[redacted]

From: Jalik Parham [redacted]
Sent: Wednesday, November 12, 2014 9:44 PM
To: Uniform Bar
Subject: Bar Exam Changes

To Whom It May Concern:

I am law student at St. John's School of Law and I intend to take the Bar Exam during the July 2016 administration. I hope that the UBE is adopted in NYS. I believe if NY adopts the UBE, the majority of the country will follow. I appreciate the fact that I would have the ability to move to other states in the future and be able to practice without too many impediments.

Thank you for your consideration,

Jalik Parham

--
Jalik Parham
[redacted]

[redacted]

From: Antigone Curis <[redacted]
Sent: Wednesday, November 12, 2014 10:01 AM
To: Uniform Bar
Subject: Opposition to UBE

To Whom It May Concern,

My name is Antigone Curis. I am a 2014 law school graduate and have just passed the New York State Bar Examination. I am strongly opposed to the New York Court of Appeals adopting the UBE in this jurisdiction. I along with thousands of my colleagues have worked vigorously to achieve passing the New York State Bar Examination. We have dedicated tireless hours and years of our lives in law school to New York practice and procedure. New York has a distinct set of rules and laws, which makes New York unique to other states.

My fear is that if this bar exam becomes uniform it will compromise the value of a New York license as its appeal and value will be unjustly diminished with out a doubt. Furthermore, this has larger implications in terms of damaging the entire legal profession as a whole. If there is one uniform bar, the difficulty level of the entire exam may very well go down leading to reduced barriers to entry in the legal profession and further saturation in the legal market.

As a new lawyer I feel passionately about this issue and feel compelled to voice my opposition to this detrimental proposal. This is a serious issue and of grave concern to me as it should be to you. This is not a proposal to be taken lightly or adopted out of sheer convenience. This proposal has very real and negative consequences. As a new lawyer, I would expect that the Court of Appeals protect this noble and prestigious profession and refuse to adopt the Uniform Bar Examination.

Sincerely,

Antigone Curis

[redacted]

From: Joan Hannon
Sent: Wednesday, November 12, 2014 11:20 AM
To: Uniform Bar
Subject: Uniform Bar Exam

I know this is late, but I hope you'll read it anyway. I am a Law Clerk to a New York State Supreme Court Justice. I, therefore, see a papers prepared by attorneys admitted to the New York State Bar every day of the week. Oftentimes those papers show a disturbing lack of understanding of New York law, especially New York procedure. Presumably, the attorneys have taken New York Practice either in law school or in their bar-review classes because it is tested on the New York State bar exam. The Uniform Bar Exam would eliminate much of the testing of New York law. I do not think that 50 multiple-choice questions are sufficient to cover New York law in general and New York practice in particular. Although it is laudable that you wish to make it easier for attorneys to come to New York from other states and vice versa, I fear that the Uniform Bar Exam will open the floodgates to attorneys with little or no understanding of how to practice in New York. The goal of the bar exam is not to provide law school graduates with portable employment, but to protect the public from attorneys who are unscrupulous or incompetent, or both. A bar exam with de minimus testing in the law of the state in which prospective attorneys are going to practice does not meet that goal.

[redacted]

From: MARGARET WILLIAMS <[redacted]
Sent: Thursday, November 13, 2014 11:02 AM
To: Uniform Bar
Subject: Uniform Bar Exam

If I understand correctly, if New York adopts the UBE, test takers will not need to know anything about New York's BCL, CPL, CPLR, DRL, EPTL, or GOL to pass the exam. Although I understand the reasoning behind portability, given the small number of law school grads who would move to other UBE states during the limited time frame, I believe the benefits of the UBE are outweighed by the harm it could do to law school graduates' employment opportunities in New York. I say this based on personal experience.

I would have been at a significant disadvantage if the UBE existed when I took the New York State Bar Exam. I was a part-time evening law student with a full-time job, so I had little legal experience on my resume. Prior to admission, my first job was in an employment law firm. I did not enjoy employment law. I wanted more client interaction. Shortly after admission, I got a job in a matrimonial and family law firm. The firm was actually seeking an attorney with more experience, but they agreed to interview me. Since Domestic Relations Law was tested on the New York State bar exam, the firm knew I was well versed in the law. If the UBE existed at that time, I would not have taken Family Law in law school. If I had not taken Family Law in law school, and the subject had not been bar tested, the firm may not have hired me. Although that may be speculation, I have a recent experience that bears noting.

I recently had a pro bono matrimonial case where I realized I needed to consult Estates Powers & Trusts Law. If the EPTL was not bar tested, I might not know the importance of referring to in this case.

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[redacted]

From: Stephen Muff <[redacted]
Sent: Wednesday, November 19, 2014 2:02 PM
To: Uniform Bar
Subject: Uniform Bar Exam Public Comments

To Whom It May Concern:

I would like to add a comment about the Uniform Bar Exam's use in New York. Firms with overseas offices frequently ask attorney applicants if they have passed the New York bar exam because it is an important financial center. New York already has reciprocity with 37 other jurisdictions, including many (if not all) UBE jurisdictions. Someone could use the UBE to obtain reciprocity already, but they have to jump through hoops to do so. Streamline the process and adopt the UBE; you can still set the passing score.

Sincerely,

Stephen Muff

[redacted]

From: Piazza, D'Addario & Frumin, Esqs. <[redacted]
Sent: Friday, December 05, 2014 3:21 PM
To: Uniform Bar
Subject: UBE

Being direct and straightforward, the proposed change to a uniform bar exam is disappointing. There is no reason to modify the long standing test for admission to the NY state bar. Changing to a uniform nationwide exam will serve no purpose except to negatively impact this profession. There is an abundance of attorneys at the present time with a shortage of jobs and to universalize the admission requirements would result in a further daunting effect.

Wake up and leave well enough alone.

Piazza, D'Addario & Frumin, Esqs.
Attorneys at Law
824 Manhattan Avenue
Brooklyn, New York 11222
Tel: (718) 389-0240
Fax: (718) 389-5542
Email: pdfattorneys@aol.com

[redacted]

From: Marcin Tustin <[redacted]
Sent: Wednesday, December 31, 2014 9:34 AM
To: Uniform Bar
Subject: Replace the MBE with the UBE

Dear Judge Rivera,

I am a member of the New York bar who took the exam last year. I am also enrolled as a Solicitor to the Senior Courts of England and Wales.

The state-law component of the bar exam is probably the major reason that newly admitted lawyers have a base of specific knowledge of state law. ABA approved law schools are not required to impart any specific base of knowledge regarding state law. If the amount of New York specific knowledge is reduced, new lawyers will likely know less about New York state law, and in consequence will find it more difficult to form a concrete, practical understanding of state law once in practice.

The purpose of requiring a JD (or one of the other routes to exam eligibility which New York wisely permits) is to test facility with general principles of law. The MBE also purports to test the same ability. To introduce a third component testing general abilities would be not just duplicative, but triplicative.

The MBE itself is a highly flawed test. It primarily tests the ability to recall the largely fictional body of law on which the exam is based. As a multiple choice test, it is highly dependent on practice of the questions and technique, to learn the specific key words and phrases employed by the examiners.

The benefit of the UBE as a replacement for the MBE would be to provide a portable, fair, and meaningful test of the same things that the MBE and a JD purport to test. In so far as the UBE provides scope for more skills-based testing, similar to the MPT it would be valuable as a measure of readiness for practice, and avoid duplication of the other testing regimes to which bar candidates are subject.

To reduce the state law components of the exam would be a disservice to both lawyers and the general public. Replacing the MBE with the UBE provides the opportunity to make the bar exam process much more meaningful.

Yours sincerely,
Marcin Tustin

--
Marcin Tustin
Tel: [redacted]

[redacted]

From: Don Nenninger Jr [redacted]
Sent: Friday, January 02, 2015 6:05 PM
To: Uniform Bar
Subject: UBE Comments

Dear Committee:

Thank you for the opportunity to comment on the possible switch to the UBE. I offer my complete support to this proposal and the earlier the better.

I am a member of the class of 2017 and the ability to crosd-liscense immediately should have already been implemented by now. New York law school graduates are losing opportunities that are going to other students/

There is no advantage to the status quo.

Thank you for the opportunity to comment and your efforts.

Respectfully,

Don Nenninger

[redacted]

From: Mark Snyder [redacted]
Sent: Sunday, January 11, 2015 3:31 PM
To: Uniform Bar
Subject: UBE proposal

To the Committee:

Thank you for the opportunity of presenting some remarks regarding the proposal to adopt the Uniform Bar Exam in NY.

I am a member of the NY bar in good standing for 35 years, 30 of which I have devoted at least in part to working with candidates to the NY bar. Accordingly, I feel it incumbent upon me to comment on the proposal.

I have been tutoring bar candidates one-on-one for about 15 years and having retired from practice 2 years ago now tutor as my full-time occupation. While I primarily tutor NY, I have tutored many students for the UBE over the recent years. As an aside, I guess I acquired a good enough reputation as a UBE instructor in that I recently turned down a quarter of a million dollars to teach the UBE to one student -- the student's benefactor insisted I work as an employee on his payroll while doing so which I refused to do.

I obviously love NY law and the unique aspects of law tested by the NY bar, otherwise I would not have devoted so much of my life to this enterprise. I will suffer the loss of a lot of personal joy should the NY bar cease to exist as we know it. Also, I think the exam to be the greatest challenge of professional knowledge and skill in existence.

However, based on my 30 years of experience teaching the NY bar, I must say I support the proposal to adopt the UBE in NY.

The challenge of the NY bar has to be considered in the enlightened perspective of what this rite of passage is designed to achieve. If 95% or more of the students forget the substance of what they struggled to learn in such short order, what have we gained as a profession when contrasted with the great opportunities presented by portability.

This leads to a larger question of the nature of this rite of passage in general. It may be more closely parallel to the tests of manhood faced by Cherokee or Cheyenne youth than to what today we consider more civilized approaches to the line of demarcation we place as a landmark to the coming of age.

There is an aspect of cruelty and even sadism to which we are subjecting our children in their quest to join our profession. It is a passage by fire. I have seen too many students develop serious and even life-threatening physical and mental illness in reaction to the severity of this exam.

As I grow older, the more objectionable I find imposing harm on our children when lawyers in Canada and England can learn their professions as they become introduced into practice and the results appear are no less notable than our own.

The UBE is a generic, law-school rooted test no less a rite of passage but not invoking similar trauma.

Let's abandon the life-long scars of adulthood the NY bar inflicts on our youth in favor of the hale and-hearty welcome with which we should greet our progeny who become our brother and sister colleagues.

Thank you again for this opportunity to comment.

Sincerely,

Mark

Mark H. Snyder
[redacted]
Doraceus@aol.com
718-593-2471

[redacted]

From: Helenkaye Burke [redacted]
Sent: Friday, January 16, 2015 4:40 PM
To: Uniform Bar
Subject: UBE

Good Day,

New York should change over to the Uniform Bar Examination because the current test is not comprehensive, nor does does it tell future employers whether or not the students have integrity or are committed to the practice of law. In consideration of this change, New York should consider the actual purpose of a bar exam. Here are few reasons that I support this change.

1. The New York Bar exam is cumbersome. Due to the large volume of information being tested, and time constraints, it does not show the best possible answers that students could provide.

As of today, the New York bar exam has become a tool used to announce to the world that the student is able to pass a rather difficult examination as opposed to a tool used to identify someone who is a qualified, and committed to the practice of law in the state of New York. This is because given the time constraints and the massive volume of information which students are required to learn, in order to pass the NY bar exam, the answers which are received by the board are not indicative of the students true abilities.

The New York bar exam is not comprehensive because though it tests a huge volume of the law, it does not test a student's actual ability to interpret the law; The test is mainly one of memorization.
Furthermore, if a student was able to complete an ABA law school program, this student given enough time, could easily present a coherent argument on any area of the law. However, due to nerves, anxiety, and cost effectiveness of bar prep programs, students are placed in a rather untenable position that does not necessarily show the board whether or not they are in fact truly knowledgable on the law.

2. Community Service
Students who are committed to the practice of law, may not necessarily know every field, however, they are very knowledgeable in the areas which they are passionate. Additionally, though many students are able to pass difficult examinations, this does not tell the board that the student is committed to public service or is passionate about any particular field.
Recently New York implemented a requirement that students complete at least 50 hours of pro bono service to the state prior to being admitted. This change suggests that the board may in fact want the students who are committed to serving their community, as opposed to only being able to pass a rather difficult examination.

3. Memorization as opposed to legal interpretation
In practicing law, an attorney must ensure that they have completed research on the case which they are working. The law is constantly evolving and as such, an attorney is not likely to present any legal issue based on memory. Therefore, the most important part of the bar exam is the MPT, because this is the only portion in which a student is given new information and has enough time to present an argument in a coherent manner. This portion of the exam, is not based on memorization but rather on the students true ability to understand and interpret the law;

The Uniform Bar examination has two MPT's as opposed to one. As such, the UBE presents the board with a clear indication of the whether or not a student is able to make coherent legal arguments, as opposed to the

memorization which bar exams programs such as barbri, have instituted as part of their training process to take the bar.

4. Transferability
The student who takes the UBE in New York but is unable to meet their score point average, may begin their legal career in one of the 14 states which have already accepted the UBE. This enables the student to work and gain experience which is valuable to young attorneys', who are usually financially strapped prior to graduation from law school.

The effectiveness of the current bar examination, is lost upon many students who are in fact knowledgeable on the practice of law, and able to make significant contributions to the state of New York. The main purpose of a bar exam is to test the students knowledge, understanding and ability to interpret the law. As such the MPT is the most important portion. Currently the MPT is tested twice for the UBE as opposed to once. This makes the UBE a better standard for the purposes of testing a students ability to be an effective attorney. Finally students are often financially strapped upon their exit from law school, and UBE gives them the flexibility to seek employment in other states if they do not meet the New York score point.

For the foregoing reasons, New York should change over the Uniform Bar Examination.
--

Helenkaye Burke

[redacted]

From: Jendayi Saada [redacted]
Sent: Wednesday, January 21, 2015 2:09 PM
To: Uniform Bar
Subject: Consideration of the UBE in NY

Dear Advisory Committee Members:

I appreciate the opportunity to weigh in on your consideration of the UBE for the state of New York. I do not reside in NY, nor am I barred in that state; however, there is one concern that I have about states adopting the UBE from a broader perspective. My concern arises out of the amount of control the National Conference of Bar Examiners will be able to exert over various state bar examinations and the examination process.

Relationship Between the NCBE and Law Schools

Last year, the NCBE sent a letter to state bars indicating that they were considering moving the MBE portion of the bar exam up to the middle of June for the July bar exam, and the middle of December for the February exam. As an administrator of my school's bar prep programs, I can tell you that the NCBE never contacted our school (or others possibly) to discuss what impact a move of that significance might have on our educational programs or our students. Additionally, the NCBE sent a letter to state bar examiners last year notifying them that the NCBE would no longer release raw score data for the MBE portion of the bar exam because they did not believe that this information was particularly useful to anyone. Again, the NCBE did not discuss this change with bar program administrators at law schools. In fact, we do use this information to help use determine our students' strengths and weaknesses and to make proper program changes. Law schools have an increasing burden of insuring students pass the bar exam on the first attempt to attain or maintain ABA accreditation. In order to do that, it is imperative that we have adequate time for test preparation and adequate data to assess our students needs and our programs' effectiveness.

Currently, most state bar examiners generously provide released exams and relevant statistics to law school so that we can prepare our students. My concern is that if the NCBE is able to control the bar exam for a majority of the states, they will be emboldened to continue to make impactful decisions about the bar exam without getting input from local state bar examiners, law schools, law school bar prep programs, or the students who benefit from them.

I hear and I forget. I see and I remember. I do and I understand.

Confucius
Chinese philosopher & reformer (551 BC - 479 BC)

Thank you for your time.

Jendayi D. Saada
Asst. Dean, Center for Academic & Bar Readiness
Assistant Professor of Law
La Verne College of Law
320 E. D Street

[redacted]

From: Emanuel Kataev [redacted]
Sent: Friday, January 23, 2015 12:54 PM
To: Uniform Bar
Subject: Re: Uniform Bar Exam for the State of New York.

January 23, 2015

VIA E-MAIL
Diane Bosse, Chair
New York State Board of Law Examiners
Corporate Plaza, Building 3,
254 Washington Avenue Extension
Albany, N.Y. 12203-5195
uniformbarexam@nycourts.gov

Dear Ms. Bosse:

My name is Emanuel Kataev and I am an attorney admitted to the bars of the State of New York and the State of Connecticut.

In February 2013, I took the New York State bar exam. The following year, in February 2014, I took the Connecticut State bar exam. The latter exam entailed only the State portion, to the exclusion of the Multistate portion, as I transferred my Multistate Bar Examination score from the prior year over.

Taking and preparing for the New York State bar exam was starkly different from preparing for the Connecticut State bar exam. Though the Connecticut Bar Examining Committee is technically not a participant of the Uniform Bar Examination, the basic composition of the exam is essentially the same. My recollection is that the first three hours, i.e., the morning session, consisted of two (2) MPT's and the next three hours, i.e., the evening session, consisted of six (6) MEE's. My understanding is that the Uniform Bar Exam consists solely of MBE, MEE, and MPT questions. Accordingly, and practically speaking, I have the experience of taking both types of exams.

Preparing for and taking the New York State bar exam was quintessentially difficult. I cannot say the same for the Connecticut State Bar Exam. In preparing for the latter exam, I discovered that all I really had to study consisted of the MBE subjects, as - statistically speaking - the one or two Connecticut State topics were virtually never tested according to the statistics.

This was disappointing. Unlike the New York State bar exam, which tests actual knowledge of New York State law - both in the multiple choice questions and in the essays - the Connecticut State bar exam completely failed to. There was no learning or required knowledge of actual Connecticut law practice. This was both disconcerting and welcome news for me, as it made my studying extremely easy. In contrast, to this day, I still remember smiling when I answered a procedural New York State

law multiple choice question my New York Practice professor instilled in me - both during my final semester of law school in class and during bar exam preparation with BARBRI - regarding what court one may file a divorce action in.

At a time when the proliferation of new attorneys continues to grow - despite recent law school admissions numbers, which I am sure will return to normal in less than two (2) years, and was the direct result (in my opinion) of the 2008 recession - and when the legal job market is still in much need of a resurgence, both in job availability and starting salaries offered across the board, I would not find it prudent to make the New York State bar exam a shorter hurdle for applicants to jump through.

For one, more out-of-state and foreign applicants take the New York State bar exam than any other state (except, perhaps, California). Indeed, in February 2013, I was one of four thousand to take the New York State bar exam. In contrast, I was one of approximately six hundred to take the Connecticut State bar exam. It is worthy to note that the fourteen (14) states that currently administer the Uniform Bar Examination are not, by any means, the more populous nor popular states for purposes of taking the bar exam. Accordingly, I believe the New York State Board of Law Examiners should not make it easier for more attorneys to join the profession in the State of New York.

Second, I strongly believe that every state's bar examination should be state-centric, as every state is a government of its own. Therefore, the New York State bar exam should remain the same.

For the foregoing reasons, my firm opinion is that the New York State Board of Law Examiners and/or the State of New York should not adopt the Uniform Bar Exam and that the status *quo* should remain the same.

It was an honor to take both New York's and Connecticut's bar exams and I am distinguished to be barred in both states. However, the New York State bar exam was the better experience.

Sincere regards,

Emanuel Kataev, Esq.
Associate
Milman Labuda Law Group PLLC.
3000 Marcus Avenue, Suite 3W8
Lake Success, NY 11042-1073
(516) 328-8899
(office)
(516) 303-1395 (direct dial)
(516) 328-0082 (facsimile)
(917) 807-7819 (cell phone)

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Thomas T. Keating Esq.

[redacted]

January 20, 2015

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

Dear Judge Rivera:

Please find attached my prior correspondence concerning the importance of requiring bar applicants to separately pass a New York-law specific essay component of the Bar Examination.

The current New York bar exam consists of five essays and 50 multiple-choice questions testing on New York State law. In contrast, the UBE, consists of six essays developed by NCBE that test the law of general application along with multiple choice questions.

The State Board of Law Examiners has proposed that if the UBE is adopted in New York, bar applicants also should be required to pass a separate state law-specific component, the New York Law Exam (NYLE), which would consist of 50-multiple choice questions.

Again I want to emphasize the positive attributes of analytical thinking and written expression that result from an effort to read and understand the common law in New York. I am a member of the Patent Bar (arguably the most tortured multiple choice legal exam in the country).

Please ignore the State Board of Law Examiners in their misguided effort to streamline the testing process with multiple choice punch cards.

Sincerely,

Thomas T. Keating

RECEIVED
NOV 0 3 2014
NYS BOARD OF
LAW EXAMINERS

Thomas T. Keating Esq. [redacted]

Oct 30, 2014

Diane Bosse, Chair
NYS Board of Law Examiners
Corporate Plaza, Building 3
254 Washington Avenue Extension
Albany, NY 12203-5195

Dear Ms. Bosse:

I am writing to express my appreciation for the opportunity to sit for the New York Bar Exam in the summer of 1988. I was able to search my legal education for an appropriate response to each question.

I had the great fortune to study at ~~the~~ St. John's University School of Law. My professors included many practitioners and commentators in New York Law.

These professors included for example — Professor Siegel (NY Practice), Professor Kniffen (contracts), Professor Alexander (Evidence), Professor Pdestino (Criminal Law) and Professor Gregory (Constitutional Law).

Everyone of these professors would review the law from a New York perspective quoting from Justice Cardozo & Judge Hand among others. Professor Polestino would always say — the three top courts are: The United States Supreme Court followed by — The New York Court of Appeals, the Second Circuit Court of Appeals, and the California Supreme Court (changing positions at times).

My concern is that the vigor of analysis through a New York perspective will be lost. It will be lost to a trend toward national standardized testing or a lack of appreciation for New York Jurisprudence.

Please use caution, disregard the cloaked offer of uniformity and uphold the values of our New York Jurisprudence.

Sincerely

Thomas T. Kelly

Report of the NYSBA Committee on Legal Education and Admission to the Bar

Follow-Up Report to October 2014 Report on the Uniform Bar Exam

Introduction

On October 6, 2014, Chief Judge Lippman announced a proposal to replace the current New York Bar Exam with the Uniform Bar Exam. After a short thirty day comment period where many questions were raised, the Chief Judge decided to appoint a task force and extend the opportunity for comment. The task force was announced in November and they are expected to work until March when presumably a report will be issued. The task force is chaired by the Hon. Jenny Rivera. As part of the work of the task force, public hearings are being held throughout the State and smaller focus group meetings are being scheduled. Following the announcement of the proposed change in October 2014, the New York State Bar Association's Committee on Legal Education and Admissions to the Bar met and adopted a report for the State Bar leadership. The report, along with a resolution, was presented to and approved by the Executive Committee on October 31, 2014. The following day, on November 1, 2014, it was presented to the NYSBA House of Delegates (See Appendix A). Following a constructive discussion in the House, the Resolution was unanimously adopted.

On November 12, 2014 Judge Lippman released a Request for Public Comment extending the comment period to March 1, 2015, by which time a report from a study committee headed by Judge Jenny Rivera would issue. Upon appointment of the Task Force by Judge Lippman, NYSBA President Glenn Lau-Kee and

Committee on Legal Education and Admission to the Bar co-chairs Eileen Millett and Patricia Salkin, met with Judge Rivera to determine how NYSBA could be most helpful to the Task Force in terms of research and information gathering. The members of the Task Force are included in Appendix B, but it should be noted that two members of the Task Force are members of the NYSBA Committee on Legal Education (one a full voting member and one an ex officio member), and one member is a past president of the NYSBA.

Timeframes set by the Court have required quick action by the Committee on Legal Education and Admissions to the Bar. Since the Task Force was established the Committee met on December 15, 2014, at which point the notice of public hearings and accompanying request for feedback on certain issues (see Appendix C) had not been issued, and on January 20, 2015.. In between the Committee's last two meetings, one member of the Committee worked on an article for the State Bar Journal designed as a factual description of the current New York Bar Exam and the Uniform Bar Exam (see Appendix D). At its January 20th meeting, Sarah Valentine (who participated in a focus group convened in advance of the May 2014 Convocation on *Coming Changes in Legal Education)* led a discussion about the inadequacy of the Multi-State Practice Test (MPT) to truly test/assess skills. The Committee's meeting on January 20, 2015 was focused on input the Committee believes would be most appropriate to present to the Task Force in February if/when the State Bar testifies. Following the Committee meeting, Ms. Valentine agreed to develop a background piece about the MPT, and Members/Liaison/former co-chair and Co-Chairs Eileen Kaufman, Sharon Gerstman, Eileen Millett and Patricia Salkin met to discuss three distinct proposals raised by the Committee for State Bar adoption.

The Committee still believes for many reasons that there is inadequate information to make a judgment as to whether the UBE is a better bar exam for New York. The three areas of concern are: whether the proposal adequately tests knowledge of NY law requisite for practice in the state; whether the proposal adequately tests the professional skills required for practice; and whether the proposal threatens to worsen the disparate impact of the bar exam. Despite these concerns, the Committee applauds Chief Judge Lippman for providing an opportunity to discuss ways in which New York can exert a leadership role in reforming the bar exam to better reflect current realities of practice. Most notably in this regard, the Committee on Legal Education, as described more fully below, recommends that any new bar exam include an experiential learning component. What follows are the three main points the Committee believes are important factors in considering the implementation of the UBE in New York.

I. UBE is a test of uniform laws and rules

The UBE at its core is a test of uniform laws and rules. Like other states, half of the current New York bar exam tests on laws peculiar to the home state, New York. Thus, the current New York bar exam, test on peculiarities under New York law of wills, trust and estates, domestic relations, civil practice law and rules and criminal law and procedure. Under the current proposal to change the New York bar exam, the UBE would substitute for certain components of what New York now requires.

The current NY Exam is a two-day written examination with four components. On Day 1, candidates are required to answer five essay questions, each presenting multiple issues and generally emphasizing New York specific law, answer 50 New

York State specific multiple choice questions (NYMC), and complete one Multistate Performance Test (MPT), an exercise that is designed to simulate a case file presented in a realistic setting and calls for candidates to demonstrate fundamental lawyering skills. The time allotted for Day 1 is 6 hours, 15 minutes. On Day 2, candidates take the Multistate Bar Examination (MBE), which is prepared by the Conference and used in most states as part of the bar exam, consisting of 200 multiple-choice questions. The time allotted for Day 2 is 6 hours.

On the current New York exam, each of the five essays requires 40-45 minutes to complete. Specifically, on the morning of Day one of the current exam, a student is given 3 hours and 15 minutes to complete three essays and 50 multiple choice questions; in the afternoon, a student is given 3 hours to complete two essays and the Multistate Performance Test.

The UBE proposal would substitute the Multistate Essay Exam (MEE) for the five New York essays. The MEE consists of six essays that test on uniform laws, rather than the laws particular to New York's jurisdiction, and they are not drafted by the New York Board of Law Examiners. Each of the six essays would require 30 minutes to complete.

Additionally, the proposal would add a one-hour multiple choice test on New York law, which would be the only part of the two day exam focused on New York law. We question whether reducing NY law to 50 multiple choice questions to be answered in an hour can adequately test the complexities and nuances of New York law. We also question whether analytical and deductive skills can be adequately tested via multiple choice questions. The experts in test design would answer no to both questions.

The current New York essays are longer and more complex than the proposed multistate essays for a reason. The current New York essays are multiple issue essays that are aimed at issue spotting, in particular, issue spotting of the peculiar nuances of several different areas of New York Law. Because New York's essays are more focused on issue spotting of the nuances of various areas of New York Law, an applicant is less reliant on rote memorization and more attentive to analytical thinking, and to the interplay of various legal concepts and theories. Are New York practitioners well served by a test that relies heavily on rote memorization, particularly as pertains to one area of law at a time, as opposed to the current New York essay format?

There is reason to be concerned about whether the UBE proposal lessens the significance of the distinctions of New York law, lessens New York peculiarities, and lessens the high esteem in which the New York exam is held. The preparation and the emphasis for the proposed UBE will be different. The proposed UBE change will not require the same rigorous attention to the study of the uniqueness of New York law distinctions as does the current exam.

The UBE is at its core a test of uniform laws and rules. One argument in favor of the UBE is that it is a move to a more nationalized standard, and with that nationalized standard comes more mobility. Indeed, proponents argue that portability will advance mobility in a nationwide marketplace. The fallacy in that argument is that NY has adopted few uniform rules. Justin L. Vigdor, a former NYSBA President and member of the Uniform Law Commission, speaking eloquently at the November 1, 2014 House of Delegates meeting said:

> I'm very concerned about the fact that the UBE is going to test uniform law. I have been one of New York's five uniform law commissioners for 26 years. Unfortunately, New York is not big on adopting and passing uniform laws. We have a terrible time getting uniform laws through the legislature . . .When we do get uniform laws passed, we have a New York version of those uniform laws, and it's questionable whether they're really uniform. This is an issue that must be addressed.[1]

Adoption of the UBE would require law schools to adapt curriculum to teach uniform laws, a proposition for which many would be ill-prepared assuming a July 2016 adoption. Doctrinal coverage of New York law would shrink with the UBE. Law schools would be required to teach general principles of law along with New York law in the same course. Courses would necessarily have to be re-worked.

Thus, adoption of the proposed UBE, with the dramatically diminished significance afforded to New York law, has the potential to diminish the value and prestige of being barred in New York State.

a) The Proposed Format for the Proposed New NYLE is Inadequate

In concert with the proposal to adopt the UBE in New York, is the proposal to add a new "New York Law Exam" (NYLE). The Committee does not believe that the proposed 50 question multiple choice NYLE is adequate to appropriately test New York law. The Committee concludes that a multiple choice format for NYLE is inadequate for three reasons: 1) the length of time necessary to cover significant

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[1] Meeting of the NYSBA House of Delegates, November 1, 2014. http://www.totalwebcasting.com/view/?id=nysbar at 160:00-160:25.

areas of law practice in NY, such as EPTL and CPLR is insufficient using this format; 2) the proposed format of these multiple choice questions which does not utilize fact patterns but simply tests rules of law, emphasizes rote memorization over analytical thinking; and 3) essay questions or quasi-essay questions or questions designed to assess drafting skills in the context of New York law are preferable and such assessment needs to be longer than the one hour currently proposed for the NYLE add-on.

To the Committee's knowledge, no sample questions that would constitute the new NYLE have been drafted and/or made public. Therefore, we cannot address specifically the substance of the testing. However, the practitioners on the Committee have advanced the concern of the practicing bar that the conceptual NYLE is inadequate to demonstrate an acceptable minimal level of proficiency in New York law prior to admission.

II. New York has an Opportunity to Lead Bar Exam Reform by Linking Experiential Learning to Licensing

The purpose of the New York Bar Exam is to protect the citizens of New York from incompetent attorneys through the licensing sorting process. A timed written bar exam may indicate whether or not someone has doctrinal knowledge and legal analysis and reasoning skills. However it is an extremely limited vehicle for determining whether someone has grounding in the breadth of legal skills necessary to practice.

The organized bar in New York has long called for bar exam reform that would tie licensing to more of the skills required for the practice of law. By using this opportunity to create a better bar exam that incorporates the skills students learn

and perform in clinical settings, New York could truly be a national leader. The Committee thus recommends that the New York State of Law Examiners, which possesses unparalleled expertise regarding standardized tests, along with clinicians and others, study whether and how a clinical component could be a part of licensing in New York.

One of the reasons advanced for adopting the UBE in New York is the idea that it would add additional skills testing to the New York state bar exam, because it includes two MPT questions. The Committee suggests it is misguided to rely on the MPT as a vehicle to test lawyering skills. We believe that the MPT's ability to test skills different than those already tested in the essay exams is extremely limited. We also believe that it is essential that law students graduate having had multiple opportunities to practice and perform lawyering skills under supervision with opportunities for feedback and reflection. This sort of guided experiential learning is how law students become law graduates most able to practice and it is this type of learning that teaches the skills the MPT cannot test.

Currently during the first day of the bar exam a candidate must answer three New York essay questions and 50 New York multiple choice questions in the morning and then answer two New York essay questions and one Multistate Performance Test (MPT) question in the afternoon. The essays and multiple-choice questions on the first day all test New York law and are written by the New York Board of Law Examiners. The MPT however, is a generic exam written by the National Conference of Bar Examiners (NCBE) and does not address New York law.

Today the MPT is worth 10% of the New York bar exam. If the UBE were adopted, the candidate would have to answer two MPT questions.. The MPT gives

the applicant a library consisting of various documents and the applicant is asked to use the library to complete a task such as writing a memo to the file or a letter to a client. The Board of Law Examiners recommends that candidates allot no more than 90 minutes to the task based on the NCBE recommendations. Thus, the format of the MPT places the candidate in a position that is antithetical to thoughtful careful lawyering – drafting a document as fast as possible - as the clock is ticking.

Reading speed is a primary factor in success on the MPT because a candidate must read through the material as fast as possible, finding the applicable law in the library, and drafting the assigned document as quickly as time permits. This is similar to what a candidate does when answering an essay question with the largest difference being the amount of material that must be read and sorted through. The Committee does not think the attorney who is the fastest reader or even the attorney who writes the quickest is necessarily the attorney who provides the most correct and thoughtful advice. The emphasis on reading speed on the MPT also places excellent attorneys whose first language may not be English as a distinct disadvantage.

Indeed, a report commissioned by the New York State Court of Appeals many years ago questioned the importance of "speeded" exams where the results are dependent on the rate at which the work is performed as well as on the correctness of the response. The report concluded that "speed in reading fact patterns, selecting

answers, and writing essay responses [is] not the kind of speed needed to be a competent lawyer."[2]

The MPT questions also test many of the same lawyering skills as the essay questions. The essay questions on the Multistate Essay Exam test a candidate's ability to identify issues, separate relevant material from non-relevant material, present a reasoned analysis of the relevant issues in a clear, concise, and well-organized composition; and demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation. While there is no description of the purpose of the New York State essay exam, it is likely that it is very similar, with the addition of determining knowledge of New York doctrine and ethical rules.

The NCBE says that the MPT tests six fundamental lawyering skills: sorting detailed factual materials and separating relevant from irrelevant facts; analyzing statutory, case, and administrative materials for applicable principles of law; applying relevant law to the relevant facts in a manner likely to resolve a client's problem, identifying and resolving ethical dilemmas, when present, communicating effectively in writing and completing a lawyering task within time constraints. The Committee wishes to make clear that these skills are what the NCBE describes as "fundamental lawyering skills" but they do not necessarily comport with the fundamental lawyering skills and professional values described in, for example, the MacCrate Report (ABA Section Of Legal Education and Admissions to the Bar, Legal Education and Professional Development – An

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[2] JASON MILLMAN, ET AL, AN EVALUATION OF THE NEW YORK STATE BAR EXAMINATION (May 1993), at 9-8 & n. 11.

Educational Continuum (Report of the Task Force on Law Schools and the Profession: Narrowing The Gap) (1992)).

However, even if one compares the skills tested on the essay questions to those tested by the MPT using the descriptions provided by the NCBE itself, it becomes clear that there is only a small set of skills the MPT tests that essay exams do not. For example, the MPT requires a student to manage their time, but so do the essay questions. The MPT may require a student to write in a specific format but the essay questions are also designed to evaluate a candidate's ability to communicate effectively in writing. The MPT allows candidates to show their capacity to reason by analogy but the essay exam tests legal reasoning and analysis as well. The MPT may, if the question includes it, require a candidate to spot an ethical issue but the New York essay exams routinely require students to address New York professional responsibility issues. The MPT requires a student to sift through and organize a library of materials but that shows how fast someone reads not how thoughtfully they attend to the task at hand. In addition, the MPT is treated much like an essay exam when it is graded[1] and is included in the number of questions an exam grader must grade within an allotted time.

If the MPT is to be offered as a mechanism for assessing a candidate's competency in foundational legal skills, it is important to understand what the MPT does not do.

The MPT does not test a candidate's ability to do legal research or fact investigation. It does not assess whether a candidate can interview a client, negotiate a lease, make an objection in court, or integrate non-legal issues into problem solving. It does not tell the grader how well the candidate is at working

collaboratively, understanding and communicating across differences, or handling indeterminacy. It also does not show how well the candidate understands his or her professional role and whether the candidate understands the importance of ethical and respectful behavior.

The MPT does not assess these lawyering skills and professional traits because it cannot - these skills cannot be assessed by a timed written exam. However these skills and traits are taught, practiced, reflected upon and assessed in law school clinics, guided externships, and simulated practice classes. One way of building lawyering skills into licensing would be to allow a set number of credits of experiential skills training to substitute for a candidate's MPT score, or for another component of the exam. Adopting this proposal would provide an essential link between legal education and admission to practice, a link that has long been advocated by, inter alia, the lead author of the Carnegie Report and the Founding Director of Educating Tomorrow's Lawyers -William Sullivan. Mr. Sullivan served as the keynote speaker at the NYSBA Presidential Summit in January 2014 and talked about the need to link a practice-based curriculum to licensing. He notes the need "to move students more effectively across the arc of professional development from novice to competent beginning practitioner and . . . to assess the readiness of such developing lawyers."[3]

This proposal would not create any additional burdens for the law schools. First the proposal would be an optional, not a mandatory program. Thus a law school would not have to create a program of legal education that would support a student

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[3] William M Sullivan, *Align Preparation and Assessment with Practice: A New Direction for the Bar Examination,* 85 N.Y. St. B. J. 41 (2013).

being able to substitute 15 credits of experiential lawyering skills training for taking the MPT. Second, the ABA Accreditation Standards were recently amended to require six credits of experiential instruction, which means that law schools have already expanded their clinical offerings. Third, the new ABA Outcomes Standards creates a structure the Court of Appeals could use to determine if a school's clinics, guided externships, and simulation courses would satisfy the program criteria. The ABA now mandates that law schools collect data that would show whether or not a school's students are meeting the lawyering competencies the ABA has set. These same structures can be used to allow the Court of Appeals to determine which law schools have put in place a program that provides the depth and breadth of lawyering skills training that would allow a graduate to substitute that training for the MPT.

The new ABA Outcomes and Assessment requirements explicitly link continuing ABA accreditation not on what law schools say they teach but on what they can show their students are learning. The ABA also promulgated additional standards that connect learning outcomes to accreditation. Pursuant to Standard 315, law schools are required to conduct ongoing evaluations of whether or not students are attaining competency in the school's learning outcomes and report to the ABA data that proves compliance with the mandated outcomes. ABA Standard 315 suggests potential mechanisms for this evaluation including among others, the maintenance and review of student portfolios, having the bench and bar assess the school's students, and student performance in a capstone course.

In addition to creating better trained law graduates, this program would also encourage law schools to create programs that would allow students to be able to substitute 15 credits of experiential learning for the MPT.

Swapping a set number of clinical credits for a component of the exam is just one possible way to build experiential learning into licensing. Other proposals that have been advanced in New York include a Practice Readiness Evaluation Program that would award points on the bar exam for successful completion of a duly certified clinical course in law school, creation of a pilot project to test a Public Service Alternative to the Bar Exam, and studying the widely respected New Hampshire Daniel Webster program, a two year performance-based bar exam that takes place within law schools, to see whether any portion could be replicated in New York.[4]

If New York were to use this opportunity to bring experts, including psychometricians, clinicians and others, to study realistic mechanisms for building experiential learning into licensing, New York would be setting a new standard for the rest of the country to follow. It would also be addressing the decades-old critique of the bar exam, most notably voiced by the NYSBA, which has long questioned whether the current format adequately tests minimal competence to practice law and whether it produces a disparate impact, a concern addressed in the point below.

III. A Study on Disparate Impact Must Be Conducted Prior to Adoption of the UBE

[4] NEW YORK STATE BAR ASS'N COMM. ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, RECOMMENDATIONS FOR IMPLEMENTATION OF THE REPORT OF THE SPECIAL COMMITTEE TO STUDY THE BAR EXAMINATION AND OTHER MEANS OF MEASURING LAWYER COMPETENCE (Feb. 12, 2013).

The Committee continues to be concerned about the potential disparate impact that could exist should the UBE be adopted. A comprehensive letter from the Society of American Law Teachers (SALT) has been submitted to the Task Force and more fully addresses this issue. The letter is attached as Appendix E.

The Committee disagrees with those who call for a disparate impact study post-implementation since should a disparate impact be identified, it will have been too late for countless numbers of bar takers. Equity and fairness suggest that such a study should precede the adoption of a new exam to provide an opportunity to address any potential disparate impact. Like the UBE proponents, the Committee does not know whether it would produce a disparate impact, but we do believe that it is possible to retain the services of a testing expert to provide a comprehensive study and report to the New York Board of Law Examiners and to the Court of Appeals. While the Committee does not have the expertise to design a disparate impact study, we believe that pre-testing of questions over the next 3 or 4 administrations of the Bar Exam is one vehicle.

In addition to the testing the disparate impact of the actual exam questions, the Committee is also concerned about the proposed change in the weighting of the various sections of the exam. For example, changing the value of the MBE to 50% of the score as opposed to the current 40% could be studies to determine whether that change would produce a disparate impact.

IV. Conclusion

Based on the foregoing concerns and recommendations, the Committee is not in favor of the proposal at this time. The Committee requests that the New York State

Bar Association convey the concerns and recommendations contained in this report to the Task Force appointed by Chief Judge Lippman to study the UBE.

Based on the foregoing, the Committee on Legal Education and Admission to the Bar approves this report and recommends approval of the report by the New York State Bar Association's Executive Committee and/or the House of Delegates.

Dissenting Comments by Committee Member James Beha

I dissent from the recommendation that there be a Bar Examination "credit" for "experiential learning" coursework that would substitute for taking a portion of the Bar Exam, however that Bar Exam may be constituted. This proposal (in a slightly different form, namely as a "point boost" for Bar Exam scores for those wo have taken "experiential courses") was discussed at the Committee level extensively some years ago; in that form it was included in a prior report of this Committee even though it never mustered widespread support, but the report which included it set forth the views of the substantial minority opposing the idea. The proposal in its present form was never mentioned at any Committee meeting prior to the last one.

I therefore dissent on both substantive and procedural grounds.

As a matter of substance, I dissent because I do not think the "experiential coursework" credit is a sound idea. As Committee members know, I strongly favor "experiential coursework" (clinics and similar supervised practice work) as part of law school education. Indeed, I have worked on the Committee's proposal that the requirements for admission to the Bar of this State should include a requirement that every candidate have completed substantial "practice preparation" coursework, including a significant number of course hours in a clinical or other supervised practice setting. That said, I think this need for better practice-preparation for new lawyers is a bull to be grabbed by the horns(to use an old and perhaps too-tired metaphor) and not something to be brought in by the back door of fiddling with how the Bar Exam is administered.

I do see inclusion of the MPT as part of the Bar Exam as a significant improvement over the former form of the Bar Exam, and notwithstanding the negative comments about the MPT's limitations contained in this Report, I believe that at one time or another over the years I have heard almost all members of this Committee express a similar view. However, I do not disagree with the argument that adding a second segment of the MPT as part of the Exam is not a step forward insofar as it means reducing the number -- and most important, the complexity -- of the essay questions. That said, I believe that there should be one Bar Exam for all candidates, and I do not think that some candidates should be "advantaged" in the scoring of the examination (which is what this proposal amounts to even if it is no longer stated as a "point boost") because of their coursework choices. I also think the proposal carries with it a variety of administrative headaches and faces almost certain legal challenges from candidates who cannot claim the "credit" and must take the full examination.

As a matter of procedure, I dissent from this aspect of the Report for two reasons, both relating to the fact that in its present form this proposal is a new topic for the Committee (even though in a different form it has a long, if checkered, history). First, this proposal in this form has not been adequately discussed at the Committee level by the current membership of this Committee -- it was never mentioned before the last Committee meeting. While I appreciate that the timetable for commenting on the Chief Judge's UBE proposal is a tight one, that is not an adequate excuse for a "rush job" in making a separate proposal about how to change the Bar Exam. Indeed, it is ironic that a Committee that expressed distress (which I shared) at a proposal that the UBE be adopted in New York with too little discussion and analysis preceding it should now be making a proposal to change

the Bar Exam in a very significant way (a way implemented nowhere else in this country) with so little discussion and analysis of its own.

Second, the "rush" presents particular problems here because so many Committee members are abstaining from this Report (typically because they are submitting their own comments on the UBE proposal). It is not at all clear that a majority of the Committee would support this proposal, which certainly could have been discussed and voted upon separate from commenting on the UBE proposal that is the immediate topic before us. I would suspect that those submitting comments of their own on the UBE proposal are not making a separate proposal like this (this is a guess, but it seems like a good one). What we might prefer to see instead of the current Bar Exam can certainly be de-coupled from the topic of whether New York should adopt the UBE (with or without a separate NYLE), but so far as I know there has not been a canvas of the views of the current Committee as a whole on this proposal as a separate topic. Certainly there has not been the extensive comment and debate of the sort that every other proposal of this Committee has received, including gathering the views of both voting and non-voting members. When the "point boost" version of this proposal was presented some years ago (in a different context and to a Committee with a noticeably different membership), there was a bare -- very bare -- majority of those then eligible to vote on the proposal who favored it, and the Report so stated and contained a full statement of the views of those who opposed the "point boost" proposal, something lacking here precisely because the proposal has not been adequately discussed among the Committee as a whole.

Finally, I would offer a separate comment about the NYLE multiple choice test ("NYLE") that is part of the UBE proposal. I strongly agree with those who

believe that the New York Bar Exam should extensively test on New York law and, importantly, that because it does candidates should spend a large portion of their preparation time studying New York law. I would endorse any proposal that was aimed at improving the "New York multiple choice" questions on the current examination or the testing of New York law in the essays. But this proposal would make "passing" the one hour NYLE a separate component of passing the examination. I believe that testing New York law as part of the "blend" of the total examination, the present approach, is the better way to proceed, and I think the requirement that candidates pass a separate NYLE is a mistake, especially when it is accompanied by discarding the current essay questions drafted by the New York Board of Law Examiners in favor of the generic and simplistic essays about "uniform" law used in the UBE.

It may be that the establishment of this multiple choice barrier will have a "disparate" impact on minorities, the topic which quite properly worries the authors of this Report. But disparate or not, the impact will be a bad one. It is a matter of simple arithmetic to figure out that a noticeable number of those who currently pass the Bar Exam as a totality would fail if also passing the multiple choice section was an independent requirement. Without doubt, if it so chose, the BOLE could inform us about what portion of those currently passing the Bar Exam did not answer the majority of the "New York multiple choice" questions correctly, and thus give us some insight into what adding this as a separate requirement might mean for the "pass rate". I appreciate that the NYLE is expected to be a new-and-improved version of the NY multiple choice segment (though I have yet to understand why if this segment can be improved in a meaningful way this is not being done in all events), but the arithmetic will still apply, and revealing how it might work under the present regime would be illustrative.

I do not think that a one hour multiple choice examination should be set up as a separate barrier to entry to the New York Bar. I understand that there are plans to allow those who fail this one section to re-take it without re-taking the entire examination, but that simply means more heartache, expense and delay for candidates who would pass the current examination, as well as more headaches for the BOLE which must administer these "re-takes". I believe that candidates for the New York Bar should be motivated ("incentivized," to use an ugly term) in their preparation for the Bar Exam to study New York law and to be ready to apply it (a goal which I believe the current "blended" approach serves well); I do not believe that the candidates or the Bar are well served by adding a second "hurdle" to passing the Bar Examination. I think that if this second hurdle is inserted into the examination process the profession, including the candidates, is going to be very unhappy with the results.

James A. Beha II
Allegaert Berger & Vogel LLP

Appendix A- October 2014 Report of the Committee on Legal Education and Admission to the Bar as approved by the House of Delegates in November 2014

Appendix B

Advisory Committee on the Uniform Bar Examination
ADVISORY COMMITTEE MEMBERS

Hon. Jenny Rivera
Associate Judge, New York State Court of Appeals

Hon. A. Gail Prudenti
Chief Administrative Judge of the State of New York

Michelle Anderson
Dean, CUNY School of Law

Hannah Arterian
Dean, Syracuse University College of Law

Diane Bosse
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Seymour James, Jr.
Attorney-in-Chief, The Legal Aid Society of New York City

E. Leo Milonas
Partner, Pillsbury Winthrop Shaw Pittman, LLP
Member, New York State Board of Law Examiners

Appendix C

Notice of Public Hearings: Uniform Bar Exam

In November 2014, Chief Judge Jonathan Lippman appointed an Advisory Committee to study the proposed adoption of the Uniform Bar Examination (UBE) in New York. The Committee, which is chaired by the Honorable Jenny Rivera, Associate Judge of the New York Court of Appeals, and includes representatives of law schools, the judiciary, the State Board of Law Examiners, and the bar, is charged with studying the potential implementation of the UBE in New York.

In connection with that responsibility, the Committee will hold public hearings throughout New York in early 2015. The purpose of the public hearings is to receive the views of interested individuals, organizations and entities on the possible transition to the UBE. After the public hearings, the Advisory Committee will make a recommendation to the Court of Appeals whether to adopt the UBE as part of the New York State Bar Examination.

The hearings will take place as follows:
• CUNY Law School
Tuesday, January 20, 2015, at 2 p.m.
2 Court Square, Long Island City, N.Y. 11101
• New York State Court of Appeals
Tuesday, February 3, 2015, at 11 a.m.
20 Eagle Street, Albany, N.Y. 12207
• Appellate Division, Fourth Department
Thursday, February 26, 2015, at 2 p.m.
50 East Avenue, Rochester, N.Y. 14604

The current New York bar exam consists of five essays and 50 multiple-choice questions testing on New York State law, one Multistate Performance Test (MPT) question developed by the National Conference of Bar Examiners (NCBE), and the 200 multiple-choice question Multistate Bar Examination, also developed by NCBE. In contrast, the UBE, which has been adopted in 14 other states, consists of six essays developed by NCBE that test the law of general application, two MPT questions, and the 200-question MBE. Unlike the current New York bar exam, the UBE produces a portable score that can be used to gain admission in other states

that accept the UBE, provided the applicant satisfies other jurisdiction-specific admission requirements.

The State Board of Law Examiners has proposed that if the UBE is adopted in New York, bar applicants also should be required to pass a separate state law-specific component, the New York Law Exam (NYLE), which would consist of 50-multiple choice questions.

The Advisory Committee seeks testimony on the following issues (the list is not exhaustive):

- The advantages and/or disadvantages of the current New York bar examination and the proposed UBE
- The extent to which adoption of the UBE would result in changes to law school curricula and bar exam preparation
- How UBE score portability would impact New York law graduates and graduates of law schools in other jurisdictions, and the law profession as a whole
- The importance of requiring bar applicants to separately pass a New York-law specific component
- Whether the NYLE should be administered in conjunction with the UBE and/or on additional dates.

The Advisory Committee's hearing panel will consider both oral testimony and written submissions. All testimony is by invitation only. If you are interested in being invited to testify at the hearing, please send an e-mail to UniformBarExam@nycourts.gov no later than 14 days in advance of the scheduled hearing at which you propose to testify. Proposed testimony should not exceed 10 minutes in length, unless otherwise instructed by a panel member.

If requesting an invitation, please (1) identify yourself and your affiliation; (2) attach a prepared statement or a detailed outline of the proposed testimony, and specify which, if any, of the topics described above will be addressed, and; (3) indicate at which of the hearings you would like to deliver the testimony. In advance of the hearing, invitations to testify will be issued and will include an approximate time for each presenter's testimony. For those not invited to present oral testimony, the proposed testimony will be deemed a written submission for consideration by the Advisory Committee.

Persons unable to attend a hearing or interested in only making a written submission may submit their remarks by e-mail to

UniformBarExam@nycourts.gov at least seven days in advance of the hearing, or by mailing the submission to the Advisory Committee at:

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

For further information, please visit the Advisory Committee's webpage at www.nycourts.gov/ip/bar-exam

Appendix D – Gallagher Article

Appendix F – SALT Letter

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‡ ALSO ADMITTED IN NJ
†† ADMITTED IN FL ONLY
††† ADMITTED IN NH ONLY
‡‡ ADMITTED IN PA ONLY
*** ADMITTED UNITED STATES PATENT AND TRADEMARK OFFICE
** ADMITTED UNITED STATES PATENT AND TRADEMARK OFFICE AND MASSACHUSETTS ONLY

February 3, 2015

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

Dear Judge Rivera,

I write this letter in opposition of the implementation of the Uniformed Bar Exam at this time.

Firstly, I believe, as an attorney practicing in New York State for almost 35 years, and also having practiced in other states, that the laws of the State of New York are extremely unique to New York.

To turn over the testing of our law students to an authority other than the New York Bar Examiners, or even to retain control but giving a uniform test will result in lesser trained lawyers, who have a less comprehensive understanding of the law. It is clear to me that lawyers getting out of law school, even with internships and some practical experience, still have to deal with a learning curve. To actually focus on areas and interpretations of laws that are not pertinent to New York creates a less trained attorney and will result in a disservice to the client.

Additionally, I believe that New York State has to continue to control its attorneys and their qualifications. To abdicate that position, will again diminish the ability to turn out and retain quality in the legal profession.

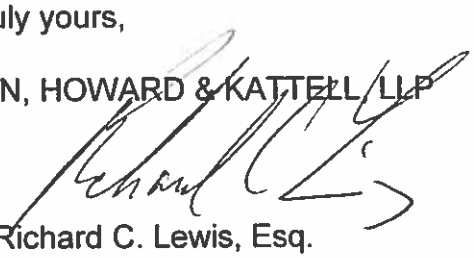
I also submit that there has not been sufficient time to review this proposal. The Bar Association, the House of Delegates of which I am a Member, needs to do an adequate review. In the interest of maintaining a working relationship with the Bar, I believe there needs to be enough time to thoroughly study this matter, and not to do so would candidly be an error as it is the Bar that represents New York State attorneys and is vitally concerned with saving the profession and the public interest. To squander the opportunity to permit thorough examination of this proposal by them would be very short sighted.

I also submit that the attorneys who are presently in law school would be put in a very precarious position not only because of the fact that they have probably, for the most part, already been involved in Bar Review courses, but they have probably focused their attention on New York State law, if that is the state in which they want to practice.

Lastly, I submit that if you look prospectively at what will transpire in the event of this multi-state exam, you will find numerous attorneys who practice in numerous states creating competition by less versed attorneys in New York law. I believe this will result in a tremendous disservice to the small practitioner. Most of us practice exclusively in New York State or primarily in New York State. If this change goes through, I believe that ultimately the small practitioner will be replaced by mega law firms with a national presence to the exclusion of the New York firms which have so well served our state throughout history. It is my belief that to implement this program would be a disservice to the Bar and a disservice to the public and the Courts.

Very truly yours,

HINMAN, HOWARD & KATTELL, LLP

By 
Richard C. Lewis, Esq.

RCL/jlp

[redacted]

From: Elizabeth Tharakan [redacted]
Sent: Saturday, February 07, 2015 11:09 AM
To: Uniform Bar
Subject: comment on adoption of the UBE

To the New York Law Examiners,

My name is Elizabeth Tharakan. I will be sitting for the summer bar exam in NY. I am writing to express enthusiasm for the adoption of the Uniform Bar Exam, especially as applied to lawyers admitted in other states waiving into NY without having to sit for the bar exam again. I think an expedited process of admission would result from NY's acceptance of UBE passage in another jurisdiction. I think it'd mean increased portability of bar passage and increased mobility of lawyers.

I hope you accept UBE scores from other jurisdictions with as few restrictions as possible.

Thanks,
Elizabeth Tharakan
Cardozo Class of 2012

[redacted]

From: Chris Rodilosso [redacted]
Sent: Tuesday, February 17, 2015 3:20 AM
To: Uniform Bar
Subject: UBE

As a future lawyer in today's competitive economy, I think the trend towards a uniform bar is reassuring. It will give us a better chance to find that critical first job (or two). Having to take multiple bar exams in the early stages of your career is highly burdensome and can discourage young lawyers from staying in the legal field. If you pick a state to take your first bar and the opportunities simply aren't there, it's not fair to have to endure the bar exam process again. I really hope NY adopts the UBE.

Chris R.

Angelica Kang
[redacted]

February 18, 2015

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

Dear Members of the Advisory Committee on the Uniform Bar Examination:

Thank you for considering my written testimony regarding the Uniform Bar Examination and how it may impact military spouse attorneys.

My name is Angelica Kang and I am a member of the Military Spouse J.D. Network ("MSJDN"), a bar association for military spouse attorneys and law students formed in 2011. I have been married to a Reconnaissance Marine for nearly four years and am in my third year as an evening student at Fordham University School of Law. MSJDN has connected over 1,000 military spouse attorneys, including spouses of active duty and retired Air Force, Army, Coast Guard, Marine, and Navy servicemembers, as well as Reserve and National Guard spouses. MSJDN works to educate the public about the challenges facing military families, encourage employers to hire military spouses, and advocate for licensing accommodations for military spouse attorneys.

The military lifestyle and the legal profession as it currently stands are at odds with each other. Military families are geographically insecure, as families of active duty servicemembers are required to move every two to three years. This move is called a "PCS" (short for "Permanent Change of Station") and can take a family to a new base domestically or overseas. The moves are based on the needs of the US government and are mandatory for the servicemember. A spouse can refuse a PCS, but this alternative offers long separation and hardships that are often augmented by deployments. For the most part, a PCS means that a military spouse attorney must seek to be licensed in her new state of residence if she is to continue her legal career.

Licensing can often take up to a year or more and can cost $4,000-$5,000 each time for preparation materials and fees.[1] Consequently, military spouse attorneys are left with difficult decisions to make in order to balance the costs of taking another bar exam and supporting the

[1] MSJDN, http://www.msjdn.org (last visited February 17, 2015).

career of their spouse. These decisions are not to be taken lightly. The Pentagon reports that 53% of military families are dual-income families; therefore, the loss of job and income due to PCS and licensure constraints is a hard hit on military families.[2]

MSJDN's annual survey shows that four out of five report that their spouse's military service has negatively affected their legal career.[3] Half of the membership has chosen to live apart from their spouse in order to maintain a legal career.[4] A staggering 41% have taken two or more bar exams to keep up with the military lifestyle while also maintaining a legal career.[5]

As member of MSJDN's membership committee, I hear countless accounts of military spouses grappling with the decision to leave her job in order to PCS. All too often a MSJDN member graduates law school and passes the bar, only to discover that a PCS is around the corner and she must begin preparing for another bar exam. We also frequently hear from members who are unable to afford bar preparation materials for yet another bar exam. The number of moves made and bar exams taken become just as much part of our identity as our spouse's branch of service. The decisions we must make as military spouse law students and attorneys are never easy. There is always a split in opinion: whether moving together is best for the marriage and family versus whether the years of time and money that have been invested in a legal career should be left behind because of yet another PCS.

New York is one of 12 states that have enacted a licensing accommodation for military spouses.[6] That has been a wonderful move of support for military spouses and we hope to see similar accommodations enacted nationwide. We also hope that the Board of Law Examiners will consider how the UBE, as well as UBE score portability, will greatly benefit military spouse law students and attorneys.

A uniform bar exam will provide continuity, consistency, and mobility for military spouse attorneys who have either graduated from a law school in New York and expect a future PCS or for a military spouse who has moved to New York on orders, is ineligible for the licensing accommodation, and wishes to take the bar exam. Administering the UBE in New York will directly address the difficult issues that military spouses face, such as repeated exams, repeated fees, and the decision not to take the exam after a PCS because of the expense and study time required. Having spoken with military spouses who have taken the UBE in other states, they attest to benefiting greatly from focusing on one set of rules and one body of black letter law. The UBE will greatly increase a military spouse's chances of a PCS and maintaining her

---

[2] Michael P. Richter & Richard Schneider, *New York's Licensing Barricade Against Military Spouses*, THE WALL STREET JOURNAL (Feb. 13, 2015, 9:47PM), http://www.wsj.com/articles/michael-p-richter-and-richard-schneider-new-yorks-licensing-barricade-against-military-spouses-1423872267.

[3] Military Spouse J.D. Network Member Survey Report of Findings, MSJDN.ORG (Jan. 1, 2014), http://www.msjdn.org/wp-content/uploads/2014/02/MSJDN-Survey-Report.pdf.

[4] *Id.*

[5] *Id.*

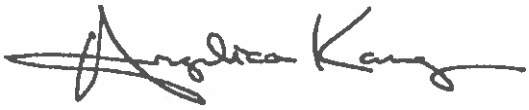
[6] State Rule Change Efforts, MSJDN.ORG (last visited February 17, 2015), http://www.msjdn.org/rule-change/.

legal career, which will also allow her to spare her family from the stress of long separations and financial harm.

Military spouse attorneys and law students are among the toughest people I have had the privilege of working alongside. With the amount of experience they derive from moving to various parts of the country and world and working in multiple jurisdictions, they are undoubtedly assets to the legal field. Moreover, the presence of military spouses in the workplace is crucial to bridging the military-civilian divide. Adopting the UBE in New York in consideration of military spouses will not only benefit the legal field, but also demonstrate great public support for military families who bear the burden of supporting military personnel on the homefront.

Thank you again for your consideration. I appreciate the opportunity to submit my comments to the Advisory Committee on the Uniform Bar Exam.

Respectfully submitted,



Angelica Kang
J.D. Candidate, '16
Fordham University School of Law

NEW YORK
CITY BAR

SUPPLEMENTAL STATEMENT OF THE NEW YORK CITY BAR ASSOCIATION

BEFORE THE ADVISORY COMMITTEE ON THE UNIFORM BAR EXAMINATION

City Bar respectfully thanks the Advisory Committee for the opportunity to supplement our previous testimony regarding New York's possible adoption of the Uniform Bar Exam ("UBE.") This supplemental testimony addresses two issues: i) the possibility of gaining bar admission in New York State based in whole or in part on evaluation techniques other than passage of a written bar exam; and ii) concerns that have been expressed in the hearings before the Advisory Committee regarding the potential impact of the Uniform Bar Exam on traditionally disadvantaged groups.

As stated in our initial testimony at the Advisory Committee's January 20 hearing, City Bar long has advocated that New York State consider basing bar admission on evaluation protocols other than a written bar exam. More than twenty years ago, we advanced for consideration that bar admission in New York might be based at least in part on a defined amount and quality of supervised experiential learning, and, specifically, in 2002 we recommended that there be established a public service alternative bar examination.[1]

We first reiterate our continuing belief that the Uniform Bar Exam presents important advantages as a written test over the current New York State Bar Exam and that New York should adopt the UBE as of July 2016, together with a new New York State focused written test. At the same time, we urge that consideration of reform not stop with the adoption of the UBE. We respectfully urge that New York State also actively consider supervised experiential learning, not as the sole pathway to bar admission, but as an alternative, in whole or in part, to the written bar examination. Such an alternative way of demonstrating competency to practice law may be more accessible to some applicants, while still fulfilling the important consumer protection element of bar

[1] See Public Service Alternative Bar Examination (joint report of Legal Education and Admission to the Bar Committees of the New York City Bar Association and the New York State Bar Association, June 2002).

testing. It also may have the practical effect of increasing the amount of skills-based learning available to prospective lawyers.

We recognize that a more detailed evaluation of this alternative would require significant study. We urge that concurrently with the adoption of the UBE, the Chief Judge appoint a Task Force to consider further this alternative.

As to the second issue, we recognize that a number of witnesses before the Advisory Committee, including the City Bar in our own January 20 testimony, have drawn the Committee's attention to the potential impact of the UBE on traditionally disadvantaged groups. We think it is important to reiterate our view that this important concern should not be the basis to preclude or delay implementation of the UBE in New York State. We believe implementation of the UBE itself will deliver powerful benefits to disadvantaged groups, especially facilitating the ability of new lawyers to relocate if necessary to areas where jobs become available, as they are available. We continue to believe that balancing all of the interests at issue here, the preferred approach is to ensure that the Bar Examiners *track* the impact of the UBE on traditionally disadvantaged groups and *react* promptly to any evidence of an adverse impact by taking prompt corrective action.

We thank the Advisory Committee for the opportunity to submit this supplemental testimony.

February 18, 2015

[redacted]

From: Victor M. Serby [redacted]
Sent: Wednesday, February 18, 2015 7:52 PM
To: Uniform Bar
Subject: Proposed Uniform Bar Examination

Dear Ms. Bosse:

I wish to comment on the proposal to adopt the UBE as part of New York's Bar Exam.

Although portability of exam scores is a good idea in theory, the UBE should be in addition to and not in lieu of a separate session specific to New York practice. This may be problematic because I assume that in order to be portable, candidates from other states would have to have reciprocity without taking an exam session specific to New York practice. This I cannot endorse.

New York lawyers must know New York law before they practice. We have enough bad lawyers out there that argue Restatement law in their briefs when there are controlling Court of Appeals cases. Eliminating the session of the NYS Bar Exam that is specific to NYS law will do a disservice to the courts, opposing counsel and most importantly to the clients that hire these attorneys to represent them. It is incumbent upon the State to protect potential clients by testing attorneys that it licenses with knowledge of New York Law.

When a client hires and puts trust in an attorney, (s)he expects that attorney to meet a minimum standard. Clients rely on the State to ensure that licensed attorneys that they hire for their legal problems meet minimum standards, and one of those standards is knowledge of New York law. New York law has some strange quirks that make it different from "multistate" law.

Let's look at the Examination for Professional Engineering for guidance. New York and 46 other states use a multistate examination for both the Fundamentals of Engineering and Professional Practice Examinations. But, California will not accept reciprocity for these examinations. They make engineering candidates take an examination that tests knowledge of earthquake design of structures, something specific to California. No one will ever convince California to fall in line with the other states and have true reciprocity. California wants its professional engineers to demonstrate competence in earthquake design (by way of examination) before they are licensed to practice. They do not want engineers learning on the job, to the detriment of their employers, their clients and the general public.

Similarly, New York State needs its attorneys to show competence in the knowledge of NYS law, by examination, before their bar admission. If New York's legislature wishes to adopt a uniform multistate law, then I would agree that having a separate section on New York practice would not be necessary, and that we should have true reciprocity. Similarly, if California were able to magically eliminate earthquakes, then it would be fruitless to require specialized knowledge of earthquake design. But neither is happening! When the State licenses an attorney, that attorney must demonstrate minimum competence in the practice areas for which that attorney is licensed. And if the licensing authority is New York State, the attorney better have a minimum knowledge of New York law before being turned loose on the general public. The reason the State licenses attorneys in the first place is to ensure the public that a member of the NY Bar meets minimum standards and is able to effectively represent them without a learning curve on their billable hours.

For the above reasons, I urge the Committee to keep the status quo and require all New York State Bar candidates to demonstrate their knowledge of NYS law by passing the multiple choice and essay components of the New York State Bar exam, specific to NY practice.

Victor M. Serby, Esq.

Patent Attorney
Licensed Professional Engineer
[redacted]

AMERICAN BAR ASSOCIATION
Young Lawyers Division

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February 20, 2015

Chair Diane Bosse
New York State Board of Law Examiners
Corporate Plaza, Building 3
254 Washington Avenue Extension
Albany, NY 12203-5195
UniformBarExam@nycourts.gov

Dear Chair Bosse,

The American Bar Association Young Lawyers Division (the "Division") urges New York to adopt the Uniform Bar Exam ("UBE"). On February 7, 2015, the Division's Assembly passed a resolution urging states and territories to adopt the UBE. That resolution is enclosed with this letter The Division believes that New York's adoption of the UBE, should it do so, would be influential on other bars' decisions. The Division believes that adoption of the UBE is the right decision, for the reasons that follow.

The underlying rationale for the UBE is a response to the times. The UBE would better reflect the multijurisdictional practice of law today, while at the same time ensuring the requisite level of competency for lawyers. The job-to-lawyer ratio is not favorable for recent graduates, and at the same time there is an access to justice gap that plagues this country. The UBE would help graduates find jobs by reducing the burden and expense of taking multiple exams, while making it easier for graduates to move to jurisdictions where jobs are available.

The vast majority of law school graduates have to choose a single jurisdiction where they will apply for admission to the bar. That decision usually must be made prior to obtaining employment. Some of those graduates may need to move to another jurisdiction, and in such situations they must often retake the bar exam at additional cost to practice law in that new jurisdiction. The UBE better reflects the reality that firms and

practices have become multijurisdictional. Lawyers, like all professionals, are increasingly mobile, changing firms and locations more than ever. Given the state of the legal job market, this need is particularly true today. Law school graduates, and even recent admittees, needing to change jurisdictions are forced to take multiple exams, adding thousands of dollars to their already-considerable debt load. The UBE offers some relief to this problem. For much less additional time and money, newly minted lawyers could transfer their license to another jurisdiction, and at the same time, give their prospective employer more confidence in hiring them.

Further, law schools develop part of their curriculum based on the bar. Over time, the UBE could become more of a test that accurately measures whether or not an examinee is prepared to practice law. Law schools would be hard pressed to not adapt their own curriculums to be more practical towards the actual practice and business of law. Such a result is more likely to transpire if we need to only adapt one exam, instead of leaving it to separate jurisdictions. The UBE is not just an opportunity to allow for more efficient multijurisdictional practice of law. The UBE is an opportunity to shape legal education to better prepare new lawyers.

The ultimate goal of bar exams is to protect the public by ensuring minimum levels of competency in the legal profession. The UBE would provide more transparency and consistency across the legal profession and relieve the New York Board of Law Examiners of the burden of creating a test twice a year. More importantly, the bar exam is not all that protects the public. The ethical rules and risk of professional liability protect the public, as well. Any lawyer would face both sanctions and malpractice suits if he or she attempted to represent a client in practice areas or state-specific law without having fully educated him or herself. So adoption of the UBE does not expose the public to greater risk of substandard representation.

Only the fourteen states that currently administer the UBE have a vested interest in shaping the quality and form of the exam. The sooner that New York chooses to adopt the UBE, the greater the impact that New York will have on the UBE's development.

With more and more jurisdictions adopting the UBE, the eventual outcome seems inevitable. New York is primed to be a leader in this outcome, and can help shape what that future will look like starting next year, and for generations to come. The legal profession also stands to gain from the widespread implementation of the UBE, with New York acting as a catalyst to achieve that result. For the aforementioned reasons, the ABA Young Lawyers Division supports the recommendation that the New York Court of Appeals adopt the Uniform Bar Exam.

Respectfully submitted,
ABA Young Lawyers Division

Andrew M. Schpak
Chair

AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION

TRUTH IN LAW SCHOOL EDUCATION TASK FORCE
OF THE YOUNG LAWYERS DIVISION

RECOMMENDATION AND REPORT TO THE
COUNCIL AND ASSEMBLY OF THE YOUNG LAWYERS DIVISION

RECOMMENDATION

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

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

WHEREAS, the increased demand for lawyer mobility has resulted in greater multijurisdictional practice and has increased utilization of admission on motion by experienced lawyers; and

WHEREAS, admission by motion rarely applies to recently admitted lawyers; and

WHEREAS, the increasing use of uniform, high quality testing instruments has rendered most jurisdictions' bar examinations substantially similar; and

WHEREAS, a uniform licensing examination for lawyers would benefit the changing landscape of legal education; and

WHEREAS, after adoption of the Uniform Bar Exam, state bar admission authorities and state supreme courts would remain responsible for making admission decisions, including establishing character and fitness qualifications, setting passing standards, and enforcing their own rules for admission; and

WHEREAS, the Conference of Chief Justices and the American Bar Association Council of the Section of Legal Education and Admissions to the Bar adopted resolutions urging "the bar admission authorities in each state and territory to consider participating in the development and implementation of a uniform bar examination";[1,2] and

WHEREAS the American Bar Association Task Force on the Future of Legal Education's final report issued January 24, 2014, recommends that state Supreme Courts, state Bar Associations and other regulators of lawyers and law practice "establish uniform national standards for admission to practice as a lawyer, including adoption of the Uniform Bar Examination";[3]

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[1] https://www.ncbex.org/assets/media_files/UBE/CCJ-Resolution-4-Uniform-Bar-Exam-2010-AM-Adopted.pdf
[2] http://www.abajournal.com/files/Uniform_Bar_Exam_2010_Council_(9-14)_v2.pdf
[3] http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf page 33

NOW, THEREFORE, BE IT RESOLVED that the American Bar Association Young Lawyers Division, by and through its Assembly, hereby supports the positions taken in 2010 by the Conference of Chief Justices and by the Section of Legal Education and Admissions to the Bar;

FURTHER RESOLVED that the American Bar Association Young Lawyers Division urges the bar admission authorities in each state, territory and the District of Columbia to consider participating in the development and implementation of the Uniform Bar Examination;

FURTHER RESOLVED, that the American Bar Association Young Lawyers Division encourages these and other entities to renew consideration of the Uniform Bar Exam now that four years have passed since previous relevant resolutions and now that fourteen states have adopted the Uniform Bar Exam, and that the American Bar Association Law Student Division is committed to working with these groups in such a re-examination; and

FURTHER RESOLVED, the American Bar Association Young Lawyers Division urges States and Territories to expeditiously adopt the Uniform Bar Exam.

REPORT

Introduction

The Uniform Bar Exam ("UBE") is entering its fourth year, with fourteen jurisdictions having administered the exam in July 2014, and New York considering adoption through a public comment period ending March 1, 2015. Iowa is also considering implementing the UBE. Such momentum is right on schedule, if not a little late. Administering significantly duplicative exams throughout the United States is inefficient. The UBE serves to decrease the expense of an exam taken mostly by recent law school graduates saddled with considerable student loan debt[4]. The UBE more adequately tests legal proficiency and still allows each jurisdiction to ensure that bar admission candidates have adequate knowledge of local law. Non-UBE administered exams already test mostly the same general issues of law, with some jurisdictions testing little to no emphasis on local variations. Year after year, more jurisdictions are adopting the UBE.

Bar Exam History

The history of the written bar exam tells the tale of a steady progression toward the UBE. The bar exam in most states is not an immutable thing, as it has been in flux for most of its existence. Prior to written examinations, bar admissions were conducted orally, either before a judge of the court or by one or more other lawyers.[5] An oral component to the exam was kept well into the 20th Century. Early bar exams focused on rote learning and basic literary skills and therefore "failed to function as effective tests of competence."[6]

In 1972, the National Conference of Bar Examiners ("NCBE") first offered the Multistate Bar Examination ("MBE").[7] The MBE is now offered in 48 states.[8] The MBE has not only improved the scope and quality of bar exams, but it has solved immense logistical problems in administering bar exams throughout the country.[9] Later, the NCBE developed supplemental exams, including: the Multistate Professional Responsibility Examination ("MPRE"), first offered in 1980,[10] and now used in all jurisdictions, except Maryland, Washington, Wisconsin and Puerto Rico;[11] the Multistate Essay Examination ("MEE"), first offered in 1988[12] and now used in 31 jurisdictions;[13] and the Multistate Performance Test ("MPT"), first used in 1997[14] and now used in 41 states and territories.[15]

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[4] Ill. State Bar Ass'n, Final Report, Findings & Recommendations On The Impact Of Law School Debt On The Delivery Of Legal Services [hereinafter ISBA Debt Report] 13 (2013), available at http://www.isba.org/sites/default/files/committees/Law%20School%20Debt%20Report%20-%203-8-13.pdf.

[5] Robert M. Jarvis, An Anecdotal History of the Bar Exam, 9 Geo. J. Legal Ethics 359, 374 (1996).

[6] *Id.*

[7] *Id.* at 378.

[8] Comprehensive Guide to Bar Admission Requirements 2010 at 17 (Erica Moeser & Claire Huisman, eds. 2010). Louisiana, Washington and Puerto Rico have not adopted the MBE.

[9] Jarvis, supra note 1, at 380 (citing Eckler, supra note 9).

[10] *Jarvis* at 384.

[11] http://www.ncbex.org/about-ncbe-exams/mpre/

[12] Jane Smith, Testing, Testing, B. Examiner, Nov. 1998, at 24, 24.

[13] http://www.ncbex.org/about-ncbe-exams/mee/mee-faqs/

[14] Andrea A. Curcio, A Better Bar: Why and How the Existing Bar Exam Should Change, 81 Neb. L. Rev. 363, 378 (2002).

[15] http://www.ncbex.org/about-ncbe-exams/mpt/mpt-faqs/

Given that nearly all states and territories use the MBE and the MPRE, and most utilize some portion of other NCBE uniform examinations, we are essentially already using the UBE in many jurisdictions.[16]

UBE Composition and Administration

The UBE is composed of the MEE, MPT, and the MBE.[17] It is uniformly graded, offering test-takers a portable score, something that would prove beneficial to law students and recent graduates. UBE jurisdictions agree to follow one scoring rubric for the MEE, which expresses general principles of law unless specified otherwise in the question, as when the law is provided within the question. The MPT uses the law of the mythical state of Franklin, which is given to the candidate as part of the exam.

The NCBE pays considerable attention to quality control and offers extensive opportunities for graders to participate in training that is specific to each question once administered and before grading begins. Tests are graded locally, and the problem of forum shopping is alleviated by the UBE grading model. Without going into the minutia of grading, graders of the MEE and MPT rank candidates from best to worst, and through scaling, differences are eliminated. The written scores are set on the MBE scale, and in this way, the effect of having a jurisdiction employ hard or easy grading is eliminated. In short, there is no advantage to forum shopping. A full explanation of scaling can be found in the December 2014 issue of The Bar Examiner.[18]

Jurisdictions that use the UBE still set their own guidelines for issues such as: setting their own passing scores; determining how long incoming UBE scores will be accepted; and deciding who may sit for the bar exam and who will be admitted into practice.[19] Jurisdictions that desire to ensure that candidates have knowledge of local law can meet this need in various ways. Most jurisdictions are not testing local law to any considerable degree on current bar examinations, and candidates can pass most bar examinations by studying a core set of subjects, paying little to no attention to local variation in the law.

At this point, an estimated 5,476 examinees have taken the UBE from February 2011 to July 2014. (See Appendix A). In February 2011 there were only two jurisdictions that offered the exam, and in July 2014 there were fourteen jurisdictions that offered the exam.[20] The amount of scores transferred has increased year to year, with 45 in 2011, 329 in 2012, and 617 in 2013. As of September 2014, at least 1,155 scores have been transferred. (See Appendix B, C).

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[16] Frederic White, A Uniform Bar Examination: An Idea Whose Time Has Come, B. Examiner, Feb. 2009, at 6, 6-7.

[17] http://www.ncbex.org/about-ncbe-exams/ube/

[18] http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2014/830414-abridged.pdf at 50.

[19] "UBE Gaining Momentum, Some Predict Dominance." NationalJurist.com. National Jurist, 18 May 2013. Web. 21 Sept. 2014. <http://www.nationaljurist.com/content/ube-gaining-momentum-some-predict-dominance>.

[20] Alabama, Alaska, Arizona, Colorado, Idaho, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Utah, Washington, and Wyoming have adopted the UBE. More information at http://www.ncbex.org/about-ncbe-exams/ube/.

UBE Benefits

The benefits of the UBE are numerous. The UBE better reflects the reality that firms and practices have become multi-jurisdictional and global. Tests of legal competency should therefore emphasize cross-jurisdictional topics.[21] Furthermore, lawyers, like all professionals, are increasingly mobile, changing firms and locations more than ever.[22] The UBE would make it easier for lawyers to gain admission in multiple jurisdictions by being able to transfer scores from one to the other. Given the state of the legal job market, this need is particularly acute today. Law school graduates without jobs cannot know where their practices will ultimately land. This can force them to take multiple exams, adding thousands of dollars to their already-considerable debt load.[23] The UBE would offer some relief to this problem.

Moving toward the UBE would also align the legal field with other professions, including medicine, which utilize a uniform exam for board licensure.[24] The common reaction to this statement is that medicine should be uniform. After all, a pancreas is a pancreas, whether it is in Missouri or New York. In reality, though, state medical board license examinations varied considerably to reflect the different diseases and medical conditions that afflict different regions and ethnic populations. Lyme Disease, for instance, may be common in Connecticut, but it is virtually nonexistent in Montana. Nevertheless, in the late 1980s, the National Board of Medical Examiners went through the same process that the NCBE is going through now and worked to establish a uniform exam. This exam ensured competency of medical professionals while at the same time easing the expense for state and territorial medical boards of administering separate exams across the country.[25]

The ultimate goal of bar exams is to protect the public by ensuring minimum levels of competency in the legal profession. The UBE would provide some level of transparency and consistency across the legal profession.[26] The UBE would relieve state boards of bar examiners of the burden of creating a test twice a year. States lack the resources to retain professional test writers. This can result in exam questions that are frequently unreliable tests of legal competency.[27] The NCBE has the resources to prescreen and heavily review and edit its tests, using a staff of law professors and professional test writers.

Rationale for Adoption

Only the fourteen states that currently administer the UBE have a vested interest in the quality and form of the exam. Therefore, only those states care to provide input towards shaping the

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[21] White, supra note 25, at 6.

[22] Hon. Rebecca White Berch, The Case for the Uniform Bar Exam, B. Examiner, Feb. 2009, at 9, 10; Mary Kay Kane, A Uniform Bar Exam: One Academic's Perspective, B. Examiner, Feb. 2009, at 19, 20.

[23] There are expenses not only in registering for exams, but also in preparing for them. Popular courses such as BARBRI can run in the thousands of dollars.

[24] Accountants also use a uniform exam for certification. Leigh Jones, Uniform Bar Exam Drawing Closer to Reality, LAW.COM, Oct. 12, 2009, at http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202434472731.

[25] Susan M. Case, Ph.D., A Uniform Licensure Examination: It Can Be Done, B. Examiner, Feb. 2009, at 30, 31-32.

[26] Susan M. Case, Ph.D., A Uniform Bar Examination: What's In It For Me?, B. Examiner, Feb. 2010, at 50, 52.

[27] Society of American Law Teachers, SALT Raises Questions For States Considering Adoption of a Uniform Exam (Jan 2010), at 1, available at http://www.saltlaw.org/userfiles/file/1-19-10SALTuniformbarexamfinal.pdf.

exam. The globalization of law practice is readily apparent. In August 2002, the American Bar Association's Commission on Multijurisdictional Practice "recognized that geography no longer dictated the substantive law a lawyer would practice, nor the location in which that practice would take place."[28] Global licensing is sure to follow, as more jurisdictions join in adopting the UBE. If all of the jurisdictions provide input into the UBE, then the exam will become greater. A single exam will be easier to change and adapt with time, while still having an impact on the profession.

Local law is not tested in most jurisdictions because the current purpose of a bar exam is to test legal reasoning skills to ensure that candidates for admission can "think like lawyers." Accordingly, law schools purport to teach law students to "think like lawyers" because law schools claim to teach towards the bar exam. While such a reality is questionable, due to the existence and need of bar review courses such as BARBRI, law schools nevertheless develop part of their curriculum based on the bar. Over time, the UBE could become more of a test that could actually measure whether or not an examinee is prepared to practice law. Reasonably, law schools would be hard pressed to not adapt their own curriculums to be more practical towards the actual practice and business of law. Such an exam is more likely to come about if we only have to adapt one exam, instead of leaving it to every separate jurisdiction. The UBE is not just an opportunity to allow multijurisdictional practice of law. This exam is an opportunity to reform legal education as we know it.

The vast majority of law school graduates have to choose a single jurisdiction where they will apply for admission to the bar. That decision usually must be made prior to obtaining employment in that jurisdiction. Some of those graduates may want or need to move to another jurisdiction, and in such situations they must often retake the bar exam at additional cost to practice law in that new jurisdiction. Reciprocity agreements are usually only available to seasoned lawyers with five or more years of experience.[29] Today, if a young lawyer sat for a bar exam in a jurisdiction where there are no longer job opportunities, then he or she must wait for up to six months and pay fees to take another jurisdiction's exam. The UBE would alleviate this circumstance, as that newly minted young lawyer could more easily transfer to another jurisdiction. While there is a legitimate concern for lose of local control, that concern is readily alleviated.

The UBE would still permit state bar examiners from either testing or otherwise ensuring competency with respect to local law. Bar examiners could design tests of local law as an adjunct to the UBE. New York is considering implementing an additional one-hour of fifty state-specific questions to the UBE. New York's state-specific portion would be administered four times a year, if the UBE were adopted. A test-taker who would want to take the UBE and practice in New York could study specific aspects of the state's law instead of studying general variations in dozens of areas. State bars could also ensure competency through bridge-the-gap CLE programs required for candidates for admission to the bar. These are already mandated in many states.[30]

For the jurisdictions that rely on all three of the multistate components of the bar exam,

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

[29] Swensen, Tim. "How to Avoid Taking Another Bar Exam When Relocating." *The Young Lawyer* 15.3 (2010). *AmericanBar.org*. American Bar Association. <http://www.americanbar.org/content/dam/aba/publishing/young_lawyer/yld_tyl_dec10jan11_career.authcheckdam.pdf>.

[30] Georgia, for instance, requires that newly admitted members complete a "Transition Into Law Practice Program." See 2004-2010 State Bar of Georgia Handbook Rule 8-194(b).

adoption the UBE is merely a formality, such as with Iowa. Certain jurisdictions have their boards of bar examiners still drafting essay questions, while the topics are largely the same as those that appear on the MEE. They involve the same general areas of law with little to no local nuances.[31] The UBE would reduce substantial duplication efforts that are occurring throughout the country, thus freeing state resources to focus on other areas of importance in bar admissions, such as character and fitness examinations, setting passing standards, enforcing their own rules for admission, and mandatory CLE programs.

The problem of the subjectivity of exam graders would be significantly reduced with the UBE. Exam graders would have uniform model answers and grading materials. Reduced subjectivity in grading exams alleviates the concern that students will opt to take the UBE in one jurisdiction over another, with the hope that the test taker can pass in an easier jurisdiction and then transfer to any jurisdiction in which he or she wants to find work. The UBE exam makes grading more uniform from jurisdiction to jurisdiction. Additionally, each jurisdiction will still have control to decide how long it will accept a transferred score, thus further alleviating any bait-and-switch concerns.

Critics often point to certain areas that vary considerably from one jurisdiction to the next, such as probate, trusts and estates and family law. Although these areas of law vary more than most from one jurisdiction to the next, there are commonalities, such as through the Uniform Probate Code. Since the law has become specialized, a test of minimum competency should not be testing special areas of the law that vary from jurisdiction to jurisdiction. Additionally, any lawyer would face both sanctions and malpractice suits if he or she attempted to represent a client in such practice areas without having fully educated him or herself.

The law is increasingly uniform throughout the states and territories. Whether through uniform laws or through the adoption of principles in the Restatements, laws do not vary considerably from one jurisdiction to the next. Most jurisdictions (Louisiana being the most notable exception) derive their general legal principles from the same English Common Law source. Where laws do vary, it is typically in specialized areas or through minor nuances, none of which are rigorously tested in an exam of basic competency.

Finally, federal attorneys only need to be licensed in one state, and then they can practice law in whatever jurisdiction their job requires. Additionally, there is trend where certain states are willing to offer reciprocity to another state so long as the other state is also willing to offer reciprocity. These two realities lend themselves to a simple conclusion – that knowledge of specific local law is on its way out for state licensure. Nevertheless, jurisdictions will still be able to set the passing score on the exam.

Furthering ABA Policy

The UBE would be consistent with several ABA policies. Most recently, in August 2014, the ABA House of Delegates adopted Resolution 108 of the Legal Access Job Corps Task Force regarding the access to justice gap. Resolution 108 outlines that "most states have substantial rural areas and some of them have an aging lawyer population. As a result, many communities are now without lawyers. For example, in one South Dakota community, the nearest lawyer is 120 miles away. State bars faced with this challenge are creating rural placement projects designed to

[31] White, supra note 25, at 6-7.

encourage and give incentives for recently admitted lawyers to set up or assume practices in these communities."

Wider adoption of the UBE could address both the problems of recent graduate unemployment and lack of access to legal services in certain locals. This resolution urges all jurisdictions to remedy this deficit by adopting the UBE, providing portability to law students and a step in the right direction towards the reformation of legal education.

Summary

The recommended resolution will enable the ABA to continue to serve the interests of law students, young lawyers and the bar in new and innovative ways. The UBE is an idea whose time has come. Such an exam would better reflect the multijurisdictional practice of law today while at the same time ensuring a level of competency for all lawyers throughout the United States. Such an exam would greatly assist law school graduates facing tremendous challenges finding employment while at the same time reducing inefficiency and expense by eliminating the duplication of efforts among state bar examiners. Finally, because most states are already, in essence, administering the UBE, formally doing so is the next logical step.

Respectfully submitted,

ABA YLD Truth in Law School Education Task Force
December 2014

APPENDIX A

UBE Exams Taken & Scores Transferred

Number of UBE Examinees by Exam Date

FEB11 (2 Jurisdictions)
Total 216

FEB12 (5 Jurisdictions)
Total 936

FEB13 (8 Jurisdictions)
Total 1 ,401

FEB14 (14 Jurisdictions)
Total 2 ,166

JUL11 (3 Jurisdictions)
Total 1 ,237

JUL12 (6 Jurisdictions)
Total 3 ,169

JUL13 (11 Jurisdictions)
Total 4 ,670

JUL 14 (14 Jurisdictions)
Total 5 ,476 (estimated)

Total UBE Score Transfers by Year

2011	45
2012	329
2013	617
2014	164 (to date)
Total	1 ,155

9/22/14

APPENDIX B

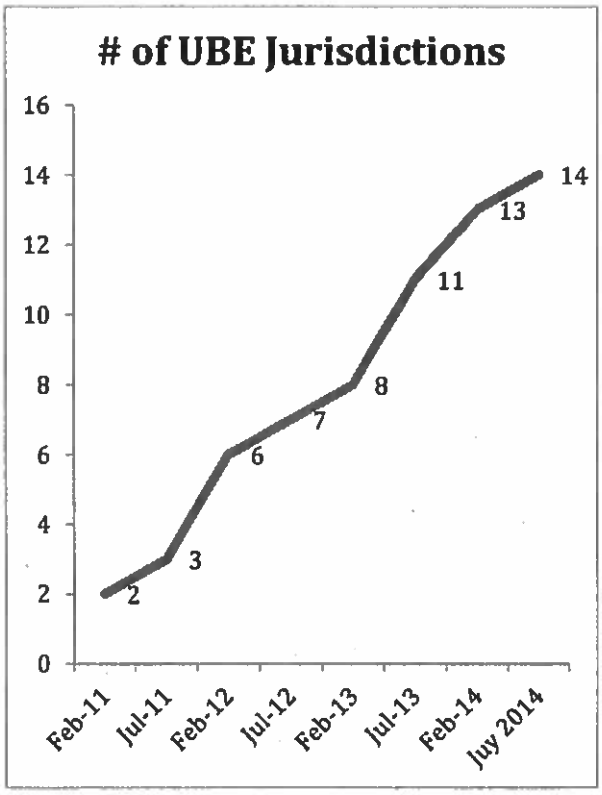
Breakdown of multi-state NCBE test adoption

State	MBE	MEE	MPT	MEE	MPRE	UBE
AL	X	X	X	X	X	X
AK	X	X	X	X	X	X
AZ	X	X	X	X	X	X
AR	X	X	X	X	X	X
CA	X				X	
CO	X	X	X	X	X	X
CT	X	X	X	X	X	
DE	X		X		X	
DC	X	X	X	X	X	
FL	X				X	
GA	X		X		X	
HI	X	X	X	X	X	
ID	X	X	X	X	X	X
IL	X	X	X	X	X	
IN	X		X		X	
IA	X	X	X		X	
KS	X				X	
KY	X	X		X	X	
LA					X	
ME	X		X		X	
MD	X		X			
MA	X				X	
MI	X				X	
MN	X	X	X	X	X	X
MS	X	X	X	X	X	
MO	X	X	X	X	X	X
MT	X	X	X	X	X	X
NE	X		X	X	X	X
NV	X		X		X	
NH	X	X	X	X	X	X
NJ	X				X	
NM	X	X	X		X	
NY	X		X		X	
NC	X				X	X
ND	X	X	X	X	X	X
OH	X		X		X	
OK	X				X	
OR	X	X	X	X	X	
PA	X				X	
RI	X	X	X	X	X	
SC	X				X	
SD	X	X	X	X	X	
TN	X		X		X	
TX	X		X		X	

UT	X	X	X	X	X	X
VT	X		X		X	
VA	X				X	
WA	X	X	X	X	X	
WV	X	X	X	X	X	
WI	X	X	X	X		
WY	X	X	X	X	X	X
#/states	50	27	38	26	49	14

APPENDIX C

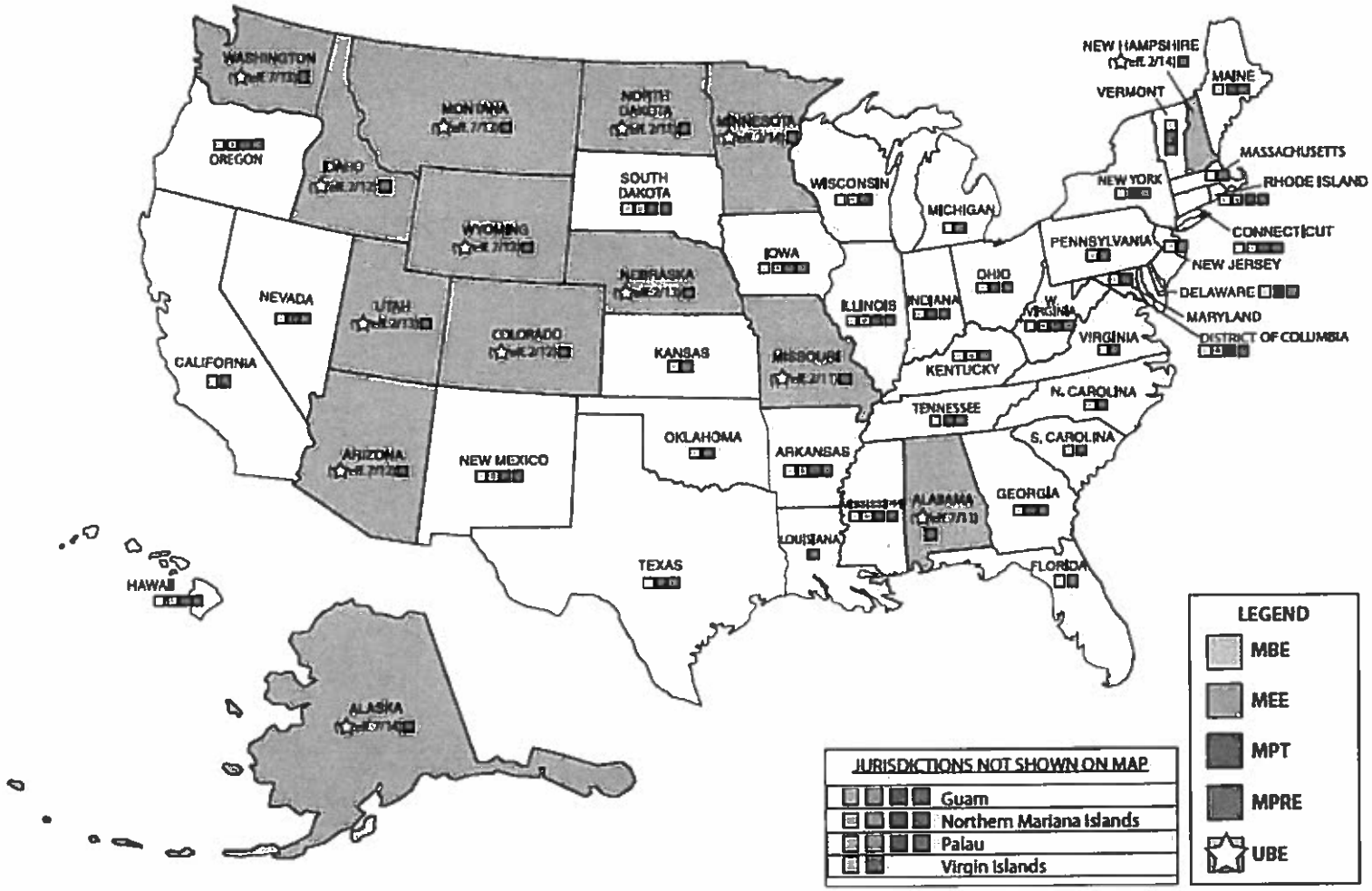
State	First UBE Administration
Alabama	July 2011
Alaska	July 2014
Arizona	July 2012
Colorado	February 2012
Idaho	February 2012
Minnesota	February 2014
Missouri	February 2011
Montana	July 2013
Nebraska	February 2012
New Hampshire	February 2014
North Dakota	February 2011
Utah	February 2013
Washington	July 2013
Wyoming	July 2013



Adoption of the Uniform Bar Examination

with Other NCBE Testing Services Depicted

8/25/2014



ABA YLD RECOMMENDATION
GENERAL INFORMATION FORM

Submitting Entity: ABA YLD Truth In Law School Education Task Force

Submitted By: Mathew Kerbis
ABA YLD Emerging Leader

1. Summary of Recommendations:

The ABA support governing bodies of state and territorial bar examinations adopting the UBE.

2. Date of Approval by Submitting Entity:

October 2014.

3. Has this or a similar recommendation been submitted to the Assembly or ABA previously?

Yes. 4YL from 2011 Midyear Assembly, which this resolutions draws from.

4. Are there any Division or ABA policies that are relevant to this recommendation and, if so, would they be affected by its adoption?

The UBE would be consistent with several ABA policies. For instance, the ABA, along with the NCBE and the Association of American Law Schools, has adopted a Code of Recommended Standards for Bar Examiners. The House of Delegates adopted the latest version of this code in August 1987. This code includes several provisions that tend to support the UBE. These standards are consistent with, if not supportive of, the UBE to test general subject matter taught in law school primarily for the purpose of testing legal reasoning and communication skills, not for the purpose of testing knowledge of specific local laws.[32]

In 1994, the ABA adopted as policy the recommendations from a report of the Task Force on Law Schools and the Profession. Among other recommendations, the task force urged "licensing authorities to consider modifying bar examinations which do not give appropriate weight to the acquisition of lawyering skills and professional values."

In 2006, the ABA House of Delegates adopted a resolution concerning minorities in the pipeline to the profession. Among other policies within the resolution, it urged state and territorial bar examiners to address significant problems facing minorities within the pipeline to the profession. Certainly, erecting a barrier in the form of duplicative and expensive tests for each state and territory is just the type of significant problem that should be addressed.

Finally, in August 2014, the ABA House of Delegates adopted Resolution 108 of the Legal Access Job Corps Task Force regarding the access to justice gap. Resolution 108 outlines that "most states have substantial rural areas and some of them have an aging lawyer population. As a result,

[32] Code of Recommended Standards for Bar Examiners §§ 18-21.

many communities are now without lawyers. For example, in one South Dakota community, the nearest lawyer is 120 miles away. State bars faced with this challenge are creating rural placement projects designed to encourage and give incentives for recently admitted lawyers to set up or assume practices in these communities."

None of the above policies, however, would be directly affected by this resolution.

5. Does this recommendation require immediate action at the next Assembly? If so, why?

Yes. With New York and other state bars considering adoption of the UBE, it is crucial for the ABA YLD to be able to weigh in on those discussions.

6. Status of Legislation (if applicable):

N/A.

7. Cost to the Association:

None.

8. Disclosure of Conflict of Interest (if applicable):

None.

9. Referrals:

None.

10. Contact Person (Prior to the meeting):

Mathew Kerbis
ABA YLD Emerging Leader
mathew.kerbis@gmail.com

C L E A

Clinical Legal Education Association

February 23, 2015

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

Re: Notice of Public Hearings: Uniform Bar Exam

Via electronic submission to:
UniformBarExam@nycourts.gov
Hard Copy Mail to Follow

Dear Judge Rivera and Advisory Committee Members:

The Clinical Legal Education Association (CLEA) very much appreciated the opportunity to present testimony on Tuesday, February 3, 2015, at the public hearing held in Albany. At that hearing, Committee members made several inquiries concerning CLEA's position on the proposed changes to the New York State Bar, and Judge Rivera invited CLEA to submit additional information. This letter serves as a response to that invitation.

1. **Institute for the Advancement of the American Legal System (IAALS) Report**

Committee members inquired about the IAALS report I referenced and the screening requirements for the Daniel Webster Scholar Honors Program. Since the public hearing, IAALS has made public its report, AHEAD OF THE CURVE, TURNING LAW STUDENTS TO LAWYERS: A STUDY OF THE DANIEL WEBSTER SCHOLARS HONORS PROGRAM AT THE UNIVERSITY OF NEW HAMPSHIPRE SCHOOL OF LAW. " It can be found online at:
http://online.iaals.du.edu/2015/02/05/first-ever-evaluation-of-experiential-law-school-program-proves-graduates-are-ahead-of-the-curve/

Notably, the study found:

- In focus groups, members of the profession and alumni expressed their belief that students who graduate from the program are a step ahead of new law school graduates;
- When evaluated based on standardized client interviews, students in the program outperformed lawyers who had been admitted to practice within the last two years; and
- The only significant predictor of standardized client interview performance was whether or not the interviewer participated in the Daniel Webster Scholar Honors Program. Neither LSAT scores nor class rank was significantly predictive of interview performance.

The report also explains the interviewing process and screening criteria used to select students. [1] The study provides a sound basis for exploring alternative forms of assessment which may not create or exacerbate performance gaps.

2. **Disparate Impact Information**

Committee members also asked several speakers, including me, about disparate impact or "performance gap" data. The questions focused on two themes: 1) is there any "good data" to support a prediction of disparate impact?; and 2) what does the available data show?

A) Who has the data?

With respect to possession of the data on disparate impact, CLEA notes the following:

> *i)* The New York State Board of Law Examiners (BOLE) possesses disparate impact data with respect to how New York test-takers of color fare on the MBE as well as on the New York Bar Exam essay and multiple choice sections. BOLE should be asked to use past test-takers performance on the MBE to assess whether increasing the weight of the MBE from 40 to 50% is likely to increase the risk of a disparate impact. In fact, a 2010 report of the New York State Bar Association Committee on Legal Education and Admission to the Bar (CLEAB) (Special Committee to Study the Bar Examination and Other Means of Measuring Lawyer Competence) also known as the "Kinney Report," references disparate impact data analysis that appears to have been conducted by BOLE; and
>
> *ii)* The National Conference of Bar Examiners (NCBE) is in the best position to provide this Committee with appropriate data. NCBE possesses the staffing and the psychometric expertise to "crunch the numbers" in order for your committee to evaluate better the disparate impact consequences. NCBE should prioritize providing the committee with information about which states collect data on disparate impact, how many test-takers of color sit for those bar exams and the results in those states. In addition, NCBE should be asked to affirmatively request additional data from appropriate sources in those UBE states which do not collect identifying data. NCBE should be asked by the Advisory Committee to provide the Committee with this analysis before the Advisory Committee goes forward with the current proposal to adopt the UBE.

[1] The screening criteria fall under four areas of inquiry: 1. Professional Relationships; 2. Professional Development; 3. Personal Responsibility; and 4. Academic Competency. Academic Competency is defined as "Demonstrate academic skills sufficient to maintain a cumulative GPA of at least 3.0 upon graduation and to obtain at least a B- in any Daniel Webster Scholar course."

B) What does the available data show?

The most recent data from California reports a disparate impact gap. Last fall, first-time African American test takers from ABA-approved schools had a pass rate of only 42%.[2] The information provided publicly is not divided in a manner which permits separate analysis of the multiple-choice versus the performance tests parts of the exam.[3]

There is evidence that reducing the "speededness of the exam" will help close the performance gap. William Henderson's germinal article on test-taking speed as an independent variable remains influential.[4] His findings have been fleshed out by Professors Andrea A. Curcio, Carol L. Chomsky, and Eileen Kaufman to illustrate how test-taking speed plays out in the bar exam.[5] Additionally, a New York bar study concluded that doubling the time allowed for the MBE would likely produce a 30 point increase in the NY Exam Results (Millman Report).[6]

CLEA urges the Advisory Committee to study the issue of speededness as recommended by the NYSBA Committee on Legal Education and Admission (CLEAB) 2012 report, RECOMMENDATIONS FOR IMPLEMENTATION OF THE REPORT OF THE SPECIAL COMMITTEE TO STUDY THE BAR EXAMINATION AND OTHER MEANS OF MEASURING LAWYER COMPETENCE.[7]

3. <u>Information from CSALE about Students Shut Out of Clinics</u>

At Judge Rivera's request, I approached the Center for Applied Legal Studies (CSALE) and requested early access to its' soon to be released report, in order to answer Judge Rivera's question about the availability of clinical slots for interested law students. Here is the information provided to me by e-mail:

> *2013-14 -- Question 4b: Student Demand for Faculty Supervised Law Clinics*
>
> *Over the past three years, student demand has typically exceeded the number of available positions in 58.5% of law clinics. In 9.1% of clinics, student demand has typically not exceeded the number of available positions; in 32.3% the number of available slots has matched student demand.*

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[2] https://verdict.justia.com/2015/01/02/additional-thoughts-concerns-low-bar-pass-rates-california-elsewhere-2014.
[3] http://admissions.calbar.ca.gov/Portals/4/documents/gbx/JULY2014STATS121814_R.pdf.
[4] William D. Henderson, "The LSAT, Law School Exams and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed," *Faculty Publications.* Paper 344 (2004), http://www.repository.law.indiana.edu/facpub/344.
[5] Andrea A. Curcio, Carol L. Chomsky, and Eileen Kaufman, *Testing, Diversity, and Merit: A Reply to Dan Subotnik and Others*, 9 U. MASS. L. REV. 206 (2014).
[6] Jason Millman, et al., *An Evaluation of the New York State Bar Examination* 8-9 & n.11 (May 1993).
[7] http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=549.

2013-14 -- Question 5: Student Demand for Field Placements

Over the past three years, student demand has typically exceeded the maximum permissible enrollment in 23.8% of field placement courses, matched the permissible enrollment in 48.2%, and been less than the permissible enrollment 28.0%.

4. Information about CLEA's Position on the Range of Competencies that Should Be Assessed in Law Students and Graduates

I was asked whether the additional provision of a second Multistate Performance Test (MPT) addressed concerns about the failure of the bar exam to assess an appropriate range of skills. It does not. Although the MPT uses simulated legal documents as the context for issue spotting, recall of legal rules, and application of those rules, the fundamental nature of what it tests and the necessity of "speededness" is substantially similar to a traditional bar exam essay. CLEA attaches a letter previously submitted to the ABA Standards Review Committee which discusses the pressure the bar exam places on law schools to concentrate only on acquisition of knowledge and critical reasoning. CLEA has also highlighted sections of this letter which address the range of skills needed as a new graduate. These skills could and should be tested by clinical assessment as part of the licensure to practice in New York.

We once again thank you for your important service and urge you to consider CLEA's concerns in your deliberations.

Yours Truly,

Mary A. Lynch
Co-President, Clinical Legal Education Association (CLEA)

[redacted]

From: Kevin Prue <[redacted]
Sent: Friday, February 27, 2015 9:40 AM
To: Uniform Bar
Subject: Request for Public Comment on the Uniform Bar Exam

Dear Miss Bosse,

Having recently taken the New York State Bar in February 2014 and the UBE in Connecticut in July 2014, I have some concerns with regard to New York adopting the UBE.

Having gone to law school in North Carolina, being new to the practice of law, and having recently taken both the UBE (CT) and a very state specific bar exam (NY), I feel that I am extremely qualified to weigh in on this matter.

Having gone to law school in a state other than New York I was not privy to any New York law other than U.S. Supreme Court cases and the occasional contracts case. As I am sure you are aware New York law is extremely unique and one not licensed here may be taken back by the complexity of New York law and the different terminology we use here in New York. For example, the CPLR, the majority of States and the Federal Courts follow the Fed. Rules of Civ. Pro. (FRCP). The CPLR although mimics the idea of the FRCP in theory, the language and the numbering of the statues is entirely different. These differences, may seem trivial to a seasoned veteran, but to a young attorney straight out of law school they are mountainous. Another example of a major New York distinction is the different verbiage we use in New York. For example a criminal battery in New York is an Assault, while an assault in most other states and the Federal Courts is the threat of a battery (NY Assault). Although subtle, this is a huge distinction that could cause a newly admitted attorney trouble.

While preparing for the New York Bar Exam I was actually able to study New York law, something that I did not learn in law school. Upon completion of my studies I truly felt familiar with New York law, which I believe is the goal of the bar exam. Granted the only way to truly learn the practice of law is to do it, studying New York specific law made the transition from student to practitioner that much easier.

On to the UBE. While studying for the CT bar exam I did not learn an once of CT law. Although I am now admitted in CT I do not feel confident to practice in CT as I am unfamiliar with their laws and court system. It was very discouraging to study and take the CT bar exam as just after taking New York I expected to learn CT law. Learning CT law is something I did not do, while preparing for said bar exam, because the UBE does not test state distinctions.

The purpose of the bar is for lawyers to prove that they are minimally competent to practice law in that state. I submit that if one is not learning state law/distinctions one is not competent to practice in that state.

The bar exam is not the SAT or the LSAT. It is an exam that tests one on their knowledge of a specific states law. The MBE is the "SAT" portion of the bar exam. There is no need to add the essay version of the MBE, which is all the UBE really is.

I conclusion, I believe that the UBE is detrimental to the practice of law in a specific jurisdiction, as it fails to equip attorneys with the minimal knowledge required to practice in that specific state. I am adamantly opposed to the adoption of the UBE.

I would be very happy to speak to you and your colleagues regarding this issue.

Very truly yours,

Kevin A. Prue, Esq.

NYSBA

New York State Bar Association

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New York, February 25, 2015

Honorable Jenny Rivera, Associate Justice of the Court of Appeals
Chair, Advisory Committee of the Uniform Bar Examination
New York State Court of Appeals
20 Eagle Street
Albany, NY 12207

Comments on adoption of Uniform Bar Examination in New York

Dear Judge Rivera and Members of the Advisory Committee:

On behalf of the International Section of the New York State Bar Association ("NYSBA") – comprised of almost 2,000 members of the NYSBA, many of whom are lawyers admitted to practice in countries around the world as well as the Bar of the State of New York – I am pleased to submit the following comments about the proposed adoption of the Uniform Bar Examination ("UBE") in New York. The comments have been approved by the International Section's Executive Committee during its meeting held on February 19, 2015 and address principally our concern regarding the de-emphasis of New York law for the large number of lawyers from other countries who are eligible to apply for the New York Bar Exam by virtue of pursuing a qualifying Master of Laws (LL.M.) Program at many American Bar Association ("ABA") approved law schools.

In her address to the 2014 National Conference of Bar Examiners in May of 2014, Diane F. Bosse, Chair of the New York State Board of Law Examiners ("BOLE"), stated that the 4,602 foreign-educated candidates tested in 2013 comprised 29% of the New York Bar candidate pool and almost 80% of the 5,928 foreign-educated candidates who sat for a Bar Examination in all of the United States. That level is expected to continue, especially as efforts such as the UBE are likely to encourage an even higher percentage of foreign-educated students to sit for the New York State Bar Exam.

Ms. Bosse added that the number of foreign-educated candidates in the New York test population likely will increase in the coming years, given the decline in enrollment in J.D. programs at ABA-approved law schools and the burgeoning number of LL.M. programs that seek to prepare foreign-educated lawyers for Bar admission in the United States.

Instead of furthering a dubious policy which its proponents claim is designed to encourage the portability of a New York Bar Exam score to other UBE jurisdictions in the United States, the International Section is concerned about the admission to the New York Bar of foreign-educated candidates who might pass the Bar Exam, but with an inadequate education and competency in New York law, and then return to their own countries as "Admitted in New York" lawyers.

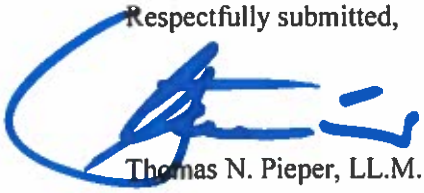
The International Section Executive Committee in September of 2009 approved "Three Long-Term Missions of the New York State Bar

Association International Section." The first is as "Custodian of New York Law as an International Standard." While proudly believing that more international transactions are governed by New York law than the law of any other jurisdiction in the world, the Section also feels strongly that this success carries with it a corresponding responsibility to make New York law strong, flexible and useful for purposes of structuring international and cross-border business and personal transactions. The International Section believes that the reduction of New York law content on the Bar Exam by the substitution of the UBE will lessen the knowledge of New York law that is an essential quality of a lawyer who holds herself or himself out as "Admitted in New York", which is the gold standard of multi-jurisdictional and cross-border practices around the world. The recent creation of the New York International Arbitration Center headed by former Chief Judge Judith Kaye is likely to increase the use of New York law in arbitration and litigation proceedings as well.

The International Section Executive Committee shares the view of those commentators who believe that an important function of any bar exam is to compel candidates, irrespective of where they have studied for their J.D. or LL.M. degrees, to undergo a period of intensive study in preparation for the New York Bar Exam as part of their legal education. This is particularly true for foreign-educated LL.M. graduates whose courses of study might have little, if any, New York law content and likely no study of New York Civil Practice Law and Rules. As many of the NYSBA International Section's members are primarily international and cross-border practitioners, we are concerned that many "Admitted in New York" lawyers will have inadequate grounding in New York law and still will be able to hold themselves out as advisors on New York law and procedural matters to their less sophisticated clients. Reducing the New York content part of the New York Bar Exam to a fifty question multiple choice test is inconsistent with what the International Section sees as its role as Custodian of New York law as the international standard for all "Admitted in New York" lawyers, especially those foreign-educated students eligible to sit for the New York Bar by virtue of a qualifying LL.M. program that might not require a significant study of New York law and procedure. We do not believe that a reduction of New York law content of the New York Bar Exam will enhance the New York Bar licensure as an internationally recognized valuable legal credential. To the contrary, we believe that the proposed substitution of the UBE risks lessening New York law as an international standard and will facilitate an increase of "Admitted in New York" lawyers who are not competent in New York law and procedure.

Thank you for your consideration.

Respectfully submitted,



Thomas N. Pieper, LL.M. (NYU)
Chair, NYSBA International Section
212-918-3532
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cc: Ms. Diane F. Bosse
Chair, New York State Board of Law Examiners
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February 25, 2015

Advisory Committee on the Uniform Bar Examination
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LAW EXAMINERS

Dear Members of the Advisory Committee:

This letter responds to your call for public comment on the proposed adoption of the Uniform Bar Examination (UBE) in New York. The Council of the Section of Legal Education and Admissions to the Bar does not ask to appear before the Committee, although we would certainly respond to a request that we appear. We ask the Committee to accept this letter and consider it in your deliberations. The views expressed in this letter are presented on behalf of the Council of the American Bar Association Section of Legal Education and Admissions to the Bar. These views have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The Council of the Section of Legal Education and Admissions to the Bar

The Council of the Section of Legal Education and Admissions to the Bar (a 21-member body composed of judges, legal educators, practitioners, "public members," and a representative from the ABA Law Student Division) is the national law school accreditor and regulator of American law schools. Graduation from a law school accredited by the Council fulfills the educational requirements for sitting for the bar examination in every American jurisdiction. The United States Department of Education recognizes the Council as the national accreditation agency for schools awarding the first degree in law, the J.D.[1] Accredited law schools are subject to Standards promulgated by the

[1] In its role as the national accreditor of law schools, the Council is "separate and independent" from the ABA. *See* 34 C.F.R.602.14. The Council, not the ABA Board of Governors or House of Delegates, is the final authority on accreditation-related matters. The Council submits these comments solely in its role as the national accrediting agency regulating law schools. The Council does not set ABA policy, which is subject to the procedures adopted by and judgments of the ABA Board of Governors and House of Delegates, often upon recommendations from individual ABA Sections,

Council, some of which relate directly to bar admissions.[2] Consequently, the Council is very interested in the rules governing admission to the bar across the country.[3]

Under our federal system, each state has the authority and responsibility to regulate those who practice law. Therefore, each jurisdiction developed its own rules governing admission to the bar. For many years, there was little commonality among bar examinations from state to state. Increasingly, however, both legal education and the legal profession operate in national and international contexts, suggesting that the more the requirements for bar admission can be uniform across jurisdictions without compromising state interests, the better it will be for law graduates, lawyers (particularly young lawyers), law schools, the profession, and the public.

The Growth of Uniform Bar Admission Testing Instruments and the UBE

Other professions – such as medicine, nursing, accountancy, and engineering – long ago adopted uniform tests for assessing qualifications to admissions to their practices. Nevertheless, each state retains the authority to decide whom to admit to the regulated professions in the state. While the legal profession did not move as rapidly as other professions to the development of more uniform tools for assessing the academic qualifications of those seeking admission to the practice of law, both legal education and bar examining have moved in that direction. In 1972, the Multistate Bar Examination (the "MBE") was first administered. Over the ensuring years, states, the District of Columbia, and the U.S. territories gradually adopted the MBE. Today, every American jurisdiction except Louisiana (with its Napoleonic Code, as opposed

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and Divisions. Neither the ABA Board of Governors nor the House of Delegates has to date adopted a policy relating to the Uniform Bar Examination.

[2] Standard 501(b) of the ABA Standards for Approval of Law Schools requires that law schools not admit applicants who do not appear capable of completing the school's academic program and "being admitted to the bar." Standard 301(a) requires each law school to maintain a rigorous program of legal education that prepares students "upon graduation, for admission to the bar...." Standard 316 builds on that general requirement by focusing on a school's graduates success on the bar examination and setting a floor for bar passage that a school must maintain to be operating in compliance with the Standards.

[3] Over the years, a number of members of the Council, of the Law School Accreditation Committee, and various other committees of the Section of Legal Education and Admission to the Bar have been active in bar admissions, and in the programs of the National Conference of Bar Examinations, an affiliated institution of the American Bar Association with representation in the House of Delegates.

to the Common Law tradition) uses the MBE as the anchor assessment tool in its bar examination.

The MBE was followed by the Multistate Professional Responsibility Examination (the "MPRE"), Multistate Essay Examination (the "MEE"), and the Multistate Performance Test (the "MPRE"). The choice of the term "multistate" as opposed to "national" is by design. It reflects that fact that each jurisdiction continues to retain its authority to set its own admissions requirements. Today, 30 American jurisdictions[4] use all three of the UBE testing components (the MBE, MEE, and MPT) in their bar examinations). Every state uses one or more NCBE testing product.

Many reasons have persuaded American jurisdictions to adopt these multistate products. It is not our purpose here to detail them all. But among the most persuasive is the economy of scale achievable through multistate participation in and adoption of the same tests to evaluate bar applicants. The National Conference of Bar Examiners spends large sums creating its testing products. Committees of content experts from around the country, and composed of academics, judges, and lawyers, using sophisticated test specifications and drafting techniques to produce professionally reviewed, edited, vetted, and "pretested" test items. Professional Ph.D.-level psychometricians equate and score examinations to assure that the results remain consistent from test administration to test administration. The quality controls in place for these examinations exceed those reasonably available to individual jurisdictions.

With the increasing use of these multistate tests, and particularly the growing commonality of jurisdictions using the MBE, MEE, and MPT, it was only natural that the question was asked, "If the same test components are being administered, should not applicants who take those tests be able to transfer a scores they earned in one jurisdiction to another jurisdiction without being required to take yet another bar examination?" The UBE was born as a result of the deliberations arising from that question. Fifteen states to date have concluded that the advantages of the UBE for bar applicants, the profession, and the public outweigh the arguments of those interested in maintaining the status quo.

The Council is keenly aware of the increasing challenges facing law school graduates. Increasing debt loads and a difficult employment market should cause all those involved in the legal education and bar admissions processes to seriously consider reasonable measures to assist recent law school graduates. The portability of the UBE score to other UBE jurisdictions creates additional options for recent law graduates and bar examination takers.

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[4] This list includes Guam, Northern Mariana Islands, Palau, and the Virgin Islands.

While the UBE is indeed a uniform bar examination and each UBE jurisdiction agrees to abide by defined conditions of use, adoption of the UBE does not foreclose any UBE jurisdiction from requiring applicants to complete other state-specific programs in order to achieve admission to the bar. For example, Missouri requires applicants to complete an on-line test of Missouri law and the Missouri legal system in order to be admitted. Arizona and Alabama require participation in an on-line course on the law of their states. These programs are designed to help assure that applicants are aware of unique and important aspects of the individual state's law and legal institutions. Each UBE jurisdiction also sets its own minimum passing score and maintains its own character and fitness requirements.

Council resolution in support of the UBE

The advantages of the UBE for applicants, jurisdictions, and ultimately the public caused the Council to adopt the following resolution in August, 2010:

> *BE IT RESOLVED that the Council of the Section of Legal Education and Admissions to the Bar urges the bar admission authorities in each state and territory to consider participating in the development and implementation of a uniform bar examination.*

The administration of accreditation Standards 301, 316, and 501 would be improved by states' choosing to use the UBE. In that regard, the resolution is Council policy in its role as the national accreditor of law schools.

Recommendation to the Advisory Committee:

The Council of the ABA Section of Legal Education and Admissions to the Bar, in its capacity as the recognized accrediting agency for legal education, encourages the New York bar authorities to recommend to the New York Court of Appeals that it consider adoption of the UBE. The Council acknowledges that issues must be addressed regarding the implementation of the UBE and the development of any other, additional tests or processes that might be adopted to complement the UBE to assure that individuals who become licensed to practice law in New York have the knowledge and skills that new attorneys should have in order to advance and protect the public interest.

Thank you for this opportunity to submit this statement. If the Advisory Committee has questions or would like additional information, please contact Barry Currier, Managing Director of Accreditation and Legal Education [redacted]

Sincerely,

Joan S. Howland BAR

Joan S. Howland
Council Chair
Roger F. Noreen Professor of Law
University of Minnesota Law School

[redacted]

From: Keith Bowers <[redacted]>
Sent: Friday, February 27, 2015 1:13 PM
To: Uniform Bar
Subject: Uniform Bar Exam - Herkimer County

The Herkimer County Bar Association has formed and authorized a committee to provide public comment on consideration being given that New York State adopt participation in a Uniform Bar Exam (UBE). Based upon the information this committee has been able to review, the adoption of the UBE poses far more questions than answers. Although a number of other public comments on the UBE predict with certainty increased job opportunities, this seems entirely speculative. Current law students are free to take the bar in any state that they are seeking to gain employment. It would seem that most all law students studying to be attorneys have a pretty good idea as to what geographic area of the country they are seeking employment and are not engaged in a wide open search of the entire continental United States.

The current states which have adopted the UBE are from a distinctly different geographical area of the country. New York State would appear to be the first or most noteworthy state to participate in this experiment. One would have to assume that the UBE will result in the significant watering down on emphasis given to New York law. It appears that as part of the UBE proposal, likely intended to appease those concerned over the deemphasis on New York law, there will be 1-2 hours of testing on New York law as opposed to the current test which dedicates a full day or 50% of the exam to New York Law. Under the UBE system, newly admitted attorneys in New York would not be required to have the same level of knowledge of New York law as has traditionally been required. Given the length of time the current system has been in place it would seem prudent to allow a bit more time to study the likely impact of adopting the UBE rather than speculate and hope for positive results. Without more reliable information or studies as to the likely positive and negative impact, the rush to adopt the UBE takes on the appearance of adopting change simply for the sake of change.

Herkimer County Bar Association
UBE Committee
Keith D. Bowers, Esq.

Law Offices of Keith D. Bowers, Esq.
209 N. Washington Street
Herkimer, New York 13350
[redacted]
e-mail: [redacted]

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[redacted]

From: Christopher Thorpe <[redacted]
Sent: Sunday, March 01, 2015 8:14 PM
To: Uniform Bar
Subject: Madison County Bar Association

To whom it may concern:

As President of the Madison County Bar Association, I have been authorized to provide comment on our organization's behalf. The issue of the Uniform Bar Exam was discussed at our February 11th meeting, and it was determined that our organization would be against the implementation of such. The New York State Bar exam is a badge of courage and a rite of passage that all members have had to take. It is what makes being a "New York Lawyer" a privilege. It is a concern of our organization that UBE would "water down" the legal profession in this state.

Should there be any further questions regarding the position of the Madison County Bar Association's position on this matter, please do not hesitate to contact me at 325-687-6093, ext 306.

Regards:

Christopher D. Thorpe, Esq
President, Madison County Bar Association

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New York State Board of Law Examiners
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Albany, N.Y. 12203-5195

Re: Proposed Modification of the New York State Bar Examination

Dear Ms. Bosse:

In December, 2014 I appointed a Task Force comprising five members of the Board of Directors of the 5000-member Nassau County Bar Association ("Association") to consider whether the New York State Bar Examination should be modified to include the adoption of the Uniform Bar Exam, as proposed in October, 2014 by the New York State Board of Law Examiners, and to prepare a report and make recommendations to the Association's Board of Directors.

The Task Force conducted research and examined the available material weighing the merits of the proposed modification to the New York State Bar Examination and considered the potential impacts of this modification on current and future members of the Association, the legal profession, and the practice of law in the State of New York.

On February 10, 2015, the Chair of the Task Force, Charlene J. Thompson, Esq., presented the Report and Recommendations of the Task Force to the Board of Directors. The Task Force focused on five issues: (a) the variables in implementation among the fourteen states that have adopted the UBE; (b) the portability of a passing UBE test score; (c) the utility of the UBE as a test of the candidate's qualifications to practice law in New York; (d) the impact of adoption of the UBE on New York's competitive job market; and (e) the impact of the adoption of the UBE on candidates of various backgrounds, including racial and ethnic minorities.

The Task Force recommended, for the reasons set forth in the Report and Recommendations, that the New York State Bar Examination not be modified as proposed by the Board of Law Examiners, that modifications

to the examination be undertaken only after further study and pre-testing of potential questions, and that the questions be analyzed for disparate impact on minority candidates. It was further recommended that the portion of the examination testing knowledge of New York law be more comprehensive and rigorous than proposed to ensure candidates can demonstrate competency to practice law in the State of New York.

A copy of the Report and Recommendation, together with a resolution of the Association's Board of Directors adopting the Report and Recommendations, is enclosed.

I thank you for the opportunity to share the Association's views on this subject and hope you will find the Report and Recommendations useful in your deliberations.

Very truly yours,

John P. McEntee
President

cc: New York State Bar Association
County and Local Bar Associations

NASSAU COUNTY BAR ASSOCIATION

REPORT AND RECOMMENDATIONS OF THE NASSAU COUNTY BAR ASSOCIATION TASK FORCE, AS ADOPTED BY THE NCBA BOARD OF DIRECTORS, ON THE MODIFICATION OF THE NEW YORK BAR EXAM AS PROPOSED BY THE STATE BOARD OF LAW EXAMINERS

Charlene J. Thompson, Chair

Patrick T. Collins
Alan B. Hodish
Lisa M. Petrocelli
Sandra Stines

February 10, 2015

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INTRODUCTION

On October 6, 2014, public notice was given that the New York State Board of Law Examiners (NYBOLE) recommended to the New York Court of Appeals that the current New York bar examination be replaced, almost in its entirety, with the Uniform Bar Examination (UBE) prepared by the National Conference of Bar Examiners. Nassau County Bar Association (NCBA) President John P. McEntee appointed this Task Force to consider the proposed modification of the New York bar exam.

The Task Force conducted research and examined the available material, weighing the merits of the modification of the New York bar exam as proposed. The Task Force also considered the potential impacts of this modification on current and future members of the Nassau County Bar Association, the legal profession, and the practice of law in the State of New York.

The Task Force focused its research on five core issues: 1) the variables in implementation among the fourteen states that have adopted the UBE;[1] 2) the portability of a passing UBE test score; 3) the utility of the UBE as a test of the candidate's qualifications to practice law in New York; 4) the impact of adoption of the UBE on New York's competitive job market; and 5) the impact of the adoption of the UBE on candidates of various backgrounds, including racial and ethnic minorities.

While the Task Force acknowledges that the proposed modification to the New York bar exam has some potentially favorable aspects, it does not recommend that the Nassau County Bar Association support the adoption of the UBE and modification of the New York bar exam as proposed by the State Board of Law Examiners. Rather, it recommends that any modification of the New York State bar exam be undertaken only after further study and pre-testing of potential

[1] Kansas has also adopted the UBE, with implementation effective as of February 2016.

questions. Potential questions should be drafted and made publicly available for review prior to the administration of the test. Potential questions should also be analyzed for disparate impacts on minority candidates. The Task Force also recommends that under any set of circumstances, the portion of the bar exam devoted to New York law be more comprehensive and rigorous than has been proposed, requiring the candidate to demonstrate competency to practice law in the State of New York.

Respectfully submitted,

Patrick T. Collins
Alan B. Hodish
Lisa M. Petrocelli
Sandra Stines
Charlene J. Thompson, Chair

VARIABLES AMONG STATES
IMPLEMENTING THE UNIFORM BAR EXAM

The Uniform Bar Exam is prepared and coordinated by the National Conference of Bar Examiners (NCBE) to test knowledge and skills that every lawyer should be able to demonstrate prior to becoming licensed to practice law. It is composed of the Multistate Essay Examination (MEE), two Multistate Performance Test (MPT) tasks, and the Multistate Bar Examination (MBE). It is uniformly administered, graded, and scored by user jurisdictions and results in a score potentially portable among those jurisdictions adopting the UBE.[2] The UBE was first adopted in February of 2011 (Missouri and North Dakota) and most recently implemented in February of 2014 (New Hampshire and Minnesota). During that period fourteen states have adopted and implemented the UBE: Alabama, Alaska, Arizona, Colorado, Idaho, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Utah, Wyoming, and Washington State. Kansas has also adopted the UBE with implementation effective as of February 2016.

Of the fourteen states who have implemented the UBE, five also require completion of a state-specific component:

1. Alabama requires the completion of a course in Alabama law;
2. Arizona requires the completion of a course in Arizona law;
3. Missouri requires passage of the Missouri Education Component Test - an online open book test;
4. Montana requires that candidates attend the Montana Law Seminar; and
5. Washington requires passage of a timed online open book test on Washington state law.

[2] See the National Conference of Bar Examiners, http://www.ncbex.org/about-ncbe-exams/ube/

Two jurisdictions, Minnesota and North Dakota, allow a candidate to waive in based upon Multistate Bar Exam (MBE) scores, whether or not the candidate took the UBE.

> Minnesota: candidates may be eligible for admission without taking the Minnesota bar exam, if admitted in another jurisdiction and proof is provided that that the candidate received a scaled score of 145 or more on an MBE taken as a part of and at the same time as the essay or other written exam given by the other jurisdiction. The completed application and evidence of the candidates score must be received within two years of the exam.
>
> North Dakota: candidates may be eligible for admission without written examination upon proof of admission in another jurisdiction and proof the candidate received a scaled score of 140 or more on the MBE taken as a part of and at the same time as the essay or other written exam given by the other jurisdiction **and** proof of a passing score of at least 85 on the Multistate Professional Responsibility Examination (MPRE).

Two jurisdictions, Montana and Wyoming, require candidates seeking to transfer UBE scores to apply within their own exam-filing deadlines.

Implementation of the UBE is not uniform. The fourteen jurisdictions require candidates to pay an application fee ranging from $400 to more than $1,200 for transferring a UBE score.

State	UBE Transfer Application Fee
Alabama	$ 750
Alaska	$ 800
Arizona	$ 675
Colorado	$ 810
Idaho	$ 800
Minnesota	$ 950
Missouri	$1,240
Montana	$ 400
Nebraska	$ 925
New Hampshire	$ 700
North Dakota	$ 400
Utah	$ 850
Wyoming	$ 600
Washington	$ 620

The time limits for transferring a UBE score also vary:

State	Expiration of Transferability of UBE Score
Alabama	25 Months
Alaska	5 Years
Arizona	5 Years
Colorado	5 Years
Idaho	37 Months
Minnesota	36 Months
Missouri	24 Months
Montana	3 Years
Nebraska	5 Years
New Hampshire	5 Years
North Dakota	2 Years
Utah	5 Years
Wyoming	3 Years
Washington	40 Months

Of the fourteen UBE jurisdictions, only Montana has a complete ban on admission by motion. The remaining jurisdictions allow for admission by motion based on years of practice and the purpose of admission. Each UBE jurisdiction also has a mandatory Continuing Legal Education (CLE) requirement to maintain admission.

Given the variable requirements for passing the bar exam and admission to the bar in each UBE jurisdiction, the Task Force believes the word "uniform" to describe the UBE is actually a misnomer.

PORTABILITY OF THE UBE SCORE

Proponents of a national bar exam say that portability would provide more mobility and job opportunities for candidates who pass the Uniform Bar Exam to practice in jurisdictions that have adopted the UBE. They argue that portability will facilitate lawyer mobility across state lines. It is said that the UBE will offer test takers in New York greater score portability in a competitive and tight job market, maximizing employment opportunities outside New York. It is argued that score portability will eliminate the need for candidates wishing to practice in UBE jurisdictions to take multiple bar exams. True UBE score portability would arguably allow New York law firms to recruit and draw from a much larger and geographically-diverse candidate pool. This would also benefit law firms and lawyers involved in multi-state practice.

In support of New York State's adoption of the UBE, proponents argue that the UBE's progress has been awaiting an influential lead state with a lot of candidates to encourage other larger states to join the UBE format. New York, they say, is such a state. Only fourteen states have adopted and implemented the UBE and only two are located east of the Mississippi.[3] Larger states such as California, Texas, Illinois, and Florida have not adopted UBE and the Task Force is not aware that they are actively considering doing so. In light of the limited and regional nature of the UBE jurisdictions, one must question, despite the advertised portability of the UBE score to other states adopting the UBE, how many New York candidates would seek employment in the current UBE jurisdictions.

As stated above, variables in the policies of acceptance of transferred UBE scores impact the level of portability.

> UBE jurisdictions must accept scores from other UBE jurisdictions. But it is only the score that is portable, not the applicant's status in the testing jurisdiction. The

[3] Kansas has adopted the UBE with implementation effective as of February 2016. All of those states, except New Hampshire and Alaska, are located in the South, Southwest and Mountain West.

> fact that an applicant passes the UBE in one jurisdiction and is admitted to practice there does not, alone, qualify the applicant for admission in other UBE jurisdictions. It remains the responsibility of each UBE jurisdiction to set the passing score that it concludes represents proof of minimum competence to practice law within its borders and to determine all other admission requirements.[4]

A law school graduate that passes the UBE will not automatically be admitted to practice law in another state. The NYBOLE has recommended a grade of 266 as the passing score for the proposed UBE. This is somewhat low as compared to other UBE jurisdictions that have set a state passing score between 260 and 280. And, portability is not forever.[5] Depending on the UBE jurisdiction, a lawyer seeking admission must apply to the transferring state within anywhere from twenty-four months to five years after taking the UBE.

Proponents also claim that candidates will save money by taking a "uniform" test. However, as compared to the $250 fee charged for the New York bar exam, the combined fees to take multiple parts of the UBE are likely to rise to as much as $1,000.00.

There is a common understanding that the majority of graduates from local and regional law schools such as Touro, St. John's, Brooklyn Law, New York Law, CUNY, Pace, Albany Law, and Hofstra, practice primarily within New York State. Hence, portability would not be a major factor and most would not benefit from a change to the UBE. With UBE score portability, one can expect a large influx of candidates from UBE jurisdictions seeking to practice in New York. For these reasons, the Task Force believes only limited "portability" benefits would be derived from adoption of the UBE in New York.

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[4] *The UBE: The Policies behind the Portability*, Kelly R. Early, The Bar Examiner, Page 17 (September 2011). http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2011/800311Early.pdf

[5] See Expiration of Transferability of UBE Score Chart, Page 5 above.

UBE'S IMPACT ON THE UTILITY OF THE NEW YORK BAR EXAM

As an organization dedicated to the advancement of the legal profession in Nassau County, New York, the NCBA has an interest in ensuring that lawyers admitted to practice in New York possess a minimum level of knowledge and competency concerning the laws of New York. Adoption of the UBE in New York would cause less of the bar exam being devoted to content derived from specific New York laws. Therefore, it is reasonable to ask whether adoption of the UBE would dilute the usefulness of the New York bar exam as test of the candidate's qualifications to practice law in New York.

The New York law component of the New York bar exam comprises five essay questions and fifty multiple choice questions composed by the NYBOLE. Candidates are instructed to answer these portions of the exam according to New York law. The other current components of the New York bar exam are already "uniform"—namely, the MBE, comprising 200 multiple-choice questions prepared by the NCBE and one Multistate Performance Test (MPT) questions, also composed by the NCBE.

Under the NYBOLE's proposal, the essay questions that test knowledge of New York law would be eliminated. Six essay questions prepared by the NCBE testing general principles of uniform laws would be added to the exam as would one additional MPT question. If the current proposal is adopted, the New York bar exam would comprise "uniform" components, except for one hour of the exam devoted to fifty multiple choice questions on New York law and/or distinctions (the "New York law exam" or "NYLE"). The NYLE questions will not be formulated in the same manner as the fifty New York law multiple choice questions currently tested on the New York bar exam.

A candidate would be required to achieve a passing grade on the NYLE, regardless of the candidate's score on the uniform portions of the exam, to gain admittance to the New York Bar. This is a departure from the current grading structure, of where the scores on different parts of the exam are weighted and combined to arrive at a single score, which determines whether the candidate passes or fails the exam.

Under the NYBOLE's proposal:

(i) only one hour of test time, the NYLE, would be devoted to New York specific law/distinctions;
(ii) New York law will be tested only in a multiple-choice format and not in an essay format;
(iii) the candidate must obtain a passing score on the NYLE, to gain admittance to the New York Bar; and
(iv) candidates who receive a passing score on the UBE, but fail the NYLE can re-take just the NYLE.

The NYBOLE proposal to administer a New York law exam with the UBE reflects its apparent conclusion there should be at least some testing of New York law on the New York bar exam. This conclusion was not necessarily inevitable, as some UBE states do not test state-specific laws.

The Task Force agrees that the New York bar exam should test New York specific law. After all, how can lawyers be licensed to practice in New York without demonstrating some minimum level of proficiency with New York law? Since the founding of our nation, the State of New York has been a population and commercial center with countless legal developments originating here. As a result, there appears to be more statutory and decisional law emanating from New York than most, if not all, other states. Moreover, certain areas of New York law, most notably the Civil Practice Law and Rules providing the procedural rules governing most

New York civil courts, are entirely unique to New York. There are too many unique aspects of New York law that would remain untested, and perhaps unstudied by candidates, if the UBE together with the NYLE were adopted as the sole source of material for the New York bar exam.

Under the NYBOLE proposal, the only portion of the bar exam devoted specifically to New York will be the New York law exam—fifty multiple choice questions administered in one hour. The Task Force is concerned the New York law exam may not be sufficiently comprehensive or demanding to ensure that lawyers admitted to practice in New York have some minimum level of proficiency with the many aspects of New York law unique to New York. The Task Force understands from the report of the New York State Bar Association's Committee on Legal Education and Admission to the Bar (the "NYSBA Report") that the New York law exam will be a "revamped" version of the current 50 multiple choice question portion of the bar exam[6] that will more heavily focus on areas where New York law or practice differs from other jurisdictions. The content outline for the New York law exam will be fully annotated and reduced in scope from the NYBOLE's content outline for the current New York portions of the exam.[7] No sample questions have yet been published for the New York law exam, but the questions will apparently test knowledge of a point of law, without a factual scenario requiring application of law to facts.

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[6] The score on the New York multiple choice question portion of the current New York bar exam counts for only 10% of the applicant's grade.

[7] The approach proposed by the NYBOLE for the New York law exam seems somewhat similar to the approach adopted in Missouri, which has adopted the UBE but also requires applicants to pass a "Missouri Educational Competence Test", consisting of multiple choice questions on local law aspects of Missouri law and for which the Missouri Board of Law Examiners publishes outlines of local law distinctions to be tested. This local law test is open-book, consistent with its purpose to test the applicant's access to information about Missouri law distinctions and not to test the applicant's absorption of substantive law of local law distinctions. See *Local Law Distinctions in the Era of the Uniform Bar Examination: The Missouri Experience (You Can Have Your Cake and Eat It, Too)*, Cindy L. Martin, The Bar Examiner, Pages 7-11 (September 2011)

The Task Force believes that the uniqueness and complexity of New York law cannot be appropriately captured by a discrete set of "distinctions" between the laws of New York and those of other jurisdictions and recommends that, regardless of whether the UBE is adopted, testing of New York law not be limited to a discrete set of distinctions. Such an approach, especially when coupled with the proposal to separately grade the New York law exam from the UBE and for candidates to be able re-take just the New York law exam, may encourage candidates to study by cramming only the list of distinctions and to forgo, to the extent permitted, taking law school classes on subjects such as the CPLR, for which New York law is significantly different.

It is also difficult to predict the impact of the proposed substitution of the Multistate Essay Examination and one additional Multistate Practice Test for the New York essay portion of the exam, which counts for 40% of the candidate's grade. The essay questions are based on the law of New York, and could, but are not designed to, encompass areas where New York law differs from law of other jurisdictions. In contrast to the current New York essays, which test more than one subject in a single essay question, each of the questions on the Multistate Essay Examination is limited to a single practice area. From a review of sample questions posted on the websites of the organizations that administer the UBE and the New York bar exam, it is apparent that the MEE essay questions tend to be shorter and less complex than the essay questions formulated for the current version of the New York bar exam. Whether implementation of less complex essay questions would be a favorable development depends on one's point of view, but adoption of the MEE essay questions would cause New York law being tested only on a relatively small number of multiple choice questions.

If the UBE is adopted so New York law is de-emphasized on the New York bar exam, there would be less incentive for New York law schools to teach New York specific law. Law schools desiring to prepare their students for the UBE could devote less of their curriculum to New York law subjects and more to subjects for which uniform laws predominate. From the standpoint of an organization devoted to improving the practice of law in New York, dilution of teaching of New York law subjects in favor of uniform law subjects would be an unfavorable result.

Finally, depending on difficulty of the New York law exam that will be administered with the UBE under the NYBOLE's proposal, the adoption of the UBE and accompanying New York law exam could make passage of the bar exam in its entirety more difficult than under the current exam structure for candidates that did not study New York law in law school. Under the current exam structure, the scores on different parts of the exam are weighted and combined to arrive at a single score, which determines whether the candidate passes or fails the exam. A candidate can conceivably overcome a lack of knowledge of New York law by achieving superior scores on the "uniform" parts of the exam (*i.e.*, the MBE, the MPT and the essays, to the extent they pertain to subjects on which New York law is similar to the laws of other jurisdictions). Under the NYBOLE's proposal, however, the New York law exam would be separately graded and a candidate must obtain a passing score on the New York law exam to gain admittance to the New York bar. If the New York law exam is sufficiently difficult, a candidate who did not study New York law in law school would presumably be more likely to fail than a candidate of comparable ability who studied New York law.

These considerations underscore the importance of fleshing out the details of the structure and content of the New York law exam before deciding whether to adopt the UBE and the accompanying New York law exam.

IMPACT OF THE UBE ON THE NEW YORK JOB MARKET

The Uniform Bar Exam is entering its fourth year, with only fourteen jurisdictions having implemented it to date. The Task Force believes there has not been enough time to gather sufficient data and study its impact upon employment either within or among the fourteen jurisdictions that have implemented the UBE. Therefore, many of the arguments both for and against adoption of the UBE in New York are primarily based upon opinion, supposition, outdated statistics, and anecdotal information.

Proponents of the adoption of the UBE in New York argue that New York lawyers will benefit from having a geographically-portable license. This ability to move out of state will purportedly maximize employment opportunities by easing professional relocation or enhancing multi-jurisdictional/cross-border practices. The UBE (and a national licensing exam) seeks to topple long-standing precepts that the practice of law is a "geographically-bound" profession and that employment recruitment "tends to be regionalized."[8]

The fourteen states that have implemented the UBE are not the jurisdictions in which most dually-licensed New York lawyers seek employment opportunities or career advancement. Even if New York adopts the UBE, those individuals who may want to also practice in New Jersey, Connecticut, Massachusetts, or Pennsylvania must still sit for another bar examination. And, there is no public indication that these states – or other major legal destinations such as Florida, California or Texas – are considering converting to the UBE, so the theory that such jurisdictions are taking a "wait-and-see" approach until New York commits to the UBE conversion seems speculative.

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[8] *The Absolute Worst States for Job-Hunting Law-School Grads*, Jordan Weisman, The Atlantic, (June 3, 2013)

Currently, attorneys who move to another state may either sit for the state-specific bar exam and/or waive in by meeting certain specified criteria.[9] The hope is that the adoption of the UBE, as proposed in New York,[10] will simplify and/or expedite admission to practice in other UBE jurisdictions.

While such portability to develop a viable job market beyond the borders of New York is appealing in its philosophy, it may ultimately cause a rebound effect by further strangling an already tight job market in our area.[11] By adopting the UBE in New York, the number of individuals taking the test nationwide would essentially triple.[12] While the portability of a license could facilitate New York attorneys moving elsewhere and ease competition within the local job market flooded with surplus attorneys, this could also permit an influx of out-of-state candidates who would then compete in the very job market that the proponents are trying to repair. And, these candidates may have not even achieved the minimum UBE passing score in their home state but might meet the proposed criteria for practicing in New York.

Without the availability of studies on the job market impact of portability in UBE states and those candidates who sought employment in an alternate UBE jurisdiction, it is impossible to determine the likelihood of professional migration. Realistically, however, we suspect many UBE candidates would prefer to travel *to* rather than *from* New York to start their career if allowed. For example, in 2012, 79% of all foreign-educated law graduates sitting for a bar exam

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[9] See Pages 3-4 above.

[10] The minimum passing score of the UBE, as proposed in New York, is lower than 10 of the 14 jurisdictions adopting the UBE.

[11] Over the last 15 years, the number of candidates sitting for the New York bar exam has increased by over 40% which included foreign-educated law graduates. *The New York Bar Exam by* the Numbers, Diane F. Bosse

[12] *New York Weighs Overhaul of Bar Exam*, Jacob Gershman, The Wall Street Journal (Law Blog) , (October 21, 2014)

in the United States took the New York bar exam.[13] It would seem that the ability to practice in New York for those individuals outweighed the benefit of taking the bar exam in a (then-existing) UBE state that might allow them to practice law in multiple jurisdictions. 9,787 individuals passed the New York State bar exam in 2009, when analysts estimated that New York State had a need for only approximately 2,100 new attorneys.[14] According to estimates based upon the number of individuals who passed the 2009 bar exam versus anticipated legal job openings (drawn from state agencies and projections from the US Bureau of Labor Statistics), most of the current UBE states show an existing and continuing surplus of attorneys for anticipated legal job openings in their own jurisdictions.[15] Although such figures are based upon pre-UBE adoption and do not factor in the recent decline in law school admissions, it still does not appear there would be a wealth of opportunity for employment of New York candidates in other UBE states.

Another factor to consider is the local hiring appeal of attorneys who have passed the UBE and only a short multiple-choice New York practice test (as opposed to the current New York bar exam which devotes one-half of the test to New York law and procedure).[16] Most local practitioners expect their associates to be familiar with the peculiarities and distinctions of New York practice, and do not wish to devote time and resources to have a new associate "learn on the job." While proponents tout the UBE as a uniform system of assessment/accreditation for attorneys, such measurement cannot be comfortably applied to New York, which is replete with anomalies and jurisdictionally-specific laws and practices.

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[13] *The New York Bar Exam by the Numbers*, Diane F. Bosse
[14] *The Lawyer Surplus, State by State*, Catherine Rampell, The New York Times, (June 27, 2011)
[15] *Id.*; See also *The Absolute worst States for Job-Hunting Law-School Grads*, Jordan Weissman, The Atlantic, (June 3, 2013)
[16] See discussion on pages 8-13 above

The proposed time limit for accepting a UBE score in New York State may be up to three years, granting UBE candidates a short window of jurisdictional flexibility. This could cause an unpredictable and staggered influx of UBE candidates who have already commenced careers in other UBE states, and must merely receive a grade of 60% or higher on a simplified, 50-question multiple choice exam to be licensed to practice law in New York. "A candidate sitting for the UBE, whether in New York or one of the 14 UBE states, would not need to have even heard of the BCL, CPL, CPLR, DRL, EPTL, or GOL to earn a passing score towards admission in New York."[17]

Casting a wider geographic net to allow firms to recruit individuals of diverse backgrounds, talent, and experience can serve both the profession and the public. However, the potential employment benefits must be balanced with the need to ensure that the public in jurisdictions that have adopted the UBE have continued access to competent legal services. Unless the laws of those states that have adopted the UBE become more uniform and New York's neighboring jurisdictions consider conversion to the UBE, the expected advantages of portability may put further stress on the highly-attractive New York job market by enticing "mobile" and possibly less-qualified candidates to relocate to New York while not incentivizing an equal or larger number of local candidates to compete for realistic employment elsewhere.[18]

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[17] *Why UBE Needs Careful Consideration*, John Gardiner Pieper, The New York Law Journal, (November 5, 2014)

[18] In 2013, the cumulative total of 15,846 individuals sat for the New York bar exam. By comparison, the UBE states were far less (Alabama (694); Alaska (155); Arizona (1,011); Colorado (1,332); Idaho (214); Minnesota (944); Missouri (1,080); Montana (200); Nebraska (189); New Hampshire (183); North Dakota (145); Utah (523); Washington (1,283); Wyoming (118). The Bar Examiner, (March, 2014)

IMPACT OF ADOPTION OF UBE ON DIVERSE CANDIDATES

One of the key tenets of the Nassau County Bar Association's Mission Statement is "[t]o encourage all lawyers to aspire to the highest principles and practices of ethical conduct and to preserve and promote the honor and collegiality of the profession." Among other benefits, racial, cultural, ethnic, and geographic diversity in the bar enhances and promotes collegiality in the profession. With an increasingly diverse population, diversity in the bar also creates greater trust in the mechanisms of government and the rule of law. Embracing different backgrounds, perspectives, and skill sets will enhance the profession and our ability to serve increasingly diverse clients.[19]

Test score disparities and the disparate impact on racial and ethnic minority law graduates taking bar examinations have been well documented,[20] and can undermine the profession's efforts to increase diversity in the bar. Those debating the merits of whether New York State should adopt the Uniform Bar Exam have urged further study concerning the impact the UBE will have on the current test score disparity and disparate impact among individuals with diverse backgrounds,[21] as it is not known whether the adoption of the UBE with a New York law component will have a favorable or adverse impact.[22]

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[19] See *Diversity in the Legal Profession: The Next Steps,* American Bar Association, Presidential Diversity Initiative (April 2010)

[20] See *LSAC National Longitudinal Bar Passage Study*, Wightman (1998). See also Comm. On Legal Educ. & Admission to the Bar of the Ass'n of the Bar if the City of N.Y. & the N.Y. State Bar Ass'n Public Service Alternative Bar Exam (June 14, 2003), available at http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26667.

[21] See Letter submitted to the New York State Board of Law Examiners on behalf of the Society of American law Teachers (SALT), (November 3, 2014).

[22] See Comments by The Association of the Bar of the City of New York on NYS Board of Law Examiners Proposal Regarding Uniform Bar Examination (November 6, 2014).

Proposals for such study are not without precedent in New York. In 2002,

> the Committees on Legal Education and Admission to the Bar of the Association of the Bar of the City of New York ("ABCNY Committee") and the New York State Bar Association ("NYSBA Committee") proposed a pilot program which would admit to the New York State Bar graduates of New York State law schools who successfully complete[d] a program of public service in the New York courts.[23]

The Committees acknowledged the "substantial" disparate effect the current bar exam had on minority law graduates and hoped that the proposed program pilot would more fairly judge the competencies of both majority and minority candidates.[24] However, more than a decade later, this proposal has yet to be implemented.[25]

The Task Force recognizes that promoting diversity in the profession is essential to the Nassau County Bar Association's core mission. Therefore, a study of the potential impact on ethnic and racial minorities should be conducted prior to the adoption of the UBE by New York State, using test questions over the next several exams. If that is not feasible, an impact analysis should be conducted post-implementation to determine whether the adoption of the UBE with a New York law component has a disparate impact on racial and ethnic minorities, and, if so, whether adjustments and modifications to the test questions and exam format should be made.

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[23] See *Joint Committee Report: Public Service Alternate Bar Examination*, Committees on Legal Education and Admission to the Bar of the Association of the Bar of the City of New York and the New York State Bar Association (June 14, 2002).
[24] Id., Page 4.
[25] See *Recommendations for Implementation of the Report of the Special Committee to Study the Bar Examination and Other Means of Measuring Lawyer Competence*, New York State Bar Association Committee on Legal Education and Admission to the Bar (February 2012).

CONCLUSION

While the Task Force acknowledges that the proposed modification to the New York bar exam has some potentially favorable aspects, we do not recommend that the Nassau County Bar Association support, as proposed by the NYBOLE, the adoption of the UBE and modifications to the New York bar exam.

NASSAU COUNTY BAR ASSOCIATION TASK FORCE ON THE MODIFICATION OF THE NEW YORK BAR EXAM AS PROPOSED BY THE STATE BOARD OF LAW EXAMINERS

RESOLUTION

WHEREAS, the Bar Association of Nassau County, New York, Inc. (NCBA), through its President, John P. McEntee, appointed a Task Force to consider the proposed modification of the New York bar exam, including the adoption of the Uniform Bar Exam, as proposed by the State Board of Law Examiners on or about October 6, 2014, and to prepare a report and make recommendations to the NCBA Board of Directors, and

WHEREAS, the Task Force conducted research and examined the available material weighing the merits of the modification of the New York bar exam as proposed; and

WHEREAS, the Task Force has considered the potential impacts of this modification on current and future members of the NCBA, the profession and the practice of law in the State of New York; and

WHEREAS, the Task Force has completed its work and issued its Report and Recommendations dated January 30, 2015; and

WHEREAS, the Task Force's Report and Recommendations was presented by the Chairperson of the Task Force, Charlene J. Thompson, Esq., to the NCBA Board of Directors for discussion and comment on February 10, 2015;

NOW, THEREFORE, IT IS

RESOLVED, that the Report and Recommendations of the Task Force are accepted; and it is

FURTHER RESOLVED, that while the proposed modification to the New York bar exam has some potentially favorable aspects, the NCBA Board of Directors does not recommend that the New York bar exam be modified as proposed by the State Board of Law Examiners; and it is

FURTHER RESOLVED, that the NCBA Board of Directors recommends that modifications to the New York State bar exam be undertaken only after further study and pre-testing of potential questions, which should be drafted and made publicly available for review prior to the administration of the test and should be analyzed for disparate impacts on minority candidates; and it is

FURTHER RESOLVED, that under any set of circumstances, the portion of the bar exam devoted to New York law should be more comprehensive and rigorous than has been proposed to require candidates to demonstrate competency to practice law in the State of New York.

THE ALBANY FOCUS GROUP

WHICH WAS CONVENED WITH THE ASSISTANCE OF THE

NEW YORK STATE JUDICIAL INSTITUTE ON

PROFESSIONALISM IN THE LAW

AND THE

NEW YORK STATE BAR ASSOCIATIONCOMMITTEE ON LEGAL

EDUCATION AND ADMISSION TO THE BAR

RESOLUTION REGARDING POSSIBLE DISPARATE IMPACT OF THE UNIFORM BAR EXAMINATION ON CANDIDATES OF COLOR

WHEREAS, the Albany Focus Group, which was convened with the assistance of the New York State Judicial Institute on Professionalism in the Law and the New York State Bar Association Committee on Legal Education and Admission to the Bar, met on February 13, 2015 at Albany Law School to discuss and provide recommendations regarding New York's proposed adoption of the Uniform Bar Examination to the Advisory Committee appointed by Jonathan Lippman, Chief Judge of the New York State Court of Appeals. The views expressed in this resolution do not represent the views of either the Judicial Institute or the Committee on Legal Education and Admission to the Bar;

WHEREAS, the members of the Focus Group were: James Ayers (Partner, Whiteman Osterman & Hanna LLP), Nicholas Barranca (3L student at Albany Law School); Melissa Breger (Law Professor, Albany Law School); Hon. William Carter (Albany City Court Judge); Jonathan Gradess (Director, New York State Defenders Association); Michael Hutter (Law Professor, Albany Law School); Michael Lieberman (3L student at Albany Law School); Connie Mayer (Associate Dean for Academic Affairs, Albany Law School); Lillian Moy (Executive Director, Legal Aid Society of Northeastern New York); Robert Rausch (Partner, Maynard, O'Connor, Smith & Catalinotto LLP); Christina Ryba (Special Project Counsel, New York Supreme Court, Appellate Division, Third Judicial Department); James Wisniewski (2L student at Albany Law School); and Patrick Wildes (2L student at Albany Law School);

WHEREAS, the moderators of the Focus Group were Mary A. Lynch, Law Professor, Albany Law School, and John J. McAlary, Executive Director of the NYS Board of Law Examiners. Others in attendance included the Hon. Jenny Rivera, Associate Judge, New York State Court of Appeals and Chair of the Advisory Committee on the Uniform Bar Examination; and Margaret Nyland Wood, Court Attorney for Professional Matters, New York State Court of Appeals.

WHEREAS, prior to the meeting on February 13, 2015, the Focus Group reviewed extensive materials on the Uniform Bar Examination ("UBE") and the possible impact of its adoption by the State of New York;

WHEREAS, while the Focus Group had differing opinions on many issues, there was one issue on which all members who voted were in agreement: New York should not adopt the UBE until a careful, comprehensive analysis has been done as to whether adoption of the UBE will have a disparate impact on students of color;

WHEREAS, the National Conference of Bar Examiners ("NCBE") has not published any report on whether adopting the UBE will have a disparate impact on students of color and if it has any data on this issue, it has not made that data available;

WHEREAS, it appears that none of the states that have adopted the UBE have published a study of the possible disparate impact of adopting the UBE and it is uncertain whether any of these states keep demographic data that would make it possible to determine whether adoption of the UBE had a disparate impact;

WHEREAS, while it may be difficult and time-consuming to gather the data necessary to draw a conclusion as to disparate impact, the Focus Group believes that it is possible to obtain the data and that it is incumbent on the Court of Appeals to do so before adopting the UBE. To do otherwise would mean that if the UBE does have a disparate impact, some students of color who would have passed the existing Bar Exam will fail the new UBE. This harsh and needless result can be avoided by doing the necessary test validating before rather than after adopting the UBE;

WHEREAS, the Focus Group believes that there are several ways to obtain data that will either be strongly predictive or at least suggestive of whether adoption of the UBE will have a disparate impact on students of color, including:

1. Retain Capable Social Scientists Including Psychometricians to Design a Study. In the following paragraphs, suggestions will be made as to existing data or other steps that may be available which will provide helpful information on the disparate impact issue. However, we believe that the best way to address this issue is for the New York Board of Law Examiners ("NYBOLE") to retain one or more social scientists who would examine available existing data and, if that is not adequate to draw a valid

conclusion, would design and execute a study to determine whether the UBE will have a disparate impact.

Instead of retaining such social scientists and psychometricians itself, the NYBOLE may wish to request that the NCBE retain these experts to undertake the study. The NCBE has prepared the UBE and it would seem appropriate that it provide states that are considering adopting the UBE with valid information showing that the exam will not have a disparate impact on candidates of color. Otherwise, each state will have to undertake the study and this would be both inefficient and needlessly costly for the states.

2. Use Data from Law Schools to Determine Disparate Impact. We understand that most if not all New York law schools have demographic data about their students and their bar exam results. Some of these students have taken the UBE in other states. If the law schools were to provide this data to the NYBOLE, the Board may be able to use this to determine whether there appears to be a disparate impact on students of color who take the UBE.

   Also, while it appears that most if not all of the UBE states do not collect demographic data on candidates, the law schools in those states may well have demographic data and test results for their students. If this data is collected by either the NCBE or the NYBOLE, it may provide a basis for determining whether there is a disparate impact.

3. Determine Impact of Increased Weighting of MBE. Adopting the UBE would increase the weight given to the Multistate Bar Examination ("MBE") from 40% to 50% of a candidate's total score. One study that could be done by the NYBOLE would be to see whether increasing the weight of the MBE score to 50% would have a disparate impact. Using the demographic data it already has, the NYBOLE could go back and rescore the tests taken by candidates of color in prior years to see if the new weighting of the MBE would have a disparate impact. While the result of this study would not be determinative of the impact of all the changes that would result from adoption of the UBE, it would at least show the impact of one component and it appears that this could be done quickly and easily.

4. Practice UBE. It is our understanding that students at New York law schools commonly take a practice New York bar exam in their second year. Students could now be asked to also take a practice UBE. It would be in their interest to do so since some of them may choose to take the UBE when they graduate and they now know that there is the possibility that New York will adopt the UBE at some time in the

future. If this were done, it would provide practice scores on both the New York bar exam and the UBE. This could provide solid evidence as to whether the UBE would have a disparate impact on candidates of color.

NOW, THEREFORE, BE IT RESOLVED, that the Albany Focus Group respectfully requests that the Advisory Committee recommend to the Court of Appeals that New York not adopt the UBE until it has obtained the data necessary to determine whether adoption of the UBE will have a disparate impact on candidates of color; and be it further

RESOLVED, that the Advisory Committee recommend that the Court of Appeals direct that the New York Board of Law Examiners undertake steps such as those described in the last whereas clause of this resolution in order to obtain the data necessary to determine whether adoption of the UBE will have a disparate impact, and that the results of these studies be published and an opportunity provided to interested parties to comment before the Court makes a determination as to whether the UBE should be adopted.

Dated: March 3, 2015

Members of the Albany Focus Group:

James Ayers
Nicholas Barranca
Melissa Breger
Hon. William Carter
Jonathan Gradess
Michael Hutter
Michael Lieberman
Mary A. Lynch
Connie Mayer
Lillian Moy
Robert Rausch
Christina Ryba
James Wisniewski
Patrick Wildes

Vote on the Resolution by the Albany Focus Group:

Yes: 14
No: 0
Abstention: John J. McAlary abstained because of his position with the Board of Law Examiners.

NEW YORK COUNTY
NYCLA
LAWYERS' ASSOCIATION

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

This report was approved by the Board of the New York County Lawyers Association on February 12, 2015.[1]

I. OVERVIEW

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

A. Arguments For and Against the UBE

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

- Because the UBE has been adopted in 15 states, more resources can be devoted to constructing UBE questions than could be devoted to bar examinations in any single state.

- UBE scores are more portable than current bar examination scores because the UBE score is relatively easy to transfer to other states that also use the UBE, subject to state-specific requirements. The legal world is becoming increasingly national and global and thus enhancements to the portability of bar examination passage would benefit younger lawyers.

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

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

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

- The costs and fees that would be imposed for administration of the UBE in New York, when compared to the modest $250 current cost of the examination for first time takers (a figure that is currently fixed by statute).

- The need for further study of possible disparate impact of the change on minorities, indigent examination takers, and graduates of foreign law schools. In particular, under the proposal all takers must pass a one hour 50 question multiple choice test on New York law. Will dependence on a high-speed multiple choice component for state law disproportionately disadvantage members of certain groups? Like other entities providing testimony on this subject, we urge that disparate impact studies be conducted on the UBE in the next year. Additionally, if (contrary to our recommendation) New York immediately adopts the UBE, we think it critical that these studies be conducted after adoption.

- Would adoption of the UBE undermine the perception that New York law is unique and, if so, would New York law be seen as less attractive for contracting parties deciding on whether to insert New York choice of law and choice of forum in contracts? If so, would the decline in New York choice of law clauses adversely affect New York lawyers by reducing the number of disputes that are brought here by way of contractual choice of forum and choice of law clauses? Again, we do not believe this factor warrants rejection of the UBE because the link between New York choice of law clauses and New York specific essay questions on the bar examination is tenuous at best, and note that, if the UBE is adopted, this will remain an open question, because of the expense of attempting to quantify any downward shift in claims filed by out of state litigants based on New York choice of law or forum provisions.

- If the UBE becomes the dominant form of bar examination, law schools which traditionally focused on New York law may arguably have to shift their emphasis to a national law curriculum. Has this been a problem in other states?

- Would the reduced focus on New York law expose the public to new attorneys who are less qualified to deal with New York specific legal problems? Is there any evidence that the state specific essays in the current exam better test an attorney's proficiency to deal with New York law matters? Could development of more targeted CLE requirements for new attorneys adequately address concerns about the lessened emphasis on New York law of the proposed New York portion of the UBE?

- Would adoption of the UBE encourage recent graduates from out of state to move to New York, relying on their passage of the UBE in another state?

II. BACKGROUND

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

A. Proposed Changes to the Bar Examination

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

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

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

B. Proposed Grading of the UBE

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

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

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

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

C. Increased Portability of the Proposed Bar Examination

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

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

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

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

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

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

[5] http://www.nybarexam.org/press/summary.pdf

administered in those states.[6] Gregory Murphy, former Chair of the NCBE[7], advised of the same thing and specifically reported that his home state of Montana was encountering no difficulty with the UBE.[8] Arizona Supreme Court Justice Berch also said that the rollout in Arizona was uneventful and that no attempts have been made to roll back the UBE in Arizona.[9] We received similar reports from a bar official in Alabama.[10]

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

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

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

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

[8] Telephone Conversation, 2/2/15.

[9] Telephone Conversation, 2/3/15.

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

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

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

[13] Dean Allard stated in the January 2015 hearing: "I know that there were people who were concerned. I wasn't concerned about our students being able to take on board that change, and I felt -- and I said this publicly -- that the proposed time table would have applied to everybody, so I thought it was an even playing field, but I think that the time table that's now on the table is adequate. I'll probably get into hot water with my faculty for saying that, but I think that that's adequate." See Transcript of Hearing of the Advisory Committee on the Uniform Bar Examination, CUNY School of Law 1/20/15 at 21.
(http://www.nycourts.gov/ip/bar-exam/Transcript-CUNY-hearing-jan20.pdf)

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

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

IV. JUSTIFICATION FOR JUDGE LIPPMAN'S UBE PROPOSAL

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

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

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

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

[15] *See* New York Judiciary Law 465 ("Every person applying for examination for admission to practice as an attorney and counsellor at law shall pay a fee of two hundred fifty dollars for each taking or retaking of the examination, or if dispensation has been received from the taking of the examination, four hundred dollars for credential review for admission on motion")
(http://codes.lp.findlaw.com/nycode/JUD/15/465#sthash.fsMOrZzk.dpuf).

[16] Diane Bosse has stated that the cost of the New York bar examination would not rise as a result of adoption of the UBE. Court System Seeks Comment on Adopting Uniform Bar Exam, *New York Law Journal* (10/7/14) (http://www.newyorklawjournal.com/id=1202672451929/Court-System-Seeks-Comment-on-Adopting-Uniform-Bar-Exam?slreturn=20150103214520).

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

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

Similarly, Rebecca S. Thiem contended:

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

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

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

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

And the former President of the NCBE argued that:

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

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

[19]Essays on a Uniform Bar Examination, The Bar Examiner (Feb. 2009). (http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2009/780109_UBEEssays_01.pdf. Ms. Thiem has served as President of the North Dakota State Board of Law Examiners, among many other positions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As Suzanne Darrow-Kleinhaus of Touro has noted:

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

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

[28]"Why Did So Many People Flunk the Bar Exam This Year?" *Bloomberg Business* (Nov. 8, 2014) (http://www.bloomberg.com/bw/articles/2014-11-18/why-so-many-law-students-failed-the-bar-exam-in-2014); Deans Dismayed by Declines in Bar-Pass Rates, *New York Law Journal* (Nov. 13, 2014) (http://www.newyorklawjournal.com/id=1202676229642/Deans-Dismayed-by-Declines-in-BarPass-Rates)

[29]D. Bosse, Summary of the October 2006 Report Prepared by the National Conference of Bar Examiners for the New York Board of Law Examiners Entitled: "Impact of the Increase of the Passing Score on the New York Examination (Nov. 2006). (http://www.nybarexam.org/press/summary.pdf) National studies have come to similar conclusions. Dan Subotnik, Does Testing = Race Discrimination?: Ricci, the Bar Exam, the LSAT, and the Challenge to Learning, 8 U. Mass. L. Rev. 332, 372 (2013) (http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2007/760307_ripkeyandcase.pdf)

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

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

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

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

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

However, others have argued to the contrary:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[40] *Id.* (http://thedailyrecord.com/2010/02/21/uniform-bar-examination-an-idea-whose-devil-is-in-the-details/#ixzz3QDyhraXC)

[41] Hon. Rebecca White Berch, Arizona Supreme Court, The Case for the Uniform Bar Exam, *The Bar Examiner* (2/09).
(http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2009/780109_UBEEssays_01.pdf .)
Justice Burch also expressed her belief that local law essays are not a particularly effective way to test local law since test takers can generally obtain scores well above passing on most local law essays simply by using national law principles.

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

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

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

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

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

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

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

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

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

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

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

[46] Cindy L. Martin, Local Law Distinctions In The Era of the Uniform Bar Examination: The Missouri Experience (You Can Have Your Cake And Eat It, Too), *The Bar Examiner* (9/11). (http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2011/800311Martin.pdf)

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

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

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

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

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[47] New York law was overwhelmingly favored for financing contracts, but was also preferred for most other types of contracts. Eisenberg, Theodore and Miller, Geoffrey P., "The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts" (2009). Cornell Law Faculty Publications. Paper 204 (http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1203&context=facpub&sei-redir=1&referer=http%3A%2F%2Fwww.bing.com%2Fsearch%3Fq%3Dchoice%2Bof%2Blaw%2Bnew%2Byork%2Blaw%2Bunique%26qs%3Dn%26pq%3Dchoice%2Bof%2Blaw%2Bnew%2Byork%2Blaw%2Bunique%26sc%3D0-20%26sp%3D-1%26sk%3D%26cvid%3D141add5d3a564acebb3e3fe5eb02bdaa%26first%3D15%26FORM%3DPORE#search=%22choice%20law%20new%20york%20law%20unique%22)

[48] M. Galligan, Partner Philips Nizer, Why Choose New York Law? (9/30/12). (http://www.phillipsnizer.com/pdf/Article-WhyChooseNewYorkLaw-MWG-9-30-12_Article.pdf)

[49] Victoria J. Saxon, Hodgson Russ LLP, New York May Be Your Best Bet When Choosing the Governing Law and Forum for your Cross-Border Contract (Sept. 24, 2013) (http://www.lexology.com/library/detail.aspx?g=e36cde01-e97b-46bc-869c-f595fcb42ea0).

VI. CONCLUSION

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

Brooklyn Law School
ESTABLISHED 1901

Advisory Committee on the Uniform Bar Exam

March 4, 2015

Additional Comments by:
Nicholas W. Allard
President and Dean
Brooklyn Law School

Thank you for the opportunity to submit additional comments on the proposed adoption of the Uniform Bar Exam (UBE) in New York. I write now to add three points to my previous testimony before the Committee on January 20, 2015.

First, as we consider adoption of the UBE in New York, the question of potential disparate impact on minority candidates rightly has received significant attention. This question must be addressed in a thoughtful, comprehensive, and data-driven way by the State so that we can fully measure and analyze any disparate impact. In this regard, as I stated in response to a question from Judge Rivera during my testimony, I support the recommendation made by Mark Morril, who testified before the Committee on behalf of the New York City Bar Association. In his testimony, he proposed that:

> The New York State Bar Examiners compile rigorous performance data relating to the UBE as implemented in the State. The Bar Examiners should review the data annually to discern any demographic trends regarding bar passage rates, particularly whether the UBE has any disparate impact on historically disadvantaged groups, or any other area of potential concern. We urge that the State Bar Examiners be charged with conducting a formal review of New York's experience in the first three years of its use of the UBE and issue a public report shortly after the end of the three-year period stating its conclusions as to whether the UBE has advanced the purpose of facilitating new lawyer mobility and improving testing techniques, whether there has been any disparate impact on underrepresented groups and analyzing any negative trends that have emerged that may require further attention or the consideration of new alternatives.

Mr. Morril's recommendation is a sensible way to proceed. In the event the State adopts the UBE, we need, at the very least, to compile, publicize, and analyze several years of data on bar examination results before we can determine if there is any evidence of disparate impact as a result of the UBE.

Second, if New York decides to adopt the UBE, it is critically important that the State assure this significant change helps to bring about further overall improvements in the bar examination and licensing process. With adoption of the UBE by New York, there is the risk the State will further strengthen the National Council of Bar Examiners' existing dominant control of the bar examination and licensing process. This will have the effect of creating more barriers to improving a system with serious flaws, such as the lack of transparency, accountability, and the regular unexplained fluctuations in results that are tolerated because of the dearth

of plausible alternatives and plain old inertia. Moreover, the established bar examination system adds a significant cost to the already high cost of legal education, but yields results, as we have seen in recent years, that are unpredictable, unreliable, and of questionable value to determining who is fit to practice law in New York.

There are many options and alternatives to licensing lawyers that have been proposed but have received little traction because of the intransigence of the current system. These alternatives include moving away from an all-or-nothing exam *after* graduation, finding better models than a written exam for assessing competence in practical skills, and adopting some examination and licensing practices used by other learned professions in the United States and in Great Britain.

Accordingly, at a minimum, I hope that a move to the UBE would be predicated on a change in the current leadership of NCBE. I have reluctantly come to this conclusion after I and many fellow law school deans around the country have for months attempted to obtain an explanation for the nationwide drop in bar examination pass rates in July 2014. But the organization has to date resisted a meaningful analysis and discussion of the problems associated with the exam, much less even contemplated change, and is not open to beginning a conversation on how we can do better. Indeed, the response by the NCBE in the media has been defensive and dismissive of all criticism. The organization is unyielding in its belief that the results of last July's exams were absolutely correct and all blame was due entirely to the test-takers, and that law schools are admitting unqualified students and failing to teach what is needed to pass the NCBE test. Recently, at the Law School Deans meeting at the American Bar Association in Washington, D.C., we were informed that the NCBE, in wake of the recent widespread concern about the bar exam, is considering the "test of the future." That phrase is itself an example of the myopia of the NCBE and its reluctance to take a fresh look at the entire bar examination process or even alternatives to the traditional test. It implies that there needs to be a test, and that the only possible future test is a variation on the current exam.

The NCBE's strategy is ill-advised and harmful for another reason. The organization's communications disparage the quality of students and the education they receive at ABA accredited law schools and give a black eye to legal education and the profession that is undeserved, as well as badly timed. The NCBE's unwavering resistance to explain bar exam results creates an unfortunate disincentive for people with the talent and motivation to be fine lawyers to study

law if they cannot be sure they will qualify to practice even if they study hard and are well-prepared. When you also consider the attached list of articles, especially those by law school faculty, that analyze and critique our current bar examination system with the goal to improve the process, the NCBE's refusal to engage with leaders in legal education on this topic is even more mystifying – and, in fact, damages our profession. The organization's tone-deaf response to very serious and, to date, unaddressed concerns reminds us of Lily Tomlin's response as Ernestine the Operator, blithely dismissing any complaints about service with the lines: "We don't care. We don't have to. We're the Phone Company." For legal education, NCBE *is* the Phone Company of Ernestine's time – powerful, inscrutable, and resistant to change. The profession can no longer afford to support NCBE in its current state.

Third, I hope that New York, a historic leader in the education and licensing of the professions, would bring together the appropriate leaders and best minds in the legal profession to establish an organizational or administrative body, whether or not through existing professional organizations such as the ABA and AALS, that would take up a serious, ongoing examination of how we should assess the competency of prospective lawyers in the 21st century. I know that it is not possible to overhaul the entire process overnight, but New York should begin – and lead – a national conversation aimed toward moving our entrenched system forward.

Selected Bar Exam Critiques and Analysis

- Joan W. Howarth, Teaching in the Shadow of the Bar, 31 *University of San Francisco Law Review*. 927 (1997), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2184472.

- Jane Yakowitz, Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam, 60 J. Legal Educ. 3 (2010), http://www.swlaw.edu/pdfs/jle/jle601yakowitz.pdf.

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- William C. Kidder, The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification, 29 L. & SOC. INQUIRY 547 (2004), http://bit.ly/1EcVap5.

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- Tamara Tabo, When Bar Scores Plummet, Who Will Examine the Examiners? *Above The Law* (Nov. 7, 2014), http://abovethelaw.com/2014/11/when-bar-scores-plummet-who-will-examine-the-examiners/.

- Derek T. Muller, Class of 2014 LSAT Scores Did Not Portend Sharp Drop in MBE Scores, *Excess of Democracy* (Nov. 11, 2014), http://excessofdemocracy.com/blog/2014/11/class-of-2014-lsat-scores-did-not-portend-sharp-drop-in-mbe-scores.

- Jerry Organ, What Might Have Contributed to an Historic Year-Over-Year Decline in the MBE Mean Scaled Score? *The Legal Whiteboard* (Nov. 11, 2014), http://bit.ly/1zEoayp.

- "Decline in Bar Exam Scores Sparks War of Words," by Jacob Gershman. *The Wall Street Journal*, Nov. 10, 2014.

- "Law School Deans Question Sharp Drop in Bar Exam Scores," by Jacob Gershman. *The Wall Street Journal*, Nov. 26, 2014.

- "Deans Dismayed by Declines in Bar-Pass Rates," by Tania Karas. *New York Law Journal*, Nov. 13, 2014.

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Glenn Lau-Kee
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March 3, 2015

Dear Glenn,

I write of behalf of the 1500 plus member Dispute Resolution Section of the NYSBA in response to your memo of February 13, 2015 enclosing a copy of the email from Diane F. Bosse, Chair of the NYS Board of Law Examiners, and soliciting comments with regard to New York subjects to be covered on the proposed 50 multiple choice question New York portion of the Uniform Bar Exam ("UBE") if the UBE were adopted in New York.

The Dispute Resolution Section is directed to the practice of alternative dispute resolution ("ADR"). The Section's Executive Committee voted unanimously to support the positions stated in this letter.

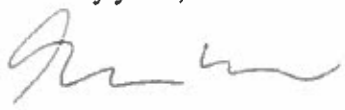
As a Section, for the reasons previously expressed in the reports presented to and resolutions passed by the NYSBA House of Delegates, we oppose the proposed adoption of the UBE by New York. We consider that the distinct disadvantages to New York practitioners and law students resulting from such a change greatly outweigh any purported advantages. In addition to our general disagreement, however, we also believe that adopting the UBE would be detrimental to the teaching, promotion and practice of ADR in New York State. We understand that the UBE focuses on uniform acts, many of which have not been adopted by New York. In particular, New York has not adopted various uniform acts that relate to the practice of ADR, such as the Uniform Mediation Act, and also has its own unique set of laws and procedures, contained in the NY CPLR and EPTL, relating to arbitration and other ADR issues.

In 2012, our Section wrote to the New York State Board of Law Examiners recommending that, because ADR is a fundamental topic required by virtually all lawyers for competent representation of their clients, more questions about ADR should be included on the New York Law portion of the Bar Exam. We note that the proposed switch to the UBE would reduce the New York-specific portion of the Bar Exam from a full day to 50 multiple choice questions. According to the outline enclosed by Ms. Bosse these 50 questions would be intended to cover thirty different subject matter areas of New York-specific law, with ADR covered only as a single subject under one of thirteen subsections of a single one of those thirty subject matter areas (CPLR). As a result, if the UBE were to be adopted, there would be a minute chance that even a single ADR-related multiple choice question would be included on the Bar Exam in any given year, severely reducing, rather than increasing, the New York Bar Exam's coverage of ADR.

We therefore unreservedly oppose a switch by New York to the UBE. We also hope that in the future, the NYS Board of Law Examiners will direct its attention towards improving the New York State Bar Exam so that it tests

more, not less, of the New York specific law that New York lawyers actually need for their practice (including but not limited to law on ADR.)

Sincerely yours,



Sherman W. Kahn
Section Chair

METROPOLITAN BLACK BAR ASSOCIATION

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March 4, 2015

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New York State Board of Law Examiners
Corporate Plaza, Building 3
254 Washington Avenue Extension
Albany, NY 12203-5195

Dear Ms. Bosse:

The Metropolitan Black Bar Association (MBBA) submits this letter in response to the request for comments regarding the proposed adoption of the Uniform Bar Exam (UBE). The MBBA has serious concerns regarding the implementation of the UBE without a thorough analysis of its impact on racial and ethnic minority bar examinees. While proponents cite advantages to adopting the UBE, namely, the portability of the UBE score to other UBE jurisdictions, thereby increasing employment opportunities for law graduates, its adoption at this time without further information regarding the potential disparate impact on minorities warrants a delay in its implementation for the July 2016 bar exam.

New York has been a leader in promoting diversity in the profession. However, the adoption of the UBE without further analysis of its effect on minority examinees is a step in the wrong direction. To date, there have been no disparate impact studies by the New York Board of Law Examiners (BOLE) on its proposed adoption of the UBE despite calls to do so by academia, such as the Society of American Law Teachers and other diverse bar associations[1]. There have been, however, numerous studies on the adverse impact the current bar exam has had on minority bar examinees.[2] As such, these reports have suggested other measures to assess lawyering skills. Unfortunately, these other competency skills have not been adopted by BOLE.[3] Further, of the fourteen (14) UBE jurisdictions, none have provided any data on the bar passage rate for minority bar applicants. Although that data does not exist, it is instructive to note that since the adoption of the UBE, the overall bar passage rate in those 14 jurisdictions has decreased significantly.[4] In addition, the BOLE recommends a passing

[1] See e.g. SALT - Society of American Law Teachers letter to the New York Board of Law Examiners, November 3, 2014.

[2] Wightman, Linda F., LSAC National Longitudinal Bar Pass Study 27 (1998), http://www.unc.edu/edp/pdf/NLBPS.pdf (study shows the first-time bar pass rates for whites was 92% compared to 61% for African-Americans, 66% for Native Americans, 75% for Mexican Americans/Hispanics and 81% for Asian-Americans.)

[3] Curio, Andrea, and Carol Chominsky.*Testing Diversity and Merit.* 9 Univ. of Mass. L. Rev. 206, (2014): 225. Print.

[4] *Declining Nationwide Bar Exam Pass Rates*, Above the Law, October 27, 2014- "[P]ass rates have declined in the majority of UBE states. The pass rates for bar examinees dropped a whopping 22% in Montana, 15.2% in Idaho,

(continued...)

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score for the UBE be set at 266 out 400. However, of the 14 UBE states, only 3 states have a minimum passing bar lower than New York. Therefore, it leads us to question how "portable" is the score to other jurisdictions.

The MBBA is also concerned that a fundamental change to the bar exam has not been subject to "pre-testing", nor subject to public review of sample questions. In fact, in a report submitted to the New York Board of Law Examiners, the New York State Bar Association's Committee on Legal Education and Admission to the Bar noted that "it was common for all standardized exams to pre-test questions and analyze results. Such questions could be included on several upcoming administrations of the present New York State Bar Exam to develop data."[5] Without such data, supporting the adoption of the UBE would be premature. We think it is prudent for the BOLE not to take a wait-n-see approach to addressing these issues only after the administration of the UBE.

In addition, under the current proposal, the UBE exam will only test on New York State specific content through 50 multiple choice questions (NYLE). Unlike the current bar exam which weighs both the MBE and New York section (NYMC and NY Essays) on a scale of 665 out of 1000, under the new proposal, examinees must pass both the NYLE, scoring 60% (30 out of 50 questions) independently of the other UBE sections- the UBE (50%), MEE (30%) and the MPT (20%). This raises another concern as well, which BOLE has not addressed, that is how will the requirement to independently pass each section impact the passage rate.

Finally, while the MBBA concedes that there are advantages to New York adopting the UBE, such as creating a path towards a national licensure exam, and therefore, increasing the mobility of New York state bar examinees to obtain admission to other UBE jurisdictions, we still urge the BOLE to introduce these changes incrementally with experimental sections over the next few bar administrations.

Respectfully submitted,

Taa Grays
President

and 13% in North Dakota...the trend is clear: people are failing the bar exam at higher rates." *A Tough Pass: UND Law School students struggle to pass bar exam*, Grand Forks Herald 2014, " overall pass rates are the lowest they've been in 10 years."

[5] COMMS. ON LEGAL EDUC. & ADMISSION TO THE BAR OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., Report of New York Board of Law Examiners Proposed Change in New York to the Uniform Bar Exam, October 23, 2014.

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Diane Bosse, Chair
New York State Board of Law Examiners
Corporate Plaza, Building 3,
254 Washington Avenue Extension
Albany, N.Y. 12203-5195
by email: UniformBarExam@nycourts.gov

March 3, 2015

Dear Ms. Bosse,

My name is Stephane Grynwajc and I am a foreign-trained lawyer practicing in NY. I am writing to share my concerns regarding the proposed adoption of the UBE in lieu of the current bar exam format in NY. I am also a member of the Committee on Legal Education and Admission to the Bar of the New York State Bar Association, a committee I joined due to my keen interest in legal education and the bar exam, and in wanting to be a voice for foreign-trained practitioners who account for a substantial portion of the NY bar exam candidates. Having said that, I am hereby testifying in my individual capacity and not in any way in my capacity as committee member.

I would like to share my particular concerns regarding the proposal on the table, and particularly the fact that the adoption of the UBE would mean adding a second MPT to the exam. I took the MPT myself when I sat for the bar exam here in NY. Based on my own personal experience, I do think that the format of the MPT does place foreign-trained lawyers as a particular disadvantage in comparison with US-trained candidates, for the following reasons:

1. The format of the MPT is one that requires candidates to use simulated law office materials and research sources to research, organize, and produce a work produce inside 90 minutes. It is an exercise that is particularly challenging for candidates whose first language isn't English. It requires candidates to sort through a substantial amount of material in a language, which, for 30% of these candidates, isn't their first language. Evidently it takes those candidates more time than it takes an English speaker to complete the exercise, thereby putting many of these candidates in the situation of not being able to complete the exercise inside the 90 minutes.

2. Most foreign-trained lawyers have been educated in a format which isn't leveraging the use of technology the way the US educational system does. As a result, most foreign-trained candidates do not type as fast as they write. They form the largest pool of candidates writing the exam, whereas most US candidates type their exam. This fact, combined with the fact that a foreign candidate takes longer to gather his thoughts in a comprehensible manner and in a language which isn't their native language, does put the foreign candidate at a disadvantage on those portions of the exam, and the MPT in particular, which require more drafting, more even so under time constraints.

3. The MPT comes at the end of the first day. By that time the candidates are tired. Foreign-trained candidates who do face the additional difficulty of having to read and write portions of an exam in a foreign language to them, often at the expense of not being able to complete the essays in time, therefore incurring substantial delays by the time they start the MPT, face more than their US counterparts the risk of not finishing the exam.

The adoption of the UBE would mean two MPTs instead of one. It would also mean six essays instead of 5, and to read, analyze and draft answers to those essays in 30 minutes each, instead of the current 45 minutes allocated to each essay. For the above reasons, the new format of the exam, if adopted, is very likely to impact negatively foreign-trained candidates who represent nearly 30% of all applicants every year. I would therefore call for the NY Board of Law Examiners to act in caution before they make the decision to adopt the UBE. There are very few states which accept foreign-trained candidates to take the bar exam merely on the back of an LLM degree for those candidates who did not get their foreign JD equivalent in a common law jurisdiction. NY is one of them, and certainly the largest of all UBE States, if it were to adopt the UBE. As a result, due to the large pool of foreign-trained candidates taking the exam in NY, it is a likely that NY will be more affected by the adoption of the UBE than all other UBE States may have been so far, and this situation may, in turn, have a ripple effect against attracting foreign-trained candidates interested in being qualified in NY.

I therefore urge NY State to exercise judgment over this issue based on the particular demographics of the pool of candidates sitting for the bar in NY, as opposed to other States. If one of the objectives for adopting the UBE is indeed to increase the attractiveness of NY as a practicing forum for lawyers, I am not sure that moving to the UBE may just do that.

Yours sincerely,

Stephane Grynwajc, Esq.

[redacted]

From: Michael Camacho <[redacted]
Sent: Wednesday, March 04, 2015 6:45 AM
To: Uniform Bar
Subject: UBE Comment

The UBE will bring more lawyers to NY, which will provide the populace with more affordable access to legal assistance. It will also produce more specialized and competent lawyers. I find it striking that the home of Wall Street is even debating a capitalist free market concept like this.

--
Very respectfully,
Captain Michael Camacho
Master of Vessels, 500 Gross Tons (Oceangoing)

March 4, 2015

Advisory Committee on the Uniform Bar Examination
Hon. Jenny Rivera, Associate Judge
New York State Court of Appeals
20 Eagle Street
Albany, NY 12207

Dear Judge Rivera:

On behalf of the Hispanic National Bar Association, the Dominican Bar Association, the Latino Lawyers Association of Queens County, the Long Island Hispanic Bar Association, and the Capital District Black and Hispanic Bar Association, we respectfully submit this statement concerning the proposed adoption of the Uniform Bar Exam ("UBE") in New York. We take this opportunity to point out that the overall number of Latino attorneys in the legal profession in New York and across the United States is dismal as compared to the general population of approximately 54 million Hispanics, which constitutes 17% of the total population.[1] In fact, the 2010 U.S. Census shows that the percentage of licensed attorneys of Hispanic origin is only 3.7%.[2] Any decrease in the number of Latino law school graduates who pass the New York bar exam will significantly and negatively impact diversity efforts in the legal profession. Despite this adverse potential outcome, there have been no studies conducted that assess the impact of the adoption of the UBE on Latino bar passage rates. Therefore, we join LatinoJustice PRLDEF in urgently requesting that a formal study assessing bar passage rates in New York and in current UBE jurisdictions be conducted prior to New York's decision on whether to adopt the UBE in order to determine if the continuing disparate impact of the New York bar exam[3] will significantly worsen.

The Society of American Law Teachers ("SALT") described New York's long history of concern about "both the breadth and depth of the exam and its disparate impact" in its letter dated January 16, 2015 to this Committee. We agree that adopting the UBE does not directly address either of these issues. The SALT letter indicates that we simply do not have the public statistical data to compare the decline in pass rates in UBE states with the decline in pass rates in non-UBE states and how those respective declines impacted various subgroups of test-takers. The pass rates are a significant factor in

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[1] *See Annual Estimates of the Resident Population by Sex, Age, Race, and Hispanic Origin for the United States and States:* July 2013, available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2013_PEPASR6H&prodType=table

[2] ABA Lawyer Demographics available at http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer_demographics_2013.authcheckdam.pdf

[3] *Report of the Committee on Legal Education and Admission to the Bar of the Association of the Bar of the City of New York in Opposition to the Board of Law Examiners' Proposal to Increase the Passing Score on the New York Bar Examination,* January 2003 available at http://www.nycbar.org/pdf/report/BARSCO~2.pdf

obtaining an increase in the number of Latino attorneys. One of the central questions that this Committee should be committed to answering prior to determining whether New York should adopt the full UBE is the following: Will the UBE affect the pass rate of minorities and other disadvantaged communities?

When New York proposed to adopt a gradual increase of 15 points in the passing score of the existing bar exam starting in 2005, a study was conducted to determine its impact.[4] The Report concluded that out of the U.S.-educated first-time takers, the Black/African American group and other minority groups tend to suffer sharper declines in pass rates than the Caucasian/White group as the passing score goes up.[5] For example, the proposed increase in passing score from 660 to 675 would have had a significant impact on the Puerto Rican population of 2005 test takers. While a passing score of 660 resulted in 80.8% pass rate for that population, a passing score of 675 would have decreased the pass rate to 71.2%, a decline of almost 10%! This decrease has a significant impact on the overall diversity of the profession, especially when the number of law graduate test takers in particular minority subgroups is already very small.

In sum, reviewing previous studies examining bar passage rates compels us to challenge the notion that increasing the number of Latinos in the legal profession is solely up to the law schools, bar associations and diversity directors. Rather, it is equally incumbent upon those administering the bar exam to actively support efforts to address this systemic inequality rather than proposing changes without knowing the potential resulting disparate impact. In the absence of any public data derived from formal studies concluding that the UBE will actually facilitate an increase in ethnic diversity in the profession, we are seriously concerned that adopting the UBE would risk worsening the existing state of affairs. Therefore, we respectfully request that the UBE not be adopted until these issues are fully vetted.

Very truly yours,

Cynthia D. Mares, National President
Hispanic National Bar Association

Neysa I. Alsina, Regional President (NY)
Hispanic National Bar Association

Karina E. Alomar, President
Latino Lawyers Association of Queens County

Gloribelle Perez, President
Dominican Bar Association

Patricia L. R. Rodriguez, President
Capital District Black and Hispanic Bar Association

Roy Aranda, President
Long Island Hispanic Bar Association

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[4] *Impact of the Increase in the Passing Score on the New York Bar Examination, Report Prepared for the New York Board of Law Examiners* by Michael Kane, Andrew Mroch, Douglas Ripkey, and Susan Case, National Conference of Bar Examiners, October 4, 2006 available at http://www.nybarexam.org/press/ncberep.pdf

[5] Id. Table 4.2 at page 82.

The Latin American Law Student Association of
Pace University School of Law
78 North Broadway,
White Plains, New York 10603

March 4, 2015

Advisory Committee
C/O The Honorable Jenny Rivera, Associate Judge
New York State Court of Appeals
20 Eagle Street,
Albany, New York 12207

Re: Uniform Bar Examination

Dear Judge Rivera:

The Latin American Law Student Association of Pace University School of Law (Pace-LALSA) submits this statement in response to the proposal for New York State to adopt the Uniform Bar Examination (UBE). Pace-LALSA represents Latina/o law students and other minority law students at the Pace Law School community. Considering our group – as law students and as minorities – will be affected the most should New York State implement the UBE, we found it necessary to express our comments and concerns to you and your committee. We appreciate this opportunity to contribute in this important decision.

For the following three reasons, we are concerned about New York State adopting the UBE.

First, implementing the UBE will go against – not for – New York State's goal of licensing more professionals with practical skills to serve the citizens of New York State. Further, the new format is likely to have a disparate impact on minority test takers, which would hamper the strides made to diversify the legal profession. Before a decision is made to adopt the UBE, we need reports, studies, and data to determine 1) if the new format will bring more competent professionals to the profession, and 2) if the new format will have a disparate impact on minority test takers? Since there are no available reports, studies, or data to answer such questions, an informed decision cannot be made to adopt the UBE.

Second, similar to the first point, we request the New York Board of Law Examiners conduct "pre-tests" of the new format before deciding to implement the UBE – a common practice for implementing standardized testings. In doing, we can evaluate the pre-testing data to determine whether to implement the UBE or have a discussion on how to improve the exam that achieves the goal of licensing competent professionals.

Third, even if the New York Board of Law Examiners believe adopting the UBE is appropriate, the new format should be implemented three years after the effective date of approving the change. This will give bar prep firms and law schools time to adjust and prepare affected law students for the exam. In addition, the impact will affect incoming law students (1Ls), giving them sufficient time to prepare for the exam.

We urge the Advisory Committee to reconsider adopting the UBE until there is more information to determine the effectiveness and impact of the new format. Certainly, while there is a need to create a uniform testing to allow legal professionals to practice across many state lines, we should take time and care to put our efforts towards implementing a better test, and not just the only alternative available.

I. No Available Reports, Studies, or Data to Determine How UBE will Affect Test Takers, Especially to Minorities, to Make Prudent Decision About Implementing New Format.

We understand the pivotal advantage of the UBE is the score will be portable to "facilitate lawyer mobility across state lines, resulting in expanded employment opportunities for lawyers throughout the nation..."[1] While appeasing, this "advantage" is outweighed by the goal of having law schools incorporate more practical skills training to better prepare us for the legal profession. CUNY Law professor, Susan Bryant, on behalf of the Society of American Law Teachers, expressed to the Advisory Committee that implementing the UBE can create "a blacklash" against the need to increase practical training, since "law school faculties always faced a tension between bar passage preparation and work on necessary practical skills.[2] Also, considering standardized testing negatively impacts minority test takers, the adoption of the new format may disparately impact racial and ethnic minority students. As the New York City Bar mentioned in their comment letter last year, it is unclear whether the "UBE with the New York law component will lessen or enhance" a disparate impact on racial and ethnic minorities.[3] To address these concerns, we need information, such as reports, studies, and any other data, to determine the effectiveness of the UBE and how the new format will affect test takers, especially minorities.

Presently, there is no information available that would give the Advisory Committee, let alone the general public, the confidence to believe the benefits of adopting the UBE will outweigh keeping the same format or considering an alternative. We humbly ask, before a decision is even considered to implement the UBE, that the New York Law of Board Examiners make available reports, studies, and any other data to evaluate whether the new format demonstrates the test taker's competence to serve the community – and not test a person's memorization skills – and, more importantly, whether the exam enhances the disparate impact on minorities. The impact analysis

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[1] Letter from New York State Board of Law Examiners (Oct. 6, 2014), *available at* http://www.nybarexam.org/Docs/NYCourtofAppeals_Request_for_Public_Comment.pdf.

[2] Andrew Keshner, Panelist Hear Concerns About Adopting Uniform Bar Exam, New York Law Journal (Jan. 22, 2015), http://www.newyorklawjournal.com/id=1202715763873/Panelists-Hear-Concerns-About-Adopting-Uniform-Bar-Exam?slreturn=20150204073336.

[3] Letter from New York City Bar Association (Nov. 6, 2014), *available at* http://www2.nycbar.org/pdf/report/uploads/20072798-CommentsonUniformBarExamProposal.pdf.

should separate the results found for the tests taken for the UBE and the New York law component, as well as break down the results of test takers as a group and minorities.

II. A Field Test Should be Performed Prior to Deciding Whether to Adopt the UBE.

It is common practice to conduct field tests, or "pre-testing," before a standardized test is implemented.[4] The purpose of the field tests is to research how the test takers handle the new format and, if necessary, adjust the exam so as to ensure it evaluates the person's ability, in this case, to competently practice law in New York State. To date, there has been no discussion to conduct such field tests for the proposed adoption of the UBE. This pre-testing will give us the opportunity to weigh in on the changes needed to effectively test a person's competency to practice law while also not enhancing the disparate impact on minority test takers. To not conduct a field test will be like driving a new car without test driving it. While the new car may give you the ability to travel longer distances, it may not perform to your level of expectation. We ask there be field tests conducted for the UBE and its New York law component and make such results available prior to deciding whether to adopt the new format.

III. If the UBE is Adopted, the Implementation Should be Delayed for Three Years After the Effective Date of the Approval.

We are concerned that even if the UBE is adopted, there will be a rush to implement the change. Doing so will disadvantage our fellow law students and exacerbate the current trend of bar passage rate declines. Instead, if UBE is adopted, sufficient time should be given to allow law students, bar prep organizations, and law schools adjust and prepare for the new format. We propose the UBE should not be implemented for at least three years after the approval decision to adopt the new format. This will impact incoming law students, instead of affecting 2 or 3Ls, giving them time to choose the appropriate bar prep organization and materials, class schedules (*e.g.*, based on the new format, some students may prefer to select classes that prepare for the bar rather than those that would provide practical skills training), and, most importantly, not enhance the level of stress that it would bring if the student was told the new exam will take effect in a few months (which occurred last semester) or the next year (if a 2L). In turn, law schools and bar prep organizations will have time to allocate resources to prepare the student.

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[4] *See, e.g.*, Pearson, *Infographic: How Standardized Tests Are Created For Your Child*, http://www.parentskidsandtesting.com/wp-content/uploads/2012/11/PEARSON_Info_F.jpg (last visited Mar. 1, 2015); Emma Brown & Lyndsey Layton, *Maryland and D.C. schools to begin field-testing new Common Core exams next week*, WashingtonPost.com (Mar. 20, 2014), http://www.washingtonpost.com/local/education/maryland-and-dc-schools-to-begin-field-testing-new-common-core-exams-next-week/2014/03/20/e5f960a4-b058-11e3-a49e-76adc9210f19_story.html ("*The field tests* — which will be administered to millions of students across the country, including to Maryland children next week and D.C. children next month — *are meant to help fine-tune the online exams before they go live next year.*") (emphasis added).

IV. Conclusion

We strongly believe a decision cannot be made without more information as to the effectiveness and impact the new format will have on test takers, generally, and minorities. The new format should do more than just facilitate lawyer mobility across state lines; it should bring competent practitioners to the legal profession to serve the community. Instead, we are making a decision with the hopes the new format will achieve this goal. Further, considering standardized tests negatively impact minority test takers, the new format may enhance a disparate impact on minorities, diminishing the strides we have made thus far to diversify the legal profession. Rather than moving forward with the new format, we should focus on making a better test. As CUNY Law professor, Susan Bryant, mentioned to the Advisory Committee, New York State is in a "unique position to push for a better test."[5] The UBE is not the better test, or at least, we do not have enough information to confidently believe that is the case.

Thank you for considering our comments. Please feel free to contact us with any questions.

Sincerely,

Pace-LALSA

Executive Board Members

Julisa Medina
Lorena Lucero
Karine Patino
Sharleen Balion
Angelica Cancel
Peter Garcia

[5] Andrew Keshner, Panelist Hear Concerns About Adopting Uniform Bar Exam, New York Law Journal (Jan. 22, 2015), http://www.newyorklawjournal.com/id=1202715763873/Panelists-Hear-Concerns-About-Adopting-Uniform-Bar-Exam?slreturn=20150204073336.

Sent via electronic mail

March 4, 2015

Diane Bosse, Chair
New York State Board of Law Examiners
Corporate Plaza, Building 3,
254 Washington Avenue Extension
Albany, N.Y. 12203-5195
UniformBarExam@nycourts.gov

Dear Ms. Bosse:

This letter is submitted on behalf of the Association of Black Women Attorneys, Inc. ("ABWA") in response to the proposal to adopt the Uniform Bar Exam in New York, effective with the July 2015 administration of the exam. The Association of Black Women Attorneys, Inc. is a not-for-profit bar association founded in June 1976 that promotes and supports the professional development and growth of African-American women attorneys and champions the elimination of bias in the legal profession. Among our most important goals is to increase diversity in the legal profession, particularly in New York.

To our knowledge, there have been no studies as to the potential impact of adopting the UBE for New York on diverse test-takers. ABWA, and as we understand, BOLE, has long been concerned about the current test score disparity, and the impact of disparate bar passage rates on racial and ethnic minorities and diversity within our profession. In light of this, we are asking the Advisory Committee on the Uniform Bar Exam and the New York Court of Appeals to delay implementation of the Uniform Bar Exam until more information is available to assess whether the UBE is likely to increase test score disparity and have an even greater disparate impact on racial and ethnic minorities.

Further, the current proposal raises concerns as to the New York Law Exam portion that would consist of 50 multiple-choice questions. ABWA advises against the implementation of such high-stakes, multiple-choice questions until they have been pre-tested. The questions, we understand, will utilize a completely different format than used on the current exam, yet have not been written or reviewed. A study should be conducted to assess whether this will also increase test score disparities.

In closing, we are of the opinion that adoption of the UBE, with efforts to reduce or eliminate disparate impact, will advance the important interest of lawyer mobility and employment opportunities nationwide as well as allow New York employers to draw on a more varied talent pool of new lawyers.

Sincerely,

Ivie A. Guobadia, Esq.
ABWA LESIGLATIVE COMMITTEE CHAIR

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www.abwanewyork org

METROPOLITAN BLACK BAR ASSOCIATION

"injustice anywhere is a threat to justice everywhere"

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March 4, 2015

Diane Bosse, Chair
New York State Board of Law Examiners
Corporate Plaza, Building 3
254 Washington Avenue Extension
Albany, NY 12203-5195

Dear Ms. Bosse:

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New York has been a leader in promoting diversity in the profession. However, the adoption of the UBE without further analysis of its effect on minority examinees is a step in the wrong direction. To date, there have been no disparate impact studies by the New York Board of Law Examiners (BOLE) on its proposed adoption of the UBE despite calls to do so by academia, such as the Society of American Law Teachers and other diverse bar associations[1]. There have been, however, numerous studies on the adverse impact the current bar exam has had on minority bar examinees.[2] As such, these reports have suggested other measures to assess lawyering skills. Unfortunately, these other competency skills have not been adopted by BOLE.[3] Further, of the fourteen (14) UBE jurisdictions, none have provided any data on the bar passage rate for minority bar applicants. Although that data does not exist, it is instructive to note that since the adoption of the UBE, the overall bar passage rate in those 14 jurisdictions has decreased significantly.[4] In addition, the BOLE recommends a passing

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[3] Curio, Andrea, and Carol Chominsky.*Testing Diversity and Merit.* 9 Univ. of Mass. L. Rev. 206, (2014): 225. Print.

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(continued...)

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The MBBA is also concerned that a fundamental change to the bar exam has not been subject to "pre-testing", nor subject to public review of sample questions. In fact, in a report submitted to the New York Board of Law Examiners, the New York State Bar Association's Committee on Legal Education and Admission to the Bar noted that "it was common for all standardized exams to pre-test questions and analyze results. Such questions could be included on several upcoming administrations of the present New York State Bar Exam to develop data."[5] Without such data, supporting the adoption of the UBE would be premature. We think it is prudent for the BOLE not to take a wait-n-see approach to addressing these issues only after the administration of the UBE.

In addition, under the current proposal, the UBE exam will only test on New York State specific content through 50 multiple choice questions (NYLE). Unlike the current bar exam which weighs both the MBE and New York section (NYMC and NY Essays) on a scale of 665 out of 1000, under the new proposal, examinees must pass both the NYLE, scoring 60% (30 out of 50 questions) independently of the other UBE sections- the UBE (50%), MEE (30%) and the MPT (20%). This raises another concern as well, which BOLE has not addressed, that is how will the requirement to independently pass each section impact the passage rate.

Finally, while the MBBA concedes that there are advantages to New York adopting the UBE, such as creating a path towards a national licensure exam, and therefore, increasing the mobility of New York state bar examinees to obtain admission to other UBE jurisdictions, we still urge the BOLE to introduce these changes incrementally with experimental sections over the next few bar administrations.

Respectfully submitted,

Taa Grays
President

and 13% in North Dakota...the trend is clear: people are failing the bar exam at higher rates." *A Tough Pass: UND Law School students struggle to pass bar exam*, Grand Forks Herald 2014, " overall pass rates are the lowest they've been in 10 years."

[5] COMMS. ON LEGAL EDUC. & ADMISSION TO THE BAR OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., Report of New York Board of Law Examiners Proposed Change in New York to the Uniform Bar Exam, October 23, 2014.

NEW YORK LAW SCHOOL

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March 4, 2015

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

Dear Judge Rivera,

Thank you for your leadership of the Advisory Committee established by Chief Judge Lippman to explore whether and how the Uniform Bar Exam ("UBE") should be adopted in New York State. By way of this letter, New York Law School, one of the State's oldest law schools, and an institution that prides itself on being *New York's law school*, submits to you its comments on the proposal.

Principally, our comments focus on the concerns raised and shared by many in legal education and the profession about the impact that the change, as proposed, could have on law graduates of color. We also are concerned about the impact that the change could have on the teaching and understanding of New York law for those who seek to practice law in New York State. Finally, we are concerned about the timetable for implementation of any such changes.

I. Impact on Law Graduates of Color.

As supported by our analysis below, New York Law School is concerned that a change in the weighting of the Multistate Bar Examination ("MBE") to 50%, from the current 40%, could have an adverse impact on law graduates of color seeking admission to the New York State Bar. We also are concerned that the introduction of the new New York Law Examination (NYLE), to be administered as part of the UBE and on the same day as the MBE, could have an adverse impact on law graduates of color because it would concentrate and intensify the scope and duration of multiple choice testing to a single day during the multi-day bar examination period.

Accordingly, if New York State adopts the proposal regarding the UBE, New York Law School asks for two things regarding its implementation:

1) That the current weighting of the MBE must remain at no more than the current 40%, instead of the proposed 50%, and that the MBE's current administration must be preserved so that it is administered independently on a single day during the multi-day bar examination period; and

2) That the proposed NYLE must be decoupled from the UBE/MBE administration. Rather than make the NYLE a requirement for bar passage, New York State should make successful completion of the exam a requirement for bar admission similar to the way successful completion of the Multistate Professional Responsibility Examination (MPRE) is required for bar admission. The NYLE could be offered at the same times and places during the year that the MPRE is offered.

Students should be allowed to take the NYLE in advance of the UBE/MBE. In terms of criteria for successful completion of the NYLE, we believe that a careful assessment of how the NYLE is scored and the requirements for successful completion need to be undertaken.

Analysis: In 2010 the American Bar Association issued *The Next Steps*, a challenge to law schools, bar associations, law firms, the judiciary, and government to address the disturbing lack of diversity in the profession.[1] That report was issued just as law school applications began their historic decline.[2] That decline has swept up students of color, especially African American students, as the job market for new lawyers remains challenging, compounded by student debt.[3]

Within this context, adoption of the UBE, especially in New York with its rich diversity potential, must be carefully examined to ensure that we erect no further barriers to becoming a profession that reflects the demographics of our great State.[4]

The number of diverse candidates enrolling in law school has declined between 2010-2013[5] as applications to law school have declined generally.[6] Between 2010 and 2013, overall first year enrollments dropped by 22.6%.[7] Although the proportion of diverse 1L students has increased by 4.3%, the overall number has fallen from 13,172 students in 2010 to 11,904 in 2013, which is a decline of 9.6%.[8] Law schools requiring the highest LSAT scores for entry actually saw a decrease in the number and in the proportion of diverse entering students.[9]

For African American candidates, overall enrollments were down from 3,867 nationwide in 2010 to 3,637 in 2013, a decrease of 5.9%.[10] Enrollments would have been far more dismal if not for the increase in African American enrollments in the lowest ranked schools; enrollments there increased

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[1] *The Next Steps: Report and Recommendations Race and Ethnicity, Gender Sexual Orientation, Disabilities* AM. BAR ASS'N. PRESIDENTIAL DIVERSITY INITIATIVE (April 2010). http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf. In 2000, the legal profession was around 90% white although the population of the United States at the time was 70%. Law remained less racially diverse than most other professions and diversity flattened further since 1995. *Id.* at 12.

[2] 2010 was the highest enrollment overall for law school students. Between 2010 and 2013, enrollments by white students declined 24%, Asian students declined by 13%, African American students declined by 5.5%, and Hispanic students increased by 3%. *Matriculants by Ethnic and Gender Group*, LAW SCH. ADMISSION COUNCIL, http://www.lsac.org/lsacresources/data/ethnic-gender-matriculants.

[3] Combined undergraduate and law school debt exceeds $140,000 for the average law school student. Jason Delisle & Owen Phillips, *The Graduate Student Debt Review*, 4 New America (2014) http://newamerica.net/sites/newamerica.net/files/policydocs/GradStudentDebtReview-Delisle-Final.pdf.

[4] New York is 70.9% white, 18.4% Hispanic, 17.5% African American, and 8.2% Asian. http://quickfacts.census.gov/qfd/states/36000.html.

[5] *See*, Aaron N. Taylor, *Diversity as a Law School Survival Strategy* 7, n. 28, 15 (2015) http://pdfserver.amlaw.com/nlj/Diversity-as-Survival_Strategy.pdf. Professor Taylor's analysis of minority admissions first made available February 10, 2015, adds much to this comment.

[6] *Id.* at 12.

[7] *Id.*

[8] *Id.* at 15.

[9] Law schools in the first quintile dropped 1.1% in diverse first year enrollments. *Id.*

[10] *Id.* at 18.

by 6.6%.[11] At first quintile schools, the country's most prestigious, African American first year enrollments declined from 700 in 2010 to 553 in 2013, or by 21%.[12]

Analysis of Hispanic enrollments was made more difficult when in 2010, the LSAC eliminated the sub-category of "Mexican-American" from Hispanics.[13] Prior to 2010, the proportion of Mexican-American applicants who were accepted into law schools from 1993-2008 fell by 11.7%.[14] "Puerto Rican" remains a sub-category of Hispanic. Between 2010-2013, Puerto Rican enrollment fell by ten students although overall Hispanic enrollment rose by 200 students.[15] Generally Hispanics have increased their actual number and proportional enrollment in all but the higher ranked law schools, the quintiles 3, 4 and 5.[16]

The Multistate Bar Exam, like the LSAT, is a speed tested, multiple choice exam. By changing the weight of the MBE from 40% to 50%, New York cannot avoid the likely impact this variation will have on bar candidates of color, no matter how qualified. We cannot ignore the fact that as a group African American and Hispanic candidates score lower on standardized tests, such as the LSAT.[17] Performance on the MBE needs to be examined by race and ethnicity, especially in light of the significant decline in passing scores for the July 2014 administration.[18] Despite calls for their release, any data examining disparities in passing scores remain exclusively within the control of the National Conference of Bar Examiners.

New York should use its influence to insist upon the release of performance information, including data on race and ethnicity, before adopting the UBE. At a time when the legal profession has been challenged to examine itself in search of eliminating barriers to admission and success of lawyers of color, it seems the wrong time to close any door to African Americans and Hispanics entering the profession.

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[11] *Id.*

[12] For example, between 2010 and 2013, actual enrollments in the first year class of African American students decreased in these top ranked New York law schools: Columbia -5; Cornell -3; Fordham -6; and New York University -18. Taylor, *supra* note 4, Appendix C 39.

[13] Columbia University and the Society of American Law Teachers (SALT) had documented the "Disturbing Trend in Law School Admissions" which showed that despite the increase in the number of law schools and consequently the number of seats available between 1990 and 2008, the actual proportion of African American and Mexican American law school students had decreased. This was true even though LSAT scores and GPAs for these applicants generally had improved. When the sub-category Mexican-American was eliminated, Columbia and SALT had to stop their reports. http://blogs.law.columbia.edu/salt/

[14] *Id.*

[15] *Admitted Applicants by Ethnic and Gender Groups, 2010-2013*, LAW SCH. ADMISSION COUNCIL http://www.lsac.org/lsacresources/data/ethnic-gender-admits.

[16] Taylor, *supra* n. 5 at 19.

[17] Susan P. Dalessandro, Lisa C. Anthony & Lynda M. Reese, *LSAT Technical Report Series: LSAT Performance with Regional, Gender, and Racial/Ethnic Breakdowns: 2005-2006 Through 2011-2012 Testing Years*, LAW SCH. ADMISSION COUNCIL (Oct. 2012), http://www.lsac.org/docs/default-source/research-(lsac-resources)/tr-12-03.pdf. Average LSAT test scores for African American applicants to law schools are generally lower than those of other ethnic groups. That test score is around 142. As a group, Hispanic test takers score higher at 146. However, white and Asian test takers, as a group, score typically higher at 153.

[18] Letter from Erica Moeser, President, National Conference of Bar Examiners, to Law School Deans, (Oct. 23, 2014) http://nylawyer.nylj.com/adgifs/decisions14/111314moeser.pdf .

II. Impact on the Teaching and Understanding of New York Law.

New York is the world's forum. And, as *New York's law school*, New York Law School understands the importance of New York law in both the global and local economies. Like many law schools in New York State, New York Law School prides itself on offering a rich curriculum that is not only national and international in scope, but also is one that celebrates and emphasizes the value of knowing New York law, and its practical application to cases and controversies in New York's courts including the Criminal and Surrogate's Courts.

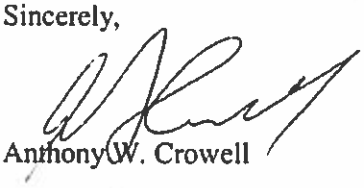
Indeed, the vast majority of our graduates who enter the profession rely on their knowledge of New York law to serve our communities, including those with vulnerable populations in need of representation and access to justice. New York Law School requests that, before any changes in the bar examination are adopted, there be consideration of how to mitigate any impact on the carefully crafted curricula designed by the State's law schools and historically relied on by students and graduates who plan to take the New York bar examination and practice law in New York State. A change in emphasis away from New York law by the New York bar examination could result in the unintended consequence of those students most likely to serve New York's communities being less knowledgeable about New York law because they will choose to take law school courses to prepare them for the UBE instead of practicing law in New York State.

III. Timetable for the Implementation of Any Changes.

If New York State adopts the UBE, New York Law School requests that the implementation date for the new examination format be no sooner than the July 2017 bar examination. This will allow the Board of Law Examiners to make all appropriate inquiries about the new examination and its impact, and it will allow law schools to adequately inform students about the format changes and design and implement any curricular or bar preparation programming adjustments.

Thank you for your consideration.

Sincerely,



Anthony W. Crowell

[redacted]

From: Alan G. Rosenblatt [redacted]
Sent: Wednesday, March 04, 2015 6:00 PM
To: Uniform Bar
Subject: Comments on the UBE by the members of the Rockland County Bar Association

Diane Bosse, Chair
NYS Board of Law Examiners
Corporate Plaza, Building 3
254 Washington Avenue Extension
Albany, NY 12203-5195

Dear Ms. Bosse:

As President of the Rockland County Bar Association (RCBA), I asked the membership of the RCBA to provide comments to me regarding their position on the UBE. While I did not receive a significant number of written responses, I did receive several verbal and written comments, all of which, except one voiced, concerns about the adoption of the UBE by New York. The concerns expressed by those who did respond included the following:

1. The resulting reduced focus on New York law making it less important for lawyers practicing in New York to know New York law.
2. Increased competition from lawyers who do not know New York law.
3. Reduced prestige in passing the New York Bar Examination due to, in part, elimination of the essay part.
4. While there may be an increase in competition among attorneys which one would hope would lead to greater representation of the indigent, there is a likelihood that the UBE attorneys are not coming to New York to represent the indigent but to cherry pick the lucrative clients.
5. The UBE does not have any proposals for those New York attorneys who have taken the Bar prior to 2015.
6. The UBE could impact applications to New York law schools.
7. The UBE could result in New York law schools watering down their teaching of New York based courses.
8. There is a lack of uniformity among the states that use the UBE to include grading and the timeframe for transfer of UBE scores.
9. There would be more of a likelihood that the flow of attorneys would be in the direction of New York rather than out of New York.
10. The UBE could result in a watering down of New York's standards to mold itself into a system of conformity and mediocrity.
11. New York already permits out-of-state attorneys to practice on an individual case bases through pro hac vice admissions or through reciprocity.
12. Disciplining of out-of-state UBE attorneys or, if UBE attorneys are disciplined in other states, how is New York to be notified except through voluntary notification by the attorney in question.
13. Protection of clients from out-of-state UBE attorneys who commit malpractice or escrow violations.

As I indicated, one attorney did express support for the UBE stating there is nothing magical about New York law and, in today's increasingly smaller world, any reasonably educated attorney can learn the nuances of New York law.

Thank you for considering the above in your determination.

Alan Rosenblatt, Esq.
Montalbano, Condon & Frank, P.C.