

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.

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.

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