



Brooklyn Law School
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**Public Hearing before the Advisory Committee
on the Uniform Bar Exam
CUNY Law School
January 20, 2015**

“Can We Do Better?”

**Testimony by:
Nicholas W. Allard
President and Dean
Brooklyn Law School**

Good afternoon.

Thank you, Judge Rivera, and distinguished members of the Advisory Committee for the opportunity to testify on the proposed adoption of the Uniform Bar Exam (UBE) in New York.

Speaking for myself, I support an ongoing comprehensive effort to improve how new lawyers are licensed to practice, including moving to a more national bar exam in a way that enables New York to maintain its standards for admission, promotes further prudent innovations, and assures that methods for measuring the qualifications of a new lawyers are accurate, objective, and meaningful for practice in the 21st century world of law.

I applaud Chief Judge Lippman's decision to appoint this Advisory Committee to review New York's bar exam given the growing number of cross-state and multiple jurisdictional practices, and the radically changing nature of the job market all graduates face. And beyond consideration of the pros and cons of the UBE, the Chief Judge's proposal provides a much-needed and timely opportunity that, in my opinion, we should not miss: that is, to examine how best to rigorously and fairly license law school graduates. In other words, let's not get caught up arguing only over whether to paint or to wallpaper when the house is on fire.

Thanks to Chief Judge Lippman's leadership, and the quality of our exceptional State and City Bars, New York sets the standard nationally in legal innovation, in the quality of legal services we offer, and in serving New Yorkers' unmet legal needs. Once again, New York will lead the way, as the decisions you will make with regard to the bar exam will certainly have national impact as well.

My purpose today is not to argue for – or against – adoption of the UBE, but to raise questions about the entire process by which we license attorneys in New York, which in my view should be addressed, and should not be, and *cannot* be, separated from a decision about the UBE.

Also, I want to be clear, I am not talking about an easier path to obtaining a license to practice. At Brooklyn Law School, which has a deserved reputation for excellent preparation and high bar exam passage rates, we have never been about "giving everyone a ribbon on field day." We believe that every law graduate should be prepared and that their qualifications should be relevant to market needs, and thoroughly tested to the highest standards.

It is imperative that we ask ourselves: Is the bar exam, as it stands now, advancing our profession and attracting the next generation of smart, talented, committed students; or are we clinging to a licensing system that may be increasingly out of step with – and not altogether relevant to – 21st century legal education?

“Can we do better?”

This is, I’m sure, a worrisome question. Change is difficult. And to change the bar exam system means taking a hard look at a complex, ongoing system, which involves deeply embedded and interlocking interests, the logistical challenge of scheduling and administering tests to thousands of students across the country, the big business of bar exam preparation courses, and so on. You do not have the luxury of putting the ship in dry dock to scrape off the barnacles, or to build a new ship from scratch. Your only realistic option is to retrofit while underway in difficult waters.

I recall, for example, how difficult it was to completely fulfill Chief Judge Lippman’s vision of an army of early test-takers qualified to do pro bono work because of the practical problem of finding sufficient space to test large numbers each February. Change is incredibly daunting to even begin to consider. The danger is that we become complacent and accept the status quo, whether or not it is working. That is worse.

For example, the historic and unexpected nationwide drop in the passage rate for last July’s exam, due to a historic decline in scores on the multi-state component, demands that we take a hard look at what is not working. It reminds us that there are regularly unexplained fluctuations in passage rates from year to year that we have come to tolerate. We still need a thorough and adequate explanation for what happened last July. This is critical. We need to know why bar exam results would vary so much from 2013 to 2014. Shouldn’t we all collectively have a sense of urgency about getting this right? The July results affected real students all over the country. It’s not a theoretical or hypothetical problem.

We should question whether the established bar exam process imposes discriminatory barriers to entry to the profession for people who would be able and effective lawyers. It’s no secret that a law school education is expensive, and that many students graduate with significant debt – and that is on top of whatever loan burden they already carry from their undergraduate years. Then there is incredible pressure on these recent graduates to spend thousands more on bar exam preparation courses. Why isn’t their education at an ABA-accredited law school

sufficient for them to pass the exam? Of course, not every law school grad can afford the test-prep courses – and many cannot afford to take days or weeks away from a paying job to take these courses. In effect, we’ve built inequity into our system that I believe hurts the less-advantaged. How can we build a fairer system? Again, how can we do better?

If a law school education itself is not sufficient for most students to be admitted to practice without additional preparation, then should law schools change *what* and *how* they teach to help more students pass the bar exam? Or should the test itself and *how* and *when* the test is administered change? For example, why wait until after graduation for a student to take this high-stakes, all-or-nothing exam? Why not consider testing students for licensure incrementally to evaluate them more comprehensively over the course of their law school careers? Perhaps, for example, we can test after their first year on the core curriculum.

How does our established approach to licensing differ from other learned professions, and why? Moreover, there is widespread agreement within the profession that law schools need to teach more practical skills. All schools have incorporated this into their curricula, yet how do we evaluate and measure practical, clinical experience? Is a written test truly the best way to evaluate practical experience? It may be easier to administer and grade, but is it really the best way to measure practical learning and skills? Can we do better? There are many alternatives we could explore. But, the fact is the inertia propping up our “business as usual” system for licensing lawyers is not designed to accommodate such fundamental change.

We’re locked into a self-perpetuating state-by-state bar exam system – with components added for MBE and MPT designed and scored by the National Council of Bar Examiners (NCBE). Before we consider shifting to greater dependence upon the National Conference of Bar Examiners, we should examine carefully its track record in developing objective, reliable exams, its organizational mission, any conflicts of interest, and questions about accountability and transparency. In addition, the serious concerns voiced about NCBE-designed portions of the bar exam unless allayed will be used as a rationale to oppose moving to the Uniform Bar Exam.

Therefore, we must now look at whether the NCBE is an appropriate organization to have influence as it does over policy, legal education, law school admissions, the LSAT, and other areas that are properly the province of the ABA, the State Bar, the courts, and law school governing boards and faculty. Should bar

associations, states, and educators be telling NCBE what to test, or should the NCBE be telling us who to admit and what to teach in order to pass its test that is built on the NCBE's status quo vision of the profession? Should the developer and scorer of the test be setting policy?

This is no small thing. The fact is, we need good lawyers more than ever – lawyers who can respond to the rapid and fundamental changes in technology and our increasingly global society. And, more than ever, we need more good lawyers who can meet the needs of the underserved. But to do this, we need to overcome the persistent and discriminatory barriers to careers in the law. The legal profession should not be an exclusive club. We all have a responsibility to encourage entry to the profession of qualified individuals who can ably serve the legal needs of an increasing number of Americans who need their help. We need to make law school more affordable, offer a curriculum relevant to constantly changing legal practice, enhance the reputation of the legal profession, and prepare our students for a new marketplace for lawyers.

We are making inroads on these fronts, and now we have an opportunity to also make meaningful change in how we license lawyers. We can do better than our present system, which, as we know, is often onerous and expensive, and yields unpredictable results. If we do not seize this moment to start significant improvements, we will impose a serious self-inflicted wound on our profession and the country. We can do better.

Many far more knowledgeable and experienced people than I have been asking these questions for years. And yet change has been slow to come. Now we can no longer afford to put aside these questions as we consider making changes around the edges that may not adequately address the larger flaws.

The work of this Committee matters. In New York City, when you travel on the number 4 subway train – which starts in Woodlawn in the Bronx, and goes through the East Side of Manhattan, past City Hall and Wall Street, onto Brooklyn Heights, before ending in Crown Heights – look at the hands holding on to the polls in each car, of the people getting on and off the subway. You see the hands of people across the spectrum of races and ethnicities – black, white, brown, the whole rainbow. You see the hands of the people from every walk of life, and from the rich to the struggling. Those are the hands of all the people of New York City and they are the hands of America. They are the hands of the people who need good lawyers. And they are the hands of many people who may be well-qualified to be lawyers who can serve society.

My worry, however, is that our outmoded, but improving, system of legal education and licensing still is unintentionally precluding many able and motivated people from becoming lawyers. We can do better.

I commend you all for taking on this very important issue for legal education and for our profession and for our country.

Thank you. I would be happy to answer any questions you may have.



The New York State Court of Appeals

Advisory Committee on the Uniform Bar Exam

Uniform Bar Exam Public Hearing

CUNY School of Law

20 January 2015

Testimony submitted by LatinoJustice PRLDEF

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statements, and financing a legal education, how to succeed in law school, and the different legal careers available to law graduates, as well as providing civil rights and corporate legal internships. The list of alumni who have benefitted from LatinoJustice's unique Education Division programming includes prominent Latino judges, members of the bar practicing in all sectors, including government service, public interest, and private practice, business and union leaders, and elected and appointed officials.

With the interests of these aspiring Latino lawyers in mind, we strongly urge the New York Court of Appeals to take adequate steps to thoroughly investigate and study the possible adverse consequences the UBE may have on Latino and other minority law graduates seeking admission to the New York Bar before adapting the use of the UBE in New York. We are very concerned that the UBE may have adverse effects on Latino law graduates seeking admission to the New York Bar without any prior comprehensive disparate impact study by NY on the impact of the adoption of both the Uniform Bar Exam and the New York Law Exam on minority law graduates of color indicating otherwise. This concern is further illuminated given that bar passage rates have been dropping nationwide, and particularly that the majority of the 14 jurisdictions currently utilizing the UBE reported declines from the 2013 to 2014 bar exam, with several states reporting dramatic double-digit declines (22% in Montana, 15.2% in Iowa, and 13% in North Dakota)¹. Given the foregoing, we respectfully submit that any review of such a gatekeeping mechanism as a professional credentialing license would clearly benefit from a racial equity analysis, including the bar examination.

The New York Bar Association has publicly emphasized its goal of diversity and inclusion in the legal profession. With the changing demographic of the U.S. population, it is

¹ Above the Law, "Declining Nationwide Bar Exam Pass Rates," October 27, 2014. <http://abovethelaw.com/2014/10/declining-nationwide-bar-exam-pass-rates>

data on minority performance on the current exam, and especially after a previous Commission recommended regular review in this regard.⁶

The fact that Latinos generally score lower than non-minorities on the New York Bar when then coupled with the considerable decline in bar pass rates in the majority of states currently using the UBE - as much as 22% in one UBE state, i.e. Montana, puts Latino (as well as African-American) test-takers at a particularly high risk of failing an exam that will also be considerably more expensive than the current New York Bar Exam. The UBE could potentially cost three to four times as much as the \$250 required to take the current test, thus creating a formidable economic barrier to minority bar applicants. It is also important to consider that transferring UBE scores to other jurisdictions ranges from \$400-\$1240. As significantly fewer Latinos and African-Americans retake the test than non-minorities as of now,⁷ that number will only grow if these test-takers fail the first time and then cannot afford to retake the exam. Given that Latinos and African-Americans are substantially more likely to graduate from law school with debt than their white counterparts,⁸ this additional cost will be an additional financial burden that will be imposed upon these minority groups.

Given the existing racial disparity in law school to begin with,⁹ and the numbers of the applicant pool decreasing since 2011, there are serious challenges to ongoing efforts to improve

⁶ *Fordham Urban Law Journal: Report of the New York Judicial Commission on Minorities*, Volume 19, Issue 2: 1991.

<http://ilawnet.fordham.edu/cgi/viewcontent.cgi?article=1359&context=ulj>

⁷ LSAC National Longitudinal Bar Passage Study, pp. 15-16.

<http://www.unc.edu/edp/pdf/NLBPS.pdf>

⁸ *After the JD II: Second Results of National Study of Legal Careers*, Table 10.1: Educational Debt Remaining by Gender and Race, pp. 81.

http://www.law.du.edu/documents/directory/publications/sterling_AJD2.pdf

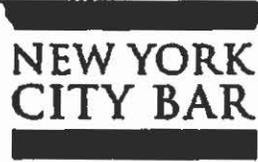
⁹ Law School Admission Council, LSAC Resources. Data on Ethnic - Gender applicants and matriculants <http://www.lsac.org/lsacresources/data/ethnic-gender-applicants> and

<http://www.lsac.org/lsacresources/data/ethnic-gender-admits>

for themselves: underrepresented minorities routinely pass the bar at lower rates, and thus are barred from the legal profession at higher rates. If the Court of Appeals is willing to undertake the significant shift from the current exam to the UBE, it should also consider providing an alternative to the bar exam and address whether elimination of the examination warrants further study. Why not consider adopting an alternative that, like medical licensing exams, test the actual skills required to practice law, such as a clerkship period closely supervised and evaluated by a current practitioner? Law school graduates could then choose between the clerkship and the bar exam as a means of admission to practice, while allowing the bar exam to remain in existence and available for those who prefer to take it.

And anecdotally speaking, literature suggests that the essay portion of the current NY bar exam is better for Latinos and blacks than adapting New York-centric multiple choice under the UBE proposal. Clearly, more study analyzing all of these various suggestions warrants a more detailed study and analysis of the pros and cons of each proposal.

We make these comments not to engage in theoretical abstraction but more along the lines of the best thinking of the Commission we cited earlier. That is, when racial equity in licensing is clearly absent in any profession, we need to then pause, study and assess the outcomes of our entry points. Only then can a true assessment involving switching examination formats as the one contemplated by this Committee on whether New York should adopt the UBE, would then sufficiently address all of the concerns that LatinoJustice PRLDEF and other advocates for full minority inclusion into the legal profession have raised.

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a bold, serif font, centered between two thick, black horizontal bars.

**NEW YORK
CITY BAR**

**STATEMENT OF MARK C. MORRIL,
CHAIR, NYC BAR ASSOCIATION COUNCIL ON THE PROFESSION
ON BEHALF OF THE NEW YORK CITY BAR ASSOCIATION**

BEFORE THE ADVISORY COMMITTEE ON THE UNIFORM BAR EXAM

I want to thank the Advisory Committee for the opportunity to testify on behalf of the New York City Bar Association. The City Bar, since its founding in 1870, has been dedicated to maintaining the high ethical standards of the legal profession, promoting reform of the law and access to justice, and providing service to the profession and the public. The Association, through its 24,000 members, continues to work for political, legal and social reform, while implementing innovative means to help the disadvantaged. Protecting the public's welfare remains one of the Association's highest priorities.

The City Bar supports Chief Judge Lippman's recommendation that New York State adopt the Uniform Bar Examination (UBE), effective July 2016. We believe that adoption of the UBE is an important reform that will significantly enhance opportunities for new lawyers to find employment wherever it is available. We believe that the UBE is correctly focused on testing the competence of the candidate on fundamental legal principles and lawyering skills that are important to entry-level practice. We also believe that adoption of the UBE by New York State will motivate other states to follow suit, thereby further advancing the goal of a more nationwide standard for admission to the bar and increased employment mobility for lawyers.

We recognize that moving to the UBE is a major step for New York State and, as with any major reform, there is a need to be alert for unforeseen consequences. We recommend that the New York State Bar Examiners compile rigorous performance data relating to the UBE as implemented in the State. The Bar Examiners should review the data annually to discern any demographic trends regarding bar passage rates, particularly whether the UBE has any disparate impact on historically disadvantaged groups, or any other area of potential concern. We urge that the State Bar Examiners be charged with conducting a formal review of New York's

experience in the first three years of its use of the UBE and issue a public report shortly after the end of the three-year period stating its conclusions as to whether the UBE has advanced the purpose of facilitating new lawyer mobility and improving testing techniques, whether there has been any disparate impact on underrepresented groups and analyzing any negative trends that have emerged that may require further attention or the consideration of new alternatives.

The City Bar has a long history of involvement and concern with the New York State Bar Exam. In May 1992, the City Bar's Committee on Legal Education and Admission to the Bar issued a report on Admission to the Bar in the Twenty-First Century expressing concern that the New York State bar examination did not adequately or effectively test minimal competency to practice law in New York and that the exam disproportionately excluded minority applicants. More recently, I was honored to Chair the City Bar Task Force on New Lawyers in a Changing Profession. The Task Force was appointed by then-City Bar President Carey Dunne in the fall of 2012 to address changes in the legal profession, with a focus on the "plight of new lawyers." Our mandate was to examine whether new lawyers are being given relevant development opportunities in law school and in their early careers so that they are employable, able to realize their aspirations in a reasonable time frame and ready to serve clients effectively. The City Bar Council on the Profession continues some of the work of the Task Force which issued its report "Developing Legal Careers and Delivering Justice in the 21st Century" in November 2013.¹

Our Task Force focused on the fact that many of the nation's new law graduates are facing diminished job prospects, unprecedented debt and limited opportunities to achieve the experience and training necessary for a professionally rewarding and financially sustainable career. We raised particular concerns with impediments to innovation that we believe have operated to artificially and unnecessarily limit professional opportunities for new lawyers.

Our Task Force found specifically that the requirement for lawyers to pass a state-specific bar examination has significantly limited lawyer mobility at a time when the practice of law is increasingly national and global. We noted the important influence of globalization on career opportunities and that opportunities may exist in parts of the nation where there are relatively few lawyers competing for available positions. A law student may take the bar exam in one state and then find that the

¹ The report is available at <http://www2.nycbar.org/pdf/developing-legal-careers-and-delivering-justice-in-the-21st-century.pdf>

best employment opportunity is in a different state, but an additional bar exam will be required to practice there. Students and new lawyers may find it necessary to relocate because a spouse or life partner finds an important opportunity in a different state.

We recognized that a bar exam may advance the important consumer protection interest of weeding out those who are not minimally competent to serve clients. A bar exam also requires applicants to focus and learn a breadth of law. But we found that in many instances state by state bar exams test skills that are of decreasing and marginal relevance to contemporary legal practice and fail to test relevant problem-solving skills.

We believe that adoption of the UBE, with its portable scores, will significantly advance the important interest of lawyer mobility in the nationwide marketplace. Also, the UBE, with its principles-based approach, will test more practical problem-solving skills than the current exam.

We agree with the Board of Law Examiners that the New York exam should continue to have a New York component. All lawyers admitted in New York should have a basic grounding in New York law and procedure. The New York component should focus on areas where New York Law or procedure differs significantly from general principles or procedures common in other states. It should be available on more dates than the current exam, including potentially on dates other than those when the UBE is administered. We believe that passage of the New York State component should be reasonably achievable by new lawyers who can demonstrate baseline competency in New York specific areas of law.

The City Bar believes that the benefits of the UBE will increase as more states follow New York and students can seek out employment opportunities nationwide with confidence that success on the New York State Bar Exam will provide most of what is needed to become licensed in another state. Conversely, adoption of the UBE also will enable New York employers to more readily draw on a talent pool of new lawyers who have taken the exam elsewhere and can become licensed in New York by successfully completing a readily accessible New York module.

I have noted that the City Bar previously has expressed concern about the impact on historically disadvantaged groups of standardized testing in contrast to other mechanisms for demonstrating a high level of competency. New York State must maintain its commitment to ensure that the bar licensing process advances the goal of setting reasonable competency standards without impeding ongoing efforts to increase

diversity in the profession. To that end, as I have stated, the City Bar urges that the New York State Bar Examiners be charged to compile and analyze data sufficient to monitor any disparate impact trends. New York State should be vocal in ensuring that any issues that are identified are addressed promptly and effectively.

Finally, we are aware that some have expressed concern about the timing of implementation of the UBE in New York. Our own earlier comments expressed the concern that a July 2015 implementation date might have upset the settled expectations of current third-year law students. We believe that a July 2016 adoption date provides a reasonable time frame for law schools to make any adjustments to their curriculum they deem advisable and for potential test takers to set their expectations. We firmly believe that there should be no further delay beyond 2016 in the implementation of this important reform.

On behalf of the New York City Bar, I thank the Committee for the opportunity to testify today.

January 20, 2015

The City University of New York
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January 16, 2015

Advisory Committee on the Uniform Bar Examination
c/o The Honorable Jenny Rivera, Associate Judge
New York State Court of Appeals
20 Eagle Street Albany, N.Y. 12207

By email to:

Margaret Nyland Wood
Court Attorney for Professional Matters
New York State Court of Appeals

Re: Outline of Proposed Testimony at UBE Public Hearing
January 20, 2015, CUNY School of Law

1. Introduction and Summary of Testimony.

- a. **Passing the New York Bar Exam: a time-honored tradition in our profession.**
- b. **Forces of change in law schools and the legal profession.**
- c. **Advantages and disadvantages of the current NY bar exam and the proposed UBE.**
- d. **Impact of UBE on law school curricula and bar exam preparation.**
- e. **Recommendations.**

2. Forces of Change in Law Schools.

- a. **Need to prepare students for clients, practice, and the profession in a rapidly changing environment and economy.**
- b. **Challenges of employment prospects for law graduates, which although improving, remains difficult at best.**

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- c. Impact of student debt, shrinking job market, and decline of law school enrollment, and continued lack of diversity in the legal profession.
- d. Access to Justice gap: Chief Judge Jonathan Lippman has been singularly effective in bringing attention to, and raising awareness of, the need for lawyers to represent the poor and middle class in matters relating to the essentials of life.
- e. Jim Silkenat, former President of the American Bar Association, speaks eloquently about the “great disconnect”—a surplus of law graduates and lawyers relative to the job market, and the escalating unmet legal needs of people who are poor or middle class, a large percentage of whom do not have access to lawyers or the courts.

*See e.g., A Joint Convocation Convened by The Judicial Institute on Professionalism in the Law and The New York State Bar Association and its Committee on Legal Education and Admission to the Bar, **The Coming Changes to Legal Education: Ensuring Professional Values** (New York State Judicial Institute, White Plains, New York, May 22, 2014); **Developing Legal Careers and Delivering Justice in the 21st Century: A Report by the New York City Bar Association Task on New Lawyers in A Changing Profession** (Fall 2013), available at <http://www2.nycbar.org/pdf/task-force-report-executive-summary-developing-legal-careers-and-delivering-justice-in-the-21st-century.pdf>; New York State Bar Association, **Report of the Task Force on the Future of the Legal Profession** (April 2011), available at <http://www.nysba.org/futurereport/>.*

3. The Bar Exam and the Law School Curricula: A Missing Link in Legal Education Reform.

- a. Developments in legal education based on goals and outcomes, criteria based assessment, and need to prepare students for clients, practice, and the profession.
- b. Advantages and disadvantages of current NY bar exam and the proposed UBE.
- c. Impact of UBE on law school curricula and bar exam preparation.
- d. Criteria based assessment in law school can be linked with bar admission.
- e. Opportunity to maintain NY role as pioneer in legal education as part of partnership among law schools, the bar, and the judiciary.

*See e.g., **The Future of Legal Education and Admission to the Bar**, Eileen D. Millett and Eileen R. Kaufman, Ed., 85 NYSBA Journal (September 2013); ROY STUCKEY AND OTHERS, **BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP** (CLEA*

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2007)(available at <http://cleaweb.org/best-practices>); WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (Jossey-Boss 2007); AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR (July 1992), REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (the McCrate Report).

4. Access to Justice and the Bar Exam: an Impetus for Reform.

- a. Access to Justice and Chief Judge Jonathan Lippman's Task Force to Expand Access to Civil Legal Services in New York.
- b. BOLE nascent effort to integrate Access to Justice topics on the NY bar exam.
- c. Goal of BOLE's Access to Justice initiative: raise awareness of the justice gap and the vast unmet legal needs of the poor and middle class.
- d. Including Access to Justice issues and fact patterns on the bar exam may encourage law schools to address access to justice issues more systematically and reinforce importance of public service as a core value of our profession.
- e. Impact of UBE on Access to Justice and the bar exam.

See e.g., 2014 Report to Chief Judge Jonathan Lippman from Task Force to Expand Access to Civil Legal Services in New York, available at <http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS%20TaskForce%20Report%202014.pdf>

2014 Report of the Law School Involvement Working Group on the Third Annual Law School Conference

Task Force Report:

<http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS%20TaskForce%20Report%202014.pdf>

Law School Report in Appendix 15:

<http://www.nycourts.gov/ip/access-civil-legal-services/PDF/2014%20CLS%20Report%20Appendices%20Vol%202.pdf>

5. Recommendations.

- a. Maintain the NY Bar Exam and explore ways to integrate Access to Justice on the exam and award bar exam "credit" for students who successfully complete a law school clinic or supervised externship.

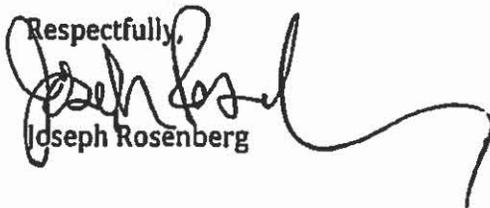
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- b. Pilot an Access to Justice practice path to bar admission, similar in structure to the Daniel Webster Scholars program at the University of New Hampshire Law School, but adapted for NY.
- c. NY law schools already offer a sequence of courses, practicums, externships, and clinics that could serve as the sequence of required courses for a practice path to bar admission.
- d. This sequenced curriculum could be unified around one or more themes or principles: for example, a focus on public interest and social justice, particular areas of practice, the realities of sustaining a solo or small firm practice, or hybrid combinations. As with the Pro Bono Scholars, it could culminate in a final semester immersion into practice.
- e. Assessment. Link legal education with assessment for professional knowledge, skills, and values. Students would demonstrate that they meet performance criteria and successfully complete a prescribed sequence of courses to qualify for bar admission.

See e.g., ABA Standards and Rules of Procedure for Approval of Law Schools 2014-2015, Ch. 3, available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_chapter3.authcheckdam.pdf; New York State Bar Association Committee on Legal Education and Admission to the Bar, *Recommendations for Implementation of the Report of the Special Committee to Study the Bar Examination and Other Means for Measuring Lawyering Competence* (February 2012), available at <https://nysba.org/WorkArea/DownloadAsset.aspx?id=51614>; Daniel Webster Scholars Honors Program, University of New Hampshire School of Law <http://law.unh.edu/academics/id-degree/daniel-webster-scholars>

Thank you for considering this testimony.

Respectfully,

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January 20, 2015

Good afternoon. My name is Allie Robbins and I am the Assistant Dean for Academic Affairs here at CUNY School of Law. I also serve as co-director of our bar support programs. I want to begin by saying welcome to CUNY Law and thank you for the opportunity to testify. We are glad you are hosting this historic hearing at our school.

I also want to start out by stating that I do not endorse the bar exam as an appropriate measure of the variety of skills that individuals need to possess in order to be good lawyers. However, the question at hand is whether to move from the current NY bar exam, to the Uniform Bar Exam. While I do not believe that the UBE is a better measure of lawyering skills than the NY bar exam, and in fact I worry that the increased weight afforded to the MBE and MPT will be detrimental to the development of a diverse bar, I know that others are testifying to those issues. My primary concerns in this testimony are to ask for lead time for whatever change to the bar exam the committee may decide upon, to raise the importance of access to resources when preparing for the bar, and to encourage the committee to recommend a streamlining of the material to be covered by the proposed New York Law Exam.

Law schools spend considerable energy and resources preparing students for the bar exam. At CUNY, as at many other schools in the state, we do so beginning in the first semester. Many of our first year professors utilize bar-type questions and work with students on writing bar essays.

Students spend 3-4 years in law school learning how to answer bar exam questions. Being taught one way and then unexpectedly having to learn a new way for a new exam is likely to be quite destabilizing. It is difficult to break out of old habits. Students currently in law school should take the exam that they have been preparing for, or should at least have the option to do so.

There are a myriad of components that go into preparing students for the bar exam. It is not simply an 8 or 10 week post-law school experience. For students, it begins from day one of law school. Yet, before a student even steps foot in the classroom, it requires considerable training and study by faculty members to understand how the bar exam tests, and how to teach students to succeed on it.

We regularly hold workshops for the faculty to train them in how and what the bar exam tests. Our bar support coordinators consult with faculty individually and provide them with information about how their specific subjects are tested on the bar. We review practice questions and exams and advise on doctrinal coverage.

Doctrinal coverage would shift significantly were NY to adopt the UBE. As a public school in New York City, while our students are prepared to practice in many jurisdictions, we place a special emphasis on preparing our students to practice law in New York. Many of our courses focus on NY law. I imagine many faculty members would want to continue this coverage of NY law. Thus they would have to simultaneously teach the general principles of law tested by the NCBE and New York law, and would need to make sure that students understood and were comfortable with those distinctions. It is going to be quite difficult for faculty to fit this double coverage into their already packed semesters.

Of course, it is possible to teach both general principles of law and state law in the same course, and many teachers do it already — though not to the extent they would have to if the UBE were adopted. If the UBE were adopted, faculty would need to be retrained and would have to rework their teaching and assessment methodologies. To do so effectively would take considerable time.

Access to resources is another issue that law schools would face if NY moves to the Uniform Bar Exam. Presently, the NY Board of Law Examiners provides previously used essays for free on its website, along with two sample answers for each question. Unlike NY however, the NCBE charges for its multistate essays and MPTs. Purchasing these materials for use by all students and faculty members would be quite expensive for law schools. This cost is likely to be prohibitive and will have a significant detrimental impact on bar support programs as we would not have access to a wide variety of materials from which to work with students. Ultimately it is the students who would suffer from this lack of freely available materials.

A similar problem exists with the NY multiple-choice questions. The NY Board of Law Examiners has never released to the public a single NY multiple-choice question. If the separate NY Law Examination were adopted, students would not have practice exams from which to study and law schools would be unable to adequately assist law students in their preparation. This is difficult on the current NY bar exam with the NY multiple-choice questions worth 10% of the bar, but would be even worse if they comprised a stand-alone exam.

I also want to take a moment to address the content of the proposed New York Law Exam. Florence Kerner, who is the co-director of CUNY Law's bar support programs, and I have begun a comprehensive review of the subject matter of the proposed content outline dated January 14th. We understand that it is important for individuals admitted to the bar in NY to have the knowledge and skills necessary to practice in New York courts. To do so competently, of course, requires an understanding of the CPLR. In order to practice ethically, an attorney must be familiar with the NY Rules of Professional Conduct.

There is a considerable amount of doctrinal overlap between the proposed NY Law Exam content outline and the MBE and MEE outlines. Most of the variances between the multistate law and NY law, however, are minute. If the proposal were adopted as stated, applicants would be forced to learn a tremendous amount of law in a very short period of time. Most of this law could not possibly be tested in one administration of a 50-question multiple-choice exam. Thus applicants would be left to spend weeks studying the intricate details of NY law when only a small fraction of that material would appear on their exam.

As these questions would not require any level of legal analysis, but simply rote memorization, applicants are likely to forget this information almost completely, the minute the exam is over.

Thus in truth they will end up learning the details of NY law in practice, and perhaps in law school, but not in bar study.

I also noticed that the proposed questions may include answer choices such as "none of the above" and "all of the above." These types of questions were eliminated in the MBE by the NCBE several years ago, and I am happy to provide the committee with research that details the negative pedagogical value of these types of answer choices.

I am mindful of the time, and am happy to provide the committee with a more detailed recommendation of how to streamline the NY Law Exam at a later date if you feel it would be helpful. My suggestion at this time, however, is that only the CPLR and Rules of Professional Conduct should be tested on the New York Law Exam.

In sum, any major change to the bar exam should be phased in only after all students now enrolled have graduated, as students need most of law school to prepare for a bar exam. Additionally, faculty need time to rethink their courses - and deans to rethink the entire curriculum.

The resources available to help students study for the bar exam are too few and too expensive. Access to resources is critical to passing the bar, and the committee must consider this issue.

Finally, the committee should consider what really needs to be tested in the New York Law Exam in order to accomplish the goal of having practice ready New York lawyers.

I hope that if a decision is made to move to the UBE, it is done with considerable lead time and with open access to prior exam questions, in recognition of all of the preparation that goes into passing the bar, on the part of both applicants and the faculty who teach them.

Thank you very much for your time.

The City University of New York
CUNY SCHOOL OF LAW

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Long Island City, NY 11101



January 14, 2015

Advisory Committee on the Uniform Bar Examination
c/o The Honorable Jenny Rivera, Associate Judge
New York State Court of Appeals
20 Eagle Street
Albany, N.Y. 12207
Re: Notice of Public Hearings: Uniform Bar Exam

Via electronic submission to:
UniformBarExam@nycourts.gov

Dear Judge Rivera and Advisory Committee Members,

My name is Sarah Valentine and I am currently Senior Associate Dean of Academic Affairs and Professor of Law at CUNY School of Law. Prior to joining the law school I practiced for ten years in civil legal services offices. I apologize for the lateness of this request. I would ask to speak to the committee at its public hearing at CUNY School of Law on Tuesday January 20th, 2015 if time affords.

I wish to address the limitations of the Multistate Performance Test (MPT) as an assessment mechanism allowing the Board of Law Examiners to evaluate the competence of a candidate to practice law. The MPT is a part of the current New York bar exam and would be a larger part of the Uniform Bar Exam. I suggest that the MPT provides much of the same type of information as the essay exams provide. The MPT is graded using methodologies similar to those used in grading the essay exams and tests much the same skill set.

While the MPT requires engagement with materials in a "library of information," the candidate is still challenged to read and apply law to a fact pattern in a timed setting. Thus the MPT is really only one more assessment of a candidate's speed in reading, identifying issues, reasoning by analogy, and applying doctrine. While the MPT claims to evaluate factual analysis, management of legal tasks and recognizing and resolving ethical dilemmas, it does so in a manner similar to the essays and the Multistate Professional Responsibility exam, which is a function of the assessment mechanism used – a timed written exam format. This format also is one that is antithetical to a thoughtful approach to solving client problems.

The MPT does not provide any indicia of the lawyering competencies the bench and bar have clearly indicated are necessary to practice law (e.g. cultural competency, problem solving, practical judgment, interviewing and counseling, listening, strategic planning, negotiation, conflict resolution, professionalism, etc.). These are skills that cannot really be assessed or evaluated in timed writing settings.

However, these are the skills and traits that law schools teach and assess through clinical and experiential lawyering programs. In the past ten years, in response to concerted calls to increase the practice capacity

Law in the Service of Human Needs

of law graduates, several state courts in collaboration with law schools have established programs to provide more practical skills training. These are New York's Pro Bono Scholars program, Arizona's early bar initiative, the New Hampshire Daniel Webster Scholar's program and California's move to require 15 credits of experiential learning prior to sitting for the California bar. New York has the opportunity establish an even more comprehensive link between legal education and admission to practice.

I respectfully request that the committee consider establishing a program that would allow applicants who take a specified number of credits in a clinic or guided externship have that experience substitute for the MPT. The New York Courts could establish the number of credits and any other criteria they think necessary to allow this substitution (*e.g.* require direct client contact, engagement with professional or ethical reflections, require a specific amount of document drafting, etc.). Such a program would have several benefits. It would increase the likelihood that law students would be better prepared for practice upon graduation. It would encourage law schools to provide tailored experiential learning opportunities to their students and it would increase the ethics and professionalism training law graduates receive.

This would not create an added burden on law schools, as it would not be mandatory. More importantly the recent ABA Standards revisions now require the kinds of data collection that would be necessary to demonstrate that the schools have designed programs that meet any requirements the New York Courts would delineate to allow specific experiential learning credits to substitute for the MPT.

Under the new ABA Standards Law schools are required to establish learning outcomes that provide specific lawyering competencies other than legal reasoning and analysis. Law schools must evaluate their programs and report to the ABA data that proves compliance with these outcomes. Thus the data collection and reporting processes will already be in place that would allow schools to show they are providing the educational experience the New York Court of Appeals determines most important for competent practice upon graduation.

I look forward to speaking to the committee if time allows. Thank you in advance for considering this request.

Sincerely,



Sarah Valentine

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January 16, 2015

Advisory Committee on the Uniform Bar Examination
c/o The Honorable Jenny Rivera, Associate Judge
New York State Court of Appeals
20 Eagle Street Albany, NY 12207

Dear Judge Rivera:

This statement is submitted on behalf of the Society of American Law Teachers (SALT) in response to a call for comments on a proposal that New York adopt the Uniform Bar Exam [UBE]. SALT is a national organization of law professors and law school administrators committed to advancing teaching excellence, social justice, and diversity. That commitment prompts this statement in which we address concerns that New York's adoption of the UBE would have negative impacts on efforts to diversify the profession and hamper law schools' ability to adequately equip tomorrow's lawyers for law practice.

I. New York Has Long Critiqued Both the Bar Exam Format and the Exam's Disparate Impact

Over the course of more than two decades, a wide range of New York lawyers and judges have questioned whether the existing bar exam format and its narrow focus accurately reflect the skills new lawyers should possess, and they have expressed grave concerns about the bar exam's disproportionate impact on minority applicants. In numerous studies and reports, New York lawyers and judges have advocated for an exam that relies less on memorization and tests a wider range of lawyering skills and that avoids the unjustified disparate impact seen of the existing exam. New York's long-standing concerns about the problems provide ample reason for New York to reject adoption of the UBE at this time.

In 1992, the Committee on Legal Education of the New York City Bar Association raised concerns that the bar exam failed to adequately test minimal competence to practice law and that it creates a disparate impact

on minority bar applicants.¹ In 1993 and again in 1996, the exam was studied and questions were raised about its content and format and its disparate impact.² In 2002, the Committee of Legal Education and Admissions to the Bar of the State Bar Association and the Bar of the City of New York issued a joint report criticizing the bar exam for testing only a few of the skills lawyers need and for its significant and serious disparate racial impact.³ In 2005, a special committee was formed to study the exam and after five years of study and debate, the committee issued a report recommending the exam shift from a focus on rote memorization so that it could include assessments of a wider range of lawyering skills.⁴ In 2012, yet another report was issued recommending the exam be linked to more skills lawyers need.⁵ Most recently, a 2013 report by the New York City Bar Association Task Force again recommended the exam be re-vamped to include a wider range of the skills new lawyers need and suggested that the exam move toward a more innovative practice-oriented testing format.⁶

This long history illustrates New York's concern about both the breadth and depth of the exam and its disparate impact. Adopting the UBE does nothing to address either of those concerns. Rather than adopting the UBE, another version of the same highly criticized exam, New York should take the lead in pressuring the National Council of Bar Examiners to devise a better exam, as further described below.

II. Study Is Necessary to Determine the Impact of Adopting the UBE on Bar Passage for All Applicants and for Particular Subgroups of Applicants.

While it is presently unclear what impact adoption of the UBE will have on overall bar pass rates and whether it will result in exacerbating the existing disparate impact, there are reasons for concern. First, the July 2014 bar exam saw a significant drop in MBE scores nationwide. Should this trend in MBE scores continue, overall pass rates in New York could be negatively affected by adoption of the UBE. As SALT noted in its November 3 letter to Diane Bosse, commenting on the proposal to adopt the UBE: "Since the entire bar exam is scaled to the MBE, it is not surprising that many states, including New York, saw a decline in passing scores. Adopting the UBE would only exacerbate this problem since the MBE would count for 50% of the exam instead of the present 40%."⁷ The overall decline in pass rates may have a more significant impact on certain subgroups of test-takers. While we don't have statistics for New York, in California the impact of declining pass rates had a

¹ Ass'n Of The Bar Of The City Of N.Y., Report On Admission To The Bar In New York In The Twenty First Century: A Blueprint For Reform 467 (1992).

² Jason Millman Et Al., An Evaluation Of The New York State Bar Examination (May 1993); Prof'l Educ. Project, Legal Education And Professional Development in New York State (1996). This study was commissioned by Chief Court of Appeals Judge, Judith Kaye.

³ See Comms. On Legal Educ. & Admission To The Bar Of The Ass'n Of The Bar Of The City Of N.Y. & The N.Y. State Bar Ass'n, Public Service Alternative Bar Exam (June 14, 2002), available at <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26667>

⁴ Report of the Special Committee to Study the Bar Examination and other Means of Measuring Lawyer Competence, New York State Bar Association, September 13, 2010.

⁵ N.Y. State Bar Ass'n Comm. On Legal Education And Admissions To The Bar, Recommendations For Implementation Of The Report Of The Special Committee To Study The Bar Examination And Other Means Of Measuring Lawyer Competence (Feb. 12, 2013).

⁶ New York City Bar, Developing Legal Careers And Delivering Justice In The 21st Century, New York City Bar Association Task Force On New Lawyers In A Changing Profession (Fall 2013)

⁷ Letter from Olympia Duhart and Ruben Garcia, SALT Co-Presidents, to Dianne Bosse, Nov. 3, 2014.

disproportionate effect on African American and Latino/a test takers.⁸

We also do not have statistics available to compare the decline in pass rates in UBE states with the decline in pass rates in non-UBE states and how those respective declines impacted various subgroups of test-takers. That data is available to the NCBE and should be made public so that those considering adopting the UBE can study it to determine the impact of the UBE on pass rates generally, and whether the UBE increases test score disparities. The study should be done over multiple exam administrations to ensure reliability, and New York should not adopt the UBE until those consequences are better understood.⁹

One often-touted advantage of the UBE is that it allows for portability of scores. Mobility of lawyers is an important concern, especially for new lawyers, but that portability is limited¹⁰ and depends upon achieving a score set by the admitting state. New York's passing score is lower than ten of the fourteen states currently using the UBE. To achieve true portability, adoption of the UBE would inevitably result in an effort to standardize the passing score, which in all likelihood would mean increasing New York's passing score. On that issue, we do have hard data that tells us that increasing the passing score has a disproportionately harsh impact on racial and ethnic minorities.¹¹

As early as 1992, New York lawyers and judges studying the bar exam noted that any changes to the bar exam should be made with an eye toward reducing test score disparities while enforcing reasonable standards of attorney competence, a concern echoed by numerous commissions and reports. We urge New York to proceed slowly and cautiously to ensure adoption of the UBE will not undermine New York's commitment to developing a diverse bench and bar.

III. Rather than Adopt the UBE, New York Should Work With the NCBE To Develop A Better Licensing Exam

The New York bench and bar has studied the bar exam and issued report after report advocating it be

⁸ Vikram David Amar, *Additional Thoughts (and Concerns) About Low Bar Pass Rates in California and Elsewhere in 2014*, Verdict, Legal Analysis and Commentary from Justia, available at <http://verdict.justia.com/2015/01/02/additional-thoughts-concerns-low-bar-pass-rates-california-elsewhere-2014>.

⁹ We do know that the UBE is likely to increase costs for bar applicants. Although New York has said it initially will not raise costs, New York currently charges \$250 but UBE jurisdictions typically charge three or four times that amount and there is a significant cost to transfer UBE scores to other jurisdictions (\$400-\$1240). These increased costs will be felt by all applicants, but those most significantly affected likely will be lower income applicants, a disproportionate number of whom may be people of color.

¹⁰ Of the 14 states that use the UBE, five require state-specific assessment prior to admission. All limit portability to between 2 and 5 years after taking the exam and most limit it to 2-3 years. With no uniform cut score and only 4 of 14 states having a cut score lower than New York, a lawyer passing the UBE in New York would not be guaranteed admission in 10 other states unless the students achieved a score that met or exceeded the required score in that jurisdiction. Even that limited portability comes at a price. States administering the UBE often charge three to four times what New York charges and the cost of transferring UBE scores to other jurisdictions ranges from \$400 to \$1240.

¹¹ *Impact of the Increase in the Passing Score on the New York Bar Examination*, Report Prepared for the New York Board of Law Examiners, October 4, 2006.

changed to better reflect the skills lawyers need.¹² Law schools have recognized the need to expand skills taught and assessed, and have begun to integrate a wider range of skills development into their curricula. However, since the introduction of the Multi-State Performance Test decades ago, the bar exam has not made any significant changes in how potential licensees are tested. SALT believes New York is in a unique position to encourage changes that have been suggested by its bench and bar for decades and that now is the time to do so.

Historically, the bar exam has driven both law school curricula and assessment methods. Schools have offered courses because they are tested on the bar, whether or not they believe those subjects are important for new lawyers to know, and have advised students to take those courses. Schools also have modified their testing to parallel bar-exam testing, whether or not they view those tests as appropriate assessments of student achievement. Despite those pressures, law schools have begun integrating more skills development and training into their curriculum, partly in response to suggestions from students and the bench and bar. While the academy moves forward, the bar exam is mired in the past. Especially in light of the recent drop in bar pass rates, schools may begin to re-think innovations designed to better prepare students for practice and revert to courses that focus mainly on doctrine tested via multiple choice and bar-exam style essay questions in order to “teach to the test.” Students, fearful of bar exam failure, may choose to take more traditional courses in lieu of clinics, externships, and other courses that engage students in a wider range of skills development and in more “real world” application of legal doctrine and analysis.

Joining the UBE states simply entrenches the existing exam and its over-emphasis on memorization of large bodies of doctrinal knowledge tested via multiple choice questions. The NCBE recognizes that New York is influential and a leader in legal education reform, including such innovations as the 50 hour pro bono requirement. The New York imprimatur would go a long way toward legitimizing the UBE. SALT respectfully suggests that instead of endorsing the status quo, New York is in a unique position to push for a better test that encompasses a wider range of skills and testing methodologies. Much of the background work has already been done via the numerous New York studies and reports already in existence.

Bar exam reforms are possible, as evidenced by the Daniel Webster Scholars Program in New Hampshire. Students who successfully complete a two-year, practice-based, and client-oriented program at the University of New Hampshire School of Law are certified by the Board of Law Examiners and are admitted to the N.H bar upon graduation. The Institute for the Advancement of the American Legal System at the University of Denver has found that students who graduated from the program outperformed lawyers who had been admitted to practice in the state within the past two years who had not participated in the program but who had taken the traditional bar exam. While the Daniel Webster Scholars Program may not be a model for all bar admissions in all states, it illustrates the potential for modifying the bar admissions process, and the need to invite rather than discourage such reforms.¹³

¹² The NCBE itself has conducted a significant study about the skills new lawyers need, many of which are not tested. Steven Nettles & James Hellrung, *A Study of the Newly Licensed Lawyer*, available at http://www.ncbex.org/assets/media_files/Research/AMP-Final-2012-NCBE-Newly-Licensed-Lawyer-JAR.pdf.

¹³ For a discussion of some potential reforms, see, e.g., Andrea A. Curcio, Carol L. Chomsky and Eileen

IV. The new New York Law Exam Requires Additional Study

The proposal under consideration raises other concerns as well. It calls for a new New York Law Exam that would consist of 50 multiple-choice questions. This exam would be graded separately from the UBE and bar applicants would not be eligible for licensing in New York if they scored less than 30 out of the 50 questions on the New York Law Exam. Ordinarily, multiple-choice questions are not used on high stakes testing unless they have been pre-tested. The questions that would appear on the NY exam, which we understand will utilize a completely different format from the multiple choice questions used on the current NY bar exam, have not yet been written or reviewed, much less pre-tested. No study has been conducted to assess the impact that the requirement of passing both the UBE and the New York Law Exam will have on overall pass rates and whether it will increase test score disparities. It has been reported that the average score on the current New York multiple-choice section is roughly 50% (25 out of 50 questions correct), not the 60% (30 out of 50 questions correct) that will now be required as a stand-alone measure. If that is accurate and if it persists with the administration of the new exam, the result will disqualify candidates who previously would have been admitted. This too requires further study.

V. Conclusion

For the reasons stated above, SALT respectfully suggests that rather than jump on the UBE bandwagon and entrench the status quo, New York should use its considerable influence to encourage changes to the bar exam so it better reflects skills needed in practice. If the UBE tested a wider range of skills and values and tested applicants in ways more reflective of practice, it would be a better bar exam and potentially worth adopting.

We thank the Committee for the opportunity to present these views and we offer our assistance should New York seek to work with the NCBE to explore better ways to assess bar applicants and ensure that the bar exam does not further exacerbate test score disparities that negatively affect our ability to develop a diverse bench and bar.

Sincerely,



Olympia Duhart and Ruben Garcia

SALT Co-Presidents

Kaufman, Testing Diversity and Merit: A Reply to Dan Subotnik and Others, 9 U. Mass. L. Rev. 206, 244-51 (2014) (discussing the New Hampshire licensing program and other alternatives to the bar exam); Andrea A Curcio, A Better Bar: Why and How the Existing Bar Exam Should Change, 81 Neb. L. Rev. 363, 393- (2002) (discussing testing via computer simulations and other methods that encompass a wider range of skills); Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 Colum. L. Rev. 1696 (2002) (discussing an experientially based bar exam, the public service bar exam).

[REDACTED]

From: amy christianson [REDACTED]
Sent: Thursday, January 15, 2015 4:40 PM
To: Uniform Bar

1/15/15

Please see below an outline submitted representing intended discussion by Kevin McMullen, Esq. at the January 20, 2015 public meeting at CUNY School of Law regarding the bar exam. I will just write this directly as submitted to me by Mr. McMullen, and I apologize for any typographical errors on my part.

Re: Uniform Bar Examination

Introduction

Plea: Please save me from making a lot of money drafting bar review materials for the U.B.E. and for organizing a private New York bar exam.

Thesis: The State of New York should not adopt the Uniform Bar Examination because a generic examination cannot certify that a candidate is competent to practice law in New York.

Outline:

- I. To practice law competently in the State of New York, an attorney must have a precise knowledge of the law of New York.
- II. The competent practice of law in an interstate or a global setting requires a precise knowledge of local law including New York law.
- III. A bar examination in New York law is superior to a generic examination in determining a candidate's competence to practice law in New York.
- IV. The adoption of the Uniform Bar Examination will give rise to an additional but private bar examination.

I. To practice law competently in the State of New York, an attorney must have a precise knowledge of the law of New York.

A. Law is a discipline which can only be known precisely or not at all competently.

1. Examples of matters requiring precise knowledge

- a. the grounds for divorce,
- b. the procedure for foreclosing on a mortgage on residential property,
- c. the different statutes of limitation for personal injury, medical malpractice, and wrongful death,
- d. the necessary order and documents for pressing and resisting a claim,
 1. notice of claim,
 2. current method of service,
 3. the proper municipal defendant,
 4. when defenses must be raised,

5. discovery devices and their enforcement,
6. discovery and subpoena of non-party witnesses,
7. timing of motions for summary judgment,
8. with which clerk to file papers,
9. obtaining a stay on appeal.

2. Even when the concepts are the same among jurisdictions, the forms, terminology, and timing are different.

B. A generic bar examination cannot test such matters,

1. Instead, it can test common law marriage, which New York abolished in the 1930s.

II. The competent practice of law in an interstate or a global setting requires a precise knowledge of local law including New York law.

A. An attorney cannot competently represent clients across boundaries until he knows his own jurisdiction's law well.

B. Examples demonstrating this principle:

1. Law firms engaged in out-of-town litigation will hire local counsel -- even inside the same state -- to ensure that the firm handles all matters in accord with local practice.

2. Attorneys admitted pro hac vice are required to associate themselves with local attorneys,

a. subsequently, their papers must comport with local practice, or the foreign attorneys will be removed from the case.

3. The foreign office of a U.S. law firm may be supervised by a U.S. attorney, but the bulk of the staff will consist of local attorneys with a knowledge of local law.

4. Foreign firms are registered in New York and staffed by their nationals to practice the law of their home countries.

5. In the LL.M. program at N.Y.U. Law School, the course in international decedent estate administration pre-supposed a prior knowledge of the law of decedent estate administration in New York.

C. Thus, as a prerequisite to admitting a candidate to the practice of law in a state, e.g., New York, that state should require him to pass an examination in the law of the state.

III. A bar examination in New York law is superior to a generic examination in determining a candidate's competence to practice law in New York.

A. The grotesque volume of law in New York makes it more important than ever that a candidate for the bar demonstrate his competence in the law of New York.

B. Although no examination can provide absolute certainty that a candidate is competent to practice law in New York, a bar examination in the law of New York both tests and enhances such competence.

1. Obviously, the more questions on New York law, the better the test,

a. Thus, the traditional bar exam which tested New York law for two days was superior to the current exam.

2. In ADDITION, when the candidate is preparing for the bar examination, a bar review course will organize and make sense of the disconnected notions which the candidate acquired in law school.

a. At the end of the bar review course, I knew twice as much as I had known at graduation.

C. Even with an additional test of only fifty questions in the law of New York, the U.B.E. cannot test the competence of the candidate to practice law in New York.

1. Preparing for the U.B.E. will direct the candidate's attention and time away from the law of New York.

a. As Dean Patricia ^SFalkin of Touro observed, "You have an entire crop of graduating law students this year and you're basically telling them that the bar exam you thought you were preparing for is going to change just before you graduate."

1. In other words, the students were paying too much attention to the law of New York.

2. A one-hour test consisting of fifty multiple choice questions -- of which the candidate need answer only thirty correctly -- is no substitute for a thorough test of the law of New York. In fact, such a test would be an embarrassment to the profession.

D. Thus, if I were hiring an associate or engaging an attorney to represent me, I would not consider that someone who had passed the U.B.E. had demonstrated his competence to practice law in New York.

1. This would be especially true if, in addition, he had not attended law school in New York.

IV. The adoption of the Uniform Bar Examination will give rise to an additional but private bar examination.

A. Private companies, such as bar review courses, could draft, administer, and grade such an examination as well as teach preparatory courses.

B. The logistics of such an operation are both obvious and manageable.

1. To formulate questions, a company could draw on previous questions used on bar examinations in New York, recent cases, and recent amendments to statutes.

2. A company could recruit personnel it had used in the past to draft questions and model answers, to give lectures, and to grade the examination.

3. The obvious initial format would be twelve essay questions administered over two days. Later, multiple choice questions could be added.

4. The candidates would be told to bring pens and pencils to a particular location on particular days.
5. The first venues could be law firms, but the examination can expand into large halls.
6. The grading would be strict, not "equilibration".

SUBMITTED ON BEHALF OF KEVIN McMULLEN, 631-261-6679

Thank you for consideration - please reply to above e-mail address or call Mr. McMullen regarding any matters related to his intended contribution at the public hearing, his time to appear, etc.

Amy Christianson, Esq.


I. Introduction

- A. Jeremy Miller— Second Year Law Student at Touro Law School.
- B. Student Assistant for the New York State Bar Association Committee on Legal Education and Admission to the Bar.

II. Portability

A. Advantages

- 1. New York could be at the forefront in changing how law school students earn a license to practice law.
- 2. Students could broaden their job search to other states.

B. Disadvantages

- 1. The states that currently offer the Uniform Bar Exam, with the exceptions of New Hampshire and Alabama, are west of the Mississippi River and might not be of much interest to current and future New York law school students.
- 2. Adopting the Uniform Bar Exam on the theory that other northeastern states will adopt it as well is a risky proposition.
- 3. A passing score in New York may not be a passing score in other jurisdictions because there is no uniform grading scale.
- 4. The current Uniform Bar Exam jurisdictions only accept scores from between 2-5 years from administering the exam.

III. Law School Curricula and Bar Exam Preparation

- A. Local bar review courses may not have much experience with the Uniform Bar Exam, leaving the current students at a disadvantage when it comes time to study for the exam.
- B. Students have already signed up for a bar review course in their first year of law school to lock in a reduced price.
- C. Students who have anticipated taking the New York Bar Exam should not have to deal with the stress associated with a rapid change to licensure.

D. Law schools have taught either New York law or New York distinctions that may not be relevant for the Uniform Bar Exam, but is for practice in New York.

E. Specifically, the Estates, Powers and Trusts Laws govern New York trusts and estates, but the Uniform Bar Exam tests the Uniform Probate Code.

IV. Recommendation

A. I recommend that New York does not adopt the Uniform Bar Exam.

B. If New York does adopt the Uniform Bar Exam, I believe that it should be implemented for the incoming class of 2017 so all current students do not have the extra burden of changing their coursework or stressing about the content differences.

V. Other Topics

A. The advantages and disadvantages of the New York Bar Exam, in general.

B. The advantages and disadvantages of the Uniform Bar Exam, in general.

C. The potential disparate impact on minorities.

D. The potential for a rise in costs associated with the Uniform Bar Exam, and the fear that such costs might be allocated to the students.

E. The New York Law Exam.

F. The declining passing rates in Uniform Bar Exam jurisdictions, such as Montana and Idaho.

C L E A

Clinical Legal Education Association

January 30, 2015

Advisory Committee on the Uniform Bar Examination
c/o The Honorable Jenny Rivera, Associate Judge
New York State Court of Appeals
20 Eagle Street
Albany, N.Y. 12207

Re: Notice of Public Hearings: Uniform Bar Exam

Via electronic submission to:
UniformBarExam@nycourts.gov

Dear Judge Rivera and Advisory Committee Members:

The Clinical Legal Education Association (CLEA) submits this letter in response to your call for comments regarding a proposal that New York State adopt the Uniform Bar Exam (UBE). The current proposal also recommends a new fifty (50) question New York-specific multiple choice test and would require students to obtain a minimum score on this portion of the New York Bar Exam in order to pass. It is our understanding that adopting the UBE would also increase the weight of the multiple choice multistate bar examination (MBE) from 40% to 50% of the total score.

CLEA supports clinical legal education and has more than 1200 members, including many active members at each of New York's 15 law schools. We have long been dedicated to preparing students for the legal profession and are concerned about the relationships among law licensure, legal education, diversity in the legal profession and addressing the justice gap in America. CLEA welcomes the opportunity to comment on these very significant proposed changes to the New York Bar Exam.

In this comment, we raise three concerns. First, adoption of the UBE and the fifty question NY multiple choice section would continue to place undue reliance on the skill of standardized test taking as a measure of professional competence. This, in turn, will incentivize law schools to be even more rigid and narrow in their admissions decisions, thereby diminishing student diversity in all dimensions. Second, requiring students to achieve a minimum score on the New York multiple choice section of the test in order to pass the bar exam will only increase the curricular pressure to favor doctrinal "bar review" courses over clinics and other skills offerings. Third, making these proposed changes at this particular time, when there remain many unanswered questions about the significant drop in bar passage rates nationally, is ill-advised and may

preclude other, much more desirable changes, locking New York State and the entire profession into a deeply flawed system for years to come.

As we raise these concerns and urge caution, we are also mindful of the advantages greater national uniformity could offer students. But the modest degree of portability this proposal would offer is far offset by the many disadvantages of tying New York to a flawed, opaque system that stoutly resists change in the face of changing times. We urge the Advisory Committee on the Uniform Bar Examination to reject this proposal. If, however, the Advisory Committee decides to go forward, then we would urge careful, detailed further study of the real consequences on law school admissions, curricula, and licensure in New York State and nationally.

1. Creating Another Mandatory Multiple Choice Test for Bar Passage Will Only Further Distort Law School Admissions Processes and Discourage Greater Diversity and Inclusivity in our Profession.

Despite our best intentions and efforts, the diversity crisis still bedevils our profession. While we have made strides, neither our law schools nor our profession reflect contemporary America. Because law school rankings are tied to bar passage rates, this current proposal, which would create a new standardized testing hurdle by requiring a minimum score on the fifty multiple choice New York questions, will further pressure law schools to admit students who have demonstrated particular skill at taking standardized exams. In addition, adopting the UBE would exacerbate this problem since the multiple choice MBE would count for 50% of the final exam instead of the present 40%. Schools will place even greater emphasis on multiple choice LSAT scores, to the detriment of applicants who present a range of experiences, qualities and skills that students of all backgrounds bring to classrooms, student organizations, co-curricular activities and even to the pursuit of justice.¹ This, in turn, would undercut the diversity of New York's law schools, especially those schools with racial and economic diversity at the core of their missions.

We want to be very clear that it is not CLEA's view that students of all backgrounds cannot do well on standardized tests; rather, standardized testing is an acquired skill that comes, along with many other advantages, with privilege and access. This is not an argument about aptitudes or abilities; it is an observation about two documented facts. Indeed, while the racial disparity in LSAT scores, particularly for Black and Latino men, is dramatic, those students succeed in law schools that offer proper support.

Thus, CLEA is concerned that the adoption of these proposed changes would have a disparate impact on diversity candidates to law schools in New York; candidates who have the range of personal and professional experiences that would broaden and deepen the education of all law students, but whom law schools would not prioritize when making admissions decisions. Thus,

¹ According to the ABA Council on Racial and Ethnic Diversity in the Education Pipeline, "the law school admissions process over the last ten years has resulted in 60% of all African American applicants and 45% of all Hispanic applicants being totally shut-out from every ABA-approved law school they applied to, compared to just 31% of white applicants." See June 26, 2011 letter from ABA Council on Racial and Ethnic Diversity in the Education Pipeline to Don Polden, Chair, ABA Standards Review Committee, available at http://www.americanbar.org/groups/legal_education/committees/standards_review/comments.html.

we urge the Committee to study and consider the potential disparate impact that would result from the adoption of these proposed changes.

2. The Current Proposal Would Discourage Clinical and Skills Education as Law Schools Retreat to Traditional Curricula in Perhaps Misguided but Predictable Efforts to Protect Against Lower Bar Passage Rates.

In addition, adoption of the UBE could undercut the curricular reform efforts that law schools in New York and nationwide are undertaking to better tailor legal education to the skills, values and competencies that the legal profession demands. As we have known for decades, traditional legal education has been disconnected from the realities of law practice. Members of the bench and bar understand fully that law school graduates who have no experience with how the law operates in real-world contexts have difficulty applying what they learned in law school to practice. Clinical and other experiential education fuses the doctrinal and theoretical underpinnings of legal education with the range of skills that students need to represent clients, engage in the practice of law and enhance the legal profession.

The economic downturn and its impact on the legal profession have increased awareness of the gulf between legal education and the legal profession. Clients are demanding lawyers who are trained. Law firms are no longer putting vast resources into training and, instead, are demanding that newly-minted lawyers have the foundational skills necessary to excel. Judges have talked about the writing and relationship skills they would like to see in their interns and law clerks. In turn, law schools across the United States are revamping curricula to integrate skills courses and modules throughout the three-year arc. In addition, the American Bar Association has recently revised its accreditation standards to implement outputs that are designed, in part, to better sync legal education with the realities of legal practice by requiring law schools to ensure that students learn the breadth of skills that will better equip them to enter the profession.

Adopting the UBE and NY Multiple Choice section as an independent licensure requirement will undermine the current reforms of legal education. Schools will inevitably respond to change, particularly change that makes bar passage more challenging, by focusing even more on one output—bar passage—to the detriment of the other outputs that measure, *inter alia*, skills, values, ethics and experiences. It would cause law schools, more than already occurs, to tailor curricula to bar preparation courses and to steer students to those courses. It would also cause law students to value those bar preparation and other doctrinal courses over the experiential courses that complement and deepen the analytical tools students acquire throughout the curriculum and provide the broad, well-rounded but interconnected experiences and skills necessary to engage and enhance the legal profession.

3. There Are Too Many Unanswered Questions About the UBE to Move Forward Now, Particularly Given the Strong Support for Alternative Reforms to the New York Bar Exam.

The recent national drop in bar passage rates is well documented. The causes, however, remain shrouded in mystery. As seventy-nine (79) law school deans noted,² the National Conference of Bar Examiners (NCBE) has comprehensive data that would shed light on the cause of the drop but it has refused to share that data, in any form, with schools, their representatives or the public. They have insisted that recent test takers are not as strong, although the data does not appear to support that claim.³ Similarly, the NCBE has not been responsive to calls to share their data, in any form, with groups concerned about the disparate impact of the MBE and the UBE on test takers of color. New York should not bind itself even more tightly to the NCBE, until it meets reasonable expectations of transparency and disclosure.

Beyond our deep concerns about the lack of transparency and accountability of the NCBE, CLEA also urges that this is the wrong reform of the New York Bar Exam. For years, many groups and knowledgeable individuals, including the Association of the Bar of the City of New York, the New York State Bar Association and leading academics and judges have noted that the bar exam does not measure graduates' ability to practice law. It is, at best, a psychometrically valid and reliable test of their legal knowledge and abstract reasoning skills. And some critics question even that.

Over the past fifteen years or so, advances in law school assessment tools and the development of clinical legal education have made other kinds of licensure exams practicable, as the experience of the innovative Daniel Webster Scholars Program in New Hampshire demonstrates. While we are mindful that the charge of this Committee is to examine the proposal to adopt the UBE and modify the New York specific portion of the exam, we also recognize that the adoption of this change will occupy the field for now and crowd out other, much more needed reforms.

For example, rather than adopt this proposal, New York could allow applicants who take a specified number of credits in a clinic or guided externship to have that experience substitute for a portion of the current or proposed timed, written examinations. As has been advocated by other groups, the New York Courts could establish the number of credits and any other criteria they think necessary to allow this substitution (*e.g.* require direct client contact, engagement with professional or ethical reflections, require a specific amount of document drafting, etc.). Such a program would have several benefits. It would increase the likelihood that law students would be better prepared for practice upon graduation. It would encourage law schools to provide tailored experiential learning opportunities to their students and it would increase the ethics and professionalism training law graduates who practice in New York State receive.

This is the wrong reform at the wrong time. There are too many unanswered questions for New York to tie itself more closely to a national system that is currently the subject of significant criticism. This proposal does very little to address the one problem it claims to solve, portability of bar admission and it does nothing to address the glaring deficits of a bar licensure regime that

² http://online.wsj.com/public/resources/documents/2014_1126_randletter.pdf

³ http://online.wsj.com/public/resources/documents/2014_1110_allardmemo.pdf

has failed to keep step with advances in legal education and the tectonic shifts in the legal profession. For these reasons, we ask the Advisory Committee to reject the current proposals.

Sincerely,

Mary A. Lynch, Professor, Albany Law School

Janet Thompson Jackson, Professor, Washburn University School of Law

2015 Co-Presidents of the Clinical Legal Education Association (CLEA)

Outline of Testimony
to be presented by Irene Villacci
President, Women's Bar Association of the State of New York
to the
Advisory Committee on the Uniform Bar Examination

- I. **Introduction: Testimony reflects comments received from across the State – 18 chapters of WBASNY were asked to review and respond regarding possible transition to Uniform Bar Examination in New York. Based on the feedback, WBASNY has many concerns about the implementation of a Uniform Bar Exam in New York:**

- II. **The Test**
 - a. **New York Law implications**
 - i. **Overall, the proposal appears: to dilute the importance of learning New York State law (30 questions is hardly enough); to promote a one-size-fits-all Bar Exam (which could diminish their profession generally); and to reduce the significance of passing the NYS Bar, one of the most rigorous in the United States, and internationally known as such. Further, New York already has reciprocity with other states where an attorney may waive in following the satisfaction of certain criteria.**

 - ii. **The UBE proposal includes a New York State law component. The concern is that this component be intensive and sufficient so that the New York State component is not "watered down".**

 - iii. **The UBE appears to make it much easier to pass the New York Bar Exam. However, the NY Bar Exam is one of the toughest exams for a reason: it is a large state, with large cities, and a complex, unique CPLR. Lawyers who practice here should KNOW New York practice, not just to be able to pass only 30 out of 50 state-specific questions.**

 - iv. **Which states participate in the UBE? What is the passage rate in those states? What is the incentive for New York to follow them (other than portability and standardization)? Why is New York interested in standardizing?**

 - b. **Implementation issues**
 - i. **The UBE passing grade should be the same in all states.**

- ii. The grades should be good for five (5) years or more; not three (3) years as most states that allow reciprocity required five (5) years of good standing in a state bar.
- iii. There could be significant implementation problems. The current proposal suggest and implementation date of July 2015. The proposal could significantly impact New York law school curriculum without providing those schools time to implement curriculum changes. Further, current law students have chosen their schools and their courses based upon an expectation of having to take the current NY bar exam.

III. Impact on Current Practitioners

- a. The UBE proposal does not have any provisions for attorneys who have taken the New York State Bar prior to 2015. Specifically, what happens to attorneys who have been practicing 20 years or 25 years or more? Shouldn't they be allowed to practice in other states without taking the UBE
- b. A more standard exam will make lawyers more "portable" in to the New York legal system. If the exam becomes easier, then it might make it harder to get a job here as more lawyers flock to New York because it will be easier for attorneys who are not familiar with New York law to practice here.
- c. The UBE will reduce the prestige of having passed the New York State Bar Exam and being a licensed New York State attorney.

IV. Law Schools and Students

- a. The UBE could negatively impact New York law schools, particularly those whose programs focus on New York practice and training for the NY bar exam.
- V. Conclusion: On behalf of WBASNY, I thank you for the opportunity to comment on this very significant proposal. As you can see, our members are very concerned about how such a change would be implemented, and to what extent it is necessary. As always, we welcome the opportunity to discuss this further with Chief Judge Lippman, the Task Committee, and the Office of Court Administration.



**Public Hearing before the Advisory Committee on the Uniform Bar Exam
New York State Court of Appeals
February 3, 2015**

Testimony by

Eric Lane,

Dean and Eric J. Schmertz Distinguished Professor of Public Law and Public Service

Maurice A. Deane School of Law at Hofstra University

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Testimony by

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Service**

Maurice A. Deane School of Law at Hofstra University

Thank you to Judge Rivera and all of the members of the Advisory Committee for the opportunity to testify in support of the proposed adoption of the Uniform Bar Exam (UBE) in New York. I also want to thank Chief Judge Jonathan Lippman for appointing this Advisory Committee to engage in a thoughtful review of the proposal and for soliciting further public comment.

At a time when the legal market and legal education face significant disruptions to our traditional practices, it is critical that New York be a leader in responding to those changes to ensure that our methods for licensing lawyers are sound and responsible. The bar exam should reflect the changing landscape of legal practice, in which lawyers are more mobile than ever before and increasingly represent clients across jurisdictional boundaries. The traditional business models

of law firms have been challenged and private practitioners must often provide more cost-effective legal services for their clients. Hiring practices have also changed, with more law firms disinclined to hire or make offers to young lawyers until after they have passed the bar. Government agencies and legal services organizations have faced significant budget limitations and staffing shortages, forcing them to hire fewer law graduates and expect that their new lawyers will be ready for immediate practice and often with minimal supervision. And in many parts of New York and other parts of our country, ever-increasing numbers of low income and middle class individuals are unable to access basic legal services.

As a result, law schools face more pressure than ever before to ensure that our students are ready for this "new normal." This necessitates that we adopt a host of learning goals for our students far beyond what was ever contemplated by traditional legal education. I believe that our state's licensing exam must stand as a final assessment of law school graduates' substantive knowledge and the legal skills necessary for today's legal practice, while at the same time not placing undue burdens on individuals who have demonstrated competency throughout law school and stand ready to provide legal services in New York or other jurisdictions. I am also increasingly concerned about law schools being continually forced to adjust their curriculum to prepare students for the bar exam, rather than the bar exam responding to the change in our profession and in legal education.

I have listened carefully to the commentary and presentations about the Uniform Bar Exam and the proposed changes for the New York portion of the bar exam, from the proponents and from those who have expressed reservations or outright opposition. I have consulted with bar prep providers, academic support colleagues, and individuals in jurisdictions where the Uniform Bar Exam is already in place. At the end of the day, I am persuaded by those who advocate that New York should lead the effort to create more uniformity in admission standards. Lawyers engage in multi-jurisdictional practice on a regular basis, and our graduates need to have as much flexibility as possible in pursuing professional opportunities, as well as opportunities to provide legal services in areas where lawyers are scarce.

While we understand the distinctiveness of several aspects of New York law and practice, I wonder whether they are so distinct as to merit several hours of assessment on the current bar exam. In my experience, any competent lawyer will have little trouble learning the relevant distinctions in the law as it becomes relevant to a particular matter. Nor do I not think that implementation of the UBE will water down test takers' knowledge of New York law. I truly believe (and will advise our students as such) that anyone who is interested in practicing in New York should continue to take New York Civil Practice courses and similar New York law-specific courses. Such courses in law school will provide far more in-depth exposure to the relevant law than what would or can be provided in a bar prep course.

In addition, I strongly believe that all law students benefit from experiential learning opportunities to engage in supervised law-related work in New York to ensure exposure to our unique rules of practice. To respond to concerns about the current proposal's one hour, multiple-choice coverage of New York specific law, the Committee might consider some alternatives. For example, graduates might be asked to demonstrate aptitude with New York law through assessment of their knowledge and practice competency in experiential settings such as clinics or field placements.

Some concerns have been raised about the potential negative impact on minority test-takers if the UBE is implemented as proposed. This would be terrible. But compared to what? What is the base line? I am unaware of data that shows the impact of the current bar exam on minority test-takers in New York. And to my knowledge, there is little data that has been made publicly available to determine whether the switch to the UBE would have a worse impact on minority test-takers in New York. Thus, I strongly encourage that a serious study be undertaken when and if the UBE is implemented, with a public report issued within the first two to three years after. At that point we can talk about the impact of the UBE on minorities and what we can do about. I am sure that the National Conference of Bar Examiners would be a willing partner in any such effort.

For the above reasons, I support the proposed changes to the New York Bar Exam.

Outline
Testimony before the Advisory Committee on the Uniform Bar Examination
February 3, 2015
Honorable Cynthia L. Martin

(addresses the advantages of UBE score portability; the consideration of local law components; common misperceptions about the UBE)

I. Introduction

- A. Member of the Missouri Board of Law Examiners from 2001 through 2011, and thus when it adopted the UBE first administered in February 2011; currently a member of the NCBE Board of Trustees
- B. Summarize scope of testimony

II. The Missouri Experience--Common Ground for Jurisdictions considering the UBE

- A. The decision to adopt the UBE
 - 1. Already using components--except some essays (MBE 50%; 1 MPT and 10 essays 50%)
 - 2. Realistic assessment of the quality of our board-drafted essays (we often wrote 4-6 of the essay questions) versus the quality of NCBE tests
 - 3. Recognition that purpose of exam is to test minimum competence--and that portability of score is in keeping with economic realities
 - 4. Analogous to admission on motion--where "minimum competence" is assumed from practice experience. Hard to argue that a UBE score does not measure minimum competence for some reasonable period of time, regardless where the score is attained
 - 5. Already accepting transfer MBE scores
 - 6. Recognition that the bar exam is not a measure of whether applicants know all things about all substantive subject matters--physically impossible to do. Instead it should be a testing instrument that generates a reliable score that measures minimum competence to practice law that is equatable across different administration dates
 - 7. Recognition that "minimum competence to practice law" should not be a variable based on jurisdiction specific knowledge

B. The perception obstacle: How can you license lawyers to practice in a jurisdiction without testing their knowledge of the law in that jurisdiction?

1. Exam instructions had counseled applicants to answer based on Missouri law, though even our board-drafted questions had largely evolved to test knowledge of general principles of law
2. Board-drafted essays often tested subject matters that are not within the scope of NCBE essay subject matters (i.e. Missouri civil procedure, administrative law)
3. Overcoming the perception:
 - a. Came to conclusion that insuring access and exposure to the peculiar aspects of Missouri law was a sound objective. If a psychometrically sound testing instrument (the UBE) can be relied on to measure minimum competence to practice based upon general principles of law ALL applicants should be expected to know, why couldn't we tackle the local law issue another way
 - b. Decided to explore how could do both

C. Exploring the Options for Exposing Applicants to State Specific Law

1. Identified substantive areas of the law that warrant coverage because of peculiar rules, procedures, statutes, or decisional law
2. Missouri initially identified nine (torts, civil procedure, real property, trusts, estates, family law, business associations, administrative law, and evidence). Eventually added a tenth (Missouri courts)
3. Created outlines that highlight significant local law distinctions in these ten areas. NOT comprehensive subject matter outlines
4. Then discussed how best to assure exposure to/awareness of this content
5. Considered local law component added to the UBE exam (at the present time, no UBE jurisdiction has a local law essay or multiple choice test as a part of its bar exam (i.e. graded as a part of its exam score); considered CLE program
6. Opted for 30 (now 33) question multiple choice, open-book, "test"
7. Advantages:
 - a. NOT intended to be a psychometric measure of minimum competence. Rather, a means of insuring access to the key local law distinctions we want every Missouri lawyer to know
 - b. Materials can be accessed by anyone and can be referred to by applicants at anytime
 - c. Once compiled, outlines can be easily maintained

- d. Can add subjects that would never test on the exam (i.e. the Missouri courts outline); or that are difficult to test (i.e. access to justice issues; pro bono initiatives)
- e. Affords better control over exposure to core local law distinctions as contrasted with "spot testing" of narrow subject matter in a local law essay on an exam

IN SHORT: a local law component that emphasizes access to critical information about local law distinctions. Since UBE already determines "minimum competence," a local law component need not duplicate this objective.

- D. How the Local Law Component Works in Missouri (online nature of test; certification; check off item for licensure versus part of "score;" time frame for taking)

III. Misconceptions/perceptions about the UBE

- A. Better off to just sit for the exam in another jurisdiction instead of paying for a UBE score transfer
 - 1. Often same fee as admission on motion
 - 2. Can transfer at anytime (not just in connection with February and July bar exam administration)
 - 3. Don't have to sit
 - 4. No need to spend money taking another bar prep course
 - 5. Not unique to the UBE--any admission to another jurisdiction has a fiscal note
- B. No other UBE states where applicants will desire to transfer score
 - 1. Missouri adopted the UBE when no other jurisdiction had done so (explain)
 - 2. Impossible to gauge an applicant's need for portability at the outset
 - 3. Score generally recognized for up to two years (and up to 5 years is some UBE jurisdictions)--flexibility is a positive
 - 4. Dynamic effect of adoption of the UBE in a geographic area
- C. Impact on pass rate/minorities
 - 1. Transfers to date where "passing score" not achieved in jurisdiction where sat--economic boost, and highly advantageous opportunity to begin practicing versus sitting again for the exam

2. Missouri did not experience an impact on its pass rate, despite reweighting of exam components when UBE adopted
3. Missouri has not experienced any claim of disparate impact on minorities

D. Will be required to retool legal education in the jurisdiction

1. Content is the same--nationally used casebooks; teach general principles as foundation even when state-specific law differs
2. Not our experience (the Missouri civil procedure example)
3. No changes in teaching methodologies
4. Law schools educate lawyers for the practice of law generally, and in the jurisdiction(s) where most students will practice; the bar exam measures minimum competence to practice law, a threshold that is not jurisdiction specific

E. Will generate a flood of applicants

1. That has not been our experience--consistent with its perceived advantage, the UBE is a tool for applicant portability associated with employment opportunities; no different than our experience with motion practice
2. None of the 14 UBE jurisdictions have expressed this concern following adoption

IV. Conclusion

The UBE tests knowledge every lawyer should be able to demonstrate as a condition of licensure, and regardless where or how the lawyer intends to practice. The exam produces a score--a portable score--and thus an assessment of minimum competence that can and should be transferable to any jurisdiction depending on its cut score. The premise that minimum competence to practice law is a variable of local law is inconsistent with the settled principle that accredited legal education (wherever attained) is normative, and with the settled principle that a certain number of years of practice in one jurisdiction will suffice as minimum competence for admission on motion in another jurisdiction.

It is possible, however, to embrace both the portability of a UBE score and the desire to expose new lawyers to significant local law distinctions. Portability of a bar exam score is not mutually exclusive with the ability to afford exposure to information about a state's significant local law distinctions as a condition of licensure.

Remarks by Chris Jennison
2nd Circuit Governor of the ABA Law Student Division
Syracuse University College of Law

Good afternoon. Thank you for allowing me to speak today. Adopting the Uniform Bar Exam is important for the State of New York, and carefully studying the implications of adopting the exam is essential.

(My name is Christopher Jennison, and) I am a 2nd year student at Syracuse University's College of Law. Even though I am not reflecting official policy of the American Bar Association, I would like to note that I am currently the 2nd Circuit Governor of the ABA's Law Student Division, where I represent all New York state law students in ABA related matters. I also serve on the Law Student Division Board of Governors, which is composed of 23 law students, of varying geographic and demographic backgrounds, each of whom are elected by our approximately 35,000 law student members. It is the task of this group to create and suggest policy and initiatives on behalf of law students nationally.

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

I urge New York to adopt the Uniform Bar Exam as soon as possible. New York's pre-eminence in the legal field requires that this committee and this judiciary consider not only the implications in New York for current attorneys, but implications for the entire legal profession, including future attorneys.

In August 2002, the ABA's Commission on Multijurisdictional Practice found "that geography no longer dictates the substantive law a lawyer practices, nor the location in which that practice takes place."¹ That was 13 years ago; the need for a portable law license for multijurisdictional practice has only grown.

Though I currently attend law school in New York, I grew up in Maryland, and attended graduate school at the University of Pennsylvania. As you know, most jurisdictions require an individual to have practiced for more than five years before admission through motion. Even still, as a result of reciprocity rules, admission after 5 years isn't guaranteed; New York is not a reciprocal state with Maryland, where my family resides, and as such I couldn't move for admission after five years of practice in New York. As a result of this tangled web, and as Chief Judge Lippman has noted, law students who take the exam in one state, such as New York, but must move to another state for employment or other reasons, "must study for, pay for, wait for, and take multiple bar exams with uncertain results."² Lippman continues saying, the "employment rate for fresh law graduates has fallen for the sixth year in a row... [and] dependable avenues of post-graduate employment have continued to erode in the face of economic

¹ Rebecca S. Thiem, *The Uniform Bar Exam: Change We Can Believe In*, B. Examiner, Feb. 2009, at 12, 13.

² Jonathan Lippman, *Uniform Bar Exam: A Template for New York?*, N.Y.L.J. (Jan. 26, 2015), <http://www.newyorklawjournal.com/id=1202715677092/Uniform-Bar-Exam-A-Template-for-New-York>.

pressures.” While I may have a preference and an idea of where I hope to be employed after law school, the reality for law students today is that we go where the market demands, or suffer from decreased job prospects. Administering duplicative exams serves to increase the expense of a test taken mostly by *recent* law school graduates, already saddled with student loans, facing poor hiring prospects.³ Adopting the Uniform Bar Exam allows current law students and future lawyers the flexibility to go where their circumstances dictate.

I understand the desire to protect the value of a New York law license and, ultimately, to protect clients. The UBE allows each state to set the passing score for their own jurisdiction. In the current proposal, New York would set the passing score at 266, a score lower than 10 of the 14 current UBE jurisdictions. I understand the need to maintain the quality of attorneys in New York, I really do; if that is the concern, New York has flexibility: set the passing score at 276 as in Colorado, or 280, as in Idaho. Setting a higher pass score than other UBE jurisdictions would allow those who sit for and pass the UBE in New York to transfer their scores elsewhere. Through a higher pass score, a state-specific multiple-choice component and continuing legal education, New York can maintain rigorous licensure requirements.

The adoption of the UBE in New York would set the legal profession on a course towards a uniform licensing structure while maintaining attorney quality. At the same time, it would also provide better options for law students who face an unprecedented legal employment market. I urge this committee and the judiciary as a whole to consider the benefits of the Uniform Bar Exam for current and future law students, and to adopt the UBE as quickly as possible.

Thank you for your time.

³ III. State Bar Ass’n, Final Report, Findings & Recommendations On The Impact Of Law School Debt On The Delivery Of Legal Services (2013), available at <http://www.isba.org/sites/default/files/committees/Law%20School%20Debt%20Report%20-%203-8-13.pdf>.

Appendix A: Column written by Chris Jennison for the March 2015 issue of The Student Lawyer, the publication of the ABA's Law Student Division.

The Uniform Bar Exam: An Idea Past Due?

Soon-to-be law school graduates are getting ready to gear up for the bar exam in just a few months and younger law students are beginning to focus on what state or region they may want to practice in. While you do so, it's important to note that the Uniform Bar Examination (UBE) may soon be coming to a jurisdiction near you, as several states weigh adoption of the portable law test.

The majority of new law graduates currently have to choose a single state in which to apply for admission to the bar, even if those graduates have not yet obtained employment in that state. In most situations, if they later move to another state, they must retake the bar exam at an additional cost. If fortunate, they may be able to weave a solution through reciprocity agreements, though in the majority of states, that option is mostly available to seasoned lawyers with five or more years of experience.

The UBE seeks to fix this portability problem. It is composed of the Multistate Essay Examination (MEE), Multistate Performance Examination (MPE), and the Multistate Bar Examination (MBE). The UBE is uniformly graded, offering test-takers a portable score, something that would prove beneficial to law students and recent graduates.

Jurisdictions that use the UBE still set their own guidelines for various issues, including setting their own passing scores and determining how long incoming UBE scores will be accepted.

It has been more than four years since the UBE was first administered, and it is now offered in 14 states. On October 7, 2014, the New York state judiciary circulated a proposal to adopt the UBE; should this take place, New York would be the largest state to date to administer the test, having examined 15,200 candidates in 2014. It is long overdue for other states and territories to adopt this UBE.

Administering duplicative exams throughout the United States is wasteful and serves only to increase the expense of a test taken mostly by recent law school graduates already saddled with considerable student loan. A uniform bar exam would test legal proficiency at an equivalent level as most individual state bar exams today, and would still allow each state or territory to ensure that bar admission candidates have adequate knowledge of law through setting passing scores in the respective state or territory. States that desire to ensure that candidates have knowledge of local law can meet this need in various ways; for example, states could also ensure a basic level of competency through "bridge the gap" CLE programs, which many states offer anyway.

The UBE is an idea whose time has come, and the Law Student Division recognized this in fall 2014 when it supported a resolution urging all US jurisdictions to adopt the UBE expeditiously. Such an exam would better reflect the multijurisdictional practice of law today, while at the same time ensuring a level of competency for all lawyers throughout the United States. Such an exam would greatly assist law school graduates facing tremendous challenges finding employment while at the same time reducing inefficiency and expense by eliminating the duplication of efforts among state bar examiners. Because most states are already, in essence, administering a uniform bar exam, formally accepting the UBE as the standard is the obvious next logical step.

Appendix B: Resolution 14/10-01 passed unanimously, as written below, in the ABA Law Student Division Board of Governors on October 25, 2014.

**AMERICAN BAR ASSOCIATION
LAW STUDENT DIVISION
BOARD OF GOVERNORS**

**RESOLUTION
URGING ADOPTION OF THE UNIFORM BAR EXAMINATION (UBE)**

RECOMMENDATION

WHEREAS, the market for new lawyers has been increasingly competitive in recent years, resulting in significant unemployment of law school graduates in the state in which they sit for the bar; and

WHEREAS, the restriction of recent law graduates to the state in which they sit for the bar contradicts the American Bar Association's aim to address the access to justice gap; and

WHEREAS, law is the only major profession that has geographically-restricted licensing exams, restricting the mobility of law students and lawyers;

WHEREAS, the Conference of Chief Justices adopted a resolution on July 28, 2010, urging "the bar admission authorities in each state and territory to consider participating in the development and implementation of a uniform bar examination;" and

WHEREAS the Council of the Section of Legal Education and Admissions to the Bar adopted a resolution on August 6, 2010, urging "the bar admission authorities in each state and territory to consider participating in the development and implementation of a uniform bar examination;"

WHEREAS the American Bar Association Task Force on the Future of Legal Education's final report, issued January 24, 2014, recommends that state Supreme Courts, state Bar Associations and other regulators of lawyers and law practice "establish uniform national standards for admission to practice as a lawyer, including adoption of the Uniform Bar Examination;"

NOW, THEREFORE BE IT RESOLVED that the Law Student Division (the "Division"), by and through its Board of Governors, hereby supports the positions taken in 2010 by the Conference of Chief Justices and by the Section of Legal Education and Admissions to the Bar;

BE IT FURTHER RESOLVED, that the Law Student Division encourages these and other entities to renew examination of a Universal Bar Exam since four years have passed since their previous resolutions and fourteen jurisdictions now administer the Uniform Bar Examination; and

BE IT FURTHER RESOLVED, and that the Law Student Division is committed to working with these groups in such a re-examination; and

BE IT FURTHER RESOLVED, the Law Student Division urges States and Territories to expeditiously adopt the Uniform Bar Examination.

REPORT

Introduction

As it currently stands, the majority of new law graduates have to choose a single state in which to apply for admission to the bar, even if those graduates have not yet obtained employment in that state. In most situations, if they later move to another state, they must retake the bar exam at an additional cost. If fortunate, they may be able to weave a solution through reciprocity agreements, though in the majority of states, that option is mostly available to seasoned lawyers with five or more years of experience.

Additionally, as well discussed by the American Bar Association and its entities, there exists an access to justice gap. As outlined in Resolution 108 of the Legal Access Job Corps Task Force:

most states have substantial rural areas and some of them have an aging lawyer population. As a result, many communities are now without lawyers. For example, in one South Dakota community, the nearest lawyer is 120 miles away. State bars faced with this challenge are creating rural placement projects designed to encourage and give incentives for recently admitted lawyers to set up or assume practices in these communities.

Wider adoption of the Uniform Bar Examination (“UBE”) will address both the problems of recent graduate unemployment and lack of access to legal services in certain places. This resolution urges all states and jurisdictions to remedy this deficit by adopting the Universal Bar Examination, providing portability to law school graduates.

The Bar Examination: A Brief History

Although many consider the written bar exam an institution, its history is actually shorter than many realize and it has been in a state of flux for much of its existence. Massachusetts was the first state to permanently institute a written bar exam in 1876. Other states soon followed suit, but some kept an oral component to the exam well into the Twentieth Century.

In the late 1960s, the National Conference of Bar Examiners (NCBE) began a concerted effort to examine proposals to improve state bar examinations. Although early proposals to address duplication of effort among states included a “National Bar Examination,” those were rejected as they implied a loss of local control, and the committee settled on a “Multistate Bar Examination” (MBE) – a voluntary, uniform, multiple-choice exam offered twice a year that state bar examiners could adopt. The MBE was first offered in 1972 and is now offered in 48 states. Later, the NCBE

developed supplemental exams, including: the Multistate Professional Responsibility Examination (MPRE), first offered in 1980 and now used in all states and territories, except Maryland, Wisconsin and Puerto Rico; the Multistate Essay Examination (MEE), first offered in 1988 and now used in 31 states and territories; and the Multistate Performance Test (MPT), first used in 1997 and now used in 41 states and territories (see Appendix A).

The Uniform Bar Examination

The idea for a uniform bar examination has been in discussion for most of the past decade. In August 2002, the American Bar Association's Commission on Multijurisdictional Practice "recognized that geography no longer dictated the substantive law a lawyer would practice, nor the location in which that practice would take place."

The UBE is composed of the MEE, MPT, and the MBE. The increased testing on lawyering skills encapsulated in these three components of the UBE will address the call by bar associations for legal education to incorporate more practical skills training. The UBE is uniformly graded, offering test-takers a portable score, something that would prove beneficial to law students and recent graduates. Jurisdictions that use the UBE still set their own guidelines for various issues, including: setting their own passing scores; determining how long incoming UBE scores will be accepted; and deciding who may sit for the bar exam and who will be admitted into practice.

It has been more than three years since the UBE was first administered, beginning with Missouri and North Dakota in February 2011; it is now offered in fourteen states (See Appendix B). On October 7, 2014, the New York state judiciary circulated a proposal to adopt the UBE; should this take place, New York would be the largest state to date to administer the test, having examined 15,200 candidates in 2014. It is long overdue for other states and territories to adopt this UBE.

Administering duplicative exams throughout the United States is wasteful and serves only to increase the expense of a test taken mostly by recent law school graduates already saddled with considerable student loan debt (up to \$200,000 in some cases). A uniform bar exam would test legal proficiency at an equivalent level as most individual state bar exams today, and would still allow each state or territory to ensure that bar admission candidates have adequate knowledge of law through setting passing scores in the respective state or territory. In reality, though, as it exists in most states and territories, the bar exam is essentially a uniform exam, given that it tests the same general issues of law with little to no emphasis on local variation. Formally adopting a uniform examination is simply the next logical step.

States that desire to ensure that candidates have knowledge of local law can meet this need in various ways; for example, states could also ensure a basic level of competency through "bridge the gap" CLE programs, which many states offer anyway. Most states are not testing local law to any considerable degree on current bar examinations, and candidates can pass most bar examinations by studying a core set of subjects, paying little to no attention to local variation in the law. Additionally, it is possible that states could maintain a section specific to state law; in New York, for example, the State Board of Law Examiners has recommended the inclusion of a component to New York state law.

Summary

The UBE is an idea whose time has come. Such an exam would better reflect the multijurisdictional practice of law today while at the same time ensuring a level of competency for all lawyers throughout the United States. Such an exam would greatly assist law school graduates facing tremendous challenges finding employment while at the same time reducing inefficiency and expense by eliminating the duplication of efforts among state bar examiners. Finally, because most states are already, in essence, administering a uniform bar exam, formally accepting the UBE as the standard is the obvious next logical step.

FINANCIAL REPORT

The adoption of this resolution entails no financial expense for the American Bar Examination, or its Law Student Division. The financial impacts in each state would vary but would be minimal, as many states are already administering NCBE test portions of the UBE (MBE, MEE, and/or the MPT).

Respectfully submitted,
Christopher Jennison
Primary Sponsor
2nd Circuit Governor, Law Student Division
J.D. Candidate, 2016 | Syracuse University College of Law
M.P.A., 2014 | University of Pennsylvania
chris.s.jennison@gmail.com

[REDACTED]

From: Berch, Rebecca <[REDACTED]>
Sent: Wednesday, January 28, 2015 5:14 PM
To: Uniform Bar
Subject: UBE Testimony

I would appreciate the opportunity to address the Advisory Committee about the UBE at your February 26 meeting in Rochester. I have arrived at my position strongly favoring adoption of the UBE as a result of much study and thought resulting from several positions in have held or now hold.

- (1) I am a supreme court justice, so appreciate the special concerns each state has about potential incursions into the state's autonomy. Because the UBE simply provides a portable score on a well-conceived, vetted, and executed standardized exam, many of these concerns are alleviated. States maintain the right to require a state-law component, enforce character and fitness standards, and set forth other considerations important to the admitting jurisdiction.
- (2) Arizona adopted the UBE during my term as Chief Justice. I will share my court's endorsement of the exam and our experience creating an Arizona Law component.
- (3) I currently serve as chair-elect of the Council of the ABA Section of Legal Education and Admissions to the Bar. During my term as a Council member, the Council approved a resolution encouraging jurisdictions to consider adoption of the UBE.
- (4) During my term as Chief Justice of Arizona, I served on the Conference of Chief Justices, which adopted a similar resolution encouraging states to consider adoption of the UBE. (I recall that no-one voted against it, but that is subject to verification.)
- (5) I served as a bar examiner for seven years in Arizona, so am familiar with exam writing/procuring and exam grading. From that experience, I can avow that NCBE has more resources and produces a better exam than any jurisdiction could possibly produce (though we thought we did a pretty good job at the time). I am also aware that an applicant for admission could miss every Arizona-law nuance in our home-produced essays, yet still pass the Arizona bar exam. With the required Arizona Law Course, we ensure that all applicants for admission to the Arizona Bar have at least passing familiarity with important aspects of Arizona law - even if those aspects (such as the requirement of filing the annual continuing legal education affidavit) are too minor to ever have been included on a bar exam.
- (6) I serve on the Board of Trustees of the National Conference of Bar Examiners and on the Conference's Uniform Bar Examinations Committee, so I am familiar with the quality of the individual exam products produced by the NCBE and also with the UBE and the policies surrounding its administration and grading.
- (7) I served on the faculty at Arizona State University College of Law (now the Sandra Day O'Connor College of Law) from 1986-1995. During that time, I taught (among other courses) the academic support program and special classes on exam writing. I am sensitive to concerns about the impact of uniform exams on diverse candidates. I am also aware that most law schools teach from law books produced by national vendors, such as Thompson/West, Foundation, and Little Brown, which do not focus on the law of any one jurisdiction. With very rare exception, the schools teach Federal Rules, Uniform Laws, and Model Rules and Laws, rather than the laws of any local jurisdiction. As a result, in-state schools usually don't teach local law; they teach law applicable

pretty much throughout the country. Given that, it seems unproductive to require recent law graduates and new lawyers to take essentially the same test, based on national rules, in each jurisdiction in which they wish to practice.

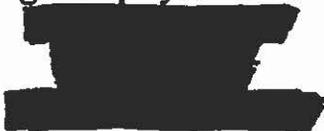
In short, from this background, I have become convinced that a more uniform approach to bar examinations nationwide serves the public both from the perspective of making access to justice more readily available, and protection of the public through administration of a high-quality, uniform exam to test the knowledge a new lawyer should possess. The UBE serves law students and new lawyers by allowing them to take an exam score earned in one jurisdiction and move it to another jurisdiction, while they remain responsible for satisfying local criteria for admission, such as a state-law program, pro bono requirements, and C&F. Law schools should also embrace the UBE, as it provides students with mobility. Given the difficult market for law-related jobs, schools should embrace programs that assist their students with placement. Finally, high courts or supervisory bodies can be assured that the test given is of the highest quality and the administrative requirements embody best practices, helping to alleviate concern regarding the giving of a high-stakes gatekeeping examination.

I hope you will consider my request. Thank you, and good luck with your inquiry.

Rebecca White Berch
Justice
Supreme Court of Arizona
1501 W. Washington St.
Phoenix, Az. 85007-3231



Greg Murphy Law Firm



February 11, 2015

Via Email Attachment

The Advisory Committee on the Uniform Bar Examination
New York Board of Law Examiners
Corporate Plaza, Building 3
254 Washington Avenue Extension
Albany, N.Y. 12203-5195

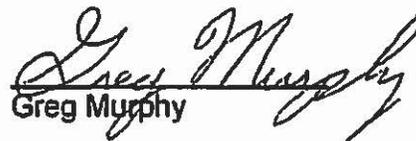
Dear Advisory Committee:

In accordance with your kind invitation and the procedures you have adopted for your public hearings, please accept this as an outline of the testimony I expect to give at your hearing in Rochester, New York on February 26, 2015.

- I. Introduction—Greg Murphy
 - A. Vice-Chair, Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association. (Former Chair, Law School Accreditation Committee.)
 - B. Co-Chair, Special Committee on the Uniform Bar Examination, National Conference of Bar Examiners.
 - C. 30-years experience in bar admissions
 1. Former Chair, Montana Board of Bar Examiners.
 2. Former Chair, National Conference of Bar Examiners.
 3. Former Chair, Multistate Bar Examination Committee.
 4. Former member, Multistate Performance Test Drafting Committee.
 - D. Distinguished Practitioner in Residence, Cornell University Law School (Fall term 2015).
- II. Why the Uniform Bar Examination?
 - A. Multistate Bar Examination employed in 49 states, District of Columbia, U.S. Territories.
 - B. Multistate Performance Test, 37 states, the District of Columbia, three U.S. territories.
 - E. Multistate Essay Examination, 28 states, the District of Columbia, and three U.S. territories.
 - F. Communality of Testing Components; why not a transferable score.

- G. 15 states have now officially adopted the UBE; in consideration in others.
- II. Quality of Test Products
- A. Committee drafting and editing by content experts, legal academics, lawyers, and judges.
 - B. Pretesting
 - C. Scaling to the MBE and combining score; Best psychometric practice.
 - D. Transferability of scores.
 - E. Opportunities for addressing state-specific law and issues.
 - a. 50-item New York test.
 - b. Online test; the Missouri model.
 - c. Online course; the Arizona model.
 - d. In-person course; the Montana model.
- III. Addressing questions and myths about the UBE.
- A. Not a revolutionary exam product, but a reasonable step to help bar applicants.
 - B. Does not mean national admission or reciprocity.
 - C. The "Gold Standard." New York would set its own minimum passing score. 29 jurisdictions now have a minimum passing score higher than New York's (calculated on a 200-point scale).
 - D. Effect on disadvantaged minorities. No data has yet surfaced that minorities do worse than existing test products.
 - E. Adopting the UBE does not mean New York forever bound.
 - F. Who opposes the UBE and why?
 - a. Some organized bar groups.
 - b. Some law professors.
 - c. Some bar examiners.

Sincerely,


Greg Murphy

Revised Testimony of Justin L. Vigdor Before the Advisory Committee Appointed by Chief Judge Jonathan Lippman to Study the Issues Related to the Proposed Adoption of the Uniform Bar Examination (UBE) in the State of New York

Dated: February 26, 2014

Good Afternoon Judge Rivera and members of the Committee:

I am Justin Vigdor. I am a past president of the New York State Bar and one of the five New York State Uniform Law Commissioners. I have served on the New York Commission for 26 years, and consequently, I normally am a strong supporter of uniformity among the states. I am grateful for the invitation to testify this afternoon and express my personal concerns regarding the UBE. I emphasize that I do not speak for the New York Commission.

I intend to be brief and simply express my reservations and my feeling that the UBE needs further study before its adoption.

I have read the report of the State Bar Association's Committee on Legal Education and Admission to the Bar and attended the meeting of the House of Delegates at which that report was received last November. That Committee's recommendation that the adoption of the UBE be delayed for further study was adopted by the Executive Committee and by the House of Delegates at its January meeting.

At the November meeting, again, speaking for myself and not for the Association or the Commission, I expressed my fear that given New York's record of non-adoption of a number of significant uniform laws, uniform laws are probably likely not being taught at New York law schools and students at those law schools would be prejudiced. As I understand it, the current five New York essays will be replaced with six essays,

not drafted by the New York Board of Law Examiners, that will test on uniform laws rather than the laws of New York. I assume that the multi-state essays will deal with important subjects of legal practice such as business entities, the Uniform Commercial Code, and a variety of other areas.

The New York Legislature, over the years, has been reluctant to adopt Uniform Acts, including some quite significant Uniform Acts and it would not seem that that is likely to change in the near future. Moreover, a number of the Uniform Acts that the Legislature has adopted contain a number of variations from the promulgated Uniform Acts and are, in that sense, not truly uniform.

Despite the fact that New York is a premier commercial state, it has lagged far behind the rest of the country in adopting certain modern versions of the Uniform Commercial Code. New York has never adopted the current versions of Article 3 dealing with negotiable instruments and Article 4 dealing with bank deposits and collections. Their adoption has been recommended as far back as 1990 by the Uniform Law Conference and the American Law Institute. Our versions of Articles 3 and 4 were adopted in the 1960's and ignore amendments adopted in 1990 and 2002, which virtually all states have adopted.

Just this past year, we adopted modern versions of Articles 1, 7 and 9. We were the last state to do so. However, the 2010 amendments to Article 9, which deals with secured transactions are not entirely uniform in certain respects and an effort will be made to convince the Legislature to consider amending those non uniform provisions. A significant departure from the Uniform version is the fact that we did not adopt the Uniform objective definition of good faith ("honesty in fact and the observance of

reasonable commercial standards of fair dealing"). Instead, we have preserved the subjective definition ("honesty in fact in the transaction or conduct concerned"). Another example is the removal from the uniform definition of "conspicuous" the safe harbor of a printed heading in capitals larger than the language in the body of the document. Our 2014 version contains a non-uniform Statute of Frauds provision with respect to sales of personal property and non-uniform provision on the law of accord and satisfaction.

With respect to Article 9 dealing with secured transactions, an important non-uniform provision we just enacted (among a number of others) is the failure to specify that the correct name to use when filing a security financing statement against an individual debtor is the debtor's name on the driver's license. All but seven of the 51 jurisdictions that adopted the new Article 9 amendments have chosen that rule.

I could go on about the commercial deficiencies but prefer to speak for a moment about New York's entity laws. We are still operating with a Partnership Act, originally adopted in 1914 and from time to time amended in non-material ways. The Uniform Law Conference promulgated a revised Uniform Partnership Act in 1994 and 1997 which has been adopted by over 40 states. Among other things, the revised Act clarifies the nature of a partnership by clearly defining it as an entity rather than as an aggregation of individuals as it is in New York. The N.Y. Limited Partnership Act dates back to 1916, whereas the Revised Uniform Limited Partnership Act was last amended by the Conference in 2013. That likewise, treats the Limited Partnership as an entity rather than an aggregation of individuals. It provides a full shield for partners against liability for entity obligations and it has self-contained provisions. Our Limited Partnership Act must refer to the Partnership Act itself to fill in coverage gaps.

LLCs, Limited Liability Companies, have become the country's most popular form of business entity being organized. New York's Limited Liability Company Law was enacted in 1994. The 2013 Revised Uniform Limited Liability Company Law is the product of a study by knowledgeable experts based on their experience with the current and prior generations of Limited Liability statutes. It is modern, flexible, user friendly, and is far more advanced than New York's 1994 Act. New York's law is out of sync with other states and therefore practitioners cannot rely on court cases which are decided elsewhere to clarify issues. We are the only state that still requires a publication for effectiveness of an LLC.

Because of our outdated commercial and entity laws, many practitioners are forming entities and closing important commercial agreements in Delaware or other states which are far more modern and hospitable. We, consequently, lose tax revenues in New York.

I could go on at length beyond commercial and entity matters but briefly, by way of example, despite efforts by the bars and by the Uniform Law Conference we have, for various reasons, not adopted the Uniform Arbitration Act, the Uniform Mediation Act, a Uniform Condominium Act, the Uniform Probate Code, the Uniform Real Property Transfer on Death Act, the Uniform Securities Act, the Uniform Trade Secrets Act, and so forth. If the substance of any of these Acts were to be tested on a Uniform Bar Examination, clearly New York students will be badly prejudiced unless law schools rapidly change their teaching materials and teach both the New York version and the Uniform version of Acts. Until this issue and some of the other issues which have been raised by the New York Committee on Legal Education and Admission to the Bar, such

as the disparate impacts on bar passage for minorities and the UBE's costs, have been studied, adoption of the UBE should be delayed.

Thank you for your attention and for affording me the opportunity to testify here today.

**ADVISORY COMMITTEE ON THE UNIFORM BAR EXAM
TESTIMONY OF DAVID M. SCHRAVER ON BEHALF OF THE NEW YORK STATE BAR
ASSOCIATION
February 26, 2015
Rochester, New York**

Good afternoon. I am David Schraver, Immediate Past President of the New York State Bar Association. I have been asked to testify this afternoon on behalf of the Association. Thanks to you, Judge Rivera, and to the Committee for inviting me to testify at this public hearing. I am aware that David Miranda, Eileen Millett and Sarah Gold testified in Albany on February 3; and while I affirm their testimony, I do not intend to repeat it.

My testimony this afternoon will cover three topics:

- An update on the Association's activities in response to the Board of Law Examiners' request for comments regarding the January 2015 draft "Content Outline for the Proposed New York State Specific Law Examination: Significant Distinctions, Laws and Rules," and a few preliminary comments on the draft Content Outline;
- A brief summary of concerns expressed by the International Section of the State Bar about the proposed adoption of the UBE in New York; and
- The efforts the State Bar has made to ascertain whether there has been a disparate impact on minorities in states where the UBE has been adopted.

As you know, the Association has a number of significant concerns about the proposal to adopt the UBE in New York. Nevertheless, in response to the Board of Law Examiners' request for comments on the draft Content Outline, President Glenn Lau-Kee circulated Ms. Bosse's e-mail and the attached Content Outline to all Section and Committee chairs as well as our Committee on Legal Education and Admission to the Bar and asked that they consider the Board's request with respect to their areas of expertise, noting the short deadline for comments. As a preliminary matter, we note that the draft Content Outline is 12 pages covering 12 general subject areas, with varying numbers of sections and subsections in each area, and numerous case citations and a glossary of thirty state statutes and rules, all subject to the express caution that the outline is intended to "indicate, in summary fashion, the examination's potential scope of coverage" and that the citations to cases, statutes and rules "[do] not mean that the cited statute or court rule includes all of the relevant legal principles regarding that entry." The scope of the Content Outline reinforces the Association's concern that a one-hour, 50 multiple choice New York Law Exam is not adequate to test New York specific law, as well as the concern that New York specific law differs in a great many areas from Uniform Acts as indicated not only by the scope of the Content Outline but also by its subtitle: "Significant Distinctions, Laws and Rules." We also note that the draft Content Outline does not include some important topics such as the commercial divisions of the supreme court and their special practices and procedures or New York trade secret law, other areas in which New York law differs from Uniform Acts.

The New York State Legislature has been resistant to the adoption of Uniform Acts and has not adopted a very large number of significant Uniform Acts. and there is no indication that its attitude is likely to change. In fact, as one recent example of this attitude, while the Uniform Law Commission adopted a new Uniform Act on Fiduciary Access to Digital Assets in 2014, the

State Legislature has asked the State Bar Association to draft a New York-centric bill on the same subject. We urge the Advisory Committee to take the time to consider carefully how testing on Uniform Laws will serve the purposes of better preparing New York law students and other bar exam candidates to be more practice ready, or of testing for minimal competence to practice law in New York.

Second, I will briefly summarize the concerns of the State Bar's International Section in response to the reduction of New York law content on the bar exam if New York should adopt the UBE proposal. The Section is preparing a letter which will explain its concerns in more detail. In 2014, 4,813 foreign-educated candidates took the New York bar exam, comprising over 31% of the 2014 candidate pool in New York. The trend is that both the number of foreign-educated candidates and the percentage of the pool of candidates they comprise are increasing. Foreign-educated candidates want to be able to hold themselves out as lawyers admitted in New York. They are not seeking portability. I have met with the Executive Committee of the International Section as they discussed their concern that the UBE proposal would, if adopted, lead to the admission of foreign-educated candidates who have an inadequate competency in New York law and, over time, would lessen the internationally recognized value of New York licensure and the primacy of New York law as the choice for international transactions and of New York as a forum for international dispute resolution.

Finally, the Association continues to be concerned that the adoption of the UBE proposal may have a disparate impact on minority candidates. Over the past couple of months, senior staff of the Association have surveyed the 14 UBE states and asked whether they have seen a disproportionate impact on minority bar exam candidates since adopting the UBE. The responses indicate that there are no meaningful data in these states regarding the impact on minority bar exam candidates. Relative to most of the states that have so far adopted the UBE, New York has a significantly larger and more diverse minority population and pool of minority bar exam candidates. Before the UBE proposal is adopted in New York, we urge that the potential impact on minority bar exam candidates be evaluated. To adopt the UBE without a meaningful effort to do so, and to plan to evaluate the impact on minority candidates after three years, is not a risk this state should take.

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

Thank you for the opportunity to testify here today.

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MEMORANDUM

DATE: March 3, 2015
TO: Members of the Advisory Committee on the Uniform Bar Exam
FROM: Erica Moeser, President 
National Conference of Bar Examiners
RE: Uniform Bar Exam Public Hearing Appearance

New York has the opportunity to provide a watershed moment in the development of the Uniform Bar Examination. Adoption of the UBE in New York at this juncture may prove to be a turning point. There are currently 15 UBE jurisdictions, all but two of which (New Hampshire and Alabama) are located west of the Mississippi. (The Vermont Supreme Court is currently considering a proposal submitted by the Vermont Board of Bar Examiners.) The addition of New York would send a signal that the legal profession, as every other profession, is well served by a uniform basic licensing test.

The purpose of my appearance is to answer any questions the Committee may pose as it concludes a series of hearings and focus groups that were intended to elicit concerns about the proposed changes to New York's licensing test structure. My goal is to educate – and perhaps to address some misconceptions.

I have also been asked to comment specifically on the following topics and will be prepared to do so:

- I. Portability of scores, especially in the Northeast
- II. Potential impact of the UBE on subsets of test-takers
- III. Gender disparities on multiple-choice questions
- IV. The drop in MBE scores in July 2014
- V. Test content selection (general principles of law)

cm/dk

**NEW YORK COUNTY LAWYERS ASSOCIATION
TESTIMONY OUTLINE OF VINCENT CHANG FOR THE MARCH 4, 2015
HEARING OF THE ADVISORY COMMITTEE STUDYING ADOPTION OF
THE UNIFORM BAR EXAM PROPOSAL IN NEW YORK**

I. OVERVIEW

On behalf of the New York County Lawyers' Association, I would like to thank the Advisory Committee for the opportunity to testify on behalf of NYCLA at this hearing today. With me today is Mr. Lewis Tesser, NYCLA President. I would like to note at the outset of this testimony that NYCLA has also issued a written report on the UBE Proposal, which was submitted to the Advisory Committee and discusses in more detail some of the points I will raise today.

NYCLA's Position

- NYCLA believes that reasonable arguments can be made both for and against the proposed adoption of the Uniform Bar Exam (the "UBE"), and therefore supports a one-year study period in which these arguments can be fully assessed.
- NYCLA sees no exigency warranting immediate adoption of the UBE and, on balance believes that a one-year period of study, before making a determination about whether to implement the UBE, would be prudent.

II. REASONS FOR A ONE YEAR STUDY PERIOD

- Most of the other states that have adopted the UBE have done so with a review period far longer than that currently proposed, with Washington studying it for one year and Minnesota implementing the exam approximately two years after it was first considered.
 - New York did not adopt the Multistate Bar Examination until 1979, seven years after its inception in other states. Indeed, New York did not implement a five point increase in its passing score for more than two years after hearings were held on the proposal.
- We are unaware of any exigency that requires that this decision be made in a shorter time frame. Indeed, any advantages of the UBE in the next few years would be exceedingly limited, as it has been adopted largely in small, distant states to which New York bar takers would not likely seek to transfer their scores.

We note that if other states were to promise to seek enactment of the UBE in their states in the event that New York does so, such promises would enhance the case for the UBE. However, to date, we are unaware that any other states have made such commitments.

- During the next year, we urge that efforts be made to obtain information on the issues identified in this report from the 15 states that have adopted the UBE, all of which have adopted it since 2011.
- A one year study period would also give law schools and law students time to prepare for UBE, if it is indeed adopted, and to adjust curricula, course selection and/or bar exam preparation accordingly.
- In addition, we urge the development and dissemination of complete information of the costs and fees associated with a New York administration of the UBE. The cost of the New York bar examination for first time takers is only \$250, one of the lowest fees in the country. The cost of the bar examination in UBE states is as high as \$880 in Arizona and \$600 in Montana and Idaho. We note, however, that New York's fees are apparently artificially low because they are set by statute. There is no reason to believe that adoption of the UBE would cause the legislature and the Governor to change the \$250 figure. However, during the one year period for study that we advocate we would urge transparency on the cost of the UBE as opposed to the cost of the current examination so that it is possible to assess whether the UBE could potentially lead to future increases in the cost of the bar examination in New York.
- NYCLA also urges that, if (contrary to our recommendation) the UBE is adopted in 2015, the BOLE conduct a three year review of the UBE's use in New York and issue a public report at the end of that period analyzing the UBE's impact on underrepresented groups and, if the data are available, on lawyer mobility.

III. Arguments For and Against the UBE

The Committee has requested testimony regarding the advantages and/or disadvantages of the current New York bar examination and the proposed UBE. While a host of arguments can be made, we believe the principal arguments for and against the adoption of the proposed UBE can be summarized as follows, with further discussion of each of these arguments in the sections below.

IV. JUSTIFICATION FOR JUDGE LIPPMAN'S UBE PROPOSAL

As set out below, we acknowledge that there are substantial reasons to support the proposed change to the UBE, although we think that, without further information supporting some of them, they are not convincing at this time.

- **First**, it is argued that more resources can be dedicated to the development and testing of the UBE than any single state could devote to its bar examination. This is a more important factor in small states with small populations of bar candidates. Indeed, bar authorities in Arizona and Montana were particularly effusive regarding the resources devoted to the UBE, as opposed to the resources their states could devote to their bar examinations. But, despite its size, New York may face similar resource constraints, given that our bar examination fees are capped by statute, which may limit the amounts that can be expended on the development and testing of examination questions. The NCBE itself advanced the claim that it is able to devote considerable resources to development and testing of questions and scoring:

- **Second**, the Committee has asked for our view as to how UBE score portability would impact New York law graduates and graduates of law schools in other jurisdictions, and the law profession as a whole. In this regard, we note that proponents of the UBE argue that it promotes portability and mobility in an increasingly national and global practice of law. NYCLA does not wish to minimize this potential factor. Increasing the fluidity of the market for legal employment is a desirable goal, particularly in an economic climate where young lawyers often cannot obtain legal employment. However, NYCLA would like to note the following with respect to the potential increased mobility:
 - At least as the landscape currently stands, a lawyer who passes the UBE in New York could transport that score to only 15 other states, many of which are small and not geographically close to New York. We are unaware of any states other than New York that are currently considering adoption of the UBE. In addition, the portability of bar passage in New York is limited by the fact that five other states have state-specific requirements and a number of states might have score cutoffs higher than those of New York, depending on the level at which New York's passing score is set.

 - NYCLA also notes that greater mobility would not necessarily be unambiguously beneficial to young New York lawyers. At least at the outset, until additional large jurisdictions adopt the UBE, it is quite likely that more lawyers will seek to use the UBE to enter New York than to use the test as a way of gaining admission in another state. It is possible that this additional inflow of lawyers could increase the competition in New York for many beginning lawyers who already find it difficult to obtain jobs.

V. REASONS FOR OPPOSITION TO JUDGE LIPPMAN'S UBE PROPOSAL

The reasons for skepticism of the UBE proposal have led us to urge that adoption be deferred; we do not see them as definitive but, rather, as reason for deferral while further information can be gathered.

- **First**, there is a frequently voiced need for disparate impact studies. NYCLA is concerned by the drop in pass rates in the current New York State bar exam. We understand there has been a similar drop in UBE test scores, which NYCLA urges the NCBE to study.
 - NYCLA believes further analysis of potential disparate impact is warranted.
 - NYCLA also notes that a study of the impact on foreign law graduates is particularly significant for New York, given that New York has disproportionately more foreign test takers than any other state – nearly one-third of New York's test takers are foreign.
- **Second**, the Committee has asked for testimony as to the extent to which adoption of the UBE would result in changes to law school curricula and bar exam preparation. We note that the concern has been expressed that a decreased emphasis on New York law on the UBE will in turn cause law schools to de-emphasize New York law, focusing instead on a "national" curriculum that teaches less New York law. In NYCLA's written report, we address this concern in more detail.
 - NYCLA notes that even if the UBE is found to induce some change in law school curricula, such changes would almost certainly not occur in out-of-state and foreign law schools. Two-thirds of those who take the New York bar examination come from such schools. Moreover, even in New York law schools, a de-emphasis on local law could result in a focus on other areas of benefit to law students. The UBE might, for example, make lead law schools to focus more on legal analysis analysis and writing skills.
 - Accordingly, NYCLA is of the view that further analysis is needed to analyze the weight to be attached to this factor. NYCLA is hesitant to place undue weight on this factor because of the lack of hard information on whether curricular changes would be made and the lack of a clear argument against such a shift.

- **Third**, the Committee has asked for testimony regarding the importance of requiring bar applicants to separately pass New York-law specific components. We note that some have charged anecdotally that the lack of New York law on the bar examination would produce lawyers who are insufficiently trained in New York law.
 - Without hard information indicating that a handful of local law essays on the bar examination more realistically test a young attorney's preparedness to confront local law issues than a number of multiple choice questions, NYCLA is hesitant to reject the UBE on this basis.
 - On this point, NYCLA notes that any perceived need to assure knowledge in specific areas of New York law could be addressed by more targeted Bridge the Gap CLE requirements or possibly required on-line courses before taking the UBE:
 - There are many benefits to the online approach. The approach is economical (and much less expensive than the development of essay questions for the bar exam). More importantly, the online content can be continuously refined and amended, ensuring for candidates for law licensure an ever-fresh introduction to the practice of law in the state.
 - As noted in more detail in NYCLA's written report, Alabama, Missouri and Arizona have adopted measures to address the study and testing of local law, including online courses and an open book test on local law.
 - Again, NYCLA believes that New York could benefit from any studies being conducted in the 15 current UBE states that analyze potential detrimental effect on the practice of law and from assessments of programs like those in Arizona, Alabama and Missouri that are designed to compensate for the removal of local law questions from the bar examination.
- **Fourth**, NYCLA notes that contracting parties choose New York law and New York as a choice of forum far more frequently than they choose the law or courts of any other state. If the UBE contributes to a perception that New York law is not "unique", then it is possible that contracting parties may feel less need to insert New York as their choice of law or choice of forum. However, without further study, NYCLA hesitates to say that this reason warrants rejection of the UBE. It is unclear whether the fact that a portion of the New York bar

examination consists of uniform components would undermine the perception that New York law is commercially unique. Indeed, we are aware of no evidence that the adoption of the multistate bar examination in New York in 1979 had any such effect. New York law may be the law of choice not because it is unique but simply because New York law is more robust with more case law on almost any given topic than the law in any other U.S. jurisdiction. Thus, absent any evidence supporting this concern, we do not give it much weight.

VI. CONCLUSION

- Based upon the foregoing reasons, NYCLA urges a delay in the decision on whether to implement the UBE for one year, by which time data may be available on many of the issues identified today and in NYCLA's report on the UBE proposal. In addition, if during the next year other states appear poised to adopt the UBE, that factor would also weigh in favor of adoption of the UBE in New York.
- On behalf of NYCLA, I again thank the Advisory Committee for the Opportunity to testify today.

**NEW YORK COUNTY LAWYERS ASSOCIATION REPORT ON
THE NEW YORK UNIFORM BAR EXAM PROPOSAL**

**This report was approved by the Board of the New York County Lawyers Association on
February 12, 2015.¹**

I. OVERVIEW

NYCLA believes that reasonable arguments can be made both for and against the proposed adoption of the Uniform Bar Exam (the "UBE"), and therefore supports a one-year study period in which these arguments can be fully assessed. NYCLA sees no exigency warranting immediate adoption of the UBE and, on balance, for reasons set out below, believes that a one-year period of study, before making a determination about whether to implement the UBE, would be prudent.

A. Arguments For and Against the UBE

As set out more fully below, NYCLA believes that there are reasonable arguments in favor of moving to the UBE, including the following:

- Because the UBE has been adopted in 15 states, more resources can be devoted to constructing UBE questions than could be devoted to bar examinations in any single state.
- UBE scores are more portable than current bar examination scores because the UBE score is relatively easy to transfer to other states that also use the UBE, subject to state-specific requirements. The legal world is becoming increasingly national and global and thus enhancements to the portability of bar examination passage would benefit younger lawyers.

However, we do not support adoption of the UBE at this time because of the concerns outlined below, some of which could be addressed by studies over the next year.

- The impact on the public of adoption of the UBE in the 15 states that have currently adopted it, all of which have adopted it since 2011. While this impact is not now known, we note that we are unaware of any negative reaction to the UBE in any state in which it has currently been adopted.

¹ This report was prepared by the NYCLA Task Force on the New York UBE Proposal, which is co-chaired by Vincent T. Chang and Steven Shapiro and includes the following members: Catherine Christian, Rosalind Fink, Bruce Green, Sarah Jo Hamilton, Lawrence A. Mandelker, Hon. Joseph Kevin McKay (ret.), Barbara Moses, Paul O'Neill, Carol Sigmond, and Edward Spiro.

- The costs and fees that would be imposed for administration of the UBE in New York, when compared to the modest \$250 current cost of the examination for first time takers (a figure that is currently fixed by statute).
- The need for further study of possible disparate impact of the change on minorities, indigent examination takers, and graduates of foreign law schools. In particular, under the proposal all takers must pass a one hour 50 question multiple choice test on New York law. Will dependence on a high-speed multiple choice component for state law disproportionately disadvantage members of certain groups? Like other entities providing testimony on this subject, we urge that disparate impact studies be conducted on the UBE in the next year. Additionally, if (contrary to our recommendation) New York immediately adopts the UBE, we think it critical that these studies be conducted after adoption.
- Would adoption of the UBE undermine the perception that New York law is unique and, if so, would New York law be seen as less attractive for contracting parties deciding on whether to insert New York choice of law and choice of forum in contracts? If so, would the decline in New York choice of law clauses adversely affect New York lawyers by reducing the number of disputes that are brought here by way of contractual choice of forum and choice of law clauses? Again, we do not believe this factor warrants rejection of the UBE because the link between New York choice of law clauses and New York specific essay questions on the bar examination is tenuous at best, and note that, if the UBE is adopted, this will remain an open question, because of the expense of attempting to quantify any downward shift in claims filed by out of state litigants based on New York choice of law or forum provisions.
- If the UBE becomes the dominant form of bar examination, law schools which traditionally focused on New York law may arguably have to shift their emphasis to a national law curriculum. Has this been a problem in other states?
- Would the reduced focus on New York law expose the public to new attorneys who are less qualified to deal with New York specific legal problems? Is there any evidence that the state specific essays in the current exam better test an attorney's proficiency to deal with New York law matters? Could development of more targeted CLE requirements for new attorneys adequately address concerns about the lessened emphasis on New York law of the proposed New York portion of the UBE?
- Would adoption of the UBE encourage recent graduates from out of state to move to New York, relying on their passage of the UBE in another state?

II. BACKGROUND

At the outset, we note that the proposed process for implementation of the proposed UBE has been far from optimal. Initially, New York Chief Judge Jonathan Lippman proposed adoption of the UBE for the 2015 bar examination, calling for a comment period of only 30 days. During that window, apparently in reaction to pressure from NYSBA and other bar associations, the Judge appointed a task force and expanded the window for comments until March 1, 2015, and ultimately to March 4, 2015. For the reasons set out below, we believe that this time frame is still an insufficient period in which to examine a number of issues relating to this proposal.

A. Proposed Changes to the Bar Examination

Under Judge Lippman's proposal, New York would join 15 other states that have adopted the UBE.² New York's bar examination currently contains four hours and 15 minutes of testing on New York specific law, including 50 New York multiple choice questions and five essays focused on New York law. Judge Lippman has predicted that "if we choose to go forward, it portends extremely well that you would have a truly uniform bar nationally." He added that "I think there is a lot of anticipation from my colleagues in other states about whether we would be going to the uniform bar and, if we do, I think it will have a dramatic impact on that uniform bar approach in very short order."³

The UBE proposal would eliminate the New York specific essay questions. The proposed bar examination would continue to include 50 multiple choice questions on New York law, to be answered in one hour, meaning a total reduction in testing on state specific law from 4 hours and 15 minutes to one hour.

The test currently includes two standardized national portions, the Multistate Performance Test and the Multistate Bar Examination. Both tests are prepared by the National Conference of Bar Examiners (the "NCBE"). These tests would be replaced by the UBE and the Multistate Essay Examination, a six-essay test also developed by NCBE. One day of the UBE would use the same questions as the current Multistate Bar Examination used in New York. The other day would be occupied by the six Multistate Essays and by two different Multistate Performance Tests.

B. Proposed Grading of the UBE

The New York State Board of Law Examiners (the "BOLE") recommends a passing score for the UBE be set at 266, which court administrators said is analogous to the current exam. The BOLE said the passing score recognized by other UBE-using states ranges from 260 to 280. In addition, the New York multiple choice questions will be separately graded and a passing score of 60% would be required to pass that section of the test. A passing score on each section would be required for admission to the bar.

² The 15 states include Alabama, Alaska, Arizona, Colorado, Idaho, Kansas, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Utah, Washington, and Wyoming.

³ <http://www.newyorklawjournal.com/id.1202672451929/Court-System-Seeks-Comment-on-Adopting-Uniform-Bar-Exam>. Notably, when New York adopted the Multistate Bar Examination, many other states followed suit. Will New York Change The Face Of The Bar Exam? Redux By Joseph Marino, NYLJ, Jan 20, 2015.

Currently, the MBE counts for 40% of the grading and the New York essays for 40%, with the New York Multiple Choice and Multistate Practice Test counting 10% each. The proposed scoring for the UBE would have the MBE count for 50%, the Multistate Essays 30% and the two Multistate Practice Tests 20% each. The total length of the examination would increase to 13 hours over two days from 12 hours and 15 minutes over two days.

C. Increased Portability of the Proposed Bar Examination

UBE test scores would be portable to other states (consistent with their UBE cutoffs) within a certain window period, and scores from test takers in others states that meet the New York passing standard would be eligible for some period of time to transfer that score to New York. The New York portion would be administered more than twice per year so that those who fail the New York portion but pass the UBE would not have to wait six months to retake the New York portion of the exam.

III. NYCLA'S POSITION AND REASONS FOR A ONE YEAR STUDY PERIOD

NYCLA urges that a decision on the UBE be deferred for one year. At that point, the BOLE should assess whether it has enough information to make a decision on the UBE, with a recommended focus on the issues set out in this Report. We note that most of the other states that have adopted the UBE have done so with a review period far longer than that proposed by Judge Lippman.⁴ Moreover, New York did not adopt the Multistate Bar Examination until 1979, seven years after its inception in other states. Indeed, New York did not implement a five point increase in its passing score for more than two years after hearings were held on the proposal.⁵

We are unaware of any exigency that requires that this decision be made in a shorter time frame. Indeed, any advantages of the UBE in the next few years would be exceedingly limited, as it has been adopted largely in small, distant states to which New York bar takers would not likely seek to transfer their scores. We note that if other states were to promise to seek enactment of the UBE in their states in the event that New York does so, such promises would enhance the case for the UBE. However, to date, we are unaware that any other states have made such commitments.

During the next year, we urge that efforts be made to obtain information on the issues identified in this report from the 15 states that have adopted the UBE, all of which have adopted it since 2011. We have received a good deal of anecdotal information about the use of the UBE in these states. For example, Diane Bosse, Chair of the BOLE, advised the NYCLA Board of Directors that she was unaware of any negative experiences with the UBE as it has been

⁴The UBE was studied for over a year in the State of Washington. http://www.wsba.org/News-and-Events/News/-/media/Files/News_Events/News_Press%20releases/bar%20exam%200211.Lashy. The first UBE held in Minnesota occurred approximately two years after it was first considered. <http://www.ble.state.mn.us/file/Uniform%20Bar%20Rules.pdf> In Arizona, the UBE was considered for at least two years. http://azdnn.dunmax.com/Portals/0/NTForums_Attach/192112581278.pdf

⁵ <http://www.nybarexam.org/press/summary.pdf>

administered in those states.⁶ Gregory Murphy, former Chair of the NCBE⁷, advised of the same thing and specifically reported that his home state of Montana was encountering no difficulty with the UBE.⁸ Arizona Supreme Court Justice Berch also said that the rollout in Arizona was uneventful and that no attempts have been made to roll back the UBE in Arizona.⁹ We received similar reports from a bar official in Alabama.¹⁰

NYCLA also urges that, if (contrary to our recommendation) the UBE is adopted in 2015, the BOLE conduct a three year review of the UBE's use in New York and issue a public report at the end of that period analyzing the UBE's impact on underrepresented groups and, if the data is available, on lawyer mobility.¹¹

Not only would NYCLA's proposal give the BOLE, bar associations and other constituencies time to study the UBE, it would also give law schools and law students time to prepare for UBE, if it is indeed adopted, and to adjust curricula, course selection and/or bar exam preparation accordingly. Dean Patricia Salkin of Touro Law School stated: "I think it's a lot of change in a short period of time . . . You have an entire crop of graduating law students this year and you're basically telling them that the bar exam you thought you were preparing for is going to change just before you graduate."¹² We note, however, the different opinion of Dean Allard of Brooklyn Law School who urged adoption of the UBE on the existing time frame.¹³ Similarly, Dean Trevor Morrison of NYU urged expeditious implementation of the UBE, in time for the February 2016 administration of the examination.¹⁴

⁶ Dianne Bosse conversation with NYCLA Board of Directors on January 12, 2015. We thank Ms. Bosse for the time she spent with us and the many insights she conveyed to us.

⁷ Telephone Conversation, 2/2/15. Mr. Murphy chaired a state board of bar examiners, chaired the National Conference of Bar Examiners in 2000-2001, chaired the Multistate Bar Examination Committee, and for ten years helped draft the Multistate Performance Test and is familiar with the psychometric features of the NCBE's test products, and with the UBE.

⁸ Telephone Conversation, 2/2/15.

⁹ Telephone Conversation, 2/3/15.

¹⁰ Telephone Conversation with Daniel Johnson 2/11/15.

¹¹ This is similar to a proposal advanced by New York City Bar Association. See Transcript of Hearing of the Advisory Committee on the Uniform Bar Examination, CUNY School of Law 1/20/15 at 44-45 (<http://www.nycourts.gov/ip/bar-exam/Transcript-CUNY-hearing-jan20.pdf>)

¹² "NY may ditch state test for uniform bar exam," *Long Island Business News*, 10/20/14 (<http://libn.com/2014/10/20/ny-may-ditch-state-test-for-uniform-bar-exam/>). Similarly, Allie Robbins, assistant dean for academic affairs at CUNY Law, said her top concern was being given "lead time." For students, "being taught one way and then unexpectedly having to learn a new way for a new exam can be very destabilizing," she said. <http://www.newyorklawjournal.com/id=1202715763873/Panelists-Hear-Concerns-About-Adopting-Uniform-Bar-Exam#ixzz3QcdWn7aq>

¹³ Dean Allard stated in the January 2015 hearing: "I know that there were people who were concerned. I wasn't concerned about our students being able to take on board that change, and I felt -- and I said this publicly -- that the proposed time table would have applied to everybody, so I thought it was an even playing field, but I think that the time table that's now on the table is adequate. I'll probably get into hot water with my faculty for saying that, but I think that that's adequate." See Transcript of Hearing of the Advisory Committee on the Uniform Bar Examination, CUNY School of Law 1/20/15 at 21.

(<http://www.nycourts.gov/ip/bar-exam/Transcript-CUNY-hearing-jan20.pdf>)

¹⁴ Dean Morrison explained in January of this year: "It has been suggested by some that more time is needed for study of the proposal and its possible effects. Although naturally caution is always warranted when changing longstanding practices, it is also the case that the New York bar exam has been the subject of numerous reports and articles, over the course of the past two decades, that have called for improvements of various sorts. We commend

In addition, we urge the development and dissemination of complete information of the costs and fees associated with a New York administration of the UBE. The cost of the New York bar examination for first time takers is only \$250, one of the lowest fees in the country. The cost of the bar examination in UBE states is as high as \$880 in Arizona and \$600 in Montana and Idaho. We note, however, that New York's fees are apparently artificially low because they are set by statute.¹⁵ There is no reason to believe that adoption of the UBE would cause the legislature and the Governor to change the \$250 figure.¹⁶ However, during the one year period for study that we advocate we would urge transparency on the cost of the UBE as opposed to the cost of the current examination so that it is possible to assess whether the UBE could potentially lead to future increases in the cost of the bar examination in New York.

IV. JUSTIFICATION FOR JUDGE LIPPMAN'S UBE PROPOSAL

As set out below, we acknowledge that there are substantial reasons to support the proposed change to the UBE, although we think that, without further information supporting some of them, they are not convincing at this time.

First, it is argued that more resources can be dedicated to the development and testing of the UBE than any single state could devote to its bar examination.¹⁷ This is a more important factor in small states with small populations of bar candidates. Indeed, bar authorities in Arizona and Montana were particularly effusive regarding the resources devoted to the UBE, as opposed to the resources their states could devote to their bar examinations. But, despite its size, New York may face similar resource constraints, given that our bar examination fees are capped by statute, which may limit the amounts that can be expended on the development and testing of examination questions. The NCBE itself advanced the claim that it is able to devote considerable resources to development and testing of questions and scoring:

NCBE maintains committees of test development professionals with years of experience in writing questions, and staff dedicated to assessing the validity of the tests in determining law practice proficiencies. The UBE provides greater transparency in test

the SBLE for the improvements it has made in prior years and for continuing to focus on further ways to reform the bar exam. We believe that this latest reform reflects the best thinking of bar examiners and legal educators in this State and other parts of the country. Although it may turn out that further refinements and improvements are needed in the future, we believe that the right decision is to go forward with the change while naturally watching for and remedying any possible unintended consequences."

¹⁵ See New York Judiciary Law 465 ("Every person applying for examination for admission to practice as an attorney and counsellor at law shall pay a fee of two hundred fifty dollars for each taking or retaking of the examination, or if dispensation has been received from the taking of the examination, four hundred dollars for credential review for admission on motion")

(<http://codes.lp.findlaw.com/nycode/JUD/15/465#sthash.fsMOrZzk.dpuf>).

¹⁶ Diane Bosse has stated that the cost of the New York bar examination would not rise as a result of adoption of the UBE. Court System Seeks Comment on Adopting Uniform Bar Exam, *New York Law Journal* (10/7/14) (http://www.newyorklawjournal.com/id_1202672451929/Court-System-Seeks-Comment-on-Adopting-Uniform-Bar-Exam?streturn=20150103214520).

¹⁷ Greg Murphy suggested this possibility to us in our 2/2/15 phone conversation.

development, administration, and scoring, and jurisdictions do not have to incur the costs of test development.¹⁸

Similarly, Rebecca S. Thiem contended:

In the 10-plus years since adopting the MEE and MPT, the board has not been disappointed either in the quality of the questions or in the resulting scores. Use of the MEE and MPT also afforded the benefit of NCBE-sponsored calibration sessions, which provided our graders with significantly more sophisticated grading skills. Later, as a member of NCBE's MEE Policy Committee, I was further reassured about our decision after learning more about the professionally driven process for drafting, reviewing, and revising the MEE questions and model answers.¹⁹

Second, proponents of the UBE argue that it promotes portability and mobility in an increasingly national and global practice of law. Mark C. Morril, Chair of the New York City Bar Association's Council on the Profession has stated: "We believe that adoption of the UBE is an important reform that will significantly enhance opportunities for new lawyers to find employment wherever it is available."²⁰

In a similar vein, proponents of the UBE in Maryland contended that:

If every state offered the uniform test, new graduates would be spared much of the hassle involved in moving from state to state. State bar officials would know just what they're getting when a new out-of-state lawyer applies for admission. . . . Finally, the UBE would recognize the growth of multi-jurisdictional practice, nationally and internationally, and bring the legal profession in line with medicine and other professions that have adopted a uniform national examination.²¹

And the former President of the NCBE argued that:

When a third-year law student must register for the July bar examination somewhere, the choice of jurisdiction can be difficult, particularly if the individual has not secured employment. By the time that first job comes along—if it comes along in another jurisdiction—it is often too late for the graduate to register for the bar examination in the second jurisdiction. The result may be that the new graduate is relegated to waiting to take a second bar examination the following February, lengthening by months the opportunity to enter the legal profession. Licensing in the jurisdiction in which

¹⁸Veryl Victoria Miles, *The Uniform Bar Examination: A Benefit to Law School Graduates*, *The Bar Examiner* (Aug. 2010).
(http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/miles_the_uniform_bar_exam.auth_checkdam.pdf)

¹⁹Essays on a Uniform Bar Examination, *The Bar Examiner* (Feb. 2009).
(http://www.ncbex.org/assets/media_files/Bar_Examiner_articles/2009_780109_UBELessays_01.pdf). Ms. Thiem has served as President of the North Dakota State Board of Law Examiners, among many other positions.

²⁰<http://www.nycbar.org/44th-street-blog/2015/01/20/city-bar-supports-adoption-of-uniform-bar-examination/>

²¹Uniform Bar Examination: An Idea Whose Devil is in the Details?" *Maryland Daily Record* (2/21/10)
(<http://thedailyrecord.com/2010/02/21/uniform-bar-examination-an-idea-whose-devil-is-in-the-details/#ixzz3QDyhraXC>)

employment occurs can therefore be delayed as much as a year after law school graduation, impacting not only the graduates but also their employers.²²

NYCLA does not wish to minimize this potential factor. Increasing the fluidity of the market for legal employment is a desirable goal, particularly in an economic climate where young lawyers often cannot obtain legal employment.²³ However, we note, that at least as the landscape currently stands, a lawyer who passes the UBE in New York could transport that score to only 15 other states, many of which are small and not geographically close to New York. In our conversation with the Chair of the NCBE, he told us that he was unaware of any states other than New York that are currently considering adoption of the UBE.²⁴ In addition, the portability of bar passage in New York is limited by the fact that five other states have state-specific requirements and a number of states might have score cutoffs higher than those of New York, depending on the level at which New York's passing score is set.

NYCLA also notes that greater mobility would not necessarily be unambiguously beneficial to young New York lawyers. At least at the outset, until additional large jurisdictions adopt the UBE, it is quite likely that more lawyers will seek to use the UBE to enter New York than to use the test as a way of gaining admission in another state.²⁵ It is possible that this additional inflow of lawyers could increase the competition in New York for many beginning lawyers who already find it difficult to obtain jobs. While we do not wish to over-emphasize this "protectionist" factor, we do believe it is worthy of further study, perhaps by analyzing shifts in the numbers of out of state test-takers. It is our understanding that the states that have currently adopted the UBE have not seen an influx of out-of-state applicants from other UBE jurisdictions (or an outflow to other UBE jurisdictions).²⁶ This paucity of data can be explained in part by the fact that the UBE has not been in existence for a long period and also by the fact that the states that have adopted the UBE are by and large not large states and many of them are not magnets for out of state bar applicants. If New York were to adopt the UBE and other large states to follow, it is conceivable that inter-jurisdictional score transfers could increase markedly. Once again, we believe further analysis would be beneficial on this issue.

²²Erica Moeser, *Both Graduates and Employers Would Benefit from Uniform Bar Examination*, NALP Bulletin (Mar. 2010) (https://www.ncbex.org/assets/media_files/UBE_NALP-Bulletin-Article-by-EM-March-2010.pdf) "The uniform bar examination, once seen as a "radical" idea, has taken hold as a concept, in part because a "terrible" job market leaves many law students "unable to tell" what state they may end up working in after the examination." Steven C. Bennett, *When Will Law School Change*, 89 Neb. L. Rev. 87 (2010)

²³ Perhaps for this reason the Young Lawyers Division of the ABA has called for "the governing bodies of state and Territorial bar examinations to adopt a uniform bar examination." RESOLUTION 5YL (<http://www.americanbar.org/content/dam/aba/migrated/yld/annual10/5YL.authcheckdam.pdf>)

²⁴ Telephone Conversation with Bryan Williams, 2/11/2015.

²⁵ As Professor Pieper put it: "Objectively, portability out of New York simply is not as attractive as portability into the legal capital of the world. Even if, as Judge Lippman suspects, closer and larger states follow New York's lead, I submit that the number of candidates taking the New York bar exam with the hope and desire to practice in another state is insignificant." John Gardiner Pieper, *Why UBE Needs Careful Consideration*, New York Law Journal (Nov. 5, 2014). Professor Pieper teaches at five law schools and founded a bar review course.

²⁶ Diane Bosse informed the NYCLA Board of Directors that last year approximately 1400 scores were transferred from one UBE jurisdiction to another, of which 18% had failed in the jurisdiction where they had taken the bar examination. Likewise Justice Berch stated that at this point there is "not a lot of traffic in transfers." Arizona had approximately 222 test takers transfer their scores out of Arizona and approximately 105 test takers transfer their scores into Arizona.

V. REASONS FOR OPPOSITION TO JUDGE LIPPMAN'S UBE PROPOSAL

The reasons for skepticism of the UBE proposal set out below have led us to urge that adoption be deferred; we do not see them as definitive but, rather, as reason for deferral while further information can be gathered.

First, there is a frequently voiced need for disparate impact studies.²⁷ NYCLA is concerned by the drop in pass rates in the current New York State bar exam. There has been a similar drop in UBE test scores, which NYCLA urges the NCBE to study.²⁸

NYCLA notes, however, that statistical analyses of New York bar examination results have suggested that a change in the components of the test (eliminating essays and focusing solely on multiple choice questions) is unlikely to further disadvantage specific racial/ethnic groups. To the contrary, racial differences in scores were found to be “fairly consistent across all of the components”:

Differences among the racial/ethnic groups are not associated with particularly high or low scores on one component of the bar exam. Rather, the differences are fairly consistent across all of the components. The fact that each group performs at about the same level on each component of the bar exam suggests that no one component is easier or more difficult for any racial/ethnic group. No one component is causing the differences observed across racial/ethnic groups.²⁹

As Suzanne Darrow-Kleinhaus of Touro has noted:

The fact is that “the MBE neither widens nor narrows the gap in performance levels between minority applicants and other applicants.” Research indicates that “differences in mean scores among racial and ethnic groups correspond closely to differences in those groups’ mean LSAT scores, law school grade point averages, and scores on other measures of ability to practice law, such as bar examination essay scores or performance test scores. . . .” “Research has shown that “two applicants with about the same LGPA

²⁷Society of American Law Teachers (SALT) Letter to Diane Bosse (Nov. 3, 2014) (<http://www.saltlaw.org/wp-content/uploads/2014/11/SALT-Letter-NY-Bar.pdf>)

²⁸“Why Did So Many People Flunk the Bar Exam This Year?” *Bloomberg Business* (Nov. 8, 2014) (<http://www.bloomberg.com/bw/articles/2014-11-18/why-so-many-law-students-failed-the-bar-exam-in-2014>); Deans Dismayed by Declines in Bar-Pass Rates, *New York Law Journal* (Nov. 13, 2014) (http://www.newyorklawjournal.com/id_1202676229642/Deans-Dismayed-by-Declines-in-Bar-Pass-Rates)

²⁹D. Bosse, Summary of the October 2006 Report Prepared by the National Conference of Bar Examiners for the New York Board of Law Examiners Entitled: “Impact of the Increase of the Passing Score on the New York Examination (Nov. 2006).

(http://www.nybarexam.org/press_summary.pdf) National studies have come to similar conclusions. Dan Subotnik, Does Testing = Race Discrimination?: Ricci, the Bar Exam, the LSAT, and the Challenge to Learning, 8 U. Mass. L. Rev. 332, 372 (2013) (http://www.ncbe.org/assets/media_files/Bar-Examiner/articles_2007_760307_ripevandcase.pdf)

from the same school have about the same probability of passing regardless of their racial/ethnic group.”³⁰

Indeed, the SALT professors, among the most vocal opponents of the UBE on the ground that it could have a disparate impact on racial and ethnic minorities, admit that they do not know whether the UBE would have a disparate impact on minorities; they concede that “it is presently unclear what impact adoption of the UBE will have on overall bar pass rates and whether it will result in exacerbating the existing disparate impact.”³¹

Nonetheless, further analysis of potential disparate impact is warranted. In this regard, NYCLA notes that a study of the impact on foreign law graduates is particularly significant for New York, given that New York has disproportionately more foreign test takers than any other state – nearly one-third of New York’s test takers are foreign.

Professor John Gardner Pieper has argued that foreign test takers are disadvantaged by the UBE:

Stripping the bar exam of its local component would do a disservice to newly admitted attorneys, including the foreign-trained attorneys who now account for nearly one-third of bar exam applications in New York and for whom bar exam preparation often is their first opportunity to learn New York law. These new lawyers have more than enough to learn and navigate in the first years of practice in New York without the specter of entering the practice without the benefit of having studied New York law and procedure that we as a bar were not just encouraged, but required to know for admission.³²

However, others have argued to the contrary:

Perhaps even more on the side of future potential is the possible role of the Uniform Bar Examination (UBE) in offering a path to legitimacy for both international law graduates and foreign law schools. The UBE serves as a new and more standardized approach to the bar examination . . . The UBE begins as detached from any particular jurisdiction, becoming relevant where the bar exam regulators accept its approach and set their own score. This detachment provides the ideal opportunity for international law graduates to use the UBE as a mechanism for assessment that provides a measure of comparability of their preparation to that of U.S. J.D. graduates.³³

More simply, a bar examination that places less emphasis on local law would seem on its face to benefit test takers from foreign and out of state law schools who are less likely to have studied New York law. One can debate whether this is a legitimate concern but, in any event, because of the large number of graduates of foreign law schools who now take the New York

³⁰ Suzanne Darrow-Kleinhaus, A Response to the Society of American Law Teachers Statement on the Bar Exam, 54 J. Legal Educ. 442, 457-58 (2004).

³¹ Society of American Law Teachers (SALT) Letter to Diane Bosse (Nov. 3, 2014) (<http://www.saltlaw.org/wp-content/uploads/2014/11/SALT-Letter-NY-Bar.pdf>).

³² John Gardiner Pieper, Why UBE Needs Careful Consideration, *New York Law Journal* (Nov. 5, 2014).

³³ Carole Silver, Globalization and the Monopoly of ABA-Approved Law Schools: Missed Opportunities or Dodged Bullets?, 82 *Fordham L. Rev.* 2869, 2894 (2014).

bar, NYCLA believes it important to study how these persons fared in those states that have adopted the UBE.³⁴

Second, the concern has been expressed that a decreased emphasis on New York law on the UBE will in turn cause law schools to de-emphasize New York law, focusing instead on a “national” curriculum that teaches less New York law. Justice Berch stated that she saw no such change in Arizona law school curricula as a result of the UBE.³⁵

However, there is some evidence that such changes could take place, as set out in a recent article in the *Massachusetts Law Review*.³⁶ That article pointed to several examples where law schools had changed their curricula in response to the bar examination. *Id.* (citing, Donald H. Zeigler et al., *Curriculum Design and Bar Passage: New York Law School’s Experience*, 59 *J. Legal Educ.* 393 (2010) (discussing how changes to New York Law School’s curriculum, including the requirement that students in the bottom quartile of the class take a wide array of courses tested on the bar exam, have improved NYLS’ bar passage rates); ABA Section of Legal Educ. and Admissions to the Bar, *Am. Bar Ass’n, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* 278 (1992) (commonly known as “The MacCrate Report”) (noting that the bar exam influences law schools to develop curricula that overemphasize courses covered by the exam and that the exam influences law students to choose doctrinal courses in areas tested by the exam); Byron D. Cooper, *The Bar Exam and Law Schools*, 80 *Mich. B.J.* 72, 73 (2001) (noting that some Michigan law schools saw substantial increases in students enrolling in no-fault automobile insurance and worker’s compensation classes when those subjects were added to the Michigan bar exam; further noting that an informal survey of Michigan property law professors found the majority of professors took “the bar exam into consideration in deciding which sections of the required casebook should be covered in the course.”)).³⁷

NYCLA notes that even if the UBE is found to induce some change in law school curricula, such changes would almost certainly not occur in out-of-state and foreign law schools. Two-thirds of those who take the New York bar examination come from such schools.³⁸ Moreover, even in New York law schools, a de-emphasis on local law could result in a focus on other areas of benefit to law students. The UBE might, for example, “induce law schools to redouble their emphasis on basic analysis and writing skills.”³⁹

Accordingly, NYCLA is of the view that further analysis is needed to analyze the weight to be attached to this factor. NYCLA is hesitant to place undue weight on this factor because of

³⁴ However, as Justice Berch pointed out to us, many of the UBE states (such as Arizona) do not permit foreign law graduates to sit for the bar examination.

³⁵ 2/3/15 Telephone Conversation with Justice Berch.

³⁶ Andrea A. Curcio, Carol L. Chomsky, Eileen Kaufman, *Testing, Diversity, and Merit: A Reply to Dan Subotnik and Others*, 9 *U. Mass. L. Rev.* 206, 276 (2014).

³⁷ We also note that Professor William LaPiana has pointed to the possibility of such curricular changes.

³⁸ Diane Bosse, January 2015 NYCLA Board of Directors meeting.

³⁹ *Uniform Bar Examination: An Idea Whose Devil is in the Details?* *Maryland Daily Record* (2/21/10) (<http://thedailyrecord.com/2010/02/21/uniform-bar-examination-an-idea-whose-devil-is-in-the-details/#ixzz3QDvhrXNC>)

the lack of hard information on whether curricular changes would be made and the lack of a clear argument against such a shift.

Third, some have charged anecdotally that the lack of New York law on the bar examination would produce lawyers who are insufficiently trained in New York law.

Again, without hard information indicating that a handful of local law essays on the bar examination more realistically test a young attorney's preparedness to confront local law issues than a number of multiple choice questions, NYCLA is hesitant to reject the UBE on this basis. As one bar examiner has noted, given the scope of law education and law practice, a bar examination "cannot and should not attempt to assess the depth of an applicant's doctrinal knowledge base," but rather should focus on that body of doctrinal knowledge necessary to "evaluate one's own competency" to handle a particular legal matter.⁴⁰

The Hon. Rebeca White Berch of the Arizona Supreme Court agreed:

Some worry that a test common to all jurisdictions would not fully protect each individual jurisdiction's special interests. But let's look at the basics. A bar exam is a test of minimum competence to practice law. On that point, we have already developed a high degree of national consensus on the content that should be tested. Almost every jurisdiction, for example, administers the MBE and uses the score on that test in assessing whether a bar applicant has sufficient knowledge of legal rules. If your state uses the MBE, it already employs a significant component of the proposed UBE—and the tool that provides a statistical means for validating other parts of the bar exam and making scores comparable from year to year. In short, those 53 jurisdictions that use the MBE have already taken a significant step toward accepting the concept of a UBE.⁴¹

And Professor Stephen Gillers of New York University has expressed doubt that local law distinctions are useful even in law school, much less on the bar examination:

Differences in the law of the new place from the law of the old place can be the only defensible justification for the requirement and that justification dissolves if the law is not (so) different, if the differences are irrelevant to the migrating lawyer's practice, if the state does not test local law on its examination, or if the differences can be quickly ascertained. ("I practice securities law. Why do I have to memorize the elements of assault? And if I ever do need to know them, I'll open a book.")⁴²

⁴⁰ *Id.* (<http://thedailyrecord.com/2010/02/21/uniform-bar-examination-an-idea-whose-devil-is-in-the-details/#ixzz30DybraXC>)

⁴¹ Hon. Rebecca White Berch, Arizona Supreme Court, The Case for the Uniform Bar Exam, *The Bar Examiner* (2/09).

(http://www.ncbex.org/assets/media_files/Bar-Examiner/articles_2009_780109_UBELessays_01.pdf)

Justice Burch also expressed her belief that local law essays are not a particularly effective way to test local law since test takers can generally obtain scores well above passing on most local law essays simply by using national law principles.

⁴² Stephen Gillers, A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It, 63 *Hastings L.J.* 953, 967 (2012).

And one law school dean questioned whether the extent of local distinctions matters, at least insofar as core subjects such as contract law are concerned:

Even given some local variations in practice or regional differences involving, for example, community property, a contract written in New York still involves virtually the same concepts as one written in Texas, Florida, or California. Consequently, other than for issues involving turf, territoriality, and protectionism—and a stubbornness thinly disguised as maintaining tradition—there is no rational justification for having each state administer its own bar examination.⁴³

On this point, NYCLA also notes that any perceived need to assure knowledge in specific areas of New York law could be addressed by targeted Bridge the Gap CLE requirements or possibly required on-line courses before taking the UBE.⁴⁴ For example, Alabama discontinued the longstanding use of six Alabama-specific essays on the bar examination but required that all applicants complete a course on Alabama law. The course is delivered for a \$3.00 fee to law students through videotaped lectures by experts conveyed through the internet with accompanying slides. One commentator describes this experiment as a success, noting:

There are many benefits to the online approach. ScholarLab charges \$3 per bar examinee to view the course online, so the approach is economical (and much less expensive than the development of essay questions for the bar exam). More importantly, the online content can be continuously refined and amended as the law in Alabama changes, ensuring for candidates for law licensure an ever-fresh introduction to the practice of law in Alabama.⁴⁵

Similarly, Missouri has adopted a 30 question, open book test on local law, requiring a 75% passing score. Questions are chosen from an outline of local law that is intended for continuing use as a reference after the bar examination.⁴⁶ For its part, Arizona requires six hours of on-line study of local law as a requirement for bar admission, including requiring responses to on-line questions.

Again, NYCLA believes that New York could benefit from any studies being conducted in the 15 current UBE states that analyze potential detrimental effect on the practice of law and from assessments of programs like those in Arizona, Alabama and Missouri that are designed to compensate for the removal of local law questions from the bar examination.

Fourth, NYCLA notes that contracting parties choose New York law and New York as a choice of forum far more frequently than they choose the law or courts of any other state. If the

⁴³ Dean Frederic White, Texas Wesleyan University, Essays on a Uniform Bar Examination, *The Bar Examiner*, Feb. 2009, at 1. (http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2009/780109_UBEEssays_01.pdf)

⁴⁴ There is currently no requirement that Bridge the Gap courses cover specific issues of New York law, as opposed to general practice pointers.

⁴⁵ Daniel F. Johnson, The Alabama Bar Exam—the Course on Alabama Law, 76 Ala. Law. 46, 46-47 (2015).

⁴⁶ Cindy L. Martin, Local Law Distinctions In The Era of the Uniform Bar Examination: The Missouri Experience (You Can Have Your Cake And Eat It, Too), *The Bar Examiner* (9/11).

(http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2011/800311Martin.pdf)

UBE contributes to a perception that New York law is not “unique”, then it is possible that contracting parties may feel less need to insert New York as their choice of law or choice of forum. In that event, the amount of business directed to New York lawyers by virtue of these contractual forum and choice of law clauses could diminish. If true, this could result in a significant loss of revenue to New York lawyers. According to one leading study, New York law is the favored choice, with New York law chosen in 46 percent of an analyzed set of contracts of public companies.⁴⁷ It is possible that contracting parties choose New York law and a New York forum because the unique content of New York law – the perception that New York law is more commercially sophisticated and better accommodates the needs of corporate contracting parties.⁴⁸

However, without further study, NYCLA hesitates to say that this reason warrants rejection of the UBE. It is unclear whether the fact that a portion of the New York bar examination consists of uniform components would undermine the perception that New York law is commercially unique. Indeed, we are aware of no evidence that the adoption of the multistate bar examination in New York in 1979 had any such effect. We also note that the choice of New York law almost certainly flows from factors other than the perception of the uniqueness of New York law, for example the perceptions that our court system is less prone to “runaway jury” awards and is of otherwise higher quality than court systems in other jurisdictions. Moreover, some commentators have attributed the prevalence of New York law contract clauses to the simple fact that New York practitioners have a role in many large corporate transactions and call for New York choice of law and forum clauses to be implemented in those deal documents.⁴⁹

Finally, New York law may be the law of choice not because it is unique but simply because New York law is more robust with more case law on almost any given topic than the law in any other U.S. jurisdiction with the possible exception of California.

Thus, absent any evidence supporting this concern, we do not give it much weight.

⁴⁷ New York law was overwhelmingly favored for financing contracts, but was also preferred for most other types of contracts. Eisenberg, Theodore and Miller, Geoffrey P., “The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts” (2009). Cornell Law Faculty Publications. Paper 204 (<http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1203&context=facpub&sei-redir=1&referer=http%3A%2F%2Fwww.bing.com%2Fsearch%3Fq%3Dchoice%2Bof%2Blaw%2Bnew%2Byork%2Blaw%2Bunique%26qs%3Dn%26pq%3Dchoice%2Bof%2Blaw%2Bnew%2Byork%2Blaw%2Bunique%26sc%3D0-20%26sp%3D->

[1%26sk%3D%26cvd%3D141add5d3a56-faccbb3e3fe5eb02bdan%26first%3D15%26FORM%3DIPORF#search%22choice%20law%20new%20york%20law%20unique%22](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1203&context=facpub&sei-redir=1&referer=http%3A%2F%2Fwww.bing.com%2Fsearch%3Fq%3Dchoice%2Bof%2Blaw%2Bnew%2Byork%2Blaw%2Bunique%26qs%3Dn%26pq%3Dchoice%2Bof%2Blaw%2Bnew%2Byork%2Blaw%2Bunique%26sc%3D0-20%26sp%3D-1%26sk%3D%26cvd%3D141add5d3a56-faccbb3e3fe5eb02bdan%26first%3D15%26FORM%3DIPORF#search%22choice%20law%20new%20york%20law%20unique%22))

⁴⁸M. Galligan, Partner Philips Nizer, Why Choose New York Law? (9/30/12).

(http://www.phillipsnizer.com/pdf/Article-WhyChooseNewYorkLaw-MWG-9-30-12_Article.pdf)

⁴⁹Victoria J. Saxon, Hodgson Russ LLP, New York May Be Your Best Bet When Choosing the Governing Law and Forum for your Cross-Border Contract (Sept. 24, 2013) (http://www.lexology.com/library_detail.aspx?g_c36cde01-c97b-46bc-869c-t595fcb42ca0).

VI. CONCLUSION

Based upon the foregoing reasons, NYCLA urges a delay in the decision on whether to implement the UBE for one year, by which time data may be available on many of the issues identified in this report. In addition, if during the next year other states appear poised to adopt the UBE, that factor would also weigh in favor of adoption of the UBE in New York.