1 COURT OF APPEALS

2 STATE OF NEW YORK

3 ----------

4

UNIFORM BAR EXAM PUBLIC HEARING

5

6

7 ----------

20 Eagle Street
8 Albany, New York 12207
February 03, 2015

9

10 Panel Members:

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

12

DAVID HERNANDEZ, ESQ.
13 Founder, David J. Hernandez & Associates

14 MICHELLE ANDERSON, ESQ.
Dean, CUNY School of Law

15

DIANE BOSSE, ESQ.
16 Chair, New York State Board of Law Examiners

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

18

HANNAH ARTERIAN, ESQ.
19 Dean, Syracuse University College of Law

20 NITZA ESCALERA, ESQ.
Assistant Dean of Student Affairs, Fordham University
21 School of Law

22

23

24

25

1 Appearances:

2 MARY A. LYNCH, ESQ.
Clinical Legal Education Association
3
IRENE V. VILLACCI, ESQ.
4 Women's Bar Association of the State of New York

5 DAVID MIRANDA, ESQ.
President-elect, New York State Bar Association
6
EILEEN MILLETT, ESQ.
7 Co-chair, NYSBA Committee on Legal Education and Admission to the Bar
8
SARAH GOLD, ESQ.
9 Chair, NYSBA Young Lawyers Section

10 ERIC LANE, ESQ.
Dean, Maurice A. Deane School of Law at Hofstra University
11
HONORABLE CYNTHIA MARTIN (Telephonically)
12 Missouri Court of Appeals, Western District and Chair, ABA Bar Admissions Committee
13

14

15

16

17

18

19

20

21

22

23

24
Sara Winkeljohn
25 Official Court Transcriber

JUDGE RIVERA: Good morning, good morning. And welcome to the second public hearing of the Advisory Committee, established by New York State Court of Appeals Chief Judge Jonathan Lippman, charged to study New York's proposed adoption of the Uniform Bar Examination.

Welcome to all of you. Welcome to the Court of Appeals Hall, if you've not been here before. Thank you for braving the snow last night, those who traveled last night. Those who were on the train with me from New York and waited many, many hours in Penn Station, thank you. And those of you, of course, who made it out this morning, perhaps dug your car out of, I don't know, one foot or whatever it is we have in Albany, thank you. We much appreciate it, and we look forward to hearing from everyone who is scheduled to testify today. And we will also have two people who were unable to travel because of the weather and who will be testifying by phone near the end of today's hearing.

Last year, Chief Judge Lippman submitted for public comment a proposal from the New York State Board of Law Examiners to adopt the Uniform Bar Examination, commonly referred to as the UBE, to replace the current New York State Bar Exam.

The UBE is prepared by the National Conference of Bar Examiners, and the proposal included adoption of a New York law examination - - - the New York Law Exam, NYLE - - - consisting of fifty New York Law specific multiple-choice questions which would be prepared by the New York State Board of Law Examiners. This test is intended to ensure proper evaluation of New York law not otherwise tested on the UBE.

In November of last year, Chief Judge Lippman appointed this Advisory Committee to study and prepare a report for the court's consideration in early 2015 on the proposed adoption and implementation of the UBE. The committee consists of myself - - - I serve as the chair, associate judge of the Court of Appeals - - - and representatives from law schools, the judiciary, and the State Board of Lax Examiners and the Bar.

Several committee members are here today. I'll briefly introduce them to you. To my immediate right is Diane Bosse, Chair of the New York State Board of Examiners. To my immediate left, Seymour James, Jr., Attorney-in-Chief of the Legal Aid Society of New York City and past president of the New York State Bar. To my right at the end is David

J. Hernandez, founder of David J. Hernandez & Associates, past president of the Puerto Rican Bar Association of New York and member of the Second Department's Character and Fitness Committee. And to his left, also to my right, is Michelle Anderson, Dean of CUNY School of Law. To my left and Seymour's left is Hannah Arterian, Dean of Syracuse University College of Law. And at the end of the table on the left is Nitza Milagros Escalera, Associate Dean of Students at Fordham University School of Law.

Each member has a well-deserved reputation for excellence, brings a wealth of knowledge concerning matters involv - - - involving the proper licensure and preparation of New York State lawyers. And my - - - the Chief Judge and myself are really so pleased that they are able to participate on this committee and do this tremendous service for New York State and the profession. And I thank them again publicly for their work.

As part of the committee's mandate, we will be receiving input on the proposal from interested individuals, organizations, and entities as part of our outreach to the legal profession and broader community. The committee also strives to educate by providing information about the current New York

State Bar Exam and the details of the proposed adoption of the UBE and the New York Law Examination.

And we invite anyone who has not already visited the court's website to review the materials describing the proposal and the current exam that are posted on the website.

Now, in furtherance of our mandate, we are also hosting a series of public hearings across the State - - - across the state to receive and consider testimony from members within our profession. Today is our second public hearing here in Albany, and we are very pleased to be able to host this hearing at the courthouse.

The hearing will proceed as follows. Each person testifying has a pre-set time to speak uninterrupted, which will be followed by brief questions from members of the committee.

So we begin today with Mary Lynch, representing the Clinical Legal Education Association. And we have all the testimony that was prepared in advance.

Thank you so much for coming today.

MS. LYNCH: Thank you. Is this appropriate? Not barreling into your ears but loud enough?

JUDGE RIVERA: No, that - - - that's fine.

MS. LYNCH: Great. Wonderful.

JUDGE RIVERA: You're very good.

MS. LYNCH: As Just - - - Judge Rivera indicated, my name is Mary Lynch. I'm a professor at Albany Law School where I am the director for the Center for Excellence in Law Teaching. But most importantly for today, I am the co-president of the Clinical Legal Education Association, also known as CLEA.

Our membership extends to 1,200 law professors, including many active members in each of the fifteen New York law schools. CLEA has long been dedicated to improving the preparation of law students for the legal profession and has paid particular attention to the relationships among law licensure, legal education, diversity in the profession, and access to justice. CLEA has submitted a formal letter to the committee, and I understand that you have hard copies in front of you.

I would like to begin by thanking Judge Rivera and the entire Advisory Committee on the Uniform Bar Exam for honoring me with granting my request to provide comment on your important work, and I also thank you very much for your service on

this important matter.

I will speak to three concerns that CLEA finds with the proposed changes to the New York Bar Exam. First, the proposed changes place undue reliance on the skill of standardized test taking and, in particular, multiple-choice test taking as a measure of professional competence. This undue reliance on examination by multiple choice creates disincentives for law schools to admit students who bring a wider range of smarts, skills, qualities, and experience than simply good test taking on multiple choice. This undue emphasis on multiple-choice test taking will negatively effect, CLEA believes, the diversity and credibility of our profession.

I want to bring your attention to two portions of the proposal that create this undue reliance. First, the standalone fifty-question New-York-specific multiple-choice exam replaces the current New York portion, which tests in both essay and multiple-choice format.

And secondly, in adopting the UBE, the proposal changes the weight of the multiple-choice multiple-bar examination. Under the proposal, the MBE would count for fifty percent of the final score instead of the present forty percent. CLEA is

gravely concerned that the proposed changes to the New York Bar Exam will incentivize law schools to be even more rigid and narrow in their admissions decisions, thereby diminishing student diversity in all its dimensions.

Because bar examination passage is scrutinized by rankings, by alums, by the media, schools are going to place even greater emphasis on admitting students with high multiple-choice LSAT scores to the detriment of applicants who present a range of experiences, qualities, smarts, and skills that students of all backgrounds bring to classrooms, student activities, organizations, co-curricular activities, student research, and most importantly, to the pursuit of justice.

And our concern is not easily dismissed given the data. The 2011 report of the ABA Council on Racial and Ethnic Diversity in the Education Pipeline noted that the law school admissions process over the last ten years has resulted in sixty percent of all African-American applicants and forty-five percent of all Hispanic applicants being totally shut out from every ABA-approved law school they applied to, compared to just thirty-one percent of white applicants.

1 Now, this exclusion is particularly
2 disturbing when we know that standardized testing is
3 an acquired skill that comes along with many other
4 advantages with privilege and access. I do not want
5 to be misunderstood. CLEA is not arguing that test
6 takers of color do not possess the smarts, aptitudes,
7 or abilities to succeed. Rather, this is an
8 observation about two documented facts. The racial
9 disparity in LSAT scores, particularly for black and
10 Latino men, is dramatic. And, two, we know students
11 who possess attributes other than high LSAT scores
12 succeed in law schools that offer proper support.
13 We fear that a regime which is going to
14 magnify the importance of multiple-choice test taking
15 will incentivize law schools to accept only primarily
16 high LSAT scores, and thereby decrease the diversity
17 in the profession. Thus, we urge the committee to
18 carefully consider the potential disparate impact
19 that result from the adoption of these proposed
20 changes. CLEA believes that the studying and
21 analysis and data crunching should occur before
22 adopting the UBE in the current proposal. And
23 moreover, as I'll discuss in point three, there are
24 better alternatives.
25 Okay. I'm going to turn to CLEA's second

concern, which involves the proposed - - - or the anticipated chilling effect on the innovative work being done in New York State's law schools and throughout the nation to better prepare law students for practice and for the profession. If the proposed changes are adopted, CLEA believes law schools will retreat to traditional curricula and assessment in perhaps misguided, but predictable, efforts to protect against lower bar pass rates.

In the past decade, the bench, the bar, clients have emphasized that law school graduates who have no experience with how the law operates in real-world context have difficulty applying what they learned in law school out in the real world, in the profession and in practice.

Law schools across the United States are revamping curricula to integrate skills, courses, and modules throughout the three-year arc. Clinical and other experiential education fuses the doctrinal and theoretical underpinnings, the knowledge, with the range of skills that students need to represent clients, engage in the practice of law, and enhance our profession. These clinical and experiential courses also motivate students to learn more, to study more, to - - - to really want to be excellent.

In addition, the ABA has recently revived its - - - revised its accreditation standards to implement outputs that are designed, in part, to better sync legal education with the realities of legal practice and require law schools to ensure that students learn a breadth of skills.

Adopting the UBE and New York multiple-choice section, that as an independent licensure requirement, will undermine, we believe, the current reforms of legal education at the very moment when innovative advances are taking off. Rather than being encouraged, innovative measures will be abandoned. 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 other outputs that measure, inter alia, skills, values, ethics, and experience-based aptitude.

So here's what we see happening. Law schools will tailor curricula to bar preparation courses and steer students to those courses - - - not for everyone, but for a large portion of their students. Faculty will steer assessments toward the kind of multiple-choice questions asked on the bar, so that students can practice for the bar. Law

1 students will hear the message that they should
2 prioritize bar prep and other doctrinal courses. And
3 law schools will have a disincentive and be
4 discouraged by this multiple-choice focus from
5 creating or expanding experiential courses, which
6 complement and deepen analytical learning and provide
7 the broad, well-rounded, but interconnected
8 development of professional knowledge, skills, and
9 values.
10 CLEA's third point: there are too many
11 unanswered questions about the UBE to move forward
12 now, particularly given the strong support for
13 alternative reforms to the New York Bar Exam. As
14 seventy-nine law school deans noted, the National
15 Conference of Bar Examiners, NCBE, has comprehensive
16 data that would shed light on the cause of the recent
17 drop in bar passage, but has refused to share that
18 data in any form with schools, their representatives,
19 or the public.
20 They have insisted that recent test takers
21 are not as strong, although deans have stated that
22 their data does not support that claim. Similarly,
23 the NCBE has not been responsive to calls to share
24 their data in any form with groups concerned about
25 the disparate impact of the MBE and the UBE - - -

whoops - - - on test takers of color. New York should not bind itself more tightly to the NCBE until it meets reasonable expectations of transparency and disclosure.

This is just a - - - not just the wrong time, though, CLEA urges, but 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. Over the past fifteen years or so, advances in law school assessment tools and the development of clinical education have made other kinds of licensure exams practicable, such as the innovative Daniel Webster Scholars Program in New Hampshire.

The Wall Street Journal recently noted a forthcoming study by the Institute for the Advancement of the American Legal System found that students who graduated from the Daniel Webster program outperformed lawyers who had been admitted to practice in this state within the past two years.

In conclusion, 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, that has not been studied for the disparate impact consequences, and is likely to chill innovation in experiential and clinical offerings at law schools. There are other, better bar exam reforms on which New York can lead the country. Thank you.

JUDGE RIVERA: Thank you very much. Let me start off the questions with first asking if you have any information on the impact on law school admissions in UBE jurisdictions, since there are some jurisdictions that have adopted the UBE?

MS. LYNCH: So - - - I'm sorry, can - - - impact on law school admissions in the jurisdictions - - -

JUDGE RIVERA: Yes.

MS. LYNCH: - - - that have adopted the UBE?

JUDGE RIVERA: Correct.

MS. LYNCH: My understanding from those who I have consulted with this and who the CLEA board has consulted with, and we - - - we tried to reach out to different people, that we don't have an analysis of that. If that exists, we didn't find it.

JUDGE RIVERA: Okay. Thank you for that,

1 just that first question. So then I wanted to ask
2 for the organization's position on the MPT questions
3 that are part of the UBE. Obviously, they're more -
4 - - is a greater opportunity through the UBE, at
5 least that's the hope, to test the kinds of skills
6 that - - - that you're referring to during your
7 testimony and in your written testimony. And I
8 wondered if you could comment on whether or not you
9 think the MPT is able to do that or has its flaws?
10 And if it has flaws, if you could discuss what you
11 think those flaws are.
12 MS. LYNCH: The - - - CLEA did not - - -
13 I'm here in a representative capacity.
14 JUDGE RIVERA: Yes.
15 MS. LYNCH: CLEA did not analyze whether or
16 not there were flaws with the MPT, so that was not
17 part of the board's voting. What I can tell you is
18 that CLEA has never thought that the MPT tests the
19 wide range of skills that is - - - that are really,
20 we think, more important to the practice of law.
21 And so, for example, in past letters that
22 CLEA has filed with the ABA and with others, we have
23 pointed to the Shultz & Zedeck study, we have pointed
24 to other studies which focus on what are the skills
25 that lawyers need that the competent lawyers exhibit

and demonstrate. And so we have never seen the MPT as to be a answer to clinical assessment as an appropriate measure.

JUDGE RIVERA: Can you subsequently submit copies of those letters to the committee - - -

MS. LYNCH: Absolutely.

JUDGE RIVERA: - - - that you're referencing? That would be great.

MS. LYNCH: And - - - and I - - - would - - - would you like me to highlight the - - - since they were responsive to, you know, proposed comprehensive review standards, would you like me to highlight the portions that respond to the skills that are needed?

JUDGE RIVERA: That would be very, very helpful. Thank you so much.

MS. LYNCH: I'd - - - I'd be delighted to do that.

JUDGE RIVERA: Yes. Yes, great.

Any other questions? Yes, Hannah, please.

MS. LYNCH: Let me just write a reminder to myself. You know, I'm in my fifties. All right, so - - - all right, so - - -

JUDGE RIVERA: Wait a minute.

MS. LYNCH: Yeah, as a supp - - - supplement.

JUDGE RIVERA: Just a moment now.

MS. LYNCH: All right. Supplement and highlight. Okay.

JUDGE RIVERA: Thank you.

MS. LYNCH: You're welcome.

MS. ATERIAN: Mary, I - - - I took a bunch of notes, and I've been thinking. And I just want to focus, I think, on one - - - one piece of this. Because the - - - it seemed - - - you said it's inevitable, essentially, that, you know, all law - - - that law schools are going to - - - if - - - if - - - if this is adopted, law schools are going to shift their emphasis to multiple choice, you know, that kind of measure of outputs. It - - - it - - - you know, as somebody - - - I think, as a dean who's trying to figure out what kind of how - - - what we do, I'm really - - - I'm - - - I'm not seeing what you're saying is inevitable.

Number one, how - - - how do - - - how would we do that? I'm curious. Now, given - - - I mean, the ABA is not saying that, you know, bar results are the output, because the bar results have always been the output. That's sort of been - - - it's always been out - - - that and - - - and job placement. So you have to have different output to

measure, outcome measures.

And, you know, I'm just more - - - I'm wondering how you - - - your - - - your group - - - I understand it's not individually - - - has come to the conclusion that this is going to, you know, kind of put the kibosh on innovation and - - - and - - - and - - - and the like. And - - - and I also think it's important - - - I'd be interested in your - - - your - - - your association's view of how the downturn in applications generally kind of - - - kind of get move - - - moved into this area, because there's just so much going on in terms of shrinking classes and the like. But I don't know how much the 2010 - - - 2010 data can help. But the - - - the - - - but the major question is how did - - - how did your group conclude that inevitably the emphasis is going to be on - - - in law schools is going to be switched to multiple choice stuff - - - outcomes?

MS. LYNCH: Well, I certainly wouldn't want to state that every exam and every assessment in law school will become multiple choice. What - - - what I think we're talking about are incentives and disincentives. And so, for example, one thing we note is that those of us who are professors now don't remember multiple choice being part of exams that we

took when we were in law school.

MS. ATERIAN: Oh, my gosh. I'm so much older than you are, and I had nightmares about multiple choice.

MS. LYNCH: Yes. But - - - but there - - - they weren't as they are now stressed, not for purposes of - - - I mean, they were some. They were some of the - - - of the exams. But I think they are stressed for a different purpose now. There's one thing to say multiple choice as a - - - as a way to hone in on or perhaps a really well formed multiple-choice question was something that professors thought they could use in their tool of assessment.

I think what we're saying is we, as an educational community, have not figured out what's wrong with our multiple-choice testing, and yet we're continuing to replicate it. And that I think there has been a move, if you look at the websites of many of the law schools, in terms of - - - of their posting of the bar pa - - - you know, what's on the bar and the bar passage, if you - - - if you talk to folks about advising that student receive, there is an assumption that students through their three years of law school better start figuring out how to take multiple-choice testing. And I think that there has

1 been a - - - so that was what the discussion was
2 about, that we have seen, many of us, this - - - this
3 emphasis on - - - on a - - - that the test itself,
4 that you're learning the test. You'll see in many
5 law schools that there are courses - - -
6 MS. ATERIAN: Um-hum.
7 MS. LYNCH: - - - now that are just about
8 preparing for the bar exam. Okay. There - - -
9 there's been really a movement on this. I don't have
10 a data on it; that's anecdotal. Partly, law schools
11 don't want to disclose - - - that they're not going
12 to say we're really worried about our bar passage.
13 It's not going to be up on their website. I mean,
14 they're going to say some of it, we're going to take
15 these strategies.
16 But if they were to make a decision between
17 resources going towards preparing for the bar and
18 whether or not there's a new clinical experiential
19 opportunity, I don't think that's going to be made
20 public. I mean, that just wouldn't - - - that's not
21 a good marketing set. So I think part of what we're
22 talking about is what we've seen in terms of
23 different focuses on the kind of assessment that is
24 needed to be implemented in law schools in order for
25 students to pass the bar, which is different than the

kind of formative assessment that we really need to have in law schools in order prepare them for the profession, and we're seeing this incredible tension.

MS. ATERIAN: So you think it's like a dichotomy? Schools have to make a choice and - - - and - - -

MS. LYNCH: I don't know.

MS. ATERIAN: Okay.

MS. LYNCH: I - - - I don't - - - I don't think that you're going to see schools do any way; I think it's a matter of priority. I think there's going to be - - - I think what we're saying is we're worried that this disincentive - - - there's going to be an incentive to - - - to steer resources toward increasing your bar passage rate, to steer admissions efforts towards increasing your bar passage rate, and in a time of - - - of the fiscal crisis, I think that when you look at where priorities are going to happen with very tight budgets, the change will - - -

MS. ATERIAN: Okay, yeah.

MS. LYNCH: - - - push the incentives towards multiple choice.

MS. ATERIAN: Okay, so you're - - - that's kind of a prediction based on, you know, information - - -

1 MS. LYNCH: Based on what we've been seeing
2 happening.
3 MS. ATERIAN: Yeah, okay. Thank you.
4 JUDGE RIVERA: Okay. Seymour.
5 MR. JAMES: You expressed concern about the
6 disparate impact of changing the bar exam,
7 particularly with respect to multiple-choice
8 questions and the expan - - - the increase in the MBE
9 from forty percent to fifty percent.
10 MS. LYNCH: Yes.
11 MR. JAMES: Do - - - do you have any
12 information as to the comparative performance of
13 people of color on the MBE portion of the New York
14 State Bar Exam and the rest of the bar exam?
15 MS. LYNCH: I do not have that information,
16 and I have not seen that information on the New York
17 website. So if that information exists - - - what we
18 do know is that back when - - - from the Committee on
19 Legal Education and Admission to the Bar, when there
20 was a move to increase the passing score of the New
21 York State Bar, which included the MBE, we did see
22 over - - - over a several year - - - there was a - -
23 - a plan for several years - - - we did see a - - - a
24 drop, a disparate impact based on that, and that move
25 some years ago was then stopped. And so we do have

that data with New York, but I am not aware of or do - - - or failed to find any data that does that kind of analysis.

MR. JAMES: Okay.

MS. LYNCH: If - - - if you have it, we would love it.

JUDGE RIVERA: Thank you. Michelle?

MS. ANDERSON: I appreciate what you've testified to, Professor Lynch. And I'm - - - and I want to follow up this question of disparate impact. You - - - your data indicates that you'd like to see the data crunching happen before the implementation of the UBE, if at all, but that there'd be a focus on data crunching. And I'm - - - I'm wondering, you know, we've heard that in testimony before us in New York City; both SALT and LatinoJustice asked - - - asked for the same thing. And I wonder what that data crunching would look like in your mind?

MS. LYNCH: Well, I would say that I am not the best data cruncher. But what we discussed was that, for example, if we looked at the results of the New York Bar Exam coming up or the last bar exam, and then you change - - - I mean, one idea is then if you change the measure of the MBE from the forty to the fifty percent and you looked at that data, that would

actually give you a little information. It wouldn't give you all the information, but it certainly would give us another piece of data to look at.

MS. ANDERSON: And what would you - - - what - - - this is fascinating and important, and I'm - - - I'm wondering what kind of data would satisfy you? What would you be looking at in that data? What would you be dissatisfied with, what would you be satisfied with in that or other kinds of data? What would you be looking for?

MS. LYNCH: I do not believe I have authority to give you an actual number from CLEA.

MS. ANDERSON: Well, no, no, no.

MS. LYNCH: But I - - - I do think that - - -

MS. ANDERSON: I mean, as a layperson, you know, as a non - - -

MS. LYNCH: Okay.

MS. LYNCH: And I - - - I will say this as somebody who's been a longtime CLEA member and who - - - and - - - and who is on the committee that, you know, put together the letter, et cetera. You know, we are concerned about the information we've seen coming out of other states. Particularly, there was some information coming out of California. And we

would want to - - - we would want - - - we would want not - - - I guess we would - - - our instinct is that we're going to see the same information coming out of New York. If, for some reason, there was data that showed that there wasn't this dramatic impact, that would helpful data for us to consider in - - - in terms of taking a new position.

MS. ANDERSON: I appreciate that.

JUDGE RIVERA: David?

MR. JAMES: Can - - - can I just - - -

JUDGE RIVERA: Did you want to follow up on - - -

MR. JAMES: I wanted to follow up on what Michelle was - - - I guess I - - - I'm not familiar with the data you're referring to in California.

MS. LYNCH: Okay. I will - - - I will get that to the - - - we didn't refer to speededness and some of the other data, because we thought it was very jargony. But I would be happy to provide that to the committee.

MR. JAMES: Does that pertain to the MPT?

MS. ATERIAN: We are now specializing in jargony, by the way.

MS. LYNCH: Okay. Okay.

JUDGE RIVERA: Thank you.

1 MR. JAMES: Does that refer to the MPT? Is
2 that what you're - - - getting the data from
3 California?
4 MS. LYNCH: I don't have the study in front
5 of me, but my understanding is that - - - I - - - I
6 can't remember whether it was the MPT. I believe it
7 was - - - it was not the MPT. It was an analysis
8 done of - - - that included multiple-choice
9 examinations. But I will - - - I will go back and
10 look at that and provide that to the Advisory
11 Committee.
12 JUDGE RIVERA: Thank you. David?
13 MR. HERNANDEZ: Thank you, Professor Lynch.
14 In response to Hannah's question, do you refer to law
15 schools now, I believe - - - correct me if I'm wrong
16 - - - giving prep courses or courses that are similar
17 to prep courses for bar exam passage; is that
18 correct?
19 MS. LYNCH: Correct.
20 MR. HERNANDEZ: Okay. And that's going on
21 even now with the current bar exam?
22 MS. LYNCH: Correct.
23 MR. HERNANDEZ: So it has nothing to do,
24 specifically, with the UBE.
25 MS. LYNCH: It does not - - - the fact - -

- correct that prior to the adoption of the UBE this is already going on.

MR. HERNANDEZ: So I'm trying to understand what you're trying to say or what you have said. I - - - and I apologize, I'm a non-educator here and a non-Bar person. So what it - - - can you repeat to me what your position is regarding - - -

MS. LYNCH: Sure. I think that our position is - - -

MR. HERNANDEZ: Or what the difference would be?

MS. LYNCH: Um-hum. The two pieces that, under the proposal, emphasize multiple choice - - - the first is the change from forty to fifty percent of the MBE, and the second is that in the New York - - - the new New York proposal, the fifty specific questions that have not been tested yet, the - - - the current examination includes essays and multiple choice, whereas the proposed new - - - sort of do-or-die fifty questions that if you're going to be a New York lawyer, it's fifty questions, it's multiple choice, and you have to get thirty of them.

MR. HERNANDEZ: I'm sorry - - -

MS. LYNCH: And so that emphasizes, that reifies multiple-choice test taking.

MR. HERNANDEZ: Did you just say that the essays also will have multiple-choice questions? No.

MS. LYNCH: No. There will no longer be any New York essays - - -

MR. HERNANDEZ: Right.

MS. LYNCH: - - - and so that, then, if you take away the essay part - - -

MR. HERNANDEZ: Um-hum.

MS. LYNCH: - - - it then - - - that's why we're calling it do-or-die. It's fifty questions - - - I'd better stop knocking over the water - - - it's fifty questions, it's thirty, and so that really means that we need to focus on - - - on how to answer the multiple-choice questions tested on the bar.

MR. HERNANDEZ: Okay. And - - -

MS. LYNCH: In - - - in addition to the knowledge, of course. I'm not denying that students need to have know - - - doctrinal knowledge in order to do that.

MR. HERNANDEZ: And - - -

MS. LYNCH: We do not oppose the limiting of the content outline.

MR. HERNANDEZ: And Judge Rivera indicated, as we all know, that there will be two M - - - MPT questions?

JUDGE RIVERA: Yes.

MR. HERNANDEZ: Which has - - - has to do, to a certain degree, with experiential learning.

MS. LYNCH: Um-hum.

MR. HERNANDEZ: Would you agree with that?

MS. LYNCH: I agree that MPT questions - - -

MR. HERNANDEZ: Or do you disagree with that? I - - -

MS. LYNCH: Well, I - - - I guess I'm not sure, Your Honor, that I can answer yes or no. I - - - I - - -

MR. HERNANDEZ: I'm not a Your Honor, but I appreciate - - -

MS. LYNCH: I think that I agree that the MPT provides another form that's not multiple choice and that begins to get at a few of the skills in - - - in a simulated version. However, I don't think it's a replacement for the kind of clinical assessment - - - I - - - I don't think it solves all our problems, I guess, and CLEA doesn't think it solves all our problems.

MR. HERNANDEZ: And I think we all - - - I think we all agree with that.

MS. LYNCH: Yeah.

MR. HERNANDEZ: Okay.

JUDGE RIVERA: Just to clarify one point. I don't know if anyone else has a - - - has a comment they want to make. But the UBE essays, of course, in part will be testing what is New York law. So it's not wholly accurate to say that the essays now will not be covering New York law. To the extent that New York law aligns with the coverage, you are still testing law that is adopted and applied in the State of New York through an essay format. Because I understood that was part of your critique, that the sort of the testing of New York law will now be relegated to a multiple-choice format, and I just wanted to clarify that that is not what the proposal is.

MS. LYNCH: Oh, from looking at the website, the MEE essay, would be a New York law essay?

JUDGE RIVERA: Well, my point is that to the extent that what is being tested on - - - through the essays on the UBE aligns with what is existing - - -

MS. LYNCH: I see.

JUDGE RIVERA: - - - New York law - - -

MS. LYNCH: So in - - - in - - -

JUDGE RIVERA: - - - bar testing what the law is if you apply - - -

MS. LYNCH: If we follow majority jurisdiction law.

JUDGE RIVERA: Well, what - - - whatever's being tested. That's true. Where there are, of course, unique rules and differences and, of course, New York practice and professional conduct, that would - - - the proposal is that that, of course, would be tested through, as you say, this multiple-choice format, what we say is the New York Law Exam. And you're correct in that.

But I just wanted to clarify that - - -

MS. LYNCH: Got it.

JUDGE RIVERA: - - - that the proposal anticipates and includes testing of New York law through an essay format to the extent you will find that on the UBE - - - in the UBE essays. So I just wanted to clarify that point.

MS. LYNCH: Okay. And what we didn't - - - yes, thank you.

JUDGE RIVERA: I wanted to make sure that CLEA understand that. You may think it's insufficient. I can understand that position. But I just wanted to clarify that.

MS. LYNCH: And I think what we would like - - - and I'm going to listen to the rest of the testimony - - - is that it's not clear to us that the number of places where - - - for example, my area is criminal law where New York differs greatly - - -

JUDGE RIVERA: Um-hum.

MS. LYNCH: - - - on its Constitutional rights. It - - - it is not clear to us how much that actually overlaps.

JUDGE RIVERA: Okay, understood.

MS. LYNCH: So thank you.

JUDGE RIVERA: And then, as I say the - - - the proposal anticipates where there are these unique rules or something that's not sufficiently tested on the UBE or appropriately, would - - - we would catch - - - we would be able to test that through the New York Law Exam. Are there any other questions before - - - you said - - - now, I had one other question - - -

MS. LYNCH: Sure.

JUDGE RIVERA: - - - before you which is, whether or not, since you've focused on experiential learning and - - - and I'm very grateful for - - - for your testimony on that, does CLEA have any information with respect to New York law schools or

nationally? I'm actually more interested in nationally. We have information on New York - - - the number of schools that - - - or excuse me, the - - - the percentage of students who would like to take a clinic who actually have seats in law schools to take clinics?

MS. LYNCH: I can obtain that information from CSALE - - -

JUDGE RIVERA: Okay.

MS. LYNCH: - - - which is a - - - it's not a CLEA database but CLEA can make a request to CSALE to get that information. And, in fact, their newest report should be coming out soon. I've got an e-mail about a request for Albany Law School this morning. So I can certainly try to get - - - and the question would be the percentage of students who desire a seat but don't get one?

JUDGE RIVERA: Yes. I - - - I'm trying to get a sense of, nationally, the opportunity for a clinical experience. I understand there may be other types of experiential opportunities, but I'm - - -

MS. LYNCH: Right. You're looking for clinical?

JUDGE RIVERA: - - - particularly interested in clinical. That is correct.

MS. LYNCH: And with clinical, do you mean in-house and field placement or the - - - the supervised clinical practice?

JUDGE RIVERA: The supervised clinical practice. Correct. But with respect to this question, more information - - -

MS. LYNCH: Better.

JUDGE RIVERA: - - - is always welcome. Thank you.

MS. LYNCH: Thank you very much. Thank you.

JUDGE RIVERA: I'm sorry.

MS. LYNCH: Oh.

JUDGE RIVERA: Michelle had a follow-up on that or a question, sorry.

MS. ANDERSON: I - - - I highlighted in my notes on your testimony that you indicate there's some data on the Daniel Webster program admittees outperforming those who take traditional bar exams. If you have access to that data and could provide to the panel, I'd very much appreciate it.

MS. LYNCH: I could - - - I was - - - I was looking on the website as - - - you know, yesterday, and they haven't published it yet. It says it's about to come out. But I can e-mail Alli Gerkman and

see if this committee could get an advanced copy.

MS. ANDERSON: Perfect.

JUDGE RIVERA: Yes. Yes, please. Diane has another question.

MS. BOSSE: And so those people would have been people that went through the Daniel Webster's Scholars Program in the past. And am I correct in my understanding that those people were people who were at the top of their class?

MS. LYNCH: The Daniel Webster Scholars Program does have a - - - I don't think it's that they were top of the class, but I do think it's called the Scholars Program, that there are certain criteria, and I can get that criteria. I mean, it's on the website. I would be happy to provide that with the - - - so there is - - - there - - - they were students who - - -

MS. ANDERSON: They were screened.

MS. LYNCH: They were screened; exactly.

MS. ANDERSON: It'd be helpful to know how they're assessing success in the profession, as well, from a clinical standpoint. So, you know, any - - - any information is - - -

MS. LYNCH: Right. The one piece that was provided in the Wall Street Journal article was about

interviewing clients.

JUDGE RIVERA: Okay. Thank you so much.

MS. LYNCH: Thank you.

JUDGE RIVERA: Very much appreciate it.

MS. LYNCH: Thank you.

JUDGE RIVERA: Our next - - - the person who will next be testifying for us is Irene Villacci from - - - representing the Women's Bar Association of the State of New York. And she is, indeed, one of those people who was with me in Penn Station yesterday for many, many hours.

MS. VILLACCI: Many hours.

JUDGE RIVERA: She spent more hours than I, but she looks rested and ready to go, and we're happy to have you here.

MS. VILLACCI: Ready to go. Good morning. As you know, my name is Irene Villacci, and I am the president of Women's Bar Association of the State of New York. Many of you know as WBASNY. On behalf of the over 4,000 members of WBASNY, I want to, of course, thank you for this opportunity to present to you comments regarding the proposed transition to the Uniform Bar Exam.

I am here today to provide you with the comments from WBASNY members from across the state.

When the proposal to possibly transition to the UBE in New York was released last fall, I asked the eighteen chapters that comprise WBASNY to review the proposal and to provide me with comments.

Based on the feedback I received, WBASNY has many concerns about the implementation of the UBE in New York. Members' concerns range from specific questions related to the exam itself to the impact on current practitioners as well as the students who would be taking the UBE. We submitted our comments in the fall, but I would now like to discuss just some of the comments I received, which I hope you will consider as you review the implications of the proposal.

First, the UBE proposal does not seem to sufficiently address New York law. Many members of WBASNY expressed concerns regarding the exam's limited coverage of New York law and whether this limited coverage would reduce the significance of passing the New York State Bar Exam, one of the most rigorous in the United States and internationally. Overall, this reduced focus would seem to dilute the importance of learning New York State law.

Although the UBE proposal includes a New York State law component, members expressed concern

regarding whether this component would be sufficient so that the New York State component is not watered down. By reducing the New York law component, the UBE appears to make it much easier to pass the New York Bar Exam. The New York Bar Exam, our members consider to be one of the toughest exams for a reason. We are in 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 a small piece of the - - - the UBE, the MEE, as well as the state component.

The second piece is the impact that the UBE would have on the legal profession in New York. Members of WBASNY raise questions about the potential impact of this proposal on the legal pro - - - profession as it exists currently in New York. The UBE could place practitioners at a disadvantage. For example, the UBE proposal does not have any provisions for attorneys who have taken the New York State Bar prior to 2015, or whenever will be the anticipated implementation date. What about attorneys, including myself, who have been practicing twenty-five years or twenty - - - or more? Would they be allowed to practice in other states without taking the UBE?

Additionally, although the exam would afford New York lawyers more flexibility to move to other states, it's possible that more lawyers from out of state would come to New York. Attorneys who are not necessarily familiar with New York law would be able to practice here, which could make it harder for all lawyers to find a job, concerning - - - especially considering the economic impact that our profession has faced in the past several years. Thus, it raises the question whether the UBE would reduce the prestige of having passed the New York State Bar Exam and being a licensed New York State attorney.

Members who - - - members also expressed concern that the UBE could negatively impact New York law schools, particularly those whose programs focus on New York practice and training for the New York Bar Exam.

Finally, there is also the issue of UBE implementation issues that our members raised. I'd like to turn to the comments that we received regarding the lack of uniformity among the states that use the UBE.

First, with regard to grading, each state is allowed to set its own passage rate. The UBE

passing grade should be the same in all states based on what our members have commented on. From what we've read, the proposed passage rate of 266 appears to be below the passage rate that most of the other states using the UBE have set.

Second, each state sets their own time frame to apply or to transfer UBE scores for purposes of applying for admission. The time frames range from two to five years, and New York is proposing three years. The grades should be good for five years or more, not three years, as most states that allow reciprocity require five years of good standing in a state bar.

Finally, I - - - I'd like to add a perspective that I've had being president for almost a year now. And what we did back in June - - - one of my goals is becom - - - in becoming president of WBASNY was actually based upon a fantastic symposium that I went to at Pace that I know that some of you were at and some of my colleagues who are in the room were at and that the State Bar offered. And it showed the - - - the - - - the changing face of legal education in what I think is a very good direction.

We have now mandatory externships, incubator law programs, and the like that are

1 addressing the fact that we have a generation of new
2 attorneys who graduate and don't receive on-the-job
3 training. And having gone to that symposium at a
4 time when I was becoming president, it gave me pause
5 and made me realize that I needed to pull back on
6 WBASNY's current mentoring program, where I realized
7 we can't - - - could not just come out with a - - - a
8 pat program for a mentoring and go to the eighteen
9 chapters and say, do it this way.
10 I had traveled around the state this summer
11 and seen many of our members, our - - - our new
12 members and our seasoned members, who were very
13 concerned because we have young attorneys, and we
14 consider that to be in the one-to-three year area out
15 of law school, who are saying, I don't have time to
16 get involved in the legal community. I have a hard
17 enough time fulfilling my pro bono requirement. I
18 don't have on-the-job training. And many of my
19 colleagues in the bar remembered that we had the on-
20 the-job training twenty-five and thirty years ago.
21 So our - - - our - - - the face of that has changed.
22 And our concern, with WBASNY we knew - - -
23 we're traveling over the state. We're trying to
24 reach out to the law schools to come up with a plan
25 so that we can stay on the pulse of this for legal -

- - legal education so that we have attorneys who are trained and they have a mentorship program that's going to work for them. And I think that that has to work for all of us statewide.

The impact of the UBE and changing the New York part may very well - - - as - - - as - - - as Ms. Lynch has stated - - - may very well impact the much-needed practical curriculum. I do believe that New York law schools will have to restructure legal education towards preparation for this new exam when they've just set off in a direction of addressing the needs of our law students and new attorneys.

So my position in this and is - - - what is being reflected from my members, is that it's time to study legal education as a whole. And potential changes to the current bar exam would only be a part of this, but certainly not the first step.

On behalf of WBASNY, I want to 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. I think it is a ripe time to have these discussions and a great time in our legal community to see how we're going to move forward to - - - together.

1 Based on comments I received, members
2 wonder, other than portability and standardization,
3 what is the incentive for New York to move towards
4 the UBE? We are hopeful that more details about this
5 proposal will become available as it is discussed
6 further. And as always, we welcome the opportunity
7 to work with you and to discuss this further with the
8 task committee, Chief Judge Lippman, and the Office
9 of Court Administration.
10 So I'll - - - of course, I'm - - - I'm
11 happy to answer any questions that you may have.
12 JUDGE RIVERA: Thank you so much for that
13 testimony, Ms. Villacci. So I - - - I wanted to
14 start out by asking, given the tremendous role that
15 WBASNY plays, of course, across the state and the
16 service to your membership, given the historic
17 challenges that women have faced - - -
18 MS. VILLACCI: Um-hum.
19 JUDGE RIVERA: - - - going to law school,
20 passing through the rigors of a legal education,
21 taking the bar, passing the bar, finding employment,
22 being treated fairly at the workplace, and the
23 reports that the New York State Bar has issued, the
24 ABA has issued, about the - - - the continued
25 challenges that women face, I was hoping that you

1 might have some comments with respect to whether or
2 not you think that this change would also have an
3 impact on women's access to the profession.
4 We have heard - - - we've heard some
5 testimony this morning, we've received written
6 comments, we've heard testimony in New York regarding
7 disparate impact focusing on racial and ethnic
8 populations, but I wanted to know if you might have
9 some insight or some comment that you'd want to share
10 with us regarding the impact based on gender, if any.
11 If you don't, you don't. I just wanted to put the -
12 - -
13 MS. VILLACCI: I don't have - - -
14 JUDGE RIVERA: - - - put the question to
15 you.
16 MS. VILLACCI: Right. I don't - - - I
17 don't have the data, but - - - but having been an - -
18 - an active member and - - - and - - - and officer of
19 - - - of WBASNY for most of WBASNY's time - - - and
20 we - - - we're - - - we're heading towards our
21 thirty-fifth anniversary this June.
22 JUDGE RIVERA: Congratulations.
23 MS. VILLACCI: Thank you. And - - - and
24 being a member twenty-six of those thirty-five, I
25 would say on a - - - on a observation that women

attorneys in New York are - - - are strong and survivors and endure much. And I don't think that necessarily this - - - there's enough to see whether that would imp - - - whether the UBE implementation would change our access. I - - - the - - - the stories I hear from my members is a woman will always find a way. But I do hear concerns over and over about our new attorneys, our - - - our young women attorneys. We have women and men - - - men members in WBASNY.

And they - - - we can't get them out of their law firms. We can't get them to come to CLEs to become active members and to see the resources of what being an active member of the bar association has to offer them to help them with their requirements, because they are not getting the practical - - - they - - - they're not getting the prac - - - practical training and support.

They're trying to stay alive and trying to stay employed in their jobs, and a lot of their billable hours go to preparing for a case where there is no mentorship. And that has been the biggest concern that has been brought to my attention from our young women attorneys, and also from our seasoned members who are saying we're not getting them out and

this is what they're saying to us. That - - - that's my biggest concern as far as access.

And I was so proud to see - - - I - - - I'm here with my president-elect, Andrea Composto, in the back, and we were both saying we're so proud that our alma mater law schools are here today, both Albany and Hofstra. Andrea's from Albany Law School, and I'm from Hofstra. And so we're very - - - I'm very proud to be sitting between our deans.

It - - - it's not a - - - we're so proud the schools heading towards the incubator programs, the launch programs, heading towards externships. The medical schools have always done that. So we're very proud of that. So the concern is that those law schools that have made their bread and butter on concentrating on preparation for the law exam, now that they've turned towards externships and practical and seeing the need of - - - of what their attorneys need when they get out of law school, how will the UBE impact that?

And WBASNY is not saying at this point that this is bad or this is good. Honestly, we all say that this is a good time for - - - for this conversation to be happening. But we don't think that it's the - - - that the UBE should go through in

1 New York without a lot of these questions being
2 answered. But also letting it be a way to look at
3 where we're heading in general, legal education,
4 having the mandatory pro bono reporting now in place
5 for our young attorneys. Where are we heading? It's
6 the time for dialogue. It's the time to look at this
7 as a whole. And - - - and possible changes to the
8 bar exam should be just one component to look at, but
9 not where it's the first component.
10 JUDGE RIVERA: Thank you for - - - and
11 thank you for sharing your concern that it should be
12 a holistic approach.
13 So let me see if anyone has any questions
14 on this side? And David - - - Seymour, David.
15 MR. HERNANDEZ: Hi.
16 MS. VILLACCI: Hi, David.
17 MR. HERNANDEZ: Thank you for your
18 testimony. Question: I understand that roughly
19 seventy-seven percent, seventy-two percent of
20 attorneys in the State of New York are small or solo
21 practitioners. So my question is, do you find that
22 your membership composed of that same, more or less?
23 MS. VILLACCI: I can tell you being the
24 president of the organization, I am a solo
25 practitioner. And there are many solo practitioners,

small firm attorneys. And by small firm attorneys, I mean, you know, people who are - - - it's - - - it's them and a partner or maybe a third partner or an associate, small firms. We have a lot of members who are small firms and solo practitioners. And that's a very grave concern.

Many - - - many of our solo practitioners, like myself, chose to, after years in - - - in - - - in the big firms, say let - - - you know, to - - - to do the solo pract - - - practicing, and it's become harder and harder. That's - - - that goes without saying. We're all - - - we're all in this together. And I - - - I think it's going to have a big impact on the economic effect. And - - - and I was proud and I was also quite shocked at the reports I was getting back from my chapters that the focus did come back on the impact of the legal profession.

And part of that, David, was because they came back and said, we have a lot of small practitioners and private practitioners in our counties. We have small chapters, and I mean 25 members in a chapter, versus our largest chapter, Manhattan, having 800. And they came back, we're concerned about our solo practitioners. We have a lot of small practitioners. What is that going to

1 happen to them? So thank you for asking that.
2 MR. HERNANDEZ: I'm a proud WBASNY member,
3 by the way.
4 JUDGE RIVERA: Thank you. And Seymour, I
5 believe, had a question. Question?
6 MR. JAMES: Yeah. I - - - I'm - - - I'm
7 not fully understanding the disadvantage that you say
8 current practitioners will be subject to if New York
9 adopts the Uniform Bar Examination. Because wouldn't
10 they still be under the same limitations as they
11 currently are with respect to reciprocity in the
12 other states?
13 MS. VILLACCI: There - - - there - - -
14 there's - - - there were two concerns on that issue,
15 Seymour. The - - - the - - - the first concern was
16 well, okay, if this does - - - if this does go
17 through, why are they - - - you know, the attitude of
18 - - - of us old timers, why are they letting the kids
19 have the benefit of this? What about all of us that,
20 you know, we had to do our - - - our - - - our third-
21 day stint in Jersey or Connecticut, and what about
22 the reciprocity of and the disadvantage to attorneys
23 who are out five years, ten years, et cetera, who did
24 not get the benefit now of - - - of having the
25 reciprocity in the other states because they did not

1 take the UBE?
2 And - - - and then the other question there
3 is also, of course, the financial impact, because the
4 practice of law has been changed so much over the
5 last few years economically, over, you know, what's -
6 - - what's gone on with - - - with the financial
7 issues in the country in general. So the - - - the
8 feedback from WBASNY was a big concern for the - - -
9 the - - - the impact on the profession.
10 MR. JAMES: Okay. Thank you.
11 JUDGE RIVERA: Thank you. Any other
12 questions? Diane?
13 MS. BOSSE: As a proud member of WBASNY,
14 thank you for being here.
15 MS. VILLACCI: Thank you.
16 MS. BOSSE: I didn't know David was a
17 member. The - - - the question of why let the kids
18 have it. Isn't that answered by motion admission in
19 other jurisdictions and the reciprocity that you did
20 mention? I mean, people who have been in practice
21 have the opportunity to seek admission in other
22 jurisdictions through admission on motion rules. So
23 doesn't - - - doesn't that answer that part of the
24 concern?
25 MS. VILLACCI: It does. And - - - and I -

- - and I, of course, went back to that, because, you know, always the one being put in front of all of you, have to go back and play the devil's advocate to her members more often than not. And I think the - - - it goes back to the question of, but are - - - are you now making it easier? And - - - and the concern from the practitioner is - - - out there is, are you making it harder for me as the practitioner because it's - - - the last five years in practice economically have been hard enough on the - - - on the private firms? And - - - and that - - - that was the response that I got, Diane.

MS. BOSSE: Thank you.

JUDGE RIVERA: Any other questions? I have one - - - one hopefully easy question. I was wondering if - - - because you've mentioned experiential learning, and I was curious if you had any information on the barriers women, again, face in accessing exper - - - experiential opportunities in law school? Because you discussed sort of postgraduate opportunities - - -

MS. VILLACCI: We - - -

JUDGE RIVERA: - - - to be mentored and learn. So I'm just curious if you have any - - - any information on the law school experience for women?

MS. VILLACCI: Not - - - not any actual study, Judge. But of - - - of course, we - - - we've had many of the - - - the law school deans and - - - and those in charge - - - charge of the externships have reached out to us. And - - - and they've been wonderful to work with. And that has been one thing that I've charged our equal opportunity profession chairs with is that you're going to go out to the law schools that are receptive to us, and we're going to find this out. Because WBASNY charges itself with always staying on the pulse of what's happening in our community.

And - - - and we don't think that, like I said, coming out with a pat mentoring program is the answer. When we saw that attorneys out already are having a problem, we said we need to go and see what the law schools are doing. And we - - - we've had a lot of the law schools we've reached out to are very happy to have us come in. We're arranging tours to go in and - - - and to meet with the attorneys. And we're meeting - - - we're meeting young women and men who are looking to WBASNY.

JUDGE RIVERA: Great, thank you so much.

MS. VILLACCI: Thank you.

JUDGE RIVERA: And thank you for braving

the snow and the long hours at Penn Station.

MS. VILLACCI: It was - - - and it's all worth it to be here. Thank you so much for accepting.

JUDGE RIVERA: You were very gracious. Both of you - - - both of you.

MS. VILLACCI: Thank you very much. Thank you.

JUDGE RIVERA: Thank you so much. Okay, great.

We'll now hear from a panel from the New York State Bar Association represented by David Miranda, president-elect of the Bar; Eileen Millett, co-chair of New York State Bar Association's Committee on Legal Education and Admission to the Bar, and Sarah Gold, chair of the New York State's Bar Association Young Lawyers section, and I assume this is the order in which you will be making your comments.

I want to thank the - - - the panel members today for giving us this testimony live. We very much appreciate it. And also, not only for braving the snow today, but for braving the snow last week during the - - - the Bar's meeting in New York when we had the blizzard that wasn't. But we very much

appreciate what you have already brought to the committee in your prior comments and your engagement with us, so without further ado.

MR. MIRANDA: Thank you, Your Honor. May it please the court and the - - - the committee.

JUDGE RIVERA: It does indeed.

MR. MIRANDA: I - - - I - - - I am the president-elect of the New York State Bar Association. And our president, Glenn Lau-Kee, asked me to express his deep regret at not being able to be here today and our Association's gratitude, on behalf of the entire Association, to the Honorable Chief Judge Lippman, to Your Honor, Judge Rivera, and to the entire committee for providing us this opportunity to share the New York State Bar Association's views regarding proposed changes to the manner in which those seeking the honor and privilege of practicing law in the great state of New York are to be examined and tested.

We applaud Chief Judge Lippman for his leadership in raising the issue of whether our current form of testing for New York State Bar admission is sufficient to test the skills and ability to be ready to practice law in New York. Our current New York Bar Exam includes one full day, six-

hours-and-fifteen minutes, of New York State-specific essays and multiple-choice questions and an MPT performance test intended to test practice readiness and fundamental lawyering skills.

We support the view in our ever-changing world that newly admitted attorneys in New York need to be more ready for practice than ever. And in order to get there, our old testing models need to be challenged and improved. However, the membership of the New York State Bar Association, the practicing attorneys of New York State, have very strong concerns that the UBE proposal for the New York State Bar Exam as it is currently configured will not lead us in the right direction but rather is a step backward from the current New York State Bar Exam.

Our Association has a committee on legal education and admission to the bar, made up of attorney leaders in the bar and academia, to study this important issue. And with me here today is Eileen Millett, co-chair of that committee, to briefly summarize our initial findings and report submitted with our testimony to assist the Chief Judge and this committee in its study of this very important issue.

Also with me is Sarah Gold, the chair of

our Young Lawyers section, which includes law students and newly admitted attorneys who have very strong concerns that our New York State Bar Exam test for competency specific to New York practice and that any changes not diminish the prestige of a license to practice law in New York.

A license to practice law in New York is the gold standard for lawyers across our nation and around the world, and that must not change or be tinkered with without long and careful deliberation and not without substantial good cause being shown. More often than not, the laws of New York do not follow the uniform laws that the UBE tests. Rather, New York laws are special, unique, and sometimes frustrating. But the ability to understand and navigate the nuances and pitfalls of New York law is crucial to the ability to be able to practice competently in New York State.

New York State, with its progressive laws and courts and judges, is a recognized leader in the legal community throughout our nation and the world. Practicing here is special and unique and very different from practicing in Nebraska or North Dakota, and our bar examination should be - - - it must be - - - properly reflective of our uniqueness,

1 our diversity, our influence throughout the world.
2 There are no two ways about it. Practicing in New
3 York is different than anyplace else in the world.
4 We are the opposite of uniform. What makes us
5 special and unique is also what makes us wonderful
6 and sought after.
7 Attorneys in other states and other
8 countries first want to practice in their
9 jurisdiction where their home is. But for many, a
10 license to practice law in New York is the most
11 valuable second. Just last month in Albany we had
12 attorneys from seventeen countries and forty states,
13 including the District of Columbia, seeking admission
14 in New York.
15 And we're - - - when we're told that the
16 UBE is better because it will increase the
17 portability of a New York license, we are concerned,
18 because there is no outcry about barriers to entry in
19 other states from our members, New York State's
20 practicing attorneys. There is no outcry for this
21 from our clients or from the public. There is no
22 outcry from the courts that they wish more out-of-
23 state attorneys could practice here. It is the
24 attorneys in other states that will now be able to
25 more easily flood the New York State legal community

1 and dilute the significance of a license to practice
2 in New York.
3 Law firms and employers in New York want
4 attorneys steeped in the complicated nuances of New
5 York practice. Clients in New York, whether rich or
6 poor, need their attorneys to be fully versed in New
7 York law. Our examination is the gatekeeper to
8 protect our public. The proposed configuration of
9 the UBE takes us from a full day of New-York-specific
10 essays and practical testing to an hour of multiple
11 choice on New York law. New York State must keep as
12 much control as possible over its testing of new
13 lawyers. Under the UBE, New York State will have
14 some influence over the UBE exam, but we would be
15 losing much of the control we have over our own day
16 of the bar examination. This proposed configuration
17 takes us in the wrong direction.
18 At this time I would like to turn over the
19 presentation to Eileen Millett, the chair of our
20 Committee on Legal Education and Admission to the
21 Bar, to share more details about our committee's
22 finding and report, and then to Sarah Gold to talk
23 about the concerns of our young lawyers. Then, if
24 there's time and with your permission, I would like
25 to have a very brief period of time for some

1 conclusory remarks and the ability to answer any
2 questions. So - - -
3 JUDGE RIVERA: Thank you. Okay, go ahead.
4 MR. MIRANDA: Thank you.
5 MS. MILLETT: I'm going to try not to
6 repeat a great deal of what David - - - David has
7 already said and has been repeated by - - - by many
8 others who've testified this morning. So I'd really
9 like to focus on three things that a report adopted
10 on January 29th unanimously by the Executive
11 Committee of the New York State Bar talked about.
12 And I'd also like to mention that I co-chair this
13 committee with Patty Salkin, the dean of - - - of
14 Touro Law School.
15 Just in the interest of time, I'm not going
16 to talk a great deal about what the committee has
17 done; I will get right to the report. We did, I have
18 to say, when - - - when the initial proposal came
19 out, realize as we started to look at the UBE, that
20 this was a very complex, a very layered, and a very
21 nuanced issue. And we - - - we sought additional
22 time, and we commend the Chief Judge for allowing us
23 some additional time so that you could be - - - we
24 could be before you today and you could receive our
25 comments.

1 Our first concern was whether or not the
2 proposed New York State Law Exam adequately tests
3 knowledge of New York law. Our second concern was
4 whether or not it tests the professional skills
5 required for practice, and the report suggests an
6 alternative that might be considered as an option.
7 And then given the New York State Bar Association's
8 solid history of pressing for diversity and the fact
9 that diversity numbers are not going in the right
10 direction, we asked whether or not the adoption of
11 this UBE proposal could worsen the problem. And with
12 that question, we asked that some data be gathered.
13 With regard to the proposed test itself,
14 whether it tests - - - adequately tests knowledge of
15 New York law, just a few points. Candidates under
16 this proposal would answer questions using uniform
17 law and acts, not necessarily New-York-specific law.
18 Although, as you have indicated, Judge Rivera, in
19 addition to the fifty essay questions, we do know
20 that the six proposed essay questions that would
21 replace the five essays that are currently allowed in
22 - - - on the New York test would have some New York
23 law.
24 However, we understand that the content of
25 those questions, those essay questions - - - we

haven't seen them; they have, as we understand, not yet been developed - - - would be different than the essays that are currently tested. Because the essays that are currently tested are multiple issue and multiple topic, they would require individuals to - - - to assess contracts, for example, statute of limitations, maybe procedural issues. The UBE essays, as we understand it, are more narrowly focused and also would take less time.

So one - - - and the - - - the other thing that we - - - we have some question about it is the fact that we don't have sample questions that, to our understanding, have yet been drafted or made public and no pre-testing has been announced. So our concern is that, conceptually, the proposed New York Law Exam is not adequate to demonstrate an acceptable minimal level of proficiency in New York law prior to admission.

Our - - - our second concern was whether or not, under the new proposal, which adds a second MPT question, the proposal would adequately test the professional skills required to practice law. And we actually sought the advice of a professor from CUNY Law School, Sarah Valentine. She came before our committee and she edicate - - - educated many of us

1 who are actually practitioners who, given the age
2 that I am, did not take the MPT, didn't take the
3 Multistate Bar Exam, and we're not familiar, as maybe
4 perhaps some academics are, with the nuances of the
5 MPT.
6 I know that the National Conference of - -
7 - of Bar Examiners says that they - - - the MPT is a
8 simulated law office task and that it really is
9 designed to have a candidate sort through factual
10 material, analyze statutes, apply relevant law and
11 facts, identify and resolve ethical problems, and
12 communicate effectively in writing. And that occurs
13 within a ninety-minute period of time. But those
14 goals do not comport with the MacCrate Report, the
15 1992 report that talked about fundamental lawyering
16 skills. So we do not see that the MPT tests the
17 ability to do legal research or investigate facts.
18 It doesn't assess whether or not you can negotiate a
19 lease, make an objection in court, integrate non-
20 legal issues into decision-making.
21 And so our suggestion was an alternative.
22 Looking, for example, at the fact that California is
23 now requiring six credits, we've suggested that as an
24 option, not as a mandatory requirement, that you
25 allow a set number of credits, we suggested fifteen,

to substitute for experiential learning, and that you provide a link between practice and legal education and the admission to practice law.

The third thing that we looked at was, as a general proposition, neither the current bar exam or the proposed test are adequate measures that will prepare a candidate for the practice of law. But with regard to minorities, the performance gap on standardized tests is complex, and no one has a good reason for why it exists. And we wanted to ensure that this proposed change would not worsen it. We now know that the MBT - - - MBE counts for more under the proposal. Studies have shown that women don't perform as well as men on multiple-choice questions. And I - - - I - - - I would like to provide the committee with a law review article just published November 2014, Massachusetts Law Review, entitled, "Testing, Diversity, and Merit". It's authored by three individuals, Andrea Curcio, Carol Chomsky, and Eileen Kaufman. And the goal of that report was to look at whether we could better predict assess - - - better predict success and reduce the impact of test score disparity by modifying the bar licensing process.

So one of the things that we've asked is

1 why not pre-test some questions? The committee is
2 not at all, and doesn't really know, whether the UBE
3 would produce a disparate impact, but there are
4 experts who could advise the Board of Law Examiners.
5 And pre-testing, for example, over the next to three
6 to four administrations of the exam would be one
7 vehicle to gather this data.
8 And just the last point that I would like
9 to make is one grounded in accountability. We would
10 be ceding control in - - - under this UBE and New
11 York Law Exam proposal - - - to the National
12 Conference of Bar Examiners, when their response to
13 the lower pass rates on the July 2014 exam - - -
14 which is our large - - - have largely been
15 attributable to the Multistate Bar Exam, and this is
16 really a - - - a summary of comments from one of our
17 committee members - - - is that they don't really
18 know, but we should trust them that they don't - - -
19 that we, being - - - being law schools, you should
20 not be admitting who you're admitting, as they can't
21 pass our test. And what and how you teach your
22 students doesn't prep - - - prepare them to pass our
23 test. There has been no offer to further investigate
24 or study the issue.
25 And I am not sure that I really care a

great deal about other states, but I do want New York to lead and not to follow. And so how and what we do by ceding control to an organization that appears to have little accountability and without extracting any concessions really is a concern to our committee and a concern to me.

I can't say that I know that - - - that Marc Morril of the City Bar suggested that we should a formal assessment. Following the adoption of this proposal we should do a formal review and a report, and it should look at whether or not this proposal advanced mobility, and then whether or not there was a disparate impact, and then we should look at - - - at any negative trends.

But to my mind, three years after the adoption of this proposal is too late. We should be trying to gather that data and - - - and get some answers from the National Conference of Bar Examiners now and not later. So I thank you very much.

JUDGE RIVERA: Thank you.

MS. GOLD: As it was stated, my name is Sarah Gold. I'm the chair of the Young Lawyers section of the New York State Bar Association. We currently stand at 3,200 members, and my constituency are lawyers in practice ten years or less as well as

the law students in the State of New York.

This has been a matter of great discussion among our section's leadership. Namely, we've had an opportunity to discuss this at length during the annual meeting week last week. Of those things that were raised - - - for those of us who have been in practice ten years or less, our career paths are not set in stone. We are trying to find our way, trying to find our place in the world.

And the biggest concern that was raised are for those of us who hadn't taken the opportunity to take exams in neighboring states, we do not understand where this new proposal would leave us. Would the other neighboring states fall in line as far as keeping reciprocity the way they - - - the way it is or would we be forced to effectively retake the exam in order to be able to practice in neighboring states?

Also, the other thing that was mentioned by many of our members is it has been greatly served by them to be able to take New York law courses. And hindsight being 20/20, at the time when you're taking them in law school, you're not necessarily seeing the big picture. You're seeing, you know, the oncoming exam, and you're prepping an - - - an opportunity to

take that exam and pass it the first time. I, myself, took courses specifically to pass the New York State Bar Exam. And now being, you know, as - - - as far removed as I am, which isn't that far, I found that the dividends that those courses have paid me, as a solo practitioner, far outweighed the experience of suffering through them at the time.

That being said, I have colleagues of mine who, when they decided they were not going to practice in New York, dropped New York practice, because, you know, seeing the forest for the trees, if they didn't have to pass the New York State Bar Exam and they didn't have to know that information, they weren't going to take the exam.

Mainly we tried to survey our members in order to find out what they believed to be the impact of the UBE. And of the 905 respondents that we received information from, 62.2 percent found it very important to have the prestige of holding a New York State license. 65.8 percent found it very important to be - - - have familiarity and competence with New York practice. And the most telling stat was among attorneys, if bringing on the UBE, they were concerned about the diminution of the value of the value of their New York license, 75.6 percent of the

1 respondents.
2 And I'll turn this over to Mr. Miranda for
3 conclusory remarks.
4 JUDGE RIVERA: Thank you.
5 MR. MIRANDA: Thank you. The New York
6 State Bar Association agrees that New York State
7 should embark on - - - upon creating an exam that is
8 greater than our current model, a bar exam that truly
9 tests the ability to practice law in New York and
10 keeps the New York license as the gold standard for
11 lawyers.
12 We submit, however, that the UBE, under its
13 proposed configuration, does not lead us in that
14 direction. We ask the Chief Judge and this task
15 force not to be unnecessarily hasty in its decision.
16 There needs to be more time to study the effect of
17 this proposal.
18 To date, we have seen scant proof regarding
19 the potential for disparate impact of this new exam.
20 It is not sufficient to say let's try it for a few
21 years and see what happens. It is - - - without
22 further study, we may well be disenfranchising
23 important groups of people from the privilege of
24 practicing law in New York. And it is a privilege.
25 A privilege that New York State, and not some other

1 entity, should control.
2 Finally, New York State must be diligent in
3 providing an examination that fully tests the
4 knowledge of New York law and the skills necessary to
5 practice in New York. The current exam does not
6 fully get us where we need to be. The proposed UBE
7 exam does not get us there, either. We must not
8 change merely for the sake of change. We here in New
9 York State can do better.
10 And we are confident that with the
11 leadership of Chief Judge Lippman and the dedication
12 of this committee working together with the organized
13 bar and the great law schools of this state, we will
14 do better. On behalf of the Bar Association, I thank
15 the Chief Judge, Associate Judge Rivera, and this
16 esteemed committee for starting us on the path to a
17 bar exam that truly and comprehensively tests the
18 ability to practice law in New York. Thank you.
19 JUDGE RIVERA: Thank you so much. Let me
20 start off with a couple of questions, and I think
21 they're best put to you. You've - - - you've raised
22 them in your closing. You've raised them in your
23 opening comments.
24 So I wanted to discuss a little bit more of
25 the New York State Bar's conclusion that New York law

is so unique and different from the law across the country and how you came to that conclusion. Was there a particular analysis you did, jurisdiction by jurisdiction, just to help inform the committee of - - - of where this conclusion comes from? We've had differing testimony on that particular issue and that's why I'm asking.

MR. MIRANDA: Right. Well, I mean, we've - - - we've brought this to the house, and that was one of the concerns that was raised by several members of our - - - our House of Delegates. New York law is very specific when it comes to criminal procedure. New York law is specific when it comes to real property and family law. In the area of intellectual property law that I practice, which is federal, when you get to trade secret law, we've got the - - - the Uniform Trade Secret Law that's applicable in forty-five states out of fifty. New York's the one that doesn't.

It's across the board, across the spectrum of substantive law, where New York has carved out a special and unique practice area. That is good and it's - - - and it's - - - and it's - - - and it's bad. You need to - - - you need to be versed in New York law to practice in New York. So of course

there's overlap when we're talking about, you know, general principles of tort or contract law that we have throughout the state.

And Eileen advises me of Justin Vigdor, past president of the New York State Bar Association, who - - - who did comment that New York - - - and who's one of New York's five uniform law commissioners for twenty-six years. And he stated that New York does not consistently adopt and pass uniform laws. We have a terrible time, he says, getting uniform laws through the legislature, and when we do get uniform laws passed, we have a New York version of those uniform laws. And it's really a question as to whether they're really uniform. And this was a statement by our past president and on the house of a past member of the Uniform Law Commission. So we have issues that are unique to New York.

JUDGE RIVERA: No, well - - - well, I understand your point, and I thank you for that answer. I'll just comment as a former full-time educator, the assumption as an educator was that to understand any differences or any trends, you had to understand what would have been the - - - the - - - either the major trend, the minority position, the majority position. And I'll ask that of Dean Lane.

He's conveniently walked out at this point, but I'll get him when he comes in.

But I - - - since your mentioned your own particular practice area, as just a quick question to you, does it not seem that that - - - what I would believe as an educator to be true - - - true from the practice side of it, that one needs to understand how something is different by looking at what you're different from.

MR. MIRANDA: Absolutely. But the most important thing is to know - - - know the law in your home jurisdiction.

JUDGE RIVERA: No. Understood, understood. So let me just take the second question or the second area of the the - - - of some of your first and - - - and last comments about the gold standard.

We have heard also testimony that when you think about New York as the gold standard, that that is driven not so much by the exam but by the nature, as you yourself acknowledged, of the practice in New York; that it is not only the law but it is that interpretation of the law, the judiciary's own approach. It's a very strong judicial branch - - - and I'm happy to acknowledge that we have received that kind of testimony - - - and - - - and that the

practice, then, is different in that way, and that when practitioners think of the gold standard, they're thinking not - - - not just of passing one exam, albeit it a two-day rigorous exam, but not just about the exam but about the actual day-to-day practice in the state that is what makes this a different, unique, driving force nationally and internationally.

So I wanted to ask if - - - if there was a discussion about that thinking about the gold standard and what might be your response?

MR. MIRANDA: I - - - well, I - - - I - - - I agree wholeheartedly. I - - - I think the - - - when I'm referring to the gold standard, it's not that our New York State Bar Exam is, in fact, the gold standard, but it's the ability to practice here in New York that's - - - that's the gold standard and our courts and our practitioners and our laws. New York laws are respected throughout the world. We - - - we have been working on a - - - a forum for New York State as a forum for international law. We want attorneys to be able to - - - to bring their disputes here to New York. And they're - - - they - - - New York law is oftentimes the law that is followed in contracts, et cetera, throughout the world. And that

is important.

But our bar exam is a gatekeeper for the practitioner here. And so even though our - - - our - - - our bar exam might not necessarily be the gold standard today, it is the key to entry into what, I think we can all agree, is, in fact, the gold standard, the ability to practice in New York and the ability to practice before New York courts.

JUDGE RIVERA: Thank you so much. Michelle, you had a question?

MS. ANDERSON: Yes. Mr. Miranda, I appreciate your - - - and the testimony of your team.

MR. MIRANDA: Thank you.

MS. ANDERSON: And I'm wanting to ask about this question, the - - - the president of the Women's Bar Association was concerned about the - - - the New York Bar Exam becoming much easier. Do you share that concern because of the smaller coverage or the - - - the narrower coverage for New York law?

MR. MIRANDA: I don't think it's a question of easier or harder. It's a question of focus.

MS. ANDERSON: Okay.

MR. MIRANDA: Under the current exam, we have six hours and fifteen minutes focused on New York law. And under the new proposal, it's going to

be sixty. So we're looking at about, you know, one-sixth or less than one-sixth. So it's the focus. I'm - - - I don't know the - - - the - - - that the issue is necessarily that it's going to be harder or easier. The issue is going to be less focused on New York law.

MS. ANDERSON: And I guess one of the things that I'm interested in, both being on the - - - on the task force here and also as a dean, is - - - is thinking about whether or not the structure under the UBE does make it harder or easier. You know, so I was - - - I'm interested in - - - in your thoughts about that. And - - - and this - - - the fact that this is a separate - - - this was called a do-or-die exam from an earlier affiant, someone who was testifying, so that it's not - - - you know, you could ignore it. It's ten percent of the total bar under the status quo.

But under the proposal, it's a separate up or down vote on New York law. And in some ways, doesn't that increase the focus on New York law? To be sure, it's tested in a different way and in a more limited fashion. But it requires separate passage of a test that's exclusively about New York law. Whereas under the status quo, as I understand it, one

1 could not do as well on New York law at all but make
2 up for those points in the uniform - - - in the - - -
3 in the tests of the - - - of the MBE and the
4 Multistate Essay Exams.
5 MR. MIRANDA: Well, that very well may be.
6 Whether it's going to be harder or a greater barrier
7 to entry by having a multiple choice, it's going to
8 depend on where you place that - - - that number, as
9 we stated, the - - - the number required for the
10 number of questions you need to get right in order to
11 pass the test. So - - - but that's a - - - that's a
12 determination that can be made on any test.
13 MS. ANDERSON: Right.
14 MR. MIRANDA: Do you need to get a
15 particular score? So you just make it - - - it's
16 harder, you need to get 100 - - - if you were going
17 to say all right, you need to get 100 on the fifty-
18 question exam, well, yes, then it would be very
19 difficult. But if you're telling me well, only need
20 to get fifteen right, well, then, it is a separate
21 exam and it is a do-or-die, but it's not quite as
22 difficult.
23 MS. ANDERSON: Right.
24 MR. MIRANDA: So that's - - - we're just
25 talking about, you know, shading there. So I think

that - - - and I mean I don't think that's really our - - - necessarily our concern. I - - - I'm going to leave it to the - - - you know, the Board of Bar Examiners to - - - to - - - to put it at a level that's going to be appropriate, and I hope that it - - - I hope that it is.

But our concern is a - - - is a - - - I think a broader concern. The concern that, you know, you - - - you do have essays that require you to understand New York State law. You know, we had a - - - a meeting with the - - - with all the - - - the law deans that - - - that I - - - I was privileged to be at. And, you know, the issue was raised as well, we've got, you know, seventy-five percent of our law students taking, you know, New York State Trust and Estates. We don't have seventy-five percent of the practitioners taking that. That may be five percent of New York State practice in - - - or ten percent practice in that area, but they need to take that so they understand what the New York State law is. And that's what we think is important, to keep that significance.

JUDGE RIVERA: Thank you. Yes?

MS. ATERIAN: I - - - I - - - I'm trying to figure something out, and I'm hoping you can help me.

Because when you describe the essay questions, just trying to - - - and having had the lovely experience of taking the New York Bar without any of the funny stuff that we're talking about now, you know, the - - - the assumption - - - I think what I'm hearing you say is okay, we now have these essay questions. Let's talk about the essay questions.

But they - - - they - - - it's the focus. The focus is New York law, right. But isn't it - - - well, I won't say it - - - I won't say whether it's true, but it appears to me, anyway, that a lot of what's really being tested there are - - - are the general principles. I mean, that is New York law. It is New York law. It - - - it's not like okay, and if you got - - - because New York law is - - - is not just, you know, rule of exceptions, because, truthfully, I don't think it would be as powerful if that were the case.

So there are - - - I didn't understand this being about well, it's going to be tested on the uniform laws. I think there's a diff - - - I mean, I think there - - - in my head there's a nomenclature problem with that, because it's on the Uniform Bar Exam; what are you testing? Well, we want you to know the uniform laws, you know. And my thinking on

1 this is that the New York State Bar Exam now, the
2 essay questions, actually do test a lot, not on
3 uniform - - - you know, uniform laws, but on the - -
4 - the - - - the - - - the basic structure of these
5 subjects where there is a tremendous amount of
6 identity. I mean there are differences, big - - -
7 huge differences in New York, as there are in other
8 states.
9 So I'm concerned when these things get
10 described because I - - - I mean, I may be wrong,
11 heaven knows I am frequently, but - - - but I don't
12 think it's fair to say that the New York Bar Exam now
13 it's just - - - it - - - its focus in those essay
14 questions is New York law. I think they're set in
15 New York. I think they're New York peculiarities.
16 But I don't think it's - - - you know, it's just the
17 - - - the weird - - - the weirdness and the
18 specialness of New York law that's tested there.
19 Because New York lawyers need to have the basic upon
20 which variations - - - and I think there are some
21 parts of our law, obviously, that are just us, you
22 know, CPLR, you know. I can just remember somebody
23 screaming about that in the bar review, so it made a
24 big impression on me. But I - - - I - - - I mean,
25 I'm curious as - - - as to whether you think I'm - -

- I'm wrong. And you can say I'm wrong. People say that to me all the time.

MR. MIRANDA: I'm - - -

JUDGE RIVERA: And she bounces back beautifully when they do.

MR. MIRANDA: I'm not going to say you're wrong. But I am going to say I didn't say weird. I said unique. So - - -

MS. ATERIAN: Okay, you said focus. Let's go back to focus. Okay.

MR. MIRANDA: And - - - but I - - - you know, I agree. I mean the essay questions are designed to have - - - to - - - to see if you can do issue spotting and reasoning and analysis. And part of that issue spotting, though, is not just of general principles of law. And under the New York essays, it will be - - - there will be some issue spotting that is New-York-specific.

MS. ATERIAN: Some.

MR. MIRANDA: Maybe - - - maybe just a portion of it, maybe you'll get some extra points, because you knew what the - - - the - - - the little unique, rather than weird, part about New York State is.

In addition to the question, though, the

fact that now I'm never going to practice in family law but I have to understand family law in New York State, is the preparation. And so we only have the five essays, and - - - and just even less than that are focused in any way on New York law. But you need to prepare. You need to understand all the other topics that might be on the exam if you're going to practice in - - - in New York.

So I don't think that your - - - your assessment of the current exam is incorrect. I think I said right at the beginning, I don't think our new - - - our current exam goes far enough to prepare practitioners. And so we encourage this discussion. But what we're doing is we're moving away from issue spotting of New York law issues to issue spotting of uniform law issues. And our position - - -

MS. ATERIAN: Not uniform. Let's not call them uniform.

MR. MIRANDA: Okay.

MS. ARTERIAN: General principles.

MR. MIRANDA: General principles.

MS. ARTERIAN: I mean I - - - I really do think that part of this is - - - I'm hearing it a lot in the testimony and that's really why this is the first time I've raised it, because I do think - - - I

1 hear uniform laws. And back, you know, from the old
2 days, I thought uniform laws were things that the
3 commissioners came up with and states passed with a
4 lot of variations. But I - - - I think of - - - sort
5 of things as the underlying. What is the - - - the
6 principle?
7 MR. MIRANDA: But when you get to issues
8 like family law, which are very state-specific - - -
9 MS. ARTERIAN: Oh, yeah. Oh, sure.
10 MR. MIRANDA: - - - and trust and estates,
11 and - - - and criminal law, there is - - - there is a
12 difference between where your focus is on your law
13 school preparation and your preparation for the bar
14 exam.
15 MS. ATERIAN: So it's a preparation issue?
16 That is, in other words, it - - - it moves people in
17 their - - - in - - - in their course of choices - - -
18 choice of courses and otherwise to think I got to
19 take this to - - - because it's important because I
20 want to take - - - to pass the bar.
21 MR. MIRANDA: The New York portion of it is
22 going to be diluted.
23 MS. ATERIAN: Right. No, I under - - - I
24 understand. Thank you.
25 JUDGE RIVERA: I just want to clarify

1 something. It might just have been that I misheard.
2 I mean, I don't think the committee and the Board of
3 Law Examiners takes the position that the exam is the
4 way people prepare to practice in New York, right?
5 It's a licensure exam. We're confirming a basic
6 level of competence. That preparation has to come
7 before then. It has to come in the law schools and
8 so forth. So that's - - - that's sort of the focus.
9 And I'll have some questions. I'm sure - - - I'm
10 sure others will of Dean Lane when - - - when he has
11 his opportunity to talk about that preparation.
12 But I - - - I think, in part, we have heard
13 responses to some of what you've just said which is,
14 you know, if someone intends to practice in New York,
15 they're going to take courses that help them do that.
16 They should not be intending to take a bar review
17 course to help them learn to practice in New York.
18 And so I think that's a bridge between some of the
19 earlier testimony, your own testimony, and other
20 testimony, that - - - that we've heard. And I just
21 wanted to make sure that I - - - I had not
22 misunderstood the Bar's position that you may have
23 some concerns about, as you say, the gatekeeper. But
24 that the preparation is something that comes before
25 then. The exam is not designed for people to prepare

1 to practice by taking the exam.
2 MR. MIRANDA: Abso - - - absolutely.
3 JUDGE RIVERA: Thank you so much. Was
4 there any other question? Diane?
5 MS. BOSSE: I - - - I have not so much as a
6 question as a comment.
7 MR. MIRANDA: Okay. Thank you.
8 MS. BOSSE: And thank you for your - - -
9 for your testimony here. I have a comment and a
10 request.
11 MR. MIRANDA: Okay.
12 MS. BOSSE: The - - - the comment is that
13 I'm concerned about the uniform law issue that's been
14 raised, because I - - - I think that's a misnomer in
15 terms of looking at what the coverage of the Uniform
16 Bar Exam is. It doesn't rely on uniform laws
17 exclusively, although it may reference that in - - -
18 in authorities, but on general principles found in
19 things like restatements and legal encyclopedias like
20 American Jurisprudence and - - - and case books and -
21 - - and things of that nature. So I think to - - -
22 to say uniform laws and that's all that's tested is -
23 - - is a - - - is a - - - is incorrect.
24 You mentioned that there are complicated
25 nuances of New York law. You've mentioned

1 specifically the intellectual property area in which
2 you practice. And those are not areas in which the
3 bar exam tests. Those are not matters of minimum
4 competence. So while I understand New York has some
5 complicated nuances and some laws that are different
6 at some higher level, I don't think we focus on that
7 when we're looking for a licensure test that assesses
8 minimum competence at the point of entry to practice.
9 So here's my request. You said that your
10 members, I understand, are concerned that the New
11 York Law Exam would not adequately assess competence
12 in New York law. We have a proposed content outlined
13 for that exam, and I would welcome the State Bar
14 Association taking a look at that, having substantive
15 law committees look at that and see, does this
16 outline capture those areas of New York law that are
17 different, unique, and important for the new lawyer
18 to know in order to be able to practice law in New
19 York?
20 We would very much welcome those comments.
21 We'd welcome those comments on our current content
22 outline as well. But the one that we have posted on
23 the committee website, and that we're currently
24 working from, is shorter and it's annotated and it
25 would be very useful for the Board of Law Examiners,

and I believe for the committee, to have your input on what it is we ought to be testing when we're testing New-York-specific law. So - - -

MR. MIRANDA: Absolutely. I'd be happy to. Thank you very much.

JUDGE RIVERA: And - - - and just to add - - - to remind everyone, we have a very short turnaround time for this so we are closing down comments March 1st and then we will be entering our deliberative process to finalize our report. So we know it's a short time frame, but whatever you can do to get that feedback to us as quickly as possible, to get to the board as quickly as possible, would be most helpful.

MR. MIRANDA: I - - -

JUDGE RIVERA: But we understand it's a short time frame for you also.

MR. MIRANDA: I appreciate that, too, and I don't - - - I don't want to mislead the committee.

JUDGE RIVERA: No, no. That's - - - I - - -

MR. MIRANDA: We're going to look at it. We're not going to be able to get back - - - do a - - - an, you know, an assessment of the content before March 1st. One of the things I'm asking for in my

ask here in the conclusory remarks is that there be more time to study this so we can do exactly what you asked.

JUDGE RIVERA: Thank you so much.

MR. MIRANDA: Thank you.

JUDGE RIVERA: And I think Seymour had a question.

MR. JAMES: Yeah. I - - - I just wanted clarification about something that Ms. Millett testified about. She referred to California requiring six credits. I - - - I don't know whether they were clinical courses or experiential courses. But are those six credits made part of the - - - are they part of the California Bar Exam or is it a prerequisite for admission?

MR. MIRANDA: I'm going to let Eileen answer that. Thank you.

MS. MILLETT: It's six credits of experiential learning, and it's a prerequisite for admission.

MR. JAMES: So it has nothing to do with the bar exam?

MS. MILLETT: Well, what - - - what we're - - -

MR. JAMES: It's not part - - - because, I

mean, you were talking about having, I guess, sixteen credits replace part of the bar exam. But so it's - - - it's not what they're doing in California. I just wanted to clarify.

MS. MILLETT: Hav - - - having the option - - - having an option provided to allow up to fifteen credits of experiential learning replace the MPT portion of the exam.

JUDGE RIVERA: That's your recommendation?

MS. MILLETT: That's right.

JUDGE RIVERA: The question was about California.

MR. JAMES: Right.

MS. MILLETT: Right. No, no, he - - - but he was - - - he was referencing - - -

MR. JAMES: Right. Okay.

MS. MILLETT: - - - and asking. The linkage to California is just that California, as - - - as an admission, as - - - as part of the requirement to be admitted, is now requiring those six credits of experiential learning. So really, the comment was just that there's a movement in that direction to allow and to require - - - actually, in California to require - - - more experiential learning, which we don't do now.

JUDGE RIVERA: Right. And - - - and experiential learning defined as?

MS. MILLETT: Clinical legal education.

JUDGE RIVERA: Externships?

MS. MILLETT: Externships.

JUDGE RIVERA: Okay.

MS. ATERIAN: Skills classes.

MS. MILLETT: Skills classes, all - - - all of that.

MS. ATERIAN: It's a - - -

MS. MILLETT: All of that. You know, I just want to respond - - -

MR. HERNANDEZ: And that's within the law curriculum, though, right? Is that correct?

MS. MILLETT: Yes. Yes, within the law school curriculum.

You know, Judge Rivera, you had asked earlier about whether there was - - - somebody could point you in the direction of data on - - - on disparate impact. And there were just two quick things that I wanted to point you in the direction of. The 1992 City Bar report on "Admission to the Bar in New York in the 21st Century", that report did have data collected that confirmed the existence of disparate impact. And - - - and just the two numbers

1 I will give you is that the pass rate for whites was
2 between eight-five and eighty-eight percent and for
3 blacks between fifty and fifty-eight percent.
4 The other thing I would just point you to
5 is the 1998 Law School Admission Council report which
6 looked at first time bar passage rates. And those
7 rates were ninety-two percent for whites, sixty-one
8 percent for blacks, sixty-six percent for Native
9 Americans, and seventy-five percent for Hispanics.
10 So I mean, there - - - there is data out
11 there that - - - that does more suggest that there
12 are difference that - - - difference that have
13 persisted over time even though the breadth of the
14 differential has decreased over time. So I just
15 wanted to - - -
16 JUDGE RIVERA: No, I appreciate that.
17 MS. MILLETT: - - - give you that
18 information.
19 JUDGE RIVERA: And the 1992 report is also
20 on first-time takers?
21 MS. MILLETT: I think so, yes, first-time
22 takers.
23 JUDGE RIVERA: Is there data on - - - on
24 people who retake?
25 MS. MILLETT: I don't think that they

1 looked at retakers.
2 JUDGE RIVERA: Thank you. Anyone else?
3 Yeah, Michelle, please.
4 MS. ANDERSON: On - - - on this question,
5 Eileen, that you've - - - that you've brought up that
6 there has been data about disparate impact of passage
7 rates under what is a test that's more akin to the
8 status quo than the UBE, what kind of data would you
9 want? I've - - - I've asked this before. What kind
10 of additional data would you want, if any? Or is - -
11 - is that sufficient to - - - in other words, I guess
12 I'm wondering what the - - - what the genesis of the
13 concern is and what data would allay your concern or
14 enhance your concern about disparate impact?
15 MS. MILLETT: Well, for example, I - - -
16 I'd like to look at the Multistate Bar Exam. And I -
17 - - I'd like there to be some judgment and assessment
18 of how women perform on the Multistate Bar Exam
19 versus men. How - - - how African-Americans perform
20 - - - perform on the Multistate Bar Exam versus - - -
21 versus whites.
22 MS. ANDERSON: So you're talking about,
23 just to - - - just to drill down, you're talking
24 about the disparities on the basis of question and by
25 demographic group and gender?

MS. MILLETT: Precisely.

MS. ANDERSON: Okay.

MS. MILLETT: Precisely.

MS. ATERIAN: And - - - and, Eileen, just to follow up. So that would be done with existing data, right? I mean, you're talking about - - -

MS. MILLETT: Well, I - - - I don't know that we have existing data.

MS. ATERIAN: No, I don't think the states do.

MS. MILLETT: That's - - - that's the part of the problem - - -

MS. ATERIAN: Yeah, I mean - - -

MS. MILLETT: - - - you know, Dean Arterian.

MS. ATERIAN: Right.

MS. MILLETT: You - - - eith - - - either there hasn't been the ask or - - - or people have not necessarily wanted to be forthcoming. But - - - but before - - - but that's why I suggested, I think at the end of my testimony, that we might do this over three or four administrations and then begin to gather the data, because, unfortunately, part of the problem we have is that it's difficult to be - - - to begin now to gather data and then have something we

compare it to. Because, candidly, if you're looking at something from 1992 and - - - and 1998 - - -

MS. ATERIAN: Um-hum.

MS. MILLETT: - - - I don't know that you're making a - - - a valid comparison. But I do think we need to begin to do it now as opposed to waiting.

MS. ATERIAN: Just so I understand what the comparison would be. Are you talking about the comparison under the current - - - you know, the - - - the current bar exam in New York State?

MS. MILLETT: I think - - - I think what we would do - - - let's assume, for the sake of argument, this proposal is implemented. Over the next three to four administrations of the - - - of this exam, we would look at the data.

MS. ATERIAN: Right, um-hum.

MS. MILLETT: And then make a comparison.

MS. ATERIAN: Yeah. Okay.

MS. MILLETT: You know, what - - - what happened on the fourth time it was administered?

MS. ATERIAN: Right.

MS. MILLETT: What happened on the second time? What happened - - -

MS. ATERIAN: That - - - that - - - that I

- - - that I get.

MS. MILLETT: Okay.

MS. ATERIAN: I'm just - - - okay. Thanks, Eileen.

MS. MILLETT: Thank you.

JUDGE RIVERA: And just to confirm, Eileen, I've said it before and I've certainly mentioned it to the Bar and - - - and to you what - - - what people refer to as the disparate impact is about these disparities. That, I've said, from the committee's perspective, is a very complex and nuanced issue; it does not turn solely on walking in the morning of the bar exam to take the bar exam, that there is - - - there are many challenges to all kinds of students. This is an access-to-the-profession question in many ways, before you even get to the bar exam, that really make it, perhaps, more difficult for those students as first-time takers to - - - to succeed on the bar exam.

So I wanted to know if there was anything you wanted to add from the committee or if you disagreed with that way of thinking about it from the committee's perspective? That we're not just talking about changing who writes the essays, that - - - but we are recognizing that - - - that there are

1 challenges that have nothing to do with the bar exam
2 itself that perhaps face different - - - different
3 populations face.
4 MS. MILLETT: I - - -
5 JUDGE RIVERA: With respect to admission to
6 New York - - - to New York State.
7 MS. MILLETT: I think in my testimony,
8 Judge Rivera, I indicated that the subject - - - I
9 think the three that I referred to, but particularly
10 this subject, having to do with disparate impact, is
11 a very complex, very layered, very nuanced issue.
12 And I completely agree with you that we don't begin
13 the discussion at the moment that the individual
14 walks into his - - - his or her law school class and
15 then at the end of three years, sits to take the
16 exam. I think there - - - there are many, many
17 issues that go into this. There are pipeline issues.
18 There are - - - there are socialization issues.
19 Those three words, "complex", "layered", and
20 "nuanced" apply. So - - -
21 JUDGE RIVERA: Um-hum. And - - - and your
22 point is do not make it worse. If we are at status
23 quo - - -
24 MS. MILLETT: Precisely.
25 JUDGE RIVERA: - - - from one page to the

other, we still have an issue.

MS. MILLETT: Precisely.

JUDGE RIVERA: And you - - - and I would take it the Bar and the committee would still be saying we need to really focus on this issue.

MS. MILLETT: And - - - and part of the reason that we're saying, let's look at this and let's focus on this, is that we cannot at all say that the UBE will make it worse or has created a problem or even - - - or - - - nor are we making a comment on the UBE, but we'd like to ask that question, and we'd like to see if we can come close to getting answers to that question before we proceed.

JUDGE RIVERA: Thank you. Yeah, go ahead, Seymour.

MR. JAMES: How - - - how exactly are you suggesting that we look at that data?

MS. MILLETT: You know, I knew you were going to ask me that question or somebody was going to ask that question. And I - - - I'm not a psychometrician. I - - - I don't know how we would go about doing it. I do know that you can hire experts and - - -

MR. JAMES: No, but in - - - in what form

1 would those questions be looked at? Because you said
2 as - - - over the next four administrations of the
3 exam, we would - - - there would be questions that -
4 - - that could be, I guess, examined. Are you
5 suggesting that the UB - - - some of the UBE
6 questions be incorporated into the New York State Bar
7 Exam?
8 MS. MILLETT: No. I'm - - - I'm saying,
9 for example, one of the things you might do is look
10 at the Multistate Bar Exam and - - - and look at how
11 different ethnicities performed on the Multistate
12 State Bar Exam. I - - - I don't know if that data
13 exists currently, but it would be useful, I think, to
14 have that data and to look at that data.
15 It might be useful if the National
16 Conference of Bar Examiners, for example, in the
17 states that currently administer the UBE, the ones
18 that have - - - because not all of them do - - - any
19 kind of significant minority population began to look
20 at and gather data that would give us some answers to
21 some of those questions. How are people performing
22 on multiple-choice questions? How are they
23 performing on the Multistate Bar Exam?
24 MR. JAMES: Okay.
25 JUDGE RIVERA: Thank you. You have any

other questions?

MS. MILLETT: I - - - I hope that answers your question.

JUDGE RIVERA: Okay. Thank you so much and thank you to the New York State Bar.

MS. MILLETT: Thank you.

JUDGE RIVERA: Very much appreciate the wisdom and the experience that you bring to this question and your testimony today. Thank you so much.

MS. MILLETT: Thank you.

JUDGE RIVERA: Okay. We will now hear from Eric Lane, Dean of the Morris A. - - - excuse me, Maurice, excuse me, A. Deane School of Law at Hofstra University. And thank you for making the trek today through the snow and so forth - - -

MR. LANE: My pleasure, my pleasure.

JUDGE RIVERA: - - - on our wonderful Amtrak system.

MR. LANE: And, actually, I have never had this happen. They said they were going to be an hour late taking off, and the next thing they said they were going to be twenty minutes late, so I've never seen it come earlier than - - - than late.

JUDGE RIVERA: Meant to be for you to be

1 here today.
2 MR. LANE: For you, for you. So I want to
3 thank you all, of course, Judge Rivera, members of
4 the committee, fellow deans, for providing this
5 opportunity to testify about the UBE.
6 And I want to say I'm here to support the
7 UBE, as my testimony details, for the reasons set
8 forth in there, for the reasons Judge Lippman placed
9 in his New York Law Journal article of a couple - - -
10 again, what, it was a month ago, some time ago.
11 But I - - - but what I don't want to do
12 today is I'm not going to read my testimony that you
13 have in front of you. Reminds - - - would remind me
14 of those old law school classes where the faculty
15 member gets up in front and just reads to you and you
16 fall asleep in class. So I hope you'll let me just -
17 - - I really want to take the time to comment on some
18 of the considerations and criticisms or concerns that
19 I've heard here in the reading of - - - on the
20 materials and at the dean's meeting that David
21 Miranda had referenced earlier in his testimony.
22 And I want to deal with two things, one
23 about New York law and one about disparate impact.
24 And I think one of the problems starts off with this
25 idea of the gold standard, New York is the gold

standard of law - - - of practice, of practice. So I, myself, come out of a small firm background before I went to become a professor. Most of our graduates - - - you know, we have our fifteen percent that go to big law, eighty-five percent of our lawyers, or say, five, ten percent, go other places.

But most of them go to one firm, to middle-sized firms, government, and there they do the great things, hopefully, that lawyers do. They represent people. They speak about the values of our democracy just by example and by hopefully expressing it. And that practice, I don't think, is any different than the practice of law that lawyers hopefully do throughout the country.

And I think when we address the gold standard of practice - - - and I think that leads us astray to think about how - - - about access to New York. I think that when we talk about the gold standard, you're probably talking about big law, because, you know, for the legal aid lawyer in New York City or the legal aid lawyer in Albany or for any of these other lawyers, it's very, very hard work without any of the aura of living, you know, on - - - in - - - under some halo.

And I - - - and I only raise that, not to

be critical of that comment, but I think the comment itself misleads us into what it is that we're trying to do. And when you think about New York law - - - and - - - and I might also add that the bar, the New York Bar, makes absolutely zero difference to most of the lawyers that get hired in the big practice. They will pass any bar. They passed this bar. It's not a relevancy. And whether it's New York law or not New York law, it's not - - - it doesn't matter to them.

But I wanted to think - - - I wanted to come to an exchange that I'm going to just detail a little bit that occurred at the dean's meeting that many of you were at. And that was a discussion about - - - from one of the - - - one of our colleagues there who's a practitioner, the former head of the - - - former president of the Bar Association, and he was articulating the view of members of the Bar, not his own view here. And he was saying that they were worried that people who they hired right away wouldn't be able to go and do something right away. They wouldn't be able to go and do a will or go to some court or do something.

And I was thinking to my - - - because the - - - because they didn't have enough New York law. And I was thinking to myself, and I actually asked

him, I - - - I was wondering whether when he hired someone, he inquired how much New York law did he know or rather, you know, how did the person, he or she, present themselves; what kind of problem-solving skills did they have; what kind of research knowledge did they have; how could they write; how did they present themselves; how was their coll - - - ability to collaborate with colleagues, with clients; how were those things coming through?

Is that what he was looking - - - and he personally said no, obviously, when you interview someone for a job, you really probably don't test them. You're going to rely on the fact that they passed the bar, I guess, or you're going to rely, I guess, on the fact that some law schools emphasize New York law more than other law schools, ask them maybe what they took.

But I think the - - - the point I'm making about that is I think that the skills that I just addressed are really the skills that young lawyers need, whether they'd be New York or anywhere else. It's what we - - - the entire movement of legal education is in the direction of training students in this way and not worrying about whether or not they know the oddities of New York law - - - and some of

1 those oddities are wonderful, more privacy under the
2 equivalent of the Fourth Amendment, you know, some of
3 the weirdnesses of the CPLR; I mean there are
4 differences but, really, is it that hard if someone
5 tells you to go research a case to find those
6 differences? I'm going to read the opinions of the
7 courts. They're going to lead me in that direction.
8 So I'm really - - - I - - - I honestly
9 don't think that the emphasis - - - and - - - and by
10 the way, we're dealing with that, as well, because
11 you're going to have a fifty question - - - I
12 actually would love there to be considered an
13 alternative like the CLEA people think about if we
14 could somehow test the capacity to actually do the -
15 - - have the skills that I was talking about, maybe
16 that would be a valuable thing. It would be a
17 valuable thing. I don't know how you'd do that.
18 But I - - - but, you know, I mean, I think
19 - - - and - - - and I know that Judge Rivera's asked
20 the law schools to go and try to find some of these
21 distinguishing things that are critical, in her
22 words, to making a difference, what we'd really have
23 to know to practice New York law. Is it distinct
24 from some other form of law? And - - - and so, you
25 know, it's a task that I'm hoping to get my faculty

1 involved in. So again, I - - - just on that point
2 alone, I - - - I just don't see that point. I - - -
3 I - - - it's not that we don't teach New York law.
4 We do teach New York law and a lot of our faculty
5 members will have some part of New York law in our
6 classes.
7 And I - - - I want to say one other thing
8 about it. I don't - - - I'm not crazy about the idea
9 that the bar drives our curriculum. That, you know,
10 because the bar does this we have to teach all these
11 courses in it. It's not that I don't believe that
12 New York law should be part of what we do. I
13 actually do think it should be part of what we do,
14 and it gives us a competitive - - - gives our
15 students a competitive example - - - exam - - - for -
16 - - advantage for practicing.
17 And I think also, as Michelle said, the
18 idea that you're going to have fifty questions on a
19 test, if they word that the way you're thinking about
20 them, are going to force us to do it more broadly,
21 not less broadly.
22 I want to come now to the last point. I'm
23 going to be short and then, hopefully, if there's
24 questions, answer them. This is this disparate
25 impact point, the effect on minorities. Now,

obviously, if this test had a horrible effect on minori - - - or a bad effect, a negative effect, I don't want to - - - I'm not mincing words here - - - it would be something we would have to really - - - and we should think deeply about it, and I, myself, am greatly concerned. In my own law school, we have thirty-nine percent minorities now. I've spent a lot of time trying to make sure that they are there, and I'm - - - and we have fifty-three percent women, referencing the prior testimony. So I wouldn't want to have a test where I had brought in, say, you know, thirty-nine percent of them and all of a sudden, you know, I'm worrying about the bar all the time and the like.

And I - - - our law school, we haven't done well all the time on the bar, and I've spent a lot of time thinking about why and trying different ways to improve it. My own experience on this is looking at it this way, when I look at our figures, and I've looked at them this year because we dropped seven points, and I read Nick Allard's stuff about blaming the bar.

But - - - but I - - - I would really try to dig deeply into it, who passes, who fails, what's the basis. Now, the clearest basis for failing the bar

at our law school - - - I don't know if this is true everywhere - - - if you're in the - - - the - - - the biggest indicator of bar failure is your rank in the class after law - - - at the end of your third year. That's the single biggest indicator, where you are. The low - - - so any - - - every law school will tell you, I think, don't - - - tell me later privately if I'm wrong on this - - - every law school will tell you that if you go down through the quartiles - - - you know, the top couple quartiles are going to pass 100 percent, and there are African-American people in there and there are, you know, all kinds of different people in there. And the lower you get in the class, the harder it is for them to pass the bar.

And, yes, it's true that all of us have had to take students - - - or most of us have, you know, as the applicant pool has declined, it's had a - - - and it's declined disproportionately among higher credentialed people - - - the lower you get on credentials, the more difficulty. I'd tell you that right now, basically, anybody 149, 150 in the LSAT, above, you know, decent GPA, their chances - - - you know, they're not correlating. They're not correlating. You get a 170 that fails the bar.

I - - - I can - - - if I took you through

that number range, you'd see that in our school, you would have - - - you wouldn't be able to predict other than the - - - other than by the - - - other than the school GPA. But once you get much - - - if you get too much lower, than you start to get correlation between the LSAT and passing the bar. And not so much GPA, because GPA at different schools, you could get a 3-something. You know, you don't - - - we don't check - - - at least I don't get the check every school we accept a student from on the basis of how - - - what the quality of that education, what's that 3-something mean.

So I - - - but I think that the problem solving - - - and this is the law school's responsibility first and foremost, not the bar's. I have to - - - it's my obligation in bringing - - - it's our obligation in bringing in students who might - - - who, you know, if I think - - - if we're bringing them in and I think they can be lawyers, because I'm not bringing in students who I don't think can be lawyers, it's our obligation to make, first and foremost - - - not the bar's - - - to make sure that we train them in a way that makes them able to pass the bar.

And so I - - - you know, I - - - that - - -

that's my comment on that. I don't see the bar - - - I don't - - - I mean it - - - since we have no base information for this bar, and we don't have any base information from the - - - the UBE, I don't see how we make those comparisons. I mean, I know you're all struggling with that same question, and I'm - - - I'm sorry I'm going over. Can I go over one last second?

JUDGE RIVERA: Yes, Yes.

MR. LANE: I'll answer any questions.

JUDGE RIVERA: Or more; a couple seconds.

MR. LANE: Okay.

JUDGE RIVERA: If you wanted to give a closing sentence?

MR. LANE: No, I don't need to conclude. I think I covered - - -

JUDGE RIVERA: You're good. Thank you. Thank you.

MR. LANE: - - - the things I need.

JUDGE RIVERA: Thank you so much and thank you for your comments. And you had actually stepped out of the room when I asked David something. I said and I'll ask you the same question, but you actually answered it with your comments, which was about - - -

MR. LANE: Okay. Then you don't need to ask me.

1 JUDGE RIVERA: Yeah. No, it was about the
2 analysis of New York law and New York coverage and I
3 take it, in part, that - - - that you're saying that
4 perhaps there's some tweaking, but - - - but you
5 don't foresee dramatic curricular changes at your law
6 school should the proposal be adopted? And - - - and
7 if there is, it would be in the direction of being
8 more focused on New York law?
9 MR. LANE: I don't - - - I agree with that.
10 I - - - I mean, we would have to look at what the
11 final - - -
12 JUDGE RIVERA: Um-hum, of course.
13 MR. LANE: - - - proposal is and talk to
14 the faculty. But I don't - - - I don't see this as
15 leading to dramatic changes. I know some people do.
16 Would we still have our New York civil practice
17 course? Yes. People who want to practice in New
18 York, they can take - - - they're free to take the
19 course. We're not going to get rid of the course,
20 because we don't have the course there for the bar.
21 We have the course there so some people who want to
22 really specialize in litigation in New York will take
23 it. Will there be fewer students? Probably.
24 JUDGE RIVERA: Okay. Thank you. And I had
25 a - - - a question about the experience of

experiential learning.

MR. LANE: Okay.

JUDGE RIVERA: And I had asked Ms. Lynch, who's going to do the little follow-up for me, but I was just curious. In - - - in your school, if - - - if you know the number off the top of your head, the number of students who are interested in taking a clinic, how many of them are - - - don't have seats available? Are you able - - - in other words, are you able to really provide for the student demand for clinical experience?

MR. LANE: So we have both full clinics, which are, I think, six credits or whatever, some large amount of credits, probably more than that. And then we have these practicums, that I don't know if you've got - - - if others on the panel have them, but they're smaller clinics, basically. So we have a tax practicum. They do less than we - - - than a criminal law clinic. I think that we cover everybody that wants to. I'm pretty sure we had - - - not - - - I'm not counting the experiential opportunities now. I'm just talking about the clinics people.

JUDGE RIVERA: Right. No, no, just from the clinic's perspective. That's what I was asking.

MR. LANE: We - - - if we mand - - - I mean

we don't cover everybody, because not everybody wants them.

JUDGE RIVERA: Yes.

MR. LANE: But we basically cover everybody that wants them.

JUDGE RIVERA: Right. Thank you so much. Hannah, you had a question?

MS. ATERIAN: No.

JUDGE RIVERA: Sorry. Anyone have a question? Michelle?

MS. ANDERSON: I just - - - I appreciate your - - - your testimony, Dean Lane. And I just wanted to - - - at one point you said we have no base information and so we can't make comparisons on the question of disparate impact. Could you tell me what you mean by base information?

MR. LANE: Well, Eileen actually raised some, you know, question that maybe there is some material out there. But as far as I - - - I - - - I think one way you could get materials on how "protected groups", let's call it that way for now, do on the bars, you could ask the law schools to break them all down.

We can do it. We've - - - I've done it in our law school, because I was interested in the

question. And I got interested because you were raising - - - it was raised in this whole discussion, and I wanted to actually look at it. So the law schools could provide you with those answers. It's a lot - - - you know, it's a pain to do it, but all of us have - - - we got - - - I think we all could break - - - you know, you know who passes, you know who fails, you know where they are in the class, you know what - - - you know what their racial identity is. So that would not be hard to look at that material and find it.

MS. ATERIAN: Can I ask a follow-up?

MR. LANE: Whether we should do it, I don't know, but we can do it.

MS. ATERIAN: I mean - - -

MR. LANE: Did I answer you first?

MS. ANDERSON: Yes, thank you.

MR. LANE: Okay.

MS. ATERIAN: I mean but - - - here - - - here's my question - - - I'm back to my - - - now I'm just - - - I drove - - - you know, the Thruway doesn't get a lot of credit for having us being - - - you know, taking time to drive across the state. I'm - - - I'm sorry I wasn't on - - - able to be on the - - - the train and suffer that way.

JUDGE RIVERA: It's the gold standard.

MS. ATERIAN: It's the gold standard.

MS. ATERIAN: Okay. But - - - but, I mean, one of the things I thought was that New York State was one of the few states where, in fact, there was people - - - people where they took the bar - - - I know, Diane, you can tell me - - - please tell me I'm wrong, if I'm wrong quickly so I don't embarrass myself first. But that one of the problems with the UBE is that - - - I don't say it's a problem with the UBE. The problem with the data is that states who are in the UBE, just like New York State, I assume it would be true for us, that the state decides what information to get from the people who take the bar. If the state decides to - - - to do that, the data is at least buried someplace. It - - - it - - - it can be found.

But if the state doesn't require it, the UBE has - - - is in no position to say, you know, go give it to me. You - - - we - - - we've had discussions that if you could get it from the law schools, perhaps, but who is the "they" that's going to get it from - - - from the law schools? Right.

MR. LANE: No, you have to get that - - - I mean, yeah.

MS. ATERIAN: Right. I mean that - - -

MR. LANE: I totally agree with that.

MS. ATERIAN: Okay.

MR. LANE: But, you know, if the law - - - if - - - the law schools all have it if they want it.

MS. ATERIAN: So you'd - - - you - - - what you'd say is that the law schools in New York State, perhaps, could be asked - - -

MR. LANE: Right.

MS. ATERIAN: - - - to get the information about their graduates who took the bar in the UBE states to do this because - - -

MR. LANE: You could do that as well, yes.

MS. ATERIAN: No, no, no.

MR. LANE: Yes, I see what you're saying.

MS. ATERIAN: Yeah, I mean if New - - -

MR. LANE: You mean if the comparison data - - -

MS. ATERIAN: Yeah.

MR. LANE: - - - once the UBE is - - - yes.

MS. ATERIAN: Because the - - - I think if New York - - - I think New York State has that information.

MS. BOSSE: We - - - we collect demographic information on the application.

MS. ATERIAN: Yeah, they - - - they collect it. And so New York State has that information. The - - - what's missing, I think, is number one, we don't know what will happen in New York State if, you know, when the UBE is - - - comes in, if that's what happens. And getting comparative data from the other states is dependent upon whether that state requires, as New York does, demographic information.

MR. LANE: Well, why don't - - - but it - - - wouldn't it help if you were just to measure New York takers under the UBE - - -

MS. ATERIAN: Sure. No, I mean - - -

MR. LANE: - - - and New York takers before?

MS. ATERIAN: I - - - no, no, no.

MR. LANE: Because that - - - this is New York we're worrying about, right?

MS. ATERIAN: No. I'm not - - - I'm not saying otherwise.

MR. LANE: No. I think you would agree on - - -

MS. ATERIAN: Yeah, I agree with that.

MR. LANE: Yeah.

MS. ATERIAN: I do. But I do think - - - I - - - again, I think we tend to blend things and we

1 need to - - -
2 MR. LANE: But I really think what you're
3 going to find - - - and I - - - I - - - I don't want
4 to lose track of this, even though it puts
5 responsibilities back on the law schools. I think
6 what you're going to find is so are there going to be
7 more minorities that are doing worse on the bar?
8 Probably. Why? Probably because are there going to
9 be more minorities that are doing worse in the
10 school? Probably. I'm not - - - you know, and - - -
11 MS. ATERIAN: No, I understand.
12 JUDGE RIVERA: Under the current bar
13 regime?
14 MR. LANE: Yes.
15 MR. LANE: But in - - - either way. I
16 mean, so - - - because you won't find very many
17 distinctions. So if I have a minority, say, an
18 African-American, one of ours, whatever, you know,
19 and they're in the upper fifty percent of the class,
20 they're going to pass with the same ease or
21 difficulty. So ninety percent of them - - -
22 MS. ATERIAN: Okay.
23 MR. LANE: - - - eighty-five percent of
24 them, they're going to pass the bar. So then what do
25 we draw from that? And if I have white kids whom are

in the lower part of the class, and there are some, of course, and they're not going to - - - they're going to have the same failure on the bar. So, you know, the issue to me - - - I - - - I really think we have to be sensitive to this issue, but I think when we dig into this issue, we're going to discover, you know, that it has to do with number of law schools and the - - - and all of these really serious issues that, actually, the bar rate makes me upset.

JUDGE RIVERA: But you raise the - - -

MR. LANE: There are issues about applications and, you know, the - - - and the finance of law schools, which - - -

JUDGE RIVERA: But you raise - - - you certainly raise a question that certainly - - -

MR. LANE: Yes.

JUDGE RIVERA: If - - - if law schools - - - if one source of this information is law schools, and let's assume that you're correct about what the data would reveal, so the law schools know what's happening with their students or at least should. I anticipate they do, especially given the current sea change in legal education and what's going on in the market.

MR. LANE: Yeah.

JUDGE RIVERA: But then what - - - what - - - I guess the next question would be - - - you don't have to answer this but, obviously, the next question is, and what do law schools do about that? So I see a student or many students or a particular demographic of students that perhaps are overrepresented in these lower ranks.

MR. LANE: Right.

JUDGE RIVERA: Which I know, historically, at my school means that they will likely have lower pass rates.

MR. LANE: Right.

JUDGE RIVERA: What do I do about that before I let them graduate and before I certify them to take the bar? I - - - again, you do not have to answer that.

MR. LANE: I'm going to respond. I'm going to respond to that.

JUDGE RIVERA: But there is that question on the table.

MR. LANE: Can I respond to that or you don't want me?

JUDGE RIVERA: I would love for you to respond.

MR. LANE: No, if you wanted to get - - -

JUDGE RIVERA: But I - - - I was just giving you the opportunity not to.

MR. LANE: And I appreciate that.

JUDGE RIVERA: Somewhat rhetorical, but, yes, please respond.

MR. LANE: So this is a huge issue, and we've made a lot - - - I think law schools have made tremendous progress in this area. I think you'll find many, many more numerous num - - - members of minority groups. And I - - - I want to focus particularly on African-Americans and Latinos here, because I don't want to throw every minority group together, because there's entirely different demographics and background experience. And I - - - I'm risking whatever, you know, criticism I get for doing this, but whatever.

So there's been a lot of progress. I mean, I can say anecdotally we've had - - - over the last five, seven years, we've had more African-Americans on our law reviews. We have our clerk that's just gone down to the Third Circuit. This is all anecdotal, right? And it doesn't - - - and I'm not proving a case, but I do think there's been a lot of improvement.

But the truth is as law schools are - - -

you know, the truth is until the education system works better and all of this stuff, until there's more equality amongst testing, we're always going to have some of this - - - these diff - - - we have these differentials. And law schools, if you take a student in, I think we all agree, if they - - - you know, especially if they're willing to work, not some kid that just goes there - - - could be white or anything and usually they are, in this case, who don't want to do anything, their father made them go, whatever those things are. They're not attentive. They want to go into real estate. Not law, real estate busin - - - business.

I mean you're going to - - - this is a real responsibility; we have to figure this out, and I don't - - - I don't think we've done a great job yet. I think other schools have done better jobs than us. We're trying to work on this now, but we - - - but the - - - I think the - - - the - - - the principle is that you take a kid in, you're obliged to really get them ready so that they can follow this vocation that they've chosen.

So if you don't think you can do, that we shouldn't take them in. And - - - and we're tempted to. I - - - I mean I'm tempted to sometimes. I

1 don't pay enough attention on the other hand because,
2 you know, universities have financial pressures they
3 put on you. You - - - you know we - - - it's such a
4 long story, but I think you understand that there's a
5 lot of costs, some of those are really fixed costs,
6 you can't do anything about those fixed costs. We
7 struggle all the time on this one. It's a huge
8 struggle, and I don't want people to think we're not
9 conscious of ethical issues, the really difficult
10 issues in this. And you - - - and what you're seeing
11 here is just the tail end of it. It's like, these
12 are real issues - - -
13 JUDGE RIVERA: Yes.
14 MR. LANE: - - - in law schools and how to
15 address it. So, I mean, I - - - but we - - - but I
16 do think, you know, we have to figure out better
17 support systems. More - - - I think more mentoring,
18 more tutoring; that all adds more costs. Finding
19 ways that students get more individualized attention
20 if their - - - we all try different kinds of classes
21 and all, but I think in the end, it's going to end up
22 more mentoring and tutoring.
23 I'm sorry, you had your hand up.
24 JUDGE RIVERA: No, no. I appreciate - - -
25 I appreciate the candor.

MR. LANE: You had your hand up.

JUDGE RIVERA: No, I absolutely appreciate the candor.

MS. ATERIAN: I feel like - - - I feel like I'm in class.

MR. LANE: This class thing.

JUDGE RIVERA: No, go ahead.

MS. ATERIAN: I - - - I'd like to just make sure that - - - that the comment - - - that that comments that we think about, the bar pass issues and about the potential disparate impact or increased disparate impact or - - - or however we want to do that, is that - - - I mean it - - - it - - - I - - - what I - - - what I think is that there is - - - and I think Eileen put it this way, there are so - - - and as - - - as did the Judge. There's so much nuance in it, because it seems to me what you - - - what to - - - to really know a disparate impact, you have to be looking at somewhat equivalence, all right. And this sounds, it seems to me, for example, if I look at the bottom quarter of our class - - -

MR. LANE: You would what? I'm sorry.

MS. ATERIAN: If - - - if I'm looking at the bottom quarter of - - - of our class - - -

MR. LANE: Right.

MS. ATERIAN: - - - at my law school. I mean, there - - - the - - - the one thing that they have in common is they have a bad grade point average. Okay, that's what they have in law school.

MR. LANE: That's all they have.

MS. ATERIAN: And we've done, actually, regression analysis and, you know, worked through kind of what seems to make a difference for all of the people who wind up there. How do those people perform on the bar or how can you distinguish them? And I think there are ways to do that but I don't think it can just be this many minorities fail the bar, this many white people fail the bar.

MR. LANE: I'm with you.

MS. ATERIAN: No, I know you are, but I just - - - yeah.

MR. LANE: It's very complicated.

MS. ATERIAN: I - - - I wasn't suggesting you weren't.

MR. LANE: No, no, no. I know. I know. I know. I'm cheering you on, really.

JUDGE RIVERA: Thank you, anything else? Michelle?

MR. LANE: I wasn't - - - I didn't think you were critical of it.

MS. ANDERSON: But - - -

JUDGE RIVERA: Michelle?

MS. ANDERSON: This - - - this - - - given - - - given perfect data, which we don't have, and - - - and resources, this is a knowable question. You could control for GPA in law school and - - - and make assessments about disparate impact. So the data is valuable, even if imperfect, and has to be looked at in a complicated way. I think we all agree with that. And I'll just - - - I'll just say that.

MR. LANE: Yes.

JUDGE RIVERA: Thank you. Thank you so much.

MR. LANE: Okay, thank you.

JUDGE RIVERA: Very much appreciate it.

MR. LANE: Thanks for doing this.

JUDGE RIVERA: Yeah. No, thank you.

And we have two other people left. They are going to be on the phone. I do know that at least one member of the committee has to leave to make sure that the member doesn't miss their flight. So we're going to try and move this along as quickly as we can.

We're ready?

JUDGE MARTIN: I'm here. Thank you.

JUDGE RIVERA: Yes, Honorable Cynthia Martin, yes?

JUDGE MARTIN: That's me.

JUDGE RIVERA: Yes, hello. Thank you so much for agreeing to speak to us. Our apologies, we're a little bit behind schedule.

Just for everyone and for the record, Honorable Cynthia Martin from the Missouri Court of Appeals in the Western District and Chair of the ABA Bar Admissions Committee.

And, again, we're sorry that you could not join us in person. The weather was not behaving. But we are so grateful that technology makes it possible to at least hear your voice and hear your comments.

JUDGE MARTIN: I appreciate that as well. And I - - - I really wish I could be there. It's always so much better when you have the opportunity to speak with people face-to-face, but, you know, as a bar admissions junkie, I do have a great interest in this issue, having served on the Missouri Board of Law Examiners for almost eleven years.

And - - - and, frankly, it's in that capacity largely that I have an interest in addressing the committee about the UBE, because

1 Missouri, of course, was the first jurisdiction to
2 adopt the UBE. I - - - I've had the opportunity to
3 read the testimony from your first set of public
4 hearing and to listen the majority of the testimony
5 today. And, you know, it's an interesting
6 observation, I had to chuckle at that, because I - -
7 - I - - - I understand. And many of the themes about
8 which you're hearing today are themes that resonate
9 with me as a former member of our board about certain
10 potential criticism and alarm with respect to what
11 the UBE may do in a hypothetical.
12 And yet, I find it kind of a curious
13 observation that you're now in a position where you
14 don't have to speak about the UBE in a hypothetical
15 context for a number of jurisdictions, and Missouri
16 is certainly one of them; the UBE is now a tried and
17 true mechanism for accepting minimum competence for
18 our practitioners.
19 And probably more important to the Missouri
20 Board of Law Examiners, it is a very accepted means
21 by which our applicants are able to generate a
22 portable score that creates flexibility for them,
23 portability for them, and opportunities for them at a
24 time when many of our applicants simply don't even
25 know, at the time they sit for the exam, where

1 they're going to practice.
2 And so in the "for what it's worth"
3 department, my goal in - - - in testifying today was
4 really hopefully to give New York what I thought it
5 must surely want to know, and that is some testament
6 of what the UBE has really turned out to be, as
7 opposed to a concern about what the UBE might be.
8 And I can assure you, at least based on Missouri's
9 experience, the only thing UBE has failed to - - - to
10 do is to yield the parade of hypothetical horribles
11 that - - - that many seem to be concerned might
12 occur.
13 In - - - in that respect, you know, UBE in
14 Missouri and the consideration of adopting it, we're
15 - - - we're not that much different from New York.
16 We were already using many of the same components of
17 the UBE that New York is using. We were using the
18 MPT. We tried one MPT. We had a number of essays,
19 not all of which were MPT essays. There were usually
20 at least four to six essays on our exam that were
21 crafted by our board. And many of us on the - - - on
22 the board when we were first approached about the
23 notion about taking UBE were like, why? Why would we
24 really be interested in modifying our exam?
25 We had a series of questions on that

subject at our board, and, frankly, with our Supreme Court that embraced the notion right away of the UBE and came to recognize pretty quickly that the purpose of the bar exam is it's designed to test for minimum competence to practice law. And that from our perspective, creating an atmosphere where applicants who sat for the exam and generated a score that tests minimum competency to practice law, may not know where they will be practicing law, we should be doing what we can, not to obstruct their ability to work, but to recognize that for some period of time, that score is an adequate measure that should satisfy a jurisdiction looking at that score.

And we had a hard time, frankly, disengaging the discussion from our condition of our admission on motion practice, where we already had come quite comfortably to terms with the fact that minimum competence for purposes of admission to practice for those who had been at the practice of law for five or ten years preceding application was a fine measure for us. We didn't spend time worrying about where they've gone to law school. We didn't spend time worrying about their competence with respect to particular unique aspects of Missouri law. We relied upon the practice being that measure of

minimum competence.

And so for us, it was a recognition that really with the UBE, we are dealing with - - - and were dealing with a relatively small period of time, and that's not a very rash change, where we would be embracing the notion of minimum competence for newly licensed lawyers based on a score as opposed to after years of practice.

And in that respect, we recognized that we would be admitting candidates where, just as we had in motion practice, we didn't really have that much control over whether they've been practicing in Missouri or knew Missouri law in any - - - in any event. And at the end of the day, we basically came to the conclusion that the recognition of the bar exam is not really a measure; it's not - - - it's not designed to test complete comprehension of every substantive matter about which a law student might have been exposed to in law school. That's a physical impossibility.

But instead, what you hope that you have with your bar exam is a testing instrument that generates a reliable score, that tells you what it is that you think it tells you. And in the case of the UBE, we were confident that it would give us a score

that would be equatable across different administration dates and as to which we could comfortably advise any other jurisdiction that might adopt the UBE, and has given the test, it's the same test on the same date that we look for, that they should recognize an importance for.

Having said that, we faced the very same perception obstacle that you're facing and that, frankly, every UBE jurisdiction faces. How in the world can you license a lawyer to practice in a jurisdiction unless you've tested their knowledge of law in that jurisdiction? And we faced that perception for much of the same reason you are. We had exam questions that we had drafted, and we had subject matters on our exam that were not tested on the National Conference that date or on the MBE. For example, Missouri Civil Procedure and Administrative Law were two threshold questions that were often a part of our essay subjects.

And having said that, we came to the realization that notwithstanding the fact we ask our applicants to answer essays based upon "Missouri law" and not generally accepted principles of law, the reality was we had been working very hard to generate, on our board-directed essays, good reliable

measures, and that in doing so, we had come to appreciate that our essays really needed to be crafted, not based on memorization of precise particular differential aspects of the law, but on comprehension of general principles of law.

So it was a form-over-substance realization that the perception was not really based in reality and that move to "NCBE-directed essays" for all of the essays would really not be a significant change in practice on our exam. And so overcoming the perception, that obstacle that somehow you must test lawyers on state-specific issues, we - - - we came to the conclusion that we could do both. That we could adopt the UBE and as well look at some other mechanism to assure us that we were exposing our applicants to the things that we would want Missouri lawyers to know.

And we started the process of our curricula very much as you have. We looked at substantive areas of the law that we felt would warrant particular coverage because of unique rules or procedures or statutes. And we ended up on torts and Civ pro, real property, trusts, estates, family law, business association, admin law and evidence. Incredibly, Missouri doesn't have modified rules of

evidence, so talk about weird. We - - - we would be right up there.

And we actually have a test subject that has to do with our court system because of our nonpartisan court plan. And as a side note, I note that - - - that really that meant we were adding content to our unique areas of law that would be something you'd never actually test on a bar exam. We created annotated specific outlines for those subject matters, and then we talked about how best to ensure that our applicants who sat for the bar in Missouri would be exposed to those subject matters.

And after looking, frankly, at a lot of options, and I won't bore you with those, we opted for essentially a multiple-choice test, as much as you - - - you are. Ours is a little different in that it can be taken online, and we don't honestly care if it's open book. It does require a particular score to pass. But in our way of thinking, it was kind of a lightbulb moment for us, we recognized that by incorporating a local law distinction in this fashion as a checkmark for criteria for admission, we weren't interested in whether or not that component of the exam created psychometric measures.

We were interested in ensuring that those

who would be practicing in Missouri were exposed in a manner where it would be fresh in their minds and highlighted for them to the unique and peculiar aspects of Missouri law that we would want every lawyer to know. And by generating outlines in the fashion that we did that could be readily modified and that were not some line, we were actually creating a tool for newly licensed lawyers in Missouri, in fact for every lawyer in Missouri, because these - - - Missouri ones are publicly available, to - - - to come back to this resource and to say hey, I understand the general principle, but what would be different in Missouri if I needed a specific reference point to find that information?

And as a result, we have actually become very, very excited about the fact that this component, this local component of admission, has given us actually greater control over exposure to local law distinctions as contrasted with the spot testing that is inherent in a finite number of essays that can only cover a finite aspect of a particular subject matter over a finite period of time on a bar exam.

And in short, we just felt that we - - - we were better served by the Missouri local law

1 component in our jurisdiction in ensuring access to
2 local law distinctions without requiring that those
3 local law distinctions be tested as a part of the bar
4 exam itself.
5 And I'd kind of like to get to the point of
6 - - - of my outline, which really addresses sort of a
7 confession in the profession adopting UBE, because
8 these were all things that Missouri addressed in the
9 course of deciding to adopt the UBE. Some think the
10 process would be better off simply just studying for
11 an exam in another jurisdiction instead of paying to
12 transfer a UBE score. Of course, you're free to do
13 that if you wish. No one makes you transfer your UBE
14 score if you get one. But I note that for a number
15 of jurisdictions, the fee to transfer the UBE score
16 is identical to the fee for admission on motion. And
17 that reflects the analogous circumstances you're
18 dealing with. You're really recognizing a score
19 versus active practice as a measure of minimum
20 competence you're willing to recognize in your
21 jurisdiction.
22 The other advantage, of course, of the UBE
23 score is you can transfer at any time. You're not
24 confined to the framework for bar admission of - - -
25 of the February, July bar exam administration. And I

suppose if you check with those who have sought UBE admission, they consider it an advantage that you don't have to sit for the exam. And for a lot of people, that's probably a significant advantage. A lot of people don't want to go back if they don't have to. I think perhaps I, the best evidence I have of that, is anybody who applies in your state to be admitted on motion has the right, if they want, to sit for the exam. But I would venture to suggest most don't, even if the expense to transfer into your jurisdiction on motion is more expensive than the fee to sit for the exam itself.

We have also heard that, you know, what we - - - what if we don't have applicants who really want to transfer to another UBE state, or there aren't UBE states close to us that would really be an attractive option for our law students. And I have to remind - - - remind you, of course, that that discussion - - - of course, Missouri adopted the UBE when no one else had it, and we were prepared for the prospect that no one else ever would. But what was the downside for us to be in a position where we at least created that flexibility for our law students and permitted them to be in the driver's seat should it be that other jurisdictions, within some period of

time after they obtained the UBE score, in fact, adopted the UBE exam?

And, in fact, that potential for dynamic, effective adoption of the UBE has borne out in our area. You look at the map of those jurisdictions that have adopted the UBE and what certain states it's going in.

In fact, to my tremendous surprise, we just learned last Friday that Kansas has now adopted the UBE, and I have to confess, having lived in the state and on the state line - - - Kansas City, right between Missouri and Kansas - - - I would never have guessed that to happen, because the Kansas Board of Law Examiners craft every single essay on their exam. They have sixteen on their exam. They're - - - they're quite protective of their essay questions on their exam, and the notion that they've abandoned ship on all of them and have not at all adopted state-specific local components to their exam and have looked at adopting the UBE was both very refreshing to me and exciting to me, but surprising to me. But it does seem that speaks to the dynamic effect of adopting the exam in a particular geographic area.

You know, much has been made about the

disparate impact of the UBE on minorities. And I certainly am not a psychometrician, nor do I choose or want to or have any reason to minimize that. In fact, educational accomplishments, however they may be measured - - - by GPA, tests, at any point in time in one's educational career or licensure exam - - - may, in fact, result in disparate percentages of pass rates for those in different classifications.

But to suggest that changing the essays on any state bar exam from those drafted by a board of law examiners testing particular state law versus essays directed in a psychometrically more reliable fashion, quite frankly, testing general principles of law would have greater impact, inherently, I have a problem with the premise of that assumption. And though I don't at all want to minimize that there's concern, I think the comments that you've heard today, in terms of disparate impact, the questions that have been asked really underscore that this issue is not a function of the bar exam itself, but it's a function of a number of other factors about which the bar exam, however it may be structured, is not likely to have any impact.

I would also point out that it's - - - and that the comments and the questions that the extent

to which anyone is in a position to study this issue is going to be a function of what each state determines and collects by way of data. And that's not something that is nationally collected, but the exam, when it's administered, it's administered under the jurisdiction of each state board law examiner, and the state would control that data.

I'm particularly interested by the comment with respect to redoing legal education and jurisdiction and/or the impact on practical curriculum. I - - - I find that intriguing because it - - - it seems to me to kind of defy the basic premise of the distinction between legal education, which is where lawyers learn to be lawyers and become prepared for the practice of law, versus the point and purpose of the bar exam, which is not to teach lawyers how to practice law, but rather to measure minimum competence.

And I can tell you from, at least, the perspective of Missouri that there has been absolutely zero impact on our curriculum. Our courses - - - the courses are still the same. The offerings are still the same. Students are still taking Missouri civil procedure. They're still taking administrative law. And the law schools in

1 our state - - - we have four - - - continue to
2 embrace the notion that their obligation is to
3 prepare lawyers to practice. And to the extent a
4 great majority of their law students intend to
5 practice or could practice in Missouri, their
6 obligation is to prepare lawyers to practice in the
7 State of Missouri.
8 So we simply have not seen any impact in
9 that scholarship and certainly no impact on practical
10 curricula, experiential learning, so to speak. In
11 fact, most of our law schools have seen a marked
12 uptake in the experiential learning opportunities.
13 And I - - - I think that's largely a part of the
14 corrected view of the deans in Missouri and in part a
15 function of ABA's recognition that experiential
16 learning is an important component of legal
17 education.
18 Finally, there is this notion of a flood of
19 applicants. There is data that is available and has
20 been collected with respect of the number of UBE
21 scores that have been obtained in jurisdictions and
22 transferred both into and out of jurisdiction. And
23 it's been Missouri's experience, and I think the
24 experience of - - - of every UBE jurisdiction, much
25 as was predicted by those who adopted the UBE, that

1 the UBE is a tool for applicant portability
2 associated with employment opportunities. It is not
3 a tool that is going to be relied upon by newly
4 licensed lawyers who, frankly, are just interested in
5 getting a job and paying off a lot of student loans
6 to go jumping around from jurisdiction to
7 jurisdiction for the two years or three years or
8 however many years that score may be recognized to
9 secure licensure in a number of different
10 jurisdictions and the associated expenses of that
11 licensure.
12 And once again, I would just point out I
13 think the best evidence about the fact that a flood
14 of applicants is not likely to result from a UBE
15 jurisdiction is measured by your motion practice,
16 where five or ten years of practice could score you
17 that coveted gold standard New York law license,
18 regardless whether the practitioner was taught the
19 law of your jurisdiction - - - or Missouri or any
20 other UBE jurisdiction. It's just, frankly, a
21 concern that does not appear to have been borne out
22 by experience.
23 In summary - - - and I apologize; I know
24 you guys are running late, and I respect your time,
25 but I - - - I just think it's important to point out

1 to you that from a UBE jurisdiction's perspective, we
2 believe in UBE because we believe it generates a
3 score that's a reliable measure of minimum
4 competence, and that is, in fact, the point and
5 purpose of the exam. That is not a variable of local
6 law distinctions. We're embracing a notion that has
7 been consistent with our appreciation that there are
8 things we want Missouri lawyers to know.
9 And there are ways to get that counted that
10 don't require incorporation of Missouri-specific
11 questions on the bar exam. And, in fact, I would
12 submit to you that the way that one can embrace the
13 local law components can actually be more beneficial
14 to exposing your applicants and emphasizing local law
15 distinctions to your applicants than a spot testing
16 on essays that currently occurs in jurisdictions
17 taking away state-specific exam questions.
18 JUDGE RIVERA: Well, thank you so much,
19 Judge Martin, for waiting for us and then - - - and
20 dealing with our time constraints and our time issue.
21 But most importantly for the great wisdom and the
22 thoroughness of your comments; very, very helpful,
23 very thought provoking, and we're very grateful to
24 hear from the first UBE state.
25 I will have just one quick question. Then

1 we'll see if anyone else has a question. I was
2 curious since you've mentioned that you've got this
3 multiple-choice open-book component to your exam how
4 you came to determine that you could do that and
5 maintain a certain sense of, sort of, the security
6 and the integrity of that exam?
7 JUDGE MARTIN: We talked about that a great
8 deal, frankly, and - - - and consulted our court on
9 that point. I think one way to capture it, to quote
10 one of our justices, Judge - - - Justice Zel Fischer
11 of the Missouri Supreme Court, who basically says,
12 the court came to understand that its point and
13 purpose with the local component was not to worry
14 about - - - well, we were more concerned that people
15 would back into problems than to run into them front
16 way, and that by requiring certification, which we
17 do, students actually have to go online, certify that
18 they've gone online, that they have reviewed these
19 materials, they actually have to sign in through
20 their portal and take this exam online so we know it
21 is them. We're relying on their honesty and in that
22 respect, of course, just as we do with any number of
23 other things associated with bar admissions. But the
24 reality is, we're confident that we're exposing them
25 to that information. You know, whether one elects

1 that New York is considering to make this a closed-
2 book board exam in a - - - in an exam-testing
3 environment versus our online feature, it's probably
4 less of a concern, it would seem to me, this notion
5 that you are requiring the students to assess this
6 material and be prepared to answer questions about
7 this material.
8 JUDGE RIVERA: Thank you so much. Any
9 other questions? Yes, Seymour. Seymour James, go
10 ahead.
11 MR. JAMES: Good - - - good afternoon,
12 Judge.
13 JUDGE MARTIN: Thank you.
14 MR. JAMES: I - - - my - - - my question
15 relates - - - I - - - I looked at your submission and
16 you indicated that Missouri has not experienced any
17 claim of disparate impact on minorities. Does the
18 state record demographic information about the people
19 who take the test? And if they don't, has any ever
20 been made, as Dean Lane suggested, to go through the
21 law schools in the state to see whether there's been
22 any difference in the pass rate amongst min - - -
23 minority students? Pre - - -
24 JUDGE MARTIN: The state does not record
25 demographic information at the time of the bar exam.

There has not been an effort undertaken by the Board of Law Examiners, to my knowledge, to work with the law schools to assess the extent to which their data would translate into pass-rate data on the bar exam.

But I will tell you this; we - - - and by "we", I mean the Missouri Board of Law Examiners - - - have a very close working relationship with our four law schools. And, in fact, we meet with them on an annual or biannual basis to talk about matters of general interest and concern relating to bar admission. And I feel very confident that if there was a concern amongst our law schools that somehow components of our exams, or certainly the adoption of UBE, had - - - had in some fashion created a problem that perhaps didn't already exist in some fashion, we would most definitely have been hearing about it.

On that point, I think it's important to note that we do keep the specifics, of course, about pass rates generally, first-time takers, second-time takers, et cetera. They're not demographically based, but our pass rates were not negatively impacted by the adoption of the UBE, despite any re-weighing of some components of our exam, and, of course, the abandonment of state-specific essays. And, in fact, both in the first February

administration and the first July administration of the UBE, our pass rates slightly went up.

MR. JAMES: Okay.

JUDGE RIVERA: Thank you so much. Michelle, Michelle Anderson?

MS. ANDERSON: Thank you, Judge, for your thoughtful remarks and your experience in this area. I wonder what percentage of the applicants taking the bar exam are people of color in Missouri?

JUDGE MARTIN: I am not prepared to answer that question. I don't know the answer to that question, but I can certainly attempt to secure the answer to that question. Again, I don't think the Board of Law Examiners will be in a position to give me that information, because we do not collect that democrat - - - or demographic data.

We could certainly see whether or not through the Board of Law Examiners we could determine, of our four law schools, the percentage of applicants of color who are enrolled in our law schools. That wouldn't necessarily translate, because not all of our law students, of course, sit for the Missouri State Exam, although a great majority of them do.

MS. ANDERSON: Right. As you can - - - can

1 see, I'm - - - I'm wondering about the applicability
2 of the thoughts about disparate impact from Missouri
3 and New York.
4 JUDGE MARTIN: I can certainly check with
5 our Board of Law Examiners and see if there's a
6 possibility of securing that information for you.
7 MS. ANDERSON: Thank you.
8 JUDGE RIVERA: That would be wonderful.
9 Thank you, Judge Martin. Anyone else?
10 No, we're done. Thank you so much. We
11 really appreciate, again, your written testimony and,
12 again, your testimony by phone.
13 JUDGE MARTIN: Thank you.
14 JUDGE RIVERA: Thank you.
15 Okay, as it turns out, Mary Gallagher is
16 unable to testify today given the time we've gone
17 over. So we are adjourned. Thank you so much. We
18 very much appreciate your coming today and your
19 testimony. I hope everyone makes their ride home.
20 (Hearing is adjourned)
21
22
23
24
25

1
2 C E R T I F I C A T I O N
3
4 I, Sara Winkeljohn, certify that the
5 foregoing transcript of proceedings in the Court of
6 Appeals was prepared using the required transcription
7 equipment and is a true and accurate record of the
8 proceedings.
9
10
11
12 Signature: _____
13
14 Agency Name: eScribers
15
16 Address of Agency: 700 West 192nd Street
17 Suite # 607
18 New York, NY 10040
19
20 Date: February 8, 2015
21
22
23
24
25