

# National Conference of Bar Examiners

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## MEMORANDUM

**DATE:** March 3, 2015

**TO:** Members of the Advisory Committee on the Uniform Bar Exam

**FROM:** Erica Moeser, President   
National Conference of Bar Examiners

**RE:** Uniform Bar Exam Public Hearing Appearance

New York has the opportunity to provide a watershed moment in the development of the Uniform Bar Examination. Adoption of the UBE in New York at this juncture may prove to be a turning point. There are currently 15 UBE jurisdictions, all but two of which (New Hampshire and Alabama) are located west of the Mississippi. (The Vermont Supreme Court is currently considering a proposal submitted by the Vermont Board of Bar Examiners.) The addition of New York would send a signal that the legal profession, as every other profession, is well served by a uniform basic licensing test.

The purpose of my appearance is to answer any questions the Committee may pose as it concludes a series of hearings and focus groups that were intended to elicit concerns about the proposed changes to New York's licensing test structure. My goal is to educate – and perhaps to address some misconceptions.

I have also been asked to comment specifically on the following topics and will be prepared to do so:

- I. Portability of scores, especially in the Northeast
- II. Potential impact of the UBE on subsets of test-takers
- III. Gender disparities on multiple-choice questions
- IV. The drop in MBE scores in July 2014
- V. Test content selection (general principles of law)

cm/dk

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NEW YORK COUNTY LAWYERS ASSOCIATION  
TESTIMONY OUTLINE OF VINCENT CHANG FOR THE MARCH 4, 2015  
HEARING OF THE ADVISORY COMMITTEE STUDYING ADOPTION OF  
THE UNIFORM BAR EXAM PROPOSAL IN NEW YORK

I. OVERVIEW

On behalf of the New York County Lawyers' Association, I would like to thank the Advisory Committee for the opportunity to testify on behalf of NYCLA at this hearing today. With me today is Mr. Lewis Tesser, NYCLA President. I would like to note at the outset of this testimony that NYCLA has also issued a written report on the UBE Proposal, which was submitted to the Advisory Committee and discusses in more detail some of the points I will raise today.

NYCLA's Position

- NYCLA believes that reasonable arguments can be made both for and against the proposed adoption of the Uniform Bar Exam (the "UBE"), and therefore supports a one-year study period in which these arguments can be fully assessed.
- NYCLA sees no exigency warranting immediate adoption of the UBE and, on balance believes that a one-year period of study, before making a determination about whether to implement the UBE, would be prudent.

II. REASONS FOR A ONE YEAR STUDY PERIOD

- Most of the other states that have adopted the UBE have done so with a review period far longer than that currently proposed, with Washington studying it for one year and Minnesota implementing the exam approximately two years after it was first considered.
  - New York did not adopt the Multistate Bar Examination until 1979, seven years after its inception in other states. Indeed, New York did not implement a five point increase in its passing score for more than two years after hearings were held on the proposal.
- We are unaware of any exigency that requires that this decision be made in a shorter time frame. Indeed, any advantages of the UBE in the next few years would be exceedingly limited, as it has been adopted largely in small, distant states to which New York bar takers would not likely seek to transfer their scores.

We note that if other states were to promise to seek enactment of the UBE in their states in the event that New York does so, such promises would enhance the case for the UBE. However, to date, we are unaware that any other states have made such commitments.

- During the next year, we urge that efforts be made to obtain information on the issues identified in this report from the 15 states that have adopted the UBE, all of which have adopted it since 2011.
- A one year study period would also give law schools and law students time to prepare for UBE, if it is indeed adopted, and to adjust curricula, course selection and/or bar exam preparation accordingly.
- In addition, we urge the development and dissemination of complete information of the costs and fees associated with a New York administration of the UBE. The cost of the New York bar examination for first time takers is only \$250, one of the lowest fees in the country. The cost of the bar examination in UBE states is as high as \$880 in Arizona and \$600 in Montana and Idaho. We note, however, that New York's fees are apparently artificially low because they are set by statute. There is no reason to believe that adoption of the UBE would cause the legislature and the Governor to change the \$250 figure. However, during the one year period for study that we advocate we would urge transparency on the cost of the UBE as opposed to the cost of the current examination so that it is possible to assess whether the UBE could potentially lead to future increases in the cost of the bar examination in New York.
- NYCLA also urges that, if (contrary to our recommendation) the UBE is adopted in 2015, the BOLE conduct a three year review of the UBE's use in New York and issue a public report at the end of that period analyzing the UBE's impact on underrepresented groups and, if the data are available, on lawyer mobility.

### **III. Arguments For and Against the UBE**

The Committee has requested testimony regarding the advantages and/or disadvantages of the current New York bar examination and the proposed UBE. While a host of arguments can be made, we believe the principal arguments for and against the adoption of the proposed UBE can be summarized as follows, with further discussion of each of these arguments in the sections below.

### **IV. JUSTIFICATION FOR JUDGE LIPPMAN'S UBE PROPOSAL**

As set out below, we acknowledge that there are substantial reasons to support the proposed change to the UBE, although we think that, without further information supporting some of them, they are not convincing at this time.

- **First**, it is argued that more resources can be dedicated to the development and testing of the UBE than any single state could devote to its bar examination. This is a more important factor in small states with small populations of bar candidates. Indeed, bar authorities in Arizona and Montana were particularly effusive regarding the resources devoted to the UBE, as opposed to the resources their states could devote to their bar examinations. But, despite its size, New York may face similar resource constraints, given that our bar examination fees are capped by statute, which may limit the amounts that can be expended on the development and testing of examination questions. The NCBE itself advanced the claim that it is able to devote considerable resources to development and testing of questions and scoring:
  
- **Second**, the Committee has asked for our view as to how UBE score portability would impact New York law graduates and graduates of law schools in other jurisdictions, and the law profession as a whole. In this regard, we note that proponents of the UBE argue that it promotes portability and mobility in an increasingly national and global practice of law. NYCLA does not wish to minimize this potential factor. Increasing the fluidity of the market for legal employment is a desirable goal, particularly in an economic climate where young lawyers often cannot obtain legal employment. However, NYCLA would like to note the following with respect to the potential increased mobility:
  - At least as the landscape currently stands, a lawyer who passes the UBE in New York could transport that score to only 15 other states, many of which are small and not geographically close to New York. We are unaware of any states other than New York that are currently considering adoption of the UBE. In addition, the portability of bar passage in New York is limited by the fact that five other states have state-specific requirements and a number of states might have score cutoffs higher than those of New York, depending on the level at which New York's passing score is set.
  
  - NYCLA also notes that greater mobility would not necessarily be unambiguously beneficial to young New York lawyers. At least at the outset, until additional large jurisdictions adopt the UBE, it is quite likely that more lawyers will seek to use the UBE to enter New York than to use the test as a way of gaining admission in another state. It is possible that this additional inflow of lawyers could increase the competition in New York for many beginning lawyers who already find it difficult to obtain jobs.

## V. REASONS FOR OPPOSITION TO JUDGE LIPPMAN'S UBE PROPOSAL

The reasons for skepticism of the UBE proposal have led us to urge that adoption be deferred; we do not see them as definitive but, rather, as reason for deferral while further information can be gathered.

- **First**, there is a frequently voiced need for disparate impact studies. NYCLA is concerned by the drop in pass rates in the current New York State bar exam. We understand there has been a similar drop in UBE test scores, which NYCLA urges the NCBE to study.
  - NYCLA believes further analysis of potential disparate impact is warranted.
  - NYCLA also notes that a study of the impact on foreign law graduates is particularly significant for New York, given that New York has disproportionately more foreign test takers than any other state – nearly one-third of New York's test takers are foreign.
- **Second**, the Committee has asked for testimony as to the extent to which adoption of the UBE would result in changes to law school curricula and bar exam preparation. We note that the concern has been expressed that a decreased emphasis on New York law on the UBE will in turn cause law schools to de-emphasize New York law, focusing instead on a “national” curriculum that teaches less New York law. In NYCLA's written report, we address this concern in more detail.
  - NYCLA notes that even if the UBE is found to induce some change in law school curricula, such changes would almost certainly not occur in out-of-state and foreign law schools. Two-thirds of those who take the New York bar examination come from such schools. Moreover, even in New York law schools, a de-emphasis on local law could result in a focus on other areas of benefit to law students. The UBE might, for example, make lead law schools to focus more on legal analysis analysis and writing skills.
  - Accordingly, NYCLA is of the view that further analysis is needed to analyze the weight to be attached to this factor. NYCLA is hesitant to place undue weight on this factor because of the lack of hard information on whether curricular changes would be made and the lack of a clear argument against such a shift.

- **Third**, the Committee has asked for testimony regarding the importance of requiring bar applicants to separately pass New York-law specific components. We note that some have charged anecdotally that the lack of New York law on the bar examination would produce lawyers who are insufficiently trained in New York law.
  - Without hard information indicating that a handful of local law essays on the bar examination more realistically test a young attorney’s preparedness to confront local law issues than a number of multiple choice questions, NYCLA is hesitant to reject the UBE on this basis.
  - On this point, NYCLA notes that any perceived need to assure knowledge in specific areas of New York law could be addressed by more targeted Bridge the Gap CLE requirements or possibly required on-line courses before taking the UBE:
    - There are many benefits to the online approach. The approach is economical (and much less expensive than the development of essay questions for the bar exam). More importantly, the online content can be continuously refined and amended, ensuring for candidates for law licensure an ever-fresh introduction to the practice of law in the state.
    - As noted in more detail in NYCLA’s written report, Alabama, Missouri and Arizona have adopted measures to address the study and testing of local law, including online courses and an open book test on local law.
    - Again, NYCLA believes that New York could benefit from any studies being conducted in the 15 current UBE states that analyze potential detrimental effect on the practice of law and from assessments of programs like those in Arizona, Alabama and Missouri that are designed to compensate for the removal of local law questions from the bar examination.
- **Fourth**, NYCLA notes that contracting parties choose New York law and New York as a choice of forum far more frequently than they choose the law or courts of any other state. If the UBE contributes to a perception that New York law is not “unique”, then it is possible that contracting parties may feel less need to insert New York as their choice of law or choice of forum. However, without further study, NYCLA hesitates to say that this reason warrants rejection of the UBE. It is unclear whether the fact that a portion of the New York bar

examination consists of uniform components would undermine the perception that New York law is commercially unique. Indeed, we are aware of no evidence that the adoption of the multistate bar examination in New York in 1979 had any such effect. New York law may be the law of choice not because it is unique but simply because New York law is more robust with more case law on almost any given topic than the law in any other U.S. jurisdiction. Thus, absent any evidence supporting this concern, we do not give it much weight.

## **VI. CONCLUSION**

- Based upon the foregoing reasons, NYCLA urges a delay in the decision on whether to implement the UBE for one year, by which time data may be available on many of the issues identified today and in NYCLA's report on the UBE proposal. In addition, if during the next year other states appear poised to adopt the UBE, that factor would also weigh in favor of adoption of the UBE in New York.
- On behalf of NYCLA, I again thank the Advisory Committee for the Opportunity to testify today.

**NEW YORK COUNTY LAWYERS ASSOCIATION REPORT ON  
THE NEW YORK UNIFORM BAR EXAM PROPOSAL**

**This report was approved by the Board of the New York County Lawyers Association on  
February 12, 2015.<sup>1</sup>**

**I. OVERVIEW**

NYCLA believes that reasonable arguments can be made both for and against the proposed adoption of the Uniform Bar Exam (the “UBE”), and therefore supports a one-year study period in which these arguments can be fully assessed. NYCLA sees no exigency warranting immediate adoption of the UBE and, on balance, for reasons set out below, believes that a one-year period of study, before making a determination about whether to implement the UBE, would be prudent.

**A. Arguments For and Against the UBE**

As set out more fully below, NYCLA believes that there are reasonable arguments in favor of moving to the UBE, including the following:

- Because the UBE has been adopted in 15 states, more resources can be devoted to constructing UBE questions than could be devoted to bar examinations in any single state.
- UBE scores are more portable than current bar examination scores because the UBE score is relatively easy to transfer to other states that also use the UBE, subject to state-specific requirements. The legal world is becoming increasingly national and global and thus enhancements to the portability of bar examination passage would benefit younger lawyers.

However, we do not support adoption of the UBE at this time because of the concerns outlined below, some of which could be addressed by studies over the next year.

- The impact on the public of adoption of the UBE in the 15 states that have currently adopted it, all of which have adopted it since 2011. While this impact is not now known, we note that we are unaware of any negative reaction to the UBE in any state in which it has currently been adopted.

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<sup>1</sup> This report was prepared by the NYCLA Task Force on the New York UBE Proposal, which is co-chaired by Vincent T. Chang and Steven Shapiro and includes the following members: Catherine Christian, Rosalind Fink, Bruce Green, Sarah Jo Hamilton, Lawrence A. Mandelker, Hon. Joseph Kevin McKay (ret.), Barbara Moses, Paul O'Neill, Carol Sigmond, and Edward Spiro.

- The costs and fees that would be imposed for administration of the UBE in New York, when compared to the modest \$250 current cost of the examination for first time takers (a figure that is currently fixed by statute).
- The need for further study of possible disparate impact of the change on minorities, indigent examination takers, and graduates of foreign law schools. In particular, under the proposal all takers must pass a one hour 50 question multiple choice test on New York law. Will dependence on a high-speed multiple choice component for state law disproportionately disadvantage members of certain groups? Like other entities providing testimony on this subject, we urge that disparate impact studies be conducted on the UBE in the next year. Additionally, if (contrary to our recommendation) New York immediately adopts the UBE, we think it critical that these studies be conducted after adoption.
- Would adoption of the UBE undermine the perception that New York law is unique and, if so, would New York law be seen as less attractive for contracting parties deciding on whether to insert New York choice of law and choice of forum in contracts? If so, would the decline in New York choice of law clauses adversely affect New York lawyers by reducing the number of disputes that are brought here by way of contractual choice of forum and choice of law clauses? Again, we do not believe this factor warrants rejection of the UBE because the link between New York choice of law clauses and New York specific essay questions on the bar examination is tenuous at best, and note that, if the UBE is adopted, this will remain an open question, because of the expense of attempting to quantify any downward shift in claims filed by out of state litigants based on New York choice of law or forum provisions.
- If the UBE becomes the dominant form of bar examination, law schools which traditionally focused on New York law may arguably have to shift their emphasis to a national law curriculum. Has this been a problem in other states?
- Would the reduced focus on New York law expose the public to new attorneys who are less qualified to deal with New York specific legal problems? Is there any evidence that the state specific essays in the current exam better test an attorney's proficiency to deal with New York law matters? Could development of more targeted CLE requirements for new attorneys adequately address concerns about the lessened emphasis on New York law of the proposed New York portion of the UBE?
- Would adoption of the UBE encourage recent graduates from out of state to move to New York, relying on their passage of the UBE in another state?

## **II. BACKGROUND**

At the outset, we note that the proposed process for implementation of the proposed UBE has been far from optimal. Initially, New York Chief Judge Jonathan Lippman proposed adoption of the UBE for the 2015 bar examination, calling for a comment period of only 30 days. During that window, apparently in reaction to pressure from NYSBA and other bar associations, the Judge appointed a task force and expanded the window for comments until March 1, 2015, and ultimately to March 4, 2015. For the reasons set out below, we believe that this time frame is still an insufficient period in which to examine a number of issues relating to this proposal.

### **A. Proposed Changes to the Bar Examination**

Under Judge Lippman's proposal, New York would join 15 other states that have adopted the UBE.<sup>2</sup> New York's bar examination currently contains four hours and 15 minutes of testing on New York specific law, including 50 New York multiple choice questions and five essays focused on New York law. Judge Lippman has predicted that "if we choose to go forward, it portends extremely well that you would have a truly uniform bar nationally." He added that "I think there is a lot of anticipation from my colleagues in other states about whether we would be going to the uniform bar and, if we do, I think it will have a dramatic impact on that uniform bar approach in very short order."<sup>3</sup>

The UBE proposal would eliminate the New York specific essay questions. The proposed bar examination would continue to include 50 multiple choice questions on New York law, to be answered in one hour, meaning a total reduction in testing on state specific law from 4 hours and 15 minutes to one hour.

The test currently includes two standardized national portions, the Multistate Performance Test and the Multistate Bar Examination. Both tests are prepared by the National Conference of Bar Examiners (the "NCBE"). These tests would be replaced by the UBE and the Multistate Essay Examination, a six-essay test also developed by NCBE. One day of the UBE would use the same questions as the current Multistate Bar Examination used in New York. The other day would be occupied by the six Multistate Essays and by two different Multistate Performance Tests.

### **B. Proposed Grading of the UBE**

The New York State Board of Law Examiners (the "BOLE") recommends a passing score for the UBE be set at 266, which court administrators said is analogous to the current exam. The BOLE said the passing score recognized by other UBE-using states ranges from 260 to 280. In addition, the New York multiple choice questions will be separately graded and a passing score of 60% would be required to pass that section of the test. A passing score on each section would be required for admission to the bar.

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<sup>2</sup> The 15 states include Alabama, Alaska, Arizona, Colorado, Idaho, Kansas, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Utah, Washington, and Wyoming.

<sup>3</sup> [http://www.newyorklawjournal.com/id\\_1202672451929/Court-System-Seeks-Comment-on-Adopting-Uniform-Bar-Exam](http://www.newyorklawjournal.com/id_1202672451929/Court-System-Seeks-Comment-on-Adopting-Uniform-Bar-Exam). Notably, when New York adopted the Multistate Bar Examination, many other states followed suit. Will New York Change The Face Of The Bar Exam? Redux By Joseph Marino, NYLJ, Jan 20, 2015.

Currently, the MBE counts for 40% of the grading and the New York essays for 40%, with the New York Multiple Choice and Multistate Practice Test counting 10% each. The proposed scoring for the UBE would have the MBE count for 50%, the Multistate Essays 30% and the two Multistate Practice Tests 20% each. The total length of the examination would increase to 13 hours over two days from 12 hours and 15 minutes over two days.

### **C. Increased Portability of the Proposed Bar Examination**

UBE test scores would be portable to other states (consistent with their UBE cutoffs) within a certain window period, and scores from test takers in others states that meet the New York passing standard would be eligible for some period of time to transfer that score to New York. The New York portion would be administered more than twice per year so that those who fail the New York portion but pass the UBE would not have to wait six months to retake the New York portion of the exam.

## **III. NYCLA'S POSITION AND REASONS FOR A ONE YEAR STUDY PERIOD**

NYCLA urges that a decision on the UBE be deferred for one year. At that point, the BOLE should assess whether it has enough information to make a decision on the UBE, with a recommended focus on the issues set out in this Report. We note that most of the other states that have adopted the UBE have done so with a review period far longer than that proposed by Judge Lippman.<sup>4</sup> Moreover, New York did not adopt the Multistate Bar Examination until 1979, seven years after its inception in other states. Indeed, New York did not implement a five point increase in its passing score for more than two years after hearings were held on the proposal.<sup>5</sup>

We are unaware of any exigency that requires that this decision be made in a shorter time frame. Indeed, any advantages of the UBE in the next few years would be exceedingly limited, as it has been adopted largely in small, distant states to which New York bar takers would not likely seek to transfer their scores. We note that if other states were to promise to seek enactment of the UBE in their states in the event that New York does so, such promises would enhance the case for the UBE. However, to date, we are unaware that any other states have made such commitments.

During the next year, we urge that efforts be made to obtain information on the issues identified in this report from the 15 states that have adopted the UBE, all of which have adopted it since 2011. We have received a good deal of anecdotal information about the use of the UBE in these states. For example, Diane Bosse, Chair of the BOLE, advised the NYCLA Board of Directors that she was unaware of any negative experiences with the UBE as it has been

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<sup>4</sup>The UBE was studied for over a year in the State of Washington. [http://www.wsba.org/News-and-Events/News/-/media/Files/News\\_Events/News/Press%20releases/bar%20exam%200211.ashx](http://www.wsba.org/News-and-Events/News/-/media/Files/News_Events/News/Press%20releases/bar%20exam%200211.ashx). The first UBE held in Minnesota occurred approximately two years after it was first considered.

<http://www.ble.state.mn.us/file/Uniform%20Bar%20Rules.pdf> In Arizona, the UBE was considered for at least two years. [http://azdnn.dnmax.com/Portals/0/NTForums\\_Attach/192112581278.pdf](http://azdnn.dnmax.com/Portals/0/NTForums_Attach/192112581278.pdf)

<sup>5</sup> <http://www.nybarexam.org/press/summary.pdf>

administered in those states.<sup>6</sup> Gregory Murphy, former Chair of the NCBE<sup>7</sup>, advised of the same thing and specifically reported that his home state of Montana was encountering no difficulty with the UBE.<sup>8</sup> Arizona Supreme Court Justice Berch also said that the rollout in Arizona was uneventful and that no attempts have been made to roll back the UBE in Arizona.<sup>9</sup> We received similar reports from a bar official in Alabama.<sup>10</sup>

NYCLA also urges that, if (contrary to our recommendation) the UBE is adopted in 2015, the BOLE conduct a three year review of the UBE's use in New York and issue a public report at the end of that period analyzing the UBE's impact on underrepresented groups and, if the data is available, on lawyer mobility.<sup>11</sup>

Not only would NYCLA's proposal give the BOLE, bar associations and other constituencies time to study the UBE, it would also give law schools and law students time to prepare for UBE, if it is indeed adopted, and to adjust curricula, course selection and/or bar exam preparation accordingly. Dean Patricia Salkin of Touro Law School stated: "I think it's a lot of change in a short period of time . . . You have an entire crop of graduating law students this year and you're basically telling them that the bar exam you thought you were preparing for is going to change just before you graduate."<sup>12</sup> We note, however, the different opinion of Dean Allard of Brooklyn Law School who urged adoption of the UBE on the existing time frame.<sup>13</sup> Similarly, Dean Trevor Morrison of NYU urged expeditious implementation of the UBE, in time for the February 2016 administration of the examination.<sup>14</sup>

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<sup>6</sup> Dianne Bosse conversation with NYCLA Board of Directors on January 12, 2015. We thank Ms. Bosse for the time she spent with us and the many insights she conveyed to us.

<sup>7</sup> Telephone Conversation, 2/2/15. Mr. Murphy chaired a state board of bar examiners, chaired the National Conference of Bar Examiners in 2000-2001, chaired the Multistate Bar Examination Committee, and for ten years helped draft the Multistate Performance Test and is familiar with the psychometric features of the NCBE's test products, and with the UBE.

<sup>8</sup> Telephone Conversation, 2/2/15.

<sup>9</sup> Telephone Conversation, 2/3/15.

<sup>10</sup> Telephone Conversation with Daniel Johnson 2/11/15.

<sup>11</sup> This is similar to a proposal advanced by New York City Bar Association. See Transcript of Hearing of the Advisory Committee on the Uniform Bar Examination, CUNY School of Law 1/20/15 at 44-45 (<http://www.nycourts.gov/ip/bar-exam/Transcript-CUNY-hearing-jan20.pdf>)

<sup>12</sup> "NY may ditch state test for uniform bar exam," *Long Island Business News*, 10/20/14

(<http://libn.com/2014/10/20/ny-may-ditch-state-test-for-uniform-bar-exam/>). Similarly, Allie Robbins, assistant dean for academic affairs at CUNY Law, said her top concern was being given "lead time." For students, "being taught one way and then unexpectedly having to learn a new way for a new exam can be very destabilizing," she said. <http://www.newyorklawjournal.com/id=1202715763873/Panelists-Hear-Concerns-About-Adopting-Uniform-Bar-Exam#ixzz3QcdWn7aq>

<sup>13</sup> Dean Allard stated in the January 2015 hearing: "I know that there were people who were concerned. I wasn't concerned about our students being able to take on board that change, and I felt -- and I said this publicly -- that the proposed time table would have applied to everybody, so I thought it was an even playing field, but I think that the time table that's now on the table is adequate. I'll probably get into hot water with my faculty for saying that, but I think that that's adequate." See Transcript of Hearing of the Advisory Committee on the Uniform Bar Examination, CUNY School of Law 1/20/15 at 21.

(<http://www.nycourts.gov/ip/bar-exam/Transcript-CUNY-hearing-jan20.pdf>)

<sup>14</sup> Dean Morrison explained in January of this year: "It has been suggested by some that more time is needed for study of the proposal and its possible effects. Although naturally caution is always warranted when changing longstanding practices, it is also the case that the New York bar exam has been the subject of numerous reports and articles, over the course of the past two decades, that have called for improvements of various sorts. We commend

In addition, we urge the development and dissemination of complete information of the costs and fees associated with a New York administration of the UBE. The cost of the New York bar examination for first time takers is only \$250, one of the lowest fees in the country. The cost of the bar examination in UBE states is as high as \$880 in Arizona and \$600 in Montana and Idaho. We note, however, that New York's fees are apparently artificially low because they are set by statute.<sup>15</sup> There is no reason to believe that adoption of the UBE would cause the legislature and the Governor to change the \$250 figure.<sup>16</sup> However, during the one year period for study that we advocate we would urge transparency on the cost of the UBE as opposed to the cost of the current examination so that it is possible to assess whether the UBE could potentially lead to future increases in the cost of the bar examination in New York.

#### **IV. JUSTIFICATION FOR JUDGE LIPPMAN'S UBE PROPOSAL**

As set out below, we acknowledge that there are substantial reasons to support the proposed change to the UBE, although we think that, without further information supporting some of them, they are not convincing at this time.

First, it is argued that more resources can be dedicated to the development and testing of the UBE than any single state could devote to its bar examination.<sup>17</sup> This is a more important factor in small states with small populations of bar candidates. Indeed, bar authorities in Arizona and Montana were particularly effusive regarding the resources devoted to the UBE, as opposed to the resources their states could devote to their bar examinations. But, despite its size, New York may face similar resource constraints, given that our bar examination fees are capped by statute, which may limit the amounts that can be expended on the development and testing of examination questions. The NCBE itself advanced the claim that it is able to devote considerable resources to development and testing of questions and scoring:

NCBE maintains committees of test development professionals with years of experience in writing questions, and staff dedicated to assessing the validity of the tests in determining law practice proficiencies. The UBE provides greater transparency in test

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the SBLE for the improvements it has made in prior years and for continuing to focus on further ways to reform the bar exam. We believe that this latest reform reflects the best thinking of bar examiners and legal educators in this State and other parts of the country. Although it may turn out that further refinements and improvements are needed in the future, we believe that the right decision is to go forward with the change while naturally watching for and remedying any possible unintended consequences."

<sup>15</sup> See New York Judiciary Law 465 ("Every person applying for examination for admission to practice as an attorney and counsellor at law shall pay a fee of two hundred fifty dollars for each taking or retaking of the examination, or if dispensation has been received from the taking of the examination, four hundred dollars for credential review for admission on motion") (<http://codes.lp.findlaw.com/nycode/JUD/15/465#sthash.fsMOrZzk.dpuf>).

<sup>16</sup> Diane Bosse has stated that the cost of the New York bar examination would not rise as a result of adoption of the UBE. Court System Seeks Comment on Adopting Uniform Bar Exam, *New York Law Journal* (10/7/14) ([http://www.newyorklawjournal.com/id\\_1202672451929.Court-System-Seeks-Comment-on-Adopting-Uniform-Bar-Exam?slreturn\\_20150103214520](http://www.newyorklawjournal.com/id_1202672451929.Court-System-Seeks-Comment-on-Adopting-Uniform-Bar-Exam?slreturn_20150103214520)).

<sup>17</sup> Greg Murphy suggested this possibility to us in our 2/2/15 phone conversation.

development, administration, and scoring, and jurisdictions do not have to incur the costs of test development.<sup>18</sup>

Similarly, Rebecca S. Thiem contended:

In the 10-plus years since adopting the MEE and MPT, the board has not been disappointed either in the quality of the questions or in the resulting scores. Use of the MEE and MPT also afforded the benefit of NCBE-sponsored calibration sessions, which provided our graders with significantly more sophisticated grading skills. Later, as a member of NCBE's MEE Policy Committee, I was further reassured about our decision after learning more about the professionally driven process for drafting, reviewing, and revising the MEE questions and model answers.<sup>19</sup>

Second, proponents of the UBE argue that it promotes portability and mobility in an increasingly national and global practice of law. Mark C. Morril, Chair of the New York City Bar Association's Council on the Profession has stated: "We believe that adoption of the UBE is an important reform that will significantly enhance opportunities for new lawyers to find employment wherever it is available.."<sup>20</sup>

In a similar vein, proponents of the UBE in Maryland contended that:

If every state offered the uniform test, new graduates would be spared much of the hassle involved in moving from state to state. State bar officials would know just what they're getting when a new out-of-state lawyer applies for admission. . . . Finally, the UBE would recognize the growth of multi-jurisdictional practice, nationally and internationally, and bring the legal profession in line with medicine and other professions that have adopted a uniform national examination.<sup>21</sup>

And the former President of the NCBE argued that:

When a third-year law student must register for the July bar examination somewhere, the choice of jurisdiction can be difficult, particularly if the individual has not secured employment. By the time that first job comes along —if it comes along in another jurisdiction—it is often too late for the graduate to register for the bar examination in the second jurisdiction. The result may be that the new graduate is relegated to waiting to take a second bar examination the following February, lengthening by months the opportunity to enter the legal profession. Licensing in the jurisdiction in which

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<sup>18</sup>Veryl Victoria Miles, The Uniform Bar Examination: A Benefit to Law School Graduates, The Bar Examiner (Aug. 2010).  
([http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/miles\\_the\\_uniform\\_bar\\_exam.auth\\_checkdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/miles_the_uniform_bar_exam.auth_checkdam.pdf))

<sup>19</sup>Essays on a Uniform Bar Examination, The Bar Examiner (Feb. 2009).  
([http://www.ncbex.org/assets/media\\_files/Bar-Examiner/articles/2009/780109\\_UBELessays\\_01.pdf](http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2009/780109_UBELessays_01.pdf)). Ms. Thiem has served as President of the North Dakota State Board of Law Examiners, among many other positions.

<sup>20</sup> <http://www.nycbar.org/44th-street-blog/2015/01/20/city-bar-supports-adoption-of-uniform-bar-examination/>

<sup>21</sup>Uniform Bar Examination: An Idea Whose Devil is in the Details?" Maryland Daily Record (2/21/10)  
(<http://thedailyrecord.com/2010/02/21/uniform-bar-examination-an-idea-whose-devil-is-in-the-details/#ixzz3QDyhraXC>)

employment occurs can therefore be delayed as much as a year after law school graduation, impacting not only the graduates but also their employers.<sup>22</sup>

NYCLA does not wish to minimize this potential factor. Increasing the fluidity of the market for legal employment is a desirable goal, particularly in an economic climate where young lawyers often cannot obtain legal employment.<sup>23</sup> However, we note, that at least as the landscape currently stands, a lawyer who passes the UBE in New York could transport that score to only 15 other states, many of which are small and not geographically close to New York. In our conversation with the Chair of the NCBE, he told us that he was unaware of any states other than New York that are currently considering adoption of the UBE.<sup>24</sup> In addition, the portability of bar passage in New York is limited by the fact that five other states have state-specific requirements and a number of states might have score cutoffs higher than those of New York, depending on the level at which New York's passing score is set.

NYCLA also notes that greater mobility would not necessarily be unambiguously beneficial to young New York lawyers. At least at the outset, until additional large jurisdictions adopt the UBE, it is quite likely that more lawyers will seek to use the UBE to enter New York than to use the test as a way of gaining admission in another state.<sup>25</sup> It is possible that this additional inflow of lawyers could increase the competition in New York for many beginning lawyers who already find it difficult to obtain jobs. While we do not wish to over-emphasize this "protectionist" factor, we do believe it is worthy of further study, perhaps by analyzing shifts in the numbers of out of state test-takers. It is our understanding that the states that have currently adopted the UBE have not seen an influx of out-of-state applicants from other UBE jurisdictions (or an outflow to other UBE jurisdictions).<sup>26</sup> This paucity of data can be explained in part by the fact that the UBE has not been in existence for a long period and also by the fact that the states that have adopted the UBE are by and large not large states and many of them are not magnets for out of state bar applicants. If New York were to adopt the UBE and other large states to follow, it is conceivable that inter-jurisdictional score transfers could increase markedly. Once again, we believe further analysis would be beneficial on this issue.

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<sup>22</sup>Erica Moeser, Both Graduates and Employers Would Benefit from Uniform Bar Examination, NALP Bulletin (Mar. 2010) ([https://www.ncbex.org/assets/media\\_files/UBE\\_NALP-Bulletin-Article-by-EM-March-2010.pdf](https://www.ncbex.org/assets/media_files/UBE_NALP-Bulletin-Article-by-EM-March-2010.pdf)) "The uniform bar examination, once seen as a "radical" idea, has taken hold as a concept, in part because a "terrible" job market leaves many law students "unable to tell" what state they may end up working in after the examination." Steven C. Bennett, When Will Law School Change, 89 Neb. L. Rev. 87 (2010)

<sup>23</sup> Perhaps for this reason the Young Lawyers Division of the ABA has called for "the governing bodies of state and Territorial bar examinations to adopt a uniform bar examination." RESOLUTION 5YL (<http://www.americanbar.org/content/dam/aba/migrated/yld/annual10/5YL.authcheckdam.pdf>)

<sup>24</sup> Telephone Conversation with Bryan Williams, 2/11/2015.

<sup>25</sup> As Professor Pieper put it: "Objectively, portability out of New York simply is not as attractive as portability into the legal capital of the world. Even if, as Judge Lippman suspects, closer and larger states follow New York's lead, I submit that the number of candidates taking the New York bar exam with the hope and desire to practice in another state is insignificant." John Gardiner Pieper, Why UBE Needs Careful Consideration, New York Law Journal (Nov. 5, 2014). Professor Pieper teaches at five law schools and founded a bar review course.

<sup>26</sup> Diane Bosse informed the NYCLA Board of Directors that last year approximately 1400 scores were transferred from one UBE jurisdiction to another, of which 18% had failed in the jurisdiction where they had taken the bar examination. Likewise Justice Berch stated that at this point there is "not a lot of traffic in transfers." Arizona had approximately 222 test takers transfer their scores out of Arizona and approximately 105 test takers transfer their scores into Arizona.

## V. REASONS FOR OPPOSITION TO JUDGE LIPPMAN'S UBE PROPOSAL

The reasons for skepticism of the UBE proposal set out below have led us to urge that adoption be deferred; we do not see them as definitive but, rather, as reason for deferral while further information can be gathered.

First, there is a frequently voiced need for disparate impact studies.<sup>27</sup> NYCLA is concerned by the drop in pass rates in the current New York State bar exam. There has been a similar drop in UBE test scores, which NYCLA urges the NCBE to study.<sup>28</sup>

NYCLA notes, however, that statistical analyses of New York bar examination results have suggested that a change in the components of the test (eliminating essays and focusing solely on multiple choice questions) is unlikely to further disadvantage specific racial/ethnic groups. To the contrary, racial differences in scores were found to be “fairly consistent across all of the components”:

Differences among the racial/ethnic groups are not associated with particularly high or low scores on one component of the bar exam. Rather, the differences are fairly consistent across all of the components. The fact that each group performs at about the same level on each component of the bar exam suggests that no one component is easier or more difficult for any racial/ethnic group. No one component is causing the differences observed across racial/ethnic groups.<sup>29</sup>

As Suzanne Darrow-Kleinhaus of Touro has noted:

The fact is that “the MBE neither widens nor narrows the gap in performance levels between minority applicants and other applicants.” Research indicates that “differences in mean scores among racial and ethnic groups correspond closely to differences in those groups’ mean LSAT scores, law school grade point averages, and scores on other measures of ability to practice law, such as bar examination essay scores or performance test scores. . . . “Research has shown that “two applicants with about the same LGPA

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<sup>27</sup>Society of American Law Teachers (SALT) Letter to Diane Bosse (Nov. 3, 2014) (<http://www.saltlaw.org/wp-content/uploads/2014/11/SALT-Letter-NY-Bar.pdf>)

<sup>28</sup>“Why Did So Many People Flunk the Bar Exam This Year?” *Bloomberg Business* (Nov. 8, 2014) (<http://www.bloomberg.com/bw/articles/2014-11-18/why-so-many-law-students-failed-the-bar-exam-in-2014>); Deans Dismayed by Declines in Bar-Pass Rates, *New York Law Journal* (Nov. 13, 2014) ([http://www.newyorklawjournal.com/id\\_1202676229642/Deans-Dismayed-by-Declines-in-Bar-Pass-Rates](http://www.newyorklawjournal.com/id_1202676229642/Deans-Dismayed-by-Declines-in-Bar-Pass-Rates))

<sup>29</sup>D. Bosse, Summary of the October 2006 Report Prepared by the National Conference of Bar Examiners for the New York Board of Law Examiners Entitled: “Impact of the Increase of the Passing Score on the New York Examination (Nov. 2006).

(<http://www.nybarexam.org/press/summary.pdf>) National studies have come to similar conclusions. Dan Subotnik, Does Testing = Race Discrimination?: Ricci, the Bar Exam, the LSAT, and the Challenge to Learning, 8 U. Mass. L. Rev. 332, 372 (2013) ([http://www.ncbex.org/assets/media\\_files/Bar-Examiner/articles\\_2007\\_760307\\_ripevandcase.pdf](http://www.ncbex.org/assets/media_files/Bar-Examiner/articles_2007_760307_ripevandcase.pdf))

from the same school have about the same probability of passing regardless of their racial/ethnic group.”<sup>30</sup>

Indeed, the SALT professors, among the most vocal opponents of the UBE on the ground that it could have a disparate impact on racial and ethnic minorities, admit that they do not know whether the UBE would have a disparate impact on minorities; they concede that “it is presently unclear what impact adoption of the UBE will have on overall bar pass rates and whether it will result in exacerbating the existing disparate impact.”<sup>31</sup>

Nonetheless, further analysis of potential disparate impact is warranted. In this regard, NYCLA notes that a study of the impact on foreign law graduates is particularly significant for New York, given that New York has disproportionately more foreign test takers than any other state – nearly one-third of New York’s test takers are foreign.

Professor John Gardner Pieper has argued that foreign test takers are disadvantaged by the UBE:

Stripping the bar exam of its local component would do a disservice to newly admitted attorneys, including the foreign-trained attorneys who now account for nearly one-third of bar exam applications in New York and for whom bar exam preparation often is their first opportunity to learn New York law. These new lawyers have more than enough to learn and navigate in the first years of practice in New York without the specter of entering the practice without the benefit of having studied New York law and procedure that we as a bar were not just encouraged, but required to know for admission.<sup>32</sup>

However, others have argued to the contrary:

Perhaps even more on the side of future potential is the possible role of the Uniform Bar Examination (UBE) in offering a path to legitimacy for both international law graduates and foreign law schools. The UBE serves as a new and more standardized approach to the bar examination . . . The UBE begins as detached from any particular jurisdiction, becoming relevant where the bar exam regulators accept its approach and set their own score. This detachment provides the ideal opportunity for international law graduates to use the UBE as a mechanism for assessment that provides a measure of comparability of their preparation to that of U.S. J.D. graduates.<sup>33</sup>

More simply, a bar examination that places less emphasis on local law would seem on its face to benefit test takers from foreign and out of state law schools who are less likely to have studied New York law. One can debate whether this is a legitimate concern but, in any event, because of the large number of graduates of foreign law schools who now take the New York

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<sup>30</sup> Suzanne Darrow-Kleinhaus, A Response to the Society of American Law Teachers Statement on the Bar Exam, 54 *J. Legal Educ.* 442, 457-58 (2004).

<sup>31</sup> Society of American Law Teachers (SALT) Letter to Diane Bosse (Nov. 3, 2014) (<http://www.saltlaw.org/wp-content/uploads/2014/11/SALT-Letter-NY-Bar.pdf>).

<sup>32</sup> John Gardiner Pieper, Why UBE Needs Careful Consideration, *New York Law Journal* (Nov. 5, 2014).

<sup>33</sup> Carole Silver, Globalization and the Monopoly of ABA-Approved Law Schools: Missed Opportunities or Dodged Bullets?, 82 *Fordham L. Rev.* 2869, 2894 (2014).

bar, NYCLA believes it important to study how these persons fared in those states that have adopted the UBE.<sup>34</sup>

**Second**, the concern has been expressed that a decreased emphasis on New York law on the UBE will in turn cause law schools to de-emphasize New York law, focusing instead on a “national” curriculum that teaches less New York law. Justice Berch stated that she saw no such change in Arizona law school curricula as a result of the UBE.<sup>35</sup>

However, there is some evidence that such changes could take place, as set out in a recent article in the *Massachusetts Law Review*.<sup>36</sup> That article pointed to several examples where law schools had changed their curricula in response to the bar examination. *Id.* (citing, Donald H. Zeigler et al., *Curriculum Design and Bar Passage: New York Law School’s Experience*, 59 *J. Legal Educ.* 393 (2010) (discussing how changes to New York Law School’s curriculum, including the requirement that students in the bottom quartile of the class take a wide array of courses tested on the bar exam, have improved NYLS’ bar passage rates); ABA Section of Legal Educ. and Admissions to the Bar, *Am. Bar Ass’n, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* 278 (1992) (commonly known as “The MacCrate Report”) (noting that the bar exam influences law schools to develop curricula that overemphasize courses covered by the exam and that the exam influences law students to choose doctrinal courses in areas tested by the exam); Byron D. Cooper, *The Bar Exam and Law Schools*, 80 *Mich. B.J.* 72, 73 (2001) (noting that some Michigan law schools saw substantial increases in students enrolling in no-fault automobile insurance and worker’s compensation classes when those subjects were added to the Michigan bar exam; further noting that an informal survey of Michigan property law professors found the majority of professors took “the bar exam into consideration in deciding which sections of the required casebook should be covered in the course.”)).<sup>37</sup>

NYCLA notes that even if the UBE is found to induce some change in law school curricula, such changes would almost certainly not occur in out-of-state and foreign law schools. Two-thirds of those who take the New York bar examination come from such schools.<sup>38</sup> Moreover, even in New York law schools, a de-emphasis on local law could result in a focus on other areas of benefit to law students. The UBE might, for example, “induce law schools to redouble their emphasis on basic analysis and writing skills.”<sup>39</sup>

Accordingly, NYCLA is of the view that further analysis is needed to analyze the weight to be attached to this factor. NYCLA is hesitant to place undue weight on this factor because of

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<sup>34</sup> However, as Justice Berch pointed out to us, many of the UBE states (such as Arizona) do not permit foreign law graduates to sit for the bar examination.

<sup>35</sup> 2/3/15 Telephone Conversation with Justice Berch.

<sup>36</sup> Andrea A. Curcio, Carol L. Chomsky, Eileen Kaufman, *Testing, Diversity, and Merit: A Reply to Dan Subotnik and Others*, 9 *U. Mass. L. Rev.* 206, 276 (2014).

<sup>37</sup> We also note that Professor William LaPiana has pointed to the possibility of such curricular changes.

<sup>38</sup> Diane Bosse, January 2015 NYCLA Board of Directors meeting.

<sup>39</sup> *Uniform Bar Examination: An Idea Whose Devil is in the Details?* *Maryland Daily Record* (2/21/10) (<http://thedailyrecord.com/2010/02/21/uniform-bar-examination-an-idea-whose-devil-is-in-the-details/#ixzz3QDyhraXC>)

the lack of hard information on whether curricular changes would be made and the lack of a clear argument against such a shift.

**Third**, some have charged anecdotally that the lack of New York law on the bar examination would produce lawyers who are insufficiently trained in New York law.

Again, without hard information indicating that a handful of local law essays on the bar examination more realistically test a young attorney’s preparedness to confront local law issues than a number of multiple choice questions, NYCLA is hesitant to reject the UBE on this basis. As one bar examiner has noted, given the scope of law education and law practice, a bar examination “cannot and should not attempt to assess the depth of an applicant’s doctrinal knowledge base,” but rather should focus on that body of doctrinal knowledge necessary to “evaluate one’s own competency” to handle a particular legal matter.<sup>40</sup>

The Hon. Rebeca White Berch of the Arizona Supreme Court agreed:

Some worry that a test common to all jurisdictions would not fully protect each individual jurisdiction’s special interests. But let’s look at the basics. A bar exam is a test of minimum competence to practice law. On that point, we have already developed a high degree of national consensus on the content that should be tested. Almost every jurisdiction, for example, administers the MBE and uses the score on that test in assessing whether a bar applicant has sufficient knowledge of legal rules. If your state uses the MBE, it already employs a significant component of the proposed UBE—and the tool that provides a statistical means for validating other parts of the bar exam and making scores comparable from year to year. In short, those 53 jurisdictions that use the MBE have already taken a significant step toward accepting the concept of a UBE.<sup>41</sup>

And Professor Stephen Gillers of New York University has expressed doubt that local law distinctions are useful even in law school, much less on the bar examination:

Differences in the law of the new place from the law of the old place can be the only defensible justification for the requirement and that justification dissolves if the law is not (so) different, if the differences are irrelevant to the migrating lawyer’s practice, if the state does not test local law on its examination, or if the differences can be quickly ascertained. (“I practice securities law. Why do I have to memorize the elements of assault? And if I ever do need to know them, I’ll open a book.”)<sup>42</sup>

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<sup>40</sup> *Id.* (<http://thedailyrecord.com/2010/02/21/uniform-bar-examination-an-idea-whose-devil-is-in-the-details/#ixzz3ODybraXC>)

<sup>41</sup> Hon. Rebecca White Berch, Arizona Supreme Court, The Case for the Uniform Bar Exam, *The Bar Examiner* (2/09). ([http://www.ncbex.org/assets/media\\_files/Bar-Examiner/articles/2009\\_780109\\_UBEEssays\\_01.pdf](http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2009_780109_UBEEssays_01.pdf).)

Justice Burch also expressed her belief that local law essays are not a particularly effective way to test local law since test takers can generally obtain scores well above passing on most local law essays simply by using national law principles.

<sup>42</sup> Stephen Gillers, A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It, 63 *Hastings L.J.* 953, 967 (2012).

And one law school dean questioned whether the extent of local distinctions matters, at least insofar as core subjects such as contract law are concerned:

Even given some local variations in practice or regional differences involving, for example, community property, a contract written in New York still involves virtually the same concepts as one written in Texas, Florida, or California. Consequently, other than for issues involving turf, territoriality, and protectionism—and a stubbornness thinly disguised as maintaining tradition—there is no rational justification for having each state administer its own bar examination.<sup>43</sup>

On this point, NYCLA also notes that any perceived need to assure knowledge in specific areas of New York law could be addressed by targeted Bridge the Gap CLE requirements or possibly required on-line courses before taking the UBE.<sup>44</sup> For example, Alabama discontinued the longstanding use of six Alabama-specific essays on the bar examination but required that all applicants complete a course on Alabama law. The course is delivered for a \$3.00 fee to law students through videotaped lectures by experts conveyed through the internet with accompanying slides. One commentator describes this experiment as a success, noting:

There are many benefits to the online approach. ScholarLab charges \$3 per bar examinee to view the course online, so the approach is economical (and much less expensive than the development of essay questions for the bar exam). More importantly, the online content can be continuously refined and amended as the law in Alabama changes, ensuring for candidates for law licensure an ever-fresh introduction to the practice of law in Alabama.<sup>45</sup>

Similarly, Missouri has adopted a 30 question, open book test on local law, requiring a 75% passing score. Questions are chosen from an outline of local law that is intended for continuing use as a reference after the bar examination.<sup>46</sup> For its part, Arizona requires six hours of on-line study of local law as a requirement for bar admission, including requiring responses to on-line questions.

Again, NYCLA believes that New York could benefit from any studies being conducted in the 15 current UBE states that analyze potential detrimental effect on the practice of law and from assessments of programs like those in Arizona, Alabama and Missouri that are designed to compensate for the removal of local law questions from the bar examination.

**Fourth**, NYCLA notes that contracting parties choose New York law and New York as a choice of forum far more frequently than they choose the law or courts of any other state. If the

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<sup>43</sup> Dean Frederic White, Texas Wesleyan University, Essays on a Uniform Bar Examination, *The Bar Examiner*, Feb. 2009, at 1. ([http://www.ncbex.org/assets/media\\_files/Bar-Examiner/articles/2009/780109\\_UBEEssays\\_01.pdf](http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2009/780109_UBEEssays_01.pdf))

<sup>44</sup> There is currently no requirement that Bridge the Gap courses cover specific issues of New York law, as opposed to general practice pointers.

<sup>45</sup> Daniel F. Johnson, The Alabama Bar Exam—the Course on Alabama Law, 76 Ala. Law. 46, 46-47 (2015).

<sup>46</sup> Cindy L. Martin, Local Law Distinctions In The Era of the Uniform Bar Examination: The Missouri Experience (You Can Have Your Cake And Eat It, Too), *The Bar Examiner* (9/11). ([http://www.ncbex.org/assets/media\\_files/Bar-Examiner/articles/2011/800311Martin.pdf](http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2011/800311Martin.pdf))

UBE contributes to a perception that New York law is not “unique”, then it is possible that contracting parties may feel less need to insert New York as their choice of law or choice of forum. In that event, the amount of business directed to New York lawyers by virtue of these contractual forum and choice of law clauses could diminish. If true, this could result in a significant loss of revenue to New York lawyers. According to one leading study, New York law is the favored choice, with New York law chosen in 46 percent of an analyzed set of contracts of public companies.<sup>47</sup> It is possible that contracting parties choose New York law and a New York forum because the unique content of New York law – the perception that New York law is more commercially sophisticated and better accommodates the needs of corporate contracting parties.<sup>48</sup>

However, without further study, NYCLA hesitates to say that this reason warrants rejection of the UBE. It is unclear whether the fact that a portion of the New York bar examination consists of uniform components would undermine the perception that New York law is commercially unique. Indeed, we are aware of no evidence that the adoption of the multistate bar examination in New York in 1979 had any such effect. We also note that the choice of New York law almost certainly flows from factors other than the perception of the uniqueness of New York law, for example the perceptions that our court system is less prone to “runaway jury” awards and is of otherwise higher quality than court systems in other jurisdictions. Moreover, some commentators have attributed the prevalence of New York law contract clauses to the simple fact that New York practitioners have a role in many large corporate transactions and call for New York choice of law and forum clauses to be implemented in those deal documents.<sup>49</sup>

Finally, New York law may be the law of choice not because it is unique but simply because New York law is more robust with more case law on almost any given topic than the law in any other U.S. jurisdiction with the possible exception of California.

Thus, absent any evidence supporting this concern, we do not give it much weight.

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<sup>47</sup> New York law was overwhelmingly favored for financing contracts, but was also preferred for most other types of contracts. Eisenberg, Theodore and Miller, Geoffrey P., “The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts” (2009). Cornell Law Faculty Publications. Paper 204 ([http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1203&context=facpub&sei-redir=1&referer=http%3A%2F%2Fwww.bing.com%2Fsearch%3Fq%3Dchoice%2Bof%2Blaw%2Bnew%2Byork%2Blaw%2Bunique%26qs%3Dn%26pq%3Dchoice%2Bof%2Blaw%2Bnew%2Byork%2Blaw%2Bunique%26sc%3D0-20%26sp%3D-1%26sk%3D%26cyid%3D141add5d3a564acebb3e3fe5eb02bdad%26first%3D15%26FORM%3DPORE#search\\_%22choice%20law%20new%20york%20law%20unique%22](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1203&context=facpub&sei-redir=1&referer=http%3A%2F%2Fwww.bing.com%2Fsearch%3Fq%3Dchoice%2Bof%2Blaw%2Bnew%2Byork%2Blaw%2Bunique%26qs%3Dn%26pq%3Dchoice%2Bof%2Blaw%2Bnew%2Byork%2Blaw%2Bunique%26sc%3D0-20%26sp%3D-1%26sk%3D%26cyid%3D141add5d3a564acebb3e3fe5eb02bdad%26first%3D15%26FORM%3DPORE#search_%22choice%20law%20new%20york%20law%20unique%22))

<sup>48</sup>M. Galligan, Partner Philips Nizer, Why Choose New York Law? (9/30/12).

([http://www.phillipsnizer.com/pdf/Article-WhyChooseNewYorkLaw-MWG-9-30-12\\_Article.pdf](http://www.phillipsnizer.com/pdf/Article-WhyChooseNewYorkLaw-MWG-9-30-12_Article.pdf))

<sup>49</sup>Victoria J. Saxon, Hodgson Russ LLP, New York May Be Your Best Bet When Choosing the Governing Law and Forum for your Cross-Border Contract (Sept. 24, 2013) (<http://www.lexology.com/library/detail.aspx?g=c36cde01-c97b-46bc-869c-f595fcb42ca0>).

## **VI. CONCLUSION**

Based upon the foregoing reasons, NYCLA urges a delay in the decision on whether to implement the UBE for one year, by which time data may be available on many of the issues identified in this report. In addition, if during the next year other states appear poised to adopt the UBE, that factor would also weigh in favor of adoption of the UBE in New York.