



September 29, 2021

**Via E-mail**

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](mailto:hlevine@woh.com)

**Re: Potential Changes to Structure and Focus 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 considering broad policy questions facing the legal profession. Our Council includes law school deans, law firm partners, in-house counsel, members of the judiciary, recent lawyers, and other leaders in the profession. We write concerning potential changes to the structure and focus of the bar examination, which your Task Force on the Future of the New York Bar Examination (the “Task Force”) is currently considering.

We expect that the Task Force will be considering the recently-released Third Report and Recommendations of the New York State Bar Association’s Task Force on the New York Bar Examination (the “NYSBA Report”). The NYSBA Report proposes dramatic changes to the New York Bar Examination. As detailed below, our Council has serious disagreements with these recommendations, starting with the proposal that New York move away from the Uniform Bar Exam (“UBE”). The NYSBA Report’s proposals would take New York backwards—in precisely the opposite direction that our State, and other states, have already decided to move. Indeed, many of the NYSBA Report’s suggestions run counter to mainstream practices in legal education, as well as the needs of most legal employers in New York and elsewhere. The NYSBA Report’s proposed redesign of the bar exam would also undermine the exam’s primary role: protection of those who engage, or seek to engage, legal representation.

In this letter, we briefly provide background about the New York Bar Examination, describe the NYSBA Report’s recommendations, and offer our Council’s perspectives. We do not intend to respond point-by-point to the NYSBA Report. Rather, we wish to note our most significant objections to that Report’s proposals and encourage your Task Force to invite further input from the legal community before making recommendations to the Court of Appeals.

**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
42 West 44<sup>th</sup> Street, New York, NY 10036  
212.382.6600 | [www.nycbar.org](http://www.nycbar.org)

## I. BACKGROUND

Debates about the structure of the bar exam are not new.<sup>1</sup> But the past decade has seen a particularly high degree of transformation in testing. We begin with some background information to put our views in context.

Prior to 2016, New York State largely wrote its own exam, known as the New York Bar Exam. The New York Bar Exam consisted of three components: (1) the Multistate Bar Examination (“MBE”); (2) a written essay component; and (3) a multiple-choice test on New York law (“NYMC”).<sup>2</sup> The MBE is a multiple-choice exam written by the National Conference of Bar Examiners (“NCBE”) that counted for 40% of the total score; the written component was weighted 50% of the total score; and the remaining 10% was made up by the NYMC. The written component consisted of five essay questions developed by New York, along with one Multistate Performance Test (“MPT”) task written by the NCBE. In sum, half of the “old” exam was written by the New York Board of Law Examiners (“BOLE”) and emphasized New York-specific law.

In 2014, the Court of Appeals announced that New York would adopt the Uniform Bar Exam (“UBE”), which it did beginning with the July 2016 examination. This change was made at BOLE’s suggestion.<sup>3</sup> The UBE is written and coordinated entirely by the NCBE. It includes: (1) the Multistate Essay Examination (“MEE”); (2) two Multistate Performance Test (“MPT”) tasks; and (3) the MBE. The UBE is administered over two days twice a year, once in February and one in July. The UBE is uniformly administered and scored.

In addition, jurisdictions that use the UBE may also require applicants to complete a jurisdiction-specific law test. New York, for example, requires applicants to take the New York Law Exam (“NYLE”). The NYLE tests 12 New York-specific subject areas. The NYLE is 50-questions, online, and open book.

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<sup>1</sup> See, e.g., Cassandra Burke Robertson, *How Should We License Lawyers?*, 89 *FORDHAM L. REV.* 1295 (2021) (discussing history of licensure schemes and the evolution of bar exams); Joan W. Howarth & Judith Welch Wegner, *Ringing Changes: Systems Thinking About Legal Licensing*, 13 *FIU L. REV.* 383, 385 (2019) (discussing potential alternative bar exam structures); Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 *GEO. J. LEGAL ETHICS* 359 (1996) (describing the history and development of bar exams since the nineteenth century and proposals for reform).

<sup>2</sup> National Conference of Bar Examiners Research Department, *Impact of Adoption of the Uniform Bar Examination in New York*, <https://www.nybarexam.org/UBEReport/NY%20UBE%20Adoption%20Part%202%20Study.pdf>. (All websites last visited on September 28, 2021).

<sup>3</sup> Mary Campbell Gallagher & Suzanne Darrow-Kleinhaus, “A Comparison of the New York Bar Examination and the Proposed Uniform Bar Examination,” *NYSBA Journal*, February 2015. The City Bar supported the move to the UBE. See, e.g., “Statement of Mark C. Morril, Chair, NYC Bar Association Council on the Profession on Behalf of the New York City Bar Association to the Advisory Committee on the Uniform Bar Exam,” January 20, 2015, <https://www2.nycbar.org/pdf/report/uploads/UBETestimony.pdf>; “Comments on NYS Board of Law Examiners Proposal Regarding Uniform Bar Examination,” November 6, 2014, <https://www2.nycbar.org/pdf/report/uploads/20072798-CommentsonUniformBarExamProposal.pdf>.

Currently, 40 U.S. jurisdictions have adopted the UBE, including 38 states, the District of Columbia, and the U.S. Virgin Islands.<sup>4</sup> Notably, at the time that New York adopted the UBE, only 15 jurisdictions used the UBE, showing its dramatic recent rise in popularity and reflecting New York’s outsized influence in these matters.

## II. THE NYSBA TASK FORCE AND REPORT

The NYSBA Report is a 123-page document prepared by the Task Force on the New York Bar Examination (the “Task Force”). The Task Force is a 23-member group of State Bar members chaired by the Honorable Alan D. Scheinkman (ret). It was formed in April 2019 to evaluate the impact of the UBE in New York. Though it issued an initial report in March 2020 (the “First Report”), the COVID-19 pandemic quickly overshadowed that work.<sup>5</sup>

The pandemic required a sudden national, state, and local rethinking of the administration of the bar examination. No longer could thousands of test-takers gather together in a single room. The Task Force, already in place, thus shifted its immediate focus towards advising BOLE and the Court of Appeals on responding to the crisis. It issued its Second Report on March 30, 2020, which was focused on pandemic response.<sup>6</sup> Among its recommendations were to move the July 2020 exam to October 2020, and that New York should decline to adopt diploma privilege in response to the pandemic.

After addressing the crisis caused by the initial onslaught of the pandemic, the Task Force continued its work to update its First Report while taking into account the sector-wide upheaval described in its Second Report. It then released its Third Report (which we call the “NYSBA Report” for clarity) in June 2021. This Report was approved by the New York State Bar House of Delegates soon thereafter on June 13, 2021.<sup>7</sup> The NYSBA Report describes its overall vision for a revised bar exam as follows:

The new New York Bar Examination should foster the study of New York law, promote New York law within the broader legal community, and assure that attorneys admitted to practice here are competent to do so, with reference to the laws that they will be working with. A return to a New York Bar Examination should bring about a renaissance in the study and development of New York law, which is the lodestar of common law legal principles both nationally and

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<sup>4</sup> National Conference of Bar Examiners, List of UBE Jurisdictions, <https://www.ncbex.org/exams/ube/list-ube-jurisdictions>.

<sup>5</sup> Report of the NYSBA Task Force on the New York Bar Examination, New York State Bar Association, March 5, 2020, <https://nysba.org/app/uploads/2020/03/Report-of-the-Task-Force-on-the-New-York-Bar-Examination.pdf>

<sup>6</sup> 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>.

<sup>7</sup> Third Report and Recommendations of the Task Force on the New York Bar Examination, June 2021, <https://nysba.org/app/uploads/2021/06/9.-Task-Force-on-the-New-York-Bar-Examination-with-staff-memo.pdf>. The City Bar has a delegation to the State Bar’s House of Delegates. How those delegates voted at the June 13 meeting is of no relevance here since they voted on an individual basis. The Council’s position was developed, and this letter drafted and approved, after the June 13 meeting.

internationally. It would also restore luster to New York admission as it would no longer be a mere credential. Once again, the public would be assured that a New York-admitted lawyer has the minimum competence to practice in New York. The confusion between New York admittees who know New York law and those who do not will become a thing of the past.<sup>8</sup>

To achieve this broad vision, the NYSBA Report offers eight interrelated recommendations, the most significant of which are:

- Eliminating the use of the UBE.
- Eliminating the short NYLE, and replacing it with a “rigorous examination on New York law.”
- Creating a “New York Law Certification program” that would be an alternative to licensure without a bar exam with a certain amount of coursework on New York-specific law.
- Creating an experimental pilot program that would allow students to spend part of their second and third years of law school engaged in forms of supervised practice.

In sum, the NYSBA Report would require that New York withdraw from the UBE and effectively require BOLE to create the entire bar exam from scratch. That new exam would emphasize New York law.

### **III. THE COUNCIL’S VIEW**

We begin by noting our respect for the efforts of the NYSBA Task Force and its members. The Task Force has produced multiple helpful reports to foster a conversation about the future of New York’s licensing mechanisms. We also acknowledge that these reports were created during a time of intense scrutiny and unprecedented uncertainty, given the COVID-19 pandemic.

Nevertheless, this Council disagrees with much of the NYSBA Report, particularly its core recommendation that New York should abandon the UBE in favor of a New York-centric examination. In our view, this framing would take New York in precisely the wrong direction.

#### **a. New York Should Not Return to a Focus on New York Law**

New York should not move away from the UBE. Like other critics of the UBE, the NYSBA Report asserts that applicants are forced to learn “the law of nowhere”—a phrase that suggests that the exam tests hypothetical law from a hypothetical jurisdiction. Instead, it asserts, bar exams should test *real* law from *real* jurisdictions, thus ensuring that licensed lawyers are prepared to actually practice. In this vein, the NYSBA Report argues:

Until the advent of the UBE, admission to the New York Bar certified that the attorney had the competence and fitness to practice, not just anywhere, but in New York, the veritable mothership of American law. With the adoption of the UBE, it is no longer necessary for an attorney to know anything about New York law to

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<sup>8</sup> NYSBA Report at 122-123.

gain admission. **We now actually have two distinct groups of New York Bar members: those who happen to be admitted here though utterly lacking in our laws and those who are competent to practice here.** Because the members of both groups are admitted in New York equally, there is no effective means to distinguish between them. Foreign law offices are now staffed with New York-admitted attorneys but the qualification to answer a New York law question is no longer provided by admission alone. **More importantly, a client in New York can no longer rely upon a new lawyer’s admission in New York as reflecting competence to provide appropriate representation.**<sup>9</sup>

We see this issue differently. First, the NYSBA Report’s proposal is premised on a mythical past that never existed. The notion that pre-UBE (i.e., pre-2016) bar applicants began their careers with a significantly more comprehensive knowledge of New York law that instantly made them better attorneys—simply because they memorized some New York law for a test—strains credulity. There is simply no evidence that recently admitted New York attorneys are less prepared than their pre-2016 counterparts. Cramming for and taking a bar exam cannot possibly ensure that a new lawyer “knows” New York law.

Second, we reject the premise that competency can be determined by how well a candidate memorizes state-specific law. Competent lawyers apply law to facts. Lawyers must do so through fact development, careful legal research, rigorous analysis, application of precedent, and clear oral and written expression. They must understand core legal concepts and know how to research nuances when needed.<sup>10</sup> Memorizing specific ways that New York rules differ from national rules is not particularly helpful in achieving those broader skills.

Third, New York’s legal market exists in a broader national context. New York is not parochial. The reality is that many New York lawyers do not practice exclusively, or even predominately, New York law. We are an exporter of legal services to the rest of the country and the world.<sup>11</sup> “New York lawyers” and “New York law firms” regularly practice across multiple jurisdictions. Whether located in Buffalo, Islip or Manhattan, they often have clients in many states and countries. Those clients regularly face legal issues that often have no explicit connection to New York. This is particularly true for “New York in-house counsel,” who must advise on the laws of the jurisdictions where their clients operate. Moreover, “New York lawyers” regularly

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<sup>9</sup> NYSBA First Report at 6 (emphasis added).

<sup>10</sup> The NYSBA Report suggests that the UBE’s grading system could result in forum shopping, essentially encouraging bar applicants to take the test in “easier” jurisdictions, and then transporting that passage to “harder” jurisdictions. But there is no evidence that such forum shopping has taken place in the five years since New York adopted the UBE.

<sup>11</sup> Judge Howard A. Levine, *The Regulation of Foreign-Educated Lawyers in New York: The Past, Present, and Future of New York’s Role in the Regulation of the International Practice of Law*, 47 N.Y.L. SCH. L. REV. 631, 632–33 (2003) (“First, New York law firms have been leaders in the ‘exportation’ of legal services abroad, and have stood at the forefront of the internationalization of legal practice during the post-World War II era. Second, New York is a leading ‘importer’ of legal services. Increasingly, foreign-educated attorneys come to New York to study in our law schools, seek admission to our bar, and work in our law firms. They seek the prestige and knowledge earned by studying law in an American law school, satisfying our rigorous licensing requirements and practicing law here”).

represent clients in arbitration and mediation proceedings, private mechanisms for dispute resolution that need not apply particular bodies of law. Indeed, New York is the dispute resolution capital of the country.<sup>12</sup> Understanding New York’s place in the broader legal market is important in considering the role of our bar exam. “Competency” in this context is fundamentally different from “competency” in more insular jurisdictions, where lawyers’ practices are more likely to be geographically limited. New York lawyers must be able to work across jurisdictional boundaries.

Finally, any proposal to move New York away from the UBE runs counter to the direction of legal education for the past half-century.<sup>13</sup> Law schools increasingly *do* teach the “law of nowhere” precisely because they know that their graduates will have broad-based practices not confined to a single jurisdiction. Again, this is *especially* true for many law schools in New York, where many applicants purposely choose to study specifically because our institutions produce graduates who will be marketable nationally and internationally. If adopted, the recommendations of the NYSBA Report would effectively force New York law schools to dramatically increase their curricular emphasis on New York-specific law.<sup>14</sup> While this recommendation might sound practical at first blush, it would inevitably deemphasize the study of numerous other subjects that are critically important to future lawyers and their legal employers.<sup>15</sup>

In short, we cannot support a parochial, New York-centric path to licensure. This vision is disconnected from the demands on new lawyers as well as the needs of legal employers.

## **b. Potential Harm to Consumers**

The NYSBA Report proceeds from the premise that the bar exam is intended to protect consumers by ensuring that admitted attorneys have a certain baseline competency. We agree with

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<sup>12</sup> See, e.g., Brian Farkas & Marie Cassard, *New York: A New Home of International Arbitration?*, ABA LITIGATION, Summer 2014, at 45 (discussing the opening of the New York International Arbitration Center in June 2013 as a mechanism for competing with jurisdictions like Paris and London for hosting private dispute resolution proceedings).

<sup>13</sup> See, e.g., Robert R. Kuehn & David R. Moss, *A Study of the Relationship Between Law School Coursework and Bar Exam Outcomes*, 68 J. LEGAL EDUC. 623 (2019) (analyzing the increase in clinical and experiential learning in law school curricula in relation to bar exam scores).

<sup>14</sup> The NYSBA Report writes that “one of the frustrations expressed most strongly by law graduates taking the October 2020 remote examination in New York was that they were required to study for an examination that did not test them on their ability to practice in New York and, therefore, in their view, there was little to be gained by compelling them to take an untried test for the sake of having a test.” <https://nysba.org/new-york-needs-a-new-bar-exam/>. Respectfully, we do not believe that this was among the most significant frustrations faced by 2020 law graduates. Their concern was not that the exam’s questions were insufficiently focused on New York law, but rather that they had to study for, and take, the Bar Exam under unprecedented conditions with the exam’s date and format changing on multiple occasions. We see no persuasive and credible evidence that applicants are demanding more New York-focused questions.

<sup>15</sup> Examples of such subjects include: arbitration, bankruptcy, copyright, employment law, immigration law, mergers and acquisitions, negotiation, securities regulation, taxation, and trial advocacy just to name a handful of important electives. If students are forced to take more New York-focused courses, they are less likely to take courses like these.

that goal. But we question whether an increased focus on New York law is the road to enhancing consumer protection.

Consumers of legal services—in New York and elsewhere—need ethical, communicative, and well-rounded lawyers who have a strong understanding of legal research, legal systems, and legal thinking. As explained above, we dispute the notion that legal consumers need counsel who have memorized particular procedural aspects of New York law, or who have studied the distinctions between New York law and federal common law. Such nuances are rarely relevant to clients’ interests, compared to the broader skill set of recognizing key issues, conducting legal research, and applying legal analysis. These are the skills that a consumer-protecting exam should aim to test. The UBE’s long-term goal is to do exactly this.

### **c. NCBE is Actively Planning to Address Concerns with the UBE**

The UBE is not perfect. Legal educators, students, and practicing lawyers have catalogued numerous concerns with the UBE.<sup>16</sup> Indeed, this letter should not be read as a full-throated defense of the current version of that test—far from it.

Importantly, however, the NCBE is actively planning to address many of these concerns. On January 28, 2021, the NCBE Board of Trustees voted to approve the preliminary recommendations of its Testing Task Force for the next generation of the Bar Examination.<sup>17</sup> Based on extensive focus groups, data reviews, and surveys of more than 15,000 lawyers, the NCBE announced its intention to revise the UBE to accomplish the following goals:

- Focusing the UBE content on the “core” doctrinal subjects, while eliminating narrower subjects such as family law, conflict of laws, trusts and estates, and the Uniform Commercial Code (except Article 2).
- Focusing the UBE content on lawyering skills such as research, writing, issue spotting, analysis, negotiation, and client relationship management.
- Redoubling efforts to enhance UBE fairness, accessibility, and affordability.
- Integrating the format of the UBE into a single test (instead of separate MBE, MPT, and essay components).

The NBCE, acknowledging that this is a large task, believes it will take several years to transition to this revised testing structure. But assuming the NCBE does not stray from these goals, the UBE will become more practice-focused and less memorization-focused. This approach incorporates the practice skills described in the widely-regarded white paper, “Building a Better Bar: The Twelve Building Blocks of Minimum Competence” published by the Institute for the

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<sup>16</sup> See, e.g., Dennis R. Honabach, *To UBE or Not to UBE: Reconsidering the Uniform Bar Exam*, 22 PROFESSIONAL LAWYER 43 (2014) (outlining common criticisms of UBE).

<sup>17</sup> Final Report of the Testing Task Force, National Conference of Bar Examiners, April 2021, <https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Final-Report-April-2021.pdf>.



Advancement of the American Legal System.<sup>18</sup> As noted above, this emphasis on the application of core substantive legal principles, rather than memorization of narrow rules, is far more aligned with modern legal education. It is also far more aligned with the needs of legal employers and legal consumers.

We view the NCBE's ongoing self-assessment as cause for optimism. We believe that the NCBE is sincere about its intention to make meaningful changes that will ultimately result in a more practical, useful, and accessible exam. We see no reason for New York to abandon the UBE before letting this process unfold. Given New York's influence in national testing (given the number of examinees who wish to practice here), we urge BOLE to work closely with the NCBE during this process.

**d. Conditioning Licensure on New York-Focused Law School Coursework would have Unintended Consequences**

The NYSBA Report recommends consideration of the limited avenue for diploma privilege based upon the successful completion of New York law-related coursework. The proposal would allow students from ABA-accredited schools inside and outside of New York to forgo the bar examination entirely if they take a certain number of credits of New York-focused classes during law school. The NYSBA Report does not offer significant detail on the scope of what would be required, other than that “[s]tudents have to graduate with a sufficient grade point average in a sufficient number of New York course credits.” While we are supportive of exploring alternatives to the bar exam as the pathway to admission, this particular idea should be rejected for four reasons.

First, as noted above, this proposal would skew legal education towards narrow parochialism, encouraging students to focus on coursework on a single jurisdiction instead of more broadly applicable doctrinal subjects. While there is no dispute that courses on New York Civil Practice or New York Criminal Law may be helpful to certain students with particular career goals, such elective courses should not receive priority over foundational classes that will equip students with broader and deeper legal vocabularies.

Second, only about half of New York's bar takers actually attend New York-based law schools.<sup>19</sup> This would effectively mean that out-of-state law schools would largely be foreclosed from giving their students this pathway to diploma privilege. Alternatively, it would mean that those out-of-state schools would need to invest in developing curricula and hiring qualified faculty to teach New York-focused courses.<sup>20</sup>

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<sup>18</sup> Deborah Jones Merritt & Logan Cornett, “Building a Better Bar: The Twelve Building Blocks of Minimum Competence,” Institute for the Advancement of the American Legal System, October 2020, [https://iaals.du.edu/sites/default/files/documents/publications/building\\_a\\_better\\_bar\\_pre\\_print.pdf](https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar_pre_print.pdf).

<sup>19</sup> See 2020 Bar Exam Data, [https://www.nybarexam.org/ExamStats/2020\\_NY\\_Bar\\_Exam\\_PassRates.pdf](https://www.nybarexam.org/ExamStats/2020_NY_Bar_Exam_PassRates.pdf) (showing that there were a total of 8,713 test-takers but only 4,063 from New York schools).

<sup>20</sup> Consider, for example, law schools like Georgetown, Harvard, or the University of Michigan that regularly send large numbers of graduates to New York. These institutions are unlikely to be able to provide extensive coursework on New York law to their students. Institutions with even fewer resources would have even greater difficulty. In short, this proposal unfairly burdens out-of-state institutions and their students.



Third, other states may follow New York’s lead, and decide to require a high degree of coursework in *their* state’s law for bar admission. New York law schools would suddenly feel pressured to add “tracks” of coursework in the law of New Jersey, Connecticut, Florida, California, and more. Even for the wealthiest law schools, this model would be unsustainable. The net result would be far more parochial legal communities, where graduates of a particular state’s schools largely practiced within that state. The UBE, of course, aims to achieve precisely the opposite: enhanced lawyer mobility. This mobility was among the key rationales for New York’s adoption of the UBE in the first place.

Fourth, diploma privilege based on a limited band of coursework is inconsistent with the overall stated purpose of the bar exam. The goal of the bar exam is to ensure some degree of uniformity, generalization, and competence. We do not support the notion that earning high grades in a few narrow subjects obviates the need for a test. If that were true, why not simply set an overall GPA threshold, and allow any student who takes certain foundational courses who meets that threshold to skip the exam? The Second Report of the NYSBA explicitly rejected diploma privilege during the COVID-19 pandemic, and reiterated the importance of the bar exam as a means of consumer protection.<sup>21</sup> If a bar exam is necessary to ensure competence, coursework on New York law should not become a method for escaping the test.

In short, any proposal to create this type of limited pathway for diploma privilege would create unfortunate incentives for students and schools, and undermine the broader purpose of the bar examination.

**e. The NYSBA Report’s Emphasis on Clinical Education has Potential for Success if Handled Carefully**

The NYSBA Report emphasizes the need for clinical and experiential education—an emphasis that matches the overall direction of legal education over the past several decades. Specifically, the Report proposes creating a pilot program modeled on New Hampshire’s Daniel Webster Scholars Honors Program through which students could spend their second and/or third years of law school engaged in supervised practice.

In our view, this proposal is worthy of further discussion and consideration. Many law schools have dramatically expanded clinical and experiential offering in recent years. Some schools also allow for semester-long programs where students work full-time for legal employers. The NCBE’s proposed revisions to the UBE would further complement the emphasis on practical lawyering skills. The idea of spending some portion of a student’s legal education engaged in full-time supervised practice would be consistent with these trends.

At the same time, this proposal requires careful study. Different schools may have different approaches to providing practical experiences. A one-size-fits-all approach may be unworkable. If students spend their final year of school in a field placement, they will inevitably take fewer

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<sup>21</sup> The City Bar supported exploring diploma privilege as a potential solution to the unprecedented crisis that faced the Class of 2020. *See*, Council on the Profession Letter to the Honorable Janet DiFiore, July 17, 2020, <https://bit.ly/2OzH4Yz>). While the City Bar did not endorse permanent diploma privilege in that letter, we do believe that alternative pathways to admissions should be considered.

classes. This means that they will be exposed to fewer areas of law with fewer opportunities to find potential passions. Law schools would also need to find ways to ensure that field placements provide quality educational opportunities—not an easy endeavor if this must be done for every single student. A model that works for New Hampshire, a state with a single law school with fewer than 1,000 students, may not easily translate to the country’s largest legal market.

Moreover, we have concerns about how this proposal might affect the cost of legal education. If law schools are required to expand clinics or facilitate large-scale supervised practice programs, this could increase expenses in ways that have not been fully analyzed.

Such effects must be carefully considered to ensure that law schools and their students can fully understand potential curricular and budgetary impacts of expanded supervised practice.

#### **f. Discussions about the Bar Exam Exist in a Broader Context**

Finally, we offer one further reaction to the NYSBA Report: While the Report addresses the structure and content of the bar exam, it does so without much consideration of issues surrounding the use of standardized testing more broadly. These issues are worthy of deeper consideration before the Task Force makes formal recommendations to the Court of Appeals.

The past few years have witnessed a broad reconsideration of the role of standardized testing within the American educational system. At the college level, the COVID-19 pandemic caused even the nation’s most elite colleges to become SAT/ACT-optional.<sup>22</sup> Many colleges intend to continue that policy after the pandemic has concluded.

At the law school level, schools have already experimented with challenging the historical dominance of the LSAT. The American Bar Association (“ABA”) permits various exceptions to admitting students based on LSAT scores. Specifically, Interpretation 503-3 of the ABA Standards and Rules of Procedure for Approval of Law Schools provides that schools may admit up to 10% of their class without an LSAT score from students who went to the same undergraduate institution, “and/or” students seeking a joint degree, provided that they either scored in the 85th percentile on the ACT, SAT, GRE, or GMAT, or were “ranked in the top 10% of their undergraduate class through six semesters of academic work, or achieved a cumulative GPA of 3.5 or above through six semesters of academic work.”<sup>23</sup>

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<sup>22</sup> Neil Vigdor & Johnny Diaz, “More Colleges Are Waiving SAT and ACT Requirements,” *The New York Times* (May 21, 2020), <https://www.nytimes.com/article/sat-act-test-optional-colleges-coronavirus.html> (noting that many elite institutions, including Harvard, Yale, Vassar, and Pomona, waived standardized testing for the 2020-21 admissions cycle).

<sup>23</sup> ABA Standards and Rules of Procedure for Approval of Law Schools, Interpretation 503-3, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf)

More broadly, legal scholars have written about the systemic socioeconomic and racial concerns that affect LSAT scores.<sup>24</sup> Similar concerns have been raised about bar exams.<sup>25</sup>

These issues raise important questions: Is the use of standardized tests a reliable measure of competence? Is the bar exam inherently exclusionary? If so, what tangible steps are being taken to address these concerns?

Any comprehensive study of the licensure process should involve a meaningful examination of the limitations and impact of standardized tests. To its credit, the NCBE is placing equity issues at the fore in developing the next version of the UBE. To the extent that New York considers adopting radical changes to its licensure system, it should take into account these broader social and educational questions.

#### IV. OUR RECOMMENDATIONS

In light of our views above, we encourage your Task Force to recommend that New York maintain its commitment to the UBE. Doing so would be consistent with the direction of legal education, as well as recognize the progress that has been made since the UBE's adoption in 2016.

Moreover, we believe that many issues raised by the NYSBA Report deserve broader attention and discussion as the Task Force reviews pathways to licensure. These include:

- **The Utility of the New York Law Exam:** The NYSBA Report argues that the NYLE is not nearly comprehensive enough—merely a 50-question open-book online exam. While the Council does not necessarily agree that this portion of the test should be “harder,” we do agree that it is highly imperfect as an assessment tool. Is there a better way to ensure some reasonable degree of proficiency with New York-specific law and procedure, which could exist alongside the UBE? If not, is there some other way that law students or graduates can be exposed to the fundamentals of New York practice in a manner that would satisfy some of the concerns raised by the Report?
- **Alternative Pathways for Licensure:** The NYSBA Report suggests one pathway towards licensure that would essentially require coursework in New York law in lieu of an exam. As noted above, we are not persuaded that this pathway is appropriate. But perhaps there are other mechanisms for diploma privilege that could be useful to study or pilot. The COVID-19 pandemic has resulted in a wealth of new approaches and data from many states that New York could analyze.
- **Practice Experience:** The NYSBA Report suggests that law students could (or should) spend some portion of their law school years engaged in full-time supervised practice. What might that look like? What steps might law schools take to achieve that goal? What

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<sup>24</sup> See, e.g., Diane Curtis, *The LSAT and the Reproduction of Hierarchy*, 41 W. NEW ENG. L. REV. 307 (2019) (discussing the intersection between rankings, LSAT scores and financial aid); Kevin Woodson, *Entrenched Racial Hierarchy: Educational Inequality from the Cradle to the LSAT*, 105 MINN. L. REV. HEADNOTES 481, 483 (2021) (discussing intersection of race and standardized testing).

<sup>25</sup> See, e.g., Christopher Williams, *Gatekeeping the Profession*, 26 CARDOZO J. EQUAL RTS. & SOC. JUST. 171 (2020) (discussing standardized testing and bar exams, among other barriers to the legal profession).

effects might this have on law schools' curricula? Could supervised practice come after graduation? These questions are worthy of consideration.

- **Building Trust with Recent Graduates:** It is no exaggeration to say that many 2020 and 2021 law graduates feel alienated by the organized bar. They faced historic uncertainty regarding the administration of the 2020 exam, and many believe that the profession failed to recognize or meaningfully respond to their lived experiences. The plain truth is that many felt that they were not heard by BOLE, the Court of Appeals, or the legal profession more generally. Their frustrations have been expressed in countless open letters and social media postings. The frustration and anger of the newest members of the profession should not be ignored. To the contrary, they should be given a seat at the table. In considering the future of the bar exam, the Task Force should seek input from these individuals both to engage them and to learn from their experiences with remote exam administration.
- **Equity, Inclusion and High Stakes Testing:** Finally, the nation is undergoing a renewed reckoning around racism. Since June 2020, 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.<sup>26</sup> As BOLE studies the bar exam, the role of the exam as a gatekeeper that could disproportionately exclude minorities must be carefully considered.

Addressing these issues is no small task. Doing so will require extensive consultation and transparency, gathering information from diverse constituencies across New York's legal community. The City Bar stands ready to help the Task Force in these efforts. We wish to actively support this critical work and renew our offer to provide assistance.<sup>27</sup> Specifically, we offer our services in coordinating focus groups and public symposia on the future of the bar exam to assist your work in gathering information. At some point in the future, these could occur in our facilities, but for now we could host them virtually. The City Bar could collect the perspective of many relevant stakeholders, and aggregate those findings for your analysis. For example, important perspectives might include those of:

- Law Graduates from 2020 and 2021
- Law Graduates from the Great Recession of 2008
- Recent Women Law Graduates
- Second Career Lawyers
- 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

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<sup>26</sup> See, e.g., "City Bar letter to Chief Judge DiFiore recommending modification of Question 26 on the New York Bar Application," New York City Bar Association, June 1, 2021, <https://bit.ly/3pjVmxW>.

<sup>27</sup> See, e.g., "Letter to the Working Group on the Future of the New York Bar Examination Offering Assistance," New York City Bar Association, October 23, 2020, <https://bit.ly/31LY6Ka>.

- Nonprofit Legal Services Providers
- Members of the Judiciary
- Senior Lawyers
- Faculty of New York’s Law Schools
- Current Student Bar Association Leaders

Additionally, the City Bar could host larger discussions—such as a national, regional, or State-wide symposia—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.

## V. CONCLUSION

The NYSBA Report would take us in the wrong direction. New York State adopted the UBE just five years ago. The NCBE is working to address many concerns about the exam’s structure and contents. Now is not the time for New York to step backwards. We should be making our new lawyers *more* prepared for “real world” practice, not less. The Council stands ready to assist your Task Force as it considers and addresses these important topics in the year ahead.

Respectfully,

### **Council Members**

Alina V. Artunian  
 Laurie Berke-Weiss  
 Melissa Colon-Bosolet\*  
 Michael A. Cardozo  
 Brenda Correa  
 Miriam Davidson  
 Matthew Diller\*  
 Brian Daniel Farkas\*  
 Aegis J. Frumento  
 Gary M. Kaufman  
 Jesse L. Kearney, Jr.  
 Devika Kewalramani.  
 David George Keyko\*  
 Lisa A. Podemski  
 Priscilla Lundin  
 Robye Margolius  
 Tyler Maulsby  
 Rhonda K. Singer  
 Michael S. Solender  
 Hon. Elizabeth S. Stong\*  
 Joseph Tremiti  
 Anne Wolfson

\* *Reflects membership on Subcommittee on the Bar Examination*

*CC: All Members of the Task Force on the Future of the Bar Examination  
All Members of the Board of Law Examiners*

**Subcommittee on the New York Bar Examination**

Matthew Diller  
Co-Chair, Council on the Profession  
Dean and Paul Fuller Professor of Law, Fordham University School of Law

Melissa Colón-Bosolet  
Co-Chair, Council on the Profession  
Partner, Sidley Austin LLP

The Honorable Elizabeth S. Stong  
United States Bankruptcy Judge for the Eastern District of New York  
Adjunct Professor of Clinical Law, Brooklyn Law School

David G. Keyko  
Chair, Lawyer Referral Service Committee  
Partner, Pillsbury Winthrop Shaw Pittman LLP

Brian Farkas  
Chair, New Lawyer Institute  
Associate Attorney, Arent Fox LLP  
Adjunct Professor of Law, Cardozo School of Law

**Contact**

Maria Cilenti, Senior Policy Counsel | 212.382.6655 | [mcilenti@nycbar.org](mailto:mcilenti@nycbar.org)