



September 21, 2022

Via E-mail

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

Re: Guidance on 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 considering broad policy questions facing the legal profession. Our Council includes law school deans, law firm partners, in-house counsel, members of the judiciary, recently-admitted lawyers, and other leaders in the profession. The Council is joined in these views by the City Bar’s Committee on Civil Rights, Committee on Disability Law, and the Office of Diversity, Equity, Inclusion, and Belonging.

We write in response to a request from the Working Group that the City Bar provide its views on a range of important issues in sufficient time for you to consider our input and conclude your work by the end of the fall. The issues you seek our comment on include:

- (1) whether New York should continue to rely upon the Uniform Bar Exam (“UBE”) offered by the National Conference of Bar Examiners (“NCBE”);
- (2) the best method of formulating and administering an exclusive New York Law Exam (“NYLE”);
- (3) the possible structure of an examination that would consist of some combination of the UBE and NYLE;

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 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.

- (4) potential alternative pathways to bar admission that could include some form of diploma privilege coupled with supervised clinical practice experience; and
- (5) comments on the recently-released information from the NCBE related to the NextGen bar exam that it is developing.

First, we express our gratitude for the opportunity to submit our views on the topics listed above. Developing a fair, comprehensive, valid, and reliable method of attorney admission—one that is built for modern legal practice—is a critical task for our State. As the Court of Appeals and Working Group know from our Council’s prior correspondence in 2020 and 2021, the City Bar has a deep interest in this project.¹ In those letters, in addition to addressing the near term concerns presented by the pandemic, we communicated our view that New York should continue to rely on an exam that provides graduates with portability (e.g., the UBE); should continue to strive for the most effective way to ensure that new lawyers are prepared to apply New York law and process in practice; and should consider alternative pathways, including diploma privilege and supervised practice. We emphasized then, as we do here, that our touchstones in the development of the path to licensure involve adherence to certain values, principles, and deliberations that include the input and wisdom of the wide diversity of the profession. Notably, these include new lawyers, as the ones who have the most recent experience with the exam, who are in the midst of experiencing what they are required to know and do to represent clients competently, and who are more likely than those more established in the profession to include representation from those communities underrepresented in our profession.

Second, we write to express support for the range of ideas the Working Group is considering and to credit the Working Group for its thoughtful study of the complicated psychometric principles that underlie the development of an equitable, valid, and reliable assessment of whether applicants have the skills and knowledge required to represent clients competently. We are not aware of exactly what that study has entailed. But, we do know that your work reflects this understanding: although practicing lawyers and judges know what the new lawyers they work with and observe in practice should be able to do, they do not know whether that set of skills and knowledge would be sufficient or necessary across the broad range of our profession. Nor are lawyers and judges experts in the fields of assessment, evaluation, and testing.

We offer here two preliminary, foundational comments that inform our views. We will, as the Working Group has requested, follow up with more detailed responses to your individual queries by the end of October.

¹ We refer to our letters to the Court of Appeals and the Working Group dated Oct. 23, 2020 (<https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/examining-the-future-of-the-new-york-bar-examination>); Sept. 29, 2021 (<https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/changes-to-structure-and-focus-of-the-ny-bar-examination>); and Feb. 15, 2022 (<https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/covid-safety-protocols-for-february-2022-bar-exam-recommendations>). These letters were sent following the shifts in the modality of the bar exam after the onset of the COVID-19 pandemic, and then addressed potential longer-term changes to the exam’s structure and content. In particular, we opposed many of the recommendations of the New York State Bar Association’s Task Force on the Bar Exam, including, inter alia, the recommendation to redouble the exam’s focus on New York-specific law. (All sites last visited Sept. 21, 2022).

I. PROCESS

As we wrote in our September 29, 2021 letter, any changes to the Bar Exam will require “extensive consultation and transparency, gathering information from diverse constituencies across New York’s legal community.” The construction and implementation of the process to determine who will be afforded and who will be denied the privilege of defining, creating, and furthering justice through representing clients, developing legal arguments, drafting legislation and contracts, and becoming eligible to administer justice from the bench are arguably the most critical building blocks of an equitable justice system. **That enterprise requires a process that is transparent, holistic, and inclusive, inviting in and engaging our profession and the justice system’s stakeholders to ensure the wisdom, efficacy, acceptance, and credibility of the outcome.**

The development of such a process is consistent both with the efforts being undertaken in other states to reconsider lawyer licensing and with other New York State Court initiatives. California, Minnesota, and Oregon have all sought broad engagement, shared interim reports on an open website, and held public hearings. Here in New York, the Pandemic Practices Working Group of the Commission to Reimagine the Future of NY Courts² has been engaging in broad, statewide outreach in order to hear from stakeholders about which COVID-19-related court developments, practices and protocols are working or not working, and which need further examination. That Group is in the midst of conducting remote listening sessions and public hearings, with public notices circulated far in advance of hearings, and video, testimony, and transcripts posted on a dedicated website.

We renew the offer in our September 29, 2021 letter to host a public symposium which would engage a broad range of stakeholders, present a broad range of positions and alternatives, and create the space for dialogue informed by expertise and evidence. We also offer again to convene focus groups of relevant stakeholders – particularly those whose interests and opinions might otherwise not be fully voiced – to insure that your deliberations take into account their perspectives, interests and insights.³

² New York State Unified Court System, *Pandemic practices*, <https://ww2.nycourts.gov/reimagine-the-future/pandemic-practices.shtml>.

³ In our Sept. 29, 2021 letter, the Council on the Profession volunteered to convene a public symposium to bring together diverse viewpoints to present potential critiques and reforms of the Bar Exam. Such a symposium (which could easily be a multi-part series) could also engage other relevant stakeholders (e.g., policymakers, members of the public, judges, etc.) and give those stakeholders the opportunity to ask questions and present ideas. Second, we offered to coordinate and host focus groups about the future of the Bar Exam. We suggested that these focus groups be curated into different pockets of relevant stakeholders. We mentioned, for example: (1) recent law school graduates, (2) recent women law graduates, (3) second career lawyers, (4) foreign-trained LL.M. graduates, (5) first generation lawyers, (6) Black law school graduates, (7) public sector graduates, and representatives from (8) in-house, (9) firm, (10) non-profit, and (11) government practice settings, and (12) members of the State or Federal judiciaries (among other potential constituency groups). Needless to say, these groups will have vital, and different, perspectives on the Bar Exam—its strengths, its weaknesses, and its areas of opportunity.

Simply put, the method by which we admit attorneys to the bar is a matter of broad importance. Accordingly, this is a situation where the process matters as much as the outcome. That is, it is important not only that New York State adopt the “right” approach—meaning, the best possible evidence-based assessment metric to ensure the admission of competent attorneys—but also that the legal community and those it serves have broad confidence in the method by which that result was reached.

II. SUBSTANCE

While we are working on our response to your specific questions, we here set forth the pillars on which we believe the lawyer licensure process should be based and against which it should be measured:

- Protection of clients and the public.
- Elimination of disproportionate impact by race, gender, disability, and socioeconomic status so that equitable access to the profession can be fully realized.
- Increase access to justice.
- Provable validity through relationship to evidence-based determination of skills and knowledge required for entry-level competent practice.
- Decrease cost, resources, and lost time of applicants.
- Fair, efficient, reliable scoring and evaluation.
- Maximize portability for admission to and from other states.
- Least cost to state.
- Continued and continuing evaluation of the efficacy of the process.

We look forward to continuing our engagement with your Working Group, redouble our offer to assist in engaging others in the process, and invite any further questions or consultation.

In sum, we urge the Working Group to move forward on a timeline that permits a robust, transparent, and inclusive process and the thorough study and deliberation that these questions – central and critical to the future of the profession—demand.⁴

⁴ It is worth noting that a new Chief Judge is likely to take office before the end of the year. Accordingly, it would seem to make sense that the process of assessing the Bar Exam should be taken slowly to allow that individual to offer their perspective before essentially receiving a “final” recommendation from the Working Group.

Respectfully,

Mary Lu Bilek, Co-Chair
Melissa Colon-Bosolet, Co-Chair
Council on the Profession

Kevin Eli Jason, Co-Chair
Kathleen Rubenstein, Co-Chair
Civil Rights Committee

Katherine Rose Carroll
Disability Law Committee

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

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