

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

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

Introduction

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

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

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

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

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

I. UBE is a test of uniform laws and rules

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

However, even if one compares the skills tested on the essay questions to those tested by the MPT using the descriptions provided by the NCBE itself, it becomes clear that there is only a small set of skills the MPT tests that essay exams do not. For example, the MPT requires a student to manage their time, but so do the essay questions. The MPT may require a student to write in a specific format but the essay questions are also designed to evaluate a candidate's ability to communicate effectively in writing. The MPT allows candidates to show their capacity to reason by analogy but the essay exam tests legal reasoning and analysis as well. The MPT may, if the question includes it, require a candidate to spot an ethical issue but the New York essay exams routinely require students to address New York professional responsibility issues. The MPT requires a student to sift through and organize a library of materials but that shows how fast someone reads not how thoughtfully they attend to the task at hand. In addition, the MPT is treated much like an essay exam when it is graded¹ and is included in the number of questions an exam grader must grade within an allotted time.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

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

Votes of the Committee Members

Members voting in favor:	13
Members dissenting:	02
Abstentions:	06

Dissenting Comments by Committee Member James Beha

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

I therefore dissent on both substantive and procedural grounds.

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

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

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

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

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

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

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

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

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

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



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #8

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Legal Education and Admission to the Bar.

On October 6, the Court of Appeals issued a Request for Comment with respect to a recommendation from the Board of Law Examiners to replace the current New York bar examination with the Uniform Bar Examination for the administration of the July 2015 bar exam, with comments due no later than November 7, 2014. The Committee on Legal Education and Admission to the Bar was asked to review the proposal with a view to determining whether the Association should submit comments. The Committee met on October 23, and the attached report represents a majority of the committee's views on this topic.

The report will be presented by committee co-chairs Eileen D. Millett and Prof. Patricia E. Salkin.

COMMITTEE ON LEGAL EDUCATION AND ADMISSION TO THE BAR

REPORT OF NEW YORK BOARD OF LAW EXAMINERS (BOLE) PROPOSED CHANGE IN NEW YORK TO THE UNIFORM BAR EXAM

NYBOLE Proposed Change to the Uniform Bar Exam

I. Introduction

On October 6, 2014, public notice was given that the New York State Board of Law Examiners (NYBOLE) recommended to the New York Court of Appeals that the current New York bar examination (NY Exam) be replaced with the Uniform Bar Examination (UBE), which is prepared by the National Conference of Bar Examiners (Conference). According to the notice posted on the NYBOLE website, "The Court of Appeals is considering adopting the UBE for the administration of the July 2015 bar exam." The Court of Appeals issued a Request for Public Comment on the proposal and will be accepting submissions until November 7, 2014. A copy of the Request for Public Comment is attached as Appendix A. No particular explanation was given for setting this deadline.

On October 23, 2014 the NYSBA Committee on Legal Education and Admission to the Bar met to discuss the proposal. The Committee invited Diane Bosse, Chair of the NYBOLE, to attend the meeting for purposes of explaining the proposed change. Ms. Bosse went through a detailed PowerPoint presentation with the Committee and answered questions for about ninety minutes.

On October 6, prior to the in-person meeting, Committee co-chairs Eileen Millett and Patricia Salkin circulated the proposal to Committee members; an article appearing the same day in the New York Law Journal (Appendix B); an article written by Ms. Bosse for the State Bar Journal's September 2013 issue on legal education entitled "New York Bar Exam by the Numbers" (Appendix C); on October 13, a list of all of the comments/questions about the proposal posed by Committee members in emails following receipt of the proposal (Appendix D); and links to some articles mentioning the UBE proposal (Appendix E).

This brief report is being made to the New York State Bar Association Executive Committee and House of Delegates because time is of the essence for the Association to provide comments; the 30-day comment period which will close shortly after the November 1, House of Delegates meeting.

II. Background

The current NY Exam is a of a two-day written examination with four components. On Day 1 candidates are required to answer five essay questions, each presenting multiple issues and generally emphasizing New York specific law, answer 50 New York State specific multiple choice questions (NYMC), and complete one Multistate Performance Test (MPT), an exercise that is designed to simulate a case file presented in a realistic setting and calls for candidates to demonstrate fundamental lawyering skills. The time allotted for Day 1 is 6 hours, 15 minutes. On Day 2, candidates take the Multistate Bar Examination (MBE, which is prepared by the Conference and used in most states as part of the bar exam) consisting of 200 multiple-choice questions that test knowledge relating to federal civil procedure, constitutional law, contracts, criminal law and procedure, evidence, real property and torts (these questions do not focus on substantive law or procedure specific to any one state). The time allotted for Day 2 is 6 hours.

The Uniform Bar Exam prepared by the Conference is also a two-day written examination. Day 2 of the UBE is the same 200 question multiple choice MBE test currently administered in New York; however, the content of the first day of these examinations are significantly different. First, the UBE candidates are required to answer six essay questions that test knowledge of general principles of uniform laws, with the potential content of these questions covering essentially the same substantive subject areas as might be covered in the NY Exam, except that the CPLR — which may figure repeatedly in the NY Exam essays — is not a UBE topic. Other differences between the UBE essays and those on the current NY Exam include: (i) that candidates must answer the questions using the uniform laws and acts, not New York specific laws (although “distinctions” can be noted), (ii) each UBE essay typically is focused on a single content area whereas the NY Exam essays each typically raise issues across multiple topics (e.g., contract law, statutes of limitation and procedure), and (iii), thus narrowly focused, a UBE essay question takes less time than a NY Exam question, allowing for six rather than five essay questions to be posed.

In addition, the first day of the UBE presents candidates with two MPT segments (whereas the NY Exam includes one MPT and the NYMC).

A. The Current Proposal from the NY Board of Law Examiners

The proposed change to the New York State Bar Exam will require all candidates to take the Uniform Bar Exam described above, plus take and pass a separate New York Law Exam (NY Law Test) consisting of 50 New York specific multiple choice questions that will be administered on Day 2 of the Bar Exam (the same day as the MBE 200 multiple question exam). The proposed change would thus (i) eliminate the 5 essay questions that test knowledge of New York specific law in favor of the UBE essays, (ii) add an additional MPT segment, and (iii) extend the length of the second day of the examination to allow time for the NY Law Test (the substance of which is discussed further below).

At present lawyers admitted in other jurisdictions who lack the years of practice required for admission to the New York Bar "on motion" can obtain admission to this Bar only by taking the NY Exam in full (and passing same), no matter how well they did on the bar examination of their original jurisdiction of admission. The current proposal uses a "portable" UBE test score and provides that those who take the UBE in other states and achieve a score that meets the New York "passing" standard would be eligible for some period of time to "transfer" that UBE score to New York, sit for the NY Law Test, and with a passing score on that test apply for admission to the New York Bar (assuming other eligibility criteria are met).

B. Other Jurisdictions Which Administer the Uniform Bar Exam

Currently 14 states administer the UBE: Alabama, Alaska, Arizona, Colorado, Idaho, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Utah, Washington, and Wyoming. Appendix F contains a chart detailing the date each state began to use the UBE, the time limit each state has set for accepting a transferred score (a score on the UBE taken in another state which is "transferred" for use in seeking admission to the bar in this state), the minimum passing score set by each state, which states require, in addition to a passing UBE score, the passing or completion of some state-specific test or training component before admission, and the fees set by each state for accepting "transferred" scores.

In her presentation to the Committee, Diane Bosse explained that each state that administers the UBE continues to: decide who may sit for its bar exam and who will be admitted to practice; set its own passing scores; grade the essays and performance tests; set policies regarding how many times candidates may retake the bar exam; decide how to assess knowledge of local law; determine for how long "transferred" UBE scores will be accepted; and make character and fitness decisions.

C. The Proposed New York Law Test

Under the proposal, passing the Bar Exam in New York will require passing two separately graded exams (the UBE and the New York Law Test). A passing score on each exam will be required to apply for admission to the New York bar.

The proposal, the New York Law Test will consist of 50 multiple choice questions and will be a revamped version of the current NYMC, redrafted to focus very heavily on points where New York law or practice differs from other jurisdictions (the "New York distinctions"). It is proposed that candidates will need a passing score of 60% (30 out of 50) to pass the New York Law Exam. As with all current aspects of the NY Exam (and the UBE), candidates will have available from the NYBOLE a detailed "content outline" to assist in preparation for the NY Law Test.

It is also proposed that the NY Law Test will be offered at two additional sessions in addition to being part of the January and July administrations of the UBE. Testing at these sessions would be available for those New York test-takers who did not pass the NY law Test when they took the UBE (assuming they did pass the UBE) and for those taking and obtaining a sufficient score on the UBE in other jurisdictions and now needing to travel to New York to take the New York Law Test. Target dates for these "off cycle" sessions are set for the fall and in the spring. Candidates who have not yet taken and achieved a sufficient score on the UBE would not be eligible to take the NY Law Test at these sessions.

D. Grading of the Bar Exam

The manner in which the New York bar exam is graded will change with the administration of the Uniform Bar Exam.

Current weighting is as follows: MBE – 40%, NYMC – 10%, NY essays – 40%, MPT (one) – 10%.

Proposed UBE weighting: MBE – 50%, MEE (essays) – 30%, MPT (two) – 20% (NY Law Test administered but separately scored)

Diane Bosse, Chair of the NYBOLE explained that educational eligibility rules set forth in Rules 520.3 and 520.6 continue to apply and that the proposed New York passing score for the UBE would be 266 out of 400 (which as a percentage is arithmetically equivalent to the current 665 out of 1,000). As a technical matter the MBE scaled score

would continue to be used to adjust the scaling of the scores on other components of the examination.

In addition, as described above, the New York Law Test will require a score of 30 correct answers out of 50 (60%) to pass, and candidates must pass this multiple choice exam in addition to the UBE to be admitted in NY.

E. Proposed Time Frame for Implementation

The October 2014 notice for comment indicates that the New York Board of Law Examiners is prepared to administer the Uniform Bar Exam and the New York Law Exam for the July 2015 administration of the Bar Exam in New York.

III. Discussion

A. Arguments in favor of the Uniform Bar Exam

Before addressing the proposal as such, we would note that some aspects of the proposed changes may be worth careful consideration even if the UBE proposal is not adopted. In particular, the use of a second MPT segment and revamping the NYMC along the lines proposed for the NY Law Test would seem potentially valuable changes to the NY Exam in all events. And the question of whether there should be a separate passing requirement based on "New York distinctions" (whether posed in the essays and NYMC or in a NY Law Test) can be debated outside the context of deciding whether to adopt the UBE. For present purposes, however, we focus here on the proposal to replace the NY Exam with the proposed combination of the UBE and the NY Law Test.

The arguments that have been advanced by the proponents of replacing the NY Exam with the UBE (plus the NY Law Test) include:

1. The legal profession should move towards a national licensing exam and New York's participation will likely convince other states to follow suit.
2. The Uniform Bar Exam will offer test-takers in New York greater portability in a competitive and tight job market in New York, thereby maximizing employment opportunities.

3. It can enhance mobility for law graduates and their families, at least between UBE jurisdictions, without having to wait for admission on motion to be available based on their years of practice.
4. Law firms in New York will be able to recruit from a more geographically diverse applicant pool (so long as applicants also take and pass the New York Law Exam).
5. It will eliminate some duplication of efforts associated with taking the bar exam in multiple jurisdictions
6. It may reduce the cost, delay, anxiety and uncertainty of having to take multiple bar exams.
7. It offers more options when choosing where to take the bar examination.
8. It will relieve the NYBOLE of the responsibility, and expense, of drafting the essay questions and model answers for the bar exam.
9. The use of a second MPT segment will enhance the utility of the examination insofar as "practice ready" skills are being assessed.

B. Concerns over a Rush to Adopt the UBE Proposal for July 2015

1. A 30-day comment period is too short to enable all of the stakeholders a fair and reasonable time for study and discussion of all of the impacts associated with a dramatic change to the composition of the bar exam in New York. While there is interest in learning more about the potential positive implications for the adoption of the UBE in New York, the Committee (with one dissenting member) believes that more time is needed to further study and discuss this UBE proposal.

2. There have been no New York state-specific studies about the impact of the adoption of both the Uniform Bar Exam and the New York Law Exam on applicants. (See Appendix G for articles describing lower pass rates in Montana and North Dakota when the UBE was initially administered). Further, the NYBOLE has not issued a report discussing all aspects of the UBE as it relates to New York.

3. The New York Board of Law Examiners should first conduct and publish a disparate impact analysis of both the UBE and the New York Law Exam for minority test takers, similar to the study undertaken when New York raised its bar pass rate.

4. There is concern over just what impact the requirement of passage of both the UBE and a New York Law Test will have on test-takers. Moreover, there has been no

analysis of how many candidates who passed prior NY Exams would have failed if a 30 score on the NYMC had been a separate requirement. While the NY Law Exam will to some extent be different than the NYMC (see next comment), the similarities are sufficient to warrant undertaking this analysis of past examinations. It is not clear what the "average" score on the NYMC has been in the past, but if it is less than 30 (which is our informal understanding), then the addition of a NY Law Test requirement may result in disqualifying a very substantial number of candidates who would be admitted in New York under present testing. Whether this is a good or bad result may be debated, but additional information is certainly needed.

5. The 50 multiple choice questions that would appear on the new New York Law Test have not been "pre-tested" on previous exams to see how test takers would do with the new format. It is common for all standardized exams to pretest questions and analyze the results. Such "test" questions could be included on several upcoming administrations of the present New York Bar Exam to develop the data. Further, sample questions are not yet drafted or publically available for review. While BOLE intends to develop a "content outline" for the NY Law Test that is an outgrowth of current materials made available to New York candidates, if the NY Law Test is going to differ from the NYMC, as proposed, then candidates for the July 2015 examination will be disadvantaged by not having the updated materials available well in advance of the examination.

6. Many law students have expressed concern that the rush to implementation this year will disadvantage them as they have already make curricular decisions and selected commercial bar review courses based on a belief that they will be taking the existing New York Bar Exam.

C. Additional Issues/Concerns Requiring Clarification and Further Discussion Prior to a Decision as to Whether the Uniform Bar Exam is Good for New York Law Students and Practitioners

1. The profession should be on the same page as to what exactly a "uniform" bar exam means. The New York proposal would follow 5 of the 14 UBE states at this time by requiring an additional state-specific assessment prior to admission. If other states were to follow New York as suggested they might, and if they would likely also require a state specific law exam like New York, this may not truly advance uniformity and portability, nor will it reduce the need to take exams in more than one state as proponents assert.
2. More transparency is needed with respect to costs. While there would be a saving for the NYBOLE in not having to develop the NY essays and model answers, New York will need to license the Day 1 UBE essay and an

additional MPT question from the National Conference of Bar Examiners. The cost for this, added to discussion of a potential increase in cost to test-takers from the current \$250 that could be three or four times as costly, plus the cost of transferring UBE scores to other jurisdictions which range from \$400 to \$1240 is important information to consider. Likewise, specific information about the cost of separately administering the New York Law Exam at times other than with administration of the UBE should be disclosed.

3. The UBE proposal for comment does not indicate how many times an applicant who passes the UBE may take the New York Law Exam without having to repeat the UBE.
4. Some Committee members expressed concern about the relative value as testing material of the MEE essay questions that would replace the current New York essay questions. The concern here is not merely that the "New York distinctions" would be lost or that the importance of candidates' mastering the CPLR will be somewhat downplayed if the CPLR appears only as a part of the NY Law Test, but also that the "single topic" MEE essays do not test reasoning skills as well as the multi-issue, multi-topic New York essays. This concern is not something that has been quantified, but it should be addressed.

IV. Conclusion and Recommendation

It is simply too soon to reach a reasonable conclusion about the adoption of the Uniform Bar Exam and the New York Law Exam in the 30-day comment period. The notice for comment contains little by way of detail and no state-specific studies or reports have been conducted nor made publically available to more fully understand the cost-benefit analysis or to assess whether adoption of the new exam would produce a disparate impact.

The Committee has not been persuaded that there is any urgency that requires immediate adoption of this proposal. Prudence dictates proceeding with caution with a change of this significance, especially when there not only is active debate about *whether* it is a good idea to use the UBE instead of the NY Exam, but also active concern about the impact of such a change, both procedurally (how will it affect bar passage as a whole and for distinct groups) and in terms of how it might affect those already preparing to take the July 2015 examination.

The Committee urges the New York State Bar Association to request that the New York Courts delay any decision on implementation of the Uniform Bar Exam and the New York Law Exam until studies as to disparate impact, bar pass rates and costs can be completed and discussed.

Further, the Committee requests that the New York State Bar Association respectfully suggest that should there be a future adoption of the UBE or other significant change in the Bar Exam, that the Courts follow the lead of the American Bar Association Council on Legal Education and phase-in significant changes with fair advance and appropriate notice to test-takers.

The Committee accordingly recommends a proposal to request that the New York State Courts delay a decision on the implementation of the Uniform Bar Exam and the New York Bar Exam until further study as to disparate impact, bar pass rates and costs can be completed.

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

Eileen D. Millett, Co-Chair
Patricia Salkin, Co-Chair

Members voting in favor of the report: 22
Members dissenting from the report: 3
Abstentions: 4

GLOSSARY OF TERMS

NYBOLE	New York Board of Law Examiners
MBE	Multistate Bar Examination (multiple choice)
MEE	Multistate Essay Examination
MPT	Multistate Performance Test
NYMC	New York Multiple Choice (existing)
NY Law Test	Proposed new multiple choice test on New York law
UBE	Uniform Bar Exam

Appendix A

Request for Public Comment

The New York State Board of Law Examiners (SBLE) has recommended to the New York Court of Appeals that the current bar examination be replaced with the Uniform Bar Examination (UBE). To date, 14 other state jurisdictions have adopted the UBE, but New York would be a national leader as the first large state in terms of bar applicants to administer this test, having examined over 15,200 candidates in 2014.

The UBE is prepared by the National Conference of Bar Examiners (NCBE) and passage of the test would produce a portable score that can be used to gain admission in other states that accept the UBE, provided the applicant satisfies any other jurisdiction-specific admission requirements. As the UBE is accepted by more states, the portable score will facilitate lawyer mobility across state lines, resulting in expanded employment opportunities for lawyers throughout the nation and facilitating multi-state law practices.

Currently, the New York bar exam is administered in July and February of each year, over the course of two days and consists of two sections: (1) the New York law component, taken on the first day, is composed of five essay questions and 50 multiple-choice questions prepared by the SBLE, and one Multistate Performance Test 1 (MPT) question developed by the NCBE; and (2) the Multistate Bar Examination (MBE), consisting of 200 multiple-choice questions prepared by the NCBE, which is given on the second day of the exam.

The UBE is prepared by the NCBE and contains three distinct assessment measures: (1) the Multistate Essay Examination (MEE), which contains six single content essay questions testing law of general application; (2) two MPT tasks; and (3) the 200-question multiple-choice MBE test. The MEE and MPT would be taken on the first day of the UBE, while the MBE would be given on the second day. The increased testing on lawyering skills will address the call by bar associations for legal education to incorporate more practical skills training.

Along with administering the UBE, the BOLE has proposed that New York's bar examination continue to incorporate a New York law-specific component. This recognizes the importance of state law, particularly in light of the thousands of out-of-state and foreign-educated applicants who seek bar admission in New York. It is imperative that New York licensure remain internationally recognized as a valuable legal credential. The proposed New York law exam (NYLE) segment would consist of 50 multiple-choice questions, tested for one hour on the second day. The SBLE has

proposed a passing score of 30 for the NYLE. In addition to being given concurrently to candidates taking the UBE in February and July, the SBLE is suggesting that the NYLE also be administered in December and late spring of each year. This provides a second opportunity to applicants who pass the UBE, but do not pass the NYLE, to retake the NYLE in order to secure earlier admission to practice.

The SBLE recommends that the passing score for the UBE in New York be set at 266. Although scored on a different scale, this grade is comparable to the passing score established for the current bar exam. Other jurisdictions have adopted passing scores for the UBE that range from 260 to 280. Applicants who take the UBE in another jurisdiction and seek admission in New York based on a transferred UBE score would have to pass the NYLE, with this testing available in December or late spring. Similar to current rules regarding the viability of bar exam scores, a UBE score earned in another jurisdiction could be transferred to New York up to three years after the date of the administration of the exam on which the score was earned.

Applicants who take the UBE in New York, and applicants who seek to transfer a UBE score to New York, must continue to meet the eligibility requirements of section 520.3, 520.4, 520.5 or 520.6 of the Rules of the Court of Appeals and undergo a character and fitness review by the Appellate Division of Supreme Court. The proposal does not contemplate any change in the statutory bar exam fees set forth in Judiciary Law § 465.

In light of this recommendation, the Court is considering adopting the UBE for the administration of the July 2015 bar exam. Persons or organizations wishing to comment on this proposal should e-mail their submissions to UniformBarExam@nycourts.gov or write to: Diane Bosse, Chair, New York State Board of Law Examiners, Corporate Plaza, Building 3, 254 Washington Avenue Extension, Albany, NY 12203-5195. Submissions will be accepted until November 7, 2014. All public comments will be treated as available for disclosure under the Freedom of Information Law, and are subject to publication by the Office of Court Administration.

The issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the court system.

APPENDIX B

Court System Seeks Comment on Adopting Uniform Bar Exam

Joel Stashenko, New York Law Journal

October 7, 2014 | 4 Comments

ALBANY - Absent major objections, New York would become the largest and most influential state to use the Uniform Bar Examination.

See Request for Comment.

While the New York bar exam would retain a section specifically about New York law, Chief Judge Jonathan Lippman said the bulk of the two-day test would be the nationally-standardized exam (UBE) prepared by the National Conference of Bar Examiners.

The state court system on Monday circulated proposed rules on adopting use of the national exam.

The test administered in July 2015 would be the first based on the UBE, if the state Court of Appeals adopts the change. The court is responsible for setting standards for legal education in New York state.

Fourteen other states, mostly west of the Mississippi, use UBE as the basis for their bar examinations. New York would be the first of the largest and most influential states to use the test. California, Texas, Florida and Illinois have not yet adopted it.

Lippman said he expected several large states to follow suit if New York adopts the UBE.

"I believe if we choose to go forward, it portends extremely well that you would have a truly uniform bar nationally," he said in an interview. "I think there is a lot of anticipation from my colleagues in other states about whether we would be going to the uniform bar and, if we do, I think it will have a dramatic impact on that uniform bar approach in very short order."

Proponents say a "national" bar exam would allow students to better pursue job opportunities by letting them pass the UBE once and then prepare for the shorter portions of the bar exam specific to each state should they want to practice there. It also would allow law firms and other prospective employers to draw from larger pools of law students by increasing the "portability" of where they can practice.

New York's bar exam already contains two standardized national portions, the Multistate Performance Test and the Multistate Bar Examination. Both are prepared by the Madison, Wisc.-based National Conference of Bar Examiners.

Lippman said the UBE would adequately test the analytical skills of candidates by adding the Multistate Essay Examination, a six-essay test also developed by the National Conference of Bar Examiners that seeks analyses on general legal principles.

The New York State Board of Law Examiners recommends a passing score for the UBE be set at 266, which court administrators said is analogous to the current exam. They said the passing score recognized by other UBE-using states ranges from 260 to 280.

The head of the conference, Erica Moeser, said Monday that UBE's developer has been "awaiting a state that has a lot of candidates, and [Lippman] has now provided that springboard for other larger jurisdictions to come aboard."

Proposed Changes

Under the proposal, test-takers would get a total of 13 hours over two days to take all components of the new bar exam, or 45 minutes more than the 12 hours, 15 minutes they now get, according to Diane Bosse, the chairwoman of the Board of Law Examiners.

The portion of the exam specific to New York law under the new scenario would consist of a 50-question multiple choice section to be answered in one hour. The current exam includes the 50 questions as well as five essays focused on New York law.

Candidates currently get four hours and 15 minutes to answer the "local" phase of the current exam.

The exam would be administered during the same customary times as the current test—the last Tuesdays and Wednesdays in July and February—though Bosse said new days would be introduced in December and in late May or early June for candidates to retake the hour-long multiple-choice portion specific to New York or for test-takers who had passed the UBE in other states who want to pass the New York bar exam.

The Board of Law Examiners, which would continue to be responsible for administering and grading the exam, has recommended New York adopt the UBE.

"Once candidates have demonstrated competence in those general principles of the law and lawyering skills, there is no reason that (UBE) score shouldn't follow them across state lines," said Bosse, who is of counsel at Hurwitz & Fine in Buffalo.

The cost of the state bar exam would not change, she said. Candidates with juris doctor degrees from American Bar Association-accredited law schools pay \$250 to take the New York test while foreign candidates pay \$750.

Lippman said if no significant objections arise, the Court of Appeals could adopt the change by late November. Besides the concern that New York law-specific questions be maintained, he said court administrators did not want to go to a third day of testing if the UBE is adopted.

Legal Scholars, Leaders React

Lippman said the proposal received a "very good" reception when court administrators presented it to New York's law school deans at a meeting last week.

Several deans reached Monday said they supported the initiative.

"By this proposal, New York has a good opportunity to take the lead among the states in de-emphasizing local issues," said Fordham University School of Law Dean Michael Martin, but cautioned that the July 2015 test could be too soon to educate all students on the issues covered by the UBE-based test.

Brooklyn Law School Dean Nicholas Allard predicted that if New York fell into the UBE line for its bar exam, other states would "rapidly" follow suit.

"This, in turn, will enhance the portability of graduates' legal education, open the job market geographically outside the Empire State for our graduates and retain New York's control of its own standards for admission and the quality of new attorneys entering practice here," he said.

Hannah Arterian, the dean at Syracuse University College of Law, found reasons for New York to go the UBE route to be "persuasive."

"I think this is tremendous," she said. "It's a real 'wow' moment for New York state and a real indication of New York state as a true leader in a variety of ways."

Bar Association leaders, meanwhile, had mixed reactions.

Bret Parker, executive director of the New York City Bar Association, called it an "extremely positive development." But Eileen Millett, co-chair of the New York State Bar Association's committee on legal education and admission to bar, said the issue needed more discussion.

"I think we have to be careful that we protect the uniqueness of what it means to have taken and passed the New York bar exam," said Millett, counsel at Epstein Becker Green.

For law schools, she said, the proposed change may raise questions of altering the competitiveness of New York law schools.

"Does it take away or add to the allure of coming to a New York law school?" Millett said. "It remains to be seen."

According to the National Conference of Bar Examiners, 15,846 people took the New York bar exam in 2013. California had the next-largest total of test-takers in the country with 13,319.

If New York adopts the UBE, law firms could recruit students they may not have otherwise found and may be more willing to cast a wider net in their associate search, said Joseph Torres, a Winston & Strawn partner and chair of the firm's hiring committee.

"All law firms are looking for the best and brightest students," he said. "Law firms seeing more law students and law students seeing more law firms is a good thing."

But Torres said some questions remain unanswered, such as whether large states such as California and Illinois would follow and whether requirements of individual states "may cut against the idea that this is a uniform process."

Court administrators asked that comment on the proposed bar exam rules be emailed to UniformBarExam@nycourts.gov or mailed to Diane Bosse, chair, New York State Board of Law Examiners, Corporate Plaza, Building 3, 254 Washington Ave. Ext., Albany, NY, 12203-5195.

The deadline for comments is Nov. 7.

Joel Stashenko can be reached at jstashenko@alm.com. Twitter: @JoelStashenko. Christine Simmons and Tania Karas contributed to this story.

Read more: <http://www.newyorklawjournal.com/id=1202672451929/Court-System-Seeks-Comment-on-Adopting-Uniform-Bar-Exam#ixzz3HCtDm7wf>

Appendix C



DIANE F. Bosse was appointed by the Court of Appeals to the New York State Board of Law Examiners in 1998, after having served as a legal assistant to the Board for 19 years. She has chaired the Board since 2001. She served on the Board of Trustees of the National Conference of Bar Examiners from 1999 to 2008 (Chair 2006–2007) and currently co-chairs the Conference's Long Range Planning Committee. Ms. Bosse is the Immediate Past Chair of the Accreditation Committee of the American Bar Association Section of Legal Education and Admissions to the Bar. A graduate of SUNY Buffalo Law School, Ms. Bosse is of counsel to the law firm of Hurwitz & Fine, P.C. She has received many awards, most recently the National Conference of Bar Examiners Chair's Award (2012) and the NYSBA's Award for Excellence in Public Service (2010).

The New York Bar Exam by the Numbers

By Diane F. Bosse

Among the ties that bind us as lawyers is the shared experience of having taken the New York bar exam. Whether we viewed it as a hazing or a rite of passage, we all remember that moment in our quest for admission to our chosen profession. But if you haven't been to a bar exam test site recently, you might not recognize the place. The size and composition of the candidate pool, the administrative procedures and the test itself have changed significantly over the years. This article describes some of those changes and reports on current initiatives.

15,745

That is the number of candidates tested on the New York bar exam in 2012 – 4,011 in February and 11,734 in July. Of those, 11,038 were graduates of American Bar Association (ABA)-approved law schools, and 4,675 received their legal education in foreign countries. The remaining 32 candidates qualified to take the exam based either on graduation from a non-ABA-approved law school plus five years of practice¹ or one year of legal education and a prescribed period of law office study.²

The graduates of ABA-approved law schools came from 48 states and the District of Columbia and from 195 (of the then 201) ABA-approved schools. New York law schools accounted for almost exactly half of all candidates taking the exam who graduated from ABA-approved schools (5,514), with out-of-state law schools contributing the balance (5,524).

The foreign-educated candidates sitting for the New York bar exam in 2012 came from every corner of the globe – from Australia to Azerbaijan, Canada to Cameroon, El Salvador to Eritrea, Iran to Ireland and Venezuela to Vietnam – 125 countries in all.

Expansion of the Candidate Pool

Over the last 15 years, the number of candidates sitting for the New York bar exam has increased by over 40%. This tremendous growth has been fueled primarily by the influx of foreign-educated law graduates seeking admission to the New York bar. The number of foreign-educated candidates sitting for our bar exam in 2012 was 2.75 times the size of that group in 1997. Now fully 30%

of all our candidates are foreign-educated. In 2012, 79% of all foreign-educated candidates who took a bar exam in the United States took the bar exam in New York.³

More candidates from China now take the New York bar exam than from any other foreign country. From 2000 to 2012, the number of candidates seeking admission in New York based on their education in China increased

number and type of distance education credits that may be counted are limited,¹⁰ and the Rule requires two credits of study in professional responsibility.¹¹

Foreign-Educated Candidates

Rule 520.6 sets forth the educational requirements to sit for the New York bar exam based upon a foreign legal

“There is no end to education. It is not that you read a book, pass an examination, and finish with education. The whole of life, from the moment you are born to the moment you die, is a process of learning.”

– Jiddu Krishnamurti

by 636%. In 2012, 846 Chinese-educated candidates took the New York bar exam, exceeding by far the next largest country contingent – the 538 candidates hailing from the United Kingdom. We are seeing significant increases in the number of candidates from Brazil, India, the Republic of Korea, Ireland and Taiwan. The number of candidates from the U.K. increased slightly from 2000 to 2012; the numbers from Canada, Israel and Germany notably declined.

Educational Eligibility to Take the New York Bar Exam

Domestically Educated Candidates

The Court of Appeals has established the educational eligibility requirements to sit for the New York bar exam.⁴ For domestically educated candidates, under Rule 520.3, graduation from an ABA-approved law school is required. An ABA-approved law school is one that is accredited by the Council of the ABA Section of Legal Education and Admissions to the Bar in accordance with the ABA Standards and Rules of Procedure for Approval of Law Schools (the Standards).⁵ A law school must be in full compliance with all of the Standards to achieve full approval⁶ and is thereafter subject to annual interim monitoring and a full sabbatical review three years after the granting of full approval and every seven years thereafter.⁷

While graduation from an ABA-approved law school is necessary under the Court’s Rule, it is not sufficient. A law student intending to sit for the New York bar exam must follow a course of study that complies with the programmatic and instructional requirements of the Rule.⁸ Recent amendments have served both to liberalize the Rule and to largely conform it to the Standards. However, some significant differences remain. Responding to requests from the New York law schools to permit more clinical legal education, the Court amended the Rule, now permitting a candidate to count up to 30 credit hours of clinical courses, field placement programs and externships toward the required 83 credit hours.⁹ The

education.¹² There are two primary routes by which foreign-educated candidates may qualify to take our exam, depending upon whether the candidate obtained a first degree in law in a common law or non-common law country.

A candidate who successfully completed a program of legal education in a common law country that was sufficient to qualify the candidate for admission to practice law in the candidate’s home country may sit for the bar exam in New York, without further education, provided that the program and course of study was substantively and durationally equivalent to that of an ABA-approved law school.¹³

A candidate whose legal education was in a non-common law country may qualify to sit for the New York bar exam if the candidate completed a program and course of study that would qualify the candidate for admission to practice in the candidate’s home country, and the education the candidate received was either substantively or durationally equivalent to that of an ABA-approved law school. Typically, that means that the candidate had three years of legal education. The substantive deficiency may then be cured by successfully completing an LL.M. program of study in the United States.¹⁴

The ABA does not accredit LL.M. programs. It acquiesces in the establishment of such programs, provided the proposed program does not detract from the school’s ability to maintain a J.D. program that meets the requirements of the Standards.¹⁵

New York regulates the content of LL.M. programs that are intended to qualify the student to take the bar exam in New York. Among the requirements are a minimum of 24 credit hours, including specified numbers of credit hours in legal research and writing, professional responsibility, American legal studies and other courses in subjects tested on the New York bar exam.¹⁶

The eligibility rules in New York do not require foreign admission as a prerequisite for sitting for the bar exam. In many countries, legal education (which is often undergraduate education) must be followed by a period of

employment under a practice contract and/or requires passing a bar exam with such a low passing rate that admission to practice in New York is often more readily achieved than admission in the candidate's home country.

Many of the foreign-educated candidates who sit for the New York bar exam do not do so with the intention of practicing law in New York; rather, admission to the New York bar is a valued credential for job seekers in international law firms around the world. New York law is the law of choice in many international contracts, and admission to practice in New York enhances employment opportunities for many foreign-educated law graduates.

Passing Rates

Domestically Educated Candidates

Our most closely watched statistic is the one that tells us how the May graduates of our New York law schools perform in July, when they take the bar exam for the first time. That passing rate has ranged over the past five years from a high of 91% in 2008 to a low of 85% last year – an impressive showing, and a credit to the high quality of legal education offered in New York. The passing rate of graduates of out-of-state ABA law schools taking the July New York bar exam for the first time has varied over that same time period from a high of 90% in 2008 to a low of 82% last year.¹⁷

Foreign-Educated Candidates

In 2012, among foreign-educated candidates, the first-time taker passing rate was 44% and the overall passing rate was 34%, which rates are both consistent with the year-to-year performance of that group. Eleven countries sent 100 or more candidates to take our bar exam in 2012, with the following results:

Country	Number of Candidates	Passing Rate
Brazil	139	32.4%
Canada	156	58.3%
China	846	40.2%
France	233	46.4%
India	213	26.8%
Ireland	123	35.0%
Nigeria	140	14.3%
Japan	351	42.7%
Rep. of Korea	322	25.2%
Taiwan	181	22.7%
United Kingdom	538	28.3%

Content and Structure of the Bar Exam

The bar exam is a two-day test designed to assess minimum competence. We sample the candidate's knowledge on an array of subjects covered by the license. The inquiry is broad but not very deep.

On the first day, candidates take five essay and 50 multiple-choice questions, generally based on New York law, and the Multistate Performance Test (MPT). The New York questions test these subjects: Contracts; New York and Federal Constitutional Law; Criminal Law; Evidence; Real Property; Torts; Business Relationships; Conflict of Laws; Criminal Procedure; Family Law; Remedies; New York and Federal Civil Jurisdiction and Procedure; Professional Responsibility; Trusts, Wills and Estates; and UCC Articles 2, 3 and 9. The scope of the test is defined by the Content Outline, available on our website.¹⁸ We invite comments regarding the Outline¹⁹ and specifically encourage comments as to what new lawyers need to know for effective practice and where New York law may vary from the common law and/or prevailing views.

The MPT is a test of lawyering skills developed by the National Conference of Bar Examiners (NCBE). The candidate is given a set of file materials and a library to use in completing an assigned task.²⁰

Candidates are able to type their essay answers and their answers to the MPT using laptop computers.²¹ Over 80% of the candidates avail themselves of that option, to the relief of the 42 attorneys selected from around the state to grade the exam.

On the second day of testing, candidates take the Multistate Bar Examination (MBE), a multiple-choice exam developed by the NCBE. It contains 200 questions on Contracts, Constitutional Law, Criminal Law, Evidence, Real Property and Torts. Civil Procedure will be added to the mix in 2015.²²

Current Developments

Two national initiatives deserve brief mention. The Uniform Bar Examination (UBE),²³ adopted in 13 states, consists of the MBE, MPT and the Multistate Essay Examination, a battery of tests designed to measure fundamental legal knowledge and lawyering skills. The score achieved on the bar exam in one jurisdiction can be transported to another, allowing a new lawyer to gain admission in another jurisdiction without taking another bar exam, provided the score satisfies the importing jurisdiction's passing score and the candidate completes local testing and/or CLE and character and fitness requirements. That portability is a worthy goal, especially in the current job market, and the Board of Law Examiners is following the progress of this movement with great interest.

Another current national initiative is a content validity study being undertaken by NCBE. The first step in the process was a job analysis, completed in 2012.²⁴ Identi-

fied through that analysis were the tasks, knowledge domains, skills and abilities that new lawyers rated as significant in their practices. The results of that analysis are now being considered as the bar exam of the future is imagined.

Conclusion

Next July, if you see legions of young people around the Javits Center in New York, the Empire State Plaza in Albany or the Convention Center in Buffalo wearing green wristbands and carrying clear plastic one-gallon bags containing their worldly goods (minus cell phones, iPods, highlighters and other prohibited items²⁵), remember back to the day you endured the ritual and give them a warm welcome to the profession. ■

1. Rules of Ct. of Appeals, 22 N.Y.C.R.R. § 520.5.
2. Rules of Ct. of Appeals, 22 N.Y.C.R.R. § 520.4.
3. http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2013/8201132012statistics.pdf.
4. Rules of Ct. of Appeals, 22 N.Y.C.R.R. §§ 520.3–520.6.
5. The Standards are available at http://www.americanbar.org/groups/legal_education/resources/standards.html.
6. Standard 103(a) of the Standards for Approval of Law Schools, 2012–2013.
7. Rules 3(c) and 12(a) of the Rules of Procedure for Approval of Law Schools, 2012–2013.
8. Rules of Ct. of Appeals 22 N.Y.C.R.R. § 520.3(c), (d).

9. Prior to April 1, 2012, credit for clinical courses was limited to 20 of the then-required 80 credit hours. See archived Rule 520.3, at <http://www.nybarexam.org/Rules/3203-6archive.htm#520.3>.
10. Rules of Ct. of Appeals, 22 N.Y.C.R.R. § 520.3(c)(6).
11. Rules of Ct. of Appeals, 22 N.Y.C.R.R. § 520.3(c)(1)(iii).
12. Rules of Ct. of Appeals, 22 N.Y.C.R.R. § 520.6.
13. Rules of Ct. of Appeals, 22 N.Y.C.R.R. § 520.6(b)(1)(i).
14. Rules of Ct. of Appeals, 22 N.Y.C.R.R. § 520.6(b)(1)(ii).
15. Standard 308 of the Standards for Approval of Law Schools, 2012–2013.
16. Rules of Ct. of Appeals, 22 N.Y.C.R.R. § 520.6(b)(3).
17. Passing rates and other statistics are available at <http://www.nybarexam.org/ExamStats/Estats.htm>.
18. Available at <http://www.nybarexam.org/Content/ContentOutline.htm>.
19. Address comments to Outline.Comments@nybarexam.org.
20. For a complete description of the MPT, see <http://www.ncbex.org/multistate-tests/tmpt/>.
21. See Laptop Program for the Bar Exam, at <http://www.nybarexam.org/TheBar/TheBar.htm#laptop>.
22. For a complete description of the MBE, see <http://www.ncbex.org/multistate-tests/mbe/>.
23. For a complete description of the UBE, see <http://www.ncbex.org/multistate-tests/ube/>.
24. See *A Study of the Newly Licensed Lawyer*, at <http://www.ncbex.org/publications/ncbe-job-analysis/>.
25. See New York Bar Exam Security Policy, at <http://www.nybarexam.org/Docs/secpolicy.pdf>.

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Appendix D

New York State Bar Association

Committee on Legal Education and Admission to the Bar

Comments Received about the New York Court of Appeals Proposal to Adopt the Uniform Bar Exam (UBE)

Comment 1- I share the concern of others that we do not compromise the NY portion of the exam. Those coming from elsewhere who wish to come to the New York to take the exam need to know that they cannot use the federal rules of practice and they need to know the CPLR. So how the BOLE will handle the specifics of NY law is a legitimate and significant issue.

Comment 2- Concerns/Questions. I may have more to add later.

1 - Fairness of timing with not enough notice to the current graduating students who are already preparing for the current NY Bar Exam.

2 - Fairness of timing with not enough notice to some law faculty who need to revise syllabi to better reflect the difference in the exams.

3 - Fairness of timing for students who have already made non-refundable deposits to commercial bar prep courses, not all of whom are experienced in the UBE.

4 - Unclear as to how truly "portable" the UBE is:

a) if it is true that other states will follow NY's lead on this, then will the "follower" states also add an equivalent of the 50 question New York Law Exam, making it a requirement that you still have to pass a state-specific exam in other states?

b) since each state can set their own pass-rate, will NY's be higher or the highest, so if you pass NY you are guaranteed to be able to practice in other UBE states? If the answer is yes, how does this relate to the current bar pass cut-off in NY?

5 - UBE jurisdictions tend to charge up to 4 times the cost of the bar exam in NY. What is the fee NY will have to pay to administer the UBE and how much more can students expect to pay in the future?

6 - Currently, the NYBOLE posts sample answers to essays on their website. These are written by candidates under test conditions and represent answers/responses with high scores. The UBE essays posted are model answers that appear to be written by

examiners, not test-takers under testing conditions. This kind of assistance is not the same.

7 - It is unclear what exactly "portability" means - according to the NCBE website, each jurisdiction decides for how long the UBE score will be recognized. Does this mean the score is only portable for a period of 1 to 3 years? There may be a perception that once you pass the UBE you can practice anywhere anytime.

8 - Why are the UBE essay questions better than the current NYBE questions? How do they test better competency to practice law in NY?

9 - Why could there not be a choice to take either or both the current NYBE and the UBE. For example, give the UBE on Day three of the NYBE for those who think they would like a more "portable" license? It seems that since NY is tacking on the NYLE, and other states may follow suit, it could be impossible to have something truly easily portable...more hoops may be coming down the road.

10 - If implementation were delayed, wouldn't it give NY a chance to see whether this proposed change gets traction in other states as well? Wouldn't NY be giving up a lot if no one followed or followed in a way that would truly serve the employment goals of students who desire to live/practice in NY and the Northeast?

11- How many NY lawyers are currently also licensed in the 14 UBE states?

12 - How many NY law firms also have offices in the 14 UBE states?

No one has yet asked how the new mix of bar components with new percentages will affect the bar pass rate. There will surely be a difference when you increase the MBE and decrease the essays. Has NY investigated whether there have been changes to the bar pass rates in the jurisdictions adopting the UBE? I happen to know that there have been significant changes in at least one jurisdiction --- North Dakota. It is unclear whether it is directly attributable to adoption of the UBE but the timing would seem to indicate that it is a factor.

Comment 3- Stripped down, this is really about the essays, since NY already uses the multi-state for the majority of the multiple choice questions and uses the MPE as well.

Personally, I feel strongly that the NY essays should be retained, and that use of the multi-state for the multiple choice and the MPE is sufficient overlap. I do not think folks who take an exam elsewhere should be able to "transfer" that score to NY and pursue admission subject only to taking a brief multiple-choice test.

I would endorse portability of the multi-state score, but only in a context where subsequent applicants to NY have to pass not only the NY multiple choice but also the NY essays. I understand that because of the way in which the essay scores are "scaled" this is a methodologically more complicated alternative that it might seem.

I am particularly troubled by the suggestion that foreign-educated candidates might begin to take the "national" examination in other jurisdictions which are not prepared to admit them to practice and then if they get a "passing" score decide to opt into taking a very limited NY multiple choice examination in NY for which a brief cram course might well suffice.

I would also add, on the other hand, that shifting to the National Bar exam for some or almost all of the NY exam might hasten the option of taking the exam (or that portion of the exam) after the second year.

While these are my personal opinions, I have no idea how the Committee as a group may feel, and I write to provoke the circulation of written comments by Committee members and see whether there is a sufficiently common position that the Committee might fruitfully prepare a Committee comment on the proposal, which presents a very important policy issue.

Comment 4- Does anyone know who grades the UBE? Is it done by the National Board, or do the individual state BEs grade it?

I also am troubled about retaining only the multiple-choice portion for one hour. While I am not opposed to use of the UBE and the shortening of a NYLE portion, I would like there to be at least one essay required, preferably on New York practice, which is significantly different from the procedure of all other states, most of which use a variation of the Federal Rules. IMHO, the current multiple choice portion always seemed like a rather insignificant portion of the New York bar exam, and it seems strange to be the portion the bar examiners would want to keep.

Comment 5- Without going through the comments sent to the group, I want to express my support for this initiative, I think it has been well thought through and works for all constituencies. Whatever views might be, and I am not certain what the group meeting on this would be aimed at, I want to let people know that if the thought is to submit some 'committee position' comment, I do not support that.

I am not suggesting there was any pre discussion in the committee. I am suggesting that individuals should absolutely give comments to the court and state board of bar examiners. I am not supporting a 'group' comment staked on the Committee.

I think there is plenty of time to adjust if there is adjustment--the students are not going to be prejudiced by this. Maybe some faculty who have courses that only aim at the NY Bar might not. This is a huge benefit to students in all fronts and the cut score issue is always there. If the Cut score is held where it is, on a statement of the board of bar examiners, it may in fact help on that -- though of course nothing is forever. The scores are portable, as I understand it. Not just the "pass".

This gives tremendous help to students, including the ability to re take just the NY portion of the exam if you have passed the UBE but failed the NY portion. IN addition, it is good to have the NY questions focused.

I don't know what to think about the holistic approach to bar exams. I am not persuaded by New Hampshire, not because it doesn't work there, but because we all have our own ideas of holistic.

In any event, I do hope you put comments to the Board as they want. I think they will be taken seriously.

My comments would support the move. I know change is change and it is never seamless, but students are benefited, and I don't think for one minute that the people of the state are going to be harmed if the bar examiners are able to do what they say will be done in the short questions.

Comment 6- I have spent years preparing bar candidates for the New York essays, and I am also acquainted with the Multistate Essay Exam as well as with the essay exams of other states, and the proposal to use the MBE troubles me. I do not believe the MEE, which is the essay part of the UBE, is a substitute for the New York essays. The New York essays are simply tougher, and they demand more knowledge of law, than the essays on the MEE. And just to take one key New York subject, so long as New York uses the CPLR, no one should be admitted to the bar here who has not studied the CPLR in a serious way, regardless of his or her intended area of practice.

Comment 7- Without knowing in detail the issues considered by the Court and the BOLE, it seems there is much to commend this proposed reform. Having said that, I'm afraid that there is not sufficient time for us to understand the proposal and its implications and reach consensus as a committee before the comments are due.

Given the short time frame for comments, perhaps it is best left to individuals and/or law schools to decide whether they want to submit comments.

Comment 8- A 2011 article in the Bar Examiner states that each jurisdiction grades its own essays according to the NCBE rubric.

http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2011/800311Early.pdf
The MEE and MPT scores are then scaled to the MBE.

The change would be adding an additional MPT and significantly reducing the number of areas of law tested on the essays (MEE tests the MBE subjects plus business associations, conflicts of law, family law and trusts and estates). Both Family Law and Trusts and Estates are very specialized subjects in New York (although now with "no-fault divorce," perhaps less so). The differences in New York civil procedure, criminal law and criminal procedure would be left to multiple-choice questions. We would also lose administrative law, which was just added. This subject is a substantial practice area (benefits, labor and employment), and is a large part of the work of legal services, which may also effect pro bono work.

Comment 9- Thirty days to comment on this seems unusually short, especially considering the importance of the matter. Does anyone have any insight as to whether there is even a possibility of getting the comment period extended?

I agree somewhat with proponents of the proposal in that it might allow students more flexibility in pursuing job opportunities. And, the reality is, many lawyers already engage in multi-state practice. That said, I think it is important that prospective New York attorneys be forced to study and continue be tested on certain basics of New York law, with particular emphasis on demonstrating familiarity with the CPLR. Moreover, to the extent not already tested, I believe prospective New York attorneys should be tested to demonstrate familiarity with the New York State court system and jurisdiction of the various courts.

My comment was simply expressing the view of a practitioner and what practitioners want are attorneys familiar with the CPLR as well as the structure and a familiarity with the New York State court system.

Accordingly, I don't know if there has been any previous dialogue between our committee and the "powers that be" on this issue/proposal. I know it was not mentioned at the committee meeting last month. If there was no prior dialogue with our committee on this, I would find that quite disappointing as I would hope that those with authority over this issue would want to get input from the NYSBA, as the largest state bar association representing tens of thousands of practitioners.

Comment 10- Here's my two cents:

I certainly agree that there are real and significant benefits to a uniform bar exam. I do, however, have three sets of concerns:

1. I'm appalled at the speed with which this is being implemented. Law schools have geared their curriculum to the current bar exam and it seems quite unfair not to give students at least a full year's notice so that their course selection can reflect this major change.

2. I worry whether a uniform bar exam will ultimately lead to a uniform cut score. I understand that that is not being proposed at this time, but the benefits of portability, etc. are lost if states have different cut scores. And, any push to make the cut score uniform will almost certainly lead to an increase in the passing score, which, as has been demonstrated in NY, will produce a disparate racial impact.

3. I also worry that adopting a uniform bar exam undercuts the effort to rethink licensing in a more holistic manner. While adopting the UBE doesn't necessarily preclude a state from considering a more practice-based, performance-based model of licensing (e.g. N.H.), it does, at least symbolically, detract from that effort.

Comment 11- I will defer to the Committee also. However, I agree in considering the proposal to switch to the UBE and various proposals to alter the bar exam in connection with the Kenney Report.

Comment 12- It would be useful to know what we discussed previously on this subject, if anything—

Comment 13 - I recall that extensive research was done when NY increased the bar pass score from 660 to 665. The following is the link to the NYBOLE's press release that summarizes the extensive research undertaken by the NCBE to assess the impact. <http://www.nybarexam.org/press/summary.pdf>

I think that NY should request that research be undertaken: (1) with regard to the jurisdictions which have adopted the UBE to see if there has been a change in the bar pass rate and (2) a statistical equating of NY's bar takers over the past three years to see whether the students who passed the NY bar exam would have passed given the proposed UBE revised component percentages, specifically with the increase in the MBE score to 50%, the decrease in the essays to 30%, and the doubling of the MPT to 20%.

How we can be expected to proceed without this information is astonishing and without precedent.

Comment circulated 10/22/2014

Others have already eloquently articulated their views regarding what seems to be an artificial sense of urgency to consider and implement this proposal by next year, and I share those concerns. This is a significant change, with many potential ramifications, and I think it deserves more study and consideration than two months at the end of a busy year will afford. Notwithstanding the Chief Judge's desire to see this implemented in 2015, I would urge the LEAB Committee to consider pressing for an additional year, both from the standpoint of providing more time to study and consider the proposal, but also out of a sense of fairness to current law students, who may have planned their schedules (and, in some cases, already pre-registered for bar review courses) based on the current exam format. My second comment relates to how, assuming that we do move toward a uniform bar exam in the near future, the many New York-specific provisions of law would be tested, in order to ensure that admittees are fully competent to practice in this state. My own memories, having gone to law school in another state, of being astonished at the complexities of the CPLR and terrified at the prospect of having to master them by July, are still fairly vivid after 35 years, and while I don't necessarily wish that experience on current aspirants to the New York bar, I think it is part of what is required to prepare someone to practice law here. I think this second comment supports the need to have a full discussion that includes law schools, law firms, students and practitioners, which deserves more time than would be available if this has to be implemented next year.

Appendix E

October 07, 2014

Faculty Lounge Blog - <http://www.thefacultyounge.org/2014/10/new-york-considers-plunging-into-uniform-bar-exam.html>

New York Considers Adopting Uniform Bar Exam

The Uniform Bar Exam - UBE - has been adopted in 14 jurisdictions thus far (Alabama, Alaska, Arizona, Colorado, Idaho, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Utah, Washington, and Wyoming) but it hasn't yet gotten its big break.

That day may soon arrive.

The New York State Board of Law Examiners is recommending to the New York Court of Appeals that the state adopt the UBE, adding only a 50 question, multiple choice, one hour test of New York law to be administered on day two. The New York Court of Appeals has now issued a Request for Public Comment.

I wonder about the potential impact of New York adopting the UBE, even under these terms. First, it would surely be a big win for the National Conference of Bar Examiners. Second, if the UBE spreads, it might significantly increase the portability of bar admission. Third, if the UBE becomes the dominant form of bar examination, there will be even less incentive for law schools to teach anything but a national law curriculum.

There are still questions here. First and foremost relates to this 50 question New York bar exam. Will students be forced to study just as many New York topics, with the same intensity, in order to pass New York? Will 100% dependence on a high-speed multiple choice component for state law uniquely disadvantage certain applicants?

This is worth watching. New York is considering adopting the UBE as early as July, 2015. Comments are due by November 7, 2014.

Above the Law – 10/9/2014 - <http://abovethelaw.com/2014/10/ask-the-professor-new-york-and-the-uniform-bar-exam/>

Ask The Professor: New York And The Uniform Bar Exam

By Joseph Marino

New York has always been the vanguard when it comes to making legal precedent. When Justice Benjamin Cardozo left the New York Court of Appeals to join the U.S. Supreme Court, many viewed it as a step backwards. New York is proposing adopting the Uniform Bar Exam (UBE).

Is this a step backwards or a move forward for New York and the rest of the country?

For those unfamiliar, first adopted in 2011, the UBE is a uniform bar exam that is prepared by the National Conference of Bar Examiners and is administered, graded, and scored by 14 U.S. jurisdictions. The exam, like all other bar exams, tests knowledge and skills that every lawyer should be able to demonstrate prior to becoming licensed to practice law. The UBE exam has three components: (1) the Multistate Essay Examination (MEE), multi-subject essays that test legal reasoning; (2) the Multistate Performance Test (MPT), a closed universe writing assignment that is similar to what they have you do as a 1L in legal writing class; and (3) the Multistate Bar Examination (MBE), a 200 multiple choice question exam testing seven subjects. Much like the Multistate Professional Responsibility Exam (MPRE), each student's score on the UBE exam is portable, meaning that the student may submit the score to any other UBE jurisdiction as part of the attorney admission process. While the UBE is administered uniformly, each individual jurisdiction sets its own passing score and continues to decide who may sit for the bar exam and who will be admitted.

Such a drastic change in the composition of the bar exam in New York is not without precedent. When the New York Board of Law Examiners adopted the MBE, only a handful of states were using it. However, as soon as New York adopted the MBE, the rest of the country quickly joined. As Erica Moeser, President of the National Conference of Bar Examiners said, the UBE's development has been "awaiting a state that has a lot of candidates, to provide that springboard for other larger jurisdictions to come aboard." New York would be that state.

Is this good or bad?

Many see the switch from a state specific exam to the UBE as beneficial in that the scores will be portable and will allow students to better pursue job opportunities.

Further, it would allow law firms and other prospective employers to draw from larger pools of law students with the increased "portability" of where they can practice.

But will there be unintended consequences? Passing the New York bar exam was a special achievement, something unique. That panache will be lost. (But who wants to be snobby anyway?) More importantly, will this make for an even tougher job market in New York? A person can sit for the exam in Arizona and apply for jobs in New York. The job market may be better for the rest of the country, but will it make the New York market impossible to get employed in? Further, what is the incentive to come to a school in New York? Why pay the high cost of tuition at an unranked New York law school when you can study in Colorado? Can these schools in New York survive the UBE?

Only time will tell if this is good for New York and/or the rest of the country.

Professor Joseph Marino has been a fixture in the world of legal education for the past 40 years. Whether you're just starting law school, about to take the bar, or an attorney in need of CLE, he and Marino Legal Academy are here to help. He is the Director of Marino Bar Review and the Marino Institute for Continuing Legal Education. He writes a bimonthly column, Ask the Professor. Visit the Marino CLE page on ATL, connect with him on LinkedIn and Facebook, or email him via info@marinolegal.com.

Above the Law – 10/27/14 <http://abovethelaw.com/2014/10/declining-nationwide-bar-exam-pass-rates/>

Declining Nationwide Bar Exam Pass Rates

By MARINO BAR REVIEW

The bar pass rates have been dropping nationwide, particularly in states administering the Uniform Bar Exam (UBE). Pass rates have declined (dramatically in some cases) from the July 2013 bar exam to the July 2014 bar exam in the majority of the UBE states. The pass rate for people taking the bar exam dropped a whopping 22% in Montana, 15.2% in Idaho, and 13% in North Dakota. The pass rate is down 7.7% and 7.5% in Arizona and Washington, respectively. Other UBE states reporting a lower pass rate include Alabama, Wyoming, and Utah. While there are a few states that have yet to report their 2014 pass rates, the trend is clear: people are failing the bar exam at higher rates across the country.

This news is troubling, not only for those unsuccessful examinees who will have to retake the bar exam, but it is cause for great concern for law schools across the country. Has something gone wrong to result in such a dramatic decline in the number of people who are passing the bar exam? How are the big bar review courses responding to severe drops in pass rates across the country?

Most bar review courses offer a free repeat of their course to unsuccessful applicants, but is it wise to stick with something that didn't work the first time? Marino Bar Review offers a unique **Retaker Course** for the New York and New Jersey bar exams.

The Retaker Course is specifically designed for people retaking the bar exam. The course, which includes 3 hours of personal tutoring, trains previously unsuccessful examinees to pass bar exam. In the midst of declining pass rates across the country, Marino Bar Review students maintained a 96% bar exam pass rate.

Suffolk County Bar Association E-Alert

What's the Big Hurry to Adopt the UBE?

By John L. Buonora

The Uniform Bar Examination, or UBE, having currently been adopted by 14 states, is a uniform licensing examination consisting of a Multi-State Bar examination (MBE), the Multi-State Essay Examination (MEE) and Multi-State Performance TEST (MPT). Currently New York State does conduct an MBE and the MPT. In addition the New York State Bar Examination also consists of five essays and 50 multiple choice items dealing with New York Law.

Before I get into too many complicated details and esoterica allow me to get to the main point of this article which is...What's the Big Hurry to Adopt the UBE in New York? On October 6th of this year the proposed new rules were circulated. Chief Judge Jonathan Lippman, a strong advocate for the proposed changes, summoned the deans of New York's law schools who basically learned for the first time that the Chief Judge planned to implement the adoption of the new UBE in time for the July 2015 Bar Examination. He asked members of the Bar for comments which are to be submitted by November 9th. The Chief Judge also stated as quoted in the New York Law Journal that the change could be adopted by late November. This writer, like so many fellow members of the

Suffolk County Bar Association first learned of the proposed change on October 7th from a New York Law Journal article and an E-Blast from SCBA President Bill Ferris that same day. Proponents of the change claim that it would make it easier for graduating students to seek employment in states other than from where they took the bar exam and that it would standardize testing nationwide. This seems to be a big selling point for the change.

The reality is, in this writer's opinion, that most students in our region's law schools such as Touro, St. John's, Brooklyn Law, New York Law, CUNY, Pace, Albany Law and Hofstra to name a few will never practice anywhere but in New York State. Even proponents of the change acknowledge that those students would not benefit from the change.

It may well be that the UBE will be adopted in New York State, it certainly appears to be fast tracked. But why the rush? There are many questions that need to be answered. Firstly, it must be understood that adoption of the UBE does not mean that if an examinee passes the test in his/her home state that they will be automatically admitted in another UBE state.

Another thing to understand is that portability, the ability to apply bar passage to another state, is not for a lifetime. Depending on the UBE jurisdiction, an examinee would have to apply for admission in the transferring state within anywhere from eighteen months to five years. States such as New York could still require a portion of the examination to be dedicated to testing the examinee's knowledge of its laws. Yet it would appear to me that adopting the UBE would force New York law schools to teach less about New York substantive law and procedure and more about generic or Federal law principles.

Perhaps the most significant problem created by the proposed change is that students who will be taking the July 2015 bar exam have already completed most of their law school education and are already taking bar review courses preparing them for the current New York bar exam. Students experience enough anxiety and sleepless nights over the upcoming bar exam. This situation will only worsen as they, to use a cliché, have to switch horses in mid-stream. It would seem to make more sense that if the change is adopted, whatever the final form, ideally it should start for current entering 1L students or, at the very least, giving students and educators a minimum of one full year to prepare for implementation.

It's interesting to note that of the fourteen states that have adopted the UBE only two are east of the Mississippi, Alabama and New Hampshire. Even assuming that a New York educated student were to seek employment in another state the pickings are slim. The closest are the aforementioned New Hampshire followed by Alabama. Also interesting is that of the most influential states in the country none have adopted the UBE. In addition to New York, California, Florida, Illinois and Texas have not adopted the UBE. UBE's proponents argue that if New York gets on board others will soon follow. I have to wonder whether this is an argument on the merits or one of civic ego or pride to be the first of the "influencers" to adopt the change. There are many other UBE issues that need to be looked into but the purpose of this article is not to "get into the high grass" debating these many issues. As Ross Perot once famously said "the devil is in the details". (One issue for instance is the question of fees. It seems that proponents claim that test takers will save money by taking a "uniform" test. Not necessarily so. Right now the fee to take the New York state Bar examination is \$250.00. I'm told that the fee for the UBE could rise to \$750.00 to \$1,000.00 in New York and the exam taker may face similar fees in other states).

Proponents of the UBE have amassed quite a bit of literature in support of their argument going back to the year 2010 or so but there doesn't seem to be any history of debate pros and cons readily available. With all due respect, I wonder if these folks only talk to each other. Giving the bar one month to consider an issue that most members have been blissfully ignorant of just doesn't seem right.

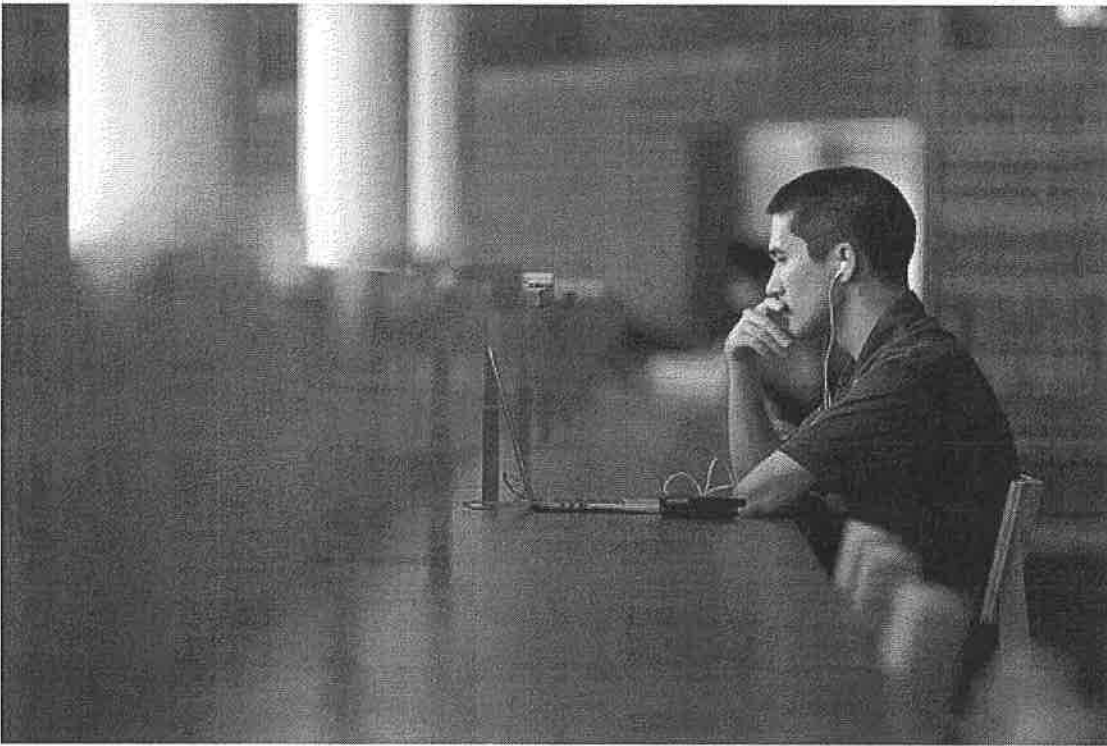
It may be that New York's ad adoption of the UBE may be a good thing. But it could very well be a bad thing, especially for so many of our students who are anticipating taking the July 2015 bar exam. We just don't know. We don't have enough information and so little time to respond to it.

What's the big hurry?

WSJ Blog

New York Weighs Overhaul of Bar Exam

By Jacob Gershman



Associated Press

New York is debating whether to replace its bar exam with a nationally administered and graded standardized test — a switch that could happen as early as next summer — that could make it easier for young lawyers to move in and out of New York without having to take another grueling test.

The judges on New York's highest court are weighing a proposal to adopt what is known as the Uniform Bar Examination, which is now used by 14 states.

Lawyers who've passed the uniform exam in one state can transfer their score to another participating jurisdiction — with some limiting exceptions.

Were New York to adopt the test, it would roughly triple the number of uniform test-takers across the country. The switch could happen quickly. It could be administered to

students now in their final year of law school as early as July 2015. The New York Court of Appeals is expected to vote on the plan after a public comment period ending next month.

“New York would be a national leader as the first large state in terms of bar applicants to administer this test,” states the proposal by the New York State Board of Law Examiners, which operates under the auspices of the Court of Appeals. The board says the uniform exam would expand “employment opportunities for lawyers throughout the nation.”

The potential impact on New York’s bar passage rate isn’t clear. The state’s cut-off score for its existing two-day test is relatively low. The board suggests a minimum passing score of 266 for the uniform test, lower than the score set by most states that use the exam.

The combined passage rate in 2013 for test-takers in those 14 states was 77.4%, according to data from the National Conference of Bar Examiners, which prepares the uniform exam. New York’s passage rate is 64.1%. Bar officials say New York’s lower rate reflects the large numbers of foreign-educated candidates sitting for the test there.

The uniform test under consideration in New York isn’t entirely portable.

A person who barely passes the New York test might not make the cut in states with a higher threshold, including Arizona, Colorado and Washington. New York would also require bar candidates to pass an hour-long New York law-specific portion, consisting of multiple-choice questions.

Patricia Salkin, dean of Touro College’s law school on Long Island, told Law Blog that New York ought to take more time before plunging ahead.

She said she feared that the switch could be jolting for third-year students who are preparing to take the current exam.

Diane Bosse, who heads the state’s examiners board, says the impact on those students would be minimal because of the overlap of content between the tests.

Appendix F

Reprinted from:

Comprehensive Guide to Bar Admission Requirements 2014

CHART 10: Admission by Transferred UBE Score/Fees

	Date of Uniform Bar Examination (UBE) administration	What is your time limit for accepting a UBE score (i.e., maximum age of the UBE score)?	What is the minimum passing UBE score?	Do you require completion of a jurisdiction-specific component† before admission?		Do you require passage of the MPRE?‡		Are applicants who are transfer of UBE* scores required to apply within your exam fi deadlines?		What is the application fee for admission by transferred UBE score?
				Yes	No	Yes	No	Yes	No	
Alabama	July 2011	25 months	256 (July 2014)	X		X			X	\$750
Alaska	July 2014	5 years	280		X	X			X	\$800
Arizona	July 2012	5 years	273	X		X			X	\$675
Colorado	February 2012	2 years / 5 years	276		X	X			X	\$810
Idaho	February 2012	37 months	280		X	X			X	\$600 / \$800 (eff. 5/1/14)
Minnesota	February 2014	36 months	260		X	X			X	\$950
Missouri	February 2011	24 months	260	X		X			X	\$1,240
Montana	July 2013	3 years	270	X		X		X		\$150** / \$400**
Nebraska	February 2013	5 years	270		X	X			X	\$925
New Hampshire	February 2014	3 years / 5 years	270		X	X			X	\$700
North Dakota	February 2011	2 years	260		X	X			X	\$400**
Utah	February 2013	18 months / 5 years	270		X	X			X	\$550 / \$850
Washington	July 2013	40 months	270	X		X			X	\$585 / \$620**
Wyoming	July 2013	3 years	270		X	X		X		\$600

*Jurisdictions may accept transferred UBE scores prior to their date of first UBE administration. See Chart 6, pages 20–21, for which jurisdictions currently accept UBE scores from other jurisdictions.

†A jurisdiction-specific component is a separate test, course, or some combination of the two that is administered by a UBE jurisdiction to assess candidate knowledge of jurisdiction-specific law. The component can be offered live or online.

‡ See supplemental remarks for time parameters within which an MPRE score must be earned or achieved.

** Plus NCBE report fee.

Supplemental Remarks

What is your time limit for accepting a UBE score (i.e., maximum age of the UBE score)?

Alabama The transferred UBE score will be valid for a period of 25 months after taking the UBE in the jurisdiction in which the transferred score was earned.

Alaska 5 years preceding the date of application to the Alaska Bar Association.

Arizona 5 years prior to taking oath in Arizona.

Colorado Applicants with UBE scores older than 2 years may apply for admission based on the UBE score plus a period of full-time law practice in a jurisdiction that allows admission on motion to Colorado attorneys. For UBE scores earned more than 2 years but less than 3 years ago, law practice requirement is at least 1 year; for UBE scores earned more than 2 years but less than 4 years ago, law practice requirement is at least 2 years; for UBE scores earned more than 3 years but less than 5 years ago, law practice requirement is at least 3 years.

Missouri 24 months preceding date of the application.

Nebraska 5 years from UBE score release date.

New Hampshire An applicant who earned a UBE score more than 3 years but less than 5 years prior to the date the motion for admission by transferred UBE score was filed must establish that he or she has been primarily engaged in the active practice of law for at least 2 years in another state, territory, or the District of Columbia, in which the applicant was a member in good standing and authorized to practice law during the entire 2-year period.

North Dakota 2 years from the date of the exam in the jurisdiction where UBE score was earned.

Utah Utah accepts all UBE scores received within 3 prior exams (approximately 18 months). For applicants with UBE scores that are older than 3 prior exams, Utah will accept UBE scores for up to 5 years with proof of the full-time practice of law.

What is the minimum passing UBE score?

Alabama Beginning with the July 2014 bar examination, the minimum passing UBE score will be 256. (The February 2014 examination consisted of the UBE and the Alabama Essay Examination [AEE]; the transferred UBE score was combined with the applicant's scaled written score on the AEE. The UBE score was weighted 80% and the AEE was weighted 20% to determine the combined score. An applicant must have achieved at least a 256 combined score.)

Do you require completion of a jurisdiction-specific component before admission?

Alabama Applicants for the February 2014 examination were required to complete the Alabama Essay Examination (AEE), a 6-question, 3-hour examination administered the day prior to the UBE. Beginning with the July 2014 examination, the AEE will be eliminated and applicants will be required to complete a course on Alabama law.

Arizona Online course on Arizona law is required prior to admission for all applicants.

Missouri Rules require an open-book online test, the Missouri Educational Component Test (MECT), for applicants to complete as a condition of licensure. Review materials are posted to assist applicants.

Montana Montana Law Seminar attendance is required prior to admission. The course is offered the day after the bar exam.

Washington Washington Law Component (WLC) is an open-book, timed, online multiple-choice test with Washington-specific study materials available online to review prior to and during the test.

Are there any time parameters within which an MPRE score must be earned or achieved?

Alabama Applicants must successfully complete the MPRE no earlier than 12 months before the UBE was taken in the transferring jurisdiction and no later than 25 months from time the first Academic Bar Examination is taken.

Alaska Within 8 years of filing an application.

Arizona Within 2 years before the successful bar examination or within 5 years after a UBE in which the applicant earned the minimum passing score required by Arizona.

Colorado MPRE scores may be earned no more than 2 years prior to filing application. MPRE need not be completed prior to filing an application.

Idaho No time limit.

Missouri No time limit.

Montana MPRE scores of 80 or better are good for 3 years.

Nebraska 5 years after the release of the passing score.

New Hampshire No time limit.

North Dakota Within 5 years of filing an application.

Utah No time limit.

Washington No more than 3 years after or 3 years before successful UBE.

Wyoming 3 years before transfer to Wyoming; 1 month after.

What is the application fee for admission by transferred UBE score?

Idaho \$500 if not admitted as attorney in another jurisdiction; \$690 if admitted as attorney in another jurisdiction.

Montana \$150 for non-attorneys or attorneys with less than 1 year of practice experience; \$400 for attorneys with 1 or more years of practice experience.

Utah \$550 if not admitted in another jurisdiction; \$850 if admitted in another jurisdiction.

Washington \$585 if not admitted in another jurisdiction; \$620 if admitted in another jurisdiction.

Appendix G

10/18/14 Legal Monitor Worldwide (Jordan) (Pg. Unavail. Online)
2014 WLNR 29095873

Legal Monitor Worldwide (Jordan)
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October 18, 201420141018132214

Standardized bar exam broadens scope to 50 states

The Montana bar's switch to a standardized test takes the focus off Montana law and broadens the scope to all 50 states. The test results from July's bar exam reveal a 20 percent drop in passing scores. Typically 87 to 94 percent of UM law students pass the test. This year only 64 percent did, which means 22 students failed. The dean of UM's law school is blaming the uniform bar exam for the dip in scores. Montana's Supreme Court said the change is a move most western states are making and Montana is just falling in line. School of Law Dean Greg Munro says Montana law is peculiar. More of a concern is when you make a test that's that general to fit all 50 states, then you're probably introducing a lot of ambiguity into the questions, said Munro. That's what's troubling for UM Law School administrators and students taking the bar exam. Munro said students spend three years learning Montana law. We think they need to learn to use code of one state -- the law from the legislature -- and use the decisions to understand the politics involved, and if they can do that, they can move to another state and understand their code, said Munro. Munro says one unusual part is insurance law, specifically the stacking policy. That policy allows people who have more than one vehicle and get into an accident, to stack the coverage of the insurance policies on both vehicles. That policy doesn't apply in Montana's neighboring states, like Wyoming or North Dakota. Munro said those specifics aren't addressed in the uniformed test. Montana Supreme Court Chief Justice Mike McGrath said the court decided to make the switch to the uniformed test for two reasons. We felt the bar exam was a more fair and objective test and the second primary reason is it allows for reciprocity with other states, said McGrath. For now Munro's biggest concern is figuring out the plummeting bar exam passage rate. Munro said the dip in scores is the lowest they have ever seen at the school and other schools who switched to the uniformed test also reported a drop in scores. Montana's Supreme Court isn't certain the test was the reason the scores dropped. They said they'll have to see what happens on future tests before weighing

A TOUGH PASS: UND Law School students struggle to pass bar exam

Grand Forks Herald (**North Dakota**)

September 16, **2014** Tuesday

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Distributed by McClatchy-Tribune Business News

Section: STATE AND REGIONAL NEWS

Length: 588 words

Byline: Anna Burlison, Grand Forks Herald

Body

Sept. 16--People are struggling to pass the **North Dakota bar exam** and the UND Law School is looking at how to address the problem.

The state offers the exam annually in both February and July, and only 56 percent of UND graduates who took the test for the first time this summer passed.

The overall pass rate for all test takers in the state, which includes those who have practiced law elsewhere but are taking the exam for the first time in **North Dakota** and those who have taken the test before, has fluctuated between 69 and 83 percent, according to National Conference of Bar Examiners Data. Concrete numbers aren't available yet for this year.

"We believe overall pass rates are the lowest they've been in 10 years, but we don't know the reason for that and that's something that the data will help us drill down on," Law School Dean Kathryn Rand said. "We want these numbers to be higher. We want our graduates to be ready to practice in **North Dakota** and launch successful careers here."

'Important milestone'

UND Law School graduates are allowed to take the state **bar exam**, or Multistate Uniform **Bar Exam**, up to five times. Once they pass the exam, they must still pass a moral character and ethics exam to be sworn in as a licensed attorney in **North Dakota**.

Graduates planning on practicing in other states must take that state's **bar exam** to practice there. This also applies to current law practitioners who choose to move their practice into another state.

North Dakota's overall passing and first-time rate is in line with national average, but this last group of 50 first-time test-takers was extremely low.

"This is not a proud moment for any of us," Rand said. "This is an important milestone. It's not the only shot our students have at being a successful attorney... but everyone who takes the **bar exam** hopes to pass it."

The numbers published by the American Bar Association, the NCBE and the *North Dakota* Supreme Court all vary slightly because they have slightly different ways of defining "first-time" testers, among other things.

But Patricia Hodny, the Law School's director of career services, said the school works to provide 100 percent of the data they have access to.

Looking for answers

In light of the test results, Rand said the school will work toward providing more support for existing students and looking at what qualities failing students had.

The Law School also recently lobbied the state to get more specific information about the results of the **bar exam** and succeeded, so starting in 2013, Rand said the school has started compiling more specific data to find out where students are struggling.

"What we really want to do is reach out to our students and to increase the support we provide while they're in law school and leading up to the **bar exam**," Rand said. "And for those students who don't do as well as they'd hoped, we'd like to have support for them."

For example, Rand would be able to figure out if students with a low undergraduate GPA did poorly, or whether a specific section of the three-part **bar exam** is proving most difficult.

"We're not at this point, but if we knew students with a certain undergrad GPA were more likely to pass the bar than students below it, that might influence our admission standards, but it would certainly influence our academic support efforts if they're admitted to law school" Rand said.

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Appendix B

Advisory Committee on the Uniform Bar Examination ADVISORY COMMITTEE MEMBERS

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

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

Michelle Anderson
Dean, CUNY School of Law

Hannah Arterian
Dean, Syracuse University College of Law

Diane Bosse
Chair, New York State Board of Law Examiners

Nitza Escalera
Assistant Dean of Student Affairs, Fordham University School of Law

David J. Hernandez
Founder, David J. Hernandez & Associates

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

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

Appendix C

Notice of Public Hearings: Uniform Bar Exam

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

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

The hearings will take place as follows:

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

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

questions, and the 200-question MBE. Unlike the current New York bar exam, the UBE produces a portable score that can be used to gain admission in other states that accept the UBE, provided the applicant satisfies other jurisdiction-specific admission requirements.

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

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

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

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

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

Persons unable to attend a hearing or interested in only making a written submission may submit their remarks by e-mail to UniformBarExam@nycourts.gov at least seven days in advance of the hearing, or by mailing the submission to the Advisory Committee at:

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

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

Appendix D – Gallagher Article

MARY CAMPBELL GALLAGHER, J.D., Ph.D., is president of BarWrite® and BarWrite Press. Her company prepares candidates for the bar exam, focusing on foreign-trained candidates and retakers, and offers in-school and in-house writing instruction. She is the author of *Scoring High on Bar Exam Essays* (3rd ed. 2006) and *Perform Your Best on the Multistate Performance Test (MPT)* (2011). Her last article for the *NYSBA Journal* was "Alternatives for Scheduling the Bar Exam" (with Professor Carol A. Buckler), September 2013. She serves on the NYSBA Committee on Legal Education and Admission to the Profession. SUZANNE DARROW-KLEINHAUS is Professor of Law and Director of Academic Development and Bar Programs at Touro Law Center. She is the author of *The Bar Exam in a Nutshell 2d*, *Acing the Bar Exam*, and *Mastering the Law School Exam*. Her law review articles include "A Response to the Society of American Law Teachers' Statement on the Bar Exam" and "Incorporating Bar Pass Strategies into Routine Teaching Practices."

A Comparison of the New York Bar Examination and the Proposed Uniform Bar Examination

BY MARY CAMPBELL GALLAGHER, J.D., PH.D. AND PROFESSOR SUZANNE DARROW-KLEINHAUS

The New York Board of Law Examiners (BOLE) proposes adopting the Uniform Bar Exam (UBE), substituting it for the current New York Bar Exam (NYBE). The BOLE proposal is currently under active consideration, and it is the subject of public hearings. This article examines some of the issues the proposal raises. For a number of reasons, the chief question is how much of an obstacle the differences between the uniform laws tested on the UBE and New York law as now tested on the NYBE pose to adoption of the UBE.

History of the Proposal

In early October 2014, the New York Court of Appeals announced that at the prompting of the Board of Law Examiners it was urging the State to adopt the Uniform Bar Exam (UBE), effective for the July 2015 bar exam.¹

The New York State Bar Association Committee on Legal Education and Admission to the Profession, co-chaired by practitioner Eileen Millett and Dean Patricia Salkin of the Touro Law Center, submitted a report on that proposal to the Executive Committee of the NYSBA.² The Committee took no position on the UBE, but it urged delay and careful consideration of the proposal. On November 1, 2014, the House of Delegates of the New York State Bar Association adopted the report of the Committee. It urged delay, stressing that if the UBE were adopted, adequate notice should be provided to all parties.³

On November 12, 2014, Chief Judge Lippman announced that the comment period would be extended from the original November 7, 2014, to March 1, 2015, and that introduction of the UBE would be delayed. He announced creation of a study committee headed by the Honorable Jenny Rivera, Associate Judge of the New York Court of Appeals.⁴ The committee has announced hearings.⁵

The Current New York Bar Examination

Structure of the New York Bar Examination

The current New York Bar Examination (NYBE) has exceptional prestige among state bar examinations in the United States. It is a two-day examination, administered twice a year, on the last Tuesday and Wednesday of February and July.⁶ It consists of four parts: (1) the Multistate Bar Examination (MBE), a full-day 200-question multiple-choice examination on seven subjects, designed and licensed to the states by the National Conference of Bar Examiners (NCBE); (2) five essays on New York law, each requiring 40 to 45 minutes; (3) the Multistate Performance Test (MPT), designed and licensed to the states by the NCBE, which is a simulated law-office task where research and writing are to be performed within 90 minutes; and (4) the New York Multiple Choice Test, 50 multiple choice questions, roughly 25 testing the Civil Practice Law and Rules (CPLR).⁷ The Board of Law Examiners creates the New York essay questions and the New York Multiple Choice Test.

Half of the current New York Bar Examination tests on New York law and is drafted by the New York Board of Law Examiners. Like the examinations of a number of other states whose examinations must reflect their legal specifics and local industries, the New York bar examination tests candidates' knowledge of specific New York law and skills for practice. Thus, the Texas bar exam tests on oil and gas; Delaware, on corporations law; California, on community property. The New York bar exam tests on the New York Civil Practice Law and Rules (CPLR), and on the numerous New York distinctions in wills, domestic relations, criminal law and procedure, and other subjects.

According to the website of the New York Board of Law Examiners (BOLE), applicants may qualify to sit for the NYBE in four ways.⁸ These are (1) graduation from an American Bar Association (ABA) approved law school in the United States with a juris doctor (J.D.) degree;⁹ (2) a combination of law school study at an ABA-approved law school and law office study;¹⁰ (3) graduation from an unapproved law school in the United States with a juris doctor degree and practice in a jurisdiction where admitted for five of the seven years immediately preceding application to sit for the New York bar examination;¹¹ or (4) foreign law school study.¹²

In 2014 the number of bar candidates taking the New York exam in February and July, combined, was 15,227. In July, 2014, the first-time pass-rate for the 8,277 candidates with a J.D. from an ABA-accredited law school was 82%. The first-time pass rate for 2,437 foreign-trained candidates was 43%.¹³

In addition to passing the bar examination, candidates for the New York bar must demonstrate that they have completed a mandatory 50 hours of pro bono work.¹⁴ They must pass the national, multiple-choice, Multistate Professional Responsibility Examination (MPRE), also designed by the NCBE.¹⁵ They must also produce proof of moral character.¹⁶

This year, under the Pro Bono Scholars Program, a limited number of graduates will be allowed to take the bar exam during their third year of law school in exchange for a commitment to do pro bono work.¹⁷

The New York State Board of Law Examiners Provides a Content Outline for the NYBE¹⁸

The BOLE states:

The New York portion of the NYBE consists of five essay questions and 50 multiple-choice questions. The general subject areas that may be tested are as follows:

- (1) administrative law [effective with the February 2015 exam];
- (2) business relationships, including agency, business corporations, limited liability companies, partnerships and joint ventures;
- (3) New York civil practice and procedure [effective with the February 2015 exam, Federal civil practice and procedure will no longer be tested on the New York portion of the exam];
- (4) conflict of laws;
- (5) New York and federal constitutional law;
- (6) contracts and contract remedies;
- (7) criminal law and procedure;
- (8) evidence;
- (9) matrimonial and family law;
- (10) professional responsibility;
- (11) real property;
- (12) torts and tort damages;
- (13) trusts, wills and estates; and
- (14) UCC Articles 2 and 9.

Proposal to Substitute the UBE for the NYBE While Adding a Stand-Alone One-Hour Multiple-Choice New York Test

Structure of the UBE

The Uniform Bar Examination is a two-day package of bar-exam components created by the NCBE and licensed to the states. Under the BOLE proposal, the UBE would be a substitute for the components of the current New York Bar Examination. None of the content of the UBE would be drafted by the New York Board of Law Examiners. The New York Board of Law Examiners would create only an add-on one-hour multiple-choice test on New York law.

The UBE would consist of these three parts: (1) the Multistate Bar Examination (MBE), as on the NYBE, the full-day 200-question multiple-choice examination on seven subjects; (2) six Multistate Essay Examination (MEE) questions, based on uniform laws, rather than state-specific law, each taking 30 minutes; and (3) two tasks of the Multistate Performance Test (MPT), simulated law-office tasks where research and writing are to be performed within 90 minutes. All parts of the UBE are designed by the NCBE and licensed to the states.

The proposal thus excludes the current New York Multiple Choice Test, with its 50 multiple-choice questions, roughly 25 of which test the Civil Practice Law and Rules (CPLR).¹⁹

Most significantly, the UBE proposal substitutes an essay component designed by the National Conference of Bar Examiners, the MEE, for the New York essays currently offered by the BOLE, while adding a separate one-hour test on New York law. The MEE component of the UBE consists of six questions that test on uniform laws rather than the law of any particular jurisdiction. Each essay requires 30 minutes.

According to the National Conference of Bar Examiners, the UBE has been adopted by these 14 jurisdictions: Alabama, Alaska, Arizona, Colorado, Idaho, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Utah, Washington, and Wyoming. Each UBE state sets its own pass score. These may of course change.

The one-hour multiple-choice test on New York law that the BOLE would add would be in lieu of the extended testing on New York-specific law in the current five New York essays and 50 New York multiple-choice questions. According to a presentation by BOLE chair Diane Bosse to the NYSBA Committee on Legal Education and

Admission to the Profession on October 23, 2014, the one-hour test would be offered on additional dates to accommodate re-takers. The BOLE has provided an outline of law to be tested in this new New York multiple-choice test. Except that the new test does not include Articles 2 and 9 of the UCC, but does include federal and New York constitutional law, although representing examinations of different lengths, these outlines are the same.

The New York Law Journal published a comparison of the UBE and the current New York Bar Examination on October 7, 2014.²⁰

Proposed UBE for NY

Day 1

AM: Multistate Performance Test
Two 90-minute test items
(3 hours)

PM: Multistate Essay Examination
Six 30-minute essay questions (3 hours)

Day 2 Multistate Bar Examination
200 multiple-choice questions
3 hours in the AM
3 hours in the PM

Current NY Bar Exam

Day 1

AM: Three essays
50 NY multiple choice questions
(3 hours and 15 minutes)

PM: Two essays
Multistate Performance Test (3 hours)

Day 2 Multistate Bar Examination
200 multiple-choice questions
3 hours in the AM
3 hours in the PM

Currently, New York bar exam scores are weighted as such: MBE = 40%; Essays = 40%; MPT = 10%; and the NY MCT = 10%. Note that these proportions are statistical constructs. Stronger scores on one section may compensate for weaker scores on another. Under the proposed UBE, the score would be weighted differently: MBE = 50%; MEE = 30%; and MPT = 20%. In addition to passing the UBE, a candidate in New York will be required to pass a separate New York multiple choice test, achieving a minimum score of 30 out of 50.

These proposed changes in scoring have raised some concerns:

- Difference in scoring between the UBE and the NY bar exam is significant because NY bar candidates can use stronger scores on one section to compensate for weaker scores on other sections; increasing the MBE from 40% to 50% of the total grade while decreasing essays from 40% to 30% may impact the pass rate.
- The UBE's increase of the MPT to 20% from 10% will not compensate for the decrease in the weight of the essays. An MPT task is a more complicated and challenging test instrument than an essay.

The differences between the essay components of two exams are discussed below Comparison of Essay Questions on the Multistate Essay Exam (MEE) and the New York Bar Exam

The MEE questions:• Candidates are allowed 30 minutes per question.

- MEE questions are open-ended. Candidates must spot the issues.
- Comparison of released sample answers in a UBE (MEE) jurisdiction, on the one hand, with released sample answers from the NY bar exam, on the other, suggests that MEE essay responses may be longer than New York responses and contain more extensive and detailed rule statements. Meanwhile, however, MEE candidates have less time to answer each question.²¹

The MEE essay subject-matter coverage:

- Answers based on "uniform rules" in such subjects as Business Associations, Wills, Trusts, Family Law.
- Subjects that are key in New York practice, such as Contracts and UCC, and that appear on every New York bar exam, may be included less frequently on the MEE.

New York essay questions:

- Candidates are allowed 42–45 minutes per question.
- The questions do not demand issue-spotting, because the interrogatories are "issue specific," for example, "Can Dan be held liable in Mom's personal injury action on behalf of Child against Dan?" Candidates must know and be able to quickly state the applicable rule of law.²²

The NYBE essay subject matter coverage:

- Answers based on New York law.
- Students who study in New York law schools and plan to practice in New York benefit from learning New York law.

Note that with the MEE rather than New York essay questions on the bar exam, law school faculty will have to choose between preparing students for practice (New York law) and preparing students for the bar exam (uniform rules). This is because the MEE tests on the uniform laws, rather than on New York law. Subjects that the NYBE emphasizes by testing at every session or almost every session, such as contracts and the Uniform Commercial Code, may show up on the MEE only once a year or less. The questions on the MEE require the bar candidate to do "issue-spotting," while those on the NYBE specify the issues the candidate must address. The questions on the MEE can be more discursive than those on the NYBE, which require producing a tight syllogistic response, more like a brief.²³ The MEE questions may be fairly described as advocates' questions or debaters' questions, those on the NYBE as practitioners' questions.

During her presentation to the NYSBA Committee on Legal Education and Admission to the Profession, on October 23, 2014, Diane Bosse, the chair of the Board of Law Examiners, offered the following chart to compare the content on the current NYBE with that of the proposed UBE. Italics indicate content unique to either the UBE or the NYBE.

Content Comparison

Current New York Bar Exam

- *Administrative Law*
- Constitutional Law
- *Professional Responsibility*
- Business Relationships
- Contracts and Contract Remedies
- Real Property
- *New York Civil Practice*
- Criminal Law and Procedure
- Torts and Tort Damages
- Conflict of Laws
- Evidence
- Trusts, Wills and Estates
- Matrimonial and Family Law
- UCC Articles 2 and 9

UBE

- Constitutional Law
- Business Associations
- Contracts
- Real Property
- *Federal Civil Practice*
- Criminal Law and Procedure
- Torts
- Conflict of Laws
- Evidence
- Trusts and Estates
- Family Law
- UCC Articles 2 and 9

At her presentation to the NYSBA committee, Diane Bosse also noted the things that do *not* change under the UBE. New York will still

- Decide who may sit for the bar exam and who will be admitted to practice
- Set its own passing scores
- Grade the essays and performance tests
- Set policies regarding how many times candidates may retake the bar exam
- Decide how to assess knowledge of local law
- Determine for how long incoming UBE scores will be accepted
- Make character and fitness decisions

Effects of Adopting the UBE Plus One-Hour Test on New York Law

Effect on Portability; Questions Remaining.

The chief argument in favor of the UBE is that it may give new law school graduates the ability to transfer their UBE scores from one UBE jurisdiction to another, that is, it offers "portability." At a time when many law school graduates have difficulty finding suitable jobs, the ability to expand the scope of their job search may have a significant advantage. Thus, a bar candidate who passes the Alabama bar exam could in theory simply transfer the score to Missouri, meet any additional licensing requirements, and be licensed to practice law in Missouri, without having to prepare for and pass the Missouri bar exam. The National Conference of Bar Examiners' Comprehensive Guide to Bar Admission Requirements, 2014, lists the additional requirements.²⁴

Likewise, new graduates who had passed the bar exam in another UBE state would no longer have to prepare for, take, and pass the New York bar exam in addition to the first bar exam, in order to be licensed in New York. They could come to New York, pass the one-hour test on New York law, and, assuming passage of the MPRE and the character requirements, be licensed and work in New York.

In her presentation to the NYSBA committee, Ms. Bosse listed the following advantages of the UBE for students:

- Eliminates the duplication of effort associated with taking the bar exam in multiple jurisdictions
- Reduces the cost, delay, anxiety and uncertainty of having to take multiple bar exams
- Maximizes employment opportunities
- Enhances mobility for law graduates and their families
- Offers more options when choosing where to take the bar exam

Possible Effect on Practice-Readiness of New York Graduates

New York law as tested on the New York Bar Examination differs markedly from the uniform law tested on the Multistate Essay Examination.

New York has adopted few uniform laws. Justin L. Vigdor is a former president of the New York State Bar Association, a long-time member of the New York State Uniform Law Commission, and a member of the Executive Committee of the National Conference of Commissioners on Uniform State Laws. Speaking from the floor at the November 1, 2014, meeting of the NYSBA House of Delegates, which was considering the UBE proposal, he emphasized the difficulty of getting the New York State Legislature to adopt uniform laws.

I'm very concerned about the fact that [the UBE] is going to test on uniform law. I have been one of New York's five uniform law commissioners for 26 years. Unfortunately, New York is not big on adopting and passing uniform laws. We have a terrible time getting most uniform laws through the legislature When we do get uniform laws passed, we have a New York version of those uniform laws, and it's questionable whether they're really uniform. . . . That is an issue that must be addressed.²⁵

Thus, substituting the UBE for the NYBE may impede the efforts of New York law schools to prepare graduates to be practice-ready, that is, ready for practice in New York State. This is because, with the UBE, law schools would have to teach the uniform laws in order to prepare students for the bar exam.

Bar-preparation professional John Gardiner Pieper argued in the *New York Law Journal* on November 5, 2014, that eliminating the intensive training in New York law that is now required to pass the bar exam would do a disservice to new lawyers:

Stripping the bar exam of its local component would do a disservice to newly admitted attorneys, including the foreign-trained attorneys who now account for nearly one-third of bar exam applications in New York and for whom bar exam preparation often is their first opportunity to learn New York law. These new lawyers have more than enough to learn and navigate in the first years of practice in New York without the specter of entering the practice without the benefit of having studied New York law and procedure that we as a bar were not just encouraged, but required to know for admission. No matter how concentrated, experienced and specialized one may become, one should have a base knowledge of certain core subjects at one's disposal along the way. The New York BOLE has labeled this "minimum competency."²⁶

New York law schools have recently emphasized preparing students to be practice-ready, adding many clinical courses, all of which must necessarily focus on New York law. The Pro Bono Scholars Program initiated by Chief Judge Jonathan Lippman counts additional practice readiness as among its objectives.²⁷ In many law schools, the effort to achieve practice-readiness may extend throughout the curriculum, encompassing doctrinal courses, writing courses, and clinics. Substituting the UBE for the New York Bar Exam would force in-school courses to reduce teaching for practice-readiness, that is, for New York law, by substituting uniform laws for New York law. To aid graduates in obtaining employment, many law schools in New York have also added credit-bearing courses specifically tailored to preparing students for the New York bar exam. This creates a conflict for the law schools.

How Candidates Prepare for the Bar Exam

At many law schools in New York State, law students can enroll in for-credit bar-preparation courses focusing on New York law, taught either by members of their own faculty or by representatives of the various bar courses. Whether or not they take such courses in law school, almost all candidates for the New York bar exam take a full six-week bar-preparation course emphasizing New York law. Courses for the NYBE are offered by BarBri, Pieper Bar Review, Themis, Kaplan, Marino, and BarMax. Supplemental shorter courses teach essay or MPT or MBE skills, or all three, or are geared to re-takers. These include BarWrite®, BarBri, Marino, Pieper, and Kaplan. Because of the numerous ways in which New York law and practice is state-specific, full bar-preparation courses and supplemental essay courses devote substantial time to preparing candidates for the five New York essays and the 50 New York multiple-choice questions.²⁸

Effect on Competence of Foreign-Trained Candidates

The effect on the education and testing of foreign-trained bar candidates raises significant issues about how the differences between the uniform laws and New York law may affect the usefulness of the UBE. If the BOLE has an alternative plan for training foreign-trained candidates if the UBE is adopted, the BOLE has not disclosed it. Foreign-trained bar candidates, about one third of all New York bar candidates, make up one of the largest groups significantly impacted by the UBE proposal. For example, many contracts entered into worldwide are governed by New York law. New York's unusually liberal standards for allowing foreign-trained law graduates to take the bar exam have been justified as promoting the global spread of New York law. For foreign-trained bar candidates, bar preparation is an essential part of their legal education. When they take a six-week course preparing them for the current New York bar exam, they learn the CPLR and the so-called New York distinctions, as well as law for the subjects on the Multistate Bar Exam. It weighs against the UBE that preparation for a one-hour test will not make for effective global ambassadors. The UBE will serve neither these bar candidates nor the policy goals of New York State.

Possible Effect on Diversity in the Legal Profession

No studies exist regarding the effect, if any, on diversity in the profession of the UBE. The Society of American Law Teachers (SALT) has written to the chair of the Board of Law Examiners, Diane Bosse, urging study of the possible disparate impact of the UBE on minority bar candidates before the UBE is adopted in New York. It noted that the suggested passing score of 60% on the new stand-alone multiple-choice test would be higher than the estimated current average score of 50% on the NYMCT. FN

FN <http://www.saltlaw.org/wp-content/uploads/2014/11/SALT-Letter-NY-Bar.pdf> possible Effect on Pass Rates

The MEE appears to require candidates to know less substantive law than the current New York bar exam, and in fewer subjects. Depending on how the exam is graded, that might be expected to raise pass rates. However, the MEE

essays are difficult in a different way. Their structure requires more issue-spotting than do the NYBE essays. This may impact the speed with which candidates must answer. Anyone hoping to raise bar pass rates by adopting the UBE must be aware that, in fact, bar pass rates have been dropping nationwide, and particularly in states administering the UBE:

Pass rates have declined (dramatically in some cases) from the July 2013 bar exam to the July 2014 bar exam in the majority of the UBE states. The pass rate for people taking the bar exam dropped a whopping 22% in Montana, 15.2% in Idaho, and 13% in North Dakota. The pass rate is down 7.7% and 7.5% in Arizona and Washington, respectively. Other UBE states reporting a lower pass rate include Alabama, Wyoming, and Utah.²⁹

The first-time pass rate for J.D.s with a degree from ABA-approved schools in New York State also dropped, but by much less. It was 83% in July 2014. In 2012, it had been 85% and in July 2013, it was 88%.³⁰

Possible Effect on Attractiveness of Law Schools in New York to Prospective Students

Practitioner Eileen Millett, co-chair of the NYSBA Committee on Legal Education and Admission to the Profession, poses the question: "Does the UBE take away or add to the allure of coming to a New York law school? It remains to be seen." That is, would adoption of the UBE make law schools in New York less attractive?³¹

Conclusion

The Board of Law Examiners and the National Conference of Bar Examiners have presented substantial arguments in favor of the Uniform Bar Examination, which tests on uniform laws. On the other side is a reluctance to give up a markedly successful bar examination, one that is a source of prestige and pride to the profession. From a practical point of view, New York law, which is in many ways unique, plays an important role in commerce locally, nationally, and throughout the world. New York's host of New York-specific laws and rules of procedure, which many law schools now emphasize in their effort to help students become practice-ready, also weigh strongly against adoption of the UBE. With the UBE, law schools may be placed in a position of choosing between preparing students for practice by teaching New York law or preparing students for the bar exam by teaching uniform laws. Until this conflict is resolved, we may be concerned about the potential of the UBE to reduce New York graduates' practice-readiness.

1 Reported by Joel Shashenko, *Court System Seeks Comment on Adopting Uniform Bar Exam*, NYLJ, Oct. 7, 2014. <http://nylawyer.nylj.com/adgifs/decisions14/100714rfc.pdf>.

2 One of the authors of this report, Mary Campbell Gallagher, is a member of the Committee.

3 Christine Simmons, *Don't Rush Adoption of New Bar Exam, State Bar Cautions*, NYLJ, Nov. 4, 2014. <http://www.newyorklawjournal.com/id=1202675408809?>

4 "Request for Public Comment on the Uniform Bar Exam." (Nov. 12, 2014). <http://nylawyer.nylj.com/adgifs/decisions14/111314request.pdf>.

5 Joel Shashenko, *Hearings Set on Adopting UBE in New York State*, NYLJ, Dec. 31, 2014.

<http://www.newyorklawjournal.com/id=1202713691686/Hearings-Set-on-Adopting-UBE-in-New-York-State>, referring to the "Notice of Public Hearings." <http://www.nycourts.gov/ip/bar-exam/publichearing.shtml>.

6 Most states now have a two-day bar examination. The bar examinations of California and Louisiana extend over three days, rather than two.

7 As of February 2015, the MBE comprises seven subjects: contracts, torts, constitutional law, real property, evidence, criminal law and procedure, and federal civil procedure.

8 <http://www.nybarexam.org/TheBar/TheBar.htm#qual>.

9 Section 520.3 of the Rules of the Court of Appeals.

10 Section 520.4 of the Rules of the Court of Appeals.

11 Section 520.5 of the Rules of the Court of Appeals.

12 Section 520.6 of the Rules of the Court of Appeals. See also the section titled "Foreign Legal Education," <http://www.nybarexam.org/Foreign/ForeignLegalEducation.htm>.

13 An additional three candidates were graduates of non-ABA law schools, and none passed. Four candidates combined law office study with law school, and three passed.

http://www.nybarexam.org/ExamStats/2014_NY_Bar_Exam_Statistics.pdf.

14 <http://www.nycourts.gov/attorneys/probono/baradmissionreqs.shtml>.

<http://www.nybarexam.org/Rules/Rules.htm#520.16>.

15 Rule 520.9 of the Board of Law Examiners. <http://www.nybarexam.org/Rules/Rules.htm#520.9>.

16 Rule 520.12 of the Board of Law Examiners. <http://www.nybarexam.org/Rules/Rules.htm#520.12>.

17 Rule 520.17 of the Board of Law Examiners. <http://www.nybarexam.org/Rules/Rules.htm#520.17>.

18 "Content Outline," revised August 2014. <http://www.nybarexam.org/Docs/CONTENTOUTLINE.pdf>.

19 As of February 2015, the MBE comprises seven subjects: contracts, torts, constitutional law, real property, evidence, criminal law and procedure, and federal civil procedure.

20 Joel Shashenko, *Court System Seeks Comment on Adopting Uniform Bar Exam*, NYLJ, Oct. 7, 2014.

<http://www.newyorklawjournal.com/id=1202672451929?>

21 See link to Minnesota sample candidate answers: <http://www.ble.state.mn.us/file/JULY2013RGAs EAs.pdf>

22 See link to New York sample candidate answers:

<http://www.nybarexam.org/ExamQuestions/JULY2013QA.PDF>.

23 See the discussion of "brief-writing" bar examination questions as opposed to "memo-writing" questions in Mary Campbell Gallagher, *Scoring High on Bar Exam Essays* 21–26 (2006).

24 NCBE and ABA Section of Legal Education and Admissions to the Bar, *Comprehensive Guide to Bar Admission Requirements*, 2014. http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf.

25 Meeting of the NYSBA House of Delegates, November 1, 2014.

<http://www.totalwebcasting.com/view/?id=nysbar> at 160:00-160:25.

26 John Gardiner Pieper, *Why UBE Needs Careful Consideration*, *NYLJ*, Nov. 5, 2014.

<http://www.newyorklawjournal.com/id=1202675467003/Why-UBE-Needs-Careful-Consideration#ixzz3P6ePjFhS>.

27 Rules of the Board of Law Examiners, "Pro Bono Scholars Program." "The Pro Bono Scholars Program is a voluntary component of legal education that provides law student participants in their final semester of study with an opportunity to assist in improving access to justice for persons of limited means while acquiring practical legal skills training." <http://www.nybarexam.org/Rules/Rules.htm#520.17>.

28 For example, full bar-preparation courses teach the CPLR. This instruction serves graduates of out-of-state J.D. programs, graduates of in-state J.D. programs that do not include the CPLR, and LL.M. graduates. Perhaps stressing a national character, not all law schools in New York State offer a course in the CPLR, which is intensively tested on the New York bar exam. Nor, to this writer's knowledge, do any out-of-state law schools offer courses in CPLR. Accordingly, to prepare candidates for local practice, bar review courses stress the CPLR.

29 Joseph Marino, "Declining Nationwide Bar Pass Rates" (advertisement), Oct. 27, 2014.

<http://abovethelaw.com/2014/10/declining-nationwide-bar-exam-pass-rates/>.

30 Tania Karas, *Deans Dismayed by Drop in Bar Pass Rates*, *NYLJ*, Nov. 13, 2014.

<http://www.newyorklawjournal.com/id=1202676229642/Deans-Dismayed-by-Delclines-in-BarPass-Rates>.

31 "What is the incentive to come to a school in New York? Why pay the high cost of tuition at an unranked New York law school when you can study in Colorado? Can these schools in New York survive the UBE?" Joseph Marino, "Ask the Professor: New York and the Uniform Bar Exam," October 9, 2014.

<http://abovethelaw.com/2014/10/ask-the-professor-new-york-and-the-uniform-bar-exam>.

Appendix E – SALT Letter

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November 3, 2014

Diane Bosse, Chair
New York State Board of Law Examiners
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Albany, NY 12203-5195

Dear Ms. Bosse:

This letter is submitted on behalf of the Society of American Law Teachers (SALT) in response to the proposal to adopt the Uniform Bar Exam in New York, effective with the July 2015 administration of the exam. SALT is a national organization of law professors and law school administrators committed to advancing teaching excellence, social justice, and diversity. Among SALT's highest priorities is working to create more diversity within the legal profession. It is that mission that prompts this letter asking the New York Court of Appeals to delay implementation of the Uniform Bar Exam until more information is available to assess whether the UBE is likely to increase the current test score disparity and thus produce an even greater disparate impact on racial and ethnic minorities than does the current bar exam. The idea of a national licensing exam has great appeal, but carries risks that should be addressed before adoption of the exam for the state.

New York has long been concerned about disparate bar pass rates and their impact on the profession's diversity¹ and we hope that such concern will translate into caution about a precipitous adoption of the UBE that may result in further disparate impacts. Several years ago, after SALT and others urged further study about disparate impact before New York raised its passing score on the bar exam, the resulting study revealed a disproportionate racial impact and the increase was not implemented. Given what we know about disparate test results from the LSAC National Longitudinal Study² and the New York study,³ New York should study the proposed change more fully to understand the implications of the change before acting on it.

New York is in the fortunate position of being able to study what has happened in other jurisdictions before deciding whether to adopt the UBE. Initial data indicates such a

¹ See e.g. ASS'N OF THE BAR OF THE CITY OF N.Y., REPORT ON ADMISSION TO THE BAR IN NEW YORK IN THE TWENTY FIRST CENTURY: A BLUEPRINT FOR REFORM 467 (1992); COMMS. ON LEGAL EDUC. & ADMISSION TO THE BAR OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. & THE N.Y. STATE BAR ASS'N, PUBLIC SERVICE ALTERNATIVE BAR EXAM 4 (June 14, 2002), available at <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26667>.

² *Wightman*, LSAC National Longitudinal Bar Passage Study (1998).

³ The study reported "the Caucasian/White group having the highest pass rates (about 88% for a passing score of 660 and about 85% for a passing score of 675), and the Black/African American group having the lowest passing rates (about 58% for a passing score of 660 and about 50% for a passing score of 675). *Impact of the Increase in the Passing Score on the New York Bar Examination*, Report Prepared for the New York Board of Law Examiners, October 4, 2006.

study is necessary. Fourteen states currently use the UBE and the majority of those states has experienced a significant decline in passing rates.⁴ Before adopting the exam, New York should seek to determine why the UBE has resulted in lower pass rates and whether there is a disparate impact in who has been impacted by those lower rates. New York should endeavor to determine whether the UBE exacerbates test score disparities before deciding to adopt the exam.⁵

The proposal under consideration raises other concerns as well. It calls for a new *New York Law Exam* that would consist of 50 multiple-choice questions. This exam would be graded separately from the UBE and bar applicants would not be eligible for licensing in New York if they scored less than 30 out of the 50 questions on the *New York Law Exam*. Ordinarily, multiple-choice questions are not used on high stakes testing unless they have been pre-tested. The questions that would appear on the NY exam, which we understand will utilize a completely different format from the multiple choice questions used on the current NY bar exam, have not yet been written or reviewed, much less pre-tested. No study has been conducted to assess the impact that the requirement of passing both the UBE and the *New York Law Exam* will have on overall pass rates and whether it will increase test score disparities. It has been reported that the average score on the current New York multiple-choice section is roughly 50% (25 out of 50 questions correct), not the 60% (30 out of 50 questions correct) that will now be required as a stand-alone measure. If that is accurate and if it persists with the administration of the new exam, the result will disqualify candidates who previously would have been admitted. This too requires further study.

Finally, we should note that a uniform bar exam cannot really be uniform without a uniform passing score. New York's passing score is lower than ten of the fourteen states currently using the UBE. There is reason to be concerned that a move toward adoption of the UBE would inevitably result in an effort to standardize the passing score, which would almost surely mean a higher passing score in NY. On that issue, we *do* have hard data and that data tells us that an increase in the passing score will fall disproportionately harshly on racial and ethnic minorities. That is simply an unacceptable outcome, given New York's longstanding commitment to increasing the diversity of the Bar.

For all of these reasons (plus a concern about the cost of the UBE⁶ and its limited portability⁷ and the unfairness to students who have prepared for a different bar exam),

⁴ The decline was 22% in Montana, 15.2% in Idaho, 13% in North Dakota, 7.7% in Arizona and 7.5% in Washington. Alabama, Wyoming and Utah also reported a lower pass rate. *Declining Nationwide Bar Exam Pass Rates, Above the Law*, October 27, 2014.

⁵ To the extent New York is concerned about overall passing rates, the UBE raises an additional concern. The July 2014 bar exam saw a significant drop in scores on the MBE nationwide. (Letter from Erica Moeser, President of the National Conference of Bar Examiners to Law School Deans dated October 23, 2014.) Since the entire bar exam is scaled to the MBE, it is not surprising that many states, including New York, saw a decline in passing scores. Adopting the UBE would only exacerbate this problem since the MBE would count for 50% of the exam instead of the present 40%.

⁶ New York currently charges \$250 but UBE jurisdictions typically charge three or four times that amount. We understand that any increased cost would not be passed on to students in 2015, but there is no guarantee that the higher cost would not eventually be borne by NY test-takers. Plus, there is a significant cost of transferring UBE scores to other jurisdictions (\$400 - \$1240). And, we do not know what the charge will be to re-take the *New York Law Exam*.

we urge the Court of Appeals to delay implementation until there has been an opportunity to seriously assess the impact of this exam on all students and, more particularly, to assess whether or not its adoption would exacerbate the persistent disparate impact of the bar exam on racial and ethnic minorities. We can see no urgency in proceeding without first conducting this essential research.

Sincerely,

Handwritten signatures of Olympia Duhart and Ruben Garcia in blue ink.

Olympia Duhart & Ruben Garcia
SALT Co-Presidents

cc Honorable Jonathan Lippman, Chief Judge, State of New York

⁷ Only 14 states currently use the UBE. Of those 14, five require a state-specific assessment prior to admission. All UBE states limit the portability of scores to between 2-5 years with most states restricting it to 2-3 years. Finally, since there is no uniform cut score and only 4 of the 14 states have a cut score lower than NY, a student passing the UBE in NY would not be guaranteed admission in the other 10 states unless that student achieved a score that met or exceeded the required score in that jurisdiction.