

ADVISORY COMMITTEE ON THE UNIFORM BAR EXAMINATION

CHAIR

Hon. Jenny Rivera

Associate Judge, Court of Appeals

MEMBERS

Hon. A. Gail Prudenti

Chief Administrative Judge of the State of New York

Dean Michelle Anderson

CUNY School of Law

Dean Hannah Arterian

Syracuse University College of Law

Diane Bosse, Esq.

Chair, New York State Board of Law Examiners

Nitza Escalera, Assistant Dean of Student Affairs

Fordham University School of Law

David J. Hernandez, Esq.

Founder, David J. Hernandez & Associates

Seymour James, Jr., Esq.

Attorney-in-Chief, The Legal Aid Society of New York City

E. Leo Milonas, Esq.

Partner, Pillsbury Winthrop Shaw Pittman, LLP

Member, New York State Board of Law Examiners

SUPPORT STAFF

John M. Caher

Senior Advisor for Strategic Communications, Office of Court Administration

Margaret N. Wood, Esq.

Court Attorney for Professional Matters, Court of Appeals

TABLE OF CONTENTS

Glossary of Acronyms	iii
Executive Summary	1
I. Introduction	7
II. The Current New York Bar Examination and the UBE	10
A. The current New York bar examination	10
B. The UBE	12
C. The SBLE proposal	14
1. The UBE	14
2. The New York Law Exam and Transfer of a UBE Score to New York	18
III. Committee's Work	21
A. Education	21
B. Oral and written comments	22
1. Public hearings	22
2. Small group meetings	25
3. Focus groups	27
C. Data and information collection and review	29
1. Existing data	29
2. Data requested by the Committee	30
D. Reports submitted with or referenced in written and oral testimony	33
E. UBE jurisdiction materials	33
F. Research on New York Law distinctions	34
IV. Views from the Profession and Legal Academy	35

V. Conclusions and Recommendations	38
A. Portability	38
B. Competency	44
1. New York law coverage on the UBE.....	44
2. New York-specific law	45
3. Curricular impact.....	49
4. Practice preparedness	50
C. New York’s “gold standard”	51
D. Potential outcome differentials across applicant subgroups	53
E. Lead time needed for laws schools, students and bar review courses to prepare for a new exam.....	63
F. Other issues	65
1. Cost.....	65
2. Authority and control of bar exam testing	66
3. Experiential learning alternatives to the bar examination	68
VI. Conclusion.....	71
Acknowledgement	75
Appendices	77

GLOSSARY OF ACRONYMS

ABA — American Bar Association

CLEA — Clinical Legal Education Association

CLEAB — New York State Bar Association’s Committee on Legal Education and Admission to the Bar

CUNY — City University of New York

GPA — Grade Point Average

Latino Justice PRLDEF — The former Puerto Rican Legal Defense and Education Fund

LGBTQ — Lesbian, Gay, Bisexual, Transgender and Queer

LSAT — Law School Admission Test

MBE — Multistate Bar Examination

MCAT — Medical College Admission Test

MECT — Missouri Educational Component Test

MEE — Multistate Essay Examination

MPRE — Multistate Professional Responsibility Examination

MPT — Multistate Performance Test

NCBE — National Conference of Bar Examiners

NYLC — New York Law Course

NYLE — New York Law Exam

NYSBA — New York State Bar Association

SBLE — New York State Board of Law Examiners

SUNY — State University of New York

UBE — Uniform Bar Examination

UND — University of North Dakota

WLC — Washington Law Component

EXECUTIVE SUMMARY

In November 2014, Chief Judge Jonathan Lippman appointed an Advisory Committee to study a proposal by the New York State Board of Law Examiners to fully adopt the Uniform Bar Examination (UBE) in New York and to administer a separate examination of New York-specific law. After months of study, during which the Committee received hundreds of written comments and heard from members of the legal community at public hearings, stakeholder meetings, and focus groups, the Committee recommends that the Court of Appeals adopt the UBE and two state-specific licensing components: an online “New York Law Course” and a separate, online 50-question multiple choice exam, the “New York Law Exam.” These changes should be implemented for the July 2016 bar examination. The Committee believes this new paradigm in New York licensing will fairly assess competency, protect clients, adapt to the geographic and economic realities of 21st century practice, and enhance candidate proficiency in New York law.

UNIFORM BAR EXAM

Benefits to Full Adoption of the UBE

The UBE, which is prepared by the National Conference of Bar Examiners (NCBE), is comprised of three assessment tools: (1) the Multistate Essay Examination (MEE), which contains six essay questions testing law of general application; (2) two Multistate Performance Test (MPT) tasks designed to test practical lawyering skills; and (3) the Multistate Bar Examination (MBE), a 200-question multiple choice test. The current New York bar exam uses the MBE and one MPT task, so a transition to the UBE would not result in a substantial change in test administration. The principal adjustment

would consist of replacing the five New York essays with the MEE's six essays on generally accepted legal principles, which often mirror New York law.

A significant advantage of adopting the UBE is that passage of the test would produce a portable score that could be used by the bar applicant to gain admission in other UBE states, assuming the applicant satisfies any other jurisdiction-specific requirements. This portability is crucial in a legal marketplace that is increasingly mobile and requires more and more attorneys to engage in multi-jurisdictional practice. An additional benefit of the UBE is that it includes two MPT tasks, as opposed to the one used on the current New York bar exam. These MPT questions, which require applicants to use fundamental lawyering skills to perform a legal task, will help better assess whether applicants possess the skills that are necessary to enter practice.

Fifteen states have adopted the UBE to date. New York would be the first large state, both in population and number of yearly bar applicants, to embrace the UBE, and the Committee is persuaded that if New York does go this route, other states will follow its lead.

The Committee recommends that the passing score on the UBE be set at 266, which is equivalent to New York's passing score on the current New York bar exam. The Committee further recommends that applicants who take the UBE in another jurisdiction be permitted to transfer that score to New York for a period of three years after the date on which the UBE was administered.

NEW YORK STATE-SPECIFIC COMPONENTS

The New York Law Course and the New York Law Exam

Although the UBE focuses on generally accepted legal principles, and therefore addresses the vast majority of topics and issues pertinent to anyone seeking to practice in New York State, the Committee members unanimously agree that New York lawyers

should be required to separately demonstrate their competence in New York law. The Committee recommends two separate and unique measures to ensure that those admitted to practice in the Empire State are well-versed in important New York legal principles and distinctions.

First, the Committee recommends that all bar applicants take an online New York Law Course. This course would consist of several hours of videotaped lectures on New York-specific law. Embedded questions would be inserted at various intervals to assure that the viewer is attentive and engaged with the course material. In order to complete the course, the candidate would have to correctly answer these embedded questions.

Second, the Committee recommends the administration of a separate, 50-question multiple choice exam, the “New York Law Exam,” which every applicant must pass in order to gain admission to practice in New York State. The Committee concluded that adding another 50 multiple choice questions on either day of the bar exam would impose an unfair and unreasonable burden. Consequently, the Committee recommends an online test, administered at least four times annually. To ensure the security and validity of an on-line exam, the Committee recommends that the SBLE employ appropriate technological measures to deter cheating, and that all applicants be required to complete an affirmation stating that they did not provide or receive any assistance in taking the exam. The passing score on the NYLE should be set at 30 out of 50.

These two New York-specific components will sufficiently ensure that new applicants for admission have a basic grounding in New York law. Although the current exam includes five essays and 50-multiple choice questions that cover New York legal principles, it is now possible for an applicant to perform poorly on the those portions of the test and still pass the bar exam if their high score on the multistate portions outweighs their low score on the New York part. With the distinct course and exam, applicants will now be required to separately demonstrate their knowledge of important and unique aspects of New York law. The Committee stresses that the purpose of these two components is to ensure that applicants are sufficiently versed in New York law and to

provide them with opportunities to learn the intricacies of New York law, not to erect unnecessary or unduly burdensome protectionist barriers.

The Committee's additional recommendations flow from comments received during the Committee's outreach. A significant number of commentators questioned whether changes to the existing bar exam would exacerbate differences in bar passage rates for certain subgroups of the test-taker population. The Committee's research did not produce any evidence to suspect, let alone assume, that its proposal would disadvantage or advantage any subgroup. That said, the Committee is mindful that the issue of differences in bar passage is highly complex, multi-layered and nuanced. The issue transcends any particular exam and involves historical differences in access to resources and opportunities for educational enrichment. Consequently, the Committee recommends that if the new assessment protocol is adopted, the SBLE conduct a three-year study on passage rates and trends, and that the results of the study be made public. This study, the details of which will be determined by the SBLE and the Court of Appeals, should compare the bar passage rates by race, ethnicity and gender under the current exam with the bar passage rates under the UBE.

Moreover, the Committee recommends the Court of Appeals and the SBLE study the bar passage trends of repeat takers to identify the challenges faced by those who do not pass the exam on the first administration. The study should identify actions that result in successful passage on subsequent administrations of the bar exam.

The final recommendation stems from the generally accepted view that new attorneys should be sufficiently prepared to practice law in New York State and the suggestion by several commentators the bar applicants should be permitted to substitute a clinical or other practical training experience for a portion of the bar exam. It is well-settled that clinics, externships and other practical skills offerings are an extremely valuable tool in educating future attorneys. However, whether these experiences should replace a component of the bar exam is beyond the Committee's charge to make a recommendation concerning adoption of the UBE. Nonetheless, the Committee

understands that the readiness of new attorneys is a concern among members of the legal profession, and therefore recommends that the Court of Appeals appoint a task force to consider whether the bar licensing process should include an experiential learning requirement or some other skills assessment.

In sum, the Committee recommends that the Court of Appeals:

- (1) Adopt fully the Uniform Bar Examination for the July 2016 administration of the bar examination in New York,
- (2) Require all applicants for admission on examination in New York to separately complete the New York Law Course and pass the New York Law Exam,
- (3) Require the SBLE to maintain data and conduct a three-year study of bar passage rates by demographic and gender subgroups, with the results of the study and the summary statistics regarding group performance being made available for public review,
- (4) Study bar passage trends of demographic subgroups to identify challenges of first-time test takers as well as strategies for success that may be implemented prior to taking the bar exam, and
- (5) Appoint a task force to study whether experiential learning may be quantified as a licensing requirement or whether some other demonstration of skills acquisition should be required for licensing.

REPORT TO THE NEW YORK COURT OF APPEALS ON THE NEW YORK STATE BOARD OF LAW EXAMINERS PROPOSAL TO FULLY ADOPT THE UNIFORM BAR EXAMINATION IN NEW YORK

I. Introduction

In September 2014, the New York State Board of Law Examiners (SBLE) recommended to Chief Judge Jonathan Lippman that the current New York State bar exam be replaced with the Uniform Bar Examination (UBE), plus a New York-specific component, to be known as the “New York Law Exam” (NYLE). The proposal is under consideration by the New York Court of Appeals.

Pursuant to Judiciary Law § 53, the Court has the authority to promulgate the Rules for the Admission of Attorneys and Counselors at Law.¹ It further has the authority to appoint the five members of the SBLE, the agency responsible for administering the New York bar exam.² All applicants for admission to practice law in New York must pass the New York bar exam, unless they meet the strict requirements for admission on motion.³

The UBE is a uniformly administered, graded and scored exam developed by the National Conference of Bar Examiners (NCBE). Founded in 1931, NCBE is a not-for-profit corporation that develops “standardized examinations . . . for the testing of applicants for admission to the practice of law.”⁴ One of these standardized exams is the UBE, which has been adopted in 15 jurisdictions and is designed to test general legal

¹ See Judiciary Law § 53.

² See Judiciary Law §§ 53; 56.

³ See 22 NYCRR 520.10.

⁴ ABOUT US, <http://www.ncbex.org/contacts/> (last visited Apr. 16, 2015).

principles and lawyering skills. Applicants who take the UBE receive a score that can be used to gain admission in the other states that have adopted the UBE.

Currently, a bar exam score achieved in New York, as in the majority of states, is state-specific. That is, a passing grade is valid only in the state where the test is administered, and nowhere else. If an applicant for admission wishes to practice in another state, the applicant generally must take and pass a separate state-specific bar exam. In comparison, the UBE yields a score that would be acceptable and transferable to any of the 15 UBE states. If the score meets the jurisdiction's minimum threshold, and the applicant satisfies all other jurisdiction-specific admission requirements, the applicant can gain admission in that jurisdiction without having to take another bar exam, provided the applicant meets the jurisdiction's timing requirements for score transfer.⁵

Based on its experience with over 100 years of bar testing, the SBLE believed that score portability would prove beneficial to law school graduates who are seeking employment in other jurisdictions, as well as the legal profession as a whole, which increasingly expects attorneys to engage in multi-jurisdictional or cross-border transactions. Additionally, the SBLE concluded that the UBE's increased testing of practical lawyering skills — the UBE includes two Multistate Performance Test (MPT) tasks rather than the one New York currently utilizes — would better assess the readiness of applicants to enter the New York State bar and the profession. While recognizing these potential benefits, the SBLE acknowledged the continuing need to test bar applicants on unique aspects of New York law. Accordingly, in conjunction with the recommendation to adopt the UBE, the SBLE proposed that applicants who seek admission in New York also be required to pass an additional test, the “New York Law Exam” (NYLE),

⁵ The applicant's score is portable, not the applicant's pass/fail status in the jurisdiction where the applicant took the exam. For example, if an applicant does not meet the minimum score requirement of Jurisdiction A, where the applicant took the exam, but satisfies the threshold score for Jurisdiction B, the applicant may seek admission in Jurisdiction B based on the score, even though the applicant did not pass the bar exam in Jurisdiction A.

comprised of 50-multiple choice questions testing unique principles of New York state law.

In October 2014, the Court of Appeals released a Request for Public Comment, seeking general input on the proposal and the possible implementation of the UBE for the July 2015 bar exam (Appendix 1). During the initial 30-day comment period, the Court received over 100 comments on the proposal (Appendix 2). The comments, submitted by law school students and faculty, recent graduates, practitioners, and bar associations, were varied, with some expressing overwhelming support of the proposal and others voicing concerns. A common theme reflected in the comments was a request for more time to fully consider the proposal.

In light of the issues raised by some of the commentators, and the overwhelming request for additional time, on November 12, 2014, Chief Judge Lippman extended the comment period to March 1, 2015, and appointed an Advisory Committee to examine all matters related to a possible transition to the UBE (Appendix 3). The Committee, chaired by the Honorable Jenny Rivera, Associate Judge of the Court of Appeals, and comprised of representatives of the judiciary, law schools, the SBLE and the bar, was charged with preparing a report and recommendations to the Court of Appeals. In addition, the Committee was tasked with conducting a series of public hearings and presentations throughout the state to better inform the profession and legal community about the proposal. To provide the Committee sufficient time to fulfill its mandate, the Chief Judge determined that the UBE would not be adopted for the July 2015 exam, and that further steps would await recommendations from the Committee (Appendix 4).

Following its formation, the Committee immediately began its outreach to members of the profession and developed its process to study the UBE. Among other things, the Committee held four public hearings throughout the state, receiving testimony from various individuals and groups. The Committee also conducted smaller, less formal meetings with several stakeholders, and collected and reviewed data from various sources on the UBE, the New York state bar, and general bar passage rates. As a result of these

efforts, the Committee gathered valuable information from a representative cross-section of the profession and legal academic community.

This report and its recommendations are the culmination of the Committee's work. In it, the Committee compares the structure and content of the current New York bar exam to the UBE, and details the SBLE proposal. The report then outlines the Committee's work, including the public hearing process, stakeholder meetings, and data collection efforts, and discusses the main issues that emerged during the information-gathering process. The report concludes by setting forth the Committee's findings and providing recommendations to the Court of Appeals.

II. THE CURRENT NEW YORK BAR EXAMINATION AND THE UBE

A. The current New York bar examination

The New York bar examination is a two-day exam that consists of: (1) five essay questions and 50 multiple choice questions prepared by the SBLE, testing knowledge of New York law; (2) one Multistate Performance Test (MPT) question, developed by NCBE; and (3) the Multistate Bar Examination (MBE), which consists of 200 multiple choice questions developed by NCBE.⁶ The five essays, 50 New York multiple choice questions and MPT task are administered on the first day of the exam; the MBE is tested on the second day. For scoring, the MBE is weighted 40%, the multiple choice 10%, the essays 40%, and the MPT 10%. Thus, the performance on multiple choice questions accounts for half of the applicant's score, while performance on the essays and the MPT

⁶ The MBE is required for admission to the bars of 49 states, the District of Columbia and three U.S. territories. Only Louisiana and Puerto Rico do not include the MBE as part of the bar exam. See GENERAL MBE FAQs, <http://www.ncbex.org/about-ncbe-exams/mbe/mbe-faq/> (last visited Apr. 16, 2015).

comprise the remaining half of the score. The exam is pass/fail and is administered twice per year, on the last Tuesday and Wednesday of February and July.

The MBE has been used as part of the New York bar exam since 1979. In 2001, the SBLE added an MPT task to the New York bar exam. The MPT is "designed to test an examinee's ability to use fundamental lawyering skills in a realistic situation."⁷ It does not test substantive legal knowledge. Instead, "it is designed to examine [the] fundamental skills lawyers are expected to demonstrate regardless of the area of law in which the skills arise."⁸ The MPT presents applicants with an assigned task and a simulated case file, which includes materials that typically are found in an attorney's file, such as transcripts, pleadings, or interview notes. Applicants are also given a library of legal authority. Using the materials in the case file, the applicants must apply the facts to the law and perform the requisite task, such as drafting a pleading, legal memorandum, or letter. Thirty-four states and the District of Columbia use at least one MPT task as part of their bar exams.

Applicants for admission to practice in New York also must successfully pass the Multistate Professional Responsibility Exam (MPRE), a multiple choice ethics test developed by NCBE.⁹ This exam is administered separately from the bar exam, and applicants may take it before or after the New York bar exam. The SBLE will not certify an applicant for admission in New York until the applicant has successfully passed both the New York bar exam and the MPRE.¹⁰

In 2014, the SBLE administered the New York bar exam to 15,227 applicants — 4,032 in February and 11,195 in July. Of those applicants, 68% were graduates of American Bar Association (ABA)-approved law schools, while 31.5% were educated in a

⁷ OVERVIEW OF THE MPT, <http://www.ncbex.org/about-ncbe-exams/mpt/overview-of-the-mpt/> (last visited Apr. 16, 2015).

⁸ *Id.*

⁹ Only Maryland, Wisconsin and Puerto Rico do not require an applicant to take and pass the MPRE for admission to the bar. *See* INTRODUCTION TO THE MPRE, <http://www.ncbex.org/about-ncbe-exams/mpre/> (last visited Apr. 16, 2015).

¹⁰ *See* 22 NYCRR 520.7.

foreign country. The remaining applicants qualified for the exam as graduates of unapproved law schools with five years of practice, or under the law office study program.¹¹ The 2014 applicants hailed from 49 states, the District of Columbia and 114 countries.

B. The UBE

The UBE is prepared entirely by NCBE and consists of (1) the Multistate Essay Examination (MEE), which contains six essay questions testing on the law of general application; (2) two MPT tasks; and (3) the same 200-question multiple choice MBE test that New York currently administers on the second day of the New York bar exam. The MEE and MPT are given on the first day of the UBE and the MBE is administered on the second day. NCBE does not grade the MEE and the MPT. Instead, each jurisdiction employs its own graders to score these portions of the UBE, using grading guidelines provided by NCBE. The weighting of the UBE, which is consistent in all jurisdictions that have adopted it, is as follows: MBE 50%; MEE 30%; and MPT 20%. Thus, like the New York State bar exam, 50% of the score is based on performance on multiple choice questions and 50% of the score is based on the essay and MPT tasks.

The UBE tests an applicant's knowledge of generally accepted legal principles, which often represent the "majority view" among U.S. jurisdictions. Sources for these core legal principles include Restatements of the Law, national case books, and legal encyclopedias, such as American Jurisprudence. These principles sometimes are codified in uniform laws or model acts, which may be used as sources.

The MBE, MPT and MEE questions are drafted by NCBE drafting committees, which are comprised of practicing attorneys, judges and law school faculty from across the country. After initial drafting, the questions are edited by content experts and lawyer-

¹¹ See 22 NYCRR 520.4, 520.5.

editor staff members, and reviewed by outside academics and practitioners who are experts in the subject matter being tested. All MPT and MEE questions are then pre-tested, and there are pre-test questions administered with each MBE.¹² For the essay questions and performance tasks, NCBE prepares grading materials, and graders have access to grading workshops, which provide training and help promote grading consistency across the jurisdictions that use those components.

As for the subjects tested on the UBE and current New York bar exam, there is a significant overlap. The 200-question MBE, which is used on the current New York bar exam and UBE, tests on *Constitutional Law, Contracts (including Uniform Commercial Code [UCC] Article 2), Criminal Law and Procedure, Evidence, Federal Civil Procedure, Real Property and Torts*. The MEE covers the same topics as the MBE, as well as *Business Relationships, Family Law, Trusts and Estates and UCC Article 9*. With the exception of *Federal Civil Procedure*,¹³ all of these subjects are tested on the current New York bar exam, both through essays and multiple choice questions. There are three subjects that are tested on the current New York essay and multiple choice questions that are not covered on the UBE: *New York Civil Practice and Procedure, Administrative Law and Professional Responsibility*

¹² See Susan M. Case, *The Uniform Bar Examination: What's In It For Me?* THE BAR EXAMINER, Feb. 2010, at 50, 51, http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2010/790110_TestingColumn.pdf; Judith A. Gundersen, *A New Mix of Questions on the Multistate Essay Examination*, THE BAR EXAMINER, Aug. 2006, at 6, 7, http://www.ncbex.org/assets/media_files/BarExaminer/articles/2006/750306_gundersen.pdf; Judith A. Gundersen, *Happy Birthday MPT*, THE BAR EXAMINER, Nov. 2007, at 18, 20, http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2007/760407_Gundersen.pdf.

¹³ Prior to the administration of the February 2015 bar exam, *Federal Civil Procedure* was tested on the New York portion of the bar exam. Because this subject was added to the MBE as of February 2015, the SBLE removed it from the content coverage of the New York bar exam in August 2014.

C. The SBLE proposal

1. The UBE

A transition from the current New York bar exam to the SBLE proposal will not effectuate a major change in test administration and coverage. The exam will continue to use the 200-question MBE, which has been a part of the exam for over 35 years. The exam will continue to use the MPT, but increase the number of such tasks from one to two. Thus, if the proposal is adopted, the principal change would be a transition from five essays on New York law to the MEE's six shorter essays on generally accepted legal principles, which often overlap with New York law. New York distinctions would be tested on the separate New York Law Exam.

The SBLE has proposed that New York set the passing score for the UBE at 266 out of 400, which is equivalent to the passing score on the current New York bar exam (665/1000).¹⁴ The SBLE suggested that the NYLE be administered for one hour on the second day of the bar exam, before the MBE, and that the passing score be set at 30 out of 50. The SBLE arrived at this proposed score by evaluating the performance data on the current New York multiple choice questions for the past six July bar exams. The SBLE also considered the goal of the NYLE, which is to ensure that applicants have sufficient exposure to and knowledge of New York law. At the same time, the SBLE did not want the NYLE to present an unnecessarily difficult barrier to admission in New York.

¹⁴ The MBE has been set on a 200 point scale since its introduction in 1972. When the UBE was first used in February 2011, NCBE determined that scores would be expressed by multiplying the MBE score times two. This reflects the fact that the written portion of the test (MEE plus MPT), which is expressed on the MBE scale, accounts for 50% of the score. *See* Kellie R. Early, *The UBE: Policies Behind the Portability*, THE BAR EXAMINER, Sept. 2011, at 17, 18-19, https://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2011/800311Early.pdf. Historically, New York has used a multiple of the MBE score (the MBE multiplied by 5). The proposed passing UBE score of 266 (133 X 2) is therefore the equivalent of New York's current passing score of 665 (133 X 5).

If New York adopts the MEE and one additional MPT, thus fully employing all the UBE components, it would be the largest and most diverse state by population,¹⁵ demographics,¹⁶ and number of yearly bar applicants¹⁷ to do so. Currently, fifteen jurisdictions have adopted the UBE: Alabama, Alaska, Arizona, Colorado, Idaho, Kansas, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Utah, Washington and Wyoming.

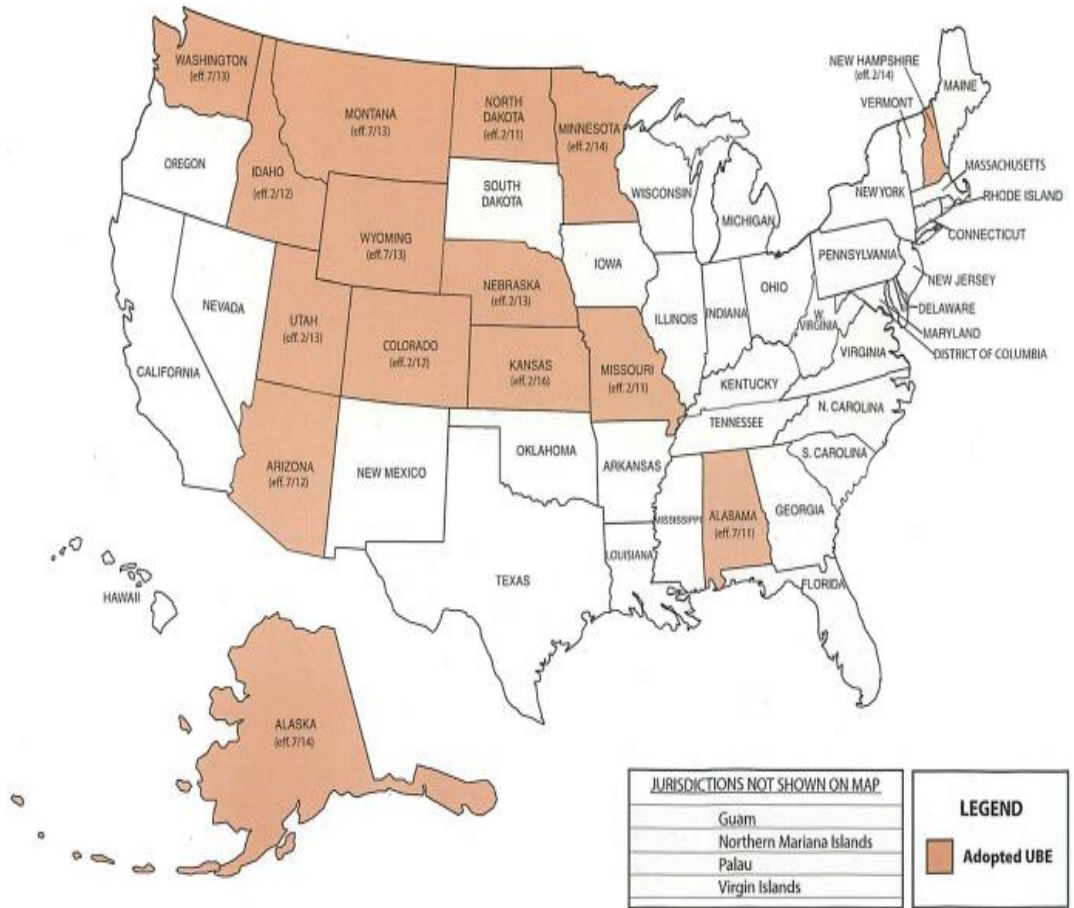
¹⁵ The overall population of New York is 19.7 million, while the largest UBE jurisdiction by population, Washington, has 7.1 million residents. *See* NEW YORK QUICK FACTS, <http://www.census.gov/quickfacts/table/PST045214/00,36> (last visited Apr.16, 2015); WASHINGTON QUICK FACTS, <http://www.census.gov/quickfacts/table/PST045214/00,36,53> (last visited Apr.16, 2015).

¹⁶ According to the current estimate by the U.S. Census Bureau, the overall population of the United States is 63% white, 13% black and 17% Hispanic. *See* USA QUICK FACTS, <http://www.census.gov/quickfacts/table/PST045214/00> (last visited Apr. 16, 2015). In New York State, the population is 57% white, 18% black and 18% Hispanic. *See* NEW YORK QUICK FACTS, *supra* note 15. By contrast, in aggregate, in the 15 states that currently utilize the UBE, the population breakdown is: 73% white, 7% black and 13% Hispanic. *See* POPULATION DISTRIBUTION BY RACE/ETHNICITY, <http://kff.org/other/state-indicator/distribution-by-raceethnicity/#> (select Alabama, Alaska, Arizona, Colorado, Idaho, Kansas, Minnesota, Montana, Nebraska, New Hampshire, North Dakota, Utah, Washington and Wyoming in “Locations” box). In New York State, women make up 52% of the population, which is slightly higher than the percentage of women (51%) in the overall population of the United States. *See* NEW YORK QUICK FACTS, <http://www.census.gov/quickfacts/table/PST045214/00?location=New+York> (last visited Apr.16, 2015).

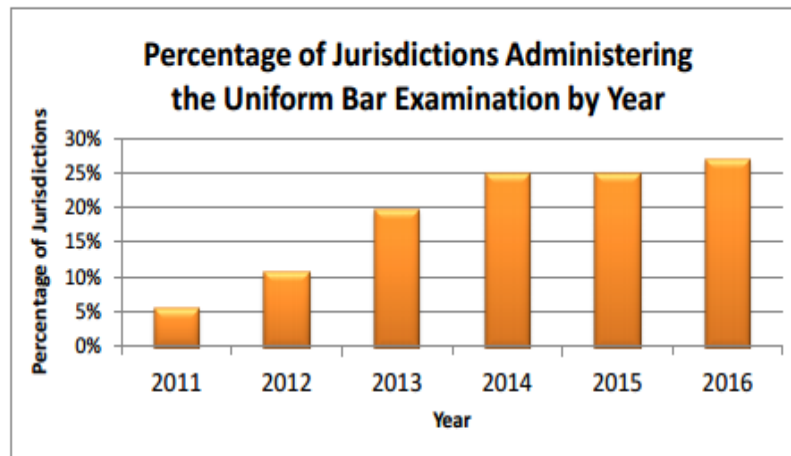
¹⁷ In 2014, New York tested 15,227 applicants, more than any other U.S. jurisdiction. The state that tested the next largest number of applicants (13,082) was California, a non-UBE jurisdiction. The UBE jurisdiction with the largest group of applicants in 2014 was Washington, with 1,220 test-takers. *See* National Conference of Bar Examiners, *2014 Statistics*, THE BAR EXAMINER, Mar. 2015, at 8, 10-11, http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2015/840115-statistics.pdf.

Adoption of the Uniform Bar Examination

February 2015



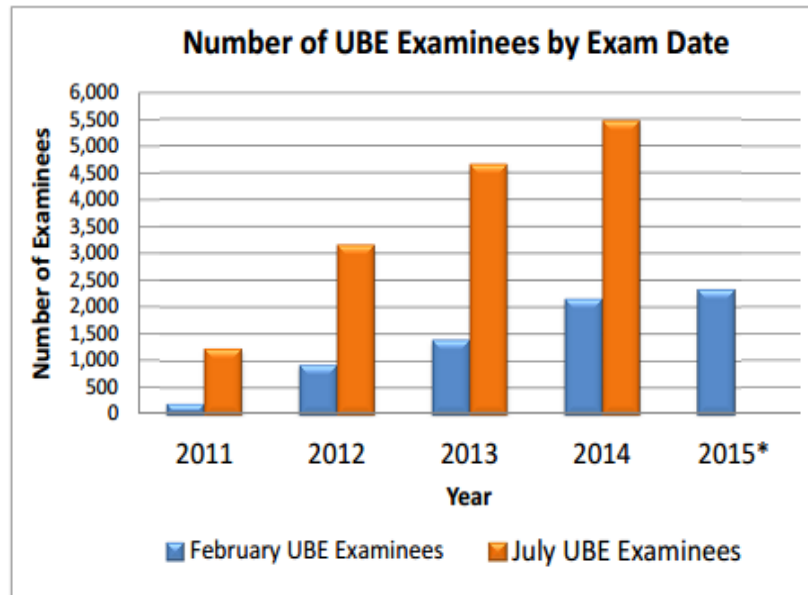
Each state sets its own passing score, which range from a low of 260 (Minnesota, Missouri, North Dakota) to a high of 280 (Alaska, Idaho).



Prepared by the National Conference of Bar Examiners, 2/20/15

It is important to note that while an applicant who takes the UBE in one jurisdiction may use the score to seek admission in another jurisdiction that has adopted the UBE, achieving a certain score on the UBE does not guarantee admission in another jurisdiction. Each state or territory that adopts the UBE is free to establish its own bar exam eligibility criteria and independently determine whether applicants possess the requisite character and fitness to practice law in that jurisdiction. Each jurisdiction also determines how long to accept transferred UBE scores. Finally, UBE jurisdictions may choose to assess applicants' knowledge of jurisdiction-specific content through a test or course separate from the UBE. Of the fifteen states that have adopted the UBE, five require a jurisdiction-specific component.¹⁸

¹⁸ Alabama and Arizona require students to complete an online course devoted to state-specific law. To ensure that the viewer is paying attention to the material presented, these courses contain embedded questions that must be correctly answered by the viewer. Montana requires completion of a seminar on state law, which is offered the day after the UBE is administered. Applicants in Missouri must pass the Missouri Educational Component Test, an untimed, online, open-book exam, with a passing score of 28 out of 33 questions. Washington requires applicants to separately pass the Washington Law Component, an open-book, timed, online test consisting of 60 multiple choice questions, with a passing score of 80%. Both Missouri and Washington prepare study materials that are available for applicants to review before the respective exams. *See* National Conference of Bar Examiners & American Bar Association Section of



*February 2015 Data is not final.

Prepared by the National Conference of Bar Examiners, 4/13/15

2. The New York Law Exam and Transfer of a UBE Score to New York

In its proposal to the Court, the SBLE recommended that New York bar applicants be required to pass a separate jurisdiction-specific component, the New York Law Exam. That exam would consist of 50 multiple choice questions testing unique aspects of New York law.

In order to seek admission in New York, applicants would have to pass both the UBE and the NYLE, which, as proposed, would be offered four times per year: during the February and July administrations of the bar exam and once in May and December.¹⁹

Legal Education and Admissions to the Bar, Comprehensive Guide to Bar Admission Requirements 2015, http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf, at 44-45.

¹⁹ The purpose of these additional test dates is to shorten the delay in admission for those applicants who do not pass the NYLE on their first attempt. An applicant who passes the NYLE but fails the UBE would only need to retake the UBE; an applicant who fails both the UBE and the NYLE may re-take the NYLE

If the UBE is adopted, in order to help applicants prepare for the separate NYLE, the SBLE would release an annotated content outline detailing the topics tested. Additionally, the SBLE has indicated that it will publish sample multiple choice questions for review by bar applicants in advance of the exam.

Applicants seeking to transfer their UBE score to New York from another UBE jurisdiction would also have to pass the NYLE. Under the SBLE's proposal, these applicants would be permitted to take the NYLE in May or December. A UBE score earned in another jurisdiction would be transferable to New York for up to three years from the date the applicant took the UBE. Among the other jurisdictions that have adopted the UBE, the time limit for accepting a UBE score (i.e., the maximum age of the UBE score) ranges from 25 months (Alabama) to five years (Alaska, Arizona and Nebraska).²⁰

with the next administration of the UBE or with a subsequent administration. *See* Court of Appeals, Request for Public Comment, App. 1, p 3.

²⁰ Colorado, New Hampshire and Utah have provisions that allow applicants with a score that is older than the maximum time limit, but have a certain number of years of practice, to combine that practice with the UBE score in order to seek admission. For more information, *see* National Conference of Bar Examiners & American Bar Association Section of Legal Education and Admissions to the Bar, *supra* note 18, at 44.

Comparison of the Current New York Bar Exam and the SBLE Proposal

CURRENT NEW YORK BAR EXAM	SBLE PROPOSAL
<p>DAY 1:</p> <ul style="list-style-type: none"> • New York Essays (five questions – worth 40%) • MPT (one task – worth 10%) • New York Multiple Choice (50 questions – worth 10%) <p>DAY 2:</p> <ul style="list-style-type: none"> • MBE (200 questions – worth 40%) 	<p>DAY 1:</p> <ul style="list-style-type: none"> • Multistate Essay Exam (six questions – worth 30%) • MPT (two tasks – worth 20%) <p>DAY 2:</p> <ul style="list-style-type: none"> • MBE (200 questions – worth 50%) • New York Law Exam (50 multiple choice questions; must be passed independently)

Table 1: UBE Passing Scores

UBE Jurisdiction	Passing Scores
Alabama	260
Alaska	280
Arizona	273
Colorado	276
Idaho	280
Kansas	266
Minnesota	260
Missouri	260
Montana	270
Nebraska	270
New Hampshire	270
North Dakota	260
Utah	270
Washington	270
Wyoming	270

Table 2: UBE Score Transfer Limitations

UBE Jurisdiction	Time Limit for Accepting UBE Score
Alabama	25 months
Alaska	5 years
Arizona	5 years
Colorado	3 years
Idaho	37 months
Kansas	36 months
Minnesota	36 months
Missouri	24 months
Montana	3 years
Nebraska	5 years
New Hampshire	3 years
North Dakota	2 years
Utah	18 months
Washington	40 months
Wyoming	3 years

If the UBE is adopted in New York, several features of the bar admission process will not change. Applicants who take the UBE in New York, as well as applicants who seek to transfer a UBE score earned in another jurisdiction to New York, will be required to present proof to the SBLE that they satisfy the educational requirements of section 520.3, 520.4, 520.5, 520.6 or 520.17 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law. Applicants for the bar also will continue to undergo a character and fitness review by the Appellate Division of Supreme Court. Additionally, the SBLE will continue to make determinations as to disability accommodations, administer the exam, grade the essay and MPT tasks, and decide how to test local distinctions on the NYLE.

III. COMMITTEE'S WORK

A. Education

After its formation, the Committee met on several occasions to formulate its plan to fulfill the Chief Judge's mandate. One of these meetings included a presentation by NCBE President Erica Moeser, who provided the Committee with a thorough explanation of the exam and the experiences of the other jurisdictions that have adopted it.

The Committee also reviewed the public comments that were received by the Court of Appeals during the initial comment period. It soon became clear to the Committee that certain misconceptions existed regarding the New York bar exam, the UBE and the SBLE proposal. The Committee determined that it was necessary to better educate the general public and correct misunderstandings about the bar exam and the licensure process in New York.

To that end, the Committee created a website (<http://www.nycourts.gov/ip/bar-exam/>) that contains extensive information about the proposal, including a Power Point presentation comparing the current New York bar exam with the UBE and a podcast

interview with Diane Bosse, Chair of the SBLE, discussing the UBE proposal in depth (Appendix 6). Additionally the website includes the proposed content outline for the 50-question NYLE, which also was circulated to the deans of the 15 New York law schools, with a request for comments or suggestions from law school faculty. Ms. Bosse also authored an article on the UBE proposal that was published in the New York State Bar Association's (NYSBA) "Bar Journal," which is circulated to more than 70,000 members of the State Bar (Appendix 6).

B. Oral and written comments

In addition to educating the public about the New York bar exam and the UBE proposal, the Committee was tasked with gathering input from individuals and groups on the possible transition to the UBE. This section describes the Committee's information-gathering process.

1. Public hearings

The Committee held a series of public hearings around the state. A notice of the public hearings, which listed the date and location of the hearings, was released on December 29, 2014, and was (1) published in the *New York Law Journal*; (2) posted on the Committee's and Court of Appeals' websites; (3) repeatedly "tweeted" through the Office of Court Administration Twitter social media account; and (4) e-mailed to all ABA-approved law school deans and local and affinity bar associations in New York State (Appendix 7). As explained in the notice, the Advisory Committee welcomed oral and written testimony on the proposal from individuals, organizations and entities.

Although testimony at the public hearings was officially "by invitation," every individual who timely requested to address the Committee was afforded that opportunity. In addition, the Committee made clear from the outset that anyone wishing to comment but unable to attend any of the hearings was free to submit a written statement. Hundreds of such comments were received and considered by the Committee (Appendices 2 and 5).

A total of 23 individual witnesses appeared at the hearings, including representatives from the large bar associations and affinity bar organizations, as well as judges, academics and academic administrators, students and practitioners (Appendix 8 [written statements of witnesses]). In varying degrees, the same issues arose and were discussed and explored at each of the hearings. The most frequently discussed topics were: whether the proposal would adequately ensure competency to practice law in New York; the value of score portability for bar applicants, the profession and clients; the impact of adopting the UBE on the New York bar's reputation; whether adoption of the UBE would adversely impact particular demographic subgroups' bar passage rates; and the extent to which adoption of the proposal would require changes to law schools' curricula. A more thorough discussion of these issues is provided in section IV below.

Some of the commentary delved into areas beyond the scope of the Committee's mandate, such as whether any bar exam is a fair and accurate predictor of professional competence, whether the entire concept of a licensure test should be re-evaluated, and the ways in which the bar exam should, or should not, be a vehicle to advance the interests of the bar, various subgroups and society as a whole. Those concerns, while certainly worthy of further discussion in another forum, were relatively remote from the issue at hand: whether the UBE should be adopted in New York and the NYLE added as a requirement for admission.

The Committee found all the hearings and testimony valuable. Even in instances where a particular witness' statement closely paralleled that of a previous witness, there were often unique nuances that assisted the panel in fully exploring and debating each issue that was raised. The Committee is grateful for the insight generously provided by the nearly two dozen individuals and groups that took the time and made the effort to share their views and expertise on this topic. Complete transcripts of the hearings are available on the Advisory Committee's website.²¹

²¹ See RESOURCES, <http://www.nycourts.gov/ip/bar-exam/resources.shtml> (last visited Apr. 16, 2015). See also Apps. 8-11.

a. New York City I

The first public hearing was held at CUNY School of Law in Long Island City on January 20, 2015. The Committee heard from: (1) the Dean of Brooklyn Law School; (2) the Deputy General Counsel of Latino Justice/PRLDEF; (3) the Chair of the New York City Bar Association's Council on the Profession; (4) three members of the CUNY School of Law community; (5) a representative of the Society of American Law Teachers; (6) a New York-admitted attorney and former commercial bar review provider; and (7) a second-year law student from Touro College Jacob D. Fuchsberg Law Center, who also serves as a student assistant for NYSBA's Committee on Legal Education and Admission to the Bar (Appendix 9).

b. Albany

On February 3, 2015, the Advisory Committee held the second public hearing at Court of Appeals Hall in Albany. The Committee heard testimony from: (1) a representative of the Clinical Legal Education Association; (2) the President of the Women's Bar Association of the State of New York; (3) the Dean of the Maurice A. Deane School of Law at Hofstra University; and (4) NYSBA, represented by the President-elect, the Co-chair of the Committee on Legal Education and Admission to the Bar, and the Chair of the Young Lawyers Section. The Committee also received telephone testimony from a Justice of the Missouri Court of Appeals, Western District, who formerly served as a member of the Missouri Board of Law Examiners when that state adopted the UBE (Appendix 10).

c. Rochester

The third public hearing was held on February 26, 2015, at the Appellate Division, Fourth Department, in Rochester. The witnesses were: (1) a second-year law student from Syracuse University College of Law, who serves as Second Circuit Governor of the ABA Law Student Division; (2) a Justice of the Arizona Supreme Court, who also serves as Chair-Elect of the Council of the ABA Section of Legal Education and Admissions to the Bar and who formerly served as a member of the Arizona Bar Examinations Committee; (3) the Vice Chair of the Council of the ABA Section of Legal Education and Admissions to the Bar and co-Chair of the NCBE Committee on the Uniform Bar Exam; (4) a member of the Uniform Law Commissioners and former President of NYSBA; and (5) the immediate past-President of NYSBA (Appendix 11).

d. New York City II

The final public hearing was held on March 4, 2015, at the New York City Bar Association in Manhattan. The Committee heard from (1) the President of NCBE; (2) the leadership of the New York State Judicial Institute on Professionalism in the Law; and (3) a representative from the New York County Lawyers Association (Appendix 12).

2. Small group meetings

In order to collect further information from interested parties, the Committee also conducted smaller, informal meetings with various stakeholder groups. The less structured format of these meetings provided for an open dialogue and a free exchange of ideas and opinions. Below is a list and brief description of these meetings.

- January 12, 2015: A meeting with the Board of Directors of the New York County Lawyers' Association, where a Committee member offered a presentation on the SBLE proposal and answered attendees' questions.
- January 13, 2015: A meeting with the President's Council of the New York City Bar Association and the Chair of the City Bar's Ad Hoc Subcommittee on the Bar Exam, with an informational presentation by two Committee members, followed by a question and answer session.
- January 27, 2015: A telephone discussion with the Bar Association of Erie County's Board of Directors and the Director of Academic Support at SUNY Buffalo Law School.
- January 30, 2015: A forum with the New York law school deans, Chief Judge Jonathan Lippman, President and President-elect of NYSBA, and the Co-chairs of NYSBA's Committee on Legal Education and Admission to the Bar, convened during the NYSBA's Annual Meeting.
- January 30, 2015: A meeting with the immediate past-President of the ABA.
- February 13, 2015: A meeting with leaders of the Hispanic National Bar Association, the Dominican Bar Association, the Metro Latin American Law Student Association, the Puerto Rican Bar Association, the Long Island Hispanic Bar Association, the Latino Lawyers Association of Queens County and Latino Justice/PRLDEF.
- February 25, 2015: A forum with local practitioners, a state and federal judge, and faculty at Syracuse University College of Law.

- March 2, 2015: A meeting with the Network of Bar Leaders, which included representatives of the following groups: the Hispanic National Bar Association, the Dominican Bar Association, the Queens County Bar Association, the Latino Lawyers Association of Queens County, the Columbian Lawyers Association of the First Department, the Metropolitan Black Bar Association, the New Rochelle Bar Association, the Association of Black Women Attorneys, the Arab American Bar Association, the Korean American Lawyers Association of Greater New York, the Women’s Bar Association of New York, the Louis D. Brandeis Law Society, the National Employment Lawyer’s Association and the New York City Bar Association.

3. Focus groups

The New York State Judicial Institute on Professionalism in the Law, in conjunction with NYSBA, volunteered to host focus groups at four separate locations throughout New York to gather additional input from interested individuals about the SBLE proposal. The Judicial Institute “serves as a permanent commission dedicated to nurturing professionalism among the members of the legal profession. The Institute provides forums for constituencies of the profession to convene for study and discussion of issues pertaining to professionalism.”²² Legal education is one of the Institute’s ongoing research areas.

²² See WHAT IS THE INSTITUTE?, <http://www.nycourts.gov/ip/jipl/whatisit.shtml> (last visited Apr. 16, 2015). In 2014, the Judicial Institute and NYSBA jointly held a convocation to discuss changes in the legal education and ensuring professional values. Prior to the convocation, focus groups were held to discuss various issues. The focus groups were reconvened for the purpose of studying a potential transition to the UBE. See *Public Hearing Before Advisory Committee on the Uniform Bar Examination* 3 (Mar. 4, 2015) (Statement of John Gross, New York State Judicial Institute on Professionalism in the Law), http://www.nycourts.gov/ip/bar-exam/pdf/04March15BarExamHearing_F.pdf.

At least one member of the Committee attended each focus group to observe and answer questions. The focus groups are listed below.

- February 4, 2015, at Touro College Jacob D. Fuchsberg Law Center – participants included two members of the Committee, several local practitioners, the former Dean of St. John’s Law School, the current Associate Dean of Students and Administration at Hofstra Law School and the Director of the Suffolk Academy of Law in Long Island.
- February 5, 2015, at Fordham Law School – participants included three members of the Committee, the Associate Dean for Academic Affairs and Faculty Development at Touro Law Center, a professor and the Associate Director of Legal Writing at Fordham Law School, the President of the Metropolitan Black Bar Association, the Deputy General Counsel of Latino Justice/PRLDEF and several New York attorneys.
- February 9, 2015, at the law firm of Goldberg Segalla in Buffalo – participants included a member of the Committee; the Vice Dean for Student Affairs and Teaching Faculty, the Vice Dean for Academic Affairs, and a professor from SUNY Buffalo Law School; an Administrative Judge from the Eighth Judicial District; several local attorneys and a 3L student from SUNY Buffalo Law School.
- February 13, 2015, at Albany Law School, in Albany – participants included a Committee member, an Albany City Court Judge, the Executive Director of the SBLE, the Executive Director of the Legal Aid Society of Northeastern New York, several Albany Law School professors and students, Special Counsel to the

Presiding Justice of the Appellate Division, Third Department, and three local attorneys.

A transcript of every focus group session was provided to the Committee for consideration during its deliberations and posted on the Committee's website for public viewing (Appendix 13). The Committee found these focus group discussions very useful and informative. While the points raised largely echoed those voiced at the public hearings, the focus group participants often brought different perspectives to the table, which assisted the Committee in more fully understanding the interests at stake.

C. Data and information collection and review

Part of the Committee's study included reviewing and collecting data and other information that was relevant to the concerns raised by the commentators. The data and information consists of two categories: information that existed prior to the Committee's formation and information that was requested by the Committee.

1. Existing data

Among the data that existed independent of the Committee's formation, the Committee examined the following information:

- Data regarding law school enrollment by race and ethnic group and the credentials of first-year law students at ABA-approved law schools, published by the ABA.²³

²³ See STATISTICS, http://www.americanbar.org/groups/legal_education/resources/statistics.html (last visited Apr. 16, 2015); <http://www.lsac.org/lisacresources/publications/official-guide-archives> (last visited Apr. 16, 2015).

- Studies by the NCBE that were done after the passing score on the New York bar exam was changed from 660 to 665 in 2005. The first study evaluated the results of various subgroups on the July 2005 exam; the second study evaluated the performance of these groups on the February 2006 exam; and the final study evaluated the performance of applicants who took the bar exam in 2005 and failed, but then re-took the exam in February and/or July 2006. The Committee also reviewed summaries of those reports prepared by the SBLE.²⁴
- Data from the SBLE on the passage rates of various subgroups on the New York State bar exam for the July administration of the bar exam from 2005 through 2014 (Appendix 14).
- Data from the SBLE on the passage rate of bar applicants who failed the July bar exam and then re-took the bar exam in February, for the years 2010 through 2013, by demographic group and gender (Appendix 14).

2. Data requested by the Committee

In conducting its public outreach, it became apparent to the Committee that data on certain issues pertinent to the proposal were not readily available. Believing that examination of such data would be useful in further considering the relevant issues, the Committee sought the following information:

- The Committee requested that NCBE conduct a simulation projecting the performance of New York test-takers on the UBE based on the scores earned on

²⁴ See New York State Bd. of Law Examiners, *Impact of the Increase in the Passing Score on the New York Bar Examination* (Jul. 2007), <http://www.nybarexam.org/press/summary2.pdf> (last visited Apr. 16, 2015).

the New York February and July 2013 bar exams. An additional simulation was done for the July 2014 bar exam (Appendix 15).

- After receiving testimony from the Clinical Legal Education Association (CLEA) about the value of clinical experiences for law students, the Committee requested that CLEA provide information about the availability of clinical slots for interested law students. In response, CLEA provided information from the Center for Applied Legal Studies on the demand for clinical experiences. CLEA also provided information about how test-taking speed affects performance on the bar exam (Appendix 8).
- In view of the testimony presented by the Honorable Cynthia Martin from the Missouri Court of Appeals, Western District, at the Albany Public Hearing, the Committee asked Judge Martin whether she could obtain additional information regarding the passage rates of certain subgroups on the Missouri bar exam, both before and after adoption of the UBE. Judge Martin provided the passage rates for minority students from the University of Missouri Kansas City Law School on the Missouri Bar Exam for the three years preceding and the four years following adoption of the UBE in that state (Appendix 10).

In addition, the Committee sent requests to select groups based on their potential to provide data responsive to the concerns raised by certain commentators. However, with a few exceptions,²⁵ the groups indicated that they either did not collect such data, or the data were not available for public inspection.

²⁵ See discussion *infra*, section V. D.

- The Committee asked the Executive Director of the SBLE to request from bar admission authorities in UBE jurisdictions any information relevant to the bar passage rate before and after adoption of the UBE by demographic group.
- The Committee sent inquiries to all law schools in UBE jurisdictions seeking information about the performance of the schools' students before and after adoption of the UBE.
- The Committee contacted the following bar associations in UBE jurisdictions to inquire whether such groups possessed data or anecdotal evidence regarding the passage rates of particular demographic groups before and after adoption of the UBE:
 - The Alabama Asian Pacific American Bar Association, Alabama Lawyers Association, Women's Section of the Alabama State Bar, Anchorage Association of Women Lawyers, Arizona Asian American Bar Association, Arizona Black Bar, Native American Bar of Arizona, Asian Pacific American Bar Association of Colorado, Colorado Women's Bar Association, Colorado Hispanic Bar Association, National Asian Pacific American Bar Association Minnesota Chapter, Minnesota American Indian Bar Association, Minnesota Association of Black Lawyers, Minnesota Hispanic Bar Association, Minnesota Women Lawyers, Missouri Asian American Bar Association, Asian American Bar Association of Kansas City, Hispanic Bar Association of St. Louis, Association for Women Lawyers of Greater Kansas City, Mound City Bar Association, Nebraska Women's Bar Association, New Hampshire Women's Bar Association, Women Lawyers of Utah Minority Bar Association, Asian Bar Association of Washington, Filipino Lawyers of

Washington, Korean American Bar Association of Washington, Vietnamese American Bar Association of Washington, Loren Miller Bar Association and Washington Women Lawyers.

D. Reports submitted with or referenced in written and oral testimony

By way of written comment or oral testimony, several individuals and groups cited reports or studies that touched on the relevant issues. The Committee reviewed and discussed many of these reports as they deliberated on the proposal. While some of the sources analyzed issues that were outside the Committee's mandate, several of the reports were helpful in providing context for and further explaining the recurring concerns.

E. UBE jurisdiction materials

In considering whether the SBLE's proposal and, specifically, the NYLE would adequately assure competence in New York law, the Committee researched the methods current UBE jurisdictions used to assess proficiency with state-specific law. As explained above, two UBE jurisdictions, Alabama and Arizona, require applicants to complete an online course that covers important principles of state law. These courses include embedded questions to ensure that applicants actively engage with the course materials. The admissions authorities from these jurisdictions provided the Committee with access to these courses, which allowed the Committee to assess the relative strengths and weaknesses of these courses. Additionally, at the Rochester UBE Public Hearing, Arizona Supreme Court Justice Rebecca White Berch provided informative testimony on Arizona's course, including how it was received by bar applicants and administrators in that jurisdiction.

Two other UBE jurisdictions, Missouri and Washington, require applicants to complete an online open-book test. Both jurisdictions provide materials that are available

for review before and during the exam. Missouri's study materials, as well as the test, the Missouri Educational Component Test (MECT), were available for review by the Committee on the Missouri court system website.²⁶ Washington's test, the Washington Law Component (WLC), is only available for those who have an admission account with the Washington State Bar. However, the Washington admissions authorities provided the Committee with sample questions from the WLC. Additionally, the Committee was able to review the WLC Review Materials, which consists of 15 comprehensive outlines on Washington state law.

F. Research on New York Law distinctions

Part of the Committee's outreach also included seeking input on the areas of law that should be tested on the proposed NYLE. During the Committee's study period, the SBLE developed a content outline of the topics that would be covered on the NYLE. After reviewing the content outline, the Committee determined that it would be beneficial to form a working group of experts to provide their guidance on the important distinctions or principles that should be subject to examination. The Committee contacted several law school professors, the authors of McKinney's Practice Commentaries, the American Law Institute and the Uniform Law Commission to seek volunteers who are well-versed in specific areas of New York law. The Committee also requested NYSBA to solicit and submit comments from the organization's substantive law committees. Several experts graciously volunteered and provided the Board with suggestions as to the New York unique rules and distinctions with which a new attorney in New York should be familiar (Appendix 17).

Members of this working group also provided their opinions as to whether the proposed NYLE was the best way to assess applicants' knowledge of New York law.

²⁶ See MISSOURI EDUCATIONAL COMPONENT, <http://www.courts.mo.gov/page.jsp?id=325> (last visited Apr. 16, 2015).

Some members argued that administering the NYLE on the same day as the MBE would be too burdensome, and that applicants' New York law competency should be measured by an open-book online exam administered separately from the UBE, or through the completion of an online course.

IV. VIEWS FROM THE PROFESSION AND LEGAL ACADEMY

Through its public outreach efforts, the Committee heard a wide array of views and opinions on whether to adopt the SBLE proposal. Law school administrators, faculty members, bar association representatives, private practitioners and law students shared their views on whether a transition to the UBE would be beneficial for attorneys, clients and the profession. These viewpoints, which largely echoed the positions expressed in the written comments received by the Committee, highlighted the various interests at stake and were invaluable as the Committee deliberated on the proposal. Early on, the main issues and concerns quickly emerged, and the same general themes were revisited, in various contexts, at virtually all the formal and informal proceedings. Those issues seemed to divide the organized bar, fostering a robust and, in the views of this Committee, principled and enlightening debate

The New York State Bar Association (NYSBA) initially did not take a position on the substantive merits of the proposal, but urged that any implementation of the UBE be delayed to provide sufficient time for further study on whether the proposal would adequately measure competence in New York law, whether it would result in any disparate impact on certain subgroups of the test-taking population, and the costs associated with a shift to the UBE. During the extended comment period, NYSBA's Committee on Legal Education and Admission to the Bar (CLEAB) authored a report that recommended against adopting the UBE. The report argued that the proposed NYLE would not adequately test knowledge of New York law, that a disparate impact study should precede adoption of any new testing model, and that the MPT was limited in its

ability to test lawyering skills. The report also suggested that any new bar exam should include an experiential learning component. NYSBA's Executive Committee unanimously adopted the report at a meeting during State Bar week in January 2015, thereby rendering the report the position of the entire association.

At the Albany Public Hearing, three NYSBA representatives (the President-elect, Co-Chair of the CLEAB Committee, and Chair of the Young Lawyers Section) testified, voicing several concerns about a transition to the UBE. Additionally, at the Rochester hearing, the immediate past-President of NYSBA offered testimony generally opposing the proposal.

A few groups that opposed adoption of the UBE argued that alternative reforms to the current New York bar exam should be considered. This includes the Clinical Legal Education Society and the Society of American Law Teachers.

In contrast, the New York City Bar Association (City Bar) characterized the UBE as an "important reform" that could enhance opportunities for new lawyers. The City Bar recommended that the UBE be adopted for the July 2016 exam, and that the SBLE be required to track bar passage rates to ensure no adverse impact on any particular demographic group. In a supplemental submission, the City Bar insisted that the debate over the UBE should be the beginning, not the end, of a broad discussion on the best way to ensure minimum competence.

Additionally, some national groups advocated for the UBE, including the Council of the ABA Section of Legal Education and Admissions to the Bar, the ABA Young Lawyers' Division and the ABA Law Student Division. Other supporters from outside New York included the deans from six law schools, four of which are in Massachusetts, and the National Association for Law Placement.

Several groups urged a wait-and-see posture in hopes that over time additional data would emerge on the impact of a new exam. For instance, the New York County Lawyers' Association advocated for a one-year study on several issues, including the

potential disparate impact on particular subgroups of the applicant population. This concern arose repeatedly, with many commentators (including the many affinity bar associations that commented on the proposal, local bar associations and several law school faculty members) insisting that no changes take effect until persuasive data is developed or emerges on the possible disparate impact.

Deans and faculty at the New York law schools offered extensive commentary. Several deans favored adoption of the exam, maintaining that the portability afforded by the UBE would prove beneficial to new graduates. On the issue of whether the UBE would require curricular changes, faculty members who commented on the proposal were split. Some felt that minor changes at most would be necessary; at least one professor suggested that no curricular changes at all would be required since the UBE more closely parallels the current curriculum than the existing bar exam. Others said that they would need to re-tool or alter the focus of their courses, at least to some degree. Some faculty questioned the appropriate timing for implementation, arguing that current law students should not be required to adjust to a new bar exam. Others raised concerns about NCBE's transparency, and argued that transition to the UBE would cede all control of bar exam testing to NCBE, an out-of-state entity that is not directly answerable to the SBLE or the Court of Appeals.

New York law students were divided on the proposal, with some relishing the prospect of obtaining a portable score that would enable them to choose from several states when launching their careers. Others, however, worried that adopting the UBE would increase competition for jobs in New York, suggesting that they could be closed out of the New York market due to an influx of out-of-staters.

Likewise, the responses and testimony received from practitioners fell on both sides of the fence – some wholeheartedly supportive, and others strongly opposed to the proposal. The reasons, pro and con, echoed those recited by other commentators. Several practitioners and organizations were troubled by what they view as an “opening of

floodgates,” predicting that large numbers of attorneys from other states would intrude on their market.

V. CONCLUSIONS AND RECOMMENDATIONS

After much analysis, consideration and deliberation, the Committee has determined that adoption of the UBE and two separate New York components — an online course and separate online exam on New York law — will propel New York's licensing process into the modern economy while at the same time ensuring that applicants for admission in this state have sufficient competence in fundamental legal principles and New York-specific law. In short, the measure is good for the profession and good for the public. While there are always uncertainties inherent in any change, the Committee believes the clear benefits overwhelmingly support adoption of the proposal. Specific findings and recommendations follow.

A. Portability

We live in an increasingly mobile society that frequently requires today's attorneys to practice across state lines — lawyers in one jurisdiction are often called on to serve clients in another jurisdiction. The absence of a common licensing exam throughout the United States makes it difficult for these lawyers to gain admission in the other jurisdiction and properly serve their clients. Moreover, the Committee is cognizant that new law graduates are entering a profession where the job market requires geographic flexibility in a challenging employment landscape.²⁷ Under the status quo, law students must decide during their final year of study where to take the bar exam. Some students

²⁷ A report by the National Association for Law Placement released in June 2014 found that the overall employment rate for recent law grads has fallen for the sixth year in a row to 84.5% in 2013, down from 91.9% in 2007. *See* EMPLOYMENT FOR THE CLASS OF 2013 – SELECTED FINDINGS, <http://www.nalp.org/uploads/Classof2013SelectedFindings.pdf> (last visited Apr. 16, 2015).

make that decision even earlier, during their first or second year of study, when they enroll in commercial bar review courses. This decision then limits where bar applicants can apply for jobs, and places additional costs on test-takers.

A significant benefit of the UBE is that it results in a portable score that can be used to gain admission in 15 other jurisdictions, with more likely to come. Once a bar applicant has achieved a certain score on this uniformly administered and graded test, the applicant should be able to seek admission in other UBE jurisdictions. Score portability maximizes new graduates' employment opportunities and eliminates the anxiety, delay and effort that comes with sitting for the bar exam in multiple jurisdictions, with uncertain results. It also potentially reduces the cost associated with taking multiple bar exams, which may be particularly important for today's law school graduates, who are entering the profession with unprecedented debt.²⁸

Law graduates' families also benefit from this increased mobility. When an attorney's spouse or partner takes a job in a different state, the attorney may relocate without having to take another bar exam or wait for exam results. This may be particularly beneficial for attorneys who have a spouse or partner in the military and have to relocate to another jurisdiction, often on short notice, in order to comply with military transfer orders.²⁹

²⁸ In 2012, the average debt for public law school graduates was \$84,600, and \$122,158 for private law school graduates. See AVERAGE AMOUNT BORROWED, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/avg_amnt_brwd.authcheckdam.pdf (last visited Apr. 16, 2015).

²⁹ "Military Families are geographically insecure, moving every two to three years . . . These moves are based on the needs of the U.S. government, and are mandatory for the service-member." MILITARY SPOUSE J.D. NETWORK, <http://www.msjudn.org/> (last visited Apr. 16, 2015). In February 2012, the ABA House of Delegates passed a resolution "urg[ing] state and territorial bar admission authorities to adopt rules, regulations, and procedures that accommodate the unique needs of military spouse attorneys who move frequently in support of the nation's defense." See AMERICAN BAR ASSOCIATION, Resolution 2012-108, http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.americanbar.org%2Fcontent%2Fdam%2Faba%2Fadministrative%2Fhouse_of_delegates%2Fresolutions%2F2012_hod_midyear_meeting_108.doc&ei=6UgQVbzELa-ZsQTDnYDYCg&usg=AFQjCNGhzX8hpeZEFswTyaDXBIn7Yc8efQ (last visited Apr. 16, 2015). In July 2012, the Conference of Chief Justices passed a similar resolution. See RESOLUTION 15, <http://ccj.ncsc.org/~media/>

Given the large and diverse pool of applicants to the New York bar, the Committee anticipates, as does the NCBE, that if New York adopts the UBE, several states will follow suit, which will open up even more opportunities for new attorneys. This increased mobility will assist legal employers, providing a larger pool of applicants from which to select new attorneys, and clients, who will benefit from a more efficient delivery of legal services. The portability afforded by the UBE also may result in the increased provision of legal assistance to traditionally under-served areas, such as low-income or rural communities.³⁰ Likewise, it may help funnel students into public interest practice, where employers often do not hire until the spring of applicants' final year of law school, after students have chosen which bar to take. The Committee heard from a number of employers who said they would welcome the opportunity to have a broader pool of applicants from which to choose.

Widespread adoption of the UBE would bring the legal profession into conformity with the other major professional disciplines, including medicine, which use a uniform exam to determine competence for licensure.³¹ These professions have recognized that a common licensing exam is able to adequately assess applicants' competency while making it easier for professionals to relocate between jurisdictions.

Microsites/Files/CCJ/Resolutions/07252012-Encouraging-Adoption-of-Rules.ashx (last visited Apr. 16, 2015).

³⁰ In August 2014, the ABA House of Delegates adopted Resolution 108 of the Legal Access Job Corps Task Force, which addresses the access to justice gap. Resolution 108 provides:

“most states have substantial rural areas and some of them have an aging lawyer population. As a result, many communities are now without lawyers. For example, in one South Dakota community, the nearest lawyer is 120 miles away. State bars faced with this challenge are creating rural placement projects designed to encourage and give incentives for recently admitted lawyers to set up or assume practices in these communities.”

Am. Bar Assoc. Resolution 108, http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2014_hod_annual_meeting_108.authcheckdam.pdf, at 4.

³¹ The United States Medical Licensing Exam, which has been used since the early 1990s, “provides a single pathway for primary licensure of all graduates of . . . accredited medical schools in the United States and Canada.” *See* Committee to Evaluate the USMLE Program, Comprehensive Review of USMLE, <http://www.usmle.org/pdfs/cru/CEUP-Summary-Report-June2008.pdf>, at 2.

This is especially important in today's global society, where the practice of law is less frequently confined to one jurisdiction and today's lawyers are far more mobile than their predecessors. Moreover, it makes sense where the fundamental knowledge and basic skills required of all who enter the profession transcend state lines.

A discussion of portability necessarily requires consideration of the UBE passing score, which is set individually by each jurisdiction that has adopted the exam. In making its proposal to the Court, the SBLE recommended that New York use a passing score of 266, which would be equivalent to the passing score on the current bar exam.³² The Committee agrees that setting the score at this point is appropriate. There has been some concern that this score is lower than 10 of the 15 jurisdictions that have already adopted the UBE. Since an applicant can only transfer a score to another UBE jurisdiction if the applicant's score satisfies the jurisdiction's minimum score, some commentators erroneously assumed that those who take the UBE in New York will not be able to seek admission in many of the UBE jurisdictions. While it is true that applicants whose UBE scores are below that required for admission in a given jurisdiction will not be able to transfer the score to that state, the Committee ultimately determined that *some* portability is better than *no* portability. Moreover, although the score required in New York to pass the exam will be lower than that of other UBE jurisdictions, the majority of New York test-takers will likely achieve a score that exceeds the passing score in every other UBE jurisdiction, the highest of which is 280.

To illustrate, in July 2014, the mean MBE score for New York first-time test-takers from ABA-approved law schools was 145.4. If we assume the MBE score is a proxy for the score an applicant would have received on the UBE, the mean on the July 2014 exam would equate to a UBE score over 290. Additionally, in July 2014, 66% of

³² On the current bar exam, the passing score is set at 665, which represents a MBE scaled score of 133 multiplied by 5 ($133 \times 5 = 665$). Since the UBE is scaled on a 400 point scale, the equivalent passing score is 266. The Committee stresses that it is NOT recommending an increase in the passing score.

first-time New York bar applicants from ABA-approved law schools scored at or above 140 on the MBE, which on the equivalent UBE scale would entitle them to admission in all 15 UBE jurisdictions.

Furthermore, if an applicant who takes the UBE in New York scores below 266 but above 260, that applicant will be able to seek admission in four other UBE jurisdictions, an option not available under the current testing regime. Once admitted in one of those jurisdictions, the applicant may be able to gain federal government employment, which would then allow the applicant to practice in that federal job in any U.S. jurisdiction, including New York. If we use the MBE scores on the July 2014 bar exam as an estimate of UBE scores, 351 first-time test-takers in New York who graduated from ABA-approved law schools would fall into this category of having failed the New York bar exam while achieving a score sufficient to secure admission in another UBE jurisdiction.

Just as New York applicants who take the UBE will be able to seek admission in other jurisdictions, applicants from those jurisdictions who score at or above 266 will be able to seek admission in New York. This has led some interested individuals and bar associations to question whether New York will be flooded with out-of-state attorneys, thereby resulting in increased competition for jobs. This argument may overlook the fact that the portability offered by the UBE would benefit only new attorneys, not experienced practitioners who have already passed a bar exam prior to the adoption of the UBE and obtained a license in another state.

Further, it bears mention that, under the status quo, New York already attracts and admits thousands of out-of-state bar applicants each year.³³ The Committee

³³ While exact statistics on the number of out-of-state attorneys admitted per year in New York are not available, given that the majority of applicants for the New York state bar exam are not residents of New York, and nearly 10,000 attorneys are admitted in New York each year (*see* Andrew W. Klein, 2013 Annual Report of the Clerk of the Court to the Judges of the Court of Appeals of the State of New York

acknowledges that adoption of the UBE may result in additional new attorneys seeking admission here, but believes the influx will be at least partially offset by individuals who use a UBE score obtained in New York to seek admission in another UBE jurisdiction. Moreover, New York law students may have a distinct advantage with New York employers, who presumably will value applicants who studied New York law in a New York-based school and had legal employment in New York during law school, as some commentators advised the Committee.

Any potential increase in the number of applicants seeking to practice in New York is mitigated by the fact that, under the bar admission scheme recommended by the SBLE, applicants from other jurisdictions who score at or above 266 on the UBE will not automatically be entitled to admission in New York. These applicants must also establish compliance with the Court of Appeals' educational eligibility requirements,³⁴ pass the NYLE, and undergo a character and fitness review by the Appellate Division.³⁵ Portability is an advantage because it creates mobility where none exists for those seeking out-of-state admission and presents no disadvantage to those not seeking to move since they are in no worse a position than under the current scheme.

The Committee believes that any desire to prevent out-of-state applicants from being admitted here is protectionist. New York has a long history of welcoming applicants from other jurisdictions, including foreign countries. These concerns regarding competition are overstated and not appropriate considerations in determining eligibility for licensure in New York. The Committee views the bar examination essentially as a consumer protection measure intended to ensure, to the extent possible, that only those who have demonstrated minimum competence are permitted to bear the title of “attorney-at-law” and to represent clients.

app. 10 (2014), <http://www.nycourts.gov/ctapps/news/annrpt/AnnRpt2013.pdf>.), it is fair to conclude that thousands of applicants from outside New York are admitted in New York annually.

³⁴ See 22 NYCRR 520.3 - 520.6.

³⁵ See 22 NYCRR 520.12.

B. Competency

1. New York law coverage on the UBE

A recurring theme at nearly every public hearing or stakeholder meeting was whether the UBE would sufficiently test knowledge of New York law and readiness to practice in this State, whether it would diminish testing of, and competence in, New York law, and whether it would focus too strongly on “uniform laws,” which this state has not adopted. The Committee finds those concerns unwarranted.

First, under the current system, an applicant can perform poorly on the New York portion of the bar exam and still pass and eventually gain admission to the bar by recording a high score on the multistate portion. In other words, a weak performance on the New York section can be overcome by a particularly strong performance on the multistate portions of the exam. Moreover, given that the law in New York frequently aligns itself with generally accepted legal principles, applicants who respond to questions on the New York portion of the current exam using that general knowledge can often score quite well on those questions, without specific knowledge of New York rules. Additionally, it should be noted that New York now admits, on a reciprocal basis, out-of-state attorneys with five years of experience without requiring those attorneys to demonstrate any competence in, or even familiarity with, New York law.

In contrast, the SBLE proposal would require all new attorneys to pass a separate New York-based exam. For the first time, new attorneys wishing to practice in our state would have to demonstrate their competence in New York law by passing a stand-alone 50-question multiple choice exam on New York-specific laws.

Second, the perception that the UBE test only “uniform laws” is inaccurate. The UBE and MEE recognize that all attorneys share a common core of legal knowledge and practical skills, regardless of where an attorney is educated, and test on generally

accepted foundational legal principles that are common across the country. So called “uniform laws” are but one component, and while it is true that New York has not fully embraced the numerous uniform laws that have been drafted by the National Conference of Commissioners on Uniform State Laws, the provisions of many of those laws in large measure parallel New York statutes.³⁶ Forty-nine states, including New York, currently assess bar applicants’ knowledge of these widely applicable legal principles, concepts and constructs by administering the 200-question multiple choice MBE.

2. New York-specific law

Although there is a significant overlap between the law tested on the UBE and New York law, the Committee agrees with the SBLE on the importance of requiring applicants to demonstrate competence in state-specific law, and endorses the concept of requiring applicants to pass a distinct test on New York legal principles.

A separate test admittedly imposes a new burden on bar applicants. The Committee acknowledges the likelihood that some applicants who would have been admitted under the current system (with their MBE scores making up for their deficiency in New York law) may not pass the NYLE on the first attempt. Regardless, the Committee believes it is essential that new attorneys admitted in this state demonstrate a level of competence in New York law, and it concludes that a multiple choice test provides for the most meaningful assessment.

Although some stakeholders voiced concerns that New York law principles would no longer be tested on the essay portion of the exam, research suggests that a multiple choice exam is an effective means of testing an applicant's knowledge.³⁷ An hour-long

³⁶ See Uniform Law Commission, *Guide to Uniform and Model Acts, 2014-2015*, at 34-41, http://www.uniformlaws.org/Shared/Publications/GUMA_2014web.pdf (last visited Apr. 16, 2015).

³⁷ See , JOHN P. HUBBARD & EDITHE J. LEVIT, *THE NATIONAL BOARD OF MEDICAL EXAMINERS: THE FIRST SEVENTY YEARS* (1st ed.1985) (discussing a three-year study done by the National Board of Medical Examiners (NBME) on of the efficacy of multiple choice questions versus essay questions). With respect to multiple choice medical examinations, the study authors found: “[T]he scores derived from the multiple-

essay could test, at most, five or six principles of law. On the other hand, the 50-question multiple choice test could test at least 50 discrete principles of law. The Committee agrees that essay tests are an excellent vehicle to test issue identification, legal analysis and communication skills. If the UBE is adopted, those skills will be tested on the six-essay MEE and the two MPT tasks. It is important to not discount essays that test on general legal principles, because those principles often mirror New York law.

While the Committee agrees with the SBLE's proposal for a separate New York law component, it differs on two main points. First, the SBLE proposed administering the NYLE on the second day of the bar exam, before the MBE. We believe that adding a state-specific 50-question test on a day when test-takers are already confronted with a six-hour 200 multiple choice exam is unreasonable.

Second, if the NYLE were administered on the same day as the MBE, it would mean that New York applicants would be subject to more arduous testing conditions than UBE applicants in other states. Having to prepare for the NYLE and UBE at the same time would place a greater burden on New York test-takers than that placed on applicants in other jurisdictions. We find that burden unnecessary and unfair.

The Committee believes that New York bar applicants should be on a level playing field with applicants across the country. Moreover, the Committee was

choice portion of the tests corresponded much more closely with the long-term evaluation of students by their instructors than did the essay test grades. Also it was found that the multiple-choice tests, even though only half as long in time as the essay examination customarily employed, had greater validity and reliability in evaluation of the student's knowledge and his ability to apply that knowledge to the situation at hand." *Id.* at 23-24. See also Susan M. Case, *Best Practices with Weighting Examination Components*, THE BAR EXAMINER, Feb. 2008, at 43-44, http://www.ncbex.org/assets/media.files/Bar-Examiner/articles/2008/770108_testing.pdf. (discussing the reliability and validity of multiple choice exams). However, some commentators have questioned the value of multiple choice exams. In a written submission to the Committee, the Clinical Legal Education Association (CLEA) suggested that multiple choice testing "is an acquired skill that comes, along with many other advantages, with privilege and access." See Clinical Legal Education Association Written Testimony, Jan. 30, 2015, App.8, at 2. CLEA contends that if bar applicants are required to pass a separate multiple choice exam, law schools may seek "to admit students who have demonstrated particular skill at taking standardized exams," which would "undercut the diversity of New York's law schools." *Id.*

concerned that a 50-question exam, standing alone, may not be the most effective method for assessing applicants' readiness to practice New York law. After extensive discussion and deliberation, including an examination of the methods other UBE jurisdictions use to assure competency in state-specific law, the Committee has determined that a slightly different approach will better serve the needs of applicants while also providing appropriate assurance of competence to practice in New York.

The Committee proposes a unique two-component paradigm in bar testing, consisting of: (1) an online educational course devoted to New York rules and distinctions, to be denominated the "New York Law Course" (NYLC) and (2) a separate open-book, online 50-question multiple choice test on New York law (the "New York Law Exam," or NYLE). Although no other UBE jurisdiction requires both an online course and a separate online exam, the Committee believes this hybrid approach will best serve the goal of ensuring that new attorneys are competent to practice law in New York.

The purpose of the NYLC is to highlight those areas of practice and procedure that the Court and SBLE believe are important for every new attorney in New York to know. It will serve as a helpful refresher for those who studied New York law in law school and a suitable introduction for those who did not. It is a pedagogically sound vehicle for educating New York State's future lawyers. The separate NYLE will assure that applicants have processed the information presented in the course and have at least a basic understanding of the ways in which New York law differs from generally accepted principles of law.

The Committee largely yields to the expertise of the SBLE in developing the course and exam, and the requirements therefor, but has some recommendations as to the general parameters. First, the Committee recommends setting the passing score on the NYLE at 30 out of 50, which will ensure, together with the NYLC requirement, that applicants have suitable exposure to and knowledge of important and unique principles of New York law, but will not act as an insurmountable burden to admission. Second, as to

the content of the course and the material tested on the exam, the Committee strongly urges the SBLE to regularly solicit comments and suggestions from educators, the State Bar and other appropriate constituents regarding the content for both the online course and the exam. Third, the Committee recommends that the SBLE produce suitable study materials that applicants can reference during the NYLC and NYLE. Although some may question the value of an open-book exam, the Committee believes that it is a sound assessment measure that mirrors what attorneys do on a daily basis, namely, look up, distill, comprehend and apply information from legal sources.

As to the issue of timing — that is, when applicants could take the online course and test — the Committee favors reasonable flexibility and recommends permitting applicants to take the course and exam up to one year before sitting for the UBE, or up to three years after the UBE. This approach ensures that applicants have completed the majority of their legal education before taking the course and exam, but also provides a fairly generous window in which to complete the requirements. In the Committee's view, the NYLE score should remain valid for only three years (as is the MPRE score under SBLE Rule 6000.6[h]). The bar exam (and, by extension, the NYLE) is a measure of *current* competence.

The NYLC should be offered on demand. That is, an applicant can view the online lecture at the applicant's convenience, so long as it is within one year before or three years after the UBE. The course should include embedded questions to ensure that the viewer is attentive and engaged with the course material. As to the exam, the Committee recommends that it be offered on specific dates, no fewer than four times per year. This approach will provide some flexibility to applicants, but will also reduce the likelihood of applicants assisting one another. To ensure the integrity of the test and to further deter cheating, the Committee recommends that the Board employ other appropriate and feasible technological methodologies, such as scrambled questions and answers. Additionally, all applicants should be required to complete an affirmation swearing that the applicant completed the NYLC and NYLE without assistance from

anyone else, and did not provide assistance to any other applicant. An applicant who violates the oath will be subject to disciplinary action, including denial of admission. While the Committee acknowledges the possibility of cheating, we emphasize that the legal profession is based on truth and integrity, and believe that the threat of non-admission will serve as a sufficient deterrent.

In sum, the Committee believes that the UBE, NYLC and NYLE will sufficiently test applicants' competence in New York law, provide applicants flexibility in demonstrating such competence, and best serve the ultimate goal of protecting the public.

3. Curricular impact

Some commentators expressed concern that adoption of the UBE would require curricular changes for New York law schools. However, the majority of law professors and administrators from whom the Committee heard indicated that to the extent any curricular changes are necessary, these changes would be minor. The current New York bar exam tests general principles of law, through the use of the MBE, and New York law, through the essays and New York multiple choice questions. These same principles would be tested on the UBE and the separate NYLE.

There seems to be no basis for the contention that if the Court of Appeals adopts this proposal, New York law schools will no longer teach New York law. As several professors indicated during the Committee's outreach, New York law schools teach general legal principles in addition to New York-specific law. The pedagogical benefit of this teaching method is obvious, as it allows the instructor and students to compare the relevant aspects of each approach. Moreover, the Committee determined that many students who attend New York law schools have an interest in practicing in New York. These law schools, therefore, will have an incentive to continue teaching New York law, in order to prepare their students for practice here. Finally, New York law schools

presumably would continue to teach New York law to prepare students for the separate New York online test.³⁸

4. Practice preparedness

Applicants' readiness to enter the legal profession sufficiently prepared for the demands of New York practice has been an issue raised for several years by members of the legal academy, organized bar, and judiciary, and that issue exists whether New York continues to use the current test or transitions to the UBE and a separate NYLE. A significant benefit of the UBE is that it contains more skills testing than our current bar exam. By incorporating two MPT tasks, the UBE emphasizes the importance of new attorneys possessing skills that will assist them as they enter practice. This increased skills testing is consistent with the growing emphasis on clinical and practical training in law schools. It also responds to calls from the profession for new attorneys to have more practical skills training.³⁹

The Committee acknowledges the limits of the MPT as a measure of an applicant's readiness to practice law in New York. As a professor and academic dean at CUNY School of Law noted at one of the public hearings, the MPT "doesn't assess how well [an applicant] can interview a client or if they can interview a client at all. It doesn't assess whether they can negotiate or litigate. It doesn't tell the grader how [skilled] the

³⁸ Notably, the majority of people who take the New York bar exam were educated at out-of-state law schools. In a recent article in the New York Bar Journal, the Chair of the SBLE observed, "many, if not most of our candidates learned the critical distinctions in New York law through their preparation for the bar exam." See Diane F. Bosse, *Assessing Minimum Competence in a Changing Profession, Why the UBE is Right for New York*, NYSBA JOURNAL, Feb. 2015, at 39, 43, <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=55076>. The passage rate of those applicants who attended law school in New York mirrors that of those who graduated from ABA-approved schools in other states. See *id.*

³⁹ See, e.g. Martha Neil, *NY State Bar Urges ABA to Encourage Law Schools to Focus on Educating 'Practice Ready' Attorneys*, ABA JOURNAL (Aug. 5. 2011), http://www.abajournal.com/news/article/new_york_state_bar_urgues_aba_to_strengthen_law_school_focus/. In an interview with the National Law Journal, then State Bar President Vincent Doyle III stated "[l]egal education should have more of an emphasis on making sure graduates are ready to practice law . . . It is something that has been de-emphasized, and it shows." *Id.*

candidate is at working collaboratively, understanding and communicating across differences, handling indeterminacy. It doesn't even allow the grader to understand how well the candidate understands their professional goal.”⁴⁰ That said, no written test is ever a perfect measure of any applicant's ability and competence, and the limitations of testing time and resources restrict the range of skills that can be effectively tested. The Committee believes that the addition of a second MPT is a useful measure of an applicant's ability to comprehend, interpret and apply statutes, regulations and case law to a new set of facts and perform an assigned lawyering task. Indeed, a representative of the Society of American Law Teachers who testified at the CUNY public hearing acknowledged that the MPT “more replicate[s] legal work than the multiple choice test or the essays.”⁴¹

In conclusion, the Committee finds insufficient support for the contention that adoption of the UBE would in any way decrease new attorneys’ competence to practice law in New York. Moreover, the Committee affirmatively finds that the addition of a second MPT item, as included in the UBE, would improve the assessment currently made of an applicant’s readiness to enter the legal profession.

C. New York’s “gold standard”

Several stakeholders, including NYSBA, expressed concern that adopting the UBE would ultimately tarnish the perceived New York “gold standard” for legal practice. The Committee finds this concern unsubstantiated.

The Committee strongly agrees that New York’s professional bar enjoys, and deserves, a national reputation for excellence. That status is a factor of the quality of its practicing attorneys and the historic stature of its judiciary – and has little to do with

⁴⁰ See *Public Hearing Before Advisory Committee on the Uniform Bar Examination* 70-72 (Jan. 20, 2015) (Statement of Sarah Valentine, CUNY School of Law), <http://www.nycourts.gov/ip/bar-exam/Transcript-CUNY-hearing-jan20.pdf>.

⁴¹ See *id.* at 85 (Statement of Susan Bryant, Society of American Law Teachers).

passing a two-day bar exam. The President-elect of NYSBA conceded that the gold standard stems not from the current New York bar exam, but from “our courts and our practitioners and our laws.”⁴² The immediate past-President of the ABA shared the same view.

A common misconception exists that the New York bar exam is one of the most difficult in the nation and has a low passage rate compared to other jurisdictions. In fact, New York’s passing score on the MBE scale is lower than that of 32 other U.S. jurisdictions.⁴³ Further, New York’s overall bar passage rate may be misleading and skewed by the fact that a large number of foreign-educated bar applicants sit for the New York exam. Those applicants historically have a low passage rate on the exam.⁴⁴ If one looks at New York’s passage rate for first-time test-takers from ABA-approved law schools, it is higher than that of many jurisdictions.⁴⁵ It bears repeating that the purpose of the bar exam is not to promote competition, restrict competition, or aid employment, but rather to ensure that those who wish to be admitted in New York have demonstrated minimum competence to practice here.

In sum, the Committee believes that New York’s “gold standard” reputation results not from the difficulty of the bar exam, but from the rigorous demands of practice in New York State. While the bar exam is a gatekeeper for the profession, New York’s

⁴² See *Public Hearing Before Advisory Committee on the Uniform Bar Examination* 85 (Feb 3, 2015) (Statement of David Miranda, New York State Bar Association), <http://www.nycourts.gov/ip/bar-exam/pdf/NycoaUBEhearing2315FINAL.pdf>

⁴³ See National Conference of Bar Examiners & American Bar Association Section of Legal Education and Admissions to the Bar, *supra* note 18, at 29-30.

⁴⁴ On the July 2012, 2013 and 2014 New York bar exams, first-time foreign-educated applicants had a pass rate of 46%, 46% and 44%, respectively. See New York State Bd. of Law Examiners, *New York Bar Exam Pass Rates 2010-2014*, http://www.nybarexam.org/ExamStats/NYBarExam_PassRates%20_2010-2014.pdf.

⁴⁵ For the February and July 2013 bar exams combined, first-time test takers from ABA-approved law schools in New York had a bar passage rate of 85%, which is higher than 30 other states and the District of Columbia. See National Conference of Bar Examiners, *2013 Statistics*, THE BAR EXAMINER, Mar. 2014, at 6, 16-19, http://www.ncbex.org/assets/media_files/BarExaminer/articles/830114statistics.pdf.

status as a leader in the global legal marketplace is a product of the talented attorneys who practice here, the well-respected public interest bar, the preeminence of international and human rights law practitioners, the large number of prominent and international firms located here, and the prestige of the New York Court of Appeals and the judiciary. Accordingly, the Committee concludes that adoption of the UBE will not impact that reputation.

D. Potential outcome differentials across applicant subgroups

A chorus of bar associations, members of the legal academy, jurists and individual lawyers have resoundingly asserted the benefits of a bar and judiciary that represent the communities they serve.⁴⁶ It is now an accepted truism that increasing access to the legal profession is beneficial to employers and clients, and also a public interest imperative to ensure our society's promise of equality under the law.⁴⁷ Indeed, as the United States

⁴⁶ See Association of Corporate Counsel, ACC Chief Legal Officers 2015 Survey 7 (2015), <http://www.acc.com/v1/public/Surveys/loader.cfm?csModule=security/getfile&pageid=1389460&page=/legalresources/surveys/index.cfm&qstring=&title=ACC%20Chief%20Legal%20Officer%20%28CLO%29%202015%20Survey%20%20Executive%20Summary> (“Gender and diversity researchers have linked and continue to link organizational diversity with positive business outcomes”); Commission on Racial and Ethnic Diversity in the Profession, American Bar Association, Goal III Report: The State of Racial and Ethnic Diversity in the American Bar Association 3 (2015), http://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_diversity/2015GoalIII.authcheckdam.pdf (“Diversity is essential to the Association and society in general.”); Committee on Diversity and Inclusion, New York State Bar Association, 2013 Diversity Report Card 3 n.1 (2014), <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=48879> (“We are a richer and more effective Association because of diversity, as it increases our Association’s strengths, capabilities and adaptability.”); Letter from Victor A. Kovner, Chair, The Fund for Modern Courts & Milton L. Williams, Jr., Chair, Exec. Comm., The Fund for Modern Courts, to the Honorable George E. Pataki, Governor of the State of N.Y. (Jul. 27, 2006), http://moderncourts.org/files/2013/10/appointment_to_court_of_appeals.pdf (“Where the judiciary does not reflect the diversity of the community it serves, public confidence in the judiciary is undermined.”); Ciara Torres-Spellisey, Monique Chase & Emma Greenman, Brennan Center for Justice at New York University School of Law, Improving Judicial Diversity 4 (2010), https://www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf.

⁴⁷ See New York State Bar Association Judicial Section, Judicial Diversity in New York State: A Work in Progress 2 (2014), http://www.nysba.org/Sections/Judicial/2014_Judicial_Diversity_Report.html (“Judicial diversity is essential because it provides equal opportunity to underrepresented groups, presents role models to encourage our youth, inspires confidence in our justice system and, most importantly, promotes justice.”); Association of Corporate Counsel, *supra* note 46, at 7 (“Diversity is associated with increased

Supreme Court has noted, “[a]ccess to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.”⁴⁸ According to the Court, diversity in higher education, including law school, is a compelling state interest.⁴⁹

The profession has also recognized that diversity is critical to ensuring confidence and trust in our legal system, and to the continued overall integrity of our government. As the ABA has stated, “[w]ithout a diverse bench and bar, the rule of law is weakened as the people see and come to distrust their exclusion from mechanisms of justice.”⁵⁰ As a consequence, the ABA and NYSBA for decades have included diversity goals in their agendas, and both have made diversity projects an integral part of the work of their various association committees.⁵¹

While New York State has one of the most ethnically and racially diverse populations in the nation,⁵² the State’s legal profession has not yet fully addressed the historic under-representation of various racial and ethnic groups within its ranks, both at

sales revenue, more customers, greater market share and greater relative profits.”); Commission on Racial and Ethnic Diversity in the Profession, *supra* note 46 at 3; Committee on Diversity and Inclusion, *supra* note 46, at 3 n. 1 (“Through increased diversity, our organization can more effectively address societal and member needs with the varied perspectives experiences, knowledge, information and understanding inherent in a diverse relationship.”).

⁴⁸ *Grutter v Bollinger*, 539 US 306, 332-333 (2003), *rearg denied* 539 US 982 (2003).

⁴⁹ *See id.* at 306; *see also Gratz v Bollinger*, 539 US 244, 268 (2003).

⁵⁰ American Bar Association, Presidential Diversity Initiative, Diversity in the Legal Profession: The Next Steps 9 (2010), http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011_authcheckdam.pdf; *see also* New York State Bar Association Judicial Section, *supra* note 47, at 2.

⁵¹ *See* NYSBA DIVERSITY AND INCLUSION HOMEPAGE, <https://nysba.org/A16300/> (last visited Apr. 16, 2015); ABA CENTER FOR RACIAL AND ETHNIC DIVERSITY, <http://www.americanbar.org/groups/diversity.html> (last visited Apr. 16, 2015).

⁵² According to U.S. Census figures, African Americans and Latinos each account for approximately 18% of the population and Asians account for about 8%. Nationally, African Americans constitute approximately 13 % of the population, Latinos 17% and Asians about 5%. *See* NEW YORK QUICK FACTS, *supra* note 15.

the bar and the bench.⁵³ The under-representation has seemingly contributed to a lack of confidence: statistics indicate that while 76% of White voters in New York trust our state’s judges, only 51% of African-American voters and 61% of Latino voters have confidence in jurists’ fairness and impartiality.⁵⁴ Further, although women have achieved parity in law school admissions, and individual women have achieved high levels of success, as a group, women continue to lag behind men in securing leadership positions across the spectrum of legal employers, and are severely under-represented among the ranks of firm partners and within the judiciary.⁵⁵ Moreover, gender and sexual identity continue to serve as a basis for discrimination and different treatment, leading to reduced opportunities and career dissatisfaction for women and members of the LGBTQ community.⁵⁶

Given these realities and New York’s long-standing commitment to increasing access to the profession and the organized bar’s continued efforts to diversify its ranks, it

⁵³ A September 2014 report by the Judicial Section of the New York State Bar Association reveals that while women account for 52% of the state’s population, only 35% of the state’s judges are women. *See* New York State Bar Association Judicial Section, *supra* note 47, at 5. Furthermore, while Whites account for 67 percent of the statewide population, they hold 81 percent of judicial positions. *See id.*

⁵⁴ *See id.* (citing Mark H. Alcott, *Achieving Gender and Ethnic Diversity in the Profession*, 78 N.Y. ST. B. J., Nov-Dec. 2006, at 6).

⁵⁵ National Association of Women Lawyers, Report of the Eighth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms 4 (2014), <http://www.nawl.org/d/do/150> (“There continues to be a disproportionately low number of women who advance into the highest ranks of large firms – in spite of decades-old pipeline of women law school graduates”); Association of Corporate Counsel, *supra* note 46, at 7 (“When looking at total compensation, female [Chief Legal Officers] were significantly more likely than male [Chief Legal Officers] to report total compensation less than \$200,000 annually (26 percent versus 19 percent). Men were more likely than women to report total compensation packages of \$600,000 or more (21 percent versus 14 percent) and seven percentage points less likely to receive compensation packages of less than \$200,000”); New York State Bar Association Judicial Section, *supra* note 47, at 4 (“Women account for 52% of New York’s total population, yet on the bench only 35% are women”).

⁵⁶ *See* Commission on Sexual Orientation and Gender Identity, American Bar Association, Goal III Report for 2014-2015 Seventh Annual Review of the Status of Lesbian, Gay, Bisexual, and Transgender Participation in the American Bar Association 5 (2015), http://www.americanbar.org/content/dam/aba/administrative/sexual_orientation/sogi_2015_goaliii.pdf.authcheckdam.pdf (“full inclusion [of the LGBTQ community] into the [legal] profession continues to remain elusive”); Association of Corporate Counsel, *supra* note 46, at 11 (“Survey findings revealed discrepancies in overall job satisfaction based on gender and minority/underrepresented group status”).

is not surprising that the Committee heard from commentators and observers, including NYSBA, New York County Lawyers Association, New York City Bar Association, various affinity bar associations, and law school deans and faculty, about their fears that adoption of the SBLE proposal would have an adverse effect on the bar passage rates of certain racial and ethnic groups, as well as for women generally. These commentators noted that passage of the bar examination is a mandatory licensure requirement, and as such serves as a gatekeeper to the profession. They therefore invited the Committee to consider whether adoption of the proposal would exacerbate existing barriers to the profession, unrelated to individual competence, and as a consequence cause a decrease in bar passage rates for discrete demographic groups.

The Committee began its consideration of this issue by reviewing data on bar passage rates by race, ethnicity and gender. Among other things, the Committee reviewed three reports prepared by NCBE at the request of the SBLE after the passing score on the New York bar exam was raised by five points (from 660 to 665) in 2005.⁵⁷ The NBCE study revealed that pass rates for ABA-educated first-time test takers who sat for the July 2005 exam differed by race and ethnicity. Specifically, the passing rates for White test takers was nearly 87%, compared with 80% for Asian/Pacific Islanders, 69.6% for Latinos and 54% for African Americans. The gap identified in the 2006 study continues with today's bar exam. In July 2013, the pass rate for first-time test-takers from ABA-approved law schools was 90% for Whites, 82% for Asian/Pacific Islanders, 79% for Latinos and 69% for African Americans. In July 2014, the pass rates for these groups, respectively, were 87%, 81%, 68% and 65%.⁵⁸ The question then remains whether the bar exam, some other factor, or a combination of factors explains these differences.

⁵⁷ See Andrew Mroch et al, *Impact of the Increase in Passing Score on the New York Bar Examination: February 2006 Bar Administration 8* (2007), http://www.nybarexam.org/press/nyrep_feb06.pdf.

⁵⁸ See *New York Bar Exam Pass Rates for Major Racial/Ethnic Groups – July 2005 - 2014*, App 14.

The Committee approached this question mindful that the current underrepresentation of various groups within the legal profession is a highly complex, multi-layered and nuanced issue, with root causes and social realities that transcend the bar exam. In considering the issue, the Committee agreed on certain foundational principles. First, individuals from all racial and ethnic groups, regardless of gender and sexual identity, have the capacity to pass the bar examination on the first attempt. Second, bar passage gaps close dramatically after two attempts, further suggesting that there are various factors that affect first-time test takers, including economic, educational and socio-political disparities unrelated to individual abilities.⁵⁹ Third, the change envisioned by the proposal, which involves replacing the New York essays with essays on general legal principles, does not in and of itself suggest that the results will greatly affect current pass scores.

While it is difficult or impossible to gauge the potential outcome differentials attendant to adoption of the UBE, in part because it has never been administered in New York, and in part because it would be impossible to administer two different tests (the current bar exam and the UBE) to the same class of applicants to compare the results, the Committee tried various ways to compile information that might provide insight as to the possible impact on bar passage rates. These efforts revealed no evidence that the UBE would result in any significant change in outcome differentials.⁶⁰

Perhaps the most helpful information considered by the Committee with respect to the possible impact on bar passage rates for different test-taker groups in New York

⁵⁹ See discussion *infra*.

⁶⁰ The proposition that members of certain racial and ethnic groups fare better on certain types of questions, meaning multiple choice versus essays and performance tests, is not supported by the statistics maintained by the SBLE. See Mroch, *supra* note 57, Table 3.2; see also July 2014 Bar Exam Mean Scores for Major Demographic Groups – ABA First Time Takers, App. 14; Susan M. Case, *Urban Legends About the Bar Exam*, THE BAR EXAMINER, May 2008, at 44, 44-45, http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2008/770208_testing.pdf. But see Susan M. Case, *Men and Women: Difference in Performance on the MBE*, THE BAR EXAMINER, May 2006, at 44, 44-45, http://www.ncbex.org/assets/media.files/Bar-Examiner/articles/2006/750206_Testing.pdf.

was a simulated analysis conducted by NCBE using data from the July 2013 and July 2014 bar exams. For this simulation, NCBE used the scores achieved on the five New York essays as a proxy for the six MEE questions, assumed performance on two MPTs would be exactly double the performance on one, and applied the UBE weights (50% instead of 40% for the MBE, 20% instead of 10% on the MPT and 30% for the MEE instead of the 40% now assigned to the New York Essays) (Appendix 15). The simulation revealed that after applying the UBE weights to the July 2014 bar exam results, 49 more people would have failed than would have passed under the current exam, out of the 11,195 people who sat for that exam. For first-time test-takers from ABA-approved law schools, the pass rate for African American applicants would decline by 0.2% (net change of -1 person); the rate for Caucasian applicants would decline by 0.2% (net change of -10 people); the rate for Asian American test-takers would decline by 0.2% (net change of -2 people); and the rate for Hispanic applicants would decline by 0.7% (net change of -3 people). The passage rate for males in this category (graduates of ABA-approved law schools taking the exam for the first time) would not change (net change of +1 person); for females in this category, the pass rate would decline by 0.4% (net change of -13 people). The data for the simulation using the July 2013 results shows similar trends.⁶¹

These simulations reveal that some applicants who pass under the current exam would fail if the UBE weights applied, and some would pass who otherwise would fail. The net changes were quite low, and the impact on passing rates for any subgroup was

⁶¹ Overall, 10 more applicants would have failed under the simulated analysis than passed the July 2013 exam. For first-time test takers from ABA-approved law schools, the pass rate for African Americans would decrease by 0.9% (net change of -5 people); the rate for Caucasian applicants would decline by 0.3% (net change of -18 people); the rate for Asian American applicants would increase by 0.6% (net change of +6 people); and the rate for Hispanic applicants would decrease by 0.8% (net change of -4 people). The passage rate for male first-time test takers from ABA-approved law schools would decrease 0.3% (net change of -13 people). The passage rate for females from the same category would decrease 0.5% (net change of -17 people). *See* Predicting the Effects of a Transition to the UBE in New York, November 2014, App. 15.

minimal. Admittedly, this study has its limits.⁶² However, it follows the same experience of other states, namely that the effect on bar passage of adopting the UBE is minimal.

The Committee reached out to law school deans in each of the 15 UBE jurisdictions as to the impact, if any, on the transition from a state-specific exam to the UBE. Although the rate of response was disappointing, the information received was encouraging. Several law schools responded that they did not keep demographic data, but provided the Committee with passage rates for their overall student population.⁶³ For example, the University of Missouri stated that the passage rates of first-time test takers on the July Missouri bar exam in 2008 — the latest year for which the school had data before the UBE was adopted — was 92%. Post-UBE adoption, the school's bar passage rate was 96% in 2012, 94% in 2013, and 92% in 2014. The University of North Dakota (UND) indicated that in 2010, the year before North Dakota adopted the UBE, the passage rate for UND first-time test takers on the July exam was 76%. In the years following adoption of the UBE, the passage rates were 78% (2011), 78% (2012), 75% (2013), and 56% (2014).⁶⁴ The Dean of the Sandra Day O'Connor College of Law at Arizona State University responded that for the three years before adoption of the UBE, its graduates' first-time test-taker passage rate was 87.3% (2009), 89.2% (2010), and 86.6% (2011); in the three years following adoption of the UBE, the bar passage rate for this category of graduates was 87.2% (2012), 88.8% (2013), and 88.4% (2014). Additionally, the Dean of Cumberland School of Law responded that the school's passage rate the year before and after adopting the UBE was nearly identical. The Committee realizes that these statistics do not take into account the test-takers'

⁶² The simulation assumes that applicants would perform the same on the six MEE essays as they would on the five New York essays and that performance on the second MPT item would be identical to performance on the first.

⁶³ See App. 16.

⁶⁴ The Dean of UND noted that the school's sample size was small and that one or two additional failures can have a large impact on the school's passage rate.

credentials, and that various factors may impact a school's overall bar passage rate. Nevertheless, these data tend to suggest that adoption of the UBE will not result in a significant drop in bar passage rates.

As for statistics on particular demographic groups' pass rates, the Committee received testimony from the President of NCBE, who stated that no jurisdiction that has adopted the UBE has reported any adverse impacts on the bar passage rates of any particular group. Justice Rebecca Berch of the Arizona Supreme Court, who testified at one of the Committee's public hearings, indicated "there has been no discernable impact on the pass rate of minorities" as a result of adopting the UBE in Arizona.⁶⁵ Another witness provided information that bar passage rates for African American and Latino test takers had increased after adoption of the UBE. According to Judge Cynthia Martin of the Missouri Court of Appeals, Western District, the data from University of Missouri at Kansas City Law School (UMKC) indicated that for the three years prior to Missouri's adoption of the UBE, the passage rate among African American and Hispanic applicants from UMKC was approximately 81%. For the four years since, the passage rate for this subgroup averaged approximately 86%.⁶⁶

The issue of potential gender differentials warrants mention. Statistically, the data indicate that women score slightly lower than men on multiple choice questions, and slightly higher than men on essays.⁶⁷ However, the data suggest that the discrepancy is very small and mirrors the gender differential on other standardized multiple choice tests, including the LSAT and MCAT.⁶⁸ Moreover, if the UBE is adopted, the respective

⁶⁵ *Public Hearing Before Advisory Committee on the Uniform Bar Examination 27* (Statement of Hon. Rebecca Berch, Ariz. Sup. Ct.), http://www.nycourts.gov/ip/bar-exam/pdf/022615_AppellateHearing.pdf.

⁶⁶ *Supplemental Testimony Before Advisory Committee on the Uniform Bar Examination 2* (Feb. 5, 2015) (Statement of Hon. Cynthia L. Martin, Mo. Ct. App.), <http://www.nycourts.gov/ip/bar-exam/pdf/Supplemental-Testimony-Hon.C.Martin-NYUBE-Advisory-Comm.pdf>.

⁶⁷ See Case, *Men and Women: Difference in Performance on the MBE*, *supra* note 60, at 44.

⁶⁸ See *id.*; see also Susan P. Dalessandro, Lisa C. Anthony & Lunda M. Reese, Law School Admission Council LSAT Technical Report 12-03: LSAT Performance with Regional, General and Racial/Ethnic Breakdowns: 2005-2006 Through 2011-2012 Testing Years, [http://www.lsac.org/docs/default-source/research-\(lsac-resources\)/tr-12-03.pdf?sfvrsn=4](http://www.lsac.org/docs/default-source/research-(lsac-resources)/tr-12-03.pdf?sfvrsn=4), at 2; Using MCAT Data in Medical Student

percentages applied to multiple choice questions and to written performances (essays and the MPT) will not change – each will be weighted at 50%. Therefore, there is little support for the proposition that adopting the UBE would disadvantage women.

Each time the bar exam is modified to adjust to modern circumstances, it is reasonable to assume that some people who would have passed the prior version will fail the newer model, and vice versa. The issue with regard to this discussion is whether adoption of the proposal would result in significant differential outcomes that would raise concerns about an invalid obstacle to admission. There is simply no available evidence suggesting that the UBE would negatively affect (or, for that matter, positively affect) any particular demographic group. Rather, from all indications, virtually all the people who would pass the existing test would pass the UBE. Virtually all the people who would fail the existing test would fail the UBE.

That said, the Committee recommends that if the UBE is adopted in New York, the SBLE be required to study the impact on test-takers. While the precise details of the study design should be determined by the SBLE in conjunction with the Court of Appeals, the Committee has identified certain key issues that should be addressed by the study. The study should analyze data about bar passage rates under the UBE by race, ethnicity and gender, looking at overall performance and performance by question type. This data should be compared to bar passage rates under the current test for the same categories. To the extent feasible, the study should take into account the credentials of applicants, including LSAT scores, law school GPA, and other indicators the SBLE considers relevant to the analysis. The Committee recognizes that assessment of the results of only one administration, or any particular administration, would be unreliable and would likely reflect idiosyncrasies unique to that examination. In order to ensure the

Selection, Assoc. of Am. Medical Colleges, <https://www.aamc.org/students/download/267622/data/mcatstudentselectionguide.pdf>, at 2.

study is based on reliable information, the Committee recommends a review that encompasses three years of examinations, beginning with the first administration of the UBE, and continuing for the subsequent five administrations of the test. The Committee believes that this study is a critical component to New York's ongoing effort to ensure fairness in the licensing process and, once completed, should be made publicly available, along with the summary statistics regarding group performance collected as part of the study. If the study reveals any statistically significant drop in bar passage rates for any particular group that are unexplained by other factors, the Court should consider further action, including terminating use of the UBE.

A related issue also requires further study. During the Committee's review of group performance data it found that many applicants who fail the bar exam on the first attempt eventually pass the exam and gain admission. Recognizing this, the Committee did not confine its analysis to first time test-takers, and requested that the SBLE provide data on applicants who take the bar exam more than once. The data revealed that the majority of applicants who retake the New York bar exam pass on their second attempt. Specifically, for those applicants who were graduates of ABA-approved law schools and who took the bar exam for the first time in July 2013, failed, and then retook the exam in February 2014, the overall passage rate was 63.9% for Asian/Pacific Islanders; 62.3% for Black/African Americans; 63.7% for Caucasian/Whites and 64% for Hispanic/Latinas. Aggregating the July 2013 passage rates with the February 2014 passage rates results in a cumulative passage rate of 89.6% for Asian/Pacific Islanders; 82.8% for Black/African Americans; 94.2% for Caucasian/Whites; and 88.5% for Hispanic/Latinas.⁶⁹

Analyzing repeat takers by gender reveals a similar narrowing of the bar passage gap. Looking again at ABA-graduates taking the bar exam for the first time, of the male applicants who failed the July 2013 bar exam and retook the February 2014 bar exam, the passage rate was 61.5%. For females in the same category, the passage rate was 63.4%.

⁶⁹ See New York Bar Exam Cumulative Passing Rates for ABA Graduates by Major Demographic Group After Two Attempts, App. 14.

The cumulative passage rate (combining the pass rate for July 2013 and February 2014) for males was 92.5% and for females was 91.6%.⁷⁰

These data demonstrate that the racial and gender differences in bar passage rates decline by the second administration of the exam, which supports the conclusion that overall success on the bar exam is not based on the inherent ability of any particular group. Rather, the data suggest that preparation strategies tailored to the needs of particular groups may help address the first-time bar exam score gap. Thus, the Committee recommends that the SBLE work with an independent researcher to identify and investigate obstacles first-time test-takers may face, as well as strategies that can lead to increased success on the first bar exam attempt. The study should make recommendations on how the Court, judiciary, organized bar, and the legal academy and institutions of higher education can help ensure that all applicants have equal opportunities to succeed on the first bar exam sitting. Given the importance of this issue, and the likely difficulty in designing the study, the Committee recommends that the SBLE issue publicly the results of its research within three years of the Court's approval of the study.

E. Lead time needed for laws schools, students and bar review courses to prepare for a new exam

The Committee explored the question of how much lead time law schools, students and bar review courses would need to prepare for a transition to the UBE and NYLE. Among the issues were whether students who began law school under the assumption that they would take a particular bar exam should be confronted with a

⁷⁰ See New York Bar Exam Cumulative Passing Rates for ABA Graduates by Gender After Two Attempts, App. 14.

different exam, whether law schools need time to adjust their curricula and whether bar review courses need time to re-tool.

As originally proposed, it was suggested that the UBE and NYLE first be administered in July 2015. This would have provided nine months of transition time between when the proposal was first advanced by Chief Judge Lippman and administration of the new test. Partially because of concerns raised regarding whether this provided adequate time for preparation, this Committee was formed.

During the public comment period, the Committee heard from law school deans, professors and students. The majority of the law school professors and deans who commented indicated that any curricular changes would be minimal; some even suggested that the UBE structure and format more closely parallels the way law is currently taught in New York law schools. Some students suggested those currently enrolled should be permitted to take the existing exam. Others, eager for a portable score, urged prompt adoption of the UBE. Commercial bar preparation courses did not voice any concern to the Committee about a transition to the UBE. Finally, we are advised by the SBLE that it could prepare the proposed online course and new exam within one year. Consequently, and recognizing that whether to implement the UBE and the precise date of transition are ultimately decisions for the Court of Appeals, the Committee concludes that New York could and should transition to the UBE by July 2016 without unfairly impacting schools and students, while providing the SBLE with more than sufficient time to prepare and administer the proposed NYLC and NYLE.

When considering a possible implementation date for the UBE, the Committee also considered the appropriate length of time in which an applicant should be able to seek admission in New York based on a UBE score earned in another jurisdiction. As previously explained, the time limit for accepting a UBE score transfer varies by jurisdiction, from a low of 25 months to a high of five years. The SBLE initially

recommended that three years is an appropriate length of time in which an applicant should be able to transfer a score to New York, and the Committee concurs with this recommendation. This mirrors the three-year filing deadline under the current admission rules, which requires an applicant in New York to seek admission within three years of being notified that the applicant passed the bar exam.⁷¹ Additionally, the Committee believes three years strikes an appropriate balance between providing an applicant sufficient time to consider where he or she wants to be admitted and ensuring that an applicant's competency has not substantially diminished in the intervening time period.

F. Other issues

1. Cost

During the Committee's outreach, some commentators questioned whether adoption of the UBE will result in an increased cost to test-takers. The fee to take the bar exam in New York is statutory.⁷² Any increase in that fee would require legislative action. If a New York UBE taker wishes to transfer a UBE score to another jurisdiction, the applicant will have to pay an additional fee, which ranges from \$150 to \$1,240.⁷³ While these transfer fees may be an additional financial burden for new attorneys, they are less than the cost of taking another bar exam when one factors in the cost of the test, the expense of a bar review course and travel to the exam location, and potential earnings lost due to exam preparation.⁷⁴ The fee to transfer a UBE score to New York will be the same as the fee to take the exam (\$250 for ABA-approved graduates), which the

⁷¹ See 22 NYCRR 520.12(d).

⁷² See Judiciary Law § 465 (1) (“Every person applying for examination for admission to practice as an attorney and counselor at law shall pay a fee of two hundred fifty dollars, or seven hundred fifty dollars if, to qualify to take the bar examination, the person must satisfy the rules of the court of appeals for the admission of attorneys and counselors at law governing the study of law in a foreign country, for each taking or retaking of the examination . . .”).

⁷³ See National Conference of Bar Examiners & American Bar Association Section of Legal Education and Admissions to the Bar, *supra* note 18, at 32.

⁷⁴ The average cost to take the bar exam in the United States for a first-time test taker is \$550. The cost is often higher for foreign-educated applicants. See *id.* at 23. A commercial bar review course can cost anywhere between \$2,000 and \$4,000. Amara Omeokwe, *Rising Bar Tab Draining New Law Grads*, CNBC (Aug. 17, 2012, 3:00 PM), <http://www.cnbc.com/id/100958832> (last visited Apr. 16, 2015).

Committee believes is reasonable. The Committee recommends that the Court of Appeals continue to monitor the cost issue to ensure that the bar exam does not become cost prohibitive for applicants.

2. Authority and control of bar exam testing

A few commentators contended if New York adopts the UBE, it will cede all control over bar exam testing to the National Conference of Bar Examiners (NCBE), a not-for-profit corporation headquartered in Wisconsin. In their view, a private company should not control the testing that provides a pathway to bar licensure.⁷⁵ What some of these commentators may not realize or acknowledge is that NCBE already develops a significant portion of the current New York bar exam in the form of the MBE and MPT. Indeed, the MBE has served as the anchor for the New York bar exam for more than 35 years. The MBE and MPT have proved to be high-quality, reliable measures of the knowledge and skills they are designed to test.

A transition to the UBE will result in New York also using the MEE, which is developed by NCBE. NCBE employs experts in the field to develop these essay questions, which are pre-tested and subject to thorough research and strict review. Like the other NCBE tests, law professors, practitioners and judges from around the country (including some from New York) are involved in the development and review of the questions and grading materials. A policy committee consisting of representatives of states using the test also reviews and comments on the questions. Jurisdictions using the MEE have expressed satisfaction with the quality of the test and its appropriateness as a measure of minimum competence.

Some commentators have complained that NCBE lacks transparency and accountability. Where raised, the complaint stemmed mostly from concern over the

⁷⁵ Notably, the National Board of Medical Examiners, a private company, develops the United States Medical Licensing Examination. See ABOUT THE NBME <http://www.nbme.org/about/index.html> (last visited Apr. 16, 2015).

results of the July 2014 bar exam, discussed below. Given the nature of the MBE as an equated test, the Committee understands NCBE's need for confidentiality regarding both its questions and the particular details regarding the scoring of a given administration of that test. The Committee likewise understands the desire for more information regarding the methodologies used in creating and scoring the test. The Committee encourages, where appropriate, open dialogue among bar admission authorities, NCBE, law schools and applicants on issues pertinent to the exam.

On the issue of accountability and control, for many years, New York has had a representative on the NCBE's Board of Trustees, which is the ultimate policymaker for the conference. Additionally, New York is routinely represented as members and in leadership roles on various committees of NCBE. Notably, NCBE has a UBE Committee that includes one representative from each UBE jurisdiction. The Committee meets each year to consider policy issues related to the UBE. NCBE also has held annual meetings of the administrators from UBE jurisdictions to discuss any operational issues. Participation in these activities will allow New York to have a strong voice regarding the content and administration of the UBE. Finally, it bears emphasizing that a transition to the UBE will not surrender control of attorney licensure to NCBE. New York will continue to set standards and determine applicants' eligibility for the exam, assess knowledge of New York-specific law through its own separate test, establish its own passing score, grade written components of the test, and assess applicants' character and fitness to practice in New York.

A brief discussion of the July 2014 bar exam results is necessary. Some commentators have questioned whether the nationwide dip in bar passage rates for the July 2014 bar exam is attributable to the UBE. Indeed, one dean from a law school in a UBE jurisdiction publicly blamed the UBE for the drop in the law school's bar passage

rate for the July 2014 exam.⁷⁶ A closer inspection of the issue, however, reveals that the UBE is not the issue. Rather, the decline in the passing rates experienced by most jurisdictions in 2014, including New York, was related to the decline in performance on the MBE. While the reason for that decline is not known, it is not disputed that nationally, the mean MBE score for the July 2014 exam decreased. Many states, including New York, scale their other exam components to the MBE, which means that a lower MBE mean score would result in a lower mean score on these other exam components. The combination of the lower performance on the MBE and the lower scaled scores on the other assessment measures resulted in a decreased bar passage rate in the majority of jurisdictions that use the MBE.

If the Court of Appeals does not adopt the UBE, New York will continue its current practice, which includes the MBE as the cornerstone of the bar exam. Whatever the cause for the decline in the MBE scores nationally in July 2014, it is not attributable to the UBE. The drop in passage rates for the July 2014 exam therefore is not a valid reason to reject adopting the UBE.

3. Experiential learning alternatives to the bar examination

One final issue warrants a more substantial discussion. During one of the public hearings, a law school professor suggested that New York establish a program that would allow bar applicants who take a specified number of credits in a clinic or guided externship to substitute for the MPT portion of the bar exam. Soon thereafter, NYSBA's Committee on Legal Education and Admission to the Bar (CLEAB) likewise proposed that New York should provide an option for clinical or experiential learning to "substitute

⁷⁶ See Jessica Mayrer, *University of Montana Bar Scores Drop*, MISSOULA INDEPENDENT (Oct. 9, 2014), available at <http://missoulanews.bigskypress.com/missoula/university-of-montana/Content?oid=2093254> (last visited Apr. 16, 2015).

for a candidate's MPT score, or for another component of the exam."⁷⁷ According to CLEAB, this proposal "would provide an essential link between legal education and admission to practice."⁷⁸

The New York City Bar Association recommended a similar proposal. In a statement to the Advisory Committee, the City Bar made clear that it supported adoption of the UBE, but "urge[d] that New York State also actively consider supervised experiential learning, not as the sole pathway to admission, but as an alternative, in whole or in part, to the written bar examination." According to the City Bar, "[s]uch an alternative way of demonstrating competency to practice law may be more accessible to some applicants, while still fulfilling the important consumer protection element of bar testing."⁷⁹ The Clinical Legal Education Association also urged that practical skills alternatives to the current bar exam be explored.

The Committee strongly believes in the value of experiential learning for law students, and notes that all ABA-approved law schools must now "offer a curriculum that requires each student to satisfactorily complete . . . one or more experiential course(s) totaling six credits."⁸⁰ Although there can be no quarrel that practical skills courses play an integral role in today's legal education, the Committee does not endorse the idea that a clinic, guided externship or other experiential learning course should substitute for the bar exam or a portion thereof. Pursuant to Judiciary Law §53(3), the bar examination in

⁷⁷ NYSBA Committee on Legal Education and Admission to the Bar, Follow-up Report to October 2014 Report on the Uniform Bar Exam (Jan. 28, 2015), <http://www.nycourts.gov/ip/bar-exam/pdf/Comments2.pdf>, at 31.

⁷⁸ *Id.*

⁷⁹ New York City Bar Association, Supplemental Statement of the New York City Bar Association Before the Advisory Committee on the Uniform Bar Examination (Feb. 18, 2015), <http://www.nycourts.gov/ip/bar-exam/pdf/Comments2.pdf>, at 55-56.

⁸⁰ ABA 2014-2015 Standards and Rules of Procedure for Approval of Law Schools, Standard 303(a)(3), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_chapter3.authcheckdam.pdf. The required experiential course "must be a simulation course, a law clinic, or a field placement." *Id.*

New York must be uniform for all applicants.⁸¹ Even if the Court had the authority to accept a practical skills experience as a substitute for a portion of the bar exam, the Committee notes that clinical and other experiential learning opportunities vary widely depending on the program, supervising attorney, and law school. Inserting a subjective element into what has always been a standardized licensing exam would raise fairness and quality-control concerns. Logistically speaking, it would be extremely difficult for the SBLE to administer and oversee such a proposal given the large number of applicants that take the bar exam every year in New York, and the fact that they come from so many different law schools.⁸² Adopting such a proposal would mean that New York could not adopt the UBE, and would forego the benefits that test offers. Notably, there was not consistent support for this proposal across law school administrators and faculty.

While the Committee does not support the suggestion that a practical skills experience should be permitted to substitute for a portion or the entirety of the bar exam, the comments received on this subject highlight that now is an opportune time for New York to comprehensively examine its licensing system and further explore how best to assess applicants' readiness to enter the legal profession. If, as certain commentators suggest, it is essential to ensure that new attorneys have had experiential training, then such training should be explored as a separate admission requirement rather than an optional substitute for a portion of the bar exam. However, the Committee acknowledges that this issue is outside the scope of its mandate, which is to make a recommendation to the Court regarding the SBLE proposal to fully adopt the UBE.

Accordingly, the Committee recommends that the Court appoint a task force to study the relevant issues and make recommendations to the Court as to whether New York's admission requirements should be amended to include, among other things, an

⁸¹ New York Judiciary Law § 53(3) provides: "The [Court of Appeals] shall prescribe rules providing for a uniform system of examination of candidates for admission to practice as attorneys"

⁸² In 2014, New York tested graduates from 193 ABA-approved law schools.

experiential learning component, or whether it is appropriate to include as a licensing requirement an assessment of applicants' lawyering skills and understanding of the practical aspects of a legal career. In researching and formulating any such recommendations, this task force should work closely with the Working Group of Law School Involvement of the Task Force to Expand Access to Civil Legal Services in New York and the Judicial Institute on Professionalism in the Law. Given the changes currently facing legal education, the Committee recommends the Task Force complete its study by September 2015.

VI. CONCLUSION

The Committee is appreciative of all the individuals, groups and associations that provided their input and views on this issue of great importance to our profession. It is clear that bar exam administration and admission to practice are issues that engender strong and impassioned responses from the legal community. That the Committee received such substantial interest and commentary on this issue confirms that members of the New York legal profession are committed to maintaining a high quality bar.

The Committee concludes that a transition to the UBE, NYLC and NYLE will help maintain the New York professional bar's reputation of excellence by ensuring that new attorneys are competent in general legal principles and important New York distinctions. Furthermore, the portability afforded by the UBE will better serve recent law graduates, who will be able to seek legal employment in several jurisdictions. The Committee also concludes that by employing an additional MPT task, the UBE will help better assess the skills that new attorneys should possess as they enter practice. Although there has been and likely will continue to be resistance to this change, the Committee's research and the relevant data demonstrate that reasons cited in opposition to the proposal are largely unsupported. In light of all the information gathered during its public outreach, the Committee concludes that adoption of the UBE will not place any category

of applicant at a disadvantage, and will serve to benefit attorneys, the profession, and the general public.

The Committee therefore recommends that the Court of Appeals:

- (1) Fully adopt the UBE, effective for the July 2016 bar exam, by replacing the current New York multiple choice questions and essay portion of the New York State bar examination with the MEE and an additional MPT;
- (2) Require all applicants who seek admission based on passage of the UBE, whether taken in New York or in another jurisdiction, to complete the New York Law Course and pass the New York Law Exam, both of which shall be designed and administered by the SBLE;
- (3) Require the SBLE to maintain data and study the impact, if any, of adopting the UBE on particular applicant subgroups, including issuing a study with critical assessments after six administrations of the UBE;
- (4) Study, in conjunction with the SBLE, the challenges faced by first-time test-takers and identify strategies for success that may be implemented before taking the bar exam for the first time; and
- (5) Appoint a task force to study whether New York should require bar applicants to complete a certain number of credits in experiential learning or some other assessment of profession readiness before becoming admitted. The task force should complete its work and report to the Chief Judge and the Court of Appeals in September 2015.

In order to effectuate the Committee's recommendation to adopt the UBE, NYLC and NYLE, the Committee recommends an amendment to the Rules of the Court of

Appeals for the Admission of Attorneys and Counselors at Law, which is provided in Appendix 18.

ACKNOWLEDGEMENT

The Committee extends its gratitude to the individuals and groups that provided their thoughts and insight on the UBE proposal. The diverse and informed commentary was invaluable to the Committee as it considered the relevant issues. Whether by way of written comment sent via e-mail, ideas shared at a focus group or stakeholder meeting, or through formal testimony at a public hearing, the Committee considered each and every viewpoint in making its recommendation to the Court. Without the well-reasoned input of the members of the legal community, including judges, practitioners, law school faculty, and students, the Committee would have been unable to fulfill its mandate.

The Committee also would like to express its appreciation to the staff at CUNY School of Law, the New York State Court of Appeals, the Appellate Division, Fourth Department, and The New York City Bar Association, who helped in the preparation for and execution of the public hearings. Thanks are also due to the New York State Judicial Institute on Professionalism in the Law and the New York State Bar Association for jointly convening the focus group sessions throughout the State and providing the Committee with transcripts of these discussions. The Committee is also grateful to the Judicial Institute for providing testimony at a public hearing that summarized the common themes of the focus groups. In addition, the Committee thanks the law firms, bar associations and law schools that hosted the stakeholder meetings with interested parties.

Finally, the Committee extends its appreciation to employees at the SBLE, who facilitated gathering data and information, and the staff at the Office of Court Administration, who assisted in the design and production of this report.

APPENDICES

- Appendix 1: Request for Public Comment, dated October 3, 2014
- Appendix 2: Comments received during initial comment period
- Appendix 3: Advisory Committee Members
- Appendix 4: Second Request for Public Comment, dated November 12, 2014
- Appendix 5: Comments received during second comment period
- Appendix 6: Power Point, podcast transcript, and article by Diane Bosse in NYSBA Journal
- Appendix 7: Notice of Public Hearings
- Appendix 8: Written statements by testifying witnesses
- Appendix 9: CUNY School of Law Public Hearing Transcript
- Appendix 10: Albany Public Hearing Transcript
- Appendix 11: Rochester Public Hearing Transcript
- Appendix 12: New York City Bar Association Public Hearing Transcript
- Appendix 13: Focus Group Transcripts
- Appendix 14: Data from the New York State Board of Law Examiners
- Appendix 15: Analyses from the National Conference of Bar Examiners
- Appendix 16: Responses from law schools on bar passage rates
- Appendix 17: List of New York Law Exam Working Group participants
- Appendix 18: Proposed rule change