

# C L E A

Clinical Legal Education Association

January 30, 2015

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

Re: Notice of Public Hearings: Uniform Bar Exam

Via electronic submission to:  
[UniformBarExam@nycourts.gov](mailto:UniformBarExam@nycourts.gov)

Dear Judge Rivera and Advisory Committee Members:

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

---

<sup>2</sup> [http://online.wsj.com/public/resources/documents/2014\\_1126\\_randletter.pdf](http://online.wsj.com/public/resources/documents/2014_1126_randletter.pdf)

<sup>3</sup> [http://online.wsj.com/public/resources/documents/2014\\_1110\\_allardmemo.pdf](http://online.wsj.com/public/resources/documents/2014_1110_allardmemo.pdf)

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

Sincerely,

Mary A. Lynch, Professor, Albany Law School

Janet Thompson Jackson, Professor, Washburn University School of Law

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

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

- I. Introduction: Testimony reflects comments received from across the State – 18 chapters of WBASNY were asked to review and respond regarding possible transition to Uniform Bar Examination in New York. Based on the feedback, WBASNY has many concerns about the implementation of a Uniform Bar Exam in New York:
- II. The Test
  - a. New York Law implications
    - i. Overall, the proposal appears: to dilute the importance of learning New York State law (30 questions is hardly enough); to promote a one-size-fits-all Bar Exam (which could diminish their profession generally); and to reduce the significance of passing the NYS Bar, one of the most rigorous in the United States, and internationally known as such. Further, New York already has reciprocity with other states where an attorney may waive in following the satisfaction of certain criteria.
    - ii. The UBE proposal includes a New York State law component. The concern is that this component be intensive and sufficient so that the New York State component is not "watered down".
    - iii. The UBE appears to make it much easier to pass the New York Bar Exam. However, the NY Bar Exam is one of the toughest exams for a reason: it is a large state, with large cities, and a complex, unique CPLR. Lawyers who practice here should KNOW New York practice, not just to be able to pass only 30 out of 50 state-specific questions.
    - iv. Which states participate in the UBE? What is the passage rate in those states? What is the incentive for New York to follow them (other than portability and standardization)? Why is New York interested in standardizing?
  - b. Implementation issues
    - i. The UBE passing grade should be the same in all states.

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

### III. Impact on Current Practitioners

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

### IV. Law Schools and Students

- a. The UBE could negatively impact New York law schools, particularly those whose programs focus on New York practice and training for the NY bar exam.

- V. Conclusion: On behalf of WBASNY, I thank you for the opportunity to comment on this very significant proposal. As you can see, our members are very concerned about how such a change would be implemented, and to what extent it is necessary. As always, we welcome the opportunity to discuss this further with Chief Judge Lippman, the Task Committee, and the Office of Court Administration.

**MAURICE A. DEANE SCHOOL OF LAW**

**HOFSTRA  LAW**

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

**Testimony by**

**Eric Lane,**

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

**Maurice A. Deane School of Law at Hofstra University**

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

**Testimony by**

**Eric Lane,**

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

**Maurice A. Deane School of Law at Hofstra University**

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

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

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

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

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

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

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

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

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

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

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

**I. Introduction**

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

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

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

- B. The perception obstacle: How can you license lawyers to practice in a jurisdiction without testing their knowledge of the law in that jurisdiction?
1. Exam instructions had counseled applicants to answer based on Missouri law, though even our board-drafted questions had largely evolved to test knowledge of general principles of law
  2. Board-drafted essays often tested subject matters that are not within the scope of NCBE essay subject matters (i.e. Missouri civil procedure, administrative law)
  3. Overcoming the perception:
    - a. Came to conclusion that insuring access and exposure to the peculiar aspects of Missouri law was a sound objective. If a psychometrically sound testing instrument (the UBE) can be relied on to measure minimum competence to practice based upon general principles of law ALL applicants should be expected to know, why couldn't we tackle the local law issue another way
    - b. Decided to explore how could do both
- C. Exploring the Options for Exposing Applicants to State Specific Law
1. Identified substantive areas of the law that warrant coverage because of peculiar rules, procedures, statutes, or decisional law
  2. Missouri initially identified nine (torts, civil procedure, real property, trusts, estates, family law, business associations, administrative law, and evidence). Eventually added a tenth (Missouri courts)
  3. Created outlines that highlight significant local law distinctions in these ten areas. NOT comprehensive subject matter outlines
  4. Then discussed how best to assure exposure to/awareness of this content
  5. Considered local law component added to the UBE exam (at the present time, no UBE jurisdiction has a local law essay or multiple choice test as a part of its bar exam (i.e. graded as a part of its exam score); considered CLE program
  6. Opted for 30 (now 33) question multiple choice, open-book, "test"
  7. Advantages:
    - a. NOT intended to be a psychometric measure of minimum competence. Rather, a means of insuring access to the key local law distinctions we want every Missouri lawyer to know
    - b. Materials can be accessed by anyone and can be referred to by applicants at anytime
    - c. Once compiled, outlines can be easily maintained

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

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

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

### III. Misconceptions/perceptions about the UBE

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

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

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

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

E. Will generate a flood of applicants

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

IV. **Conclusion**

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

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