



PROPOSED REVISION  
OF THE  
NEW YORK BAR EXAM

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Diane Bosse, Chair

New York State Board of Law Examiners

# What is the Proposal?

- Adopt the Uniform Bar Examination
- Add a NY law component

# What is the UBE?

- It is a uniformly administered, graded, and scored bar examination that results in a PORTABLE SCORE that can be transferred to other UBE jurisdictions.
- UBE jurisdictions use the same multistate tests to assess the fundamental knowledge and lawyering skills needed to begin practice.
- UBE tests knowledge of general principles of law, legal analysis and reasoning, factual analysis, and communication skills.

# Benefits to Law 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 examination

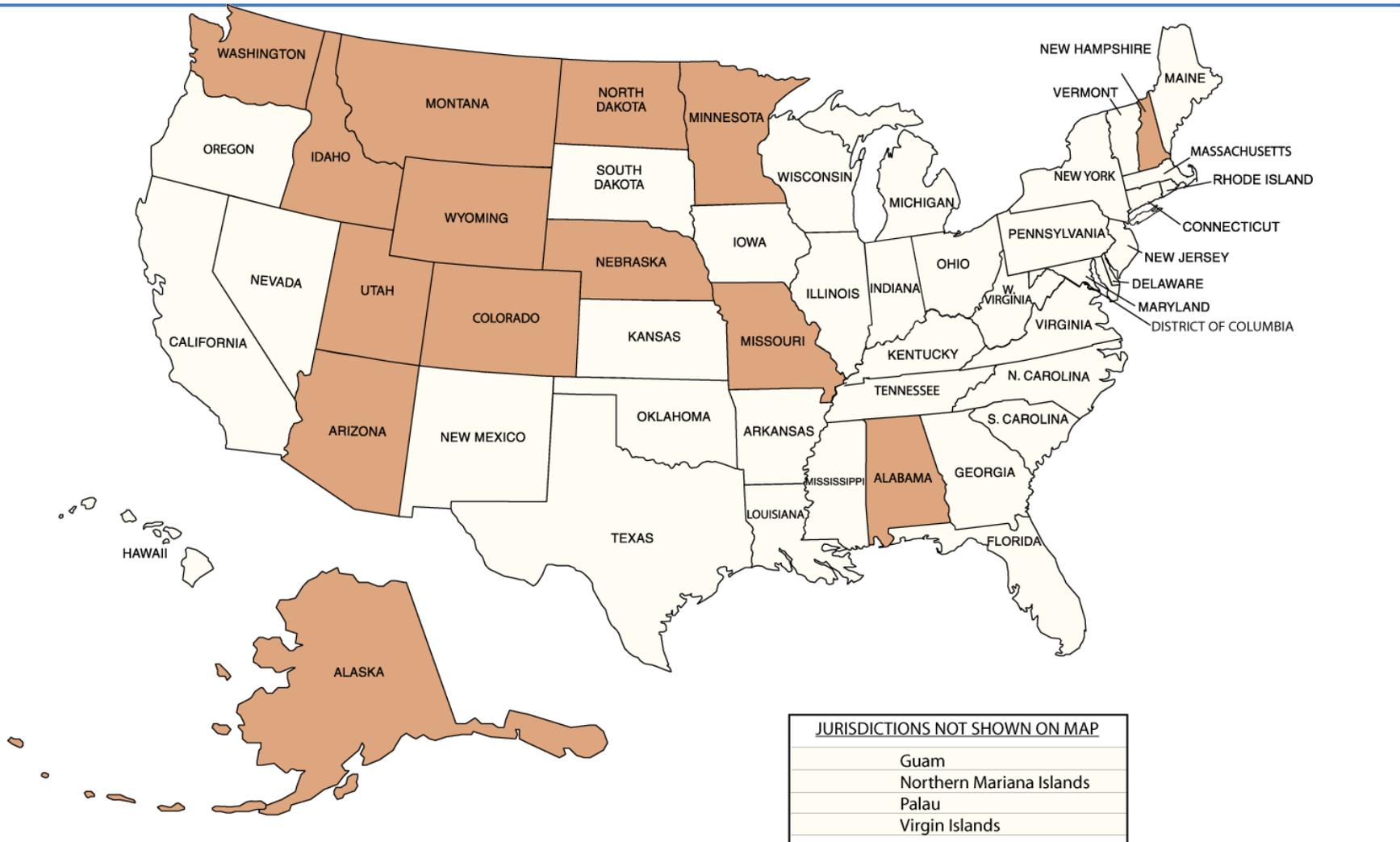
# Benefits to the Profession

- Enhances mobility of lawyers
- Facilitates multi-jurisdictional and cross-border practice
- Acknowledges a shared core of legal knowledge and lawyering skills
- Assures a high quality, uniform system of assessment of minimum competence

# Benefits to Law Firms & Clients

- Recognizes the reality of multi-jurisdictional or cross-border practice
- Widespread UBE adoption would offer improved efficiencies and cost savings for firms and clients
- Reduces delay for associates in gaining admission in multiple jurisdictions
- Gives employers a larger pool of graduates to choose from
- High quality, uniform system of assessment protects the public

# 14 States Have Adopted the Uniform Bar Examination



# What Doesn't Change under the UBE

## UBE Jurisdictions Continue To...

- Decide who may sit for the bar exam and who will be admitted to practice
- Set their 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

# Structure of Current NY Bar Exam

Day 1:

- Five Essays
- 50 Multiple Choice items
- Multistate Performance Test (MPT)
- Total: 6 hours, 15 minutes

Day 2:

- Multistate Bar Examination (MBE)
  - 200-question, multiple-choice exam (6 hours)

# UBE Test Components

## Day 1:

- Multistate Performance Test (MPT)
  - Two 90-minute items (3 hours)
- Multistate Essay Examination (MEE)
  - Six 30-minute essay questions (3 hours)

## Day 2:

- Multistate Bar Examination (MBE)
  - 200 multiple choice questions (6 hours)

# Content Comparison

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## Current NY Bar Exam

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

## UBE

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

# Proposal for Revised NY Bar Exam

- Adopt the UBE
- Include a NY law specific component, the New York Law Examination (NYLE)

Day 1:

- MPT
- MEE

Day 2:

- NYLE
- MBE

# The New York Law Examination (NYLE)

- 50 item, one-hour multiple choice test
- Candidates would be required to achieve a passing score on both NYLE and UBE to be certified for admission
- Passing score: 30 (60%)

# Proposed Content of NYLE

- Questions would be short, testing knowledge of a specific point of law without a factual scenario requiring application of law to facts
- Content : NY distinctions and important NY rules
- Content Outline: fully annotated. Significantly reduced from current Content Outline

# Proposed Administration of NYLE

- Administered with the UBE, for those taking the UBE for the first time in NY
- Administered on the morning of the MBE
- A candidate who fails the NYLE but passes the UBE could re-take the NYLE in December or in May/June
- A candidate who passes the NYLE but fails the UBE would only need to retake the UBE
- A candidate who fails both the UBE and the NYLE would re-take the NYLE with the next administration of the UBE

# Difference from Current New York Bar Examination

- Six short essays instead of five longer ones
- Two MPT items instead of one
- Remains at 250 multiple choice questions
- Current weighting: MBE – 40%, NYMC – 10%, NY essays – 40%, MPT – 10%.
- UBE weighting: MBE – 50%, MEE – 30%, MPT – 20%
- Must pass both UBE and NYLE

# Eligibility and Passing Score: Unchanged

- Educational eligibility rules set forth in Rules 520.3 and 520.6 continue to apply
- UBE passing score: 266 out of 400, instead of current 665 out of 1,000. MBE scaled score equivalent of 133 would be unchanged

# Transfer of Scores to Other States

- Jurisdictions vary on time limit for accepting transferred scores
  - Variation is two years to five years
- Passing scores vary from 260 to 280

# Transfer of UBE Scores to NY

- Scores achieved in another jurisdiction would be transferrable into NY for three years, measured from date of UBE to date of application in NY
- A candidate importing a UBE score may take the NYLE in December or in May/June

**Host:** Welcome to "Amici," news and insight from the New York Judiciary and the Unified Court System.

On today's Amici, our guest is Diane Bosse chair of the New York State Board of Law Examiners. The board is responsible for administering the bar examination to candidates seeking admission to practice law in New York State. It was created in 1894 and consists of five attorneys appointed by the Court of Appeals.

Diane, who practices with the Buffalo firm of Hurwitz & Fine, has devoted a substantial portion of her professional life to bar admissions and legal education. She was appointed to the board in 1998 and elevated to chairwoman in 2001. Before that, she spent 19 years as an assistant to the board.

Currently, the Court of Appeals is considering a proposal in which New York would transition to the so called "Uniform Bar Exam," which is essentially a national bar exam. Diane is a member of an advisory committee studying the proposal.

Diane, first, what exactly is the Uniform Bar Exam, or "UBE?"

**Ms. Bosse:** The Uniform Bar Exam is a high quality, uniform battery of tests that are administered simultaneously in the UBE jurisdictions. It consists of the Multistate Bar Examination or MBE, the Multistate Performance Test, or MPT and the Multistate Essay Examination, or MEE.

The UBE tests knowledge of general principles of law and the skills of legal analysis and reasoning, factual analysis and communication skills – essentially, it tests the fundamental knowledge and lawyering skills that are needed to begin the practice of law. The UBE is uniformly administered, graded and scored, and it results in a score that can then be transferred to other UBE jurisdictions.

**Host:** Have other states adopted the UBE?

**Ms. Bosse:** Yes. Currently there are 14 states that have adopted the UBE. They are Alabama, Alaska, Arizona, Colorado, Idaho, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Utah, Washington and Wyoming. While no large jurisdictions, in terms of the number of candidates they test, have, as yet, adopted the UBE, there are a number of large metropolitan areas represented by these states. A number of states are currently considering adoption of the UBE.

**Host:** What are the benefits to law graduates?

**Ms. Bosse:** Score portability is the key feature – and compelling justification – for the UBE. Law students must decide in their last year of law school where they are going to take a bar exam. They often must make this decision before they have a job. If they later get a job in another jurisdiction, they must then take the bar exam in that other jurisdiction in order to be admitted to practice there.

The UBE eliminates the duplication of effort associated with taking the bar exam in multiple jurisdictions and reduces the cost, uncertainty, anxiety and delay associated with having to do so. It gives law graduates more options when choosing where to take the bar exam and maximizes their employment opportunities and attractiveness to employers – both important factors in the current job market.

Additionally, the UBE enhances mobility for new lawyers and their families. For example, it enables the new lawyer to relocate without the concern of taking another bar exam when his or her spouse or partner has a job opportunity in another state.

If New York were to adopt the UBE, it is anticipated that a number of other states would follow suit. That will expand these opportunities for law graduates. The structure of the UBE puts more emphasis on skills performances than our current bar exam. This is in line with changes in legal education, and provides greater opportunity for law graduates to demonstrate that they are prepared for practice.

**Host:** What are the benefits to the profession?

**Ms. Bosse:** Interestingly, law is the only professional discipline that does not have a common licensing exam. We are one profession. While local laws may vary in some respects, the fundamental principles of law at the foundation of legal practice and basic lawyering skills are common across the country.

The UBE acknowledges that we share this common core of legal knowledge and skills. The UBE recognizes the realities of modern day multijurisdictional practice. It is an acknowledgement that clients' problems frequently cross state lines and that lawyers need the ability to engage in crossborder practice without running afoul of state unauthorized practice laws. The UBE assures a high quality, uniform assessment of minimum competence. Simply put, the UBE takes the limitations of our patchwork system of bar examining out of the equation, while still assuring that candidates are evaluated in a consistent manner that serves the function of the bar exam, which is, of course, to protect the public.

As noted earlier, the UBE also incorporates additional skills testing, making for a more complete assessment of the readiness of new graduates to enter the profession.

**Host:** How would it affect law firms and other businesses that employ lawyers and their clients?

**Ms. Bosse:** The UBE would give law firms a larger pool of applicants from which to choose their new associates and would reduce delay for those associates in gaining admission in multiple jurisdictions. Adoption of the UBE would promote the ability of lawyers to engage in multi-jurisdictional practice. Widespread adoption of the UBE would promote more efficient delivery of legal services and cost savings for lawyers, legal employers, and their clients.

**Host:** Let's backup a second. Could you please outline the current structure of the New York Bar Exam and explain just what would change if New York were to adopt the UBE?

**Ms. Bosse:** Sure. The New York bar exam is a two-day exam. On Day 1, currently candidates take five essays, 50 multiple choice questions and the Multistate Performance Test or MPT. On Day 2, they take the Multistate Bar Examination or MBE.

The MPT is a test in which the candidate is presented with a simulated case file. The candidates are assigned a task and given a file of materials – interview notes, transcripts, correspondence, contract provisions, photographs – whatever materials might be found in a lawyer’s file. They are also given a library, with cases, statutes and regulations. They are required to assimilate the facts from the file, abstract the applicable principles of law from the library, and perform the task – which can be to write a memo, write a letter, draft a pleading or a contract, or do another task such as a new lawyer might be required to do. One such item is currently administered as part of Day 1 of the New York bar exam.

The MBE, Day 2 of the exam, is a 200-item multiple choice test on the subjects of Civil Procedure, Constitutional Law, Contracts (including Uniform Commercial Code Article 2), Criminal Law and Procedure, Evidence, Real Property and Torts. It is currently administered in 49 states and the District of Columbia.

If New York adopts the UBE, instead of the five essays which are currently prepared by our Board, we would administer the Multistate Essay Examination or MEE. That is a six essay test on all of the MBE subjects I just outlined and the additional topics of Business Associations, Conflict of Laws, Trusts and Estates, Family Law and the Uniform Commercial Code Article 9.

The MEE questions are shorter than the current New York essays, but test much the same content. If we adopt the UBE, there will be two MPT items instead of just one. That’s important – we would be increasing the testing time allocated to skills testing and the range of clinical skills tested on our exam.

With the UBE, we would administer the MBE on Day 2 of the exam, just as we do now. We would separately administer a 50 item multiple choice test on New York law, focusing on important aspects of New York law that are either different from the general principles and prevailing views of the law tested on the MBE and the MEE or are unique to New York and important for the new practitioner to know. We are calling that test the New York Law Exam. Candidates would have to pass the New York Law Exam as an independent requirement from passing the UBE in order to be admitted to practice.

The weighting of the test would change. If we adopt the UBE, the weight assigned to the MBE would increase from the current 40% to 50%. Instead of the 40% weight currently assigned to our essays, we would weight the MEE at 30%. The weight assigned to the MPT would increase from 10% for the one item we currently administer to 20% for the two MPT items that form a part of the UBE. And we would no longer have the New York multiple choice questions, currently weighted at 10%, but rather would have the separate test of New York law that I described.

**Host:** Ok, we've addressed what would change. What would NOT change?

**Ms. Bosse:** Several important aspects of our admission process would not change.

The UBE is about score portability; it is not about who gets admitted to practice. So, the Court of Appeals' rules regarding educational eligibility to sit for the bar exam would not change. The Appellate Divisions would continue to make the determinations as to Character and Fitness that they do now. As to the exam itself, significantly, the passing score would be the same, albeit on a different scale.

Here's how that works.

The MBE is an equated test. What that means is that, through a statistical process that involves the comparison of performance on common items embedded on different administrations of the test, a score on the MBE achieved on one administration of the test has the same meaning as a score earned at a different time.

In order that our bar exam scores overall similarly have that same consistent measure of competence, we scale the other components of the bar exam to the MBE. On the MBE scale, our passing score is 133. Currently, we use a 1000 point scale. We multiply the MBE scores by 5, and our passing score is 5 times 133 or 665 out of 1000. If we adopt the UBE, we are proposing to have a passing score of 266, or 2 times 133, as the UBE is on a 400 point scale.

The other important characteristic of the overall bar exam that would not change is the subjects that are tested. If you compare the subjects tested on the UBE to the subjects we currently test on the New York bar exam, there are very few differences. We test Administrative Law, Professional Responsibility and New York Civil Practice and Procedure. Those subjects are not tested on the UBE. They would continue to be tested, as part of the separate New York Law Exam.

On the UBE side, Federal Civil Procedure is being added to the MBE effective with the February 2015 administration of the exam. While New York has always tested Federal Civil Procedure, with its inclusion on the MBE, we are dropping that subject this coming February. Other than that, the subjects tested on the UBE are also tested on the current New York bar exam.

Of course, we test from a New York perspective and rely on New York authorities, but the answer would frequently be the same, even if we were using as authorities published restatements of the law, uniform rules and acts or other principles of general applicability.

As to administrative issues, the New York Board of Law Examiners would continue to determine the passing score on the exam, make determinations as to disability accommodations, administer the exam and grade the essays and performance test items, and decide how to test local law – by the preparation and administration of the New York Law Examination.

**Host:** Ok. So let me see if I have this right. If I understand correctly, under the proposal: there would be six short essays instead of five longer ones; there would be two multistate performance test or MPT components rather than one; there would still be 250 multiple choice questions, 50 of them on New York law and 200 of them from the multistate bar examination. Is that correct?

**Ms. Bosse:** That's exactly right.

**Host:** All in all, would you say the new testing would be more rigorous or less rigorous?

**Ms. Bosse:** In some respects, it could be said that the proposed new testing would be more rigorous.

Currently, our testing of New York specific law is embedded in the exam, and the scores achieved by the candidates represent a composite of their performance on the parts of the test that are based on general principles and skills and the parts that are specific to New York. Under the proposal being considered by the Court of Appeals, candidates would have to separately demonstrate their competence on New York specific law, by passing the New York Law Exam with a score of 30 out of 50 or 60%.

We plan to ameliorate this added hurdle by making the questions short, testing strictly knowledge of the law, by having a detailed, annotated Content Outline, by publishing a bank of sample questions, and, most importantly, by offering the test multiple times per year to reduce the stakes associated with the test and to shorten the delay in admission for those who may fail it on their first attempt.

**Host:** New York has long had a reputation as being in the "gold standard," and there has long been a perspective that if an attorney can make it here, she or he can make it anywhere. If New York were to go with the UBE, would the state and the bar retain that distinction, or would it be watered down?

**Ms. Bosse:** Because of New York's central position in the global marketplace, the location here of many large law firms and many international firms, and the high regard in which our Court of Appeals is held throughout the country, New York attracts some of the best and brightest of the law graduates in the United States. We have and will continue to have a stellar bar, and our bar is surely worthy of the gold standard reputation.

**Host:** When would the change take effect, at the earliest?

**Ms. Bosse:** That determination will be made by the Court of Appeals, when and if it adopts the UBE. The change would not take effect in July 2015.

**Host:** What exactly is the role of the advisory committee chaired by Judge Jenny Rivera of the Court of Appeals?

**Ms. Bosse:** In appointing the advisory committee, I believe Chief Judge Jonathan Lippman had two roles in mind.

The first assignment to the Committee is to listen to the stakeholders, to understand their interests and their concerns, and to gather their input. The second assignment to the Committee is

to educate. It appears that there is some misinformation in the profession about the UBE and, in fact, about the current New York bar exam.

Moreover, although the concept of the UBE has been discussed for several years, many people just don't know about it. Our role through outreach and education is to ensure that the proposal can be discussed and comment can be made from a shared base of knowledge.

**Host:** Where can people go for more information, or to comment on the proposal?

**Ms. Bosse:** Information about the proposal under consideration can be found through a link on the homepage of the OCA website, which is [www.nycourts.gov](http://www.nycourts.gov).

Probably the best source of information about the UBE itself is the website of the National Conference of Bar Examiners. That is the group that produces the components of the UBE – engaging law professors, judges and practitioners from around the country to draft the questions that comprise these tests. That website address is [www.ncbex.org](http://www.ncbex.org).

**Host:** Thank you, Diane. And thank you, friends, for listening to this edition of "Amici." If you have a suggestion for a topic on Amici, call John Caher at 518-453-8669 or send him a note at [jcaher@nycourts.gov](mailto:jcaher@nycourts.gov)

BY DIANE F. BOSSE



**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 a member of the Council of the American Bar Association Section of Legal Education and Admissions to the Bar and the Immediate Past Chair of the Accreditation Committee of the Section. 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 Lawyer of the Year Award from the Bar Association of Erie County (2014), National Conference of Bar Examiners Chair’s Award (2012) and the NYSBA’s Award for Excellence in Public Service (2010).

# Assessing Minimum Competence in a Changing Profession: Why the UBE Is Right for New York

Wherever we attended law school, and wherever we practice, lawyers across this country share a common core of fundamental legal knowledge and basic lawyering skills. First-year law students learn general principles in foundational subjects; in ensuing coursework they learn concepts that are a feature of every state’s law, although the implementation and interpretation of those concepts may, at times, vary from state to state. Law students, wherever they are schooled in the law, learn the elements of a negligence action, the requirements for contract formation, the ways in which landowners may hold title, and the dual aspects of personal jurisdiction. They learn *mens rea* requirements for imposing liability on criminal conduct and the concepts of federalism and state sovereignty. They learn that there are rules of intestate succession, grounds for divorce, and various types of business organizations with particular formation requirements and differing obligations of ownership. They learn how to perform legal research, how to analyze facts and apply the law, how to read a statute, and how to communicate effectively and in the required voice.

Bar examiners across this country assess the competence of law graduates in these general principles,

concepts, and skills, with the ultimate purpose of protecting the public by ensuring that those who are awarded a license have the knowledge and skills required for entry-level practice. But while bar examiners are all in large measure testing the same material, they do it in a patchwork fashion and with significant disadvantages to the new lawyer who, after passing the bar exam in one jurisdiction, wishes to gain admission in a second. Such admission might be sought, for example, to allow the new lawyer to accept a job in our still unsettled legal job market, to relocate in order for a spouse or partner to take advantage of an employment opportunity, to become more valuable to an existing employer, or to serve clients in another jurisdiction.

Last October, acting on a recommendation from the New York State Board of Law Examiners, Chief Judge Jonathan Lippman announced a proposal to replace the current New York bar exam with the Uniform Bar Examination (UBE) and a separate test of New York-unique laws and distinctions, to be known as the New York Law Examination (NYLE).<sup>1</sup> Following an initial period of public comment, Chief Judge Lippman extended the comment period and appointed an Advisory Committee, chaired by

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the Honorable Jenny Rivera, Associate Judge of the Court of Appeals, to provide a report and recommendation to the Court after studying and evaluating the proposal through a public process. That ongoing process includes accepting testimony at public hearings and in written comments to the Committee; conducting outreach to engage in dialogue with stakeholders, including bar associations, most notably the New York State Bar Association and the American Bar Association; and, where possible, enlisting the Board of Law Examiners and the National Conference of Bar Examiners to perform relevant data analysis for the Committee's review. Information regarding the Committee's work and resources regarding the proposal are available on the Committee's website.<sup>2</sup>

This article is intended to provide information regarding the proposal and to address some questions that have been raised in the hopes of informing the discussion. The threshold question is definitional – just what is the Uniform Bar Examination?

### The Uniform Bar Examination Basics

The UBE is a high-quality, uniform battery of assessment measures that are administered simultaneously in the jurisdictions that adopt the test. It consists of the Multistate Bar Examination (MBE), the Multistate Performance Test (MPT), and the Multistate Essay Examination (MEE). Together, these components test the fundamental legal knowledge and lawyering skills that are needed to begin the practice of law. The UBE is uniformly administered, graded, and scored by the participating jurisdictions, and it results in a score that can then be transferred to other states that have joined the UBE network. New York currently incorporates components of the UBE, specifically the MBE and the MPT, into its bar exam. Thus, the proposal requires New York to adopt the remaining component, the MEE.

For those unfamiliar with the tests that comprise the UBE, the MBE is a 200-question multiple-choice test on the subjects of Civil Procedure, Constitutional Law, Contracts (including Uniform Commercial Code [UCC] Article 2), Criminal Law and Procedure, Evidence, Real Property, and Torts. It is currently administered as part of the bar exam in 49 states and the District of Columbia. (Louisiana, with its Civil Code, has not adopted the MBE.)

The MPT is a test in which candidates are presented with a simulated case file and directed to perform a task. The file consists of materials – such as interview notes, transcripts, correspondence, contract provisions, and pleadings – that might be found in a lawyer's file. Candidates are also given a library consisting of cases, statutes, and regulations. They are required to assimilate the facts from the file; abstract the applicable principles of law from the library; apply these principles directly or by analogy to the facts; and perform the task. The task can be either persuasive, such as to write a section of a brief or a letter to opposing counsel, or objective, such as to write a memo or an opinion letter – the kinds of tasks that a

new lawyer might be required to do. The UBE includes two such exercises on each administration, generally one being a persuasive task and one requiring an objective writing. In addition to New York, 35 states and the District of Columbia, currently use at least one MPT item as part of the bar exam.

The MEE would be new to New York. Composed of six essay questions, the MEE covers all of the MBE subjects and the additional topics of Business Associations, Conflict of Laws, Family Law, Trusts and Estates, and UCC Article 9, the particular subjects covered varying from exam to exam. The MEE questions are shorter than the current New York essay questions but test much the same content. Both the New York essays and the MEE questions are designed to test the candidate's skills of issue identification, factual and legal analysis, and written communication, as well as knowledge of the law. Twenty-seven states and the District of Columbia currently administer the MEE.

The theory of the UBE is that once a law graduate has achieved an acceptable score on this uniform battery of tests, he or she should be able to take that score and seek admission in another UBE jurisdiction. The state importing that score could add a local component, by way of a test or course covering important state law distinctions, and would perform its own character and fitness investigation before admitting the candidate to practice. But the candidate would not face the delay, cost, uncertainty, and anxiety of sitting for another – and unnecessary – bar exam, having already demonstrated competence on the core legal knowledge and skills that are the stuff of minimum competence.

The UBE tests a candidate's knowledge of generally accepted fundamental legal principles. Sources for questions on the UBE are compendia of black letter law, such as *Restatements of the Law* for various subjects, introductions to legal topics such as are found in *American Jurisprudence 2d* and similar legal encyclopedias, casebooks, treatises, uniform laws and model codes.

Fifteen states have adopted the UBE.<sup>3</sup> Admittedly, they are not large states by numbers of candidates tested, and our near neighbors have not yet adopted the test, New Hampshire being the only state in the Northeast to currently occupy a place on the UBE map. However, a number of large metropolitan areas are represented by the states that are UBE jurisdictions. Other jurisdictions are watching closely, and if New York were to adopt the UBE, it is reasonable to assume that other jurisdictions will follow. New York is perceived as a leader, and for good reason.

### A Comparison of the UBE and the New York Bar Examination

Table 1 compares the components of the current New York bar exam with those of the UBE and the proposed new exam. The MBE has been part of the New York bar exam since 1979, and New York has included one MPT

item as part of its bar exam since 2001. The UBE would add a second MPT item to the exam, giving twice the testing time and weight to the critically important assessment of clinical skills on the bar exam. While the MPT cannot assess all of the skills needed by a new lawyer, doubling the time devoted to practice skills testing and including two items that require different lawyering tasks will improve the measure we make of a candidate’s readiness to enter the profession. The MEE would capably replace the current New York-created essay questions, and the New York multiple-choice questions would transition to a separate 50-question New York Law Examination.

As is apparent from a review of Table 2, three subjects are tested on the current New York bar exam that are not

tested on the UBE. These are Administrative Law (being added to the New York bar exam in February 2015), New York Civil Practice and Procedure, and Professional Responsibility. On the UBE side, the only subject tested that is not tested on the New York bar exam is Federal Civil Procedure. The Board of Law Examiners determined to delete that topic from the content coverage of the New York bar exam because it is being added to the MBE as of February 2015. Thus, candidates will have to continue to prepare to be tested on Federal Civil Procedure, regardless whether or not the proposal is adopted.

The New York multiple choice and essay questions on the current exam are crafted by our Board of Law Examiners. They may test any of the topics listed above. Typi-

**Table 1. Structure and Weighting of Current New York Bar Exam, Uniform Bar Exam, and Proposed Exam**

New York Bar Exam	Uniform Bar Exam	Proposed Exam
<b>Day 1</b>	<b>Day 1</b>	<b>Day 1</b>
Multistate Performance Test (MPT) (1 item – 10%)	Multistate Performance Test (MPT) (2 items – 20%)	Multistate Performance Test (MPT) (2 items –20%)
NY essay questions (5 questions – 40%)	Multistate Essay Examination (MEE) (6 questions – 30%)	Multistate Essay Examination (MEE) (6 questions – 30%)
NY Multiple-Choice Questions (50 questions – 10%)		
<b>Day 2</b>	<b>Day 2</b>	<b>Day 2</b>
Multistate Bar Examination (MBE) (200 questions – 40%)	Multistate Bar Examination (MBE) (200 questions – 50%)	Multistate Bar Examination (MBE) (200 questions – 50%)
		New York Law Examination (NYLE) (50 multiple-choice questions. Must be passed independently. Offered with the UBE and on other dates)

**Table 2. Content of Current New York Bar Exam and Uniform Bar Exam**  
(subjects indicated in italics are unique to that exam)

New York Bar Exam	Uniform Bar Exam
<i>Administrative Law</i>	–
Business Relationships	Business Associations
<i>NY Civil Practice and Procedure</i>	<i>Civil Procedure* (Federal)</i>
Conflict of Laws	Conflict of Laws
Constitutional Law	Constitutional Law*
Contracts and Contract Remedies	Contracts*
Criminal Law and Procedure	Criminal Law and Procedure*
Evidence	Evidence*
Matrimonial and Family Law	Family Law
<i>Professional Responsibility</i>	–
Real Property	Real Property*
Torts and Tort Damages	Torts*
Trusts, Wills and Estates	Trusts and Estates
UCC Articles 2 and 9	UCC Articles 2* and 9

\*Subjects marked with an asterisk are tested on the MBE, as well as on the MEE. The other listed UBE subjects are tested only on the MEE.

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cally, essays test major substantive areas of Contracts, Criminal Law, Family Law, Real Property, Torts and Wills and Trusts, with minor substantive areas and, at times, procedural issues or Professional Responsibility questions integrated into the essay questions.

On a given exam, about half of the multiple choice questions will be based on procedural issues and on remedies, including New York (and, prior to February 2015, Federal) Civil Procedure, Criminal Procedure, Contract Remedies, Tort Damages, Equitable Remedies and Evidence. The remaining questions focus on substantive law.

The Board relies mostly on New York authorities in writing essay questions, but quite often the analysis of the issue and answer to the question would be the same, or substantial credit would be awarded if the candidate answered in accordance with general principles. The goal of a question is frequently to test the candidate's understanding of legal concepts, such as the statute of frauds, an attempt to commit a crime, strict liability, or ademption, and an answer that does not correctly state the New York rule may nonetheless earn several of the allotted points for recognizing and stating the issue and analyzing the facts, as well as for the quality of the writing and analysis.

If the only point of a question was to test a candidate's knowledge of the law, that could be done more efficiently with a multiple choice question than with an essay. Essays permit testing of the skills of identification of the legal issue, legal analysis and reasoning, and written communication. Replacing the New York essays with the MEE will allow continued assessment of these important skills, in the context of fundamental legal principles of the type that are generally taught regardless of where one attended law school.

### Proposed New York Law Examination

The subjects tested on the proposed NYLE would be largely the same as the content of the current New York essays and multiple choice questions, except that questions would focus on areas where New York law varies from the prevailing views or generally accepted fundamental legal principles or is unique. Constitutional Law would be dropped as an independent topic (although it would still be tested in the context, for example, of important New York expansive constitutional protections afforded to criminal suspects and defendants). The UCC would also be eliminated, as it is adequately covered by the UBE.

The NYLE would be heavily focused on New York Civil Practice and Procedure, given the importance of that subject to practice in our state and the unique nature of our practice statute, and on distinctive features of the New York Rules of Professional Conduct. Administrative Law would be tested on the NYLE, as that subject is not tested on the UBE. The NYLE would also sample knowledge in other content areas where New York law

parts company with the prevailing views on fundamental principles that are tested on the UBE.

In addition, the Board is committed to continuing to test issues, where appropriate, in an access to justice context, as well as the particular obligations of New York attorneys with respect to service and engagement in pro bono activities.

Some concern has been raised that testing of general principles on the UBE and entrusting the assessment of a candidate's knowledge of distinctive aspects of New York law to the separate NYLE will inadequately test our state law. The focus of some criticism is the mistaken belief that the UBE tests strictly "uniform laws," and the observation is made that New York is somewhat of a contrarian when it comes to adopting proposed uniform legislation.

The MBE and MEE test generally accepted fundamental legal principles, drawn, as noted above, from an array of sources, with uniform laws being only one such source. And while New York may not have adopted in wholesale fashion the myriad uniform laws that have been drafted by the National Conference of Commissioners on Uniform State Laws, the provisions of such laws are often substantially aligned with New York law.

New York long ago accepted the idea that it was appropriate to assess the competence of law graduates by testing their knowledge of generally accepted principles, such as are tested on the UBE. Were that not the case, we would not have relied on the MBE for over 35 years as the anchor for our bar exam. But clearly there are differences. It is for that reason that the proposal under consideration includes a requirement that candidates take and pass the NYLE.

In considering what structure a separate test of New York-specific law should take, the Board was mindful of the fact that multiple choice tests provide greater reliability than essays, because more questions can be asked per unit of testing time, supplying better information about the competence of the candidates. We are cautioned by testing experts that, if content can be tested in multiple choice format, it is the preferred method of testing. In addition to enhanced reliability, multiple choice questions have the advantage of being readily graded, so as not to delay the announcement of results, and they are graded objectively, without being subject to the potential for bias and human error found in essay grading. The Board believes that the important distinctions in New York law can be tested in multiple choice format and, thus, to add an essay exam on those distinctions would only duplicate the skills assessments already adequately made by the MEE. Finally, there are administrative and cost impediments to an essay test, which are insurmountable if the NYLE is to be administered in conjunction with the UBE.

In terms of the number of questions to be included, considerations were given to when and how the test could be administered, and to the fact that this test was

designed to be an independent means to evaluate competence in New York-specific law. No test covers 100% of the coursework, and this test was not intended, on each or on any administration, to assess the full range of New York distinctions. Rather, it was intended to sample the candidate's knowledge of areas where New York law is unique and important, and specifically to include those aspects of our jurisprudence that, as a matter of public protection, a new lawyer should be expected to know.

As noted above, if the proposal is adopted, the NYLE will be an independent requirement. The proposed passing score is 30, or 60%. The addition of this test would

New York has for many years tested on both general principles and New York distinctions with regard to the MBE subjects, which now number seven.<sup>5</sup> Candidates are already preparing for the New York bar exam by learning the general principles that are tested on the MBE, together with the New York rules tested on the traditional New York bar exam.

Thus, it is only with regard to the non-MBE UBE subjects that appear (along with the MBE subjects) on the MEE that testing would pivot from a New York-only perspective to general principles and New York distinctions. Those subjects are Business Associations, Conflict of Laws, Family Law, and Trusts and Estates. Additionally,

Wherever we attended law school, and wherever we practice, lawyers across this country share a common core of fundamental legal knowledge and basic lawyering skills.

represent a shift to an exam requiring a greater demonstration of competence in New York law than is required on the current bar exam, where the score achieved is a blend of performance on New York-specific and general principles. On the current exam, candidates who do well on the MBE and MPT could offset any deficiency in their knowledge of New York-specific law and pass the exam.

If the plan is adopted as proposed, the NYLE would be offered multiple times a year. The Board has created a detailed, annotated outline for the proposed NYLE and invites comment from all stakeholders. Comment is particularly invited as to the scope of the outline: whether New York law, in fact, varies from the prevailing view in a way that is significant and important for entry-level practice; and whether there are critical areas of practice that are not reflected in the outline.<sup>4</sup>

In addition, the Board is drafting and, if the proposal is adopted, plans to post a bank of questions on its website. The Board anticipates that these will be direct questions of legal principles, testing a candidate's specific knowledge of the law. Gone will be any complex fact patterns to present the issues, given that the Board is satisfied that the factual and legal analysis skills required by fact-based questions will be adequately assessed on the UBE.

### Preparing for the UBE and the NYLE

Some are concerned that if New York adopts the UBE, it will disadvantage New York candidates who have learned the New York rules in their study in New York law schools. Others fear that our New York law schools will no longer teach New York law. These dual concerns touch the question of how candidates will prepare – and will be prepared by their law schools – for the new testing regimen.

UCC Article 9 would be tested on the UBE, but it would not be tested on the NYLE.

While the Board of Law Examiners has no doubt that New York law schools seek to prepare their students for practice in New York, the majority of people who sit for the New York bar exam did not earn their J.D. degrees at our New York law schools and presumably did not have the benefit of studying New York-specific law. In fact, while there are 15 law schools in New York, in 2014 graduates of 193 ABA-approved law schools sat for the New York bar exam. Out of the 15,227 candidates who sat for the bar exam in New York in 2014, 5,088 were graduates of New York law schools, 5,304 were graduates of out-of-state ABA-approved law schools, 4,813 were foreign-educated, and a handful qualified in another fashion.

The Board assumes that most, if not all, of our candidates – including those who attended law school in New York – studied from national casebooks and learned the general concepts that are tested on the UBE. Many, if not most, of our candidates learned the critical distinctions in New York law through their preparation for the bar exam. The passing rates on the bar exam for candidates who graduated from an ABA-approved law school and then sat for the New York bar exam for the first time in July are quite similar for graduates of New York law schools and for those who attended law school beyond our borders. On our July exams, from 2008–2014, the passing rates for these first-time takers who were New York law school graduates ranged from 83% to 91%; the out-of-state law school graduates passed at rates ranging from 82% to 90%.

The adoption of the UBE does not incentivize reducing the amount of New York law taught in the classroom. As it now stands, faculty teach general principles and

## POINT OF VIEW

certain jurisdictional distinctions, including rules unique to New York. That would not change given the need to prepare for the NYLE and the alignment of New York law with UBE coverage. The Board also anticipates that many students attending New York-based law schools want to learn New York law because they believe this provides them with an edge in the employment market. Therefore, New York-based law schools would be an attractive option for these students, providing sufficient motivation to continue to teach as much New York law as schools have in the past.

Some are concerned that, if New York adopts the UBE, it will disadvantage New York candidates who have learned the New York rules in their study in New York law schools.

While graduates of New York law schools may have – and may continue to have – an advantage in demonstrating their knowledge of New York law on the NYLE and in gaining employment in New York, insofar as the UBE is concerned, it is not anticipated that the change to testing general principles (rather than strictly New York law) in the non-MBE UBE subjects, and particularly in the essay format in which they will be tested, will present a significant added burden to any candidates or disadvantage to graduates of New York law schools. Certainly, the high caliber of the faculty at our New York law schools suggests that they have broad knowledge of their subject areas and are fully capable of preparing students both for practice and for the bar exam, in whatever format it is administered.

### Passing Score on the UBE

A word about the passing score on the UBE is in order. The passing score on the UBE would be the same as the passing score on the current New York bar exam, albeit on a different scale. The key is the MBE. The MBE is an equated test, meaning that, through a statistical process that involves the comparison of performance on common items embedded on different administrations of the test, a score on the MBE achieved on one administration of the test has the same meaning as a score earned at a different time. In order for our bar exam scores overall to have that same consistent measure of competence, we scale the other components of the bar exam to the MBE. On the MBE scale, New York's passing score is 133. Currently, we use a 1000-point scale. We multiply the MBE scores by five, and our passing score is five times 133, or 665 out of 1000. If we adopt the UBE, we are proposing a passing score of 266, or two times 133, as the UBE is on a 400-point scale. To emphasize, the score of 266 would have the same meaning as the current 665.

There are more than 30 jurisdictions whose passing scores, on that same MBE scale, are higher than New

York's.<sup>6</sup> This has given rise to some concern about the portability of the scores earned on the UBE if taken in New York. A candidate can transfer a score to a jurisdiction only if the score is sufficiently high to satisfy the passing standard in the importing jurisdiction. New York's passing score is lower than that of 10 of the 15 jurisdictions that have already adopted the UBE. But two considerations bear mention.

First, New York test takers who are graduates of ABA-approved law schools typically do quite well – and earn a mean score on the MBE that is well above the

passing score. Those candidates who graduated from ABA-approved law schools and took the New York bar exam for the first time in July 2014 earned an MBE mean score of 145.4, which is higher than the MBE-equivalent passing score required by any state in the country, UBE jurisdiction or not.

Should a candidate not score sufficiently high on the UBE for admission in New York, the candidate may still satisfy the passing score in another UBE jurisdiction, become admitted, and enter practice there, whereas he or she would be relegated to repeating the bar exam under the current testing regime. The candidate could qualify for federal employment (in New York or elsewhere) or could otherwise become employed and may ultimately, after five years of practice, qualify to be admitted on motion in New York, should that be the desired outcome.

### Effect on Employment in New York

There are, naturally, concerns about the potential impact of new cadres of candidates who could qualify for admission in New York without taking the current New York bar exam. Of course, these candidates would be required to demonstrate their knowledge of New York law by taking and passing the NYLE, but the concern is one of the effect on job opportunities for New York lawyers.

Because of New York's central position in the global marketplace, the location here of many large law firms and many international firms, and the high regard in which our Court of Appeals is held throughout the country, New York already attracts some of the best and brightest of the law graduates in the United States.

The people who would be eligible for admission based upon their having taken the UBE in another jurisdiction would be new lawyers. They hardly represent competition to the seasoned practitioner. Moreover, New York is a traditionally "open market." New York has educational eligibility requirements that are welcoming to foreign-educated applicants. New York's ability to attract legal

talent from all corners of the country and of the world is a significant strength. It is what makes the New York bar the envy of the world. It would be ironic for New York to extend a hand to foreign-educated lawyers but close the door to new graduates of accredited American law schools who have demonstrated their competence on a robust and rigorous test. And, of course, the purpose of the bar exam is to protect the public by admitting to practice only those candidates who have acquired the quantum of knowledge of skills that equates to minimum competence.

### Impact of Change on Discreet Groups

The Bar as a whole is committed to improving access to the profession and increasing the diversity of our ranks. Change of any kind breeds uncertainty and concern. Important concerns have been raised about the impact of the adoption of the UBE on subgroups of our test-takers, and particularly on racial and ethnic groups, and whether the adoption of the UBE will exacerbate existing barriers to the profession unrelated to individual competence. Such barriers include lack of sufficient financial resources, crushing educational debt, and family caretaker responsibilities. The Board shares those concerns. The short answer – and one that is understandably not fully satisfactory – is that we cannot know with 100% certainty what the impact would be. However, we have no reason to think there should be an adverse effect, and no UBE jurisdiction has reported such an effect, but the data are simply not available. And we will never fully know the answer. It is impossible to give the current New York bar exam and the UBE to the same population of candidates, so we cannot know how a given cohort's performance on one instrument would compare to that group's performance on another.

However, the UBE is sufficiently similar to the existing test to make wide swings in performance unlikely. The Board has examined what data are available and will continue to monitor performance, but there is no reason to believe that we would see outcomes that are significantly

different from the results observed on the current bar exam. The uncertainty should not be an obstacle to adoption of the UBE but a caution for continuing analysis.

### Conclusion

The present New York bar exam has served us well. It has produced a bar with a long and proud tradition of competent and ethical representation of trusting clients. It is not by reason of any deficiency in the structure or content of our current exam that consideration should be given to the adoption of the UBE. Rather, it is the mobile nature of our society and the ongoing dramatic transformation of legal education and our profession that compels the conclusion that the time has come in this country for a common licensing test. The UBE acknowledges our shared heritage of foundational principles, while allowing space for our unique approach to law and policy, in those areas where we choose to be different. Adoption of the UBE would also mean more testing of practice and lawyering skills, in furtherance of the current goals and trends in legal education.

Assessment of law graduates on this complementary battery of tests will assure that they have assimilated the fundamental legal knowledge and lawyering skills required for entry-level practice. Requiring candidates for admission in New York to pass the New York Law Examination, in addition to the demonstration of competence implicit in passing the UBE, will further serve the ultimate purpose of the bar exam – to protect the public. ■

1. See Request for Public Comment, October 6, 2014. <http://www.nycourts.gov/ip/bar-exam/resources.shtml>.
2. <http://www.nycourts.gov/ip/bar-exam/>.
3. The UBE has been adopted in Alabama, Alaska, Arizona, Colorado, Idaho, Kansas (effective April 2, 2015), Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Utah, Washington, and Wyoming.
4. The Content Outline can be found at <http://www.nycourts.gov/ip/bar-exam/resources.shtml>.
5. Eight, including UCC Article 2.
6. *Comprehensive Guide to Bar Admission Requirements 2015*, chart 9, pp. 29–30. [http://www.ncbex.org/assets/media\\_files/Comp-Guide/CompGuide.pdf](http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf) (last visited Jan. 31, 2015).

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