In The Matter Of:

Uniform Bar Exam Public Hearing v.

March 4, 2015

Supreme Court - New York

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3 UNIFORM BAR EXAM PUBLIC HEARING
4 MARCH 4, 2015
2:00 p.m.
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NEW YORK CITY BAR ASSOCIATION
6 42 West 44th Street
New York, New York
7
8 A P P E A R A N C E S:
9 PANEL MEMBERS:
10 HON. JENNY RIVERA
HON. A. GIAL PRUDENTI
11 DEAN MICHELLE ANDERSON
DEAN HANNAH ARTERIAN
12 DIANE BOSSE, ESQ.
DAVID HERNANDEZ, ESQ.
13 SEYMOUR JAMES, ESQ.
E. LEO MILONAS, ESQ.
14
SPEAKERS:
15
JOHN GROSS, ESQ.
16 Judicial Institute on Professionalism in the Law
Accompanied by Paul Saunders and James Wicks
17
ERICA MOESSER, ESQ.
18 President, National Conference of Bar Examiners
19 VINCENT CHANG, ESQ.
New York County Lawyers Association
20 Accompanied by Lewis Tesser, Esq.
21
22
23
24 Terry-Ann Volberg, CSR, CRR
Eric Allen, RPR
25 Official Court Reporters.
26

1 Public Hearing
2 HON. JENNY RIVERA: Good afternoon.
3 Thank you for everyone that is here today.
4 This is the fourth and last public hearing of
5 the Advisory Committee to consider the State Board of
6 Lawyer Examiners' proposal on changing the New York
7 State bar exam.
8 We have most of our members of the committee
9 here today or who are en route. We are going to get
10 started. Again, I want to thank them publicly for all
11 the work they have done on the committee and that they
12 will continue to do as they prepare to complete the
13 task that's been assigned to us.
14 We are going to start today hearing some
15 testimony from the Judicial Institute on
16 Professionalism in the Law, John Gross. He is
17 accompanied by Paul Saunders and James Wicks.
18 Thank you so much.
19 MR. JOHN GROSS: Good afternoon.
20 Sitting with me, as the judge indicated, is
21 Paul Saunders, who is Chair of the Institute, along
22 with Jim Wicks who is a member of the Institute.
23 The Institute has been in existence for
24 approximately 16 years, was a product of the Craco
25 Commission a number of years ago and created by
26 judicial order of Judge Kaye. It consists of

practitioners and some academics, some people from the Academy.

We are charged with a responsibility to maintain awareness and adherence to professional values and ethical behavior by attorneys of the State of New York. We have the authority to conduct hearings throughout the state on various topics that we are interested in, and we have conducted over the years many convocations, last spring a major convocation on legal education that drew wonderful speakers from across the country looking at the issues that confront us with respect to legal education.

As a result of that effort, after a meeting of myself and Paul along with the president of the New York State Bar Association, some other representatives of the state bar, we agreed to assist your efforts and conduct focus groups throughout the state to solicit the views of the practicing bar and the members of the academy on the important UBE issues that face this task force.

Those have been completed, transcripts have been finished and supplied, I believe, to the task force, and our effort today is to merely highlight to you what occurred during those four rather interesting focus groups.

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The focus groups were drawn essentially from the folks that participated in four focus groups in anticipation of the spring convocation on legal education. It was supplemented by some others who had not been on the initial focus groups, but were unable -- filled in for people that were unable to participate this time around.

The focus groups occurred in Long Island, New York City, Albany and Buffalo.

I must emphasize at the outset that the Institute has not taken the position -- a position nor do we believe it is within our jurisdiction to do so. We participate with you in the effort of information gathering and identification of issues, not in terms of a position.

And just as an aside, I know the Albany focus group decided to adopt a resolution urging additional time be expended in the study of this effort. I want to emphasize why we welcome their effort and their participation. It does not reflect the position of the Institute because we are not taking a position on the efficacy of the UBE or not, again, believing it to be a bit outside of our jurisdiction.

Theme-wise it appears there are two or three critical issues that were treated with by the focus

groups. The first appears to have articulated issues relative to structure of the UBE exam and diversity concerns, and when I mention diversity, I am not only talking about diversity relative to people of color, but also some concerns about gender diversity, and if I can include them, foreign students as well.

And let me first try to articulate the concerns and issues that were raised relative to foreign students. And I do want to preface my comments by indicating that we fully understand that one of the major reasons for urging movement to the UBE is portability. All of the issues I'm going to raise are issues outside of the issue of portability, but I will speak to portability as well.

We are confronted with a situation where there's a suggestion of a change in the exam. The primary rationale appears to be portability, but other issues have occurred, and those are the other issues I'll cover, in particular, exam structure and adversity.

With respect to foreign students, it was articulated at, I believe, the New York City focus group that there are approximately 29 percent, at least last measured, foreign students who take -- 29 percent of those who take the New York bar are foreign

students. They have the lowest passage rate among those taking the exam, and there's a significant concern that the MPT, the doubling of the MPT score, it was articulated that there is a concern that that may have significant impact on the corpus of foreign students taking the exam because of reading skills that the MPT requires within a timed structure, I believe 90 minutes, for the answers to be produced by the test taker.

And certainly since New York has become, and certainly New York State Bar Association -- I should mention, I was remiss in failing to mention that the effort of the focus group is jointly supported by New York State Bar Association as well as the Institute, New York State Bar has certainly taken, through its international law section, great efforts to develop and focus New York as the tribunal for the resolution of international disputes. Witness how easy it is to get jurisdiction in New York. People strive to establish jurisdiction for resolution of international disputes in New York, and there is a concern that this may somehow be a bit contrary to that goal, mainly the impact, potential impact on foreign students.

The shift, the shift in the UBE from, in terms of scoring, from reliance more heavily on essay

exams to multiple choice raises some question. I am not a psychometrician, but certainly there's been an argument made that this may cause a gender issue, that women appear to do better on essay exams as opposed to multiple choice exams.

There seems to be a pit of paradigm shift in scoring to heavier reliance on multiple choice questions under the UBE regimen compared to the existing New York State regimen.

And I would also, with respect to that issue, where we turn to the NYLE, the New York test, the 50-point test, that really, in a sense, was argued. There was a bit of a profound shift, and the profound shift is, you've gotta pass that or you don't get your license to practice law. And it's composed of 50 multiple choice questions. And query, if indeed there is a gender issue, does that not militate against the interests of women taking the bar exam?

All of that notwithstanding, the notion that was emphasized at the various, not all of the focus groups, but some of the focus groups, was that we need a bit more time to take a look at those issues through the utilization perhaps of sample questions on exams, to the employment of psychometricians to take a look at prior results.

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I know there is a paucity of data when it comes to looking at diversity issues. I know from the testimony and information we received that the National Board of Law Examiners has indicated that there has been at least no anecdotal evidence of disparate impact either on people of color or woman as a result of the shift to the UBE in the 14 jurisdictions that have shifted. However, that does not necessarily give at least some of the persons at the focus group comfort.

There is a desire for more empirical analysis of the potential impact of the shift of the UBE. And certainly I think there is no question that the bar exam to an extent is seen as a bit of a barrier to greater diversity.

The goal certainly of the New York State Bar Association shared by all the members of the Institute, and I'm sure by every member of this room, is for increased diversity, that our bar look like the people we serve as attorneys and have the privilege of serving as attorneys.

We are not suggesting, it wasn't suggested during the course of these focus groups that the UBE in any way empirically will have that effect. However, borrowing from the medical profession of "do no harm," we have the existing exam, we lived with the existing

exam, we know there is a concern with the existing exam, and shifting over to the UBE quickly without the passage of two, three years of study may be precipitous with respect to diversity.

And, again, I want to assure you, I am trying to articulate the position of the persons at the focus group, not me.

Another theme that arose during the course of the various focus groups was the gold standard argument. New York is a special place. New York must continue to have its own bar exam. It must continue to be state-centric including heavy emphasis, namely the five, continuing the five New York essays. The argument in support of that is that we are the best. That's the perspective.

A query, some other arguments were raised, should the bar exam perpetuate a monopoly? Perhaps not, but certainly the belief that a New York license to practice law is a special thing was articulated at the various focus groups and the interweaving of New York law in the five essays.

And I might add as an aside, not directly on point, but the notion of the complex essay in contrast to the single issue UBE-type essay lead a lot of people at the focus groups to feel that the New York test and

the notion of the gold standard was important.

An argument was raised, at least at one point an issue was raised, one of procedural due process where we have had law students for three years dutifully taking a particular course of study and now in position, albeit delayed, of a new entry door to the receipt of a property at interest, to wit, a license to practice in the State of New York, a query, and that's solvable by time, that's not a complete shift to UBE, but if the argument was made or suggested that procedural due process might be violated by a precipitous shift making the test applicable to those who are currently "in the street," so to speak.

Finally, portability: I will certainly indicate to you there were many persons who are very much in support of the shift to UBE in our different focus groups because of portability. The increased opportunity to students, the increased opportunity to employers, the movement to national homogeneity with respect to the law.

Why should New York close its doors to the free flow of students? On the other side of the ledger, some arguments are made that this only includes 14 states, does not include Florida and California, who we all know have been very restrictive in terms

territorially with respect to admission to the bar in those states. Illinois, Texas, the states that participate tend to be, and I don't want to offend anybody from Iowa or Montana, but tend not to be thought of as the centers of litigation and legal issues like New York. So that was raised as an issue.

Some questioned whether or not the portability is a real portability apropos of the apparent fact that we -- our cut score, our pass score, there are only three of those states that have lower scores. So our admission of our persons by portability may be limited depending upon the passage score in the other states.

And there were five, five other states that do require, as New York apparently may, an NYLE test. So query in terms of ease of portability, if one goes to Utah, and Utah decides to have a Utah test, there is a limit on portability, not a preclusion of portability, and certainly better than waiting for reciprocity to kick in, but certainly that is, it was pointed out as a bit of a limited portability.

In closing, we truly applaud the efforts of the Board of Law Examiners and the Chief Judge and this task force in looking at this critical issue, and we hope the Institute, and I think I can also speak for

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2 New York State Bar, that we have been of some
3 assistance in gathering information for you.
4 Thank you.
5 HON. JENNY RIVERA: Thank you very much.
6 Yes, there's been a tremendous service that
7 you provided to us in those focus groups. At least one
8 member of the committee attended each of them, and we
9 are very pleased to do so, and it really was very
10 obvious that there was a dynamic conversation and many
11 different positions represented at each of these focus
12 groups. So we are very grateful for that work and for
13 the transcripts so that we can continue to go back to
14 the materials.
15 Having said that, I wanted to ask, it appears
16 that you mentioned specifically the foreign student
17 issue was discussed in New York City focus group. I
18 was wondering if there were other issues that were
19 unique to any of other focus groups, positions raised?
20 MR. JOHN GROSS: Sure.
21 The diminution [sic.] at the Long Island
22 group. There was -- and I didn't mention it because it
23 is a main theme in that particular transcript. It
24 speaks for itself, but certainly a pervasive concern
25 among solo and small firm practitioners that the
26 potential for an influx of graduates from other states

coming into this state will create a difficult, create a greater number of attorneys and less work for those who are in small firms and in solo practice. We all know that the employment market, although apparently it is slightly improving, has not been the greatest for lawyers, and a lot of them these days coming out of law schools who don't get jobs in larger firms are hanging up their shingle to practice. And there is a concern that was articulated at that Long Island group, I would even say a few on the part of solo and small firm practitioners, that this is going to worsen their competitive situation.

That's the one thing, Judge, that jumps out at me that I did not include in the presentation.

HON. JENNY RIVERA: Thank you so much.

My other question by other committee members, they want to ask, is give us a sense with respect to the four focus groups what were the primary issues, if there were any, with respect to curriculum potential, curriculum changes, how this might affect legal education?

MR. JOHN GROSS: Interesting.

I recall in Long Island the hypothetical, not hypothetical, the issue was raised, is this going to require law schools to dramatically change to

instruction in Uniform Laws which New York State we know has a pension for not adopting? Is it going to create that kind of a paradigm shift in curriculum? And by and large the academics both there and elsewhere did not see that as a major issue.

In fact, I think his testimony is quite interesting. It raises another issue that I perhaps should not get into, but Bruce Green at the City Bar said, look, the bar exam does very effective work in testing what one has learned in law school, but does it do a great job in testing analytical skills, skills that you need in a courtroom, how do you handle a client? The answer is no.

So query, do we need New York-centric components of the bar exam? Is it not just a test of legal knowledge and we move on from there? There is no necessary -- necessarily a need to rely on New York law to test the ability to think like a lawyer.

HON. JENNY RIVERA: Thank you.

DEAN MICHELLE ANDERSON: I really appreciate your hard work in setting up these focus groups. I was privileged to attend one of them, Mr. Gross. I have two questions for you.

One is, in terms of foreign students, foreign graduates, is the concern that just time, the time

compression of the MPT, or is it about the reading skills overall? In other words, if given more time, would the foreign students do better on the reading, the MPT, because their reading skills are limited due to the time or is it -- in other words, did the question of reading and time come up?

MR. JOHN GROSS: I don't think there was -- both came up. I don't think there was a distinction.

There was also a discussion that apparently in European, and I should say, foreign law schools reliance on technology is not the level that it is in the states. And the students taking the bar use laptops, American students have an easier time in that 90 minute period, when the foreign students were more used to answering questions apparently with pencil and paper. But my recollection is that really both issues were giving, were giving the proponent of that issue concern.

DEAN MICHELLE ANDERSON: I remembered it that way too. I wanted to, since you have given some time to review these records, I wanted to get your sense of it.

The other question I have is the concern about an influx of graduates from law schools from other states. What's your response to the position

that I've heard others articulate that that is really a form of protectionism and isn't really particularly valid? Maybe it is valid and --

MR. JOHN GROSS: -- Well --

DEAN MICHELLE ANDERSON: -- the current lawyers should be protected, maybe it's not.

What's your take on that?

MR. JOHN GROSS: Well, it was interesting.

Certainly that argument was raised, and even I think at the Long Island session two recent graduates had said, oh, my G-d, if I knew I could come in under portability I wouldn't have spent all the money I did at NYU or Columbia. I have would have gone to the University of Whatever, and then moved in and saved myself the 200,000 or 150,000 in debt I have.

But the issue of monopoly came up, and I think initially it was raised as a negative, why should we prevent people from out-of-state or make it easier for people of out-of-state to come in? We shouldn't do that because that's monopolistic. And somebody said, well, it is a monopoly, it's controlled by the Court of Appeals, it's controlled by the State of New York, it's controlled by the New York State Board of Law Examiners. We read the essays. So the system is monopolistic to begin with.

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Now in terms of protection of lawyers, certainly, and I have held various hats in that New York State Bar Association, certainly the Bar Association I would think would be concerned about protecting the interests of New York lawyers, that organization. The Institute, again, we really haven't taken any position on this. So if I can finish the answer by simply saying, I think New York State Bar would be concerned with that issue.

DEAN MICHELLE ANDERSON: Thank you.

DEAN HANNAH ARTERIAN: Thank you very much for all the work that was done and for your testimony.

I wondered if in those same discussions about the affect on recent graduates or not so recent graduates who are solo practicing about the influx of employers coming in, whether there was -- was the voice about the competence of the people coming in under portability option because my sense of the bar exam is that it's primarily, I think, to try to assure, to the extent appropriately possible, to protect potential clients, not to, you know, limit the number of lawyers. So I am not asking your opinion, because I know you're not in a position to do that. I am wondering if any of that came up in the discussion.

MR. JOHN GROSS: It did. Thank you for

reminding me of it.

There was an argument raised that having, forgive the phrase, New York-centric issues on the bar exam, questions on the bar exam, while somebody, while they are working and in law school, is not ready to practice law, some of the small firms and solo practitioners have said that when I hire someone from a New York Law School I, at least, can rely on their familiarity with New York law, they know where to begin, if I have somebody coming in from out of state, and a number have indicated in the smaller firms they don't necessarily hire other than from New York law schools, there could be a deleterious impact on clients because of additional time expended in research, et cetera. Now, certainly one could argue the ethical issue of whether they should be charging for the additional research time, but that was raised, an impact on clients. And even, you know, more general than that, New York education, a New York lawyer being familiar with New York law would be in a better position to represent the client at least initially.

DEAN HANNAH ARTERIAN: But not -- I guess -- I appreciate that, and I think we've heard that. I really was wondering whether in the conversation about keeping people out there was any discussion about what

the real purpose of the bar exam is, which is not essentially in any way supposed to be monopolistic. I mean, my sense is that the bar examiners and the courts, that that's not their, their goal with bar exam creation, administration and admission.

MR. JOHN GROSS: In response to Ms. Anderson's questions that she raised with me, I obviously didn't articulate it as clearly as I could.

There was strong argument made at one of the sessions that utilizing the bar exam as a mechanism, an economic device, was inappropriate, that the purpose of the bar exam is to measure legal knowledge, is somebody at least competent to begin practice.

DEAN HANNAH ARTERIAN: Thank you very much.

(Continued on next page.)

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HON. E. LEO MILONAS: You said a lot of things that perked my interest and I would just like to go through a few of them and you can answer or not answer. It's up to you.

The first thing is about the MPT of reading skills. And, as you know, we make allowances for people who have reading disabilities and problems reading because of things that are caused by nature. We do that all the time. However, is it appropriate to -- or does not being able to read or write without a disability and answer bar exam questions, does that really go to competence? If they are unable to use the tools of the trade, query: Does that not go to competence? After all, the bar exam is not an IQ test. I am sure they are smart, but are they able to manipulate the words they need to practice law?

MR. JOHN GROSS: That --

HON. E. LEO MILONAS: Wait, let me finish.

You said the bar exam is the barrier to great diversity. I am wondering if you had any ideas of what we can do about it. You mentioned the bar exam is the gold standard. As a member of the portable examiners, I am delighted to hear that, but when we talk about the gold standard, we are really talking about New York law.

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MR. JOHN GROSS: Yes, sir.

HON. E. LEO MILONAS: And New York law is the gold standard and that is created by the Court of Appeals and Appellate Division. That's the gold standard. You mentioned only 14 states are in the bag now. I think you should ask once New York gets to the game, I think that will change the picture dramatically. And you said that the bar exam is the test of legal knowledge and skills. I submit to you that UBE is a much better test of legal skills and at the same time will be testing legal knowledge.

The final point about the pencil and paper; the difference, I don't there is a difference. And Diane Bosse can shed some light on it between the written exam and the typed exam. I think we found there is no difference in competence.

MR. JOHN GROSS: Of course these were not John Gross' views that you reviewed. These are issues raised at the --

HON. E. LEO MILONAS: I know. I am --

MR. JOHN GROSS: If I may, the first one, certainly we all know the Americans With Disabilities Act as well as the various other federal statutes we have to make appropriate accommodations for our disabled but otherwise able persons. And certainly I

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was not suggesting that the argument about foreign students had anything to do with disability.

The argument, I think, was, look, it's been demonstrated over decades that educational testing does sometimes discriminate against different persons in our society who have, because of any number of factors -- and, again, I am not a psychometrician -- but have a tough time with particular types of questions and I think that is the category that the foreign-student argument falls within; that it -- that English is a second language to them and that within constraints of a 90-minute period, albeit potentially expandable, it becomes an impediment to someone who would otherwise be qualified to be an attorney to that group of persons.

So, I think --

HON. E. LEO MILONAS: That goes to the old bar exam, too.

MR. JOHN GROSS: Yes.

HON. E. LEO MILONAS: Nothing changes.

MR. JOHN GROSS: With respect to the gold standard, you are absolutely correct, and I am a New York lawyer and very proud of it and the law of the state leads the world and that certainly is the bigger picture, but I think the argument was raised: If that's the case, then shouldn't the admission ticket

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require specific knowledge of that law in the bar exam? So, I think that summarizes what the argument was.

And the rest I will pass on, Judge.

HON. GAIL PRUDENTI: Mr. Gross, thank you, but I would just like to ask you: When there was discussions about procedural due process issue, was there also discussions about the license to practice law being a privilege?

MR. JOHN GROSS: Sure.

I just raised that -- certainly that would be the argument on the other side of the coin. The argument in favor of procedural due process would be is the license as a property interest otherwise protected by the 14th Amendment. I just raise it as a potential argument that was discussed at the Long Island session. Whether it has legal legs is another issue.

HON. GAIL PRUDENTI: The group that was allegedly injured procedurally by procedural due process, was that law students --

MR. JOHN GROSS: -- that were presently in the system.

HON. GAIL PRUDENTI: In New York; was that the argument?

MR. JOHN GROSS: New York. The argument would be they dutifully followed a curriculum -- and we

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certainly have national law schools that don't teach New York law.

HON. GAIL PRUDENTI: Even here in New York?

MR. JOHN GROSS: Right. But there are law schools that are very specific relative to New York law and the argument would be they have dutifully followed that curriculum, invested in it and know the rules of change. That's essentially it.

HON. JENNY RIVERA: Thank you so very much. And, again, thank you for the work on the focus groups, the transcripts, your testimony today and the work for the judicial institute overall. I certainly commend anyone who is not -- it was excellent work. Thank you for having us.

Next we will hear from Erica Moeser, president of the National Conference of Bar Exams.

Who has more snow?

MS. ERICA MOESER: We are sending you more snow.

It was almost irresistible to break in and ask questions of the previous speaker. I was almost overcome.

One of the most charming aspects of the job that I get to do going around the country and talking about the Uniform Bar Exam is to experience how jurisdictions respond to the notion that the UBE might come to them.

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And last fall, one of the principal concerns of the Vermont community was that New York lawyers were going to be massing at the boarder, if New York ever adopted the UBE, to take away all the jobs from the Vermonters. Somehow, I think they have the better argument.

The fact is every jurisdiction prides itself on its own body of law. New York, I will concede, occupies a special place in that regard, but don't underestimate the fact that other jurisdictions that have adopted the UBE have had to overcome exactly those feelings in order to move forward.

I put some materials at your places and I should sort of introduce what I am hoping to do here with my limited amount of time in terror of the "two-minutes left" sign, and that is respond to the comments -- in terms of comments I was asked to provide and then to give you plenty of time to answer questions -- ask me questions.

I placed in front of you a map of the -- the current map of the Uniform Bar Exam. You will see that we have moved from 14 to 15. In what almost seemed like a stealth move, the State of Kansas moved to adopt the UBE effective next February. They will be accepting UBE scores starting with this April of 2015,

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so we're now at -- we're now at 15 jurisdictions, noting, though, that only two of them are east of the Mississippi and also noting that Vermont has now gone public with a request for comment on the part of the court with the deadline April 27th; I think anticipating a favorable outcome in terms of adopting the UBE there.

I often get asked who else is taking a look at the UBE and, frankly, it's in conversations in a number of places and it would surprise you to know not in a number of places. But it might be worth mentioning that in addition to Vermont, Florida, as a matter of public record, has a commission that's been appointed by the state bar and among the charges to that commission is the request that they study the appropriateness of the Uniform Bar Exam for Florida. That means absolutely nothing in terms of whether that idea will have legs there, but it's probably worth mentioning.

And I might also mention that you have two jurisdictions nearby that rely on you to give a Tuesday written portion so they can give a Thursday written portion. New Jersey and Massachusetts, both of which do that in order to leverage one bar exam experience so that their graduates can get two licenses. And I am

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2 aware of the fact that four of the Massachusetts deans
3 wrote a letter last year to the chief judge of that
4 court asking for some consideration of exploring the
5 UBE in Massachusetts. I doubt that will happen without
6 New York.
7 And I guess one of my themes today needs to be
8 that New York is, for all the reasons New Yorkers feel
9 is significant, is very significant with regard to the
10 Uniform Bar Exam. Certainly, Missouri and North
11 Dakota, as the first two states to jump in, were very
12 important to getting the thing off the ground. But in
13 terms of showing the world that this mobility is
14 important and that the notion of one general license to
15 practice law that can then meet jurisdictional
16 requirements for admission otherwise, that the time has
17 come. And so it's not lost on anyone that what you do
18 is extremely significant in terms of the future of the
19 Uniform Bar Exam.
20 I was struck with the former speaker, just at a
21 few ironies. And one of the ironies is that concern
22 for your foreign-educated candidates who -- New York is
23 the league leader in terms of access to the profession
24 by foreign-educated lawyers and so I find some irony in
25 the fact that the access by recently admitted --
26 recently tested individuals who have taken a common

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test would not be an easy decision to make. I find it ironic that while some of the written materials you received speak to the importance of skills training, that one of the issues that would arise with regard to evaluating foreign educated candidates is that you can be over-skilling it by moving to two MPTs.

In terms of diversity, I find it ironic that while -- I'll speak to diversity at greater length as I move on, it's a legitimate concern and one that deserves attention that one of the key benefits of the UBE is that there are jurisdictions which have a lower requirement for passing, which would mean that candidates who fall between the threshold, which is 260 in UBE talk or 130 in MBE speak, would have access to a license even if they were unsuccessful on your exam, which uses the equivalent of 133 on the MBE.

That's a real gift to someone who is seeking a first license and a first job, so that to the extent that there are those who have raised the issue of diversity I think somewhat unfairly -- and I will get to that -- I think it deserves mention that there is access offered by becoming part of that UBE family that is significant in the lives of the people who will fall between a 130 and a 133.

As far as the materials that you have in front

of you, one of the questions that I was asked was to speak to portability. And the only thing I can add to that is I did ask the staff at the New York board to tell me a little bit about the number of people that actually transfer scores out of New York into other jurisdictions, which would suggest to me that they have an interest in practicing in more than one place or in practicing in a different place.

If I didn't have 85 pieces of paper here, I could read you at actual number, but it was between 2 and 3,000 in one year. That hardly suggests that everybody's staying home. Ah, here we have it. Let's take a look. Let's put on my glasses. Let's find that word. No, that's the wrong piece of paper. Never mind. It's between 2 and 3,000 people. And I suspect that the New York board can provide you with that number.

But, in any event, I think it should put a page to the notion that there isn't an interest on the part of individuals who pass this examination to move to another jurisdiction or to add a jurisdiction, so that they have the opportunity to practice in more than one place or to be hired in more than one place.

So, that speaks to portability in the northeast. I think -- if I were guessing, I would guess that

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Vermont will be added. Whether Vermont would be a significant -- make a significant difference in your deliberation, I have no idea. But I think the thing that will make the greatest difference in the northeast will be what you do and I can't dress it up to look any different than that.

As far as gender disparities go, we do know that women score less well on the MBE than on the written portion of the exam. It is not a significant difference in terms of it's not a very large gap. Contrary to what you just heard, your current bar exam has 50 percent multiple choice as well, because you have the MPT at 40 -- or MBE at 40 percent and the New York multiple choice at 10 percent, so the 50/50 breakdown, perhaps the best that could be set of it is that to the extent that men do slightly better on multiple choice, the women do slightly better on the written portion, 50/50 sort of brings it a little bit closer as to what you might view as fair.

If you were thinking of moving the multiple choice to 70 percent or the written portion to 70 percent, you might have gender issues you don't have now.

But we have taken a look, item by item, at our test materials. We have -- there is an article that

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Susan Case, who was our director of testing, published on the issue of gender differences on medical licensing tests, which was her home base before she came to us, and our examinations. What we know is that there is a difference. We have actually undertaken what her article recommended, which is giving panels of our drafters questions which were blindfolded in terms of which groups did better, men, women, on questions and defied them to guess which one or to divine which one -- which question favored one or another or neither. It was an utter failure in the sense that it defeated any attempt at analysis after the fact.

I do know that we put a tremendous amount of effort into seeking out bias were we can find it in terms of all the reviews we do of our questions; external reviews, internal reviews. The last thing we want to do -- where we are giving a test with 190 items in the multiple choice, the MBE questions, the last thing we want to do is waste a question in a way that isn't fair. The goal of this -- these exams is to be fair.

So, I did pull an article that the law school admission council had written, picking up five or six years worth of LSAT data to see what their differential was. Their differential was, if anything, a little

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greater than ours in the five years reported. And we have -- it has been reported to me by people on my research staff that the gap actually narrows perhaps because when candidates go to law school, they come from different institutions, different majors. When they come together, they at least have the homogeneity of one curriculum, even though within that curriculum there may be some choices that explain some of differences.

It's heartening to know that on our multistate professional responsibility exam, which is a separate exam, that the gap is even narrower, which suggests that if you turn people loose on a narrow band of content, you start -- you continue to narrow the differences among any of the groups that take the test.

And perhaps -- and I say this just over the picket fence in terms of your New York multiple choice test you are contemplating, that it may be that if you give -- if you have defined content, you will be able to eliminate not only some of the distinctions between men and women, but you will be able to eliminate some of the distinctions that occur in different racial and ethnic groups.

So, I think there is cause for some optimism just based on what we have learned through our

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experiences with the MPRE.

I'm going a mile a minute here trying to keep someone happy over there with the sign.

I was asked to talk a little bit about the drop in MBE scores from last summer and I hasten to tell you this has virtually nothing to do with the Uniform Bar Exam except that to the extent that anyone was unhappy with the bar exam last summer, it's understandable they might be unhappy with the organization that is encouraging consideration of this uniform test across the country, and I respect that.

But I did put in your materials, just for your own comparative purposes, a breakdown of the New York law schools for you; not to single out any, but to tell you what that chart tells me.

What that chart tells me is that legal education is -- and this is hardly a news bulletin. You all know this -- is in a period of enrollment shrinkage, applicant shrinkage and -- in more law schools than we have ever had before.

It's an extremely tough time to be a law school and a very tough time to be the dean of a law school, and I suspect you have two deans in your number who would confirm that. It's very challenging to make budgets, it's a challenge to compete for students. And

what law schools have had to do is to try to broker or adjust enrollments to try to maintain a certain level of student and, at the same time, keep the doors open. We just heard that William Mitchell and Hamline are now going to merge because those schools have decided they couldn't fight the fight any longer and we're going to see more of that as time goes on.

The figures that I have put to the right there are the ones that trouble me the most and that I suggest are seeing the future in terms of the bar exam, with one big except that I will mention at the end, and that is: Law schools, because of the competition for the dwindling number of applicants, have had to make a decision about how far into the applicant pool they go. And that 25th percentile, as published by the Law School Admission Council, that is the top of the bottom quartile. We don't know where the tail of that curve ends. I certainly don't know.

But what you can see with some of the schools is that where they were enjoying a pretty -- sort of pretty good days when law school enrollments were, as they were just a few years ago, 52,000 across the country, this year where the enrollments are in the $38,000 -- 38,000 -- that's tuition -- 38,000-student category, there is sort of a necessary compromise on

where that -- where the top of the bottom quartile is sitting.

It isn't -- I don't counsel that this is doomsday. It means that law schools are going to be even more significantly challenged to educate the students they have admitted, as they are obligated to do under the accreditation standards of the American Bar Association. But it shouldn't surprise you that for those schools -- and you can see them coming. If you look at the column that says 2010, they aren't all the students that finished in 2013. This is the -- just the data from the entering classes in those years. Who knows if they graduated and where they took the bar exam. But just as an indicator, which is troubling to me, that class finished as it did. The group that entered in 2011 is the group that just spilled out in July of 2014; where there was some modest slippage in some of these schools. And bearing in mind that the LSAT scale is the scale from 120 to 80; a 60-point school. Our scale is a 200-point scale, so it is going to be amplified.

There is a lot more I can say about that, but what I suggest you do is take a look at the group that just entered in the fall of 2014 that is going to be finishing in 2017. The challenge is going to be there

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for the law schools but there is also going to be a challenge for the bar examiners because it's going to be very easy to try to find a way to work the system so that we don't see those passing percentages fall.

And I think the bar examiner -- the bar exam is a messenger of what is going to come out of law school, who is going to come out of law school and it isn't a pretty picture. But I think it goes a long way to explaining that it shouldn't have been a great surprise that some scores dropped as they did this year. And, frankly, for those schools that had enrollment management well in mind and saw this from the very beginning, it probably was only very moderate change. So, I pass that along.

I think that's everything -- I think I have addressed what you all wanted to know, but I know you will tell me if I didn't.

HON. JENNY RIVERA: Thank you so much. Thank you for coming today to our sunny New York City.

So, I'll just start off with a question.

We've heard this at numerous events, whether they are stakeholder meetings or public hearings or through written submissions, about finding some way to accumulate the data that give us a sense of comfort as to whether or not adoption of what is really in this

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case, the MPE, because we have adopted every component of the UBE, the MEE, but some comfort as to whether or not that would result in a greater spread with respect to the pass rates along racial, ethnic groups, socioeconimc differences and foreign educated and gender differentials. So I was hoping you might be able to address and make some suggestions as to how that data could be developed because we know that we keep such data but other jurisdictions do not or many others do not, including many of the UBE jurisdictions, so it's hard for us to make any comparisons even within the limits of that kind of assessment. So, perhaps you can give us some guidance or some ideas on your side as to how we might feel a comfort or respond to those questions.

(PLEASE CONTINUE ON FOLLOWING PAGE.)

MS. ERICA MOESER: You're absolutely correct, that New York is not, if not unique, is certainly in the rare category of jurisdictions that collect demographic data.

And I should, I hesitate to admit this, but the National Conference has great ambitions to be more of a data source than we are. We collect what we can, we have limited resources, and we put them into research efforts when requested. The New York study that appears on the New York website of several years ago represents a work, a really fine work that was done by two people in our office on a complementary basis for the good of the order.

I don't know of a source of data that would be satisfactory. As far as the Uniform Bar Exam jurisdictions go, for the most part I think they do not collect anything of value. They -- I think you have independently contacted them and know there is no anecdotal evidence so it's not being filtered through my rose-colored glasses.

I must say, I strongly believe, because there are very active minority bars in a number of those jurisdictions, that if there was a problem, the minority bars would not be napping.

What perplexes me a little bit is you have in

your hands, I think, the most extraordinary and useful information already, and that is simulation that our office performed at your request using your data with no massaging, simply taking the MBE, which is common to both exams, and casting it as a 50 percent portion of the test, as the UBE is, taking the New York essay portion, as casting that in lieu of the MEE, and then taking the score that your actual candidates earned and doubling that, figuring that it's better than any other way to predict what somebody might do, if they could demonstrate that still on one item they could demonstrate it on another. And while we could scratch our heads and try to invent something that would, I think, only be a simulation, because until you do it, you really aren't going to know, I think you should take great heart in the fact that the differences in performance were so minimal given the fact that you had over 11,000 people testing, that there really is nothing to fear, and I'm hard-pressed to come up with anything that's better than that.

Two things, if I could just remember two things I meant to say: One is that I know there's -- I would like to go back to a comment that the previous speaker mentioned, but I've also heard and read on your website, and that is some misconception about who has

access to practice law in other UBE jurisdictions. As a candidate who gets a UBE score, you get a score. If it's a 140, you can go anywhere with it. If it's a 130, you can go to -- you can go to three jurisdictions. If it's a 135, you can -- you simply have to get better than that.

It isn't -- I hope none of you were laboring under the misconception that the only place you can take a UBE score out of New York is to those three jurisdictions. You can take it anywhere if it's a score that meets -- that we do require that the accepting jurisdiction cannot set a higher standard for a UBE score than it sets for its own test takers on the theory that they are all taking the same test on the same day.

The other thing I utterly neglected to mention is that there's been some question about what fundamental principles of law are, and more troublesome, I think, of a perception that somehow the multistate essay exam confines itself to uniform laws, which is simply not the case. There are, as anybody who thumbs through a law school textbook will tell you, there are majority views on things. Those are the things that get reflected in the questions. We clearly avoid the third rail of issues that are so divided

around the country that would be unfair. And to the extent that we ever do give a question of that type, we give the law. So that to the extent that you're asking someone to apply the law, it becomes a mini performance test. But we are careful to avoid contents areas that would be so split as to be unfair to a candidate.

And it's -- we are not interested in trickery. This is really a very basic test to get at some very basic knowledge and skills for an entry level lawyer because we all know that some of the big learning that starts to occur, occurs after someone gets a license.

HON. JENNY RIVERA: Let me ask another question.

The New York State of Board of Law Examiners goes through an extensive process to identify or to design the essays and so forth. Briefly, I know we do not have time to go through the whole process that you go through, but I was curious as to whether or not you have individuals from the UBE jurisdictions that are involved in the process of identifying and helping to design the issues, the essays for the MBE, or is that the same set of people from the NCBE who do it for every administration of the exam?

MS. ERICA MOESER: They do it. We have

about 15 jurisdictions that are giving the MEE that are not UBE jurisdiction. So it's the same test for everyone. Frankly, it's the same drafting committee. What we do, however, is we have a policy committee for the UBE that meets at least once a year, and we have been pulling together the administrator from the UBE jurisdictions at least once a year in order to have conversations with them about how things are going.

So that, I mean, one of the fears, and I understand it, is that somehow this test is being turned over to this national organization which no matter how transparent we try to be still seems mysterious and, frankly, suspicious, and what we think is really important is to make sure that the jurisdictions that use the UBE feel a sense of ownership in terms of the policy issues which do arise, and essentially to give them some control over making the policy decisions that have arisen some of which came out of left field and we didn't anticipate. That participation, I think, has gone a long way to eliminating concern that we were going to be shipping out of Madison everything everybody needed to know and never mind what you think about it.

The other thing we do is we ask all the jurisdictions after they have used these products, the

written products, to comment on them, critique them, because sometimes a question, even after the years that we put into development, a question can just end up not being the question we thought it was. We want to know that. We want our drafting committees to know that. They want to know that so we learn from errors if we make them.

HON. JENNY RIVERA: One more question before I cede to the other members of the committee. I have a question.

The chief judge, as I am sure you know, has been very focused on access to justice issues and no less so when it comes to the bar exam. The Board of Law Examiners thought of ways to embed the exam with the impact of access to justice issues. I was curious if you have done that with the MEE or for the MBE, however you want to answer that.

MS. ERICA MOESER: It's been a conversation point, as far as the MBE goes. I think it's more active with the written portion, and in terms of -- there really, in my opinion, is not a body of access to justice law, but in terms of preparing lawyers to go out and work in what one might call "street law" situations, bearing in mind that the top of the class is not going to, is not going to be touching those same

access to justice issues, but a lot of graduates are going out, working with real people in real circumstances, and what we have encouraged our drafters to do is to find contexts in which to bring home a test setting, if you will, that gets it down to a level of what I suppose I'm cavalierly calling street law, but the law of every day people, the law of the solo practitioner. And while I can't tell you that every item will look that way, I think it's our -- it's in our institutional interests to acknowledge that access to justice is one of the pressing issues in the profession and, frankly, with the public.

HON. JENNY RIVERA: Thank you so much.

DEAN MICHELLE ANDERSON: Thank you so much for coming and testifying here.

I wanted to begin with a question that's actually about process, and that is, do you collect -- could you collect demographic data from the candidates across the country who took the Uniform Bar Exam?

MS. ERICA MOESER: We can do it to a certain extent. Let me explain.

We -- it's a hopscotch, and that's why it's not easily done, but we now have something called the NCBE number. We were attempting to get rid of the Social Security number on answer sheets because of

privacy concerns I suspect we all share.

We have developed this number, and this number does not require of anyone any demographic information. However, we also administer the Multi-state Professional Responsibility Examination, and the registration is handled for us by the Law School Admissions Council. That registration form elicits that information.

To the extent that we look at the population that registers for the MPRE, and is willing to provide demographics, and most recently we looked at, about 70 percent of the candidates do, and to the extent that we then find a UBE jurisdiction, if you find a UBE jurisdiction some of them require the use of the NCBE number. We can actually track back through the NCBE number to the MPRE, to the demographic information if it's there.

Now, as far as the list of jurisdictions, there are about nine, I have them here, that require the NCBE number. There are four or five or six now, I don't know what Kansas is doing because I marked this up before I knew about Kansas, that do not require it. So, yes, we could come up with something. Whether it would be that telling, I don't know. But if that were, if that were an important item to try to grab at what

we could get with all the caveats that it's 30 percent of the people don't tell you, and I have no idea how, how psychometricians would predict who answers and who doesn't, we tracked it, and if they took the MPRE, and if we found them in a data file with the UBE, yes, we could tell you something.

DEAN MICHELLE ANDERSON: Okay.

Are there jurisdictions that don't require the MPRE?

MS. ERICA MOESER: No, everybody requires the MPRE.

DEAN MICHELLE ANDERSON: Could you ask jurisdictions to require that the same number be used for the UBE and for the MPRE?

MS. ERICA MOESER: I think we could require them, but we don't because, in the sense that we try very hard not to -- we try to coax -- it's very hard to be helpful to jurisdictions without occasionally appearing as though we are telling them what to do, and we try to err on the side of not telling people what to do.

For example, the NCBE number, we have now dropped -- there's not even room for the Social Security number on the answer sheet. There is room for the last four digits because we wanted to eradicate

that as a source of compromising somebody's records. And so we can't require it, but I think the world is moving in the direction of that number. And, in fact, I'm happy to tell you New York is 100 percent jurisdiction, California is 100 percent jurisdiction.

So when I say, you know, there is so many that do and don't, in terms of the percentage of the candidates that are providing that number now, and to the extent that those candidates are not retreads who didn't take the MPRE recently because it's only since in the past -- we are in the third year of registration with LSAC, so it's subset after subset, but there is something there.

DEAN MICHELLE ANDERSON: That's really helpful.

I wanted to put on my hat as dean, and having just gone to a national conference with deans of law schools across the country, some of my colleagues, as you know, have raised substantial concerns about the NCBE, and transparency, and accountability. I appreciate from your perspective that those two issues of transparency and accountability for the July 2014 bar exam are entirely independent of the question of whether New York State should record the UBE. I appreciate that position.

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I think for some of my colleagues I just want to channel their ability to ask you: Are there steps that you are taking to increase accountability and transparency so that there is more comfort among law school deans in terms of moving toward the UBE?

I would say a number of deans from jurisdictions that have adopted the UBE have indicated to us informally that the transparency and accountability of the information they get from NCBE thereby decreases when there is a move to the UBE. So I am wondering both is there a decrease in the amount of information that law schools obtain after having a jurisdiction moving to the UBE, number one, and, number two, independent of that, what are the steps or are you considering steps to increase accountability and transparency to the law schools?

MS. ERICA MOESER: First of all, we don't provide anything to law schools, period. So to the extent that law schools obtain information, they are obtaining it from their own boards of bar examiners. We report our scores to New York. We don't report anything to you, as you know, from your own being.

I think a few things are getting confused here. We have made a decision based on strong measurement advice no longer to report raw scores

because raw scores misrepresent what people do and tend to be misused. So to the extent that there is a dean out there who says, I used to get raw scores, and that's because of the Uniform Bar Exam, the two are 100 percent unrelated.

DEAN MICHELLE ANDERSON: That's all.

MS. ERICA MOESER: I think there is a misunderstanding. I think that --

HON. JENNY RIVERA: For those who may not understand what that meant, what do you mean by "raw scores" versus some other score?

MS. ERICA MOESER: Well, the MBE is an equated test. An equated test means that we provide a mathematical procedure after the candidate takes the test to try to set that, take a raw score, the raw score being the number of questions one got right, and adjust it in such a way that you can say that the score that somebody earned on the February 2015 MBE is the equivalent, to be interpreted the same way if they had gotten that score on the July exam.

Now, in fact, we know that some questions, we throw out some questions. We know that some test populations -- the February test, the cohort that takes the February exam is, as a rule, is a weaker cohort, largely, I think, because there are a lost of repeaters

who have taken it in July and are sitting a second time. So that going by raw scores, it's deceptive. It's not useful, and, in fact, it gets in the way of appropriate equating.

Equating is a process where we actually embed questions that we previously used on an exam or several exams, and we embed them in the test of the future, and when we look and see how the candidates perform on that test in the future, we can look back and compare their performance on those equating items with the way those equating items performed when used previously and make judgments about whether the current test is easier or more difficult than the test that preceded it. That adjustment is called achieving a scaled score. So that candidate might have a raw score 140, and it turns out to be a scaled score of 147, or they may have a scaled score of 140 and that turns out to be a scaled score of 139, but it's that process.

Frankly, that's not a process that will lend itself to the T word, transparency. At some point when we when we engage multiple Ph.D. psychometricians and put them to work at equating the test, and they independently produce identical results, and when we task them not only with that, but going back and equating it against a prior exam to see if there was

any variable whatsoever in terms of the decisions that were made, and come up with some -- when we trust saying no, there is nothing, there are no errors, I spent months of my life looking for errors because if anyone understands how the National Conference works, you would understand that if we found an error we would correct it. And unfortunately we are not in a position to turn over our test questions or our specific performance data to external groups, and I think that has grated on some deans.

We've also offered if deans, and I think we know who they are, if they chose to give us their entering predicting data and their transcripts of the students from one year to the another, we would be happy to do an analysis, a confidential analysis to say this is where we see some differences that you may not have perceived because it seemed to you as though everybody performed, you know, this class was the same as the last class.

DEAN MICHELLE ANDERSON: That's really helpful.

The last question I have is: You said that the gap, the racial disparity we see in the LSAT scores actually narrows, that that racial gap narrows by the bar exam. I'm wondering, what's your data to support

that?

MS. ERICA MOESER: I don't have it with me. We published it in the Bar Examiner, and we have speculated it's because of the relative homogeneity of the law school curriculum.

DEAN MICHELLE ANDERSON: The end point is that the bar exam, you are saying, by the time the bar exam comes around?

MS. ERICA MOESER: Yes.

DEAN MICHELLE ANDERSON: So what data, given the difficulty in finding demographic data assisting the bar exam, what data are you referring to there?

MS. ERICA MOESER: We are referring to data we received from the Law School Admissions Council maybe a decade ago.

DEAN MICHELLE ANDERSON: I understand all of that.

MS. ERICA MOESER: And that we published -- we did a comparison. We took a look at the whether the gap narrowed at all. We were hoping it would and it did.

DEAN HANNAH ARTERIAN: To follow up a bit on Dean Anderson's questions, channeling issues that have been raised with us, by the deans, I think I caught one of the concerns, I think, that was expressed, that the

inability of somebody, correct me if I am wrong here, in the UBE state or state that gives the multi-state essay, whether or not it's a UBE state, for a person who does not pass to be able to go with whatever appeals process there might be to review a question and to be able to, essentially can actually change a score or not learn from that experience. And so it sounds to me that if a state permitted that under their state bar exam with their own homegrown questions, that switch to the UBE would mean that that wouldn't happen.

Is that a fair --

MS. ERICA MOESER: No, that's not even close to correct.

DEAN HANNAH ARTERIAN: Wow!

MS. ERICA MOESER: Should I have said that more diplomatically?

Could you be more wrong?

DEAN HANNAH ARTERIAN: I could be very wrong. I am frequently.

MS. ERICA MOESER: A state decides what a candidate can see or not see after the fact of reviewing a paper.

DEAN HANNAH ARTERIAN: It would be up to the state to say, yes, of course you can see that UBE question that you took?

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MS. ERICA MOESER: Yes. What we might to, and what we do do currently is, to the extent a jurisdiction is still testing, we aren't going -- and some jurisdictions test for quite a while because of the ADA, we wouldn't allow those questions to be released immediately because we wouldn't want to jeopardize or compromise their use, but in terms of -- we don't, we certainly take no position on whether a jurisdiction may or may not.

DEAN HANNAH ARTERIAN: I think that's very helpful because I definitely heard, and I'm glad Michelle agrees with me, we both heard, this was discussed as something that made it very difficult, but it's not a difficulty that is generated by the UBE -- by the national group, it's up to each state as to what they would permit.

MS. ERICA MOESER: I think jurisdictions would be unhappy if we were to require them to do it, but we certainly -- there are certain jurisdiction prerogatives we respect, you know.

DEAN HANNAH ARTERIAN: Right. I mean, there are other questions, but I think that was one that the clarification was extremely helpful.

HON. JENNY RIVERA: Thank you.

Seymour.

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MR. SEYMOUR JAMES: I have a follow-up on this question.

With respect to the 2014 exam, you cited figures comparing the LSAT scores of the 2014 to that of '10. I see there's a significant difference there.

Is the dropoff between the Class of 2010 and 2011 with the LSAT scores comparable to the diminution of passage rates for the 2013 and 2014 takers of the UBE?

MS. ERICA MOESER: We think it's not inconsistent. It's a judgment call. There is a modest drop. And on the UBEs, and on the LSAT scale, which is a more compressed scale, a one point drop on the LSAT could translate into a larger drop on the MBE scale because the MBE scale is so much larger. But if you look at a chart that has all of the law schools listed, and look at the bottom line, sort of an adjusted total for graduates who came out in 2013 and 2014, there is a reduction in the figure that's the 25th percentile.

MR. SEYMOUR JAMES: If I could follow-up: So is that consistent across the schools where the LSAT score was the same?

MS. ERICA MOESER: We didn't look school by school. We don't have information school by school of what their -- we don't ask on our answer sheet for you

to supply the name of your law school. So we don't know you as a graduate of X law school.

MR. SEYMOUR JAMES: Thank you.

DEAN HANNAH ARTERIAN: I want to, again, make sure I understood.

You say you have made an offer to the deans of the law schools that if they will supply you certain information, you would be happy to do, you know, an analysis for them to show this?

MS. ERICA MOESER: I think given the limitations of our own resources which are -- you know, I want to be certain that if 204 deans called me tomorrow, I would have to resign, but I can tell you there are people at our office who would be -- who are itching to do an analysis to see because we are just as interested in getting at the truth.

DEAN HANNAH ARTERIAN: Sure. The reason I ask is because, at least I don't think I had realized, maybe other deans had not realized it either, that's why I asked the question. I understand you can't do 204.

MS. ERICA MOESER: Believe me, they've been encouraging conversations with us, and I think that's -- as they go forward will be discussed in those conversations.

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DEAN HANNAH ARTERIAN: And we did, to make sure you know, we did learn about that. There had been a presentation on that. That was completely out there. So not to worry about that.

HON. JENNY RIVERA: Any other questions?

Thank you so much.

MS. ERICA MOESER: Thank you.

HON. JENNY RIVERA: Thank you for coming to sunny New York. Safe travels home.

MS. ERICA MOESER: You all have really dispensed with me, you've rung me out and thrown me in the trash.

May I depart?

HON. JENNY RIVERA: Absolutely.

MS. ERICA MOESER: Are you through with me?

Thank you so much for your courtesy.

HON. JENNY RIVERA: Thank you so much.

Next we will hear from Vincent Chang from the New York County Lawyers Association accompanied by Lewis Tesser.

Thank you for being here today.

MR. VINCENT CHANG: Good afternoon.

Thank you for allowing us to submit the views of the New York County Lawyers Association which is known to friends and foe alike as NYCLA.

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With me is NYCLA's President, Lewis Tesser, who has also worked with me on these issues since the UBE proposal was first made public last year.

NYCLA is an organization of some 9,000 attorneys. It's one of the most diverse Bar Associations in the state with members ranging from solo practitioners to law professors to judges and big firm and corporate attorneys.

Justice Rivera, we thank you for the great work that this Advisory Committee is undertaking. I know some of the members of this committee from other Bar Association activities. I am confident that this committee will arrive at a fair and reasonable conclusion.

(Continued on next page.)

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MR. VINCENT CHANG: We convened a task force at NYCLA and have come to realize the many complexities surrounding this proposal. In connection with our report, we contacted the bar officials in Alabama, Arizona and Monday tan and we were pleased to receive the comprehensive report from Diane Bosse, we have also looked at a great deal of published literature.

After all of this, NYCLA is of the view that there are not surprisingly potential advantages to the proposed adoption of the UBE and potential disadvantages. As a result, we believe that the issue would benefit from a year of additional study. This is consistent, we add, with Mr. Gross' survey of his focus groups.

Our conclusion of one year of additional study time is informed by a number of considerations. First, we see no exigency associated with this issue and no need to adopt the UBE immediately.

Second, an additional year would afford New York the opportunity to see what other states do. If other states announce an intention to adopt the UBE, that would enhance the value of adopting the UBE in New York because it would mean that New York test takers could transfer their scores to additional states.

And third, for the reasons that I will outline,

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these are complex issues that deserve additional study. We note in this regard that some of the other states which adopted the UBE studied the issue for more time than New York currently proposes to do. And before adopting the Multistate Bar Examination and raising its passing score, New York spent far more than one year before making those changes to its bar.

Fourth, a one-year study period would also give law schools and law students time to prepare for the UBE if it is, indeed, adopted, and to adjust curricula, course selection and/or bar exam preparation accordingly.

Finally, during the one-year period, we urge the development and dissemination of complete information on the costs and fees associated with the New York administration of the UBE. We realize that bar examination fees are fixed by statute, but transparency regarding the cost of the UBE would permit us to determine whether adoption of the UBE could conceivably result in future upward cost pressure.

We acknowledge that there were substantial reasons to support the proposed change to the UBE. Although we think that without further information supporting some of these proposed advantages, we cannot regard any of the advantages and disadvantages as

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conclusive in absence of further study on the issue.

First, we recognize the argument that more resources can be devoted to the development and testing of the UBE than any single state, even a state as large as New York could devote to its bar examination.

This is a more important, in fact, in small states with small populations. Bar authorities in Arizona and Montana were particularly effusive regarding their resources devoted to the UBE as opposed to the resources their own states could devote individually 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.

We thus urge that this consideration be studied to a greater extent during the one-year study period that we are proposing.

The committee has asked us for our view as to how UBE score portability would impact New York law graduates and graduates of law schools in other jurisdictions and the law profession as a whole. We canvassed some of our members to get their views on this issue.

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We note that proponents of the UBE argue that it promotes portability and mobility in an increasingly national and global practice of law. NYCLA does not wish to minimize this 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 suitable legal employment. However, NYCLA would like to note the following with respect to the potential increased mobility:

At least as the landscape now stands, a lawyer who passes the UBE in New York could transport that score to a maximum of only 15 other states, many of which are small and not geographically near New York. We are unaware of any states other than New York that are currently considering adoption of the UBE, though we just heard that perhaps Florida is considering it.

In addition, the portability of the bar passage in New York is limited by the fact that five other states have state-specific requirements and a number of states have cutoffs higher than those of New York.

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 would seek to use UBE scores to enter

New York than to use the test as a way of gaining admission in another state. It is possible that the addition of an in flow of lawyers can increase the competition in New York for beginning lawyers who already are finding it difficult to obtain jobs.

Now, we know Dean Anderson's comment of that is an arguably protectionist view, but our argument is that protectionist or not, we need to know what the answer to this question is and we urge that during the one-year study period that this topic, among others, be studied so we can determine whether or not this is a factor we should consider or whether it's something that we can reject fairly out of hand as just protectionist and, in any event, as one that does not particularly disadvantage young lawyers in New York.

Turning now to the disadvantages that have been offered by some of our members and by some of our analysis on the UBE -- and, again, we do not find these disadvantages compelling enough at this time to urge rejection of the UBE outright. Instead, we believe that each of these concerns warrants further study.

First, there is a frequently voiced need for disparate impact studies. NYCLA has looked at some of the existing data on disparate impact and it is relatively convinced that the existing data do not show

any particular desperate impact from one component of the bar exam to another. In other words, there is arguably a disparate impact with respect to the bar examination as a whole, but from component to component, there is very little racial difference among scores on various components of the New York bar examination. So, we do not see any evidence at this point, but believe there is a need for further study on the issue because of the importance of it and because of our concern about the drop in passage rates nationwide on bar examinations.

Now, we note that the argument that that is not -- that that is not a reason to reject the UBE because it's something that is in existence right now with the current New York bar examination, but studying the causes of the desperate -- of the drop in the bar examination score we believe might help to determine whether there is a desperate impact in, for example, one part of the bar -- current bar examination or another.

But, in any event, NYCLA notes the study of the impact on foreign law graduates is insignificant. We don't believe there is enough data on foreign law graduates. And given that New York has disproportionately more foreign law graduates as any

other jurisdiction -- as noted one-third of the takers are foreign -- we believe there has to be additional study on that issue.

The committee has also asked for testimony as to the extent to which the drops in the UBE could result in changes to the law school curricula and bar examination preparation. I believe that Justice Rivera mentioned this factor earlier today. We note that this concern has been expressed and there has been a belief that New York -- that New York's adoption of the UBE could cause law schools to deemphasize New York law, focusing instead on a national curriculum that teaches less New York law. In NYCLA's written report, we address this concern in more detail.

However, we note 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. And as Diane Bosse pointed out when she spoke to us, two-thirds of us who take the New York bar examination come from out-of-state and foreign law schools.

Moreover, many New York law schools do not even emphasize local law at this time. Thus, we do not believe that this is a necessarily significant factor, but just one deserving a further study.

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We also note that a deemphasis on local law could result in a focus on other areas of law that are of benefit to law students. UBE might, for example, cause law schools to focus more on legal analysis and writing skills, which would be a benefit to law students.

Accordingly, NYCLA is of the view that further analysis is needed to attach the weight to be attached to this factor and it is hesitant to place undue weight on this factor because of the lack of hard information.

The committee has asked also for testimony regarding the importance of requiring bar applicants to separately pass New York law-specific components. We note that some have anecdotally charged that lack of New York law on the bar examination could produce lawyers who are insufficiently trained in New York law. That concern was expressed earlier today.

Without hard information indicating that a handful of local law essays on the bar examination could realistically test a young lawyer's preparedness to confront local law issues as compared to multiple choice questions as opposed to national law questions, NYCLA's hesitant to reject the UBE op this basis.

We are particularly skeptical to the extent of which New York law differs from national law in many

areas that matter to practitioners. For example, contract law and fraud law in New York are, in fact, the bread and butter of commercial practice and in those areas New York law is not dramatically different from other jurisdictions.

In any event, NYCLA notes that the perceived need to assure knowledge in specific areas of New York law could be addressed by more targeted Bridge The Gap CLE requirements or possibly require online courses before taking the UBE. There are some benefits to the online approach. That approach could be less expensive. It also could be continually refined and amended. And as noted in more detail in NYCLA's written report, officials in Alabama, Missouri and Arizona told us they have adopted measures to address the study and testing of local law there, including online courses and on open-book test on local law and they believe that these online courses work very well.

Again, we believe that New York could benefit from studies that are conducted in these states or any states that we could conduct on our own about whether programs like that could be adopted perhaps in conjunction or in supplement to the Bridge The Gap requirements to enhance the teaching of local law to compensate for any removal of local law questions from

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the bar.

Again, thank you for looking at this difficult issue. We appreciate the opportunity to present our views here.

HON. JENNY RIVERA: Thank you so much.

We appreciate that the gist of your recommendation is to do a particular type of study over the following year. It does seem that there are some concerns that have been raised about the UBE that you reject outright as you mentioned.

But I wanted to get back to the point about the foreign students because we had earlier testimony in which -- which seemed to be a little more specific about what the people in those focus groups raised as the concern about the foreign test takers, the additional challenges that they might face based on the proposal as it now stands. Is there something in particular, other than the concern, generally, about foreign law grads and the fact that so many of them take the New York bar, that the New York County Lawyers Association has identified that you want to bring to our attention?

MR. VINCENT CHANG: Well, Justice Rivera, I think one thing in particular is that while the issue of whether there are ethnic disparities among the

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components of the bar examination has been studied fairly extensively, we don't think that the same kind of analysis or study has been made of the disparate impact on foreign graduates with respect to the different components of the bar examination. We think that that kind of study would probably be worthwhile.

HON. JENNY RIVERA: Okay, thank you.

HON. E. LEO MILONAS: Why do you think that the UBE or do you think that the UBE would have more of a disparate impact on the existing bar exam?

MR. VINCENT CHANG: We don't think that necessarily, but we believe it's an area that is a fertile ground for further study. It's quite possible that this study could determine that there isn't any additional disparate impact. It's possibly even likely, from my reading of the existing data on such issues.

HON. E. LEO MILONAS: Why? What does the data show you?

MR. VINCENT CHANG: Well, the data do show -- I think at least the data that exists now do show that with respect to ethnic minorities that there are very little disparate impact with respect to how minorities do on one component of the bar examination vis-a-vis other components of the bar examination.

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There is a gap between how minorities do and nonminorities do on the whole bar examination. But with respect to the individual components, there is little evidence, at least now, that minorities fair any worse on any individual components than they do on the bar examination as a whole.

And I guess my belief would be that it's quite possible that similar findings might occur with respect to foreign students. We just don't know at this point, I don't think.

HON. JENNY RIVERA: One last question for myself.

Let's say hypothetically that we had the kind of data to be able to address some of the concerns that you have raised and perhaps enough to make the membership feel comfortable to address the concerns that they have raised with you and your task force. Would implementation of the proposal in July 2016 seem to be viable or do you have some concerns about that implementation of the proposal the following year?

MR. VINCENT CHANG: I think if that kind of data can be accumulated, 2016 is -- it's -- I think we would say it's probably a little bit on the early side, frankly. We would think that 2017 would be more appropriate for actual implementation, but that the

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study be done until 2016.

HON. JENNY RIVERA: Curious: Why would you think two years instead of one? Is that based on the law schools having to change their curriculum in some way --

MR. VINCENT CHANG: Well, we are thinking one additional year is what we're thinking. 2015 to 2016 for the study and, then, yes, we do believe that after the decision has been made there needs to be a period of implementation so law schools can adjust their curricula, so law students can adjust their expectations. Not that I believe in the procedural due process argument, but we do believe that there needs to be some period for transition.

HON. JENNY RIVERA: Thank you so much.

DEAN HANNA ARTERIAN: I just want to follow-up on that.

And, again, thank you very much for the work that has been done and for the clarity of the submission and of your testimony.

I just -- I want to see if there is any other reason for the years, thinking about a transition implementation period, because we have heard testimony or some things in focus groups about concerns that some particular law students might have and perhaps some

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particular individuals would have about the effect of a move to the UBE on the curriculum and on the students and yet it seems to me rather speculative -- I think there is at least a sense that law schools are very different, each law school is different, and that, in fact, it's hard to see what effect really -- what the change in a year for a student or for a curriculum, given what is a fairly standardized curriculum in law schools, as we know.

So, if there is something more on that, it would be good to know because the -- I speak only for myself but my sense is that it's conversational and not really much more than anecdotal.

MR. VINCENT CHANG: Well, Dean, I think the concern maybe on the transition period is longer with respect to giving students the opportunity to take the right bar courses rather than the concern about law school curricula. We do say in our report that we agree with the concern about law school curricula changes are somewhat speculative. First they raise the fact that two-thirds of the students who take the bar examination don't even come from New York law schools and some of the New York law schools don't teach New York-specific law in any event right now. We examined bar officials in other states to see whether there had

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been curricula changes in those states and they said that they had not really seen anything like that; that they pretty much view their law as aligned with national law in the first place; that they didn't really see any change in that regard.

DEAN HANNA ARTERIAN: So it's basically you have heard some students say that -- or others have heard students say --

MR. VINCENT CHANG: Yes, students or perhaps law professors may have even expressed a concern.

DEAN HANNA ARTERIAN: Okay.

MR. VINCENT CHANG: But, no, our report does not say we believe there is a reason for rejection of the UBE because we do regard it as somewhat speculative but worthy of further study like a lot of other issues during what we have proposed for a one-year period of study.

DEAN HANNA ARTERIAN: Thank you.

HON. JENNY RIVERA: Any other questions?

Thank you so much for your testimony today. I very much appreciate hearing from the New York County Lawyers Association, a great bar association.

Thank you to everyone who testified today. The public hearing is adjourned.

(THEREUPON, THE HEARING WAS ADJOURNED.)

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