



November 1, 2022

By Email

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. We write together with the City Bar’s Committee on Civil Rights and its Office of Diversity, Equity, Inclusion, and Belonging.

This letter responds to a request from the Working Group that the City Bar provide its views on a range of important issues related to the future of the bar examination. We understand that the Working Group intends to complete its recommendations by the end of this fall, and therefore we want to ensure that we provide our views in a timely manner. That said, and as we communicated in our letter dated September 21, 2022¹, we would recommend that the process be continued and broadened to ensure that wider ranges of perspectives from all the relevant stakeholders are heard.

In our communications over the past year, we have highlighted the importance of a robust and inclusive process and the values and benchmarks critical to a lawyer licensing system that

¹ <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/future-ny-bar-exam-working-group-request-initial-response>

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.

reflects and promotes principles of justice.² Our September 29, 2021 letter, in particular, outlined the Council’s serious concerns about the potential negative impacts of an exam focused on New York law that retreats from New York’s recent adoption of the Uniform Bar Exam (“UBE”).

Recently, you wrote seeking our thoughts on several specific issues. We appreciate your outreach and hope that this input - and the input of the other groups we hope that you are consulting (e.g., the identity-based bar associations, law school deans, recent graduates, key leaders from other states, etc.) - will be helpful as you continue to consider these critical issues. In particular, you sought our input on these questions:

- (1) whether New York should continue to rely upon the 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;
- (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.

We will address these questions thematically:

Questions 1 and 5: Whether New York should continue to administer the UBE (question 1) and comments on the NextGen bar exam (question 5)

As you are aware, the NCBE will offer the UBE only until 2025. The UBE will be replaced in 2026 by the NextGen Bar exam. We believe that New York should continue to administer the UBE. Based on information that we have so far, we believe that NY should adopt the NextGen bar exam once it is released.

We are supportive of the NextGen exam because it is a test that focuses on skills more than rote memorization, which has been shown to be a more effective way of assessing competence. We are aware that, in creating the NextGen exam, the NCBE has engaged in an extensive, multi-year study to determine the skills and knowledge new lawyers need. The NCBE has invested millions of dollars in the development of a psychometrically designed test to reflect those skills, and now has the evidence that is necessary to develop a valid and reliable test. As a result of this work, there will be, for the first time, a good measure of what constitutes competence for new lawyers. If rolled out as planned, the NextGen exam will protect the public, ensure fairness to examinees, and therefore protect against legal challenges.

² We refer to our letters to the Court of Appeals and the Working Group dated October 23, 2020, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/examining-the-future-of-the-new-york-bar-examination>; September 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 February 15, 2022, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/covid-safety-protocols-for-february-2022-bar-exam-recommendations>.

As an educational matter, the NextGen exam is also consistent with overall trends in legal education over the past two decades. Law schools in New York and elsewhere increasingly focus on training students in rigorous analysis and application of law to fact, rather than memorization of particular rules, holdings, or state-specific rules. The bar exam should mirror, as closely as possible in an artificial setting, the way lawyers recall, find, and use the law in practice: recalling and applying foundational principles, standards, and legal terms and then using legal research to discover or confirm the precise and current legal rules and exceptions.

It is our view that sticking with the UBE and then adopting the NextGen exam is in the best interests of the public and the graduates who will take the bar. Because the NextGen exam will be informed by rigorous scientific research, we predict that a majority of states will adopt it. New York lawyers should have the benefit of the portability option.

Question 2: The best method of formulating and administering an exclusive New York Law Exam (“NYLE”)

Should New York choose not to adopt the NextGen exam, New York would have to perform its own study to determine what constitutes competent practice for new lawyers in New York State.³ That would be both expensive and time-consuming. Thoughtful test design and psychometrically developed questions are critical to developing a fair exam that accurately tests competence.

Subject to our response to Question 3, we believe that any New York Law Exam should be relatively short and should not comprise a significant portion of an individual’s total examination score. While we believe more research is needed on what the substance of such an exam should be, our initial view is that the NYLE should focus on general information about the New York State legal system, such as the hierarchy of state courts and the primary sources of procedural law. It should not get lost in the weeds of testing the minutia of local civil and criminal procedure, nor the details of state-specific causes of action. Our view, consistent with our endorsement of the NextGen exam, is that the bar should generally test core lawyering skills and foundational concepts rather than an applicant’s ability to memorize rules and exceptions that are quickly and easily found through legal research.

Question 3: The possible structure of an examination that would consist of some combination of the UBE and NYLE

Adding a NYLE to the UBE (and eventually to NextGen)—whether in a single exam or in a separate “New York day”—would increase the costs of bar preparation for exam takers, for no great benefit. We therefore do not believe there should be any New York law “combined” into the UBE or NextGen.

³ More specifically, if the Working Group finds that some testing of New York law is necessary, New York would have to find a way to engage in the same type of detailed study that the NCBE has undertaken.

Still, there is value to exposing new lawyers to state-specific law. In our view, CLEs are the best ways to accomplish that goal. For example, New York’s Bridge the Gap programs are a better route to ensuring basic familiarity with New York law. Bridge the Gap programs allows lawyers to learn while employed, rather than adding to costs of bar exam study during the summer after graduation. These CLEs are also taught by actual practitioners, giving new attorneys the chance to learn New York practice directly from experienced attorneys rather than from bar exam preparatory materials. Rather than test applicants during an exam, new attorneys in their first two years of practice could be required to take a certain number of CLE credits on New York-specific law. This scheme would fit nicely into current regulations on requiring new attorneys to fulfil certain types of CLE categories upon their admission.

Question 4: Potential alternative pathways to bar admission that could include some form of diploma privilege coupled with supervised clinical practice experience

We encourage the Working Group to draw on learning from other states, such as Oregon, about alternatives to the bar exam. Any alternative pathway should take account of the following points:

1. The alternative pathway should be available to *all* graduates who wish to practice in New York, not just to graduates from New York law schools. We remind the Working Group that New York, more than most other states, draws new attorneys from across the country. It is critically important that graduates from law schools outside of the state are able to qualify for any “alternative” pathway without any additional hurdles.
2. In formulating an alternative pathway, consideration should be given to the financial impact on law schools. We do not think it wise to add a path that requires law schools to significantly change their curriculum or bear significant added costs (e.g., hiring new faculty). Curriculum requirements, if any, should build on programs that law schools already have in place, such as existing in-house and field clinics, which are subject to the ABA’s rigorous rules and requirements. For example, New York should not create an “alternative” pathway based on an applicant taking a New York-law specific course in law school. Not all schools have the faculty to teach such a course, particularly in schools outside of New York. Moreover, this could significantly add to the burden of the court system in auditing individual students’ transcripts and auditing syllabi.
3. Care should be taken to ensure that graduates who take this path to admission are not stigmatized. An attorney who joins the bar through an “alternative” pathway – one that requires demonstrated competence in an actual practice setting -- should be treated and recognized no differently from one who has taken an exam.
4. More research is required on the benefit of pathways that entail post-graduate employment. Any such pathway that entails post-graduate employment should involve *paid* employment (as opposed to apprenticeships, fellowships, or post-grad internships) and be part of the regular hiring of graduates for post-graduation full-time employment.

We appreciate the Working Group's request for our views and are more than happy to elaborate on any of the points expressed above through further written comment or through a meeting. We thank you for your time to these critically important issues for the future of the legal profession in New York State.

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

Tanya Martinez-Gallinucci
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Contact

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