  
20 that there may be a feeling -- I think you used the  
21 word "focus" and I think that at the -- at Albany --  
22 in the Albany testimony that word was used, that  
23 we're losing the focus, but I think it may be that's  
24 not really the case in terms of what's actually  
25 being evaluated in those questions, and that, in

1 fact, there's a merging of test scores or whatever.  
2 I don't think -- I would say this results -- I could  
3 argue -- one could argue, and that's sort of what  
4 we're trying to do, right, that this actually sets  
5 up a much bigger hurdle for somebody.

6 I mean, I'm -- I've been interested -- I  
7 haven't heard anybody really in the public testimony  
8 say that, that, you know, before you showed general  
9 competence in these various ways. Those questions  
10 might have been weighed fifty percent, but it  
11 doesn't mean it was only New York law that was being  
12 weighted in that way.

13 But now moving to this test there's going to  
14 be something there that if you don't demonstrate  
15 your competence on that at whatever level the state  
16 decides it doesn't matter. Nothing else matters.  
17 Nothing else will matter, and -- I mean, it matters,  
18 but not to get admitted in the State of New York.

19 And, you know, my general sense is that there  
20 is not a lot of general understanding about that and  
21 that that has in a certain sense been a hindrance I  
22 think to really better dialogue about this. I mean,  
23 we all have different views about it, but I do think  
24 one thing that has happened -- would happen if this  
25 went forward is that it would be, you know, one

1           hundred percent barrier. You know, you can't -- you  
2           can't get there unless you actually demonstrate --  
3           directly demonstrate competence in that, and I don't  
4           think that's the case under the current -- under the  
5           current system.

6                   MR. SCHRAVER: Well, I don't know what the  
7           general understanding is about it, but if as you  
8           suggest it may present a higher hurdle, that would  
9           it seems to me play into our concern about the  
10          potential disparate impact.

11                   MS. ARTERIAN: Right. I totally understand  
12          that. I do understand that. I think there's no one  
13          on this task force that doesn't care a great deal as  
14          the state bar does about, you know, a diverse bar --  
15          a diverse group of practitioners in this state and  
16          in the country. So --

17                   MR. MILONAS: Other bar associations have  
18          different views of the state bar on this -- on this  
19          issue.

20                           For example, the city bar feels that a  
21          uniform bar tests skills much better than the  
22          current bar exam does and that the fact that you  
23          have the ability to be portable to get around and  
24          people come and go in and out of the state and  
25          lawyers practice in different states, as we heard

1 earlier today, is very important, that that's the  
2 way we are today. Civilization is that way today.  
3 So why not get with it, if you know what I mean.

4 MR. SCHRAVER: Well, of course, we already  
5 have the MPT and the MBE. So really what we're  
6 talking about is the essays, as I understand,  
7 primarily, and the essays --

8 HON. RIVERA: Yes. And the New York multiple  
9 choice would change. There are right now fifty  
10 multiple choice administered.

11 MR. SCHRAVER: But the essays to the extent  
12 that they test various skills -- not just New York  
13 law, but they do weave into the essays now New York  
14 concepts and New York law.

15 So -- so how different the UBE would be in  
16 terms of testing those writing skills, reasoning  
17 skills, other lawyering skills that are tested by  
18 essay questions I don't know, but we would not have  
19 in those questions the New York component.

20 MR. MILONAS: Well, they're structured  
21 differently.

22 HON. RIVERA: They're shorter essays, fewer  
23 issues.

24 MR. SCHRAVER: Yes. With respect to the  
25 portability issue, I understand that -- I mean, with

1           respect to multi-jurisdictional practice, for  
2           example, New York has still not adopted the Rules of  
3           Professional Conduct that would permit more  
4           inter-jurisdictional practice or  
5           multi-jurisdictional practice. So we're behind the  
6           curve in that area as well.

7                     Portability? I'm not sure that -- I don't  
8           know how big a deal that is. I mean, most people  
9           who go to New York law schools I would think intend  
10          to practice here in New York. To the extent that it  
11          opens up the possibility for others from other  
12          states to come in, there are already a lot of other  
13          people from other law schools, out of state law  
14          schools that take the New York bar exam. I don't  
15          think that would change. Whether portability makes  
16          a lot of difference to those people or not, I don't  
17          know. They come here and they take our bar exam  
18          anyway.

19                    There are some limits on the portability, as  
20          you know. You have to do it within a certain amount  
21          of time, which varies from state to state. You have  
22          different scores. You have costs. So I don't know.  
23          It's something that I guess is hard to evaluate.

24                    MS. ARTERIAN: Mr. Schraever, the one thing I  
25          would just say is when you talk about students going

1 to law school in New York State, I think there are  
2 some law schools where everybody -- not everybody,  
3 but most. But there are law schools where less than  
4 half of the students want to and wind up staying in  
5 the State of New York, and Syracuse is one of those.  
6 We're not the only one, and there again, I think we  
7 wind up -- you've got to be careful about what we're  
8 thinking is going on in various law schools.

9 HON. RIVERA: Well, the other concern is the  
10 market. If the job is not here or if you have to  
11 move because of your family. It's market driven  
12 some of those choices. I think that's the other --  
13 that's the other issue. Yeah.

14 MR. SCHRAVER: I understand the ABA young  
15 lawyers division favors the UBE and the portability  
16 while the New York State Young Lawyers to the extent  
17 Sara Gold's testimony reflects their views is not  
18 the same.

19 HON. RIVERA: Yes. And on the portability  
20 issue it does -- it does no harm because you're not  
21 put in a worse position. The question is do you  
22 create more opportunity or at least that's the way  
23 it's been presented to us. There would not be  
24 opportunities lost by creating the possibility of  
25 portability.

1                   MR. MILONAS:  There's also the argument, you  
2                   know, New York State is the big player nationally in  
3                   this area.  If New York State does it, then a lot of  
4                   other states will join in and it will perhaps become  
5                   a national bar exam.

6                   MR. SCHRAVER:  Well, I'm aware of the  
7                   argument.  I can tell you that this came up in  
8                   Vienna when I was there with the international  
9                   section and Ken Standard was moderating the panel  
10                  and he asked about this.

11                  One of the panel members was a recent past  
12                  president of the Massachusetts bar, and she very  
13                  strongly and immediately said there's no way  
14                  Massachusetts will adopt the UBE.  Now, that's  
15                  anecdotal and I don't know whether that's -- I don't  
16                  know.  I just don't know what Massachusetts or New  
17                  Jersey or Pennsylvania or Connecticut are going to  
18                  do, and while I appreciate and understand New York's  
19                  influence in these things I don't think anybody  
20                  really knows.

21                  MS. BOSSE:  Can I ask a question?

22                  HON. RIVERA:  Of course.

23                  MS. BOSSE:  If you don't think that a fifty  
24                  item test -- multiple choice test that's specific on  
25                  New York law just in those areas where New York is

1 different or has an important unique rule is  
2 sufficient in addition to a two day exam on general  
3 principle and skill, what would you -- what would  
4 you think is sufficient?

5 MR. SCHRAVER: Well, I don't think the state  
6 bar has taken a position on that or I don't know if  
7 anybody has really considered what would be  
8 sufficient. It's above my pay grade. I'm not an  
9 expert in these things.

10 So I really don't know, but I think, again,  
11 the concern is cutting back from fifty percent of  
12 the bar exam that at least includes New York law  
13 concepts to a separate one hour exam is the concern  
14 as to whether that's efficient.

15 MS. BOSSE: I'm thinking in that fifty  
16 percent of the exam that includes some New York  
17 concepts I think we'd probably be hard-pressed to  
18 identify fifty New York rules that are tested in  
19 that. And so if you say that we've tested the  
20 general principles and we then pull out and test  
21 something in addition, I was just curious as to  
22 whether or not you have any impression as to how  
23 much more there ought to be.

24 MR. SCHRAVER: I don't think I've seen  
25 anything. I've reviewed the focus group's

1 testimony. I've reviewed some of the other things.  
2 I've obviously reviewed our reports --

3 MS. BOSSE: Sure.

4 MR. SCHRAVER: But I don't recall that I've  
5 seen anything on that.

6 MS. BOSSE: I just wondered if anybody  
7 expressed anything.

8 MR. SCHRAVER: I don't know.

9 MS. BOSSE: Thank you very much.

10 HON. RIVERA: Thank you so much. Thank you  
11 all.

12 Is there something you wanted to --

13 MR. MURPHY: This is to supplement the  
14 record, as I promised.

15 HON. RIVERA: Oh, yes. Thank you, Mr.  
16 Schraver. Very much appreciated.

17 MR. SCHRAVER: Thank you Judge.

18 HON. RIVERA: This is in response to my  
19 question about --

20 MR. MURPHY: I'm not adding anything to --  
21 although I'd love to, I'm not adding anything to my  
22 earlier testimony.

23 HON. RIVERA: Well, we're accepting comments  
24 until March -- we've extended the date. It's up to  
25 you if you wish want to.

1                   MR. MURPHY: I would make one comment, and it  
2 actually relates to -- there's much I could say, but  
3 Justice Berch made the point that gee, the body is  
4 the same whether you're in California or New York so  
5 have a national -- I mean uniform exam with respect  
6 to admission to practice medicine or accountancy.  
7 Intuitively that seemed right, but it turns out that  
8 that's not necessarily the case.

9                   In Montana we have Rocky Mountain Spotted  
10 Fever, but they don't have much of that in Florida,  
11 and the medical profession got over this long ago  
12 and doesn't seem to have suffered at all nor the  
13 people in various jurisdictions.

14                   So I think -- before World War II I was told  
15 once it was actually possible for a lawyer to know  
16 the law, but since then we've had this explosion and  
17 we have to be careful about how far we go in saying  
18 you need to know all these rules in a particular  
19 practice to determine whether the person is  
20 minimally competent.

21                   Now I'll get to the point.

22                   HON. RIVERA: Yes. You had something there.

23                   MR. MURPHY: Yes. You asked how many states  
24 have an additional requirement beyond the score for  
25 admission.

1           There are five states. Alabama has an online  
2           course. Arizona has an online course. Missouri has  
3           an open book online test. Montana has a one day  
4           seminar following the examination, and Washington  
5           has an open book on time online multiple choice  
6           test. I don't know what -- Kansas is not listed  
7           here. I don't know if they've made a determination  
8           in that regard.

9           I'd be happy -- this is pages 32 and 33 of  
10          the guide that I'd be happy to give to you for your  
11          record because it has all the information relevant  
12          to the UBE and it might be helpful to you.

13          HON. RIVERA: We have it.

14          MR. MURPHY: You do. It's on pages 19 and  
15          20.

16          HON. RIVERA: This is the most recent  
17          version. It's the update.

18          MS. BOSSE: I can circulate a copy to the  
19          committee. I just got the book.

20          HON. RIVERA: Perfect. Good.

21          MR. MURPHY: Thank you again for the  
22          supplement.

23          MR. SCHRAVER: Judge, if I may invade  
24          Mr. Vigor's jurisdiction for just a moment.

25          HON. RIVERA: With his consent which I think

1 is given.

2 MR. SCHRAVER: He provided it to me in  
3 response to Judge Milonas's question before, but  
4 Mr. Vigdor did provide to me a chart of all of the  
5 uniform acts and which ones have been adopted or not  
6 in all these states. That might be helpful to you.  
7 You will need a magnifying glass to read it.

8 MR. MILONAS: What I was really thinking --  
9 what I was really thinking about is what provisions  
10 of the uniform act are in conflict with New York  
11 law. You know what I mean? That would be more  
12 interesting. I doubt that there are that many, but  
13 you pointed a lot out.

14 MR. SCHRAVER: It might be a useful aid for  
15 you to decide which acts you think are more  
16 important if, in fact, you want to get into that  
17 kind of a comparison.

18 HON. RIVERA: Yes. That would be useful. I  
19 think we would like to have that. Thank you so much  
20 for that.

21 Thank you all for providing testimony today  
22 and making your way out here. Some of you not  
23 having to travel very far, but nevertheless,  
24 bringing important testimony to us, and this public  
25 hearing is adjourned. Thank you.