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2 ADVISORY COMMITTEE ON THE :

3 UNIFORM BAR EXAMINATION (UBE) :

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5 CUNY School of Law  
6 Two Court Square  
7 Long Island City, New York 11101  
8 Tuesday, January 20, 2015

9 P U B L I C H E A R I N G

10 B E F O R E:

11 THE HONORABLE JENNY RIVERA,  
12 Associate Judge, New York State Court of Appeals

13 THE HONORABLE A. GAIL PRUDENTI,  
14 Chief Administrative Judge,  
15 New York State Unified Court System

16 MICHELLE ANDERSON, Dean,  
17 CUNY School of Law

18 HANNAH ARTERIAN, Dean,  
19 Syracuse University School of Law

20 DIANE F. BOSSE, Chair,  
21 New York State Board of Law Examiners

22 NITZA ESCALERA, Assistant Dean,  
23 Fordham University School of Law

24 DAVID HERNANDEZ, ESQ.

25 SEYMOUR JAMES, ESQ., Attorney-in-Chief,  
Legal Aid Society of New York City

THE HONORABLE E. LEO MILONAS,  
New York State Board of Law Examiners

Janice Clarke, Senior Court Reporter  
James W. Johnson, RPR, Senior Court Reporter

Hon. Rivera

1           HON. RIVERA: Good afternoon, and welcome to this  
2 first public hearing of the Advisory Committee established  
3 by New York State Court of Appeals Chief Judge Jonathan  
4 Lippman to study New York's proposed adoption of the  
5 Uniform Bar Examination. I'm Associate Judge Jenny Rivera  
6 of the Court of Appeals. I'm chair of the committee.

7           Last year Chief Judge Lippman submitted proposed  
8 comments, a proposal from the New York State Board of Law  
9 Examiners to adopt the Uniform Bar Examination, commonly  
10 referred to as the UBE, to replace portions of the current  
11 New York State Bar Examination.

12           The UBE is prepared and scored by the National  
13 Conference of Bar Examiners, the same entity that currently  
14 prepares and administers other exams required for admission  
15 to the New York State Bar, specifically the Multistate  
16 Professional Responsibility Exam, known as the MPRE, and  
17 the Multistate Bar Exam, commonly referred to as the MBE.

18           The proposal also includes adoption of a New York  
19 Law Examination, the NYLE, consisting of 50 New-York-law-  
20 specific multiple-choice questions. This test would ensure  
21 proper evaluation of New York laws not otherwise tested on  
22 the UBE. Based on several comments and requests to extend  
23 the time for consideration of this proposal, in November of  
24 last year Chief Judge Lippman appointed this Advisory  
25 Committee to study and prepare a report for the Court's

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1 consideration in early 2015 on the proposed adoption and  
2 implementation of the UBE in New York State.

3 The committee consists of representatives of law  
4 schools, the judiciary, the State Board of Law Examiners  
5 and the bar. All the committee members are here today, and  
6 I'd like to briefly introduce each of them. First we have  
7 the Honorable A. Gail Prudenti, to my right, Chief  
8 Administrative Judge of the State of New York and former  
9 Presiding Justice of the Second Department.

10 The Honorable E. Leo Milonas, former Associate  
11 Judge of the First Department and former Chief  
12 Administrative Judge, a current partner at Pillsbury  
13 Winthrop Shaw Pittman, and a member of the New York State  
14 Board of Law Examiners.

15 To Judge Prudenti's right is Diane Bosse, Chair  
16 of the New York State Board of Law Examiners and of counsel  
17 to Hurwitz and Fine, PC. Not currently at the panel, but  
18 soon to come, is Seymour James, Junior, Attorney in Chief  
19 of the Legal Aid Society of New York City and Past  
20 President of the New York State Bar.

21 All the way to the end of the panel on the right,  
22 on my right, is David J. Hernandez, founder of David J.  
23 Hernandez and Associates, Past President of the Puerto  
24 Rican Bar Association of New York and a member of the  
25 Second Department's Character and Fitness Committee.

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1           To Former Judge Milonas's left, Hannah Arterian,  
2           Dean of Syracuse University College of Law, and then I had  
3           not forgotten her, but our host for today's public hearing,  
4           to the right of Diane Bosse is Michelle Anderson, Dean of  
5           CUNY School of Law. Each member of the committee is a  
6           well -- oh, I'm sorry. Nitza Escalera, who will also be  
7           joining us in a few minutes, is walking in the door, all  
8           the way to the left, Associate Dean of Students at Fordham  
9           Law School.

10           Each member of our committee has a well deserved  
11           reputation for excellence and brings a wealth of knowledge  
12           concerning matters involving the proper licensure and  
13           preparation of New York State lawyers. Their individual  
14           and combined experience will serve this committee well, and  
15           on behalf of the Chief Judge and myself, I want to thank  
16           them all today for serving on this committee.

17           Now, as part of our mandate the committee will  
18           receive input on the proposal from interested individuals,  
19           organizations and entities, and as part of our outreach to  
20           the legal profession and the broader community the  
21           committee will strive to educate by providing information  
22           about the current New York State Bar Examination and the  
23           details of the proposed adoption of the UBE and the New  
24           York Law Examination.

25           In furtherance of our mandate we're hosting a

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1 series of public hearings across the state to receive and  
2 consider testimony from members within the profession.  
3 Today, as I mentioned, is our first public hearing, and we  
4 thank CUNY School of Law and the CUNY community for hosting  
5 us today, and I wanted to provide Michelle with an  
6 opportunity to extend her welcoming remarks

7 MS. ANDERSON: Hello, everyone, and welcome to  
8 CUNY School of Law. We're so pleased to be in what we  
9 still sort of consider our new building here at Court  
10 Square in Long Island City. It's a beautiful new space.  
11 We're very pleased to be able to use it for important  
12 public events like this, and I want to welcome you all to  
13 the law school.

14 HON. RIVERA: Thank you, Michelle. Before we  
15 proceed with the testimony, committee member and New York  
16 Board of Law Examiners Chair Diane Bosse will speak very  
17 briefly about the proposal. Diane?

18 MS. BOSSE: Good afternoon, and I'll add my  
19 welcome to that of Judge Rivera and Dean Anderson, and  
20 thank you to of you for being here. We are very interested  
21 in hearing your comments and any input that you can give us  
22 on this important issue.

23 We have prepared a brief handout. I hope that  
24 everyone has that, just so we have a common understanding  
25 of what exactly the structure is of the current New York

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1 Bar Exam, what the Uniform Bar Exam's structure is, and  
2 what the structure of the proposed exam would be, which  
3 would be the Uniform Bar Exam plus the New York Law Exam,  
4 and it also includes the weighting of the various  
5 components of the exams.

6 And on the reverse side is a comparison of the  
7 content of the current New York Bar Exam and the Uniform  
8 Bar Exam. The New York Law Exam as we've proposed it would  
9 include essentially the same content in terms of content  
10 areas, with some reduction in it, but a significant  
11 reduction overall in the coverage of those content areas,  
12 because we would eliminate areas that are already, were  
13 already duplicated on the questions of the Uniform Bar  
14 Exam.

15 And we also have produced an outline, a content  
16 outline that's in draft form, and you can find it on the  
17 website of the committee, and there is a link to the  
18 website from the OCA website, and that content outline is  
19 about half as long as our current content outline for the  
20 current New York Bar Exam, and it's totally annotated, with  
21 references to statutes and cases that we would be looking  
22 at to draft questions. And we welcome comment on that.

23 The goal is not to duplicate things that are  
24 otherwise tested, but to test those areas of New York law  
25 that are important and unique and that new lawyers coming

Allard

1 into practice in New York should know, so we welcome you to  
2 look at that and give us comments on that.

3 And just one final comment. I wanted to let you  
4 know that I have to leave a few minutes early, so I'm very  
5 sorry that I may miss the last portion, possibly more,  
6 depending on how long it goes. I'm very sorry to catch a  
7 plane, but I really have to leave a few minutes early. And  
8 thank you again for being here.

9 HON. RIVERA: Thank you, Diane. Diane is either  
10 the most knowledgeable person about the New York State Bar  
11 or the second most knowledgeable person about the New York  
12 State Bar, so we are very, very fortunate to have her, as  
13 well as, I believe, the former Chair of the National  
14 Conference of Bar Examiners -- yes? -- so very well versed  
15 on not only the bar examination in New York State, but the  
16 national trends in national testing, so we're very, very  
17 grateful for all the time she's given us on the committee  
18 and for bringing her great expertise to us. Thank you.

19 So, now, the hearing will proceed as follows.  
20 Each person testifying has a preset time that they've been  
21 informed of to speak uninterrupted. That will be followed  
22 by brief questions from members of the committee. So we  
23 begin today with Nick Allard, Dean of Brooklyn Law School.  
24 Thank you, Dean.

25 MR. ALLARD: Thank you, Judge Rivera. Good to

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1 see you again, and in your introductions you omitted a key  
2 factor about Leo Milonas is that he's a great graduate of  
3 the great Class of 1960 of Brooklyn Law School.

4 MR. MILONAS: I wish you didn't mention the year.

5 HON. RIVERA: The alma mater is okay. The class,  
6 we're not so sure about that.

7 MR. ALLARD: Well, I'm very proud of that, of  
8 that class, and it's good to see so many of you again.  
9 What a distinguished panel, and I'm very grateful for the  
10 opportunity to testify on the proposed adoption of the  
11 Uniform Bar Exam in New York.

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

21 I applaud Chief Judge Lippman's decision to  
22 appoint this Advisory Committee to review New York's bar  
23 exam, given the growing number of cross-state and multiple-  
24 jurisdictional practices and the radically changing nature  
25 of the job market all graduates face where mobility and

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1 portability are critical.

2 And beyond consideration of the pros and cons of  
3 the Uniform Bar Exam Chief Judge Lippman's proposal  
4 provides a much needed and timely opportunity that, in my  
5 opinion, we should not miss; that is, to examine how best  
6 to rigorously and fairly license law school graduates. In  
7 other words, let's not get caught up arguing over whether  
8 to paint or wallpaper when the house is on fire.

9 Thanks to Chief Judge Lippman's leadership and  
10 the quality of our exceptional state and city bars, New  
11 York sets the standard nationally in legal innovation, in  
12 the quality of legal services we offer, and in serving New  
13 Yorkers' unmet legal needs. Once again New York will lead  
14 the way, as the decisions you will make with regard to the  
15 bar exam will certainly have a national impact as well.

16 My purpose today is not to argue for or against  
17 adoption of the Uniform Bar Exam, but to raise questions  
18 about the entire process by which we license attorneys in  
19 New York, which, in my view, should be addressed and should  
20 not be, and cannot be, separated from a decision about the  
21 Uniform Bar Exam.

22 Also, I want to be clear. I'm not talking about  
23 an easier path to a license to practice. At Brooklyn Law  
24 School, which enjoys a well deserved reputation for  
25 excellent preparation and high bar passage rates, we have

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1 never been about giving everybody a ribbon on field day.  
2 We believe that every law graduate should be prepared and  
3 that their qualifications should be relevant to market  
4 needs and thoroughly tested to the highest standards.

5           So how can we do better? This is, I'm sure, a  
6 worrisome question. Change is difficult, and to change the  
7 bar exam system means taking a hard look at a complex,  
8 ongoing system which involves deeply embedded and  
9 interlocking interests, the logistical challenge of  
10 scheduling and administering tests to thousands of students  
11 across the country, the big business of bar exam  
12 preparation courses, and so on.

13           You do not have the luxury of putting the ship up  
14 in dry dock to scrape off the barnacles or to build a new  
15 ship from scratch. Your only realistic option is to  
16 retrofit while underway in difficult waters. I recall, for  
17 example, how difficult just recently it was to completely  
18 fulfill Chief Judge Lippman's vision of an army of early  
19 test-takers qualified to do pro bono work because of the  
20 practical problem of finding sufficient space to test large  
21 numbers in each February.

22           Change is incredibly daunting to even begin to  
23 consider. The danger is that we become complacent and  
24 accept the status quo whether or not it's working. That's  
25 worse. For example, the historic and unexpected nationwide

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1 drop in the passage rate for last July's exam due to a  
2 historic decline in scores on the multistate component  
3 demands that we take a hard look at what is not working.

4 It reminds us that there are regularly  
5 unexplained fluctuations in passage rates from year to year  
6 that we have come to tolerate. We still need a thorough  
7 and adequate explanation for what happened last July. This  
8 is critical. We need to know why bar exam results would  
9 vary so much from 2013 to 2014.

10 Shouldn't we all collectively have a sense of  
11 urgency about getting this right? The July results  
12 affected real students all over the country. It's not a  
13 theoretical or hypothetical problem. We should question  
14 whether the established bar exam process imposes  
15 discriminatory barriers to entry to the profession to  
16 people who would be otherwise able and effective lawyers.

17 It's no secret that a law school education is  
18 expensive and that many students graduate with significant  
19 debt, and that is on top of whatever loan burden they  
20 already carry from their undergraduate years. Then there  
21 is the incredible pressure on these recent graduates to  
22 spend thousands more on bar exam preparation courses. Why  
23 isn't their education at an ABA accredited law school  
24 sufficient for them to pass the exam?

25 Of course, not every law school grad can afford

Allard

1 the test prep courses, and many cannot afford to take days  
2 and weeks away from a paying job to take these courses. In  
3 effect, we've built inequity into our system that I believe  
4 hurts the less advantaged. How can we build a fairer  
5 system? Again, how can we do better?

6 If a law school education is not sufficient for  
7 most students to be admitted to practice without additional  
8 preparation, then should law schools change what and how  
9 they teach to help more students pass the bar exam? Or  
10 should the test itself and how and when the test is  
11 administered change?

12 For example, why wait till after graduation for a  
13 student to take this high-stakes, all-or-nothing exam? Why  
14 not consider testing students for licensure incrementally  
15 to evaluate them more comprehensively over the course of  
16 their law school careers? Perhaps, for example, we can  
17 test after the first year on the core curriculum.

18 How does our established approach to licensing  
19 differ from other learned professions and why? Moreover,  
20 there is widespread agreement within the profession that  
21 law schools need to teach more practical skills. All law  
22 schools have incorporated this into their curricula, and  
23 how do we evaluate and measure practical clinical  
24 experience?

25 Is a written test truly the best way to evaluate

Allard

1 practical experience? It may be easier to administer and  
2 grade, but is it really the best way to measure practical  
3 learning and skills? Can we do better?

4 There are many alternatives we could explore, but  
5 the fact is the inertia propping up our business-as-usual  
6 system for licensing lawyers is not designed to accommodate  
7 such fundamental change. We're locked into a self-  
8 perpetuating state-by-state bar exam system with components  
9 added for a Multistate Bar Exam and MPT designed and scored  
10 by the National Conference of Bar Examiners.

11 Before we consider shifting to greater dependence  
12 on the National Conference of Bar Examiners -- and with  
13 Chairwoman Diane Bosse here there's no person better  
14 situated or knowledgeable in the country to begin to help  
15 push and ask these questions -- we should examine carefully  
16 its track record in developing objective, reliable exams,  
17 its organizational mission, any conflicts of interest, and  
18 questions about accountability and transparency.

19 In addition, the serious concerns voiced about  
20 NCBE-designed portions of the Bar Exam, unless allayed,  
21 will be used as a rationale to oppose moving to the Uniform  
22 Bar Exam, which I personally support. Therefore, we must  
23 now look at whether the NCBE is an appropriate organization  
24 to have influence as it does over policy, legal education,  
25 law school admissions, the LSAT and other areas that are

Allard

1 properly the province of the ABA, the state bar, the courts  
2 and law school governing boards and faculty.

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

9 This is no small thing. The fact is that we need  
10 good lawyers more than ever, lawyers who can respond to the  
11 rapid and fundamental changes in technology and our  
12 increasingly global society. We are making inroads on many  
13 fronts, but now we have an opportunity to also make  
14 meaningful change in how we license lawyers. We can do  
15 better than our present system, which, as we know, is often  
16 onerous and expensive and yields unpredictable results.

17 If we do not seize this moment to start  
18 improvements, we will impose a serious self-inflicted wound  
19 on our profession and on the country. We can do better.  
20 Many far more knowledgeable and experienced people than I  
21 have been asking these questions for years, and yet change  
22 has been slow to come. Now we can no longer afford to put  
23 these questions aside as we consider making changes around  
24 the edges that may not adequately address the larger flaws.

25 The work of this committee matters, and, if

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1       you'll permit me, in New York City when you travel on the  
2       number four train, which starts in Woodlawn in the Bronx  
3       and goes to the East Side of Manhattan, past City Hall,  
4       past Wall Street, onto Brooklyn Heights, and it ends in  
5       Crown Heights, look at the hands holding on to the poles in  
6       each car of the people getting on and off. You see the  
7       hands of people across the spectrum of races and  
8       ethnicities, black, white, brown, the whole rainbow.

9                You see the hands of people from every walk of  
10       life and from the rich to the struggling. Those are the  
11       hands of all the people of New York City, and they're the  
12       hands of America. They're the hands of people who need  
13       good lawyers, and they are the hands of many people who may  
14       be well qualified to be lawyers who can serve society.

15               My worry is that our outmoded but improving  
16       system of legal education and licensing still is  
17       unintentionally precluding many able and motivated people  
18       from becoming lawyers. We can do better. I commend you  
19       all for taking on this important issue for legal education,  
20       for our profession and for our country, and I thank you  
21       again for the opportunity to be before you here today.

22               HON. RIVERA: Thank you so much, Dean Allard.  
23       Let me start the questions. Thank you very much for your  
24       very thoughtful remarks.

25               I wanted to ask, the dean suggested testing

Allard

1 throughout the life of a student's law school experience.  
2 There were some comments that, for the first comment  
3 period, suggesting that, at least as to the New York Law  
4 Exam, we should consider giving that part of the Bar Exam  
5 during the period that students are actually attending law  
6 school.

7 So my question is whether or not that would  
8 increase the incentive for law schools to teach to the test  
9 as opposed to teaching for practical skills and developing  
10 some of the kind of lawyering abilities that the bar tells  
11 us they want people walking out of law school with, and I  
12 raise that also because you suggested considering whether  
13 or not to test after the first year, after different points  
14 in the law school experience.

15 MR. ALLARD: Well, my answer is, is that the  
16 mission of law schools is twofold. One is to prepare  
17 people for the profession, so there's nothing at all wrong  
18 with, and we need to have, our core curriculum be relevant  
19 to practice.

20 It seems to me that there is a disconnect between  
21 legal education and practice and licensing if as soon as  
22 people graduate the first thing they need to do is to study  
23 things that they haven't learned or that they, you know,  
24 are clueless about, so I think we need to bring those  
25 things together.

Allard

1           Now, I strongly believe -- you know, I came from  
2 private, 30 years of private practice, and every law school  
3 that interviewed me for a job, including Brooklyn Law  
4 School, would ask me, which is more important, what's the  
5 proper balance between professional training and  
6 scholarship. That was not a friendly question in those  
7 interviews.

8           And so my answer was you have to do both, and  
9 that's the answer, really, to your question. I think that  
10 the structure of an all-or-nothing bar exam at the end  
11 raises serious questions, especially if people have to  
12 immediately start investing in bar preparation classes in  
13 order to pass. I hope that was responsive to your  
14 question.

15           HON. RIVERA: Yes. Thank you. Members of the  
16 committee?

17           MR. MILONAS: Picking up on this, if you're going  
18 to do the UBE except for the New York portion of the exam,  
19 how can you give it in stages? I'm not sure how pragmatic  
20 that is.

21           MR. ALLARD: Well, if it's in increments -- and  
22 what I'm suggesting is that an improvement of the bar,  
23 including moving to the UBE, so long as the -- and I have  
24 concerns about the accountability and the objectivity of  
25 the National Conference of Bar Examiners. We still don't

Allard

1 have an answer about July, what really happened.

2 As long as those concerns are allayed, okay, I  
3 don't think that that movement, which would be an  
4 improvement in terms of portability and mobility and in  
5 other ways, should forestall these larger questions.

6 We shouldn't just be satisfied this is the answer  
7 and then have the status quo, in effect, be more  
8 entrenched, so I think that -- but I think we should keep  
9 our eye overall -- you know, other professions which have  
10 very serious academic training, the medical profession,  
11 dentistry and so on, they take a much different approach,  
12 and I don't think that you would want any dentist or any  
13 doctor to be working on you if they've never dealt with, if  
14 they haven't been tested on their ability to deal with real  
15 patients.

16 MR. MILONAS: I think Diane can answer the July  
17 phenomenon, but generally anecdotally it's, I'm told, a  
18 result of the decline in admissions in law schools across  
19 the board.

20 MR. ALLARD: Well, that's the canard. That's the  
21 canard, but the fact is that the difference between 2013  
22 and 2014 does not explain that, and it is the presumption  
23 that a drop in LSAT scores -- because that's the  
24 preference, the all-powerful LSAT scores -- is the answer,  
25 and I will tell you categorically that that is not true,

Allard

1 and I'll tell you another reason why it's not true.

2 It's not just, it's not simply that the  
3 difference -- or certainly our law school, we had virtually  
4 the same LSAT scores and had slightly higher GPAs in law  
5 school, GPAs. We had a 10-point drop in the bar passage  
6 rate. The lower end, the 25th percentile, which now the  
7 president of the NCBE is suggesting is the explanation, was  
8 well above, you know, the range of people who are supposed  
9 to be problematic in passing the bar. That's not the  
10 answer. We don't know what the answer is

11 MR. MILONAS: May I ask, my dean, what do you  
12 think happened?

13 MR. ALLARD: Well, I don't know. Okay? I've  
14 been in practice for 30 years. I know when to smell a rat,  
15 but I don't always smell what it is. I don't have the  
16 answer, but I don't find the answer in anything that I've  
17 heard.

18 The other thing is that when I review the  
19 people -- this is anecdotal evidence -- when I review the  
20 LSAT scores of the people at our law school who did not  
21 pass the July exam, there were as many people in the 160s  
22 as there were in the 150s.

23 The only thing that I can see is what I've  
24 referred to in my testimony, was that I know that there  
25 were many, a disproportionate number of people who either

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1       took no bar exam, who took a cheapy bar exam review class,  
2       took no bar exam review class, or were continuing to work,  
3       and I have to assume that it was because of economic  
4       pressure, so that's the only explanation I have.

5               Now, people with lower grades in law school did  
6       more poorly, but duh. It has to be expected, and we need  
7       to reach out and work with those people, but the  
8       explanations that have been offered are not persuasive, so  
9       we really do not have an explanation, and I'm not satisfied  
10      -- this would be like asking Enron to forgo accounting in  
11      general, you know, accounting standards, and say, you know,  
12      it's okay, trust us, our books are okay.

13              You know, there's not any independent audit of  
14      what those results are, and we don't have an adequate  
15      explanation.

16              HON. RIVERA: Thank you. Judge Prudenti?

17              HON. PRUDENTI: Yes. Dean Allard, as the dean of  
18      a prestigious law school, let me ask you this question.  
19      Many of the comments that I've read on a totally different  
20      subject, but many of the comments that I've read, which are  
21      very difficult to tell whether someone is pro or con the  
22      UBE, but one thing that seems consistent is that the law  
23      schools seem to believe that they need more time, more lead  
24      time to prepare for a new examination or a new examination  
25      format.

Allard

1                   How do you feel about that? And maybe you can  
2 share with me the, some of the comments that you've  
3 received from your professors today.

4                   MR. ALLARD: Well, I, first of all, I've had the  
5 opportunity to look over my friend Mark Morrill's very  
6 thoughtful comments from the City Bar of New York, and I  
7 would embrace his comments and support them, and I think  
8 that implementation of the time table that's now on the  
9 table is enough time.

10                   I know that there were people who were concerned.  
11 I wasn't concerned about our students being able to take on  
12 board that change, and I felt -- and I said this  
13 publicly -- that the proposed time table would have applied  
14 to everybody, so I thought it was an even playing field,  
15 but I think that the time table that's now on the table is  
16 adequate. I'll probably get into hot water with my faculty  
17 for saying that, but I think that that's adequate.

18                   HON. PRUDENTI: Thank you.

19                   HON. RIVERA: Anyone else on the committee? I  
20 have one last question for you. The UBE does test skills  
21 more than we currently test, so I'm just curious as to what  
22 you might predict to be curricular changes in response to  
23 that part of the UBE if it were adopted.

24                   MR. ALLARD: I don't think we're going to change  
25 the curriculum in any regard at all. I mean, one of the

Allard

1 strengths -- today on a program from Davos Marriott (ph)  
2 said that its great success was that it didn't pretend to  
3 be anybody else other than who it is.

4 One of our great strengths has always been  
5 clinical work and practical training, so I don't think that  
6 whatever is the -- I only question not whether the  
7 preparation for a test should be changed; I just question  
8 whether a written test is the best way to track, to test  
9 somebody's ability to meet face to face with a client, or  
10 rise up on their hind legs, as Rundle (ph) used to say, to  
11 make an argument in court.

12 Be gentle.

13 MS. ARTERIAN: I want to make sure that I, that,  
14 whether or not I'm correct in this, in my interpretation of  
15 your very thoughtful comments, and that is that you do --  
16 understanding your doubts about really what went on with  
17 the last, the administration of the UBE and your concerns  
18 with it behind that about the broader issue of transparency  
19 within the, the National Conference, I thought, I do think  
20 what I'm hearing from you is if those things are addressed  
21 that the proposal is at least in some margin, at some  
22 level, some margin okay and it does address a couple of  
23 ongoing issues, but that it isn't the answer to the much, a  
24 much bigger question about what shape and what approach  
25 should be taken in actually assessing people for licensure

Allard

1 in the State of New York.

2 MR. ALLARD: Dean Arterian, that is a very  
3 accurate and useful Cliff note of my testimony, so I thank  
4 you for that clarification.

5 I would only add the following, that I have been  
6 chided by the President of the National Conference of Bar  
7 Examiners in that they do not administer the exam; they  
8 design and score the exam, so it's with the design and  
9 scoring that they -- I take no position, I have no  
10 information of the snafu that occurred in terms of software  
11 in the administration of the exam. That's a separate  
12 issue, but you have -- to be clear, you had the points that  
13 I intended to make.

14 One is that I support a movement which is an  
15 improvement that would provide more, tread the balance  
16 between greater portability and mobility while maintaining  
17 New York State's prerogatives about admission and  
18 standards. I have serious questions about the lack of  
19 accountability, admission, conflicts of interest, the  
20 entire package, but I have complete confidence.

21 That confidence is strengthened by the talent of  
22 the people in this room, including, as I said, the Chair of  
23 the Law Examiners, Diane Bosse, in order to address those  
24 problems, so I do not believe that, notwithstanding that I  
25 have those serious reservations, that should derail

Perez

1 movement in the right direction.

2 On the other hand, I'm very concerned that there  
3 are much larger issues and that we should remain vigilant  
4 in attacking them, even though even the thought of making a  
5 change in some of the ways I suggested seems almost  
6 unfathomable in that we have this relentless cycle, like  
7 Ecclesiastes 1:9, water down from the mountaintop to the  
8 sea and then back into the clouds. It's this never-ending  
9 cycle of bar prep, bar exam, bar prep.

10 We're approaching the February administration of  
11 the Bar Exam. We're already forgetting about the snafu  
12 from July and we haven't yet had an answer.

13 HON. RIVERA: Thank you, Dean. Thank you very  
14 much.

15 MR. ALLARD: Thank you.

16 HON. RIVERA: Our next speaker is Jose Perez,  
17 Deputy General Counsel of LatinoJustice PRLDEF. Welcome.

18 MR. PEREZ: Good afternoon, Judge, Dean Anderson,  
19 esteemed members of the committee. Thank you for inviting  
20 LatinoJustice PRLDEF to testify at this afternoon's  
21 hearing.

22 On your calendar you were, Juan Cartagena, our  
23 President and General Counsel, is listed as delivering the  
24 remarks here today. President Cartagena was teaching an  
25 intersession course at Inter-American University School of

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1 Law in Puerto Rico this last week and, unfortunately, did  
2 not, was able to take his flight back to New Jersey  
3 yesterday, so --

4 HON. RIVERA: We would have accommodated and  
5 gone, but I understand.

6 MR. PEREZ: So I have been tapped to substitute  
7 in for Mr. Cartagena. Again, he sends his profuse  
8 apologies to the committee, to Ms. Woods, for accommodating  
9 him. I hope he makes it back, because he's supposed to  
10 teach a class at Rutgers University this evening.  
11 Otherwise his students, I guess, will have an early night  
12 at Rutgers.

13 My name, again, is Jose Perez, Deputy General  
14 Counsel of LatinoJustice PRLDEF. Again, on behalf of Juan  
15 Cartagena, our President and General Counsel, we welcome  
16 the opportunity to share our thoughts on this critical  
17 issue concerning entry into the legal profession.

18 LatinoJustice PRLDEF was founded in 1972 as the  
19 Puerto Rican Legal Defense and Education Fund and is a  
20 national civil rights legal defense fund that champions an  
21 equitable society by seeking to protect and defend the  
22 civil and constitutional rights of Latinos in the United  
23 States and in Puerto Rico by improving the way Latinos are  
24 treated in US society and, of particular interest to this  
25 committee and the subject matter of this hearing, seeking

1 to increase Latino entry into law school and the legal  
2 profession, championing diversity.

3 During its 42-year history LatinoJustice has  
4 litigated numerous precedent-setting impact cases,  
5 challenging multiple forms of discrimination, including  
6 education, employment, fair housing, language rights,  
7 policing issues, voting rights, and a wealth -- as well as  
8 challenging the validity of entrance examinations for the  
9 uniformed services, in one of our earlier cases back in the  
10 '70s and '80s.

11 The current proposal to replace the current New  
12 York Bar Exam with the Uniform Bar Examination, or UBE as I  
13 shall refer to it hence, without any real prior study or  
14 assessment of the UBE's impact upon Latino and other  
15 minority law graduates of color raises a number of serious  
16 concerns.

17 Long before others talked about the need for  
18 diversity in the legal profession, LatinoJustice after its  
19 founding in 1972 established a unique league education  
20 program to encourage Puerto Ricans and other Latinos to  
21 become attorneys. Since our inception thousands of  
22 aspiring minority attorneys have come to us for assistance  
23 and support in entering the legal profession.

24 Our legal education division provides a full menu  
25 of free or affordable programs, including an LSAT prep

Perez

1 course, our annual Law Day, which is one of the first in  
2 the country, providing an opportunity for law schools from  
3 around the country to come to New York and recruit minority  
4 applicants, workshops on law school admissions, personal  
5 statements, and financing a legal education, as well as how  
6 to succeed in law school upon being admitted and the  
7 different legal careers available to law graduates, as well  
8 as providing civil rights and corporate legal internships.

9 The list of alumni who have benefited from our  
10 unique education division programming includes prominent  
11 members of the bar, esteemed judges -- I know Judge Rivera  
12 is an alumna of the PRLDEF, having worked there earlier in  
13 her legal career.

14 HON. RIVERA: Don't give the class.

15 MR. PEREZ: Members of the bar practicing in all  
16 sectors, including government services, public interest and  
17 private practice, business and union officials and leaders,  
18 and elected and appointed officials.

19 With the interests of these aspiring Latino  
20 lawyers in mind, we strongly urge the New York State Court  
21 of Appeals and this committee to take adequate steps to  
22 thoroughly investigate and study the possible adverse  
23 consequences that adoption of the UBE may have on Latino  
24 and other minority law graduates seeking admission to the  
25 New York Bar before agreeing to adopt the UBE in New York.

Perez

1           We are very concerned that the UBE may have an  
2           adverse impact on Latino law graduates seeking admission to  
3           the New York Bar absent any prior comprehensive disparate  
4           impact study by New York on the impact of the adoption of  
5           the UBE and the proposed new New York Law Exam on minority  
6           law graduates of color indicating otherwise.

7           This concern is further illuminated given that  
8           bar passage rates have been dropping nationwide, as Dean  
9           Allard previously referred to, and particularly that the  
10          majority of the 14 jurisdictions that are currently  
11          utilizing the UBE reported declines from the 2013 to the  
12          2014 bar exam, with several UBE states reporting dramatic  
13          double-digit declines, 22 percent in Montana, 15.2 percent  
14          in Iowa and 13 percent in North Dakota.

15          Given the foregoing, we respectfully submit that  
16          any review of such a gatekeeping mechanism as a  
17          professional credentialing license, including the bar exam,  
18          would clearly benefit from a racial equity analysis. The  
19          New York Bar Association has publicly -- and I'm sorry  
20          Mr. James is not, as a former state bar committee member,  
21          is not here currently, but citing, or reading an article  
22          that he wrote:

23                 The New York State Bar Association has publicly  
24                 emphasized its goal of diversity and inclusion in the legal  
25                 profession. With the changing demographics of the US

1 population, it is vital that legal professionals represent  
2 American society as a whole. When attorneys and clients  
3 differ in race, ethnicity, language, religion, it is  
4 important to find a way to provide culturally sensitive and  
5 effective representation.

6 Attorneys need to be able to communicate  
7 effectively with clients, understand their needs, and to  
8 move past any cultural barriers to quality representation  
9 which may exist due to cultural differences between clients  
10 and attorneys. Greater diversity in the legal profession  
11 is one mechanism that can clearly facilitate this.

12 Despite the role of diversity, as of 2012 Latinos  
13 comprised only four percent of lawyers in the US and earned  
14 only 8.3 percent of the Juris Doctor degrees conferred in  
15 that year. In New York as of 2005, Hispanics comprised  
16 only six percent of the total enrollment of all New York  
17 law schools combined, despite the fact that that same year  
18 16.2 percent of New York's population identified as  
19 Hispanic.

20 The 1991 New York State Judicial Commission on  
21 Minorities, the first and only comprehensive study of the  
22 New York Bar Exam pass rates for minorities over a period  
23 of time, found that the New York Bar pass rate for Latinos  
24 was 40.9 percent compared to 73.1 percent and 62.95 percent  
25 for Caucasian and Asian-American test-takers, respectively.

Perez

1           A more recent study of the February 2000 New York  
2 Bar Exam, when the proposal to raise the bar passage rates,  
3 further showed that Latinos showed significantly, scored  
4 significantly lower than non-minorities.

5           Though the Commission at the time of the 1991  
6 study recommended further monitoring of pass rate data to  
7 evaluate minority performance, there has been no thorough  
8 meaningful follow-up examination of minority performances  
9 for almost 25 years. Why is that?

10           It seems to us that it is premature to adopt a  
11 test whose consequences for underrepresenting groups are  
12 unknown, especially lacking any real data on minority  
13 performance on the current exam, and especially after a  
14 previous commission recommended regular review in this  
15 regard.

16           The fact that Latinos generally score lower than  
17 non-minorities on the New York Bar, when coupled with the  
18 considerable decline in bar pass rates in the majority of  
19 states currently using the UBE which I mentioned earlier,  
20 puts Latino as well as African-American test-takers at a  
21 particularly high risk of failing an exam that will also be  
22 considerably more expensive than the current New York Bar  
23 Exam.

24           The UBE, as I understand the data provided, could  
25 potentially cost three to four times as much as the \$250

1 registration fee required to take the current test, thus  
2 creating an additional formidable economic barrier to  
3 minority bar applicants. It is important to consider that  
4 the cost of transferring UBE scores, given that one of the  
5 arguments in favor of this is about portability to other  
6 jurisdictions, ranges from \$400 to over \$1,000.

7 As significantly fewer Latinos and African-  
8 Americans retake the test than non-minorities as of now,  
9 that number will only grow if these test-takers fail the  
10 first time and then cannot afford to retake the exam.  
11 Given that Latinos and African-Americans, per studies, are  
12 substantially more likely to graduate from law school with  
13 debt than their white counterparts, additional costs will  
14 be an additional financial burden that will be imposed upon  
15 these minority groups.

16 Given the existing racial disparity in law school  
17 to begin with and the numbers of the applicant pool clearly  
18 decreasing since 2001, there are serious challenges to  
19 ongoing efforts to increase diversity in the profession.  
20 We need to make sure that any changes to the Bar Exam do  
21 not exacerbate these discrepancies any further.

22 Unfortunately, we are at a severe disadvantage in  
23 being asked to comment upon Latino and other minority law  
24 graduate bar passage rates under the existing current New  
25 York Bar Exam or the UBE, given the dearth of any public

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1 information on the ethnic and racial background of those  
2 taking the exam and passing it.

3 It is our understanding that the individual law  
4 schools do collect this data and maintain it. Why is it  
5 not publicly disclosed or reported or at the least shared  
6 with the Court of Appeals, the New York State Board of Law  
7 Examiners and/or the State Bar Committee on Legal Education  
8 and Admission to the Bar?

9 There are other state agencies governing, who act  
10 as licensing gatekeepers who are able to collect this data  
11 and publicly report this. The New York State Department of  
12 Financial Services in 2014 issued in its annual report an  
13 insurance licensing examination for the year ending  
14 December 2013 which shows that under the various licensing  
15 exams under that Department's purview it was able to report  
16 on the race and ethnicity of licensed test-takers.

17 I see the red light is on. If I may have a  
18 moment more to conclude, Judge Rivera.

19 HON. RIVERA: Yes.

20 MR. PEREZ: If the New York State Department of  
21 Financial Services is able to identify and report on the  
22 race and ethnicity of these applicants taking a life  
23 insurance agent exam, why cannot we do so for the Bar Exam?  
24 The question of whether to adopt the UBE, especially when  
25 looked at from a racial equity perspective, it begs the

1 question of whether alternative licensing mechanisms need  
2 to be added to the profession. Dean Allard, I think,  
3 alluded to that in his remarks.

4 Putting aside the argument that the Bar Exam at  
5 best measures legal analysis as opposed to the requirements  
6 necessary for the actual practice of law, the facts speak  
7 for themselves that underrepresented minorities routinely  
8 pass the bar at lower rates and thus are barred from the  
9 legal profession at higher rates.

10 If the Court of Appeals is willing to undertake a  
11 significant shift from the current exam to the UBE, should  
12 it not also consider providing an alternative to the Bar  
13 Exam and address whether elimination of the examination  
14 warrants further study?

15 Why not consider adopting an alternative that,  
16 like a medical licensing exam, tests the actual skills  
17 required to practice law, such as a clerkship period  
18 closely supervised and evaluated by a current practitioner?  
19 Law school graduates could then choose between the  
20 clerkship and the bar exam as a means to admission to  
21 practice, allowing the bar exam to remain in place.

22 Anecdotally speaking, literature suggests that  
23 the essay portion of the current New York Bar Exam is  
24 better for Latinos and Blacks than adopting this new  
25 proposed New-York-centric multiple-choice under the UBE.

Perez

1       Clearly, more study analyzing all these various suggestions  
2       warrants a more detailed analysis of the pros and cons of  
3       these various proposals.

4               We make these comments not to engage in  
5       theoretical abstractions, but more along the lines of the  
6       best thinking of that 1992 Commission that we cited  
7       earlier; that is, when racial equity in licensing is  
8       clearly absent in any profession we need to then pause,  
9       study and assess the outcomes of our entry points.

10              Only then can a true assessment involving  
11       switching examination formats, such as the one contemplated  
12       by this committee on whether New York should adopt the UBE,  
13       would then sufficiently address all of the concerns that  
14       LatinoJustice PRLDEF and other advocates for full minority  
15       inclusion in the legal profession have raised.

16              Thank you, Judge. Thank you, members of the  
17       committee.

18              HON. RIVERA: Thank you. Thank you, Mr. Perez,  
19       and thank you, LatinoJustice PRLDEF. Given your expertise  
20       and history with respect to these issues and on preparing  
21       members from a diverse community to join the profession,  
22       we're particularly grateful for your testimony. Today I  
23       have a couple of questions before I open it up to the  
24       committee.

25              First, I was hoping that you could comment on the

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1 challenges that you're particularly most interested in, on  
2 the impact of diversity and the challenges faced with  
3 respect to the pipeline to law schools already mentioned,  
4 that there's already been a dramatic impact on the  
5 admission process and the current pool of law students and  
6 therefore will affect the test-takers now and in the  
7 future, so I was hoping you might have some comments about  
8 the pipeline and what might be done to improve not only  
9 what's going on now, but in increasing the pipeline or  
10 improving the pipeline in the future, so that's one area of  
11 inquiry for you.

12 My other question is, to the extent that the UBE  
13 has, tests skills to a greater extent than the New York  
14 State Bar, it sounds that in part it's more aligned with  
15 your vision of alternative measures and evaluators for  
16 purpose of licensure.

17 So I was wondering if you can comment on whether  
18 or not you think that there's any, additional testing of  
19 skills is a good idea with respect to the way it's done on  
20 the UBE, or even in that context is not really in line with  
21 what your organization is suggesting is a better approach  
22 to ensure people are competent and serving our  
23 community in this state.

24 MR. PEREZ: In response to your first question, I  
25 think if you look at the gate, the entry points into the

Perez

1 legal profession, I see -- and typically the first one is,  
2 you know, is applying to, is admitting into college and  
3 then is thinking about taking the LSAT -- again, I think  
4 the economic, we clearly have identified that economic  
5 cost, that these commercial LSAT prep courses, what Dean  
6 Allard alluded to in terms of the commercial bar prep  
7 courses, are quite expensive and prohibitive for members of  
8 the lower socioeconomic classes, again, particularly  
9 Latinos and African-Americans.

10 So this additional cost, LatinoJustice has kind  
11 of addressed this by creating and engaging our own LSAT  
12 prep course instead of, as equal to any of the commercial  
13 ones at a fraction of the cost. Again, due to limitations  
14 we can't offer it to everyone, but, again, that's an  
15 option.

16 I think, Dean Anderson, looking at you, I think  
17 CUNY has adopted programs, if I recall, in terms of  
18 coaching and prepping individuals who may not have fared as  
19 well on the LSAT in terms of applying to law -- not the  
20 LSAT; on the -- yes, on the LSAT, applying to law school.

21 So, again, I think these options or alternative  
22 programming in terms of the bar exam, if we're going to  
23 require a formal bar exam, I think you've got an economic  
24 question. The UBE does suggest that in fact that it is  
25 significantly higher than the existing bar, New York Bar

Perez

1 admission registration cost, sometimes as much as three or  
2 four times as much, and, again, so those economic barriers,  
3 I think, are of critical concern.

4 In terms of, you know, again, suggesting  
5 alternatives, again, the clinical externships, as law  
6 schools adopt clinical programs in teaching the practical  
7 lawyering skills, why not look at it like the medical  
8 profession in terms of its, you know, you do a residency  
9 and that that suffices in terms of taking an examination?

10 Can there not be -- again, I think the proposal  
11 to increase that practical skills from one to two is a step  
12 in the right direction in that vein, but, again, if that is  
13 part of the overall UBE change, you're eliminating the New  
14 York essays and replacing those with the multistate essays,  
15 you're replacing the existing New York multiple-choice to a  
16 new format of New-York-centric multiple-choice, and the  
17 question is, those questions have yet to be created, those  
18 questions have yet to be tested, what are the impacts?

19 And so it's kind of a doubled-edged sword, so I'm  
20 hesitant to say, you know, that that is -- I agree that  
21 it's a step in the right direction, but would that suffice?  
22 I hesitate.

23 HON. RIVERA: Thank you. Members of the  
24 committee? I see Seymour James is here. Do you want to  
25 take your seat?

Perez

1 MS. ARTERIAN: One of the things that I'm curious  
2 about is whether or not your organization, just because of  
3 its history and its scope and network, whether you have any  
4 information about whether or not in, not simply in this  
5 last application of the Uniform Bar, or the, you know, the  
6 portions of it that get taken in a variety of states even  
7 if they're not taken in the Uniform Bar states, have you  
8 learned anything from those states from your connections  
9 there about whether in general the move to the UBE has in  
10 fact overall had a negative effect on the passage rates for  
11 particularly Latinos, given your history there, but I'm  
12 curious, I am very curious about that, because that's sort  
13 of the question that I think we have, but it's also true, I  
14 think, that that's very dependent on how the states  
15 themselves track.

16 I was hoping that you may have some different  
17 sources of information.

18 MR. PEREZ: Given that we're based here in New  
19 York City and also have a Southeast regional office in  
20 Orlando, our focus has traditionally been, and particularly  
21 educational programming, is students here, aspiring law  
22 students here on the East Coast, so given the UBE, out of  
23 the 14 states only two are on the Each Coast, as I recall,  
24 New Hampshire and Alabama, so the majority of states are  
25 out in the Northwest, Southwest, we don't necessarily

Perez

1 engage or service that client population.

2 We have had on occasion college students from  
3 California come to our office for programming, and, again,  
4 it speaks to the dearth of, the lack of any real pipeline  
5 support, you know, programs in any, in the rest of the  
6 country. I note that, you know, among the UBE states  
7 there's Arizona and Colorado, which have significant Latino  
8 populations.

9 Why -- it seems to me that it would make sense  
10 that why not do, the Multistate Bar Examiners, why not do  
11 some type of study or have those states do some type of  
12 study of their bar passage rate of the students in those,  
13 in those two states, particularly given that they have a  
14 significant Latino population, and presumably the number of  
15 law schools -- I think there's three in Arizona and at  
16 least two in Colorado, you know, that have significant  
17 Latino populations -- I mean, it goes to the point that I  
18 made.

19 There is no real information out there anywhere,  
20 in New York or across the country, about the UBE or other  
21 bar exams' impact on minority law graduates, particularly  
22 Latinos.

23 MS. ARTERIAN: If I could just follow up for a  
24 second on that. I had a long career in Arizona before  
25 coming to New York.

Perez

1           I, I may be wrong about this, but I think if the  
2           states themselves are the ones that track or don't track, I  
3           mean, ethnicity and race and whatever in when people file  
4           to take the bar exam -- and, again, I admit that I have  
5           very limited scope on this, but I think that those are  
6           state decisions, and if the state hasn't decided to do that  
7           I don't know who gets to tell them you have to do it.

8           That was really, when talking about how you get  
9           historical information, that was really what I meant.

10          MR. PEREZ: I think the source is the law  
11          schools, and, again, as you point out, being correct, that  
12          would be up to the individual states, but, again, the  
13          Multistate Bar Examiners, you know, indicates that if  
14          there's any concerns the states can test this after the  
15          fact. I think the question is, this should be tested  
16          before we adopt it and move to a new examination.

17          HON. RIVERA: Any questions from the members of  
18          the committee? I wanted to ask, if no one else has a  
19          question, then another area of inquiry for you, if you're  
20          able to answer it.

21          There's certainly a difference between first-time  
22          takers and second- and-third-time takers on the rates. Do  
23          you have any information on the success for Latinos,  
24          specifically second- and third-time takers? Not -- the  
25          spirit of the question is not to suggest that if those

Perez

1 rates were higher that would be good enough. It's merely a  
2 fact-based inquiry.

3 MR. PEREZ: Again, I recall in preparing for this  
4 hearing that, again, given that Latinos don't necessarily  
5 pass at the highest rates, that they are more apt to  
6 retake, but, again, based on those economic barriers they  
7 just can't afford to take it. If you don't pass in July  
8 you then take the February exam. They may wait a year or  
9 two because they have to work, they have families to  
10 support, they have other financial obligations.

11 I don't know specifically, again, on those second  
12 or those repeat test-takers, again, whether they fare  
13 significantly higher or better than their Caucasian  
14 counterparts, again given that they do not, that they are  
15 not as successful the first time around. If I recall  
16 anecdotally. They again do not -- they pass, but not,  
17 again, as high as their counterparts.

18 HON. RIVERA: And then that triggers one other  
19 question for me. Given the nature of your comments, if you  
20 can, what would you say is a recipe for success for  
21 Latinos? Now. Just under the current Bar Exam, which, as  
22 you say, Latino students face tremendous challenges on  
23 trying to do well on the first time around, what would you  
24 say is a recipe for success for a recent graduated student?

25 MR. PEREZ: Well, again, I think, you know,

Morril

1       graduating, incurring debt, the cost of existing commercial  
2       bar preps, which is kind of mandatory, in my experience?  
3       We've encountered numerous students who don't even take,  
4       they study on their own, which to me is a recipe for  
5       disaster, that I think they really need that edge, and I  
6       think certain schools now do provide mandatory bar  
7       preparation.

8                 Again, I'm not sure, you know, why it is that  
9       after three years of full-time legal education that they  
10      now are providing supplemental bar review education. In  
11      terms of, you know, where we're moving if the discussion is  
12      to look at alternatives, again, I think this kind of field  
13      clinical externship component should be perhaps explored as  
14      a more real serious alternative.

15                New York has had this kind of clerkship on the  
16      books, clerkship to bar admission on the books for quite  
17      some time, but I think it kind of really flies under the  
18      radar, and the standard has always been law school and then  
19      the bar exam, so perhaps, I don't know, exploring that  
20      option.

21                HON. RIVERA: Thank you so much. Our next  
22      speaker is Mark Morrill, Chair of the New York City Bar  
23      Association's Council on the Profession. Thank you for  
24      coming today.

25                MR. MORRILL: Thank you, Judge Rivera and members

Morril

1 of the committee. I want to thank you all for the  
2 opportunity to testify this afternoon on behalf of the New  
3 York City Bar Association.

4 The City Bar Association since its founding in  
5 1870 has been dedicated to maintaining the high ethical  
6 standards of the legal profession, promoting reform of the  
7 law and access to justice, and providing service to the  
8 profession and to the public.

9 The association through its 24,000 members  
10 continues to work for political, legal and social reform  
11 while implementing innovative means to help the  
12 disadvantaged. Protecting the public's welfare remains one  
13 of the Association's highest priorities. The City Bar  
14 supports Chief Judge Lippman's recommendation that New York  
15 State adopt the Uniform Bar Exam effective July 2016.

16 We believe that adoption of the UBE is an  
17 important reform that will significantly enhance  
18 opportunities for new lawyers to find employment wherever  
19 it is available. We believe that the UBE is correctly  
20 focused on testing the competence of candidates on  
21 fundamental legal principles and lawyering skills that are  
22 important to entry-level practice.

23 We also believe that adoption of the UBE by New  
24 York State will motivate other states to follow suit,  
25 thereby further advancing the goal of a more nationwide

Morril

1 standard for admission to the bar and increased employment  
2 mobility for lawyers.

3 The City Bar does recognize that moving to the  
4 UBE is an important step for New York State and, as with  
5 any major reform, there is need to be alert for unforeseen  
6 consequences. We recommend that the State Bar Examiners  
7 compile rigorous performance data relating to the UBE as  
8 implemented in New York State.

9 The Bar Examiners should review that data  
10 annually to discern any demographic trends regarding bar  
11 passage rates, particularly whether the UBE has any  
12 disparate impact on historically disadvantaged groups or  
13 any other area of potential concern.

14 We urge also that the Bar Examiners be charged  
15 with conducting a formal review of New York's experience in  
16 the first three years of its use of the UBE and that the  
17 Examiners issue a public report shortly after the end of  
18 the three-year period stating its conclusions as to whether  
19 the UBE has advanced the purpose of facilitating new lawyer  
20 mobility and improving testing techniques, whether there  
21 has been any disparate impact on underrepresented groups,  
22 and analyzing any negative trends which have emerged that  
23 may require further attention.

24 The City Bar has a long history of involvement  
25 and concern with the New York State Bar Exam. In 1992 the

Morril

1 City Bar's Committee on Legal Education and Admission to  
2 the Bar issued a Report on Admission to the Bar in the 21st  
3 Century -- here we are -- expressing concern that the New  
4 York State Bar Exam did not adequately or effectively test  
5 minimal competence to practice law in the state and that  
6 the exam disproportionately excluded minority applicants.

7 More recently I was honored to chair the City  
8 Bar's Task Force on New Lawyers in a Changing Profession.  
9 The Task Force was appointed in 2012 by then-President  
10 Carey Dunne to address changes in the legal profession with  
11 a focus on the plight of new lawyers.

12 Our mandate was to examine whether new lawyers  
13 were being given relevant development opportunities in law  
14 school and in their early careers so that they are  
15 employable, they're able to realize their aspirations in a  
16 reasonable time frame, and they are capable of serving  
17 clients effectively.

18 The City Bar Council on the Profession, which I  
19 now chair, continues some of the work of the Task Force,  
20 which issued its report, which you may have seen,  
21 Developing Legal Careers and Delivering Justice in the 21st  
22 Century, in December of 2013.

23 Our Task Force focused on the fact that many of  
24 the nation's new law graduates are facing sharply  
25 diminished job prospects, unprecedented debt and limited

## Morril

1 opportunities to achieve the experience and training  
2 necessary for a professionally rewarding and financially  
3 sustainable career.

4 We raised particular concerns of impediments to  
5 innovation that we believe have operated to unnecessarily  
6 limit professional opportunities for new lawyers. Our Task  
7 Force found specifically that the requirement for new  
8 lawyers to pass a state-specific bar exam has significantly  
9 limited lawyer mobility at a time when the practice of law  
10 is increasingly national and global.

11 We noted the important influence of globalization  
12 on career opportunities and that opportunities may exist in  
13 parts of the nation where there are relatively few lawyers  
14 competing for available positions. A law student may take  
15 the bar exam in one state and later find that the best  
16 employment opportunity is in a different state, but under  
17 the current scenario an additional bar exam will be  
18 required to practice there.

19 Students and new lawyers may also find it  
20 necessary to relocate because a spouse or life partner  
21 finds an important opportunity in a different state. We do  
22 recognize that a bar exam may advance the important  
23 consumer protection interest of weeding out those who are  
24 not minimally competent to serve clients.

25 A bar exam also requires applicants to focus and

Morril

1 learn a broad scope of law, but we found that in many  
2 instances state-by-state exams test skills that are of  
3 decreasing and marginal relevance for contemporary legal  
4 practice and fail to test the relevant problem-solving  
5 skills.

6 We believe that the UBE, with its portable scores  
7 and principles-based testing, will significantly advance  
8 the important interests of lawyer mobility in the  
9 nationwide marketplace. The UBE, with a principles-based  
10 approach, will test more practical problem-solving skills  
11 than the current exam.

12 We agree with the New York Board of Law Examiners  
13 that New York should continue to have a New York State law  
14 component. All lawyers admitted in New York should have a  
15 basic grounding in New York law and procedure. The New  
16 York component should focus on areas where New York law or  
17 procedure differs significantly from general principles or  
18 procedures that are common in other states.

19 We urge that it be available on more dates than  
20 the current exam, including potentially on dates other than  
21 those when the UBE is administered. We believe that the  
22 New York portion should be constructed in a way that  
23 passage will be reasonably achievable by new lawyers who  
24 can demonstrate a baseline proficiency in New-York-specific  
25 areas of law.

## Morril

1           The City Bar believes that the benefits of the  
2           UBE will increase as more states follow New York and  
3           students can seek out employment opportunities nationwide  
4           with confidence that the success on the New York Bar Exam  
5           will provide most of what is needed to become licensed in  
6           another state.

7           Conversely, adoption of the UBE also will enable  
8           New York employers to more readily draw on a talent pool of  
9           new lawyers who have taken the exam elsewhere and can  
10          become licensed in New York State by successfully  
11          completing a readily accessible New York module.

12          I noted earlier that the City Bar previously has  
13          expressed concern about the impact on historically  
14          disadvantaged groups of standardized testing in contrast to  
15          other mechanisms for demonstrating a level of competency.  
16          New York State must maintain its commitment to ensuring  
17          that the bar licensing process advances the goal of setting  
18          reasonable competency standards without impeding ongoing  
19          efforts to increase diversity in the profession.

20          To that end, as I stated earlier, the City Bar  
21          urges that the Bar Examiners be charged to compile and  
22          analyze data sufficient to monitor any disparate impact  
23          trends. New York State should be vocal in ensuring that  
24          any issues that are identified are addressed promptly and  
25          effectively.

Morril

1           Finally, we are aware that some have expressed  
2           concern about the timing of the implementation of the UBE  
3           in New York State. Our own earlier comments expressed a  
4           concern that a July 2015 implementation date might upset  
5           settled expectations and law school curricula.

6           We believe that a July 2016 adoption date  
7           provides a reasonable time frame for law schools to make  
8           any adjustments they deem necessary to their curriculum and  
9           for potential test-takers to set their expectations. We  
10          firmly believe that there should be no further delay beyond  
11          2016 in the implementation of this important reform.

12          On behalf of the New York City Bar, I again thank  
13          the committee for the opportunity to testify today.

14          HON. RIVERA: Thank you so much. I wanted to  
15          ask, with respect to the New York Law Exam, the multiple-  
16          choice section, it's your position that that part of the  
17          licensure process should be limited to law graduates? Or  
18          would you also support giving that exam, say, in the third  
19          year of law school?

20          MR. MORRIL: We -- I think the bar alone can, we  
21          can do better. We do think -- and it was an important part  
22          of our internal discussion -- that the New York State  
23          module should be very accessible. One of our members  
24          suggested it might even look something like the Series 7  
25          exam for a securities license, that it be available to

Morril

1 people all of the time on a computer-based system, however  
2 that's logistically feasible.

3 So, consistent with that, I think being able to  
4 take it at an appropriate time would be very beneficial.  
5 As I looked at the materials in preparing for today's  
6 hearing, I was actually concerned with the length of the  
7 day on which the New York module was given, and perhaps one  
8 way to ameliorate that, what looked like to be an extremely  
9 long day, would be to give people the option to take the  
10 New York module at a different time.

11 HON. RIVERA: I asked the question because there  
12 were comments raised on whether or not teaching to the test  
13 might increase were this particular section of the bar  
14 available to those who might not yet graduate from law  
15 school.

16 MR. MORRIL: My understanding was that the plan  
17 was to make this a test of baseline competency essentially  
18 geared to be achievable for passage, so I would hope that  
19 it would not have the purpose of increasing teaching to the  
20 test and that it might mitigate that with change.

21 HON. RIVERA: Thank you so much. Other members  
22 of the committee? Dean Anderson.

23 MS. ANDERSON: Thank you for your testimony,  
24 Mark. I just wanted to clarify the proposal from the City  
25 Bar committee suggesting that there be a review at three

Morril

1 years of data on who has taken and who has passed, who has  
2 failed, and trying to identify whether or not there has  
3 been a disparate impact in the first three years.

4 Is it part of your proposal that that data be  
5 available on an annual basis publicly? Or that it be not  
6 available on an annual basis publicly, but that this be  
7 reviewed and then a public analysis of that be published?

8 MR. MORRIL: Our proposal is that the data be  
9 generated immediately so that the Law Examiners start to  
10 compile that data in a vigilant way starting in the first  
11 year and that they analyze it and then that they, they're  
12 vigilant about reacting to any adverse trends that are  
13 appearing. Our recommendation is that the formal review  
14 take place in the third year, when there's a reasonable  
15 quantum of data available, and that that be a public  
16 report.

17 MS. ANDERSON: And is the data itself available  
18 on an annual basis? Or is simply the report available at  
19 the end of three years?

20 MR. MORRIL: We didn't take a position on the  
21 availability of the data in the earlier years, whether it  
22 be the data in the third year. My view would be that data  
23 is a good thing and that to the extent there is competent  
24 data generated that it may be helpful to the debate in the  
25 ongoing improvement of the process for data to be made

Morril

1 available, but I think the onus will be on the Law  
2 Examiners to ensure that good data is generated from the  
3 testing.

4 MS. ARTERIAN: I wonder -- I appreciate your  
5 careful, careful delivery of the position of the  
6 organization. I wonder about -- I mean, I am just sort of  
7 an academic on this, but I hear about the disparate impact.  
8 I guess I'm trying to figure out, is it something we can  
9 compare it to. In other words, if you see the disparate  
10 impact -- let's assume there's a disparate impact, just to  
11 make it difficult.

12 How do you, how would you suggest that be looked  
13 at? I mean, I understand you don't want a disparate  
14 impact. That would not be good, but does it matter if  
15 there was a disparate impact now? I mean, a disparate  
16 impact that was smaller or the disparate impact now, and  
17 the disparate impact was bigger? I'm sure that it does  
18 matter, but I don't know if your organization has given any  
19 thought to that piece of it.

20 MR. MORRIL: Well, I mean, I -- clearly we want  
21 to do better, and we've heard already this afternoon that  
22 there are ongoing issues with the existing test in areas  
23 that have been of historic concern to the City Bar. The  
24 City Bar in 1992 advocated the possibility of alternative  
25 paths to licensure beyond the written exam.

Morril

1                   We continue to believe that would be desirable,  
2                   but, again, as Dean Allard said, just because we can't do  
3                   even better doesn't mean that we shouldn't do better in the  
4                   first instance, so I think my answer to your question,  
5                   Dean, would be that the critical focus should be that we  
6                   don't do worse by moving forward, but we, our understanding  
7                   is that there is no data now.

8                   There is no reason to conclude that it would be  
9                   worse and that there are many great benefits to this exam  
10                  in lawyer mobility and smarter testing techniques, both of  
11                  which are important, and therefore we think it's important  
12                  to move forward, coupled with generating the data necessary  
13                  to analyze and react quickly.

14                  HON. PRUDENTI: Thank you so much. I was very  
15                  interested in your recommendation, and I know that there  
16                  probably were many discussions with regard to the  
17                  recommendation that in July of 2016 the first UBE  
18                  examination be held.

20                  Could you tell us, based on those discussions,  
21                  what are the concerns for the future testing for the law  
22                  schools themselves or for the fact that it was a date that  
23                  had been a starting point and the data that followed would  
24                  be what would be carefully looked at before any  
25                  determination could be made about the UBE?

Morril

1           MR. MORRIL: I think that we should look at two,  
2 both halves of the balance, and we thought that you -- the  
3 real problems that lawyers are facing would be addressed in  
4 our Task Force.

5           The roughly 50 percent employment levels in the  
6 last three or four years was so important, and the benefits  
7 of lawyer mobility were so important, that we didn't see --  
8 we thought that a year -- and it's almost two years at this  
9 point -- noticed that New York is going in this direction,  
10 was sufficient for people to set their expectations that  
11 law schools could adapt when they had to adapt and fix  
12 standards within an achievable time frame, and we thought  
13 that the importance of increasing job opportunities was so  
14 important that it would be a mistake to delay it any  
15 further.

16           HON. RIVERA: Mr. Hernandez, do you have a  
17 question?

18           MR. HERNANDEZ: Thank you, Mr. Morril, and my  
19 question was why do you think that July 2017 should not be  
20 put off, and I think you answered that.

21           HON. RIVERA: I'm sorry, so are there any other  
22 questions from the committee? This is my one final  
23 question.

24           When you were saying we should not do worse, I  
25 just wanted to clarify what you mean by that, so, as I

Morril

1 understand it, numerically across the country and in New  
2 York the majority of those who failed the bar the first  
3 time are white. People of color are not the majority of test-takers w  
4 who fail the exam.

5 But to the extent that this issue on disparate  
6 impact and disproportionate impact that you and others  
7 already raised is about particular racial and/or ethnic  
8 groups and members from those groups who are skilled and  
9 will be excellent lawyers, yet face particular challenges  
10 on the bar, but that's when you say we should not do worse,  
11 but to the extent there are barriers to that population the  
12 UBE or anything that's proposed should not inherently set  
13 up additional barriers to that particular population.

14 Is that what your message is?

15 MR. MORRIL: This is in response to Dean  
16 Arterian's question "as compared to what," and I think I  
17 was essentially saying there are a lot of competing  
18 potential baselines out there, but whatever baseline is  
19 chosen certainly you don't want to be below that baseline  
20 level.

21 HON. RIVERA: Right. I guess my question is  
22 about a certain nuance about the way the numbers work.

23 If one could hypothesize that there are  
24 test-takers who have particular challenges on the current  
25 exam that they might not face the same challenges on the UBE,

Morril

1       they might do better, they might do worse, and there are  
2       those who take the current exam who don't face particular  
3       challenges who might face those challenges or might face  
4       other challenges that make their pass rate lower on the  
5       UBE, but I took the point of your testimony and the  
6       perspective of the City Bar that you want to ensure that we  
7       have competent, skilled lawyers serving our community,  
8       serving clients, and that it appears that the current bar  
9       exam may not be the best way to evaluate that, but if we're  
10      going to adopt the UBE we should ensure that that is not a  
11      worse evaluator, from your perspective, than the current  
12      evaluator and that that might break down differently for  
13      different racial groups and ethnicities, and that's all I'm  
14      trying to clarify.

15               MR. MORRIL: Well, I mean, we think there's  
16      reason to believe that the UBE is a better test because of  
17      its principles- and skills-based orientation. That in  
18      turn, to the extent there is teaching to the test, is good,  
19      would be a good result.

20               We were struck primarily by the relative dearth  
21      of data as to both the current test against the UBE, and we  
22      came out with the position that the most critical thing was  
23      to generate data, that we didn't see anything in it that  
24      would suggest we shouldn't adopt this important reform, but  
25      that we should be generating the data.

## Rosenberg

1           We did, we were aware of anecdotal suggestions  
2           that historically disadvantaged groups have a tougher time  
3           with multiple-choice than essays. We had some  
4           information -- and it was not hard, statistical  
5           information -- that that actually has not proven out in the  
6           statistical analysis, that, while there may be different  
7           performances by different groups, it does not appear to  
8           correlate to that type of question.

9           HON. RIVERA: Thank you so much. We thank you  
10          for coming.

11          Okay, next we have a group from CUNY Law School.  
12          We have a panel of speakers from the law school, Joseph  
13          Rosenberg, Professor and Associate Dean of Clinical  
14          Programs, Allie Robbins, co-director of the law school bar  
15          support programs, and Sarah Valentine, Associate Dean of  
16          Academic Affairs and Professor of Law, so we'll have all  
17          three of you speak, and then we'll do the questions and  
18          answers, and, if you don't mind, we'll proceed in that  
19          order.

20          MR. ROSENBERG: Judge Rivera, Dean Anderson and  
21          other distinguished members of the committee, thank you for  
22          the opportunity to testify. Regardless of the ultimate  
23          outcome, the UBE proposal and the work of this committee  
24          are raising important issues related to the bar exam that  
25          will benefit the general public, law schools and the

## Rosenberg

1 practicing bar.

2 I want to acknowledge the efforts of those who  
3 have worked diligently and thoughtfully on reforming the  
4 bar exam or suggesting alternatives, including the UBE. In  
5 New York there has certainly been no shortage of  
6 committees, task forces, commissions, reports, studies and  
7 proposals dealing with the bar exam over the past 20-plus  
8 years.

9 Passing the New York Bar Exam is a time-honored  
10 tradition in our profession. The New York Bar has long  
11 been established as the gold standard. It is a rite of  
12 passage that unites us as attorneys in New York State, yet  
13 most of us probably remember the emotional toll of the test  
14 more vividly than the law we learned. Despite its  
15 strengths, questions exist about the connection between  
16 what is required to pass the New York Bar Exam and the  
17 knowledge, skills and values needed by practicing lawyers.

18 Concerns have also been raised about the  
19 persistent racial and economic disparities in standardized  
20 tests generally, including the bar exam, and the extent to  
21 which our standardized tests adversely impact our shared  
22 goal of increasing access to and diversity in the legal  
23 profession, which, according to the American Bar  
24 Association, remained 88 percent white as recently as 2010.

25 My testimony will focus on the forces of change

1 in law schools and the legal profession, advantages and  
2 disadvantages of the current New York Bar Exam, and the  
3 proposed UBE and recommendations. During the past several  
4 years a confluence of forces, many arising from the Great  
5 Recession of 2008 and its impact on the legal job market,  
6 have begun to reshape law schools and the legal profession.

7 These force include the following: The need to  
8 prepare students for clients, practice and the profession  
9 in a rapidly changing environment and economy. The ABA  
10 will now be requiring law schools to identify measurable  
11 outcomes for students. The challenging employment market  
12 for law graduates, which although improving remains  
13 difficult at best.

14 Escalating students debt, which, coupled with the  
15 shrinking job market, has made law school a less attractive  
16 option, with a resulting decline in enrollment for many law  
17 schools. The need for law schools to address the access-  
18 to-justice gap, both by offering a greater variety of  
19 clinics, supervised externships and practicums and by  
20 encouraging law students to pursue public interest careers  
21 or provide pro bono services as part of their core  
22 commitment to our profession.

23 Chief Judge Lippman has been singularly effective  
24 in bringing attention to and raising awareness of the need  
25 for lawyers to represent the poor and middle class in

## Rosenberg

1 matters relating to the essentials of life. The  
2 relationship of the bar exam and law school curricula is a  
3 missing link in legal education reform.

4 The ABA, individual states, including New York,  
5 and many law schools have responded to the critiques  
6 leveled at the legal academy, which have mostly focused on  
7 the failure of law schools to prepare students for practice  
8 and the perceived waste of time and money arising from that  
9 failure. This is including requiring a minimum number of  
10 credits for experiential learning, the option of the  
11 two-year curriculum, the ABA outcomes I mentioned, and  
12 Chief Judge Lippman's Pro Bono Scholars Program.

13 Yet not as much attention has been paid to the  
14 impact of the bar exam on law school curricula and the  
15 extent to which most law schools must devote time and  
16 resources to provide students with courses, activities and  
17 often financial support to help them pass the bar exam,  
18 often at the expense of other courses and activities that  
19 more directly prepare students for clients, practice and  
20 the profession.

21 The advantages of the UBE have been summarized  
22 succinctly by the Board of Law Examiners. I agree that  
23 portability, uniformity, two multistate practice tests  
24 instead of one, the relative similarity between national  
25 law and New York law, and the ability to separately take or

## Rosenberg

1       retake the New York Bar Exam all are generally positive  
2       aspects of the UBE proposal.

3               I also understand the rationale behind  
4       outsourcing all but a separate New York Law Exam  
5       50-question multiple-choice component to the National  
6       Conference of Bar Examiners, which ironically is located in  
7       Wisconsin, the only state in the United States that offers  
8       a diploma privilege to graduates of Wisconsin and Marquette  
9       who successfully complete a required sequence of courses.

10              There are, however, a number of disadvantages to  
11       adopting the UBE. The UBE increases the emphasis on  
12       speediness as a skill needed to pass the test. It  
13       decreases opportunities to integrate doctrinal knowledge,  
14       preparation for the New York Bar and practical lawyering  
15       skills in bar electives and other courses. The UBE will  
16       not include access-to-justice issues and fact patterns.

17              The Board of Law Examiners has initiated an  
18       effort to integrate access-to-justice topics on the New  
19       York Bar Exam. If the UBE is adopted, the access-to-  
20       justice topics will be relegated to the 50-question New  
21       York Law Exam. The UBE also does nothing to address the  
22       financial toll on law graduates whose postgrad bar exam  
23       semester costs thousands of dollars for a bar preparation  
24       course and about 500 hours over 10 weeks studying for and  
25       taking the bar exam followed by months of waiting before

## Rosenberg

1 admission.

2 Merely adopting the UBE may cede too much control  
3 to the National Conference of Bar Examiners and severely  
4 limit the opportunity to innovate and adapt to the New York  
5 Bar Exam, for example, by incorporating access-to-justice  
6 issues and testing a broader range of skills. I will  
7 conclude with two sets of recommendations.

8 First, I recommend that we continue the New York  
9 Bar Exam, continue the initiative to integrate access to  
10 justice on the exam, and award bar exam credit for students  
11 who successfully complete a law school clinic or supervised  
12 externship. This additional credit could be equal to the  
13 percentage of the New York multiple-choice questions if we  
14 maintain the New York Bar or substitute for passing the New  
15 York Law Exam component of the UBE.

16 Second, regardless of whether we adopt the UBE or  
17 maintain the New York Bar Exam, I urge the Board of Law  
18 Examiners to build on the McCrate Report, best practices,  
19 the Carnegie Report and the ABA outcomes mandate to pilot  
20 an access-to-justice alternative practice path to bar  
21 admission.

22 This would generally be similar in structure to  
23 the Daniel Webster Scholars Program at the University of  
24 New Hampshire Law School, but adapted for New York. The  
25 Daniel Webster Scholars Program is a two-year bar exam

## Rosenberg

1 during which students take a sequence of courses and meet  
2 performance criteria and demonstrate that through a  
3 portfolio.

4 New York law schools already offer a sequence of  
5 courses, practicums, externships and clinics that could be  
6 refined and unified as a sequential curriculum that will  
7 demonstrate a student's capacity to practice law and serve  
8 as a practice path to bar admission.

9 Individual schools would be able to design an  
10 appropriate curriculum within a general framework endorsed  
11 by the Board of Law Examiners. As with the Pro Bono  
12 Scholars, this program could culminate in a final semester  
13 of immersion into practice and a law school clinic or  
14 supervised externship. This model directly links  
15 assessment during law school with professional knowledge  
16 skills, values and bar admission.

17 I'm not advocating that we admit people to the  
18 bar who will not be excellent attorneys. I am suggesting  
19 that all of these forces, the access-to-justice gap, the  
20 need to better prepare students for practice, the mandate  
21 to increase the value of law school, and the impact of the  
22 bar exam on the curriculum, create what Dr. Martin Luther  
23 King, Junior in a much more important context at the 1963  
24 march on Washington called the fierce urgency of now.

25 Regardless of whether New York maintains the

Robbins

1 current New York Bar Exam or adopts the UBE, these  
2 recommendations will enable New York to establish a new  
3 alternative gold standard for bar admission. Thank you  
4 again for your work and the opportunity to testify.

5 MS. ROBBINS: Good afternoon. As was mentioned,  
6 my name is Allie Robbins. I'm the Assistant Dean for  
7 Academic Affairs here at CUNY School of Law and also the  
8 co-director of our bar support programs. This may be  
9 redundant at this point, but I want to start by welcoming  
10 you to the law school. We're excited that you have chosen  
11 to host the first of these historic hearings here, and  
12 thank you for the opportunity to testify.

13 I also want to begin by quickly stating that I  
14 don't endorse the bar exam as an appropriate measure of  
15 testing the variety of skills that individuals need to  
16 possess to be good lawyers.

17 However, the question at hand is whether to move  
18 from the current New York Bar Exam to the Uniform Bar Exam,  
19 and while I do not believe that the UBE is a better measure  
20 of learning and skills than the New York Bar Exam and in  
21 fact I worry that the increased weight afforded to the MBE  
22 and MPT portions of the exam would be detrimental to the  
23 development of a diverse bar, I know that others are and  
24 will be testifying to those issues.

25 My primary concerns in this testimony are to ask

Robbins

1 for lead time for whatever changes to the bar that the  
2 committee might decide upon, to raise the importance of  
3 access to resources in preparing for the bar, and to  
4 encourage the committee to recommend a streamlining of the  
5 material to be covered by the proposed New York Bar Exam.

6 Law schools spend considerable energy and  
7 resources preparing students for the bar exam. At CUNY, as  
8 at many other schools in this state, we do so beginning in  
9 the first semester. Many of our first-year professors  
10 utilize bar-type questions and work with students at  
11 writing bar essays. Students spend three or four years in  
12 law school learning how to answer bar exam questions.

13 Being taught one way and then unexpectedly having  
14 to learn a new way for a new exam is likely to be slightly  
15 destabilizing. It is difficult to break out of old habits.  
16 Students currently in law school should be able to take the  
17 exam they have been preparing for, or should at least have  
18 the option to do so.

19 There are a myriad of components that go into  
20 preparing a student for the bar exam. It's not simply an  
21 eight-or-ten-week post-law-school experience. For students  
22 it begins from day one of law school, but even before a  
23 student steps foot in a classroom it requires considerable  
24 training and study on the part of faculty members to  
25 understand how the bar exam tests and how to teach students

Robbins

1 to succeed on the bar exam.

2 We at CUNY regularly hold workshops for the  
3 faculty to train them in how and what the bar exam tests.  
4 Our bar support coordinators consult with faculty  
5 individually and provide them with information about how  
6 their specific subjects are tested on the bar. We review  
7 practice questions and exams and advise faculty on  
8 doctrinal coverage. Doctrinal coverage would shift  
9 significantly were New York to adopt the UBE.

10 As a public school in New York City, while our  
11 students are prepared to practice in many jurisdictions, we  
12 place a special emphasis on preparing our students to  
13 practice law here in New York. Many of our courses  
14 consequently focus on New York law. I imagine many faculty  
15 members would want to continue this coverage of New York  
16 law.

17 Thus, they would have to simultaneously teach the  
18 general principles of law tested by the NCBE and New York  
19 law, and we need to make sure that students understand and  
20 are comfortable with these distinctions. It's going to be  
21 quite difficult for faculty to fit this double coverage  
22 into their already packed semesters.

23 Of course, it is possible to teach both general  
24 principles of law and state law in the same course, and  
25 many professors do it already, though not to the extent

1       that they would have to if the UBE were adopted.  If the  
2       UBE were adopted, faculty would need to be retrained and  
3       would have to rework their teaching and assessment  
4       methodologies.  To do so would take considerable time.

5               Access to resources is another issue that law  
6       schools would face if New York moves to the UBE.  Presently  
7       the New York Board of Law Examiners provides previously  
8       used essays for free on its website along with two sample  
9       answers to each essay questions.  Unlike New York, however,  
10      the NCBE charges for its multistate essays and its MPTs.

11              Purchasing these materials for use by all  
12      students and faculty members would be quite expensive for  
13      law schools.  The cost is likely to be prohibitive and will  
14      have a significant detrimental impact on bar support  
15      programs, as we would not have access to a wide variety of  
16      materials from which to work with our students.  Ultimately  
17      it's the students who would suffer from this lack of freely  
18      available materials.

19              A similar problem exists with the New York  
20      multiple-choice questions.  The New York Board of Law  
21      Examiners has never released to the public a single New  
22      York multiple-choice question.  If a separate New York Law  
23      Exam were adopted, students would not have practice exams  
24      from which to study and law schools would be unable to  
25      adequately assist law students in their preparation.

Robbins

1                   This is difficult as it is on the current New  
2                   York Bar Exam with the New York multiple-choice questions  
3                   worth ten percent of the bar, but would be even worse if it  
4                   were combined with a standalone exam.

5                   I also want to take a moment to address the  
6                   content of the proposed New York Law Exam. Florence  
7                   Kerner, who is the co-director of the CUNY Law bar support  
8                   programs, and I have begun a comprehensive review of the  
9                   subject matter of the proposed content outline that is  
10                  dated on January 14.

11                  We understand that it's important for individuals  
12                  admitted to the bar in New York to have the knowledge and  
13                  skills necessary to practice in New York courts. To do so  
14                  competently, of course, requires an understanding of the  
15                  CPLR. To practice ethically an attorney must be familiar  
16                  with the New York Rules of Professional Conduct.

17                  There's a considerable amount of doctrinal  
18                  overlap between the proposed New York Bar Exam content  
19                  outline and the MBE and MEE outlines. Most of the  
20                  variances between the multistate law and New York law,  
21                  however, are minute. If the proposal were adopted as  
22                  stated, applicants would be forced to learn a tremendous  
23                  amount of law in a very short period of time.

24                  Most of this law could not possibly be tested in  
25                  one administration of the 50-question multiple-choice exam.

Robbins

1        Thus, applicants would be left to spend weeks studying the  
2        intricate details of New York law when only a small  
3        fraction of that material would appear on their exam.

4                As these are questions that do not require any  
5        level of legal analysis, but simply rote memorization,  
6        applicants are likely to forget this information almost  
7        completely the minute the exam is over. Thus, in truth,  
8        they will end up learning the details of New York law in  
9        practice and perhaps in law school, but not in bar study.

10               I've also noticed that the proposed questions may  
11        include answer choices such a "none of the above" or "all  
12        of the above." These types of questions were eliminated in  
13        the MBE by NCBE several years ago, and I'm happy to provide  
14        the committee with some research that details the negative  
15        pedagogical value of these types of answer choices.

16               I'm mindful of the time, and I'm happy to provide  
17        the committee with a more detailed recommendation of how to  
18        streamline the New York Law Exam at a later date if you  
19        feel it would be helpful. My suggestion at this time,  
20        however, is that only the CPLR and the New York Rules of  
21        Professional Conduct should be tested on the New York Bar  
22        Exam.

23               In sum, any major change to the Bar Exam should  
24        be phased in after all students now enrolled have  
25        graduated, as students need most of law school to prepare

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1 for a bar exam. Additionally, faculty need time to rethink  
2 their courses and deans to rethink the entire curriculum.  
3 The resources available to help students study for the bar  
4 exam are too few and too expensive. Access to resources is  
5 critical for passing the bar, and the committee must  
6 consider this issue.

7 Finally, the committee should consider what  
8 really needs to be tested on the New York Law Exam in order  
9 to accomplish the goal of having practice-ready New York  
10 lawyers. I hope that if a decision is made to move to the  
11 UBE it's done with considerable lead time and with open  
12 access to prior exam questions, in recognition of all of  
13 the preparation that goes into passing the bar on the part  
14 of both applicants and the faculty who teach them. Thank  
15 you very much.

16 MS. VALENTINE: Good afternoon, committee  
17 members, and thank you for allowing me to speak. My name  
18 is Sarah Valentine. As you've heard, I'm a professor here  
19 and currently Academic Dean. I also practiced law as a  
20 civil Legal Aid attorney for a decade here in New York  
21 before I began to teach.

22 My comments are directed at the Multistate  
23 Performance Test, the MPT, and I ask the committee to  
24 consider establishing a more comprehensive link between  
25 legal education and practice by allowing 15 credits of

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1 experiential learning and clinics, guided externships and  
2 simulation courses to substitute for the MPT scores in New  
3 York.

4 I'd like to gently challenge the assumption that  
5 the MPT actually tests lawyering skills in any real,  
6 meaningful way. Currently the MPT is worth 10 percent of  
7 the New York exam, and that percentage would double under  
8 the UBE. It consists of one or more 90-minute questions  
9 where an applicant is given a library consisting of various  
10 documents and is asked to go through this library and then  
11 complete a task such as drafting a clause in a contract,  
12 writing a memo to a file, drafting a letter to a client.

13 The MPT allows for no independent legal research.  
14 It doesn't allow any individual fact investigation. It  
15 doesn't allow for client interviewing, or it doesn't allow  
16 for any lawyering activity to occur other than reading  
17 through the material, spotting the issues, both substantive  
18 and ethical -- and that is new -- reason by analogy, and  
19 then, as fast as possible, drafting the assigned document,  
20 which isn't really how lawyers are supposed to practice at  
21 all.

22 The MPT tends to assess a candidate's ability to  
23 read fast, quickly, if you want to put it this way, to  
24 issue-spot and reason by analogy, all skills already  
25 assessed in the essay questions. It does allow a grader to

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1 see a candidate's clarity of writing, but they can see that  
2 in the essay questions as well. The MPT does not surface  
3 the candidate's ability to do complex problem solving as  
4 defined by the McCrate Report.

5 It doesn't allow them to assess the candidate's  
6 ability to think of nonlegal solutions to the issues that  
7 might be presented. It doesn't allow them to assess  
8 whether the candidate has thought of plans and strategies  
9 yet can be flexible enough to change those strategies as  
10 facts emerge. It doesn't test the candidate's ability to  
11 do legal research, fact investigation.

12 It doesn't assess how well they can interview a  
13 client or if they can interview a client at all. It  
14 doesn't assess whether they can negotiate or litigate. It  
15 doesn't tell the grader how well the candidate is at  
16 working collaboratively, understanding and communicating  
17 across differences, handling indeterminacy. It doesn't  
18 even allow the grader to understand how well the candidate  
19 understands their professional goal.

20 The MPT doesn't assess these skills and  
21 professional traits because it can't. Those skills and  
22 traits can't be assessed in a timed writing exam. However,  
23 those skills and professional traits are taught, practiced,  
24 reflected upon and assessed in law school clinics, guided  
25 externships and simulated practice classes.

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1           New York could, by allowing 15 credits of  
2           experiential learning to substitute for the MPT, increase  
3           the number of students better prepared for the practice of  
4           law upon graduation. Doing so would not require anything  
5           more of the schools than is now required under the new ABA  
6           standards. Under the new ABA outcome standards law schools  
7           are required to establish learning outcomes that establish  
8           competencies in specific lawyering skills.

9           The new standards also require six credits of  
10          experiential learning, and they define the types of classes  
11          that meet those, the definition of experiential learning.  
12          However, the new standards require that law schools  
13          establish assessment methods to prove to the ABA that the  
14          program they've designed actually leads to student  
15          competency in specific lawyering skills.

16          These same mechanisms, without anything more,  
17          could allow the Court of Appeals to determine whether an  
18          individual school has established a program of study in  
19          which students learn the critical lawyering skills that the  
20          MPT does not and cannot test.

21          The successful completion of 15 credits of  
22          experiential learning courses would be a much better  
23          assessment of a candidate's competency to practice law than  
24          one or even two 90-minute reading and reasoning tests.

25          Such a program would also recognize the

Valentine

1 importance of lawyering skills. It would provide  
2 additional impetus for law schools to teach lawyering  
3 skills, and because of the new ABA standards law schools  
4 would not be, you would not be saddling law schools with  
5 coming up with a new structure of having to implement a  
6 program that you're mandated. And this would not be  
7 mandated at all. This could be something that students  
8 could be allowed to do.

9 Thank you.

10 HON. RIVERA: Thank you very much. I'm familiar,  
11 but perhaps other people in the room are not -- if you  
12 could discuss very briefly, any of you in particular or one  
13 or two of you specifically, the way CUNY has responded to  
14 the kinds of challenges that have already been identified  
15 with respect to the economic challenges that particular  
16 racial and ethnic groups face on the existing  
17 exam.

18 How has CUNY Law School responded to that,  
19 because I know you're trying to balance skills,  
20 competencies and preparation with ensuring that people pass  
21 the bar and can indeed serve their clients.

22 MS. VALENTINE: Well, I'll speak to just a part  
23 of that. We have mandated a certain number of bar-type  
24 electives, and those can take up -- and those are full bar  
25 electives and we provide a range of those kind of courses,

Valentine

1 but from the academic side we require students to take  
2 certain courses, and we also provide -- but I think Allie  
3 can speak to this a little bit more -- a significant course  
4 on core competencies in the last semester, so there are --  
5 and that takes away from the freedom to teach other things  
6 or offer other clinics, because of the number of credits  
7 that are assigned to these bar electives.

8 MS. ROBBINS: To follow up, in our, in the last  
9 semester students do take a course that we have called core  
10 doctrine, coupled with a skills course that focuses on  
11 essay writing for the bar and multiple-choice questions,  
12 doing the Multistate Performance Test, and then once a  
13 student graduates, whether they're going to take the  
14 February bar or the July bar, we have a mentoring program  
15 that we have a member of faculty as well as alums  
16 participate in, so the students meet one on one once a  
17 week, actually write an essay, get immediate feedback, and  
18 get help just with the study process and how things are  
19 going.

20 In order -- in response to your question about  
21 the economic hurdles, we also have a bar scholarship  
22 program with help from our alums that is getting harder and  
23 harder to do every year, given the economic climate, but we  
24 provide a certain number of students, based on need, with  
25 money to help cover the cost of that bar, that commercial

Valentine

1 bar review program, as well as their living expenses for  
2 the two and a half months that they're devoting to bar  
3 study.

4 HON. RIVERA: Let me just ask about the  
5 recommendation regarding the 15 credits of practice, skills  
6 to practice, that you were talking about. In part I would  
7 assume that a response to that would be that that would  
8 abdicate the role of the Court of Appeals and the Bar  
9 Examiners to ensure that someone indeed is competent and  
10 would abdicate that role to faculty, which I don't think  
11 the bar is ready to do, but what might be your response to  
12 that?

13 MS. VALENTINE: Well, my suggestion is you're not  
14 getting the information that -- the MPT isn't telling you  
15 what you, what it's claimed to be telling you.

16 It is telling you how fast someone can read  
17 through documents and draft out an answer, and if you look  
18 at some of the articles that have been written by them,  
19 they talk about, they're taught that it's, it's, they're  
20 looking for reasoning, reasoning by analogy, and if you  
21 look at how the bar companies teach the MPT they teach it  
22 almost like an essay.

23 What's the call of the question? Is this a  
24 letter? Is it a memo to the file? Is it a contract?  
25 Okay, once you're found that, go back and, go back and find

Valentine

1 key terms, because the statute, make sure to use those, the  
2 language of the statute. They teach you how soon to block  
3 out and when to started writing.

4 HON. RIVERA: I guess the point is that they  
5 should have learned some of that before they get to the bar  
6 review course. The bar review course is targeting the bar  
7 exam and success on the bar exam, but the question of  
8 competency is to be able to successfully look at materials.

9 Granted -- I understand your point. It's a  
10 closed universe. It's not really the way lawyers work. I  
11 understand your point, but, to the extent you're working in  
12 a closed universe, that is something that law schools test,  
13 so what would be your response -- or does train -- excuse  
14 me -- to be able to do, reflect certain skills?

15 Or are you saying it doesn't reflect any skills?

16 MS. VALENTINE: I'm saying that the skills that  
17 it reflects are so close to the essay exam that it's almost  
18 not worth it, and that there's a move afoot -- and I think  
19 it's a very good move -- to try to have law schools teach,  
20 with the help of the bench and the bar, people to be able  
21 to walk out and practice as ethical professionals.

22 And my suggestion, I think, builds a link, and  
23 also would allow the Court of Appeals, as it has pushed  
24 with the Pro Bono Scholars and some other things, but one  
25 more push to say we credit practical skills, and I would

Valentine

1       also suggest that you're not abdicating anything more to  
2       law schools than you are abdicating to the NCBE if you  
3       shift to more MPTs.

4               HON. RIVERA: Thank you.

5               HON. PRUDENTI: Just one quick question. I think  
6       it's probably appropriate for Ms. Robbins. You know,  
7       fundamental fairness dictates I ask Dean Allard and  
8       Mr. Morrill about if the new exam, the UBE, were to come in  
9       effect, how much time and preparation would be needed.

10              Based upon your testimony here today, I think I  
11       heard a little bit of a different feeling than maybe they  
12       had themselves. I understand, and I commend the law  
13       schools for the importance of their clinical programs and  
14       the practical, pragmatic approach that they are taking to  
15       have people ready for the practice of law, but I also  
16       understand teaching to the bar exam and how important that  
17       is to the bar exam.

18              So I guess my question to you is how long do you  
19       think would be necessary in order to prepare for a  
20       different type of bar examination.

21              MS. ROBBINS: So I think considerable time is  
22       necessary. I differ with my colleagues on that. I would  
23       like to see the students that are in law school now take  
24       the exam that they think they're going to take now so that,  
25       you know, it includes our first-year students if at all

Bryant

1 possible.

2 HON. RIVERA: Anyone else? Thank you, all. Next  
3 we'll here from Susan Bryant, Professor of CUNY Law School,  
4 representing and testifying on behalf of the Society of  
5 American Law Teachers, also known as SALT.

6 MS. BRYANT: Yes. Thank you. Good afternoon,  
7 Judge Rivera, Dean Anderson and other distinguished  
8 committee members. As Judge Rivera said, my name is Sue  
9 Bryant, a Professor of Law here at CUNY, today representing  
10 the Society of American Law Teachers, or SALT.

11 SALT is a national organization of law professors  
12 and law school administrators committed to advancing  
13 teaching excellence, social justice and diversity. That  
14 commitment prompts this statement, in which SALT addresses  
15 concerns that New York's adoption of the UBE would have a  
16 negative impact on efforts to diversify the profession and  
17 hamper law schools' abilities to adequately equip  
18 tomorrow's lawyers for law practice.

19 SALT would like to make four points. First, the  
20 New York bench and bar have long critiqued the bar exam  
21 format and the exam's disparate impact. Second, study is  
22 necessary to determine the impact of adopting the UBE on  
23 bar passage for all applicants and for a particular  
24 subgroup of applicants.

25 Rather than adopt the current UBE, New York

Bryant

1 should work with the National Conference of Bar Examiners  
2 to develop a better licensing exam, and finally, the new  
3 New York Law Examination also requires additional study.

4 First, SALT's written submitted testimony  
5 highlights in footnotes the many prior reports prepared  
6 over more than two decades by a wide range of New York  
7 judges and lawyers that question whether the existing bar  
8 exam format and its narrow focus accurately reflects the  
9 skills new lawyers should possess. They've also expressed  
10 grave concerns about the bar exam's disproportionate impact  
11 on minority applications.

12 Those comprehensive studies and reports mirror  
13 SALT's concerns about both the breadth and depth of the  
14 exam and its disparate impact. Adopting the UBE does  
15 nothing to address either of those concerns. Rather than  
16 adopting the UBE, another version of the same highly  
17 criticized test, New York should take the lead in  
18 pressuring the National Conference to devise a better exam.

19 Point two, study is necessary. Before adopting  
20 the UBE, New York should have a better understanding about  
21 how the UBE will affect the overall bar passage rates for  
22 all takers and whether it will result in exacerbating the  
23 existing disparate impact of the current exam. Because the  
24 UBE counts the MBE as 50 percent of the exam instead of the  
25 40 percent counted by the current New York exam, there are

Bryant

1 reasons to be concerned.

2 New York should examine whether greater reliance  
3 on the MBE scores will lower overall rates of passage and  
4 then whether overall rates of passage will have a more  
5 significant impact on certain subgroups of test-takers.  
6 The July 2014 bar results which many people have referred  
7 to saw a significant drop in MBE scores nationwide and  
8 therefore lower bar passage rates.

9 Should this downward trend in MBE scores  
10 continue, the overall pass rate in New York could be  
11 further negatively affected by the adoption of the UBE,  
12 with its greater reliance on the MBE. Changing overall  
13 pass rates may have -- and we want to stress may have; it  
14 needs testing and study -- a more significant impact on  
15 certain groups of test-takers.

16 For example, while we do not have statistics in  
17 New York about the impact of the 2014 MBE results, in  
18 California the impact of a declining bar passage rate had a  
19 disproportionate effect on African-American and Latino/  
20 Latina test-takers. We do not have statistics available to  
21 compare the declining rates in pass rates in UBE states  
22 with the pass rates in the non-UBE states as a result of  
23 that 2014 decline, but that study should be done.

24 The NCBE should make public those results so that  
25 those considering adopting the UBE, like New York, can

Bryant

1 study to determine the impact of the UBE on pass rates  
2 generally and then whether the UBE increases test score  
3 disparities. I think where we differ with some of our  
4 other colleagues is whether we should go ahead and then  
5 study or whether we should study and then go ahead.

6 SALT takes the position that the studying should  
7 be done ahead of time, joining our colleagues with  
8 LatinoJustice PRLDEF. As early as 1992 New York lawyers  
9 and judges studying the Bar Exam noted that any changes  
10 should be made with an eye towards reducing test score  
11 disparity, so if it's not as bad, then that's not good,  
12 because any change should be about reducing disparity.

13 SALT urges New York to proceed slowly and  
14 cautiously, to ensure that the adoption of the UBE will not  
15 undermine New York's commitment to developing a diverse  
16 bench and bar. Our third point is that rather than  
17 adopting the UBE New York should work with the National  
18 Conference to develop a better licensing exam.

19 This hearing is focused on the UBE versus the  
20 current exam. Implicit in this choice, however, is a  
21 choice that -- the choice to move to the UBE is also  
22 another choice. To move to the current UBE necessarily  
23 means New York is unlikely in the near future to make the  
24 changes recommended by the bench and bar that the Bar Exam  
25 be changed to reflect the skills that lawyers need.

Bryant

1           We know we move glacially. If we make this step  
2 we're unlikely to make others in the near future. SALT  
3 believes New York is in a unique position to encourage  
4 these changes that have been suggested.

5           As Allie Robbins has already indicated, the bar  
6 exam drives law school curricula and assessment methods.  
7 Schools often offer courses tested on the bar whether or  
8 not the school believes that every student should take  
9 them. We encourage our students to take those courses.  
10 Schools' testing often parallels bar exam testing whether  
11 or not teachers view those tests as the best assessment of  
12 student achievement. Despite these pressures, law schools  
13 are integrating more skill development and training into  
14 their curriculum.

15           While the academy moves forward, the bar exam is  
16 mired in the past. Especially in light of the recent drop  
17 in bar pass rates, schools may begin to rethink innovations  
18 designed to better prepare students for practice and revert  
19 to courses that focus mainly on doctrine, tested via high-  
20 speed multiple-choice and bar-exam-style essays.

21           Students fearful of bar exam failure may choose  
22 to take these more traditional courses. New York's joining  
23 the UBE simply entrenches the existing exam and its  
24 overemphasis on memorization of large bodies of doctrinal  
25 knowledge tested via the high-speed multiple-choice

Bryant

1 question. The National Conference recognizes that New York  
2 is influential and New York's imprimatur would go a long  
3 way towards legitimizing the UBE.

4 SALT respectfully suggests that instead of  
5 endorsing the status quo New York is in a unique position  
6 to push for a better test that encompasses a wider range of  
7 skills and testing methodologies. You've heard from others  
8 about possible suggestions that might do that. We've also  
9 included a numerous number of cites in our letter that  
10 suggest alternatives.

11 Finally, for three reasons we think the New York  
12 exam requires additional study. The proposed  
13 multiple-choice questions have not been written, reviewed  
14 or pre-tested. Second, there's no study to assess the  
15 impact of those tests on the test-takers and whether or not  
16 it will have an increase or a decrease on the overall test  
17 scores and the test score disparities.

18 It is possible with the administration of the New  
19 York new exam together with the UBE that the results may  
20 disqualify candidates who previously were qualified to be  
21 admitted, and we need to study that before we go down that  
22 path.

23 So, in short, SALT opposes the move, encourages  
24 innovation, and SALT offers the assistance of the  
25 organization should New York seek to work with the National

Bryant

1 Conference to explore better ways to assess bar applicants  
2 and ensure that the bar exam does not further exacerbate  
3 test score disparity. Thank you.

4 HON. RIVERA: Thank you so much. I wanted to  
5 ask, with respect to the MPT section, do you, does SALT  
6 also share the position of what I heard from the panel from  
7 CUNY Law School, that the MPT really does not test the  
8 kinds of competency skills that New York State should be  
9 concerned with?

10 MS. BRYANT: I think we would say that it's  
11 better than the others because it does more replicate legal  
12 work than the multiple-choice test or the essays, but that  
13 it is limited in the ways that I think Dean Valentine so  
14 aptly expressed.

15 The high-speed quality of it and the failure to  
16 allow an applicant to exercise a more sophisticated  
17 judgment makes it a narrow, imperfect judge, judgment of a  
18 capability of a person to practice, but it's better than  
19 the multiple-choice and essay.

20 HON. RIVERA: I know that you were Director of  
21 Clinical Programs at CUNY for a very long time, very well  
22 respected in the clinical teaching area, so I'm going to  
23 ask this particular question to you not just as the person  
24 from SALT speaking on this. Do you also share the concern  
25 that adoption of the UBE and NYLE sections, the New York

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1 Law Exam section, would have a negative, or a backlash on  
2 curricular changes that have trended towards clinical  
3 teaching? Is that a concern that you share?

4 MS. BRYANT: Yes. It is. I think there's always  
5 a tension that a law school faculty faces when we're trying  
6 to balance and calibrate a legal education that both  
7 prepares students for practice and prepares students to  
8 practice the bar, which we must, and how that, how that  
9 balance gets struck is very much affected by how a school  
10 does, how the graduates of a particular school do on the  
11 bar exam.

12 So if the UBE were to result in fewer bar, less  
13 passage of the bar, or a lower bar passage rate I guess is  
14 the right way to say it, then the balance would be struck  
15 absolutely back, and the changes that we've seen to help  
16 prepare people for practice, I think, would take a second  
17 seat.

18 HON. RIVERA: Thank you. Does any other member  
19 of the committee have questions? No? Thank you.

20 Next is Kevin McMullen, a member of the New York  
21 Bar. Thank you for coming today.

22 MR. McMULLEN: Thank you, Your Honors, ladies and  
23 gentlemen. My name is Kevin McMullen, and I have no  
24 affiliation. I have been in and out of the bar review  
25 business several times over the decades, but I don't do

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1       that now, so I can speak more frankly than Joe Marino or  
2       Joe Pieper. As a matter of fact, my plea today is you save  
3       me from making a lot of money preparing bar review  
4       materials for the new UBE and for helping to organize a new  
5       private bar exam on New York law.

6               I have a thesis that the State of New York should  
7       not adopt the UBE because a generic examination cannot  
8       certify that a candidate is competent to practice law in  
9       New York, so you can see I'm entirely out of step with  
10      today's aggregation.

11             I have four contentions. First, to practice law  
12      competently in the State of New York an attorney must have  
13      a precise knowledge of the law of New York. Second, the  
14      competent practice of law in an international or global  
15      setting also requires a precise knowledge of New York law  
16      because the effective, the effective local, the respective  
17      local laws, including New York, will be factors in the  
18      representation.

19             Third, the bar examination in New York law is  
20      superior to any generic examination in determining  
21      consideration of competence to practice New York law, even  
22      with the mini test appended.

23             And fourth, the adoption of the UBE will give  
24      rise to additional, but private, bar exams for candidates  
25      to demonstrate their competence, returning then to my first

1           contention, to practice law competently in the State of New  
2           York the attorney must have precise knowledge of the law of  
3           New York.

4                        Law is a discipline which can be known only  
5           precisely or not at all. Let me give some examples: The  
6           grounds for divorce, the procedures for foreclosing a  
7           mortgage, the statutes of limitations for personal injury,  
8           medical malpractice and wrongful death, the method of  
9           pressing and resisting a cause of action, a notice of  
10          claim, which municipal defendant to sue, what are the  
11          discovery devices, a motion for summary judgment, et  
12          cetera, et cetera. Right?

13                      Different jurisdictions may employ the same  
14          concepts, but they have differences in forms, terminology  
15          and timing. A generic bar exam cannot fairly test this.  
16          It could test things like, you know, common-law marriage,  
17          which we abolished in the 1930s, so New York should have,  
18          require precise knowledge demonstrated on a New York exam,  
19          which brings me to the second question which, you know, has  
20          been raised lately.

21                      The competent practice of law in an interstate or  
22          global setting also requires a precise knowledge of the New  
23          York law, because the respective local laws, including the  
24          law of New York, will be factors in representation. A  
25          lawyer cannot represent a client competently in a matter

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1 crossing jurisdictional boundaries unless he knows his own  
2 jurisdiction's law as well.

3 Let me give you some examples of this principle  
4 that you need the local law in each case. Back when I was  
5 in the LL.M. program at NYU, the course in international  
6 decedent and estate administration presupposed a knowledge  
7 of the law of decedent administration in New York.

8 We all know that an attorney admitted pro hac  
9 vice has to associate himself with a local attorney, and  
10 the American Foreign Law Association learned that a U.S.  
11 firm engaged in a transnational negotiation of a contract  
12 will employ local counsel in the other country and vice  
13 versa, and that a foreign office of a New York firm may be  
14 headed by a US lawyer, but the bulk of the staff is going  
15 to be local personnel versed in the local law. Right?

16 Thus, since the law of New York will be a factor  
17 in global representation, even in that context you have to  
18 have a precise knowledge of New York law, which turns us to  
19 the bar exam. My third contention is that a bar  
20 examination in New York law is superior to a generic  
21 examination in determining a candidate's competence to  
22 practice law in New York.

23 Since the volume of law in New York has become  
24 grotesque -- and it is grotesque -- it's more important  
25 than ever that a candidate be tested thoroughly on New York

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1 law, and a bar exam both enhances, enhances as well as  
2 tests his competence. It enhances his competence because  
3 by preparing for the bar exam a bar review course will  
4 clarify and organize all the disparate notions that the  
5 candidate acquired in law school.

6 In 1972 I knew twice as much at the end of the  
7 bar review course as I had at graduation because of the  
8 necessity to prepare for the exam. Later, while being  
9 charged with essay grading for various bar review courses,  
10 I found that on the first essay test the average score  
11 would be about 27 percent. By the time of the last essay,  
12 the average score would be about 60 percent, now that  
13 students realized they had to focus on the New York law.

14 A bar exam tests the knowledge so that the more  
15 questions about New York law you have, the better the exam,  
16 all other things being equal, so the traditional exam,  
17 which tested New York law for two days, is superior to the  
18 current exam, and the current exam would be superior to the  
19 UBE. Even with the mini test of 50 multiple-choice  
20 questions on New York law, the UBE can't be the equivalent  
21 of that kind of test.

22 In fact, preparing for the UBE will distract  
23 students' attention and time away from New York law. As  
24 Dean Patricia Salkin of Touro observed when wanting the  
25 exam delayed, you have an entire crop of graduates, law

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1 students this year, and you're basically telling them that  
2 the bar exam you thought you were taking is going to change  
3 just before you graduate.

4 In other words, the students were paying too much  
5 attention to New York law to do well on the UBE, and of  
6 course a mini test of one hour, 50 multiple-choice  
7 questions, of which a student is probably only going to  
8 have to pass 30, is no substitute.

9 My friend Tom Principe of Kramer Dilloff told me  
10 last week at his firm they consider it a sham. If I were  
11 hiring associates or engaging a lawyer to represent me,  
12 which has happened, I wouldn't consider anybody who took  
13 just the UBE with that mini exam to be competent to  
14 practice law in New York and represent me or be hired.

15 This brings me to my fourth contention; that is,  
16 the adoption of the Uniform Bar Examination would give rise  
17 to an additional but private bar examination for candidates  
18 to demonstrate their competence. Private companies such as  
19 bar review courses can easily do this. You can draft,  
20 administer and grade an alternate bar exam, a private bar  
21 exam, and provide the professionals for the test prep  
22 courses for it.

23 The logistics are both obvious and manageable.  
24 When would you give it? At the end of the summer, after  
25 the regular bar exam, with time for more classes. You get

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1 the questions from the existing material, past bar exams  
2 and recent cases out of the Law Journal. I've been  
3 clipping cases out of the Law Journal for months.

4 You would recruit the personnel to be authors and  
5 lecturers and graders and so forth for the people you've  
6 already used for the bar review programs and the CLE  
7 programs that these people all run now. Over the years  
8 I've recruited at least 25 people to be CLE lecturers. Of  
9 course, I've met others when lecturing myself.

10 The exam could be two days, 12 essays, all in New  
11 York law. As this program goes on you could add multiple-  
12 choice questions. As to venues to hold the exam, a number  
13 of private high schools in New York City would be happy to  
14 rent you the space for those two days. My one fear is that  
15 the law schools will preempt us by creating their own  
16 optional comprehensive examinations.

17 Now, comprehensive examinations aren't unusual at  
18 the graduate level. I've taken one, and what they can do  
19 is say, to prove how well you are competent to practice law  
20 in New York, you don't have to do this, but for an extra  
21 fee at the end of the summer you can take a test just in  
22 New York law, not necessary for the degree, but you can  
23 pass or fail it and we will have extra classes to get you  
24 ready for it.

25 The school can actually use as instructors and

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1 authors and graders and so forth the people such as the  
2 adjunct professors they've had to lay off as enrollment has  
3 shrunk, and they would fill up particular subjects with  
4 existing faculty members or retired members. Dick Farrell  
5 of Brooklyn Law School would certainly be competent to  
6 teach the six hours in evidence, for example.

7 As to bar review courses, I've already made a  
8 mental list of different people I know that have given a  
9 CLE lectures for us or graded for us, their specialties and  
10 what they could teach.

11 Now, I'm not saying the bar exam is the end to  
12 proving competency and fitness. God knows there are a  
13 great many problems with the curriculum in law school, such  
14 as practical skills, and they have to be addressed. It was  
15 scandalous. We came out of law school, had never seen a  
16 will or a contract or a deed.

17 At the same time, I'm a great believer in  
18 continuing legal education. In the two-year cycle I have  
19 reported as many as 149 hours of CLE credits. I reported,  
20 I think, 104 the last time. I'm a great believer in it,  
21 because we didn't learn it in law school and you have to  
22 pick it up somewhere. My dream is that by the time I  
23 retire I will be competent to be a paralegal. I'm finished  
24 and I hope there are questions.

25 HON. RIVERA: Thank you. Thank you. I

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1 appreciate your candor and your comments. Anyway, as I was  
2 listening to your comments, let me ask you, you had  
3 admitted at the very end that your critique is really  
4 targeted at law schools if indeed the New York State Bar  
5 Exam increases, taking the bar exam course increases your  
6 chances of passing the bar exam.

7 MR. McMULLEN: Oh, certainly. I had a full  
8 scholarship to law school, so I didn't --

9 HON. RIVERA: But I didn't give you my question  
10 yet.

11 MR. McMULLEN: I didn't pay a cent for my JD, and  
12 I've always felt I got my money's worth.

13 HON. RIVERA: So my question is, given that,  
14 really, your concern is whether or not lawyers that are,  
15 that pass the bar exam are indeed competent to serve  
16 clients in New York and that adopting the UBE would mean  
17 that law schools would focus less on preparing students to  
18 do that, it sounds to me a little bit that the response to  
19 that is in part that it's what drives the market, so that  
20 the employers have an expectation that their future  
21 employees know New York law in addition to having passed  
22 the bar exam, really know New York law, that that's the  
23 measure that goes back, I think, to the point of what the  
24 other people testified to today, that that's what drives  
25 the market, that drives the curriculum, that drives the

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1 employment sector, more than your point about whether or  
2 not the UBE --

3 MR. McMULLEN: You would think. I think more now  
4 than it was when I was a student, but yes, is there a,  
5 there's a great surplus of lawyers, and with the UBE and  
6 with mobility we will have even more in New York. People  
7 will be desperate -- some of them already are -- to  
8 distinguish themselves.

9 You know, I go to the international law  
10 convention every year, and we've had people get up and say,  
11 I have my JD, I've got an LL.M., I have language skills, I  
12 cannot get a job, I'm \$200,000 in debt. People need  
13 something to distinguish themselves, and this will be, a  
14 private bar exam would be the way to do it, also for the  
15 employer's point of view.

16 I'm inundated at the firm, let's say, with  
17 applications. How do I distinguish them? Right? How do I  
18 move them into different piles? One is to remove New York  
19 law schools from schools from out of state, but that's too  
20 crude. How about somebody coming in and saying, Joe Pieper  
21 gave a New York bar exam for two days and I got 80 percent  
22 on it and half of my class didn't have the courage to take  
23 it.

24 HON. RIVERA: Well, but that would be the case  
25 now. Judge -- I'm sorry -- Dean Anderson.

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1 MS. ANDERSON: What's to prevent commercial bar  
2 review courses or law schools from engaging in exactly that  
3 behavior in the status quo?

4 MR. McMULLEN: Which behavior?

5 MS. ANDERSON: That they're going to create their  
6 own kind of hyper bar exam that's much more rigorous and  
7 intense than the bar exam that's currently given for New  
8 York and in order to distinguish students, to provide them  
9 with an additional credential.

10 I guess I'm skeptical about the incentive  
11 structure you opined, that a shift to the UBE would suggest  
12 that in order to additionally credential students that they  
13 have students stand out, that they would, that either the  
14 commercial bar reviews or the law schools would develop  
15 their own bar exams.

16 I'm skeptical about that, particularly given that  
17 they could do that under the status quo and no one has  
18 attempted it.

19 MR. McMULLEN: But you see, from their point of  
20 view, the point of view of the students, the situation  
21 would be worse under the UBE, because they would have less  
22 of a certification that they're really competent to  
23 practice in New York. When Tom Principe -- I think you  
24 know him, Judge Prudenti.

25 HON. PRUDENTI: Yes, I do.

Miller

1           MR. McMULLEN: -- from Kramer Dilloff was talking  
2 to me last week he said a prospective associate would be  
3 silly to come in and say, well, of course I need a license,  
4 I did so well on the exam and I took this 50- question New  
5 York section of it, and boy, I got 45. The shrewd  
6 candidate would come in and say, oh, God, it's so  
7 embarrassing, I know we weren't really tested on New York  
8 law. I mean, that little 50-question exam, I wish like the  
9 old days, but listen, I -- you test me. Give me a problem  
10 and I'll show you what I can do in New York law.

11           And he's, uh, I don't know what people in power  
12 are thinking, sir, but listen, I couldn't help that, I  
13 don't decide what the bar exam is, give me something to do  
14 to show what I can do.

15           HON. RIVERA: Any other questions from the  
16 committee? Thank you, Mr. McMullen.

17           So our last speaker today -- we're very pleased  
18 to welcome him -- is Jeremy Miller, a 2L student. We  
19 finally have a 2L in the room to speak to us. We're happy  
20 to hear from you. A 2L student from Touro Law Center and  
21 Student Assistant for the New York State Bar Committee on  
22 Legal Education and Admission to the Bar.

23           MR. MILLER: Good afternoon. My name is a Jeremy  
24 Miller, and I am a second-year law student at Touro Law  
25 School. I would first like to thank the Uniform Bar Exam

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1 Committee for this opportunity to speak on the critical  
2 issue of whether New York State should adopt the Uniform  
3 Bar Exam.

4 Over the last six months I've had the privilege  
5 to contribute to the New York State Bar Association  
6 Committee on Legal Education and Admission to the Bar as a  
7 student assistant. Having a seat at the table with  
8 prominent stakeholders, including bar leaders, law school  
9 deans, professors and practitioners, has been invaluable in  
10 developing my own opinion on the ultimate issue.

11 Making a major change to the requirements for  
12 earning a license to practice law in New York must be  
13 deliberate, and all stakeholder should be a part of the  
14 debate, especially law students. While I am only one  
15 student and many others will have different opinions, I'm  
16 honored to provide my insight.

17 When I heard about the proposal to adopt the  
18 Uniform Bar Exam in New York I initially became excited,  
19 like most other students, about the idea of having a  
20 portable license to practice law. On its face the idea  
21 seemed appealing. In October Diane Bosse, who chairs the  
22 New York State Board of Bar Examiners, spoke at Touro and  
23 before the committee.

24 Ms. Bosse's excellent presentation provided  
25 specifics on how the UBE would be implemented in New York.

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1 Even though Ms. Bosse provided compelling arguments in  
2 favor of adopting the UBE, I still had my concerns. First  
3 and most importantly is the idea of portability and the  
4 value it brings to New York law students.

5 After looking past the headlines, the notion that  
6 earning a passing score on the UBE would result in a  
7 portable score became less appealing. Currently, five of  
8 14 jurisdictions that have adopted the Uniform Bar Exam  
9 also require a student to pass their own state-specific  
10 component. New York would also require a state-specific  
11 component.

12 This is a hurdle that students must overcome in  
13 order to practice law in those jurisdictions in addition to  
14 passing the UBE. However, students may not immediately  
15 know if they want to practice law in another state that  
16 offers the UBE. Even though a student could take a  
17 state's, the state-specific component separate from the  
18 exam, another state might not accept the student's score.

19 For example, a student may score a 268 in New  
20 York, which would satisfy the UBE component under the  
21 proposal, but would not be a passing score in the majority  
22 of the UBE jurisdictions, including Arizona and Colorado.  
23 In addition, a student may not realize that he or she wants  
24 to practice law in another jurisdiction until the score  
25 becomes stale.

1           UBE jurisdictions currently accept scores between  
2 two and five years from when the exam was administered.  
3 Finally, students may not be willing to live and practice  
4 law in jurisdictions that currently offer the UBE. Alabama  
5 and New Hampshire are the only states east of the  
6 Mississippi River that have adopted the Uniform Bar Exam.

7           Second, law schools have taught their students  
8 either New York Law or New York distinctions, which makes  
9 complete sense. If a student intends to practice law in  
10 New York they need to know the New York laws. A reasonable  
11 presumption is that a majority of students who attend law  
12 school in New York intend to practice in New York.  
13 Therefore, students should be tested on the New York rules  
14 and not general principles of law.

15           For example, trusts and estates is governed by  
16 the EPTL in New York, but the UBE tests the Uniform Probate  
17 Code. The code has no authority in this state. In fact,  
18 the Uniform Probate Code has been adopted in its entirety  
19 by nine of the 14 UBE jurisdictions.

20           Consequently, students will be required to take  
21 and pass an exam on law they had not studied in law school  
22 and that would not be applicable to practice. Third, many  
23 law students have already chosen which bar review course  
24 they will take. Students have the unique opportunity for a  
25 majority of their courses to lock in a reduced price during

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1 their first year of law school.

2 Even though national bar review courses may have  
3 experience with the Uniform Bar Exam, some of the local  
4 courses may have little to no experience with the exam.  
5 Therefore, students who have already chosen a local bar  
6 review course will be at a disadvantage for two reasons.

7 First, some students will be subjected to a trial  
8 run of the UBE review. The bar review company should be  
9 given more time to fully prepare for the UBE. Second,  
10 students who use the local courses should not have to deal  
11 with the stresses associated with taking a course that may  
12 not have a great deal of experience with the UBE.

13 Students have spent upwards of \$150,000 for the  
14 opportunity to practice law. The bar exam is stressful  
15 enough, but a bar review course is meant to help place  
16 students in the best position to pass the exam. I do  
17 believe that parts of the proposal could be implemented in  
18 New York.

19 When Ms. Bosse spoke at Touro I was very  
20 intrigued when I heard the details of the New York Law  
21 Exam. A portion of the exam should include specific points  
22 of law without an extensive fact pattern to test if the  
23 student knows the fundamental law that all practicing  
24 attorneys should know.

25 In sum, I believe that the State of New York

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1 should not adopt the Uniform Bar Exam. However, if the  
2 Court of Appeals does in fact adopt the UBE I hope that the  
3 Court considers delaying implementation until the July 2018  
4 administration.

5 If the Court delays implementation until the  
6 incoming class begins their studies this fall, law schools  
7 and individual law school professors would have a clean  
8 slate to appropriately adjust their curricula and syllabi  
9 to reflect what is tested on the UBE. Bar review courses  
10 would have time to properly adjust their course content.

11 Lastly, current students would not have to deal  
12 with the stress associated with the mismatch between  
13 learning New York law in law school while being tested on  
14 uniform principles by the bar exam. I believe it would be  
15 unfair to the current students if the court adopted a new  
16 exam when we were under the impression since day one that  
17 we would have to pass the New York bar exam in order to  
18 practice law in New York. Thank you.

19 HON. RIVERA: Thank you so very much, and thank  
20 you for waiting to speak to us. It's good to have somebody  
21 who's actually got to deal with the decision here, either  
22 way, by the Court of Appeals in the sense of taking the  
23 exam.

24 I have a question for you. I understand your  
25 points about the portability. Certain people suggested

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1           that because New York is so significant and has such great  
2           impact nationally that New York's adoption of the UBE might  
3           have a ripple effect and that -- or a domino effect or a  
4           ripple effect -- that other jurisdictions would then adopt  
5           the UBE. Might that influence the way you've been thinking  
6           about the portability?

7                       MR. MILLER: I think it would influence me if we  
8           knew that certain states, preferably Northeastern states,  
9           were going to adopt the Uniform Bar Exam. I don't think  
10          it's in the best interest of the state to go and under the  
11          notion or the belief that other states might follow,  
12          because what if they don't?

13                       We've lost -- the students are not being tested  
14          on New York City rules specifically. They're being tested  
15          on general principles of law, which in practice doesn't do  
16          much. It just gives a way for students to be tested. And  
17          I believe that, yes, if you could have Massachusetts, New  
18          Jersey, Connecticut, all the surrounding states of New  
19          York, potentially talk about adopting the Uniform Bar Exam,  
20          then yes, there would be some -- portability would be  
21          promoted, but under the current system it doesn't seem like  
22          it is.

23                       HON. RIVERA: I would think that also -- and I  
24          just want to see if you agree with me, based on your  
25          experience at Touro that New-York-based schools whether or

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1 not the UBE is adopted focus on, as you say, New York law  
2 and will continue to do so, because their mandate is to  
3 prepare students to practice law in New York State, so  
4 they're focusing on lawyering in New York. You're the  
5 consumer. You're looking to practice in New York.

6 So I'm just wondering how realistic the concern  
7 is that moving to the UBE would mean that there won't be an  
8 appropriate focus on preparing students to practice as New  
9 York lawyers.

10 MR. MILLER: I think it would take away from all  
11 the time that teachers must, professors must spend on  
12 teaching students general principles of law.

13 Instead of noting what the Uniform Probate Code  
14 is or what other areas of law would be tested on the UBE,  
15 the professors would have to stray away from what's really  
16 important and what is being tested, what is being practiced  
17 in New York, so if teachers, if professors were, had to  
18 teach students more in depth than what the UBE covers, I  
19 believe that they wouldn't have the time to test as in  
20 depth what New York requires.

21 HON. RIVERA: Thank you. Hannah?

22 MS. ARTERIAN: Yeah, I -- you know, I guess I'll  
23 see you later at the committee meeting. You know, I'm, I  
24 appreciate the fact that you begin by saying this is my  
25 view from my experience and whatever. I don't think it's

Miller

1 true that every law school in the State of New York really  
2 just like focuses as heavily as it has been your experience  
3 on getting people ready to take the New York Bar Exam. I  
4 think the other -- let me just finish, if you don't mind.

5 MR. MILLER: No. Of course.

6 MS. ARTERIAN: I tend to think of the core  
7 courses in law school as the building blocks of legal  
8 literacy for any lawyer no matter where they're going to go  
9 and what they're going to do. That isn't to say that, you  
10 know, you can't have courses that are New-York-bar-  
11 directed, directed at the New York bar, and I think, I'm  
12 sure most law schools do that, but it's troubling to think  
13 that your sense is that, your experience is I will feel  
14 like, you know, I've prepared myself for one bar exam, and  
15 you're just in your second year of law school and this  
16 proposal came out, you know, in whatever it was, October.  
17 It's a little troubling.

18 At least it's troubling in the sense I'm  
19 concerned about the law schools in the state and how hard  
20 it would be for the law schools to, you know, take into  
21 account what the differences might be, and I do think law  
22 schools that do focus very heavily on New York law will be  
23 very advantaged in a number of ways in terms of placement  
24 opportunities for the students, and there are all kinds of  
25 market things out there, but you spoke really well and I'm

Miller

1           delighted that you're helping our committee. Thanks.

2                   HON. RIVERA: Any other questions from the  
3 committee members? Thank you so very much.

4                   MS. ARTERIAN: Thank you.

5                   HON. RIVERA: Thank you for everyone today who  
6 provided testimony. The committee is most grateful and  
7 very appreciative. We have your written testimony and we  
8 will read it and if we have questions we will reach out to  
9 you. The public hearing is adjourned. Thank you.

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