



October 23, 2020

Via Email

The Honorable Howard A. Levine
Chair, Task Force on the Future of the Bar Examination
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207
hlevine@woh.com

Re: Offer of Assistance on Examining the Future of the New York Bar Examination

Dear Judge Levine:

We write on behalf of the New York City Bar Association's Council on the Profession – the committee of the City Bar charged with broad policy questions facing the legal profession. As you may know, we previously wrote to the Court of Appeals on July 17, 2020 with a set of recommendations regarding the administration of the 2020 bar examination.¹ We are grateful that the Court, with the support of your Working Group on the Future of the New York Bar Examination, adopted the National Conference of Bar Examiners online exam for October 2020 as we recommended. We hope that this mechanism will provide an expedient path to admission for thousands of bar applicants.

Today, we write regarding the broader conversations on the future of New York's bar examination. Your Working Group is taking the lead in the evaluation of the current test, and the consideration of potential improvements and modifications. Such a monumental project will require extensive consultation and transparency, gathering information from diverse constituencies across New York's legal profession. As one of the oldest, most diverse, and most active bars in New York State, the City Bar wishes to actively support that critical work. Specifically, we write to offer our services in coordinating a series of focus groups and public symposia on the future of the bar exam to assist the Working Group in its responsibility for gathering information.

Most of the concerns about the bar exam's structure and content are not new. Indeed, some have been under discussion for decades. Many critics argue that, at best, the exam prioritizes memorization of abstract rules over lawyering skills, and at worst, serves as an unnecessary barrier

¹ Letter from New York City Bar Association Council on the Profession to Hons. DiFiore, Garcia and Levine, July 17, 2020, <https://s3.amazonaws.com/documents.nycbar.org/files/NYSBarExam2020COVID.pdf> (all websites last visited Oct. 22, 2020).

to the legal profession that disproportionately affects low-income and minority applicants.² The first issue relates to the content of the exam. Are we actually screening for the skills that modern lawyers need to serve clients properly? The second relates to the Court's responsibility for the membership of the profession. Are we unwittingly contributing to inequity in the profession because of the exam's structure, content or process without really adding any protection for the public? Undoubtedly, the Working Group will consider both issues as it looks towards the future.

Even before the pandemic, the future of the exam was under discussion. The New York State Bar Association ("NYSBA") formed its own Task Force to consider the exam, albeit through a different lens. The primary purpose of that Task Force was to investigate the impact of New York's adoption of the Uniform Bar Examination ("UBE"), which was implemented in 2015. The Task Force released an 80-page report on March 5, 2020 (the "Report").³ In sum, that Report recommended the elimination of the New York Law Exam and the adoption of a more rigorous exam on New York-specific law either instead of, or in addition to, the current UBE.⁴

The City Bar does not take a position on the merits of the NYSBA Report, except to say that these issues are important enough to merit further conversation and study to ensure that a wide range of constituencies are heard as the Court of Appeals formulates long-term policies. Moreover, the world has also changed in several important ways since the NYSBA issued its Report last year:

- First, many states have adopted new and innovative approaches to the admission of lawyers in the wake of the pandemic. These approaches range from full diploma privilege, to supervised practice schemes, to new online alternatives to in-person examinations.⁵ These creative responses to the pandemic – which likely never would have been considered otherwise – are worthy of New York's attention, particularly given that we can draw on the experiences of so many jurisdictions. Perhaps this crisis has yielded some useful information that we can apply even after the pandemic abates.
- Second, 2020 law school graduates around the country have faced historic uncertainty regarding the administration of the exam. It would be imprudent to ignore the

² Claudia Angelos, Sara J. Berman, Mary Lu Bilek, Carol L. Chomsky, Andrea A. Curcio, Marsha Griggs, Joan W. Howarth, Eileen Kaufman, Deborah Jones Merritt, Patricia E. Salkin, Judith Welch Wegner, "The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action," March 22, 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559060 (summarizing disproportionate impacts of the bar exam particularly in light of the pandemic).

³ "Report of The Task Force on the New York Bar Examination," March 5, 2020, available at <https://nysba.org/app/uploads/2020/03/Report-of-the-NYSBA-Task-Force-on-the-New-York-Bar-Examination-With-Appendix-compressed.pdf> (this report sets forth the results of the task force and their recommendations for New York's bar examination).

⁴ The Task Force released a "follow-up" report after the onset of the pandemic that recommended, *inter alia*, the postponement of the in-person exam instead of either diploma privilege or an online exam. See "Second Report of the Task Force on the New York Bar Examination: The Coronavirus and Bar Examination Administration," March 30, 2020, <https://nysba.org/app/uploads/2020/03/Second-Report-of-the-Task-Force-on-the-New-York-Bar-Examination-April-2020.pdf>.

⁵ See, e.g., Karen Sloan, "National Momentum Builds for Diploma Privilege as Oregon Makes Bar Exam Optional," Law.com, June 30, 2020, available at <https://www.law.com/2020/06/30/national-momentum-builds-for-diploma-privilege-as-oregon-makes-bar-exam-optional/> (list additional examples of criticisms).

unprecedented frustration and engagement – and in some cases, anger – of those who hope to be the newest members of our profession. The plain truth is that many felt that they were not heard by the Board of Law Examiners, the Court of Appeals, or the organized bar more generally. Their frustrations have been heard through countless open letters and social media campaigns. We cannot allow thousands of lawyers to enter the profession with a sense of bitterness, believing that senior leaders do not care about them or their careers. In considering the future of the bar exam, the Working Group and the Court should take the opportunity to seek input broadly and publicly.

- Third, the nation is undergoing a renewed reckoning around racism, prompted by the killing of George Floyd in Minneapolis. Since June, sustained protests have emerged around the country to press for criminal justice reform. This historical moment requires a heightened attention to the importance of diversity, equity and inclusion in the legal profession. As the Working Group studies the bar exam, the role of the exam as a gatekeeper that could disproportionately harm minorities must be carefully considered.

The Working Group cannot achieve a sustainable solution to the modernization of the bar exam addressing all of these issues without considering these three “new” aspects of the landscape. Indeed, the Working Group will need to seek input from broad sectors of the legal community, across boundaries of industry, practice area, age, and diversity, in order to accumulate useful data to inform its decision-making. The scope of the issues demands a transparent and holistic process.

To that end, the City Bar is willing and able to convene discussions and focus groups around the future of the exam. At some point in the future these could occur physically in our facilities, but for now we could host them virtually. Focus groups could be an effective tool for gathering data from critical subgroups, which the City Bar could aggregate for the benefit of the Working Group. For example, one could imagine the following targeted focus groups:

- Recent Graduates from the Great Recession of 2008
- Foreign LL.M. Graduates
- First-Generation Law School Graduates
- Black Law School Graduates
- Public Sector Graduates
- Law Firm Managing/Hiring Partners
- In-House Counsel
- Small Firms
- Nonprofit Legal Services Providers
- Members of the Judiciary
- Faculty of New York’s Law Schools
- Current Student Bar Association Leaders

Beyond these focus groups, the City Bar could host larger discussions – such as a national or State-wide symposium – that would bring important viewpoints to the table. As noted above, states around the country have now begun novel experiments around attorney admissions, and New York could benefit from the knowledge they have gained.

The City Bar commends both the Working Group and Chief Judge DiFiore on the willingness to rethink conventional approaches to the exam. New York State should be a national leader in offering a clear, fair, and equitable pathway into the profession while safeguarding potential clients. We stand ready to partner with the Working Group in whatever ways would be most helpful. We greatly appreciate your careful attention to this work, and to the volunteerism of the Working Group's members in overseeing this process. We look forward to remaining part of the conversation moving forward, and would welcome the opportunity for a virtual meeting to discuss these issues and ideas further.

Respectfully,

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Cc: Members of the Working Group on the Future of the New York Bar Examination
(*Via Email*)