



Staff Memorandum

HOUSE OF DELEGATES Agenda Item # 9

REQUESTED ACTION: Approval of the report and recommendations of the Task Force on the New York Bar Examination.

The Task Force on the New York Bar Examination was appointed in 2019 to review the impact of New York's adoption of the Uniform Bar Examination on applicants, newly admitted attorneys, members of the bar, the courts, and diversity in the profession. Its report was approved by the House of Delegates in April 2020. A second report, relating to the impact of COVID-19 on the July 2020 administration of the bar examination, was prepared and considered simultaneously with the first report; it also was approved by the House in April 2020.

The Task Force's third report is attached, assessing the remote administration of the exam and the long-term future of the New York bar examination, particularly given the National Conference of Bar Examiners' proposed new examination.

The report will be presented at the June 12 meeting by Task Force chair Hon. Alan D. Scheinkman.



NEW YORK STATE
BAR ASSOCIATION

Third Report and Recommendations of the **Task Force on the New York Bar Examination**

June 2021

The views expressed in this report are solely those of the Task Force and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

I. BACKGROUND

The Task Force on the New York Bar Examination (the “Task Force”) was formed in April 2019 by then-President Michael Miller to investigate and report on the impact of New York’s adoption of the Uniform Bar Examination (the “UBE”) on applicants, on the qualifications and relevant legal knowledge of newly admitted New York attorneys, on potential employers, on members of the Bar, on the court system, and on diversity in the profession.

The Task Force delivered a Report (the “First Report”)¹ on March 5, 2020 which was approved by the Executive Committee on April 3, 2020 and adopted by the House of Delegates on April 4, 2020.² The key recommendations made by the Task Force in its First Report include:

- Eliminating the New York Law Examination (the “NYLE”);
- Requiring the passage of a rigorous examination on New York law as a prerequisite to admission to the New York Bar;
- Undertaking an independent psychometric analysis on the grading and scoring of the UBE;
- Requiring that law graduates who intend to practice exclusively in New York take (i) the Multi-State Bar Examination component (the “MBE”) and the Multistate

¹ Report of the New York State Bar Association Task Force on the New York State Bar Examination, March 5, 2020 (available at <https://nysba.org/app/uploads/2020/04/Report-of-the-NYSBA-Task-Force-on-the-New-York-Bar-Examination-amendment-1.pdf>).

² The First Report was endorsed by, among others, the New York County Lawyers Association, the Brooklyn Bar Association, the Nassau County Bar Association, the Erie County Bar Association, the Bronx County Bar Association and the Onondaga County Bar Association.

Performance Test component (the “MPT”) of the UBE; and (ii) a rigorous New York-based examination;

- Affording those law graduates who do not intend to practice in New York the opportunity to take the UBE so that they could have portability;
- Considering a New York Law Certification program under which students who graduate from law schools accredited by the American Bar Association (the “ABA”) with enough credits in courses with New York law content, earned with sufficient grades, would be permitted to forego the Bar Examination entirely; and
- Considering a program under which students who spend significant time during their second and third years of law school in supervised law practice in New York, and whose activities are monitored and graded by law school faculty, gain admission without examination.

Just as the First Report was being presented to the Executive Committee and the House of Delegates, the COVID-19 pandemic struck New York with full force. On March 7, 2020, Governor Andrew M. Cuomo issued an Executive Order declaring that a disaster emergency existed in New York State due to the novel coronavirus. On March 16, 2020, by order of Chief Administrative Judge Lawrence K. Marks, all courts of the State were limited to essential operations only. Recognizing that the pandemic was impacting the legal profession, law schools, and law students in unanticipated ways, then-President Henry M. Greenberg requested that the Task Force consider the impact of the public health crisis upon the July 2020 administration of the Bar Examination.

The Task Force issued a Second Report (the “Second Report”)³ on March 30, 2020, dealing with the Coronavirus and the Administration of the Bar Examination. The Second Report was presented to the Executive Committee and to the House of Delegates simultaneously with the First Report. Among the salient recommendations contained in the Second Report were:

- The July 2020 Bar Examination should be postponed, and the examination should be administered proximate to Labor Day 2020;
- The use of “student practice orders” should be expanded to give law graduates the opportunity to commence the practice of law without further undue delay in the event the Bar Examination could not be timely administered;
- The Court of Appeals should grant a general waiver of distance-learning limitations for all ABA-accredited law schools for the Spring 2020 semester;
- Online testing should not be implemented; and
- Law students should not be admitted based solely upon their having graduated from law school, *i.e.*, there should not be a “diploma privilege.”

As President Greenberg informed both the Executive Committee and the House of Delegates, the Court of Appeals adopted our recommendations within 48 hours, although, as will be discussed, some of the recommendations were overtaken by subsequent events. New York, and many other states, were unable to administer the Bar Examination on an in-person basis in September 2020 as we had hoped. Due to capacity constraints and uncertainty as to whether the

³ Report of the New York State Bar Association Task Force on the New York State Bar Examination, March 30, 2020 (available at <https://nysba.org/app/uploads/2020/03/Second-Report-of-the-Task-Force-on-the-New-York-Bar-Examination-April-2020.pdf>).

Bar Examination could be administered at all, applicants in some UBE states were encouraged to register for the Bar Examination in other UBE states.

Conflicts emerged as various states promulgated rules to restrict the pool of law graduates who could sit for the Bar Examination in their jurisdictions. As bar authorities struggled to devise an appropriate means for allowing 2020 law graduates to enter law practice, many law school deans and faculty, and thousands of law students, advocated for the adoption of a “diploma privilege,” meaning that law school graduates could gain admission without examination solely based on having graduated from a law school. Diploma privilege legislation was introduced in the New York Legislature.

The National Conference of Bar Examiners (the “NCBE”) agreed to produce a scaled-back iteration of the Bar Examination to be remotely administered in October 2020. Because the NCBE would not scale this unique examination as it customarily does, grades were not inherently portable, though many states banded together to grant reciprocity by agreement. The efficacy of the October 2020 remote examination was publicly questioned both before and after its administration.

The emergency created by the pandemic highlighted the vulnerabilities of a national testing regime. In June 2020, when the NCBE announced that it would allow jurisdictions to administer an October online exam as a precaution, it stressed that the online test would not be considered a UBE and thus would not offer candidates the same score portability between jurisdictions.⁴ In doing so, the NCBE also relieved itself of grading responsibilities.⁵

⁴ See *Daily Coronavirus Update: NY To Allow Transfer of Remote Bar Exam Scores*, Christian Nolan, NYSBA (Aug. 18, 2020), <https://nysba.org/daily-coronavirus-update-ny-to-allow-transfer-of-remote-bar-exam-scores/>

⁵ *Id.*

As a result, individual states were left to reach agreements with other states to accept their candidates' scores and grade the exams on their own. Additionally, several states initially made it clear that they would not allow New York residents to take the Bar Examination in their jurisdictions and limited the number of potential test-takers. Simultaneously, law school deans and students in other states objected to New York's efforts to limit the number of people it tests. Students moved between various jurisdictions -- not because they really intended to practice there -- but to take advantage of what they perceived to be the most favorable testing opportunities. States, including New York, encouraged this.⁶ When New York was still endeavoring to pursue an in-person September examination, it warned bar applicants that it might not be able to administer an examination at all and that they should look to other states for test seats.

These breakdowns make it clear that portability and reliance on the NCBE—the main reasons for adopting the UBE—are not guaranteed under the current bar exam format. New York, as a leading state which tests some 20% of all bar applicants, is particularly vulnerable.

At the request of President Scott Karson, the Task Force remained engaged with respect to the issues relating to the Bar Examination. President Karson charged the Task Force with the task of updating the First and Second Reports to consider the significant developments that occurred over the prior year. President Karson also requested that we study and report on the responses to the First Report made by the New York State Board of Law Examiners (“BOLE”) and by the NCBE.

⁶ Letter from Hon. Janet DiFiore, Chief Judge of the State of New York Court of Appeals, to Deans of New York Law Schools, dated April 30, 2020. In her letter to the deans, the Chief Judge stated it would be possible to seat only a fraction of the over 10,000 candidates that typically sit for its bar exam in the summer and, therefore, “all candidates are encouraged to consider sitting for the UBE at a later date or in other jurisdictions that may be better positioned to accommodate them at this time.”

The Task Force met several times over the past year to consider and evaluate both the short-term and long-term concerns with the Bar Examination. The Task Force monitored developments with the administration of the 2020 Bar Examination and the promulgation of student practice orders. The Chair of the Task Force participated, along with members from the Committee on Legal Education and Admission to the Bar, in a virtual forum with law students to discuss the student preference for diploma privilege and student concerns with the examination process and administration. The forum, organized by NYSBA President Scott Karon, provided a productive and useful exchange of ideas and information, and discussions with students, both virtually and via email, continued thereafter.

The Task Force evaluated the remote administration of the Bar Examination in October 2020 and has monitored the plans for the administration of the Bar Examination in February and July 2021.

The Task Force continued to focus on the long-term future of the Bar Examination, receiving a detailed presentation on a possible new New York examination from Professor Deborah Jones Merritt of the Moritz College of Law of The Ohio State University, one of the leading national experts on bar examination. Professor Merritt personally briefed the Task Force on her October 2020 report, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence*, a work undertaken in collaboration with the Institute for the Advancement of the American Legal System. The Task Force has reviewed and discussed the Overview of Preliminary Recommendations for the Next Generation of the Bar Examination issued by NCBE in January 2021 (“Preliminary NCBE Recommendations”).

Having completed these activities, the Task Force herewith renders its Third Report. To avoid undue repetition, familiarity with the First and the Second Report is assumed.

II. UPDATED AND REVISED RECOMMENDATIONS

The Task Force reaffirms its central recommendation that applicants for admission to practice law in New York be required to demonstrate basic knowledge of New York law. It remains our view that, if passage of a Bar Examination is either the exclusive, or an alternative, pathway to practice in New York, that examination should include a rigorous test on matters of New York law. We strongly believe that persons seeking admission to practice law in New York must be required to demonstrate that they are able to do so competently. Given the unique complexities of the New York legal landscape, including an elaborate court structure, a complicated civil practice code, and distinctive rules governing evidence, family law, and trusts and estates, among a myriad of legal principles unique to New York, it is not enough that an applicant show competence solely with reference to the “law of nowhere.” Public protection requires that a person licensed to practice in New York demonstrate a basic working knowledge of key New York legal principles and concepts. Ironically, 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.

In the First Report, we expressed the belief that the development of a new New York Bar Examination could be undertaken either in conjunction with ongoing national bar-examination reform or as an entirely New York-centric enterprise. The possibility of working together with the NCBE to place a meaningful New York examination alongside an existing or revamped MBE has since been effectively foreclosed by the NCBE.

The Preliminary NCBE Recommendations contemplate the elimination of the present UBE and its replacement with a new test that further deemphasizes major aspects of state law. The new examination would no longer directly test family law, trusts and estates, secured transactions, and conflict of laws. The new examination would not consist of separately graded components, as the MBE, the MPT and Multi-State Essay Examination (the “MEE”). Test takers would take an integrated test which would resemble the existing performance test. The examination would still be administered over two days. However, a candidate would receive only a single score. The NCBE’s new examination would incorporate more material provided by the NCBE itself. The NCBE has advised that it will take four to five years to develop the new examination to allow time for law schools and law students to prepare for it. The NCBE would offer the new test twice a year, to be taken by law school graduates.

Of almost as much importance as the content of the proposed new NCBE examination is the format. The NCBE proposes that, while the examination would be proctored in-person, the examination would be delivered to, and completed by, test takers on computers without any hard copy distribution. We support the return to an in-person, proctored test as soon as public health conditions reasonably permit. There are serious issues with remote proctoring undertaken by facial recognition software. We are in complete agreement with the recent statement by the Oregon State Board of Law Examiners that “an-person exam provides the fairest and most equitable exam for all applicants.”⁷

On the other hand, putting aside our reservations as to the content of the test, we have grave concerns with the exclusive administration of a computer-based test. Even taking away

⁷ Statement of the Oregon State Board of Law Examiners, issued March 26, 2021, available at: <https://www.osbar.org/docs/admissions/2021-03-26BBXStatementJuly21Exam.pdf>.

the issues posed by on-line proctoring, there are serious questions as to the fairness of a test delivered and answered solely by computer. While we have no quarrel with allowing test takers to use computers to answer the test questions on computers, it is a very different concept to both: (a) require candidates to use only computers to view the test questions and materials; and (b) require, rather than permit, the answering of questions on computers.

Exclusive use of computer-based examinations may be unfair to persons with cognitive disabilities; indeed, aspects of a computer test, particularly performance questions, may be daunting for anyone (including non-disabled persons) to answer on a computer, without access to physical copies of test material. Ironically, the NCBE is proposing to increase the portion of the examination that consists of performance questions -- thus emphasizing the aspect of the examination that may be the most challenging to deal with solely in digital form. Moreover, unless applicants are to be given standardized computer equipment to use during a digital examination, applicants with better, more-up-to-date computers may have advantages over applicants with older, slower, and less efficient computers. The timed examination could become more of a test of one's computer skills than of one's legal knowledge.

The NCBE has left open whether its new examination would be administered at test centers and has not addressed whether candidates testing at such centers would be provided with, and required to use, the center's computers. We note that, in response to our suggestion that BOLE administer the New York Law Examination at test centers, BOLE stated that doing so would present significant challenges. It anticipated that there may not be enough test center capacity to host the number of candidates and that cost would be an issue.⁸

⁸ BOLE July 2020 Response to First Report at 19.

While we recognize that these concerns may be addressed, and technology is constantly advancing, we would not make the iron-clad commitment, as NCBE does now, to shift to a digital only test. Whether the format of a Bar Examination should be exclusively digital is a matter that requires much more study and thought. There are scientific studies indicating that reader comprehension is less when reading is done on some computer screens, as opposed to paper or some other forms of electronic presentation. Although the use of a digital examination was necessary in New York during the pandemic as an emergency measure, it should not become the routine absent appropriate assessment of its impacts on bar applicants and of its essential fairness. That assessment has not been made. Remote administration occurred only twice, once in October 2020 and once in February 2021. The October 2020 administration was not even of a full-bore UBE. The impact of using remote administration needs to be examined before it becomes the norm.

Additionally, as set forth in Section XIV, *infra*, NCBE has refused to meaningfully address our concerns about the way the UBE is scored. As discussed at length in the First Report, there are serious issues with NCBE's opaque scoring process, particularly as applied to examinees across state jurisdictions. We pointed out that the same person may be found "minimally competent" to practice law in one UBE jurisdiction and "not minimally incompetent" in another, even though it is the same person with the same skill level writing the same exam. BOLE acknowledged "a theoretical possibility that a candidate might receive different scores in two different UBE jurisdictions."⁹ And NCBE confirmed it: "[i]t is true that an examinee could get a different raw score on the written portion of the bar exam depending on which jurisdiction she sat

⁹ BOLE Letter, Appendix A: *Letter to Presiding Justice Alan D. Scheinkman*, New York State Board of Law Examiners, at 16 (Dec. 16, 2019).

in.”¹⁰ However, NCBE has refused to identify any means for correcting for this or give a logical reason for why such a bizarre result is acceptable. The NCBE has not indicated that it will change any of its scoring practices for its new examination.

We believe that the Bar Examination should be used to evaluate whether an individual possesses minimum competency for law licensure -- not whether that individual has knowledge that is stronger or weaker than another. Under the NCBE’s scoring process, a person can be the “strongest of the weak” candidates and still be found to be competent to practice law -- *vice versa*, someone can be the “weakest of the strong” candidates and still be found not competent to practice law. We continue to object to the NCBE’s scoring which may result in the grant or denial of a law license on grounds other than a determination of individual competency. This system renders the Bar Examination arbitrary and unfair.

Unfairness is enhanced by states setting their own, and different, passing scores, with the result that a candidate’s score can be considered a “pass” in one state but a “failure” in another, even though the same test and scoring system are used. Nine different cut scores are used by the various UBE states, ranging from a high of 280 in Alaska to a low of 260 in Alabama and four other states. As one law professor has put it, what is it about the practice of law that requires attorneys to score more points in one state than in another, though the content of the test is the same.¹¹

¹⁰ NCBE Response to First Report at 14.

¹¹ Skolnick, Bar Exams May Soon Be Easier to Pass, as States Eye Changes, March 29, 2021, available at: <https://news.bloomberglaw.com/business-and-practice/bar-exams-may-soon-be-easier-to-pass-as-states-eye-changes>.

Because of the NCBE's decision to plough ahead, New York now has a stark choice to make. If it does nothing, it will be stuck with whatever new examination the NCBE chooses to offer. Law schools and law students will be shifting their curricula to prepare for the new NCBE test. Since the UBE and its various components will be disappearing, states that are presently dependent on the UBE must act now to separate and create their own examinations or else be left with no choice but to use the revamped test constructed by the NCBE.

This is a far different circumstance from when New York adopted the UBE. When New York adopted the UBE, its form and content had been used in other jurisdictions and, for better or worse, New York knew what it was getting. The new NCBE examination is a work in progress and, unless New York acts now, it will have no choice but to accept whatever final product emerges from the NCBE.

We propose that New York use the four-to-five-year period to develop its own new New York Bar Examination and allow law schools, law students, and bar preparation courses, to prepare for the new New York test. We also believe that, through its proposed New York test, New York would rapidly become a national leader and many states would grant reciprocity to those passing the New York test, thus addressing student interest in portability while avoiding the problems associated with the NCBE's grading system and varying state cut scores. The experience during the pandemic reflects that portability can be achieved, not by relying on a putative "national" test, but by states working together to extend reciprocity under appropriate terms and conditions. Since there are only four jurisdictions that are commonly sought out by New York test takers as additional jurisdictions in which to practice (New Jersey, Connecticut, Massachusetts, and the District of Columbia), this task does not seem particularly daunting.

We agree with the NCBE that the Bar Examination needs to be updated to deemphasize rote learning, include more performance-based tests, and probe applicants' legal research, legal writing, and analytical skills. However, we do not agree that these matters should be tested by resort to fictional rules of the mythical state of "Franklin" (the "law of nowhere") but can and should be tested by resort to the governing legal principles of the State of New York. We also do not agree that a shift to performance-based testing should occur simultaneously with a shift to an all-digital examination.

While a new New York bar examination should be the primary pathway to practice, it also remains our view that New York should consider providing two alternative pathways to admission: (a) a pathway for admission through concentrated study of New York law while in law school; and (b) a pathway for admission through supervised practice of law in New York. Attainment of minimum competency to practice law in New York can, we believe, be demonstrated by law school achievement as well as by actual practice experience. An examination is not necessarily the exclusive means to judge minimum competence. Alternative pathways should be considered either as stand-alone alternatives or as complements to a written examination.

As to the first alternative pathway, we believe that an applicant for admission to the New York Bar may demonstrate proficiency in New York law by studying it extensively and successfully. ABA-accredited law schools would be encouraged to offer courses meeting defined criteria as to New York-law based content. For example, a course on New York Civil Procedure would be entirely credited towards a New York law certification, while a course on Evidence may generate partial credit based on the amount of specific New York law content presented during the course. Students would need to demonstrate their knowledge of these

materials by the attainment of a specified minimum number of credit hours and grades. Law schools would be required to maintain and enforce appropriately academic standards to assure that the course of study, and measure of student academic achievement, are rigorous.

Recognizing that not all law schools would make the necessary curricular adjustments and the investment in faculty, we would permit students attending law schools without New York-oriented courses to take New York-oriented courses at those law schools that do.

While we favor the development of a carefully crafted pathway for admission through concentrated study of New York law while in law school, we remain opposed to broad adoption of a diploma privilege by which any law school graduate from any law school, either inside or outside the country, may gain admission to practice in New York without any measurement of academic success or competency.

As to the second alternative pathway, we believe that an applicant for admission may be able to demonstrate proficiency in New York law by practicing it successfully. Students should be permitted, after successful completion of the first year of law school, to engage in supervised practice in New York, undertaking such activities as counseling clients, working with practicing lawyers, participating in court conferences and depositions, and negotiating business documents. These activities would be undertaken in the context of law school internship or externship programs, with a faculty member being responsible to evaluate and grade the student's performance, in addition to supervision by a practicing attorney. Law students would have the ability to create a portfolio of work to be assessed by a faculty member every semester and to provide to potential employers. This practice-oriented program could potentially be either a compliment to, or an expansion, of the existing Pro Bono Scholars Program in which third-year students participate. While the precise contours of this second pathway will need to be carefully

designed, the goal is to produce practice-ready attorneys and increase the legal service assistance available to underserved populations.

As part of the practice pathway, consideration should be given to allowing admission through participation in a Lawyers Justice Corps program in New York.¹² Lawyers Justice Corps programs are open to recent graduates of law schools who obtain jobs with legal services providers. The state determines what type of organizations qualify as “legal services providers.”¹³ Those providers hire recent graduates using their usual hiring practices and criteria. If a provider and graduate choose to participate in the Corps program, the recent graduate begins work shortly after graduation and practices under the kind of supervised practice rules that New York has already adopted.

Each participant in the Corps would commit to working for a full year for their hiring organization. For the first six months of the program, the participant would document their work and meet regularly with their supervisor for feedback.¹⁴ If the participant performs competently and in accordance with the state’s rules of professional conduct, the supervisor would certify the participant for bar admission at the end of that six-month period. If desired, BOLE could hire clinical professors to review the documentation, much as it hires graders for the traditional bar exam.

¹² The Lawyers Justice Corps is a licensing pathway developed by the Collaboratory on Legal Education and Licensing for Practice, a group of scholars who have studied the bar examination, licensing, and legal education for many years. Professor Kaufman (a member of the Task Force) and Professor Deborah Merritt, who spoke to the Task Force, are both members of the Collaboratory.

¹³ A list of approved placements already exists for the Pro Bono Scholars Program.

¹⁴ The Collaboratory is preparing templates for documentation and feedback that New York could choose to adopt. “Train the trainer” materials may also be available for supervisors participating in the program.

The Lawyers Justice Corps provides a rigorous, real-world test of lawyer competence, while also developing a cadre of new lawyers dedicated to serving underserved and vulnerable populations. Although the program would begin with existing positions at legal services organizations, foundations might provide funding for additional positions. There are also realistic opportunities for government funding in the post-COVID world, which has generated unprecedented demand for legal services within unrepresented communities.

If New York does accept the NCBE's new Bar Examination modalities, we believe that the two alternative pathways will better protect the public from incompetent lawyers gaining admission to the New York bar. We would have little confidence that the takers of a standardized, digitalized national examination, devoid of meaningful inquiries into important matters of state law, could be expected to have the minimum competency to practice law in New York. On the other hand, those who successfully studied New York law for two years or who successfully practiced it would surely meet that standard, if not surpass it.

There is growing recognition that a written examination can assess only some of the foundational knowledge and skills that new lawyers need to possess to practice competently. Written examinations can ascertain familiarity with rules of ethics, understanding of legal processes and sources of law, and the ability to interpret legal materials, among other things. However, no written examination can test listening skills, negotiation skills, seeing the big picture of the client problem, coping with stress, and communicating effectively with others. On the other hand, law school study alone or supervised practice alone will also fail to assess key skills. It may well be that, in the future, new attorneys should be admitted only after passage of both a written exam and completion of one of the two alternate pathways we propose.

As for a new New York Bar Examination, our viewpoint has been informed by a recent study by Professor Deborah Merritt of the Moritz College of Law of the Ohio State University, undertaken in conjunction with the Institute for the Advancement of the American Legal System. That study revealed that new lawyers work for many types of organizations and practice diverse kinds of law. This diversity means that a newly licensed lawyer could enter any of dozens of practice areas. The report made four important findings as to the work of new lawyers:

- State and local law played a prominent role in the work of young lawyers;
- Young lawyers rarely relied upon memorized rules;
- Young lawyers engaged frequently with clients; and
- Most young lawyers assumed substantial responsibility for client matters during their first year, with little or no supervision.

As will be discussed further in this report, the study disclosed that young lawyers were more likely to rely upon state and local law in their work than on federal law. About half reported that they worked exclusively with state and local law; most of the remainder worked with a mix of federal, state, and local law. Some lawyers needed to work with laws of multiple states, and some had clients whose matters involved multiple states. As result, there is a disconnect between what the NCBE tests -- federal law and selected generally applicable legal principles -- and what law new lawyers use -- state and local rules. This mismatch between testing and practice has led some new lawyers to make mistakes while representing clients. While a uniform, generic Bar Examination makes it easier for lawyers who move between states, it does not account for the fact that new lawyers are more likely to apply the laws of individual states -- which are often highly individualistic -- than federal law. The proposed new NCBE exam will only serve to accentuate this disconnect.

In short, the UBE places a premium on subject matter that new lawyers do not use and, to the extent that many law schools orient their curricula to what is tested on the UBE, law schools stress teaching young lawyers material they do not often use and are not teaching young lawyers what they need to know in their early years of practice.

Professor Merritt presented us with a proposal for a new New York Bar Examination, which she developed utilizing the results of her study. Her proposal envisions that New York develop its own examination which would consist of the following principal elements:

1. Two Performance Tests, each of 3 hours duration, based upon substantive principles of New York law (including federal constitutional and statutory principles), which would incorporate more client-centered tasks; these tests would be predicated upon a library of New York materials to be provided to the candidates;
2. A Research Test of 3 hours, in which candidates would be required to participate in research exercises based on New York law, with responses, derived from their research, taking the form of either short answers or multiple choice selections;
3. A multiple-choice test of New York Practice and Procedure in which candidates would be required to respond to 75 questions in 3 hours in a closed book format.

In a performance test, candidates are given a client file and a library file and are assigned to prepare a written document, such as a memorandum to a client or a legal brief. These tests closely approximate the entry-level work that young lawyers do. A research test would assess the ability of candidates for bar admission to do basic legal research – a key skill that must be found in the new lawyer’s toolbox. Lawyering is not always about knowing the answer off the bat; it is as much about knowing how to find the answer. A test on New York practice and procedure is vital because this is the most common subject for new lawyers.

We generally support Professor Merritt’s proposal and believe it provides a strong foundation upon which to construct the new New York bar examination. We call upon the New York Court of Appeals to support the development of a new New York test and to appoint a

working group to design the examination. In undertaking the design of the test, the working group should consider some modifications to Professor Merritt's proposal.

While we support the idea of performance tests, we are concerned that if students perceive that, when they take the bar examination, they will be provided with a library file of New York materials, they may not study the New York material during law school. Bearing in mind that most young lawyers in New York will be working with New York state and local law, performance tests must be carefully developed to ensure that law students will study New York legal principles during law school. For this purpose, we define New York legal principles to mean not just New York law but, more broadly, as the legal concepts of which New York lawyers should have a basic familiarity, even if those concepts are not derived from New York state law. Those concepts may include legal principles unique to New York, New York variations on generally accepted legal principles, and federal principles.

Regarding federal principles, we have pointed out that the UBE does not test subject matter that is important to newly admitted attorneys, such as health law, immigration, and cybersecurity. In designing its own test, New York needs to account, not only for state principles but also for emerging federal laws that young lawyers will be utilizing in their formative years. To make sure that the new examination reaches as many subject areas as possible, it may be appropriate to substitute traditional essays for one of the performance tests.

We are concerned that two lengthy performance tests may not be able to provide the requisite coverage of the broad areas of law that new lawyers should be expected to have familiarity. We agree that 90-minute test sessions are too short; however, we are concerned that a three-hour test session devoted to one performance test may be too long and that it may be appropriate to shorten each session to provide more questions that cover more subjects. While

requiring a procedure examination will encourage law schools to hire faculty to teach New York procedure and law students to study it, we want to also encourage instruction and study in important substantive New York law subjects, such as family law, trusts and estates, conflicts of law, landlord/tenant and the law of employment and discrimination.

In the First Report, we proposed that the new examination include four essays, each of 30-minutes duration. These would test New York Civil Practice, No-fault insurance, Workers' Compensation, Family Law, Professional Ethics, Trust and Estates and other subjects. We noted that it would not be difficult to combine subjects, for example, to combine a civil practice question with a family law or legal ethics problem. A single essay could cover three or four issues so that even four essays might reach as many as 16 subject areas. We would therefore consider modifying Professor Merritt's proposal by dropping one of the performance tests and substituting essay questions.

We are concerned that a closed-book, multiple choice examination on New York civil procedure may inappropriately encourage memorization and rote learning and perpetuate the discriminatory impact that the use of multiple-choice tests has on women. We agree that it is important to test prospective New York lawyers on New York civil procedure. Too many lawyers have been admitted in New York without knowing much, if anything, about our complicated court system. However, we would consider the use of either short-form or traditional essay questions on the procedural examination and permitting test takers access to statutory materials during the test.¹⁵

¹⁵ We note that the possibility exists that if the NCBE retained the MBE, either in its present form or in a modified fashion, it could be used as a basis for working with other jurisdictions to achieve reciprocity.

We urge the Court of Appeals to appoint a working group of law school faculty and practitioners, aided by a professional mathematician, to work with BOLE to develop the new test and to design the proposed alternative pathways to admission. The working group should formulate a test structure that is fair and equitable, seeks to encourage the study of New York law, promotes New York law within the broader legal community, and assures that attorneys admitted to practice here are competent to do so, with reference to the laws that they will be working with. In achieving these goals, the working group should assess both question formats (*e.g.*, performance tests versus essay questions) and testing conditions (*e.g.*, open or closed book) to ascertain the best formats for testing appropriate familiarity with New York law, taking into account a broad spectrum of perspectives on these complicated issues.

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 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.

We advise against shifting to an examination that is administered solely by computer, at least at the present time. While we would give candidates the option to use computers for all portions of the test, and computers would have to be used for the research component of the test, we would give candidates the option of completing as much of the examination as they wish in traditional pen-and-paper format. If nothing else, test takers should be able to read the test material in hard copy. While the NCBE would move to an exclusively computer-administered examination, we believe that the issue of computer-based exams requires much more study. We

are concerned that all candidates be on an equal footing and the Bar Examination not become a test of computer, rather than legal, skills.

At the 2021 midyear meeting of the American Bar Association House of Delegates, a resolution was adopted urging the bar admission authority of each UBE jurisdiction to amend its bar admissions rules to provide that the minimum number of years an applicant must have been primarily engaged in the active practice of law to be eligible for admission by motion be equal to the maximum age of a transferred UBE score that the jurisdiction has adopted for purposes of admission by UBE score transfer. In the First Report, we noted that UBE scores are portable for three years, while an attorney could waive into the state without examination after five years of practice. We are unaware of any principled policy reason for a two-year gap, between the end of the third year of portability and the beginning of the sixth year of practice, during which an attorney cannot gain admission in New York without having to take the UBE all over again.

While our proposal would eliminate admission through mere passage of a national examination, in the short-term, the existence of the two-year gap does not appear to serve any useful purpose. Yes, it is true that a UBE score goes stale and the longer a person is away from law school, the less likely it is that the person may be able to pass the test again without study. On the other hand, there is little reason to think that, in general, an attorney with five years of experience is likely to be significantly more qualified by practice than an attorney with three years. However, we reiterate our prior recommendation that attorneys who seek to gain admission in New York based on their admission and practice in other jurisdictions, no matter what the period of years, be required to take a course in New York law and pass a New York law test.

III. THE OCTOBER 2020 REMOTE EXAMINATION

The Task Force, in the Second Report, recommended that the July 2020 Bar Examination be postponed to a date in September 2020 proximate to Labor Day. The Court of Appeals accepted our recommendation and the NCBE thereafter agreed to provide examination materials for dates in both early September and in late September. BOLE then embarked on efforts to arrange for an early September in-person examination.

In April 2020, it was readily apparent that a September 2020 Bar Examination could not be administered in large venues, such as the Jacob Javits Convention Center, due to both social-distancing restrictions and the utilization of large venues as temporary health care centers. BOLE obtained the cooperation of all law schools located in New York State to provide for the administration of the examination at sites provided by the law schools. Seating priority was granted to the J.D. and LL.M. graduates of New York law schools. Guidance was issued cautioning that seating for the examination in New York could be limited and that candidates should inquire into other jurisdictions where they might be able to take the examination. Deans of out-of-state law schools voiced concerns and objections to these arrangements.

Similar controversies arose in other states which announced limitations on who could sit for the examination. Serious questions were presented as to whether states could effectively restrict eligibility for the limited seats perceived to be available based on residency or law school attended. These disputes would not have arisen prior to the adoption of the UBE. In an environment in which each state administered its own examination, each state would be dealing with only those applicants who truly sought admission within its borders. However, with the advent of the UBE, limitations on who could take the UBE in one state necessarily triggered a cascading impact on other UBE jurisdictions. A person shut out from taking the examination in

one place could seek to take the test elsewhere. Indeed, a central premise of the UBE is that persons who take the Bar Examination in one jurisdiction will seek to transfer their scores to other jurisdictions within three years. The vaunted portability of the UBE, enabling young attorneys to use a single bar examination as a basis for admission to multiple states, was undermined in the face of individual decisions by states to control who got to take the test in their locations, although this was redeemed in part by reciprocity agreements.

While it may be said that a global pandemic is a unique, once-in-a-generation episode that is not likely to recur, the fact remains that in our modern generation, we are experiencing, on a seemingly regular basis, unusual events that were thought unlikely to occur. In February 2021, just shortly before the February administration of the Bar Examination, Texas, a UBE jurisdiction, experienced an unusually harsh (for it) winter storm that entirely disrupted the state's stand-alone electrical grid. As it happens, ExamSoft, which is relied upon to administer remote Bar Examinations, is based in Texas. While ExamSoft expressed confidence that it could fulfill its national responsibilities in connection with the February 2021 examination, the problems with the Texas electric grid gave rise to concern among prospective test-takers, both inside and outside, Texas.¹⁶ It is evident that the possibility existed that if an individual test taker was without power, that test taker (such as a person from New York taking the UBE in

¹⁶See announcement of Texas Board of Law Examiners, available at <https://ble.texas.gov./news.action?id=2323>. The Texas board expressed its understanding that many bar applications were without power or water. It offered applicants the opportunity to defer taking the examination to July, the opportunity to take a makeup examination, and, if an applicant wished to take the February examination at a hotel, reimbursement of up to \$250 for the hotel expense.

Texas) might to try to make alternative arrangements to take the test in another jurisdiction, assuming the registration period was still open.¹⁷

In any event, by mid-July 2020, BOLE had managed to secure a sufficient number of seats as to permit all who had applied to take the UBE in New York in early September to be granted admission. However, around the same time, it became apparent that it would not be possible to administer an in-person examination. On July 23, 2020, the Court of Appeals announced that New York would administer a remote examination on October 5 and 6, 2020. The remote examination would not be the full UBE and would not be scaled by the NCBE. President Karson, on behalf of NYSBA, supported the decision to proceed with a remote examination. While the Task Force had opposed the use of a remote examination in the Second Report, it was recognized that events limited the available options to but three alternatives – a remote examination, broad diploma privilege, or indefinitely delayed admission for June 2020 law graduates. Given these realities, resort to a remote examination was the most appropriate choice. As NYSBA President Karson said at the time: “Chief Judge Janet DiFiore and the New York State Court of Appeals have wisely provided recent law school graduates with a measure of certainty at a time when they face mounting student debt and a slow job market brought on by the coronavirus pandemic... We agree that a remote exam is not a perfect solution, but also concur that the benefits outweigh the potential shortcomings in affording the Class of 2020 with a much-needed path to a law license, which they previously did not have.”

¹⁷ See letter from John McAlary to Member of Assembly Jo Anne Simon, dated February 19, 2021. With the NCBE’s intention to shift to an examination administered entirely by computer, it is not difficult to foresee that unexpected disruptions to electrical, heating, air conditioning, and water systems will create significant obstacles to the simultaneous admission of an examination across the country.

The Court of Appeals and BOLE performed admirably to adapt to the unusual circumstances created by the pandemic. However, the various changes, and announcements, made along the way led to confusion and uncertainty as to who could take the test, how the examination would be administered, when the test would be given, whether the novel means of administration would produce a fair result, and whether the scores would be portable.

Ultimately, the Bar Examination was remotely administered on October 5 and 6, 2020. Candidates were able to take the test in their homes or other locations of their choosing. Recognizing that some candidates might not have a quiet, isolated area suitable for test taking in their home, or that some candidates might not have reliable home internet access, the New York law schools helped those who needed a suitable testing venue.

The number of persons who took the test in New York in October 2020 was significantly lower than is customarily the case. In October 2020, 5,150 persons completed the examination. By contrast, in July 2019, 10,071 people took the test and 9,679 did so in July 2018. Thus, the October 2020 remote examination, which was a substitute for the customary July examination, was taken by only about one-half of the people who take the test in a normal year.

Several factors may account for the dramatic drop off in the number of test takers.

Some candidates reported having made the election to take the test in other jurisdictions. Some jurisdictions administered a test at an earlier date than New York; others administered the remote examination at the same time New York did. In July 2020, an in-person examination was administered in 23 jurisdictions to 5,678 examinees. In early September, when New York was scheduled to administer an in-person test, eight jurisdictions did so, with 1,811 persons taking the test. In late September, five jurisdictions administered an in-person test to approximately 500 examinees. The remote examination in early October was given in 20 jurisdictions to some

30,000 examinees.¹⁸ While it may be impossible to ascertain how many people elected to take an earlier test or take a test in a jurisdiction other than New York, at least some did.

Several candidates reported that they did not wish to take the remote examination due to concerns about the unproven remote technology and the fairness of the result. Others reported having difficulty obtaining accommodations for a disability. The Chair of the Task Force received the following email in late September 2020 from a June 2020 law graduate from a respected out-of-state law school, which sets forth the graduate's reasons for withdrawing from the test:

I decided weeks ago that I would not take this exam, for several reasons. I could no longer afford to study for a test I wasn't sure would happen, via ill-equipped software and with a number of material disadvantages to success. The prohibition on diagramming and the requirement that we memorize the same amount of material for only a fraction of the normal UBE were only the first of several cards stacked against us this year. I think we deserve, and New York is capable of, something better - - or, at least we deserve as good and as fair an exam as the one our predecessors have taken, with ability to annotate questions, paper to use as "scrap", peace and quiet, stable internet, and a modicum of security.

More importantly, though, I have a serious preexisting condition and my health insurance lapsed just before graduation. My employer postponed my start date (to March 1), further delaying my access to coverage (like many others, my employer did not embrace the Court's temporary practice order). To make ends meet and for the sake of health insurance, I decided to withdraw from the October test and get a non-legal job. Now, I am now working - but not as an attorney, even after having worked a combined 12 months in a law firm and another 4 months as a law student counselor, three years of law school, and a life devoted to achieving this dream.

I'm the first in my family of Cuban immigrants to make it this far. I promise you that I will achieve all I've worked so hard to place within my path. This is a roadblock, but I will rise, as I have always had to do.¹⁹

¹⁸*Press Release*, National Conference of Bar Examiners, issued October 7, 2020, available at www.ncbex.org/news.

¹⁹While the Chair of the Task Force urged this individual to reconsider, the person did not take the October 2020 test. However, the Chair was remained in contact with the candidate and reports having been advised that the person is registered for the February 2021 Bar Examination.

Of some interest, the number of takers who graduated from law schools located in New York State did not decline significantly. In October 2020, a total of 3,027 test takers earned their degrees from New York law schools, while in July 2019, that number was 3,513 and in July 2018, it was 3,431. The major reduction in the number of takers was seen in graduates from ABA-accredited law schools located out of state. In October 2020, a total of 1,135 such graduates took the test, while in July 2019, 2,994 did so and in July 2018, there were 3,009 test takers in this category.

The administration of the examination went relatively smoothly. According to NCBE, 98% of the applicants who downloaded the exam files started their exams as planned. Of the balance, only 0.3% had technical issues that required additional action, with the most common problem being user devices that did not meet the minimum published standards. The other 1.7% were “no-shows” or were ineligible to test. ExamSoft reported that most requests for assistance made by examinees were educational in nature, such as verifying that their answer files had been uploaded after the examination.²⁰

In New York, of the 5,167 applicants who downloaded the exam software, only 17 did not successfully complete the examination. It seems possible that at least some of the 17 who did not complete the examination were unable to do so for other than purely technological issues. It is not uncommon for candidates in traditional in-person examinations to leave without completing the examination. Nationally, ExamSoft reported that 98% of the 30,000 candidates who downloaded the examination were able to successfully start the test, with the majority of

²⁰ *Press Release*, National Conference of Bar Examiners, issued October 7, 2020, available at www.ncbex.org/news.

those who did not log in being “no-shows” or persons excluded by bar officials. Only 2% experienced technical issues that required action to rectify.²¹

From reports we have gathered, only about 10% of the test takers sought assistance with technical issues during the remote examination in New York. Similarly, a survey undertaken by members of the New York State Legislature, was completed by less than 500 people²², meaning that fewer than 10% of the test takers completed the survey. It is not unreasonable to assume that persons who had issues were more likely to complete the survey than persons who did not. It is submitted here that, at a minimum, there was not a broad groundswell of complaint following the administration of the test.

Of the respondents to the legislative survey, nearly 59% reported that they did not have any technical issues during the test, while 4.2% reported an internet disruption, 32% reported an issue with the testing software, and about 5% reported having both an internet and a software issue.²³

Most calls to ExamSoft during the examination were simply to confirm that answer files had been received, to otherwise assure that the candidates were proceeding properly, or to instruct candidates on how to use the software.²⁴ According to both ExamSoft and BOLE,

²¹ Coe, *Online Bar Exams Create Flurry of Frustrations Across US*, Law360, October 7, 2020, available at www.law360.com/articles/1317320/online-bar-exams-create-flurry-of-frustrations-across-us.

²² Sloan, *Test Takers Slam New York’s First Online Bar Exam in New Survey*, Law.com, October 16, 2020, located at www.law.com/newyorklawjournal/2020/10/16/test-takers-slam-new-yorks-first-online-bar-exam-in-new-survey/.

²³ *Id.*

²⁴ *See* Coe, *supra* note 21. While the exam software provides an electronic confirmation of receipt of an uploaded answer file, the anxiety experienced by Bar Examination takers induces some to obtain further confirmation.

technological issues were generally confined to those relating to the equipment of the test taker or other issue pertinent to the test taker, as opposed to having been attributable to a systemic failure. In this regard, the percentage of test takers who raised technical issues during the remote examination was comparable to the percentage of test takers have experienced technical issues while using exam software on their own computers during an in-person examination. Such issues may arise because a test taker's personal computer may be outdated or incompatible with the exam software or have insufficient memory. While the technological requirements are publicly disseminated, candidates may not digest that information or, lacking means to obtain better equipment, simply have hoped for the best in using their existing computers.

Most of the technical issues that were experienced during the examination were resolved through calls to ExamSoft, just as most technical issues that arise during an in-person exam are resolved through the assistance of an in-person assistant provided by BOLE. ExamSoft reported dealing with more than 1,500 support cases on the first day of the examination and some candidates reported frustration with long waits for assistance.²⁵

There were at least some isolated hitches. In one publicly reported incident, a test taker named Colin Darnell discovered, during an MPT portion of the examination, that the ExamSoft software was not video recording his session. He called ExamSoft and was told, erroneously, that he could finish the test unrecorded. He then called BOLE and was told that an unrecorded test would not be accepted. He decided to withdraw from the test but then tweeted about his experience. After his tweet was widely retweeted, Mr. Darnell received a telephone call from John McAlary, BOLE's executive director. Mr. McAlary advised Mr. Darnell that he could complete the test after the ExamSoft support team fixed the problem by accessing his laptop

²⁵ *Id.*

remotely. While Mr. Darnell was then able to finish the test, the story does not end there. Mr. Darnell was subsequently notified that he failed the test. After he inquired, it was discovered that his first, blank, MPT was graded, not his subsequent, completed one. BOLE then had the second MPT graded and Mr. Darnell was notified that he passed. According to Mr. McAlary, this problem occurred only with this one candidate and BOLE is working with ExamSoft to ensure that the problem will not be repeated.²⁶

Overall, the administration of the October 2020 remote examination went much better than at least some had expected and should be considered successful, given the need to resort to a new way to administer a bar examination, the time constraints under which NCBE, BOLE, and the candidates were operating, and the public health crisis that existed.

The results from the October 2020 remote examination reflect a substantially higher pass rate than is typical. Overall, 84% of all persons who took the October 2020 remote examination passed it. In comparison, the overall pass rate for the July 2019 examination was 65% and the overall pass rate for the July 2018 examination was 63%.

First time takers from New York law schools passed at an 87% rate, while first time takers from out-of-state law schools passed at a 93% rate. These passing rates are somewhat higher than is customary. In July 2019, 85% of first-time takers from New York law schools passed, while 87% of those from out-of-state law schools did so. The increase in the overall passage rate seems to be more attributable to there being fewer foreign-educated takers, and better performance from those who did take the examination, as well as there being few repeat takers. 70% of the foreign law graduate first-time takers passed the October 2020 remote

²⁶*See Man who was told he failed bar exam actually passed, and he blames software*, ABA Journal, January 26, 2021.

examination; in July 2019, 53% did so. In October 2020, there were no repeat foreign law graduates; in July 2019, there were 1,161 of whom only 22% passed. Indeed, while in July 2019, there were a total of 2,155 repeaters, of whom 24% passed, in October 2020, there were only 146 repeaters, of whom 45% passed. Since there were much fewer repeat takers, and repeat takers had a better pass rate, the overall pass rate was not significantly diminished.

The October 2020 remote examination was not scaled by the NCBE and the scores were not directly portable. However, BOLE entered into reciprocity agreements with 11 jurisdictions which permit certain candidates to transfer their scores: Connecticut, District of Columbia, Illinois, Maryland, Massachusetts, New Hampshire, New Jersey, Ohio, Oregon, Tennessee and Vermont. A candidate from one of these jurisdictions who earned a score of at least 266 is eligible to transfer the score to New York if: (i) the candidate graduated from an ABA-approved law school with a J.D. degree and had not previously sat for a bar exam in any U.S. jurisdiction; (ii) the candidate was foreign educated and graduated from an ABA-approved law school with an LL.M. degree and had not previously sat for a bar exam in any U.S. jurisdiction; (iii) the candidate graduated in 2018 with a J.D. degree from an ABA-approved law school and sat for one prior administration of the UBE but who had not sat for more than one prior bar exam in any U.S. jurisdiction; and (iv) the candidate graduated in 2019 or later with a J.D. degree from an ABA-approved law school and had not previously taken the UBE and failed more than two times. Candidates who do not meet one of these four criteria may submit a petition to BOLE for permission to transfer their score.

IV. THE FEBRUARY 2021 AND JULY 2021 BAR EXAMINATIONS

On October 19, 2020, the NCBE announced that it would make a full set of UBE examination materials available for purposes of the February 25-26, 2021 Bar Examination but

permitted participating jurisdictions to choose between an in-person or a remote examination. The Court of Appeals, on October 21, 2020, decided to conduct the February 2021 Bar Examination remotely. While it had originally anticipated that the October 2020 examination would be the only one administered remotely, the Court concluded that the threat posed by the pandemic had not sufficiently abated to permit BOLE to safely conduct an in-person examination. The examination went off as scheduled on February 25 and 26 and, apart from the concerns expressed about the Texas power outage, there was little pre-test public outcry and virtually no publicly expressed complaints. We understand that negative commentary was presented on various social media utilized by candidates. BOLE has declared that the New York February 2021 remote examination was administered successfully and that the results will be released by the end of April 2021.²⁷

On February 2, 2021, the NCBE announced that it would again offer jurisdictions the option to administer the UBE this summer either in-person or remotely. The examination is scheduled for July 27 and 28, 2021 and each jurisdiction will decide which delivery mode it will use. On March 5, 2021, BOLE announced that the July 2021 New York UBE would be administered remotely. BOLE determined to open the examination to all eligible applicants but to cap the number of applications at 10,000. The application period opens April 1, 2021 and continues until either April 30, 2021 or when the 10,000 cap is reached.²⁸ It appears that applications will be accepted on a rolling, first-come, first-served basis.

²⁷ See notice updated March 5, 2021 at <https://www.nybarexam.org> (last visited March 20, 2021).

²⁸ *Id.*

These examinations will be the full UBE and the NCBE will score these examinations, whether remotely administered or not, to permit the scores to be portable among UBE jurisdictions, without the necessity of reciprocity agreements.

V. **ISSUES WITH REMOTELY ADMINISTERED EXAMINATIONS**

The remote administration of the Bar Examination in October 2020 was successful in assuring that candidates had to pass a meaningfully rigorous test to gain admission to the Bar. Implementing a remote examination, in the face of a global pandemic and with the use of technology not previously adapted to this purpose, was a major achievement. There were those who doubted, prior to the examination, that it could be conducted at all or that it could be conducted in a fashion that would be perceived as fair and equitable. Nevertheless, there are significant issues and concerns with remote examinations.

A. The Use of Facial Imaging Technology

Concern has been expressed that existing facial imaging technology, used for identity verification purpose on remote Bar Examinations, adversely impacts persons of color and other discrete groups. Examinees are required to upload photographs of themselves prior to the test and computer cameras on test day match the images to the photographs in order to verify the identity of the test taker. However, critics assert that there are issues with the use of facial recognition technology when verifying the identities of women and nonwhite people.

In August 2019, the American Civil Liberties Union of Northern California released a study in which it applied facial recognition technology to photographs of all 120 members of the California State Legislature. The technology used was one marketed to law enforcement. According to the study, the technology mistakenly matched the faces of one out of every five lawmakers with those in an arrest database. More than one-half of those falsely identified were

lawmakers of color.²⁹ A study by the National Institute of Standards and Technology found that, when conducting database search known as “one to one” matching, many facial recognition algorithms falsely identified African American and Asian faces 10 to 100 times more than Caucasian faces.³⁰ It should be noted that facial imaging technology is different from facial recognition technology in that the former compares a baseline image of a given individual to verify his or her identity as the test taker while facial recognition software compares the image of an individual to a database of facial images.

A 2020 law graduate, Ian To, withdrew from California’s October 2020 remote Bar Examination because the technology failed to identify him. While the Lawyers’ Committee for Civil Rights has demanded that California desist from the use of such technology for the February 2021 examination³¹, California has asserted that insufficient information has been provided to show that its limited use of the technology to verify identifies of bar examinees results in an unlawful discriminatory impact.³²

There is anecdotal evidence of an issue. In early September 2020, a law student of color tweeted that he was unable to complete a mock New York examination because the ExamSoft software did not recognize him. The student reported that the software indicated it could not

²⁹See <https://www.aclunc.org/news/facial-recognition-technology-falsely-identifies-26-california-legislators-mugshots>.

³⁰ See <https://venturebeat.com/2019/12/20/u-s-government-study-finds-racial-bias-in-facial-recognition-systems>.

³¹ See letter dated February 10, 2021, from Noah Baron, Esq., found at <https://lawyerscommittee.org/wp-content/uploads/2021/02/Bar-Exam-FRT-Demand-Letter-to-State-Bar-Final.pdf>.

³² See letter dated February 16, 2021 from James Chang, Esq., found at <https://images.law.com/contrib/content/uploads/documents/400/2021-02-16-Letter-Chang-to-Baron.pdf>.

recognize him because of “poor lighting, even though he was sitting in a well-lit room (which he demonstrated through a photograph). A different student, a woman of color scheduled to take the October remote examination in California, reported that she planned to keep a light shining directly on her face during the two-day examination, a tactic she had learned about through other law school graduates with dark skin.³³ A Hispanic test taker of the October 2020 examination in California received a notice that the ExamSoft software deemed him “not present” during the exams that he completed. He was exonerated of any wrongdoing.³⁴

In December 2020, a group of six United States Senators (Richard Blumenthal, Ron Wyden, Chris Van Hollen, Tina Smith, Elizabeth Warren, and Cory Booker) wrote to ExamSoft regarding a litany of problems with remote proctored examinations. In the letter, the Senators recounted issues with the technology encountered by students of color and students wearing religious dress, such as headscarves. The Senators expressed concern as well with issues confronting students with disabilities, such as software that incorrectly flags their disability as cheating or software glitches that may impede or interrupt their performance. The Senators posed a series of questions, aiming to ensure that virtual testing systems do not leave students behind, particularly students of color and students with disabilities.³⁵

³³ See <https://venturebeat.com/2020/09/29/examsofts-remote-bar-exam-sparks-privacy-and-facial-recognition-concerns/>

³⁴ Skolnick and Holland, Cheating Scandal Aside, New Remote Bar Looks a Lot Like Old One, Bloomberg Law, Feb. 1, 2021, available at <https://news.bloomberglaw.com/business-and-practice/few-fixes-made-to-february-remote-bar-exams-after-cheating-snafu>.

³⁵ Letter dated December 3, 2020 to Sebastian Vos, Chief Executive Officer of ExamSoft.

B. Other Issues with Remote Proctoring

Because the Bar Examination is given without an in-person proctor, proctoring is done remotely. At the beginning of each session, after a candidate has logged in, Exemplify software is used to video and audio record the session. The examinee is required to remove all notes, papers, and other prohibited items (which include mobile phones) from the testing area. A “Monitoring” eyebrow appears at the top center of the examinee’s screen. Examinees are instructed to remain within the camera frame during the test session. Further, examinees are told to periodically check the “Monitoring” eyebrow at the top center of the screen to ensure that their face is visible within the camera frame for the recording.

In the event the software detects an issue with a candidate, the software “flags” the issue for review. Review may result in a determination to fail the candidate or may result in a determination that there was no issue at all or that any issue should be excused. While the number of “flags” issued in New York in October is not known, in California, over one-third of all takers of the remote test were “flagged.”³⁶ Of the 3,000 people “flagged” in California, only 429 were sent notices that they were being investigated for possible rule breaking. In the end, 47 test-takers were implicated in rules violation.³⁷ One California candidate was “flagged” because her eyes may have been outside the view of the webcam for a prolonged period during the test. She was insulted and shocked when she received a notice of the flag and was concerned that she might have to report the notice to the character and fitness committee.³⁸

³⁶ Ward and Moran, *Thousands of California bar exam Takers have video files flagged for review*, ABA Journal, December 18, 2020.

³⁷ Skolnick and Holland, *Cheating Scandal Aside, New Remote Bar Looks a Lot Like Old One*, Bloomberg Law, Feb. 1, 2021, available at <https://news.bloomberglaw.com/business-and-practice/few-fixes-made-to-february-remote-bar-exams-after-cheating-snafu>.

³⁸ *Id.*

Apart from whether individuals view remote proctoring as invasive, candidates have expressed concern and anxiety simply over the prospect of being “flagged”, not to mention actually being flagged. As evident from this discussion, being flagged does not by itself mean that a person has cheated. Rather, it reflects that the software has detected an anomaly which requires human intervention. The Task Force has been advised by BOLE that most flags are quickly resolved.

Flags may be issued because the examinee looked away from the computer for more than an expected amount of time, or because the examinee has a facial tic, or the lighting conditions in the testing area have prevented the computer from clearly seeing the examinee’s face. An examinee may be flagged if another person walks into the camera view, such as a young child entering a bedroom where a parent is taking the test. One person in California was flagged for being on the telephone with ExamSoft tech support when the examinee was having difficulty getting the exam to load on the computer.³⁹ In New York, where the examinee announced to the camera that he or she had an emergency and provided an explanation (including emergency use of a restroom), the Board lifted the flag and excused the temporary absence.⁴⁰

ExamSoft has indicated that it has improved how in-test attachments may be viewed. It is also now providing support for Apple devices using new processors and is implementing other

³⁹ See Pease, Remote proctoring services are invasive, biased and can’t stop cheating, critics say, The College Fix, Feb.18, 2021,, located at: www.thecollegefix.com/remote-proctoring-services-are-invasive-biased-and-cant-stop-cheating-critics-say/

⁴⁰ See letter from John McAlary to Assembly Member Jo Anne Simon, dated February 19, 2021.

user experience improvements.⁴¹ We do not yet have information on whether the facial recognition software fared better when used for the February 2021 test.

C. Impacts on Persons with Cognitive and Learning Disabilities

An applicant for bar admission who has a cognitive impairment that substantially limits a major life activity, reading, may be entitled to accommodation in the administration of the Bar Examination.⁴² A test that is delivered and completed entirely via computer is manifestly different from one that is delivered and completed in paper-and-pen or delivered in paper-and-pen but completed on computer. One author has expressed concern as follows:

Research has found that reading digital content is a different brain process that reading print material. In her 2018 book, “Reader Come Home: The Reading Brain in a Digital World”, University of California, Los Angeles, professor Maryanne Wolf [Harper Collins 2018], revealed that eye movements, sustained focus, and thus deep reading comprehension are different for digesting digital content, such as PDFs or online material.

Across languages, students tend to overestimate their comprehension of digital format, which she attributes to the complex neural networks that underlie comprehending advanced content. For learning-disabled students, these networks are awry and atypical, thus adding processing demands.

Meanwhile, the proverbial jury is out on how other aspects of computer-delivered tests, such as the clicking back and forth between content on different screens, a student’s ability to write or annotate by hand and easily refer to this material, and the shift toward likely increased working memory demands, affect those with attention, working memory, spatial analysis, executive function or visual memory gaps.

Because granular analyses of performance of disabled individuals on computerized tests have not been done, it is premature to assume that computer—delivered formats are equivalent to paper-delivered ones.

Factors such as increased anxiety further complicate the matter, particularly as parameters for using or excusing these new formats are considered

⁴¹ Skolnick and Holland, Cheating Scandal Aside, New Remote Bar Looks a Lot Like Old One, Bloomberg Law, Feb. 1, 2021, available at <https://news.bloomberglaw.com/business-and-practice/few-fixes-made-to-february-remote-bar-exams-after-cheating-snafu>.

⁴² See *Bartlett v. New York State Board of Law Examiners*, 226 F.3d 69 (2d Cir. 2000).

by test agencies. The time delays in advocacy and appeals to test agencies currently complicate the preparation process.⁴³

In two cases, California federal courts rejected claims that the remote October 2020 Bar Examination violated the Americans with Disabilities Act. *In Gordon v State Bar of California*,⁴⁴ three disabled law graduates sued to compel the state bar to accommodate their disabilities by providing paper tests, scratch paper, and bathroom breaks. The court held that these proposed accommodations would impose an undue burden on the state bar and were not feasible for the October examination.

Similarly, in *Kohn v State Bar of California*,⁴⁵ the court dismissed an action by a disabled law graduate who was not granted all of the accommodations he sought in connection with the October 2020 examination. The plaintiff was diagnosed with several physical and psychological conditions including autism and neurological/attention disorders, digestive system conditions and visual impairments. He was granted certain accommodations but was denied his requests to take the examination only on weekends, to test in a private room (rather than an exam center), to be allowed breaks at his discretion, and to be provided with an ergonomic workstation, a hotel room, and an experienced proctor. The court held that the plaintiff did not have a fundamental right to take the bar or practice law, that bar admissions policy was subject to only rational basis review, and that the plaintiff failed to present facts demonstrating that California's procedures and accommodations failed rational basis review.

⁴³ Mannis, *Remote Bar Exams Pose New Learning Disability Challenges*, Law 360, Feb.1, 2021.

⁴⁴ 2020 WL 5816580 (N.D. Cal. 2020).

⁴⁵ __ F. Supp.3d ___, 2020 WL 629038 (N.D. Cal. 2020).

The October 2020 remote examination was a response to a unique public health crisis and was the only feasible alternative to either delaying admission opportunities indefinitely or allowing for a diploma privilege. As was noted in *Gordon*, additional accommodations made by California included a lower passing score and the establishment of a provisional licensing program which allows law-school graduates who had not yet passed a Bar Examination to practice law until June 2022. It remains to be seen if the courts will be more receptive to disability-based objections to examinations delivered and responded to only digitally at a time when a paper examination was feasible.

As discussed further below, in three jurisdictions that offered both in-person and remote examinations, the remote test takers did not do as well as those who took the examination in person.⁴⁶

We are concerned that the issues experienced by persons with cognitive issues in the remote Bar Examination setting will be repeated by persons taking a computer-delivered and answered test in an in-person setting. Although having the examination administered in-person with proctors present will eliminate the problems associated with the use of facial recognition software, persons with cognitive issues may experience other obstacles in endeavoring to respond to an examination delivered and answered exclusively by computer. The problems associated with taking a digital test are considered further in this Report below.

⁴⁶ See Ward, *Did bar candidates who had a choice do better on in-person or remote exams?*, ABA Journal, Feb.9, 2021,

D. Bathroom Breaks

The issue of bathroom breaks, whether for the disabled or otherwise, was a controversial one. One anonymous Pennsylvania bar candidate stated that, because he understood that if he left the view of the camera he would fail, when he could not hold his need to urinate until the end of a 90-minute session, he elected to urinate on himself, rather than go to the bathroom. He said: “I was put in this position where I had to make this barbaric choice to either piss myself or fail the most important exam I’m ever going to take in my life. It’s an odd position to put an applicant in.”⁴⁷

Candidates with disabilities were granted accommodations for restroom breaks during the October 2020 MPT and will be given similar accommodations for the February 2021 UBE. Where a candidate has a condition that may not rise to the level of a disability, the candidate may request an administrative accommodation. These requests typically are made by candidates who are pregnant, who are nursing, or have a condition that requires frequent use of the bathroom. These candidates were either granted a four-day schedule (which provides for more but shorter test periods) or instructed to announce to the camera that they have an emergency and need to use the restroom.⁴⁸

Assembly Member Jo Anne Simon has urged BOLE to permit candidates to take restroom breaks at their discretion during the MPT, singling out the MPT portion of the test as it

⁴⁷ Hudgins, Pee-Soaked Pants to Cyberattacks: States’ Glitch-Filled Launch of Remote Bar Exams, Law.com, Dec. 21, 2020, located at www.law.com/legaltechnews/2020/12/21/pee-soaked-pants-to-cyberattacks-states-glitch-filled-launch-of-remote-bar-exams/ We are advised by BOLE that this would not have happened in New York as the examinee could have announced on camera that he needed to use the restroom and followed up, after the examination, with a letter to BOLE to explain the circumstances.

⁴⁸ Letter dated Feb.15, 2021 from John McAlary to Assembly Member Jo Anne Simon.

is a closed-universe question and cheating is thus impossible.⁴⁹ The Board did not accept this request, citing, among other things, security concerns.⁵⁰ While the Board did not specify the ground for its security concerns, it is possible that, during the MPT, an off-camera examinee could consult with a third person as to how to structure an answer. On the other hand, the Board did restate to candidates that should an emergency arise during the examination that requires them to leave the view of the camera they should make an announcement to that effect and then follow up after the exam with the Board in writing to explain the circumstances. The Board would then decide whether to excuse the temporary absence and has granted excuses based on necessity for emergency bathroom usage.⁵¹

We understand – and support – BOLE’s determination to maintain the integrity of the remote test by declining to permit test-takers to take breaks at their discretion. However, even though BOLE’s policy is not as inflexible as some have represented it to be, and BOLE has made significant efforts to explain its policy, its policy may not be fully understood by examinees. The administration of an on-line exam was, and remains likely, to alter and probably expand the population needing accommodation. The perception of the remote examination as being fair would undoubtedly be improved by continued efforts to make it clear that test takers who have health conditions requiring breaks (bathroom breaks and medication breaks) may obtain advance authorization in a fashion consistent with BOLE’s legitimate need for security and even-handed treatment. Candidates may view BOLE’s existing application process as cumbersome, time-consuming, and so exacting as to be rarely granted. A more user-friendly, somewhat more

⁴⁹ Letter dated Feb.18, 2021 from Assembly Member Jo Anne Simon to John McAlary.

⁵⁰ Letter dated Feb.19, 2021 from John McAlary to Assembly Member Jo Anne Simon.

⁵¹ *Id.*

flexible policy, would go far to reducing pre-test stress and anxiety, reduce the present level of student hostility towards BOLE, and improve the efficacy of remote testing.

E. Return to In-Person Examinations

In view of the issues seen with remotely administered examinations, we are in complete agreement with the recent statement by the Oregon State Board of Law Examiners that “an-person exam provides the fairest and most equitable exam for all applicants.”⁵² We urge the Court of Appeals and BOLE to provide for an in-person examination as soon as possible, hopefully, with the February 2022 examination.

VI. NEW YORK’S STUDENT PRACTICE ORDER PROGRAM

When the decision was made to postpone the September 2020 Bar Examination, the Court of Appeals, to provide a mechanism for recent law graduates to obtain employment, amended Part 524 of its Rules, effective July 22, 2020, to establish a program by which eligible graduates of ABA-approved law schools could apply for temporary authorization to practice law under the supervision of an attorney who is admitted to practice in New York State. The program is intended to meet the needs of law graduates who are employed in New York, pending their admission to the bar. Pursuant to the amended rules of the Court of Appeals, temporary authorization to practice may be granted by order of the Appellate Division upon application by an eligible applicant. The Appellate Division, in turn, recognized the unique challenges that are confronting recent law graduates and joined the Court of Appeals in seeking to provide an impactful means of assisting these graduates in pursuing legal employment in New York pending their admission to the bar.

⁵² Statement of the Oregon State Board of Law Examiners, issued March 26, 2021, available at: <https://www.osbar.org/docs/admissions/2021-03-26BBXStatementJuly21Exam.pdf>.

To be eligible to apply for temporary authorization, an applicant must: (i) have received a J.D. or an LL.M. degree from a law school that is approved by the American Bar Association; (ii) be employed to engage in the practice of law in the State of New York; (iii) be qualified to take the New York State bar examination, pursuant to the Rules for the Admission of Attorneys and Counselors-at-Law; and (iv) not have previously failed a bar examination administered in New York or any other state or territory of the United States, or in the District of Columbia. Applications are made on simplified forms, consisting of an employer supporting affirmation and an affirmation from the applicant.

Since the inception of the program, the Second Department issued 104 temporary practice orders and denied 22 applications. The First Department issued 55 orders, the Third Department 28 orders (none since November 2020) and the Fourth Department issued 43 orders. All Departments report that the program was easy for applicants to navigate.

It appears that the temporary practice order program was underutilized, particularly in the First, Third and Fourth Departments. It is possible that the small level of participation is accounted for by limited, or non-existent, hiring of recent graduates by private sector attorneys and law firms. It also may be accounted for by reliance by public sector employers (such as District Attorney offices and legal services organizations) upon traditional, statutory-based student practice order programs. It has been observed that at least some of the temporary practice authorizations went to recent graduates who were being employed by relatives, such as parents and siblings. Nevertheless, the courts should be commended for developing and implementing the program as it provided opportunity to practice to 230 law graduates who otherwise would not have been able to.

VII. BUILDING A BETTER BAR

In October 2020, Professor Deborah Jones Merritt and Logan Cornett issued a ground-breaking report on how to construct an improved bar exam. Professor Merritt is a nationally recognized expert on bar admissions and examinations. She is a Distinguished University Professor and the holder of the John Deaver Dinko/Baker & Hostetler Chair in Law at the Moritz College of Law, The Ohio State University. Logan Cornett is the Director of Research at the Institute for the Advancement of the American Legal System (“IAALS”). Their report is entitled, “Building a Better Bar: The Twelve Building Blocks of Minimum Competence” (referred to below as “Building a Better Bar”). A complete copy of their report is attached hereto as Appendix A.

As Building a Better Bar explains, the Bar Examination professes to distinguish between those law graduates who have attained minimum competence to practice law from those who have not attained such competence. There is, however, no accepted, evidence-based definition of minimum competence. Without understanding what minimum competence is, and how to test for it, it impossible to know if the examination is a valid measurement of minimum competence or simply an artificial barrier to entry. To gain insight into what new lawyers do, and therefore what they need to know in order to practice law competently, 50 discrete focus groups were conducted involving over 200 new and supervisory lawyers. The focus groups were held in 18 different areas of the country, including Manhattan, Queens and rural New York. All practice settings were involved.

The data derived from looking at what new lawyers do was assessed as comprising 12 interlocking components or “building blocks.” These 12 building blocks are:

- The ability to act professionally and in accordance with the rules of professional conduct;
- An understanding of legal processes and sources of law;
- An understanding of threshold concepts in many subjects;
- The ability to interpret legal materials;
- The ability to interact effectively with clients;
- The ability to identify legal issues;
- The ability to conduct research;
- The ability to communicate as a lawyer;
- The ability to see the “big picture” of client matters;
- The ability to manage a law-related workload responsibly;
- The ability to cope with the stresses of legal practice; and
- The ability to pursue self-directed learning.

Building a Better Bar reported new lawyers work for many types of organizations and practice diverse kinds of law. This diversity means that a newly licensed lawyer could enter any of dozens of practice areas. However, the report made four important findings as to the work of new lawyers:

- State and local law played a prominent role in the work of young lawyers;
- Young lawyers rarely relied upon memorized rules;
- Young lawyers engaged frequently with clients; and
- Most young lawyers assumed substantial responsibility for client matters during their first year, with little or no supervision.

To elaborate on the first of these findings, the focus group members reported that they were more likely to rely upon state and local law in their work than on federal law. About half reported that they worked exclusively with state and local law; most of the remainder worked with a mix of federal, state, and local law. Some lawyers needed to work with laws of multiple states, and some had clients whose matters involved multiple states.⁵³

This finding has important implications for the content of the Bar Examination. The UBE tests only federal law and generally applicable legal principles. But new lawyers more often apply state and local rules. As Building a Better Bar found, this mismatch between testing and practice has led some new lawyers to make mistakes while representing clients. While a uniform, generic Bar Examination makes it easier for lawyers who move between states, it does not account for the fact that new lawyers are more likely to apply the laws of specific states – which are often highly individualistic – than federal law.⁵⁴

To address these issues, Building a Better Bar makes several recommendations.

A. The Limitations of a Written Examination

Written examinations assess only about one-half of the 12 identified building blocks. It is difficult to measure others using written tests. Issue-spotting on exams is quite different from issue spotting in real life. Written exams do not effectively evaluate basic listening comprehension nor do they evaluate project management skills, the ability to see the big picture in client matters, and coping with stress. Therefore, written examinations should be complimented by other forms of assessment.⁵⁵

⁵³ Building a Better Bar at 29-30.

⁵⁴ *Id.* at 30.

⁵⁵ *Id.* at 94.

B. Limit the Use of Multiple-Choice Tests

While multiple choice tests are efficient to grade and may be more reliable, multiple choice tests are inconsistent with the cognitive skills that lawyers use in practice. Constructed-response questions which require test-takers to answer a question in their own words offer a more authentic assessment of lawyering skills.⁵⁶

C. Eliminate Essay Questions and Use More Performance Tests

Essay questions were found to not parallel the written forms that examinees use in practice, while performance tests allow for assessment of the test taker's understanding of legal processes and sources of law, ability to interpret legal materials, and other building blocks. Performance tests can be adapted to measure research ability. Rather than providing closed universe case files for every performance test question, jurisdictions could require candidates to conduct research on one or more of these exercises.⁵⁷

D. Multiple Choice and Essay Questions Should be Open Book

Lawyers use threshold concepts to find more detailed, jurisdiction-specific rules that they apply to the problem. An exam which tests the application of concepts should make more detailed rules available. Allowing candidates to use outlines, rule books and other sources would test their knowledge of threshold concepts, while also replicating the type of recall, research and rules application that lawyers use in the real world.⁵⁸

⁵⁶ *Id.* at 95. The Task Force has previously noted that, in a multiple-choice test, the examinee must only identify which of the alternative answers is most correct, rather than having to produce an answer without a prompt.

⁵⁷ *Id.* at 95.

⁵⁸ *Id.* at 96.

E. More Time to Answer Questions

New lawyers should work carefully, taking time to check and reflect, and should not rush through their assignments. Current Bar Examinations place a premium on speed. Even performance tests place unrealistic time constraints. In practice, even an experienced lawyer would not absorb a new problem, analyze sources in a novel field, and develop a cogent written analysis in 90 minutes.⁵⁹

F. Law Course: Client Interaction Credits

While in law school, candidates should be required to successfully complete three academic credits of course work that develops their ability to interact effectively with clients.⁶⁰

G. Law Course: Negotiation Credits

While in law school, candidates should be required to successfully complete three academic credits of course work that develops their ability to negotiate.⁶¹

H. Law Course: Citizen Credits

While in law school, candidates should be required to successfully complete three academic credits of course work that is focused on the lawyer's role as a public citizen having special responsibility for the quality of justice.⁶²

⁵⁹ *Id.* at 97.

⁶⁰ *Id.* at 98.

⁶¹ *Id.*

⁶² *Id.* at 99.

I. Law School Clinical Work

While in law school, candidates should be required to successfully complete at least four credits of closely supervised clinical work, as well as at least four academic credits of additional clinical or externship work.⁶³

J. Create a Working Group

Jurisdictions should create a diverse workgroup of legal educators, judges, practitioners, law students and clients to design an evidence-based licensing system that is valid, reliable and fair to all candidates.⁶⁴

VIII. TOWARD A NEW NEW YORK BAR EXAMINATION

Professor Merritt urged New York to create its own 21st century New York Bar Examination and made a presentation to the Task Force in support of her proposal. A copy of her slide presentation is annexed as Appendix B to this Report.

Professor Merritt notes that New York is a leader in the legal profession and, by itself, tests more than one-fifth of all candidates for Bar admission in the country. New York has the expertise to undertake this task, as well as the ability to persuade other states to grant admission within their jurisdictions to those admitted in New York.

For the reasons outlined in *Building a Better Bar*, Professor Merritt maintains that the UBE falls short of what is needed to measure minimum lawyer competency. It pays inadequate attention to state and local law; it does not test research skills; issue spotting is artificial; it does not sufficiently test statutory and contract interpretation; the essay writing style does not match

⁶³ *Id* at 99-100.

⁶⁴ *Id* at 102.

styles needed in practice; and no attention is paid to client counseling, negotiation, and other essential skills.

Professor Merritt cited a study which involved 16 licensed attorneys who took a 100-question simulated MBE. No one came close to passing. The highest score was 52% and half of those tested scored below 40%. Participants even failed portions connected to their practice areas and participants failed even when they had passed the examination within the previous year.

Professor Merritt argues that, to best protect the public, we need lawyers to have coursework preparation, clinical experience, and a Bar Examination.

The new New York Bar Examination that she proposes would have three elements:

- (i) two New York Performance Tests (3 hours each);
- (ii) a New York research examination (3 hours); and
- (iii) a test on New York Practice and Procedure (3 hours).

Candidates would be able to take the examination all at once, over two days, or else take one component each quarter starting in law school.

In a performance test, candidates receive a client file and a library file and proceed to prepare a written document, such as a legal memorandum or a brief. These tests are authentic representations of what new lawyers do and closely approximate entry-level work. A performance test can assess multiple building blocks and can be graded reliable.

Professor Merritt advocates that, in contrast to the approach (both currently and as projected) of the NCBE, New York use performance tests that are based on New York law, as opposed to law of a fictional jurisdiction which consists of general legal principles. She would incorporate more client-centered tasks into the test and would allow much more time to complete each performance test (three hours) than the NCBE presently allows (90 minutes).

Professor Merritt argues that more time should be given to complete each answer to avoid the test being simply a measurement of who can read or type the fastest. Speedy questions teach the wrong lessons about quality. Haste harms clients. While lawyers work under time constraints, the 90-minute exam timing is unrealistic.

The ability to research is a key legal skill that new lawyers need to have. Lawyering is generally not about knowing immediately what the answer is to a legal question; lawyering is knowing how to find the answer. Therefore, it is appropriate to require candidates for bar admission to demonstrate their legal research skills on the Bar Examination. They can be given 3 hours of exercises – across multiple subject matter areas – using straightforward problems. Answers can be in short answer form or multiple choice. The questions would be based on New York law. Grading would be objective.

Professor Merritt believes that the Bar Examination should include a test on practice and procedure. It is the most common subject for new lawyers, while the performance and research tests would cover the substantive subjects. She proposes that New York test New York practice and procedure, using 75 multiple choice questions, in a closed book, three-hour examination.

As an alternative component, Professor Merritt suggests that candidates be given the option of choosing a subject matter area for a three-hour test of doctrine. This portion of the examination would be open book.

In addition, Professor Merritt proposes that the written Bar Examination be complemented with an open-book Multi-State Professional Responsibility Examination (an “MPRE”), courses in client counseling and negotiation, and clinical work.

She maintains that, in adopting such a new New York Examination, New York would have the first evidence-based examination to admit lawyers. Other states could be persuaded to

emulate it, if not adopt it. The skills tested on the performance and research tests are transferrable. The UBE tests on the law of nowhere. Why not test candidates on proficiency with the law of a leading state? The new examination would be research-based and would embrace best practices.

Instead of being a follower of the NCBE, New York would become the leader in attorney licensure. Based on extensive research she has done into the necessary building blocks to test minimum competency on the bar exam, Professor Merritt has crafted a proposal for New York to take advantage of its status as a leader in the legal profession and create its own bar exam based on New York law principles that would truly measure competency to practice law in New York.

While we generally support Professor Merritt's proposal, we have reservations regarding aspects of it and suggest consideration of some modifications.

While we support the idea of performance tests, we are concerned that if students perceive that, when they take the bar examination, they will be provided with a library file of New York materials, they will not study the New York material during law school. Bearing in mind that most young lawyers in New York will be working with New York state and local law, performance tests must be carefully developed to ensure that law students will study New York legal principles during law school. For this purpose, we define New York legal principles to mean not just New York law but, more broadly, as the legal concepts of which New York lawyers should have a basic familiarity, even if those concepts are not derived from New York state law. Those concepts may include legal principles unique to New York, New York variations on generally accepted legal principles, and federal principles.

Regarding federal principles, we have pointed out that the UBE does not test subject matter that is important to newly admitted attorneys, such as health law, immigration, and

cybersecurity. In designing its own test, New York needs to account, not only for state principles but also for emerging federal laws that young lawyers will be utilizing in their formative years. To make sure that the new examination reaches as many subject areas as possible, it may be appropriate to substitute traditional essays for one of the performance tests.

We are concerned that two lengthy performance tests would not be able to provide the requisite coverage of the broad areas of law that new lawyers should be expected to have familiarity. We agree that 90-minute test sessions are too short; however, we are concerned that a three-hour test session devoted to a single performance test may be too long and that it may be appropriate to shorten each session to provide more questions that cover more subjects. While requiring a procedure examination will encourage law schools to hire faculty to teach New York procedure, we want to also encourage instruction and study in important substantive New York law subjects, such as family law, trusts and estates, conflicts of law, landlord/tenant and the law of employment and discrimination.

In the First Report, we proposed that the new examination include four essays, each of 30-minutes duration. These would test New York Civil Practice, No-fault insurance, Workers' Compensation, Family Law, Professional Ethics, Trust and Estates and other subjects. We noted that it would not be difficult to combine subjects, for example, to combine a civil practice question with a family law or legal ethics problem. A single essay could cover three or four issues so that even four essays might reach as many as 16 subject areas. We would therefore consider modifying Professor Merritt's proposal by dropping one of the performance tests and substituting essay questions.

We are concerned that a closed-book, multiple choice examination on New York civil procedure may inappropriately encourage memorization and rote learning and perpetuate the

discriminatory impact that the use of multiple-choice tests has on women. We agree that it is important to test prospective New York lawyers on New York civil procedure. Too many lawyers have been admitted in New York without knowing much, if anything, about our complicated court system. However, we suggest consideration of the use of either short-form or traditional essay questions on the procedural examination and permitting test takers access to statutory materials during the test.⁶⁵

We call upon the Court of Appeals to appoint a working group of law school faculty and practitioners, aided by a professional mathematician, to work with BOLE to develop the new test and to design the proposed alternative pathways to admission. The working group should formulate a test structure that is fair and equitable, seeks to study of New York law, promotes New York law within the broader legal community, and assures 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 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.

IX. THE NCBE'S PROPOSED NEW EXAMINATION

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. A

⁶⁵ We note that the possibility exists that if the NCBE retained the MBE, either in its present form or in a modified fashion, it could be used as a basis for working with other jurisdictions to achieve reciprocity.

copy of the Overview of the NCBE Preliminary Recommendations is attached hereto as Appendix C.

The recommendations call for the elimination of the existing separate tests – the MBE, the MEE, and the MPT and their replacement with a single, integrated examination that would be administered over two days. Candidates would receive a single grade, derived from their responses on both days, given at or near the point of licensure (*i.e.*, after completion of law school). Each day will not be graded separately.

The integrated examination would use both stand-alone questions and item sets, as well as a combination of formats (*e.g.*, “selected-response,” short answer and “extended constructed-response” items). Selected response questions include multiple choice and true/false items. Extended constructed response questions have been traditionally called essay questions.

The integrated examination would test on “foundational concepts and principles”, which the NCBE deems to be “legal subjects that are common to numerous practice areas, which is consistent with the regulatory framework of a general license.”⁶⁶ These foundational principles are: civil procedure (including constitutional protections and proceedings before administrative agencies); contracts (including Article 2 of the Uniform Commercial Code); Evidence; Torts; Business Associations (including Agency); Constitutional Law (excluding principles separately covered under civil procedure and criminal law); Criminal Law and Constitutional Protections Impacting Criminal Proceedings (excluding criminal procedure outside of constitutional protections); and real property. The integrated examination would also seek to cover the foundational skills of legal research, legal writing, issue spotting and analysis, investigation and

⁶⁶ Overview of Preliminary Recommendations for the Next Generation of the Bar Examination, at 4.

analysis, client counseling and advising, negotiation and dispute resolution, and client relationship and management.

The examination would be a “computer-based” test, administered either on the candidates’ laptops at facilities supplied by the testing jurisdictions or at computer testing centers.

The revamped examination would not test family law, trusts and estates, the Uniform Commercial Code (except for Article 2), and conflict of laws. While the recommendations call for less rote memorization, the examination would continue to be closed book. Professor Merritt welcomes the NCBE’s proposal to shift to a more skills-based test but questions whether the NCBE can deliver on its reform. She noted that the present exam purports to test fundamental legal principles, rather than detailed rules, but many have criticized the current examination as requiring too much rote memorization.⁶⁷

X. CONCERNS WITH A COMPUTER-BASED TEST

Apart from the issues related to the content of the proposed revamped NCBE examination, the Task Force is greatly concerned with the NCBE’s intention to shift to an examination which is administered solely by computer. In addressing this issue, we have been informed by the experience on the October 2020 remote examination. Although the October 2020 remote examination was not a full UBE and the February 2021 remote examination was, there has not been any publicly available reaction to the February 2021 administration.

While we support the use of computers to administer a remote examination during a pandemic which makes in-person proctoring impossible, in looking forward, we assume, as does

⁶⁷ Sloan, “*A Dream Come True Instead of a Nightmare*”: *Will the Bar Exam Revamp Go Far Enough*, N.Y.L.J., January 12, 2021.

the NCBE, that, after the pandemic has passed, future Bar Examinations will be conducted with candidates and proctors personally present at jurisdiction provided facilities (such as law schools or the Jacob Javits Center) or at computer testing centers. As we have previously stated in this Report, we wholeheartedly agree with the Oregon State Board of Law Examiners that an in-person test is the fairest and most equitable form of administration. We are advised that BOLE supports a return to in-person testing as well.

Having the examination administered in an in-person setting will eliminate the issues identified, and previously discussed, with the use of facial recognition technology. It will also mitigate the concerns about restroom breaks needed by certain categories of candidates. It would also eliminate the distractions that candidates may have experienced when taking examinations in their own homes. However, significant issues remain which, in our view, should preclude New York from committing, either affirmatively or by inaction, to the exclusive use of a computer-based test.

There are scientific studies which have reported that the shift from distributing text materials from print to digital (in the form of pdf files) has negatively impacted comprehension. Perhaps due to characteristics of the computer screen (refresh rate, high levels of contrast, fluctuating luminance), comprehension derived from computer-based reading is not great as it is when derived from paper-based reading.⁶⁸ A study of 15 to 16 year old female students in Norway reported that students who read texts on paper performed significantly better than those who read the texts on the computer screen.⁶⁹ The study suggested that the difference in

⁶⁸Mangen, Walgermo, and Brønnick, 58 *International Journal of Educational Research* at 61-62 (2013).

⁶⁹*Id.* at 65.

comprehension performance could be related to issues of navigation within the document. Specifically, reading on a computer screen, the reader must scroll the document (unless the document is short and fits entirely on the screen). Scrolling hampers reading “by imposing a spatial instability which may negatively impact the reader’s mental representation of the text and, by implication, comprehension.”⁷⁰ Some of the differences between print and screen media may relate to the different lighting conditions in the two modalities. LCD computer screens are known to cause visual fatigue while e-book technologies based on electronic ink, like Kindle, are merely reflecting ambient light and are more reader friendly.⁷¹ This suggests that computer reading of pdfs on screens may result in reduced reader comprehension as compared to either computer reading of an “e-book” or traditional paper reading.

Taking a Bar Examination on a computer is very different and, at least to some, more difficult, than taking the same test in a pen-and-paper environment. For the performance test, for example, a candidate will be required to open the library attachments and view and digest the materials on the screen. A space for virtual scrap paper is provided. Multiple screens are not permitted. While both the library and the answer can be viewed on the computer and the candidate can enlarge the size of one window, doing so will necessarily decrease the size of the other windows. Material in the library cannot be highlighted but parts of questions can be. A candidate can “cut and paste” from the virtual scrap paper to the answer but cannot do so between the library and the answer. Thus, a candidate cannot “cut and paste” the key portion of a statute or case set out in the library but would have to re-type it in the answer.

⁷⁰ *Id.* at 65.

⁷¹ *Id.* at 66.

The process of compiling an answer is as much a test of computer skills as it is a test of legal knowledge. A library file in a performance test can span at least two dozen printed pages. A candidate will need to navigate back and forth among those pages as well as between the library, the scrap papers, and the answer, while responding. For at least some non-disabled candidates, the inability to simply look at a printed copy of the material will make the examination considerably more challenging.

In the belief that a picture (or in this case a video) is worth a thousand words, we provide the following link to a demonstration made by an academician to show other academicians what their candidates experience when taking the Bar Examination by computer⁷²:

https://umassd.zoom.us/rec/share/0M4erlOA3YCKEBiAYGokTGpnz_bUYIToTtYctxffdiCYy5W_to-l-miMohslD114.Qk4J87SEWG25b-PV?startTime=1612880403000

Not all millennials are comfortable with technology to the level required for comfort in taking the bar exam solely by computer. While the current generation may be the first to grow up with computers, so-called “digital natives”, we should not confuse how those computers have been used and what the bar exam is asking them to do. It is one thing to be adept on social media and quite another to use the technology for learning and high stakes licensing exams with major written components. It is also the case that not all bar candidates are millennials or will be for many years to come. Law students come in all ages and with all backgrounds. Many are more comfortable with reading materials, especially complex materials, in hard copy.

A law professor in Texas, where a remote examination was administered in October 2020 observed that the remote examination involved a fair amount of screen scrolling. “The act of writing in a booklet and taking notes the way people have been practicing to do, it’s so much

⁷² Laurel A. Albin, Esq., Program Director of Bar Success, University of Massachusetts School of Law – Dartmouth, Zoom Presentation, February 9, 2021.

more efficient. For a typical essay, students might spend 10 minutes planning how to write an answer. Online, they might spend up to 15 minutes, including the scrolling back and forth”.⁷³ She observed that, in writing practice essays for the online examination, students prepared shorter, less detailed answers than students did preparing for a paper examination. Also, she observed that many students were slower with practice essays when using the online platform.⁷⁴

Ironically, the shift to performance-based testing (which we favor) may well contribute to making the test more a test of computer skills than a test of legal knowledge, particularly if the NCBE maintains its 90 minute-per-test session time limits. If candidates are to take a computer-administered test on their own laptops, persons with bigger and more modern equipment will be at an advantage of those who have slower and more outdated computers. While the playing field could be leveled if all candidates are required to take the test at test centers using equipment provided by the centers (rather than their own equipment), there is reason to doubt the practicality of this approach in New York. There may not be enough capacity in test centers to accommodate the large number of New York candidates and the cost could be significant. In response to our proposal to administer the NYLE at test centers, BOLE asserted that doing so “at test centers presents a number of challenges, including test center capacity and cost.”⁷⁵ If capacity and cost would be an issue for a test given four times a year, the challenges would be greater for a test administer only twice a year, with many more candidates each test.

⁷³Zoe E. Niesel, associate professor at St. Mary’s Law School, quoted in Ward, *Did bar candidates who had a choice do better on in-person or remote exams?*, ABA Journal, February 9, 2021.

⁷⁴ Ward, *Did bar candidates who had a choice do better on in-person or remote exams?*, ABA Journal, February 9, 2021.

⁷⁵ BOLE Response to First Report, July 2020, at 19.

Furthermore, as set out earlier in this Report, serious issues, both legal and as to fairness, are posed by requiring persons with cognitive disabilities to use computer-based examinations.

Although the situation with the Texas power grid in February 2021 did not ultimately cause a significant disruption in the national administration of the February 2021 examination, with the NCBE's intention to shift to an examination administered entirely by computer, it is not difficult to foresee that unexpected disruptions to electrical, heating, air conditioning, and water systems will create significant obstacles to the simultaneous admission of an examination across the country. There is no indication as to what, if any, plans are being developed to address such occurrences.

We believe that, at best, it is premature to commit to an irrevocable shift to a computer-administered Bar Examination. There have only been two instances of such an exam being given – the October 2020 and February 2021 remote examinations. While the complaints regarding the October 2020 administration are now known and are being addressed, there is no available information yet as to the experience with the February 2021 examination. The July 2021 examination will be remote in New York and is anticipated to involve more candidates than either of the two earlier remote examinations. The experiences with these examinations should be carefully studied and evaluated prior to deciding to make the shift away from pen-and-paper examinations. We are, therefore, quite surprised, and disappointed that NCBE decided to make the shift, rendering its decision in early January 2021, without any apparent assessment of the efficacy of the October 2020 remote examination. Nor does it appear that NCBE has examined the issues relating to comprehension differences when material is presented by computer or by paper or even as to how a computer examination might be delivered (pdf v. e-book).

The limited information available now suggests that with respect to those candidates who had a choice between taking an in-person examination and a remote examination, the candidates who opted for the in-person examination did better. These results are in line with the scientific studies indicating that comprehension is better when material is read by print than by computer.

Texas had an in-person September 2020 examination with 1,037 candidates, with a pass rate of 76.66%. Texas had a remote October 2020 examination which was taken by 1,116 candidates of whom 60.13% passed.⁷⁶ Arizona had 399 test takers in-person, of whom 80.7% passed; 189 people took the remote exam, which had a pass rate of 44%. In Idaho, 120 people took the in-person examination, with 76.7% passing, while 28 people took the remote examination, with a 32.1% pass rate.⁷⁷

The differences in pass rate between in-person and remote examinations may not be entirely related to the different mode of test administration. The tests themselves were different; in Texas, the in-person examination was a NCBE-provided UBE while the Texas remote examination was drafted locally. It is also possible that October remote examination may have been graded harder in these three jurisdictions, just as it is possible that the examination may have been graded more leniently in others. It is also possible that the candidates who took the September examination were collectively stronger than the candidates who took the remote examination in October. The candidate pool could have also been influenced to the extent that candidates who had jobs may have had an incentive to take the exam earlier. It is also possible

⁷⁶ *Id.*

⁷⁷ *Id.*

that some candidates were drawn to the September examination because it was a full UBE, while the October examination was not.⁷⁸

XI. THE CONTENT AND SCORING OF THE NCBE'S PROPOSED NEW EXAM

Apart from the form of delivery, we are concerned with the substantive content of the proposed new NCBE examination.

Contrary to our view that New York should require candidates for admission to its Bar to demonstrate meaningful knowledge of New York law, the NCBE is doubling down on its deemphasis on state and local law. Despite the finding in *Building a Better Bar* that most new lawyers work on matters of state and local law, as opposed to federal (or, unsurprisingly, fictional law), the NCBE proposes to reduce testing on three key components of state law – family law, trusts and estates and conflict of laws.

Family law and trust and estates are fields to which many new lawyers gravitate. These are matters that are highly relevant to the future lives of the lawyers themselves. The divorce rate in the United States has historically been approximately 50%; at least half of new lawyers, not being immune to family conflict, will likely be involved a divorce themselves and will certainly have friends and relatives who are going through divorce. Lawyers should also be familiar with issues of domestic violence, what causes it and how to address it – again, for their own personal benefit, if not for the betterment of their clients. We know from experience in New York that if a subject is not on the Bar Examination, most students will shy away from taking it in favor of taking a subject that is tested. Discouraging generations of future lawyers from learning about family law and domestic violence would be unfortunate. Incentivizing them

⁷⁸ *Id.*, quoting Vice Dean Adam Chodorow, Arizona State University Sandra Day O'Connor College of Law.

to learn it should be the route taken. Similar concerns apply to trusts and estates. Mortality is a basic fact of the human condition. Whether a lawyer intends to practice trusts and estates, a lawyer should have a foundation in its basic principles.

Conflict of laws, the third subject to be eliminated, is a foundational concept with which lawyers should be familiar. Portability of licensure has been the predominant feature of the UBE and would continue to be predominant in the new examination. If lawyers flit from one jurisdiction to another, we submit they need to understand which jurisdiction's laws apply under what circumstances. Absent this being a subject that is tested on the Bar Examination, students will eschew taking a conflicts course.

By eliminating state law subjects, the NCBE is increasing its focus on federal law, yet it shows no sign of recognizing that young lawyers are increasingly inclined to work in immigration, health care and cybersecurity. Federal law predominates in these fields, but these disciplines have never been tested on the Bar Examination. While many law school graduates may hope and expect to practice in federal courts exclusively, Building a Better Bar shows that most lawyers' initial careers are more prosaic.

We welcome the NCBE's decision to shift away from its current forms of testing to performance-based tests. However, like Professor Merritt and the several recent test-takers we have heard from, we do not see the benefit for law students to be tested on the generic law of a fictional state, rather a leading state such as New York.

As discussed below in Section XII, the NCBE has not addressed the concerns we have previously raised with the scoring of the UBE, leaving us concerned that the NCBE will perpetuate its scoring regime with the new examination.

XII. UPDATE ON PORTABILITY

The benefit of “portability” was most frequently cited to justify the change to the UBE. Proponents argued that what was important was the ability of law graduates to practice in multiple jurisdictions without having to take multiple examinations. In the First Report, the Task Force analyzed the information then available to determine whether the UBE was, in fact, being used to obtain licensure in multiple states without having to take multiple examinations. We concluded portability provided only a small benefit to a minority of test takers.⁷⁹ We found that the portability issue was relevant only to two subsets of test takers: (1) those who seek to come to New York to practice within the first three years after taking the test in another UBE jurisdiction; and (2) those who decided, within the first three years after the test in New York, to seek to practice in another UBE jurisdiction.⁸⁰ We stated that, because the majority of New York UBE test takers stay in New York, New York was failing to protect the public by ensuring that these lawyers know New York law.

In connection with the preparation of the First Report, BOLE informed us that it had no information on whether candidates used their New York UBE scores to obtain admission in other UBE jurisdictions. Such information resides with the NCBE but the NCBE does have information on what law school candidates attended. On transfers into New York, BOLE told us it had no information on where candidates attended law school until the candidates demonstrate that they have satisfied New York’s educational eligibility requirements.

In connection with this Report, BOLE was able to provide us with additional information. In its submission, BOLE, which has maintained its support for the UBE, argues that portability of

⁷⁹ First Report, at 65.

⁸⁰ *Id.* at 66.

scores between UBE jurisdictions “saves examinees considerable time and expense required to prepare for and take multiple bar examinations, expedites their admission and permits them to compete for employment opportunities that they may not have been able to do if they had to retake a bar exam in another jurisdiction.”⁸¹ BOLE asserts that portability also benefits the lawyers’ who engage in business in multiple jurisdictions.⁸² In looking at portability as an unqualified positive, BOLE assumes that legal skills are fungible across state lines, even though state and local law, which most new lawyers practice, vary considerably. In other words, BOLE assumes that new lawyers who can pass a generic national examination are equally qualified to practice in any of the UBE jurisdictions. But as Building a Better Bar reports, the law that most new lawyers work with is state and local law, which are not tested on the UBE.

As we noted in the First Report, that there are complexities to an analysis of the available data. A person who attends law school in New York may not intend to seek admission here or even practice here; conversely, a person who attends law school outside New York may be intending to become a New York attorney. BOLE adds to this the fact that some candidates may take the UBE in the state where they went to law school, or where they live permanently, rather than bear the expense of travel to New York to take the UBE here. BOLE also states that some candidates may elect to take the UBE here because the exam fee of \$250 is the lowest in the country.⁸³ In other words, the selection of a testing jurisdiction may be, at least for some, a matter of personal convenience.

⁸¹ Letter dated March 24, 2021 from John J. McAlary, Executive Director of BOLE, to Hon. Alan D. Scheinkman (“McAlary Letter”) at 1.

⁸² *Id.* at 2.

⁸³ *Id.*

BOLE does not permit people to take the UBE in New York unless they certify that they are *bona fide* candidates for admission here. Because candidates must so “certify”, BOLE argues that we “should presume that most of those transferring UBE scores out of New York are intending to be New York lawyers authorized to practice in other jurisdictions.”⁸⁴ If we assumed that this was so, and adopted BOLE’s presumption, we believe that it would be all the more important to require that these New York lawyers, practicing in New York at least some extent, establish that they have at least minimum competence in New York law. While BOLE does not require candidates to certify that they intend to practice here, and such a certification would be unenforceable as a practical matter, those who seek New York licensure are either seeking to practice here or, if not, seeing New York admission as a credential. If the former, knowledge of New York should be required; if the latter, the use of New York admission as a mere credential should be discouraged.

But we do not believe that BOLE’s presumption should be accepted. The candidate certifications of intention to practice in New York are not policed and there is no apparent means by which to do so, even if enforcement was desired. Once a person has taken the UBE in New York and gains admission, the person cannot be compelled to practice here. Indeed, many do not – we know that foreign law graduates, who comprise roughly one-third of the number of test-takers, tend to return to their home counties. Further, an intention to practice could be stated truthfully predicated on an intention to practice here either completely, partially, or only sporadically. A person can always assert that his or her intentions changed. Indeed, if one accepts BOLE’s statement that the UBE has made it easier for law graduates to seek employment in

⁸⁴ *Id.* at 1.

multiple states, a law graduate who took the UBE here may not intend to practice here anymore because she accepted a position in another state.

BOLE's presumption that persons transferring UBE scores out of New York are still intending to practice here, as well elsewhere, is unwarranted given BOLE's acknowledgement that some people opt to take the test wherever they find it convenient to do so, regardless of whether they truly intend to practice in the testing jurisdiction. BOLE concedes that at least some people take the test where they went to law school, or where they reside, rather than where they really intend to practice full-time. BOLE also acknowledges that some who take the UBE in New York are doing so because the fee is low. We note that, according to the information provided by BOLE, between 59 and 93 graduates of New York law schools transferred their scores into New York, indicating that, for whatever reason, these graduates did not take the UBE in New York, though they obtained their legal education here.

Amid the pandemic, people may have chosen to take the test wherever they thought it was healthiest or safest to do so or where they thought the test was most likely not to be canceled. The February 2021 examination was, and the forthcoming July 2021 examination will be, full UBEs and scores will be portable. The October 2020 remote administration was not a full UBE but was portable through state reciprocity agreements. With these three examinations being administered remotely, it is at least plausible that candidates elected to take the test in the most convenient location available to them, rather than the jurisdiction where they intended to practice. It is also important to consider the issue of foreign law graduates, who comprise roughly one-third of the candidates in a normal year. Many, if not most, of these do not intend to physically practice in New York and take the UBE in New York because, as BOLE acknowledges, they are not eligible to seek admission in many jurisdictions in the United States.

BOLE reports that the most common jurisdictions for the transfer of UBE scores (and the scores from the October 2020 remote examination) in and out of New York are New Jersey, Connecticut, Massachusetts, and the District of Columbia.⁸⁵ These same four jurisdictions were also the most common places for transfers of MBE scores prior to the adoption of the UBE.⁸⁶ This strongly suggests to us that the portability arrangements decided by most law graduates could be accomplished through reciprocity arrangements with those four jurisdictions, without having to adhere to NCBE's total regimen. Florida and California, two other states which would seem to be attractive alternative jurisdictions for lawyers from New York or might produce lawyers seeking to come to New York, are not UBE jurisdictions.

Because there are myriad reasons why a person would opt to take the UBE in New York, we do not agree with BOLE's suggestion that a presumption be applied that all who take the test in New York intend to stay here to practice.

With this background, the following chart provided by BOLE⁸⁷ reflects the score transfer requests to and from New York processed annually by NCBE since New York adapted the UBE.

Year	UBE Scores Transferred OUT of New York	UBE Scores Transferred INTO New York
2020	1,987	882
2019	2,165	799
2018	1,663	747
2017	1,373	517
2016(July only)	526	270
TOTAL	7,714	3,215

⁸⁵ *Id.* at 3.

⁸⁶ *Id.* at 3.

⁸⁷ *Id.* at 2.

The number of persons who transfer their scores into New York is relatively small as compared to the number of people who take the UBE. In 2019, for example, 34,377 people earned a UBE score, including 14,200 who took the UBE in New York⁸⁸. If a bar passage rate of only 50% is assumed⁸⁹, that would mean that some 10,138 people passed the UBE outside of New York⁹⁰, of whom 799 transferred their score into New York. Since only a relative few who take the UBE outside of New York seek to transfer their score into New York, it would not cause a significant disruption to require these individuals to take a New York test and learn New York law. This, of course, assumes the premise that what is important is the ease of admission by law graduates, as opposed to protection of the public from lawyers lacking minimum competency.

BOLE reports that nearly all examinees who transfer a UBE score into New York are Juris Doctor graduates of ABA-approved law schools.⁹¹ A chart, again provided by BOLE⁹², reflects this information:

⁸⁸ <https://thebarexaminer.org/2019-statistics/the-uniform-bar-examination-ube/#step3>.

⁸⁹While the actual overall passage rate is not known, the NCBE has reported a passage of 58% for all 68,305 people taking a bar examination in 2019. Since all but 1,655 of those reported taking a test took the UBE, assuming a 50% pass rate seems reasonable, if not conservative.

⁹⁰ This figure is derived from subtracting 14,200 from 34,377 and then dividing the result by 2 to reach 10,138.

⁹¹ *Id.* at 2. BOLE does not, however, know the identity of these examinees or have any demographic information regarding them.

⁹² *Id.* at 2.

Year	UBE Scores Transferred OUT of NY	UBE Scores Transferred INTO NY	UBE Score Transfers Into NY Certified by BOLE to Appellate Division	Number of Foreign-Educated	% Foreign-Educated	Number of ABA Juris Doctor Graduates	% ABA Juris Doctor Graduates	Graduates of NY Law Schools Transferring Score into NY	Graduates of Out of State Law Schools Transferring Score into NY
2020	1,987	882	831	11	1%	820	99%	93	727
2019	2,165	799	639	7	1%	632	99%	68	564
2018	1,663	747	590	5	1%	585	99%	76	509
2017	1,373	517	457	7	2%	450	98%	61	389
2016 (July only)	526	270	255	3	1%	252	99%	59	193
	7,714	3,215	2,772	33	1%	2,739	99%	357	2,382

“All UBE scores are transferred through NCBE. We know who transfers a score into NY (and the school they attended) because they must apply for admission in NY. But we do not have demographics on the examinees that transfer scores out of NY because the score is transferred through NCBE. NCBE was able to provide us the annual numbers of examinees transferring scores in and out of NY.”

The number of individuals who transfer their scores out of New York is more significant.

The BOLE submission states:

Most UBE jurisdictions require a passing score of 266 or greater although a small number of jurisdictions require a passing score of 260 or greater (Alabama, Minnesota, Missouri, New Mexico, and North Dakota). In 2019, the 2,165 scores transferred out of New York represented roughly one-third of the number of Juris Doctor graduates from ABA-approved law schools who earned a UBE score of 260 or greater on the New York bar examination. In 2020, that percentage was 42% although the number of examinees who took the bar exam in 2020 was lower due to the limitations placed on the number of examinees for the October 2020 remote bar examination.

The 1,987 UBE scores that were transferred out of New York in 2020 did not include the October 2020 Remote Bar Exam, which was not recognized as UBE due to its abbreviated testing components. The Board processed requests from 1,640 examinees from the October Remote Bar Exam to transfer their score to one or more of the 11 other remote bar exam jurisdictions pursuant to reciprocity agreements entered into between those jurisdictions (all of the remote bar exam jurisdictions required a passing score of 266 or greater). The 1,640 examinees who requested the transfer of their New York Remote Bar Exam score represented nearly 40% of the examinees who passed the October

2020 Remote New York bar Exam. The Board also received 455 requests to transfer the October 2020 Remote Bar Exam score to New York from examinees who took and passed the October 2020 Remote Bar Exam in one of the other 11 remote bar exam jurisdictions.

The most common jurisdictions for the transfer of UBE scores (as well as the October 2020 Remote Bar Exam scores) in and out of New York are New Jersey, the District of Columbia, Connecticut, and Massachusetts. These were also the most common jurisdictions that examinees used to transfer MBE scores to and from New York prior to the adoption of the UBE. The number of score transfers suggest that examinees are benefitting from the portability of UBE scores by not having to take and pass multiple bar examinations to obtain admission in more than one jurisdiction. As noted earlier, this saves examinees valuable time and financial resources and will benefit their clients engaging in business in multiple jurisdictions.⁹³

BOLE provided us with information showing the total number of people who were eligible to transfer their scores out of New York, inclusive of all ABA Juris Doctor graduates who obtained a sufficiently high enough score (260 or greater) to transfer a score out to another UBE jurisdiction. The overwhelming majority achieved a passing score on the New York UBE (266 or higher) but because there are five states that accept scores of 260 or higher, BOLE included people who scored between 260 and 265 even though they were not successful on the New York UBE. However, BOLE does not know the total number of people who were eligible to transfer scores into New York as that number consists of the total number of people who earned a UBE score of 266 or greater in all other UBE jurisdictions.

The chart provided by BOLE is set forth as follows:

⁹³ *Id. at 3.*

Year	UBE Scores Transferred OUT of NY	NY Candidates Eligible to Transfer Out a score (ABA grads with a score of 260 or greater)**	Percentage Transferred OUT a Score
2020	1,987	4,763	42%
2019	2,165	6,567	33%
2018	1,663	6,116	27%
2017	1,373	6,887	20%
2016 (July only)	526	5743	9%
<p>“**For each year we included all ABA JD graduates who earned a score of 260 or greater on the NY Bar Exam. Although a score of 266 is required to pass the NY Bar Exam there are a few states that have a cut score of 260 where some applicants transfer a score (i.e., AL, MN, MO, ND & NM). <i>We only included ABA graduates because we know that foreign-educated applicants rarely transfer a UBE score because they are not eligible to seek admission in many U.S. jurisdictions.</i> “⁹⁴</p>			

BOLE’s chart increases the number of potential transferors by including in that category persons who failed the New York UBE but achieved a high enough score (260 to 265) to be admitted elsewhere. It also increases the percentage of transfers out by eliminating from foreign law graduates from the base, on the theory that they cannot transfer their scores in any event.

We do not agree.

In assessing the efficacy of a bar examination, we do not agree that it is appropriate to include the potential benefit to be derived by persons who fail the examination in the jurisdiction in which they take it. Nor is there any indication that any significant number of candidates who achieve a failing score of between 260 and 265 in New York are interested in gaining admission to Alabama, Minnesota, Missouri, New Mexico, and North Dakota, which are the 5 states which would accept their scores. As for foreign law graduates, if other states do not accept them and,

⁹⁴ Email of March 31, 2021 from John J. McAlary, Executive Director of BOLE, to Brendan Kennedy, NYSBA Staff Liaison to the Task Force (emphasis added).

therefore, there is no portability for them, it seems incongruous to exclude them from the count to enhance an argument argue in favor of portability.

Our chart reflects the following:

Year	UBE Scores Transferred OUT of NY	ALL PASSING NY CANDIDATES
2020	1,987	1,430 (February only)
2019	2,165	8,380
2018	1,663	7,516
2017	1,373	8,624
2016 (July only)	526	6,577

In sum, while a minority of law graduates benefit from portability (whether inward or outward), we maintain that New York, rather than prioritizing ease of interstate practice, should be protecting its public by insisting that New York lawyers establish their knowledge of New York law before they may practice it in New York. We maintain, as we did in the First Report, the purpose of a bar examination is to assure that lawyers practicing in the jurisdiction are qualified to do so. That purpose is not served by simply requiring would-be lawyers to pass a generic national test, supplemented only by a facile CLE-style course and a weak, and virtually impossible to fail, “examination”.

XIII. REPLY TO BOLE’S JULY 2020 RESPONSE TO THE FIRST REPORT

The First Report identified serious concerns regarding the current New York bar exam and recommended, among other things, that passage of a rigorous examination on New York law should be a prerequisite to admission to the New York bar and that the NYLE should be eliminated. While the members of the Task Force believed that there were significant issues

with the UBE, the First Report made it clear that regardless of whether the UBE was retained going forward, the New York law component (the NYLE) need to be revamped. We offered a number of suggestions for how that might be accomplished. In our judgment, this is not only consistent with what was promised when New York adopted the UBE, it is what is required to ensure that New York retains its status as a leader in the legal field and, most importantly, that clients receive the legal representation they deserve.

In July 2020, BOLE issued a response to the Report (the “BOLE Response”) that staunchly defended the current testing regime and criticized us for various purported “misconceptions” and labelling our recommendations as “impossible.”⁹⁵

We are not surprised that BOLE has strongly urged the maintenance of the *status quo*. However, we are disappointed in the stridency of BOLE’s response and its failure to truly engage in a meaningful discussion of the points in contention. We view BOLE’s response as largely a rehash of assertions made by BOLE in its written and oral presentations to us, which were fully considered and addressed in the preparation of our First Report.

We do not perceive the need, in this Report, to address every item raised in the BOLE Response or attempt to correct the considerable number of statements that we believe are not accurate. Instead, we will highlight our substantial differences regarding the importance of testing New York law on the New York bar exam, how we see the future of the bar exam in New York and, in the process, correct the record where appropriate.

As explained fully in the First Report, as we have discussed above and will discuss again below, the Task Force envisions a New York bar exam that includes a rigorous New York law

⁹⁵ We note that the present Chair of BOLE took office after the BOLE Response was issued.

component. Making that a reality begins with obtaining agreement on the importance of testing a candidate's understanding of New York law for lawyers seeking to practice here. This is perhaps the subject of the most fundamental disagreement between the Task Force and the BOLE: in the view of BOLE, the New York portion of the bar exam should not be a "significant hurdle" to admission, and it is not necessary for a lawyer who wants to practice here to first demonstrate "minimum competency" in New York law.

Even if we were to assume that only a short CLE-type course and limited open book examination is what is appropriate, we were, and still are, of the view that the NYLE is woefully inadequate and must be abandoned in favor of a rigorous New York examination. Unfortunately, despite its acknowledgement of numerous issues with the NYLE, BOLE resisted any meaningful change, flatly rejecting the proposals by the Task Force for how that might be accomplished and refusing to implement several possible steps BOLE itself identified. BOLE has chosen to basically stand behind its product, the NYLE, which we have documented, and BOLE has not disputed, has been widely disrespected by those required to take it, by academicians, and by the New York legal community at large. The Task Force continues to believe its prior recommendations merit consideration and would substantially improve the New York Bar Examination.

A. The New York Bar Examination must include a rigorous New York law component

A fundamental tenet of the First Report is that New York must deliver on Chief Judge Lippman's promise at the time the UBE was adopted of having a bar exam with a thorough and rigorous New York law component. The First Report concluded that the current bar exam fails to protect New Yorkers by not requiring attorneys seeking the right to practice within this state to demonstrate minimum competence in this state's law. The Task Force would have hoped this

point would not be highly controversial and, perhaps, even mark the start of a constructive dialogue to improve the bar exam for the benefit of all New Yorkers. But BOLE does not share this belief.

While acknowledging that “[t]here is room for debate as to whether or not adoption of the UBE was right for New York”⁹⁶ and “initial iterations of the [NYLE] were insufficiently rigorous,”⁹⁷ BOLE insists that the UBE, as complemented by the New York Law Course (“NYLC”) and the NYLE, is a valid and reliable test of minimum competence to practice law. BOLE’s position has since, in our view, been undermined by the Preliminary NCBE recommendations to entirely recast the UBE.

According to BOLE, we “misunderstand” the intent of the NYLC and NYLE, which BOLE states was not designed to be a test of minimum competence,⁹⁸ but rather an attempt to comply with the “directive” that the NYLE not be a “significant barrier to admission.”⁹⁹ We find this statement troubling on several levels. As we pointed out in the First Report, Chief Judge Lippman, in proclaiming the move to the UBE, specifically and publicly stated in his May 2015 Law Day address that there would still be a “thorough and rigorous” portion of the bar examination that would cover “[i]mportant and unique principles of New York law”.¹⁰⁰ Thus, a direction that the New York portion of the bar examination is not rigorous is plainly contrary to Chief Judge Lippman’s documented public statement. BOLE has not identified the source of the directive nor

⁹⁶ BOLE Response at 1.

⁹⁷ *Id.* at 5.

⁹⁸ BOLE Response at 3.

⁹⁹ *Id.* at 6.

¹⁰⁰ First Report at 7, n14, quoting Jonathan Lippman, Chief Judge of the New York State Court of Appeals, Law Day 2015 Address (May 5, 2015) (transcript available at: <https://www.nycourts.gov/ctapps/news/LawDay2015.pdf>).

provided any documentation of it. Further, a directive that the New York portion of the bar examination is not rigorous is not acceptable to those who think that applicants should not be licensed to practice in New York without meaningful knowledge of New York law. Additionally, BOLE does not indicate a willingness to adjust the NYLE if a different “directive” is given and, instead, suggests that it is not feasible to make any changes that would make the NYLE more rigorous.

Over the course of 11 months, the Task Force endeavored to investigate and report on the impact of New York’s adoption of the UBE. While studying the issue, the Task Force heard from law school deans, law school faculty, admitted attorneys, and attorney applicants themselves that the current New York component of the exam is not taken seriously.

The shift away from a meaningful New York exam has led to a de-emphasis on New York law in the classroom and disadvantages in practice. Once prevalent, law school courses focusing on New York law and New York law distinctions are now in decline, along with student enrollment in those courses. New York law topics have been displaced by material that does not benefit students once they begin to practice law in New York. The results have been readily apparent, as practitioners and judges alike have provided accounts of newly admitted attorneys who do not demonstrate the requisite familiarity with New York law to practice in New York. The proposed revamp of the Bar Examination by NCBE will only accelerate this development. If family law and trusts and estates are no longer key Bar Examination subjects, students will gravitate to the subjects that are tested on the bar exam. Scholarship by faculty in the discarded subjects, and the number of faculty in the law schools who focus on these subjects, will continue to decline. Law schools are like businesses in the sense that they will cater to their customers and their customers want to know what they need to learn to pass the bar. Law students are practical – they want to be

able to gain admission to the bar above all else. And they certainly do not want to spend additional funds after law school on learning subjects that were not taught in law school.

These realities continue to surface because—unlike the previous NYBE that was “designed to assess minimum competence” in several subjects, including New York law¹⁰¹—the current UBE only gauges minimum competence on the “law of nowhere.” As such, it is not enough to have a state-specific component in place that BOLE describes as a low hurdle to admission and the equivalent of a notice test.¹⁰² Instead, ensuring the integrity of the state’s licensing system and protection of clients requires a state-specific exam that for which candidates need to learn and demonstrate minimum competency in New York law.

BOLE criticizes the Task Force’s reliance on “anecdotal evidence” of a problem and claims there is no “widespread clamoring” for change.¹⁰³ However, the viewpoints expressed by relevant stakeholders during our study, the various bar associations that supported the Report, and the NYSBA House of Delegates unanimous vote in favor of adopting the Report demonstrate that these issues are real and make it clear that there is widespread concern about the current New York bar exam. Moreover, as BOLE is well aware, the concerted effort undertaken by thousands of law students during the summer of 2020 for the adoption of a diploma privilege, included a compelling argument that it was unfair and arbitrary to require them to take a slimmed-down remote examination in order to practice in New York since the examination did not test their knowledge of New York law. Perhaps BOLE did not hear this clamor because of its own clamoring to retain the *status quo*.

¹⁰¹ *Id.* at 10.

¹⁰² *Id.* at 8, 58.

¹⁰³ BOLE Response at 7.

B. There are numerous problems with the NYLC/NYLE that must be remedied

As detailed in the First Report, there are myriad problems with the NYLE: it is not taken seriously by candidates, there are disturbing reports of cheating, it does not require candidates to demonstrate minimum competence in New York law and it is detrimental to law school curriculum. BOLE's response to these criticisms is disappointing, to say the least.¹⁰⁴

As explained in the Report, the NYLE is widely disparaged by applicants and is viewed as a mere speed bump on the road to admission. This general sentiment was expressed by law school deans, professors, and students. Applicants themselves have shared these sentiments with Task Force members at Character and Fitness interviews. Moreover, the Task Force's student survey found that fewer than a quarter of the students surveyed thought that the NYLE was challenging.¹⁰⁵ BOLE itself concedes that initially the NYLE was not sufficiently challenging and further acknowledges that the NYLE could be made more rigorous, listing several steps that could be taken to improve the exam. But it has taken any of these steps and has not indicated a willingness to do so.

In addition, there have been troubling reports of impropriety on the exam: applicants have taken the NYLE in groups, shared their responses to the questions, used multiple computer screens, and taken screen shots of previously searchable NYLC outlines to assist them.

While BOLE claims that they have not heard about instances of impropriety on the exam—a prior concern of the Advisory Committee—it has not investigated the matter. Despite the Task Force's identification of the various methods that could be used to cheat on the NYLE, it remains that the only safeguards against improper conduct regarding the NYLE are the scrambling of the

¹⁰⁴ First Report at 43-44.

¹⁰⁵ First Report at 28.

question sequences and a certification—both of which have proven inadequate. BOLE rules out any proposed remedy as cost prohibitive, without explaining what that is so. Even though the New York bar examination fee is the lowest in the Nation, BOLE does not address the possibility of increasing the fee to cover the cost of additional NYLE security.

A comparison between the recent steps taken to ensure the accuracy and reliability of the October remote bar exam and the steps, or lack thereof, previously taken on the NYLE highlights the need for change. For example, the remote Bar Examination featured a technology called ExamID to verify an applicant’s identity before the start of each exam session. The exam was also administered using remote proctoring through a software called ExamMonitoring. This software ensured reliability by recording applicants, via audio and video, throughout each exam session. After the conclusion of each session, the recordings were then uploaded to ExamSoft and an artificial intelligence program analyzed the recordings to flag any unusual behaviors, movements, or sounds.¹⁰⁶ New York must ensure that the results of the state-specific portion of the bar exam are at least as reliable as the portion of the bar exam testing knowledge of the “law of nowhere.”

More fundamentally, the NYLC and NYLE do not supply the necessary foundation for lawyers to practice in New York because they are purposefully designed only to give candidates some exposure to New York law, not to require “minimum competency” or act as a “significant hurdle” to admission. We find it curious that, on one hand, BOLE defends the NYLE’s lack of difficulty by saying that it was never meant to be a barrier to admission, and, on the other hand, BOLE proclaims that the NYLC and NYLE “do more to require candidates to identify and apply

¹⁰⁶ See FAQs for October 5-6. 2020 Remote Exam in New York (Revised Oct. 2, 2020), https://www.nybarexam.org/Docs/Revised%20FAQs%20NY%20Remote%20Exam_10.02.2020.pdf.

specific principles of New York law than did the former NYBE.”¹⁰⁷ Those claims are inconsistent. It is also quite surprising that BOLE argues that NYBE, which it administered for years, did not attempt to question candidates about New York law. BOLE’s assertion that, in formulating the NYBE, it “made no specific effort to determine whether or not the rules of law to be applied in answering the questions were unique to New York,”¹⁰⁸ is not supported by review of the bar exam topics and questions before the UBE’s adoption.¹⁰⁹ Nor is it supported by the substantial testimony we received from admitted attorneys and law faculty that BOLE drew its essay questions from recent Court of Appeals decisions, a fact that was well-known and caused New York Court of Appeals decisions to be carefully studied by bar applicants – something that does not happen today.

The New York principles that BOLE considers merely “idiosyncratic rules,”¹¹⁰ certainly are important to a client whose case or cause is lost because, for example, a newly admitted attorney did not learn New York’s Civil Practice Law and Rules and filed a case in the wrong court, or, not having learned the Estates Powers & Trusts Law, improperly drew a will. BOLE discounts the amount and type of preparation that went into studying for the NYBE—when students were required to learn and remember New York law and distinctions to pass the exam. New York law was stressed in law schools, both inside and outside New York; bar preparation classes focused on New York law as well. Now both law schools and bar preparation courses

¹⁰⁷ First Report at 28.

¹⁰⁸ *Id.* at 2.

¹⁰⁹ *See* First Report Appendices G-H. Contrary to the BOLE’s assertion, our First Report expressly acknowledged that NYBE did not test exclusively on New York law distinctions. However, we also explained the benefit of the New York distinctions and principles that were tested on the NYBE. *See* Report at 57-62.

¹¹⁰ BOLE Response at 5.

teach, virtually exclusively, federal law and the law of nowhere. This, even though Professor Merritt's *Building a Better Bar* informs us that young lawyers rely upon primarily upon state and local law in their formative work, not federal law.

As we pointed out in the First Report, because law schools are measured by the bar passage rates of their students, many law schools have adapted to the UBE by orienting their curricula to it. Law schools, whether they like it or not, teach esoteric matters, such as the Uniform Probate Code, a model statute which has not been adopted in its entirety anywhere, with significant state-to-state variations among the states that have adopted parts of it.¹¹¹ Some familiarity with the model Uniform Probate Code, without awareness of state variations, may be harmful to clients.¹¹²

Given the current bar exam's lack of emphasis on New York law, it is also not surprising that the law school curriculum has moved away from focusing on New York law—a correlation that was well-documented by most law school deans and professors from whom the Task Force has heard.¹¹³

¹¹¹ The proposal by the NCBE to remove trusts and estates from the subjects listed will likely have the indirect effect of reducing interest in the Model Probate Code.

¹¹² In one case, plaintiffs obtained a default judgment against a Florida domiciliary in a Michigan federal court. After the defendant died, the plaintiffs timely filed a claim with the defendant's Florida estate. Thereafter, the Michigan court set aside the default judgment but allowed the suit to proceed further in Michigan. The estate successfully moved in Florida to strike the claim against the estate. That order was not appealed, with the plaintiff's Michigan-based attorney perceiving that the pending federal lawsuit was adequate, under the Model Probate Code, to protect his clients' rights. The plaintiffs recovered a \$3.76 million verdict in their action and filed a new claim against the estate. The Florida courts struck the claim, holding that it was untimely. While the Florida appellate court recognized that this was a harsh result, particularly since the estate was not prejudiced as it had known about the claim along, "[w]e cannot rewrite Florida probate law to accommodate a Michigan attorney more familiar with the Uniform Probate Code." *Payne v. Stalley*, 672 So.2d 822, 823 (Fla. Dist. Ct. App. 2d Dist. 1995).

¹¹³ First Report at 62-63.

Yet BOLE disputes any direct connection between the content of the bar exam and law school curriculum. Instead, to explain the drop in New York law courses, BOLE points the finger elsewhere rather than concede that the format of the Bar Examination shapes law school curriculum. First, BOLE insists, without pointing to any evidence, data, or survey, and contrary to our prior findings, and to common sense, that students are not motivated to take courses based on the content of the Bar Examination. BOLE downplays the documented evidence that curriculum has been altered as a direct result of New York's transition to the UBE.¹¹⁴ BOLE's overlooks that many law schools are teaching to the Bar Examination because a paramount goal of law students is passing the Bar Examination—something that was widely agreed upon during the Task Force's investigation—and many law schools have significant interests in having a high percentage of their students achieve a passing score. BOLE then faults law schools for not offering more New York law courses to prepare practice-ready graduates.¹¹⁵ BOLE faults employers for not telling law schools to offer more New York law courses or being willing to devote more time to training new lawyers.¹¹⁶

Law schools are not going to offer more New York courses unless students are incentivized to, and do, take them. The Task Force, which includes members who are or have been full-time law faculty, recognize the fact that law schools in general are not going to offer courses that students are not taking; law schools are not going to hire and compensate faculty to teach courses that students are not taking. Similarly, to fault employers for not training new lawyers more extensively ignores today's economic reality. Small firms and sole practitioners simply do not

¹¹⁴ BOLE Response at 12, 16.

¹¹⁵ *Id.* at 16.

¹¹⁶ *Id.*

have the economic foundation to hire young lawyers and then pay them while they learn to practice. Middle-class clients and small businesses cannot afford to pay legal bills for time spent by new lawyers learning the basics of practice. Even larger firms are under client pressure to moderate billing for young lawyers. It is ironic that BOLE would advocate that the UBE helps clients who operate in multiple jurisdictions but impliedly criticizes those clients for being unwilling to pay to further the training of the newly admitted, multiple-jurisdiction attorneys. BOLE should not be permitted to shift the buck – it is the bar examination that is supposed to test whether young lawyers are minimally practice-ready. And it is BOLE’s job to assure that the examination does that.

The plain truth is that UBE incentivizes law schools to teach, and law students to study, the law of “nowhere” since that is the law that is tested on the bar, with the results of the bar being critical to the futures of students and many law schools.

An essential ingredient to a capable newly admitted attorney is a foundation of law school courses that prepare him or her for the legal issues that they will experience in practice. Anything less is a disservice to the public. When law school curricular are shaped by a bar exam that places no real emphasis on New York law, even the best efforts of law school deans and professors simply cannot achieve the twin aims of preparing students for success on the bar exam and in practice.

C. The benefits of fixing the New York portion of the bar exam far outweigh any costs associated with implementing necessary changes

Building a Better Bar, the Merritt study, indicates that almost half of newly admitted lawyers rely *exclusively* on state and local law in practice, and a similar proportion rely on a mix of state, local, and federal law.¹¹⁷ It is undisputed that the UBE pays no attention to state or local

¹¹⁷ Building a Better Bar, *supra*, a copy of which is annexed to this Report as Appendix A.

law. In addition, and as discussed above, the NYLE does not adequately cover these crucial subjects either. The NCBE, is moving to reduce the content of state law tested even further by removing family law, conflict of law, and trusts and estates from the subjects tested. As such, fixing the New York portion of the Bar Examination, first and foremost, is a matter of protecting the public.

In this regard, the First Report ultimately recommended “design[ing] a new New York Bar Examination, one that better measures the competence of applicants to practice law in New York.”¹¹⁸ It further concluded that “[t]he development of a new New York Bar Examination may be undertaken in conjunction with on-going national bar exam reform efforts or as an entirely New York enterprise.”¹¹⁹ New York has an opportunity to be a leader in this field. After all, New York already tests more than a fifth of all candidates.¹²⁰ Yet, the BOLE outright rejects the Task Force’s proposals for improving the existing NYLE as “administratively and economically impossible.”¹²¹

Curiously, BOLE does not provide any cost/benefit analysis before rejecting our proposals for change on economic grounds. Further, BOLE assumes that the only way to improve the NYLE would be to administer an in-person proctored exam, four times per year—something that the First Report did not recommend. Again, BOLE is, in essence, simply repeating its prior statements to the Task Force when we asked if BOLE would consider changing the way the test is administered. BOLE answered that “[c]ontinuing the test on-line is the only feasible way it can be

¹¹⁸First Report at 72.

¹¹⁹ *Id.* at 73.

¹²⁰ *See* Building a Better Bar, *supra*.

¹²¹ *See* BOLE Response at 13.

administered.”¹²² BOLE asserts that “administratively and cost-wise, adding a third day to the bar exam is not feasible” and “to administer the test at test centers presents a number of challenges, including test center capacity and cost.”¹²³ We suggest that surely there are other ways to design and administer a test that BOLE has thus far been unwilling to explore.

While BOLE criticizes the First Report for not fleshing out all of the details for exactly how its recommendations would be implemented, it does not offer any analysis as to how to effectively implement any of the recommendations. To be sure, the menu of available options was meant to start a conversation and help guide the Court of Appeals. Our proposals were intended to start the process and were not intended to be fully detailed regulations ready for implementation. The nuances of administering a specific test fall within BOLE’s expertise, and it would be presumptuous to assume that the Task Force can flesh out the intricacies surrounding its proposals better than the body responsible for administering the exam. We are hopeful that the ultimate decision-maker, the Court of Appeals, will give appropriate direction to BOLE and consider the formation of a working group to help guide the process.

There are several less burdensome ways to implement the Report’s recommendations. For instance, if the NYLE is eliminated, that frees up one extra day to use to offer its replacement. So, it is disingenuous to say that *replacing* the NYLE is *adding* a third day of testing. The tests could be broken up into stages that are administered during and after law school, or a more rigorous New York test could be worked into the existing exam structure, as we ultimately propose in this Report.

¹²² First Report at 44.

¹²³ BOLE Response at 19. This then raises the question as to whether BOLE would have similar reservations about the NCBE’s proposal to administer its next generation of the Bar Examination at test centers.

Any additional costs necessary to make the bar exam more rigorous and reliable—which, again is something that BOLE has only assumed at this point—would be well spent. As the First Report detailed, an exam that does not require attorneys to demonstrate minimum competence in New York law has numerous consequences. It is a disservice to the public at large, a disservice to the profession, and a disservice to the future New York lawyer who is put at a disadvantage. Any cost of improving the exam will undoubtedly pay dividends in the future. In that regard, as noted above, we strongly recommend the Court of Appeals and other interested stakeholders consider the Report’s recommendations as well as Professor Merritt’s proposal for a true 21st century New York Bar Examination.

D. The changes necessary to combat COVID-19 present a prime opportunity to address the issues identified by the Report

The COVID-19 pandemic has forced us all to adapt to a “new normal,” and the bar exam is not immune from this reality. When the Court of Appeals was forced to reschedule the September 2020 bar exam to protect the well-being of thousands of law school graduates and proctors, it had to rethink the very nature of the bar exam. In many ways, the remote exam that was held in October is an example of how innovative thinking can effectively respond to immediate challenges.

The emergency created by the pandemic also highlighted the vulnerabilities with a national testing regime. In June 2020, when the NCBE announced that it would allow jurisdictions to administer an October online exam as a precaution, it stressed that the online test would not be considered a UBE and thus would not offer candidates the same score portability between

jurisdictions.¹²⁴ The NCBE also relieved itself of grading responsibilities,¹²⁵ although it did provide jurisdiction with grading analysis for the MEE and MPT questions so that the same grading scale could be used. As a result, individual states were left to reach agreements with other states to accept their candidates' scores and grade the exams on their own. Additionally, several states took actions to limit the ability of New York residents to take the bar exam in their jurisdictions, while out-of-state law student deans and students objected to New York's efforts to limit the number of bar applicants its tests. As noted previously, students moved between various jurisdictions – not because they really intended to practice there – but to take advantage of what they perceived the most favorable testing opportunities to be. These breakdowns make it clear that portability and reliance on the NCBE—the main reasons for adopting the UBE—are not guaranteed under the current bar exam format and that New York is particularly vulnerable.

As New York continues to consider the necessary adjustments required to administer an effective bar exam in this “new normal,” it must rethink the Bar Examination, as we now have a stark choice between accepting the new computer-based examination to be developed by NCBE that further deemphasizes state law or forging our own path. We should take advantage of this opportunity, as the die is about to be cast.

XIV. REPLY TO NCBE'S RESPONSE TO OUR REPORT

As with BOLE, we are extremely disappointed by the tone and substance of NCBE's reply to the First Report. Much of the NCBE's response is unprofessional and inappropriate. This is most unfortunate because we had thought that NCBE's intent was to provide the best possible

¹²⁴ See *Daily Coronavirus Update: NY to Allow Transfer of Remote Bar Exam Scores*, Christian Nolan, NYSBA (Aug. 18, 2020), <https://nysba.org/daily-coronavirus-update-ny-to-allow-transfer-of-remote-bar-exam-scores/>

¹²⁵ *Id.*

exam process for candidates seeking law licensure. Instead, perhaps perceiving that their attempt to monopolize the Bar Examination market was threatened, they reacted, as did BOLE, by attempting to circle the wagons and to refuse to professionally deal with criticism, except by *ad hominem* attack that NCBE would not tolerate from a prospective lawyer.

We identified serious problems with the UBE and the NYLE in the First Report. The identification of these problems was among the outcomes from its charge to investigate and report on the impact of New York's adoption of the UBE. By necessity, such an investigation required a full evaluation of every aspect of the UBE, including its content and scoring, uniformity and portability. Over the course of 11 months, we applied as much diligence as we could to comprehensively evaluate the UBE's impact in New York. It was only after a thorough review of the available data and consideration of the various recommendations proposed by experts and stakeholders across the state that the Task Force made eight recommendations, one of which was an independent psychometric analysis of the scoring and scaling of the UBE.

We raised many questions in the First Report. We may not have asked all the right questions or even all the questions that need to be asked about the UBE's grading and scaling practices. Thus, we asked for a review by independent psychometric experts experienced in high-stakes licensing exams. The purpose of the recommendation for a third-party review is to create a process that all stakeholders can trust.

We are committed to fact-finding and not fault-finding, no useful purpose would be served by a detailed response to the many baseless and accusatory statements in the NCBE White Paper. Instead, we will address only the most contentious statements.

We begin with the NCBE's misinterpretation of the Task Force's questions to be an assault on NCBE itself. We are not questioning the NCBE's expertise or credentials when we ask whether

the current set of licensing exams achieves its objectives for the State of New York. Nor is it a critique of the NCBE for the Task Force to recommend an independent review when the test products involve high-stakes testing for law-licensure. We perceived our recommendation as adding value by bolstering the process and confidence in it. Plainly, the fact that a person or an organization is an expert does not *ipso facto* mean that they are correct or that their assertions should go unchallenged.

The NCBE places great weight on the fact that, after New York adopted the UBE, other states did as well. We are fully aware of this development. Indeed, we have asserted that New York, which tests approximately 20% of the nation's law graduates, is perceived as a leader in this field. However, simply because other jurisdictions elected to follow New York's lead does not mean that New York is frozen from reassessment of its prior determination. Indeed, NCBE would permanently lock New York into its orbit, notwithstanding its own determination to entirely revamp the UBE. Our primary consideration was, and remains, what is best for the State of New York and its people.

It is a matter of great concern that until adoption 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 demonstrate meaningful knowledge of New York law to gain admission.” The Task Force's inquiry into the content, structure, and grading of New York's licensing law exams — the UBE and the NYLE — is about whether these exams serve the interests of all New York's stakeholders in the legal profession.

NCBE objected to the Task Force Report for including critics of the Bar Examination who argue that the exam is flawed because it does not test some key skills that lawyers need.¹²⁶ The NCBE responded by stating that no licensure exam could possibly test every skill a professional needs and that “this impossibility does not represent a fatal flaw in the bar exam or other licensure exams.”¹²⁷

The NCBE’s reaction is misplaced and misguided. When the Task Force reports that some stakeholders question the current licensure process because it fails to test some key skills and knowledge that newly admitted New York lawyers should possess,¹²⁸ the comment reflects our viewpoint which we are entitled to express. The Task Force is charged with making recommendations regarding the future content and form of New York’s bar exam and that is precisely what the Task Force has done. It made eight recommendations, including consideration of a licensing avenue that does not even include a bar exam — a New York Law Certification program.¹²⁹ It is worthy of note that Building a Better Bar has since called the UBE to task for failing to test on matters of state and local law, notwithstanding that is the law that most young lawyers practice, not federal law or law of a fictional jurisdiction.

We now turn to specific criticisms made by the NCBE.

A. Uniformity Issues

NCBE attempts to deflect attention from the Task Force’s inquiry into the validity of a portable UBE score by comparing branches of the United States military with the UBE’s test

¹²⁶ NCBE Response, p. 3

¹²⁷ *Id.*

¹²⁸ First Report, p. 22.

¹²⁹ *Id.*, at 4.

questions.¹³⁰ While we fundamentally disagree with the applicability of this analogy, we note more specifically that the Task Force does not question the uniformity of the individual UBE components, but rather questions the meaning of its resulting score when the purpose is portability.

A key point in this regard is that, while the individual exam components (MBE, MEE, MPT) are the same in each exam administration and assigned the same weights and graded in accord with the same grading materials in every jurisdiction, the applicant pool taking the exam is different. The written components (MEE, MPT) are relatively graded and then scaled to the MBE mean for that particular jurisdiction. This results in a local score that is then transported to another UBE jurisdiction that was graded and scored, albeit using the same uniform instruments, but against a completely different group of test takers.

We note that the NCBE, as part of its Preliminary Recommendations, has indicated that it is eliminating the three distinct components (MBE, MEE, MPT) and their separate grades in favor of a single integrated score. It is readily apparent the NCBE, then, was not as entirely satisfied with its existing format as it professed to be.

The issue is not about the test instrument, grading materials, or how carefully the graders are calibrated. It is about whether a “local” score, dependent on the applicant pool that took that exam in a particular jurisdiction, is a reliable “portable” score for the State of New York. Notably

¹³⁰ NCBE Report, p. 5. “The Task Force Report claims that the UBE is not uniform because the passing score varies from jurisdiction to jurisdiction and the grading is not consistent. Differences in passing scores do not, however, make the exam itself non-uniform. Different branches of the US military, for example, have different height and weight requirements, but no one would take those differences in *standards* to imply that the *instruments* (scales or measuring tapes) are not uniform. The UBE includes the same test questions (MBE, MEE, MPT), which are assigned the same weights and graded in accord with the same grading materials, in every jurisdiction that administers it. It is unclear how the test instrument itself could be made more uniform.” However, while the instrument may be uniform, the notes that come out of it are not uniform.

the NCBE has not stated that it intends to score its new examination uniformly, no matter the jurisdiction in which it is given. Thus, the issue remains trenchant, both for the present and for the future.

Because of the locality of the portable score as confirmed by BOLE when it stated that “[s]caling related to putting written scores onto a distribution of the same mean and standard deviation as the MBE scores of a given group of test-takers,”¹³¹ we questioned, we believe rightfully, what this means for a score transported from a UBE jurisdiction into New York. Because the Task Force has such questions, it recommended an independent psychometric evaluation. This recommendation reflects a quest for answers from an outside independent source. Further, seeking an outside independent evaluator is simply a recognition of the plain fact that NCBE wears multiple hats; sometimes it is a provider of assessment products and sometimes it is not.¹³² The NCBE generates income from its sales of its products and has an economic interest in maintaining, if not expanding, its sales.

Another concerning issue for the Task Force is the possibility that the same person may be found “competent” to practice law in one UBE jurisdiction and “incompetent” in another, even though it is the same person with the same skill level writing the same exam. BOLE answered this question when it acknowledged that it is “a theoretical possibility that a candidate might receive different scores in two different UBE jurisdictions.”¹³³ And NCBE confirmed it: “It is true that an

¹³¹ BOLE Letter, Appendix A: Letter to Presiding Justice Alan D. Scheinkman, New York State Board of Law Examiners, at 23 (Dec. 16, 2019 (hereinafter “BOLE Letter”).

¹³² See The National Conference of Bar Examiners, Our Mission, <https://www.ncbex.org/about/> (last visited Aug. 21, 2020).

¹³³ BOLE Letter, Appendix A: Letter to Presiding Justice Alan D. Scheinkman, New York State Board of Law Examiners, at 16 (Dec. 16, 2019).

examinee could get a different raw score on the written portion of the bar exam depending on which jurisdiction she sat in.”¹³⁴

And herein lies the heart of the matter: the Task Force questions whether this is the right result for New York whereas NCBE accepts this as an acceptable possible outcome. NCBE explains that “[g]iven the relatively high correlation between MBE scores and scores on the written portion, if an examinee sits in a jurisdiction with a relatively low mean MBE score, the raw score that examinee receives on the written portion is, indeed, likely to be higher than it would be if she sat in a jurisdiction with a higher MBE mean. However, the fact that different jurisdictions could or would award different raw written scores does not mean that the examinee will ultimately get a different scaled written score and, by extension, a different total UBE score.”¹³⁵

Clearly, the Task Force’s and the NCBE’s basic perspectives are different. The Task Force is concerned with finding a pathway to law licensure in the State of New York that assures the public that its newly admitted attorneys are prepared to practice law in New York that includes New York law, while also assuring the candidate that the bar exam he or she takes is a fair and reliable assessment of that individual’s minimum competency to practice law. NCBE is concerned with the validity and reliability of its exam products and scoring practices.

B. Reducing the Number of Scored MBE Items and the Changing Proficiency of Examinees

The NCBE reduced the number of live (scored) items on the MBE beginning in February 2017 from 190 to 175, while the number of equator items remained the same.¹³⁶ The number of

¹³⁴ NCBE Response, p. 14.

¹³⁵ *Id.*

¹³⁶ NCBE Response, p. 10.

live test items was reduced to increase the number of unscored items being pretested for future use. We questioned the reduction of live items; the NCBE again mischaracterized the First Report.

The First Report did not claim that there were a “number of negative effects”¹³⁷ in decreasing the number of live MBE items, but questioned the effect of reducing the number of items by about 8%. The Task Force could not possibly know if there were actual “negative effects” because such data is not available to it. It could only question and draw inferences from the facts presented. The facts are that the number of MBE test items were reduced from 190 to 175 items commencing with the February 2017 administration of the bar exam while the number of equator items remained the same. As Nancy Luebbert, Director of Academic Success at the University of Idaho College of Law, observed, “[o]ne doesn’t have to be a mathematician to recognize that the effect of one wrong answer is magnified when the number of test items goes down, and that this effect is most pronounced for those near the pass line.”¹³⁸

At the time this change went into effect, former NCBE President Erica Moeser advised law-school deans that while the MBE will consist of only 175 scored items, “MBE scores will continue to be expressed on a 200-point scale. Because MBE scores are equated and scaled, scores will be comparable to those earned when there were more scored questions. The change was made in consultation with our testing and measurement staff with the goal of further strengthening the

¹³⁷ *Id.*

¹³⁸ Posting of Nancy Luebbert to asp-1@chicagokent.kentlaw.edu (Aug. 31, 2016, 1:46 p.m. EST) (The subject heading of this email is [ASP-L:6281] *Re: ASP Response to concerns with the NCBE*) (on file with the Task Force).

MBE.”¹³⁹ There is nothing in this statement to explain how a change to 25 pre-test items in an exam with only 200 items raises no issues as to instrument efficacy. The Task Force finds it insufficient to rely on President Moeser’s bare and unverified assertion that because NCBE checked these changes with its own testing and measurement staff, the question is settled.

Furthermore, in response to the Task Force Report, NCBE now informs us that it ensured that no changes would result from an 8% decrease in the number of MBE test questions because its psychometricians went back and rescored old exams as though they had 15 fewer scored non-equator items, not expecting “to see more than negligible effects via this modeling on individual scores or on mean scores for the group” and found that “subsequent exam administrations bore out the prediction....”¹⁴⁰

We continue to question whether the reduction in live items has an effect and do not find NCBE’s explanation reassuring. Perhaps rescoring old exams as though they had 15 fewer scored non-equator items was the appropriate methodology, but this raises a question about the equator items. Once again, the Task Force’s recommendation for an independent psychometric review is the reasonable and appropriate response.

¹³⁹ Memorandum from Erica Moeser, President, NCBE, to Law School Deans (at all American Bar Association-accredited law schools) (August 31, 2016) [hereinafter Moeser, Letter to Law School Deans, Aug. 31, 2016]; (Memorandum on file with the Task Force).

¹⁴⁰ NCBE Response, p. 11. “NCBE modeled the impact the reduction in the number of scored items would have on scaled scores using prior MBE exams. This modeling was conceptually straightforward: psychometricians went back and rescored old exams as though they had 15 fewer scored non-equator items. NCBE research/ psychometric staff did not expect to see more than negligible effects via this modeling on individual scores or on mean scores for the group. Results of the February 2017 and subsequent exam administrations bore out the prediction of the modeling and confirmed that the change had a negligible effect.

NCBE expected to find no more than “negligible effects” in reducing the number of test items and then found none. This result is the opposite one from what Dr. Susan Case, former Director of Testing for the NCBE, repeatedly stated: “the more questions you ask, the higher the reliability.”¹⁴¹ She also stated: “The broader the content domain, the more questions are required.”¹⁴² And just to be sure that the concept was clear, Dr. Case added: “[i]f more questions provide greater reliability, it follows that reliability is reduced when fewer questions are used.”¹⁴³

In questioning the effects of reducing the number of live test items, we relied on these statements and explanations by the NCBE’s own Director of Testing as reported in NCBE’s June 2012 edition of the *Bar Examiner*. It seems disingenuous for NCBE to dismiss our reliance on one of its own experts by limiting all that Dr. Case stated above and reducing it to four words: “[o]ther things being equal.” And why is this article in the *Bar Examiner* no longer available to the public on NCBE’s website? Did the NCBE decide that Dr. Case was wrong or has it decided that Dr. Case’s explanations should not be available for public consideration?

What meaning *should* we have given to Dr. Case’s statement that “[b]ut for a given topic or set of topics, all else being equal, the larger the sample of questions the more likely you are to have a good estimate of knowledge and skills”?¹⁴⁴ Dr. Case placed the limiting words — “other

¹⁴¹ Dr. Susan Case, *The Testing Column, What Everyone Needs to Know About Testing, Whether They Like It Or Not, The Bar Examiner*, June 2012, at 29 [hereinafter Case, *What Everyone Needs To Know*]; this Article is on file with the Task Force; it is no longer available on NCBE’s website for *The Bar Examiner*. (last visited August 22, 2020); https://thebarexaminer.org/?search=&authername=Case%2C_Susan_M.%2C___Ph.D.&publishedate=&action=my_posts_request_filter&post_type=article&submit=Search.

¹⁴² *Id.*

¹⁴³ *Id.* at 29-30.

¹⁴⁴ *Id.* at 29.

things being equal” — in the middle of the sentence, both here and in another instance. The words were not at the beginning of the sentence to indicate to the reader that whatever follows is limited by these words. Now, however, in rewriting Dr. Case’s explanation, NCBE begins with these words and deflects Dr. Case’s emphasis that “more questions provide greater reliability” with the following:

Other things being equal, the longer the exam, the greater the reliability, and vice versa. But the key point here is “other things being equal.” Besides test length, score reliability can also be affected by item discrimination (Traub, 1994)—that is, the ability of items to distinguish between different levels of examinee proficiency. *Other things being equal*, a test consisting of items with higher discrimination values would lead to a higher reliability, so test length and item discrimination are compensatory in nature; increasing one can offset a reduction in the other.¹⁴⁵

If these words of limitation were so critical to understanding sample reliability, one would reasonably expect Dr. Case to have made this clear by beginning each of her statements with the limiting words. Yes, she used them, but they were in the middle of the sentence. How would the average reader be expected to understand the critical importance of these words and the variables to be considered in determining “what other things are needed to be equal”?

In sum, we continue to believe that our recommendation for an independent psychometrician to review this matter is a necessary and sound one. There is no other way to know what meaning to give to NCBE’s explanations: should we believe what NCBE told us in the Bar Examiner in 2012 or what they are telling us now. Importantly, if the NCBE had confidence in its viewpoints, one would think it would welcome independent confirmation. And the prospective change in examination formats would not moot these questions since the NCBE has not indicated that it plans to change the way it scores the examination.

NCBE addresses the Task Force’s concern with reliability and its possible effect on equating the exam by explaining that although NCBE reduced the number of live MBE items, “the

¹⁴⁵ NCBE Response at 11 (emphasis added]

number of equators remained the same.”¹⁴⁶ According to the NCBE, its number of equators used on the MBE far exceeds the guidelines for best practices in psychometrics.¹⁴⁷ NCBE further explains that equator items are carefully selected and refers to a comprehensive list of criteria in selecting these items.

Since the Task Force is not composed of mathematicians, we do not have the expertise to know what significance to attach to such general descriptions: “content representation, date of most recent use, placement from most recent use, and statistics from most recent use.”¹⁴⁸ For example, does “content representation” or any of the stated criteria include an examination of “whether changes in average MBE scores over time correspond to changes in the same candidates’ average scores on other relevant measure of candidate ability, such as by investigating whether variation in mean MBE scores over time parallel changes in mean scores on the Law School Aptitude Test (the “LSAT”) ?”¹⁴⁹

We believe that this is a reasonable inquiry: these embedded test questions are used to compare “the performance of the new group of test takers on those questions with the performance of prior test takers on those questions. The embedded items are carefully selected to mirror the content of the overall test and to effectively represent a mini-test within a test.”¹⁵⁰ This means that if there has been a change in the examinee population, then it might affect the equating

¹⁴⁶ *Id.* at 10.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Stephen P. Klein, GANSK & Associates, *Summary of Research on the Multistate Bar Examination*, at 11.

¹⁵⁰ Erica M. Moeser, *President’s Page, The Bar Examiner*, December 2014, at 4.

process. Has the NCBE accounted for this change in its statement that it considered “content representation”? Since the NCBE claims that their standardization process means that a 135 on the MBE last year is the same as a 135 achieved now and a 135 achieved ten years ago,¹⁵¹ then it is necessary to ask how the change in the examinee population has affected the equating process. Standardization of the MBE assumes that the populations who originally answered the anchor items are the same in the terms of their underlying ability as the current population. If they differ in that ability, then the standardization may be unreliable.

And the populations differ in that ability because NCBE President Erica Moeser has told us so. They differ in that all indicators “point to the fact that the group that sat in July 2014 was less able than the group that sat in July 2013.”¹⁵² According to Ms. Moeser, “It is telling that between fall 2012 and fall 2013 the law school entering class that emerged in 2016 was reduced from 43,155 to 39,674. That figure dropped to 37,892 first-year students in the fall of 2014, the class that will graduate in 2017 and test that July.”¹⁵³ Not only are there far fewer candidates sitting for the bar exam, but today’s bar candidates are different from previous bar candidates for

¹⁵¹ Case, *What Everyone Needs To Know*, at 31. Dr. Case explains that “[s]caling written-component scores to the MBE involves an algebraic process that places the written-component scores on the same scale as the MBE. This process “equates” the written-component scores and assures that the scores mean the same thing across test administrations.” Erica Moeser states that “[t]he result is that a scaled score on the MBE this past summer—say 135—is equivalent to a score of 135 on any MBE in the past or in the future.” Moeser, *President’s Page, The Bar Examiner*, Dec. 2014, at 4.

¹⁵² Memorandum from Erica Moeser, President National Conference of Bar Examiners to Law School Deans on Two Matters (Oct. 23, 2014) [hereinafter, Moeser, Letter to Law School Deans, Oct. 23, 2014]. Ms. Moeser defended the MBE scores from the July 2014 test administration, and informed law school deans, that “[b]eyond checking and rechecking our equating, we have looked at other indicators to challenge the results. All point to the fact that the group that sat in July 2014 was less able than the group that sat in July 2013.” (Memorandum on file with the Task Force).

¹⁵³ *Id.*

many reasons, not least of which is that they are “less able” because law schools are admitting less qualified students.¹⁵⁴ The determination of “less qualified” is based on entering class data for scores marking the 25th percentile level of the LSAT. The data for the class that entered law school in fall 2015 and will graduate in 2018 are “still discouraging.”¹⁵⁵ Further, Ms. Moeser claims that the downward spiral was “not unexpected” since “[w]e are in a period where we can expect to see some decline, until the market for going to law school improves.”¹⁵⁶

In addressing the Task Force’s concern with the changing examinees, NCBE explains that “[r]eliability indicates the degree of consistency in the quality (precision) of measurement; it does not require that the measurement itself is constant. A thermometer does not become less reliable because the temperature changes.”¹⁵⁷ We find this analogy rather unhelpful. The reliability of the temperature in the thermometer is only as reliable as the calibration of the thermometer. We have

¹⁵⁴ Moeser, Letter to Law School Deans, Oct. 23, 2014.

¹⁵⁵ Moeser, *President’s Page*, *The Bar Examiner*, March 2016, at 5. See charts on pages 11 and 12: Change in Enrollment and LSAT Score at the 25th Percentile from 2010 to 2015 and Changes in First-Year Enrollment and Average LSAT Score at the 25th Percentile, 2010-2015, respectively. Although NCBE does not provide the total number for how many law schools provided data for the charts, the scatterplot analysis indicates that “[m]ost of the schools appear in the lower left quadrant; this quadrant contains schools that have experienced decreases in both the LSAT score at the 25th percentile and their enrollment numbers.” <https://thebarexaminer.org/article/march-2016/presidents-page-march-2016-2/> (last visited Aug. 23, 2020). See also, Paul L. Caron, TAXPROF BLOG, *Law School Applicants From Top Colleges Increased 1% In 2016 (But Down 48% Since 2010)*, March 1, 2017 (noting that “for the first time since 2010, the total number of graduates from the nation’s top universities increased instead of continuing to decline.” While only a slight increase, it may be a sign that top university students are considering law school once again; http://taxprof.typepad.com/taxprof_blog/2017/03/law-school-applicants-from-top-colleges-increase-1-in-2016-but-down-48-since-2010.html (last visited Aug. 23, 2020).

¹⁵⁶ Natalie Kitroeff, *Bar Exam Scores Drop to Their Lowest Point in Decades: Unprepared Students Can’t Handle a Harder Test* BLOOMBERG (Sept. 17, 2015, 2:32 PM) <https://www.bloomberg.com/news/articles/2015-09-17/bar-exam-scores-drop-to-their-lowest-point-in-decades>.

¹⁵⁷ NCBE Response, p. 12.

questions regarding the NCBE's equating design of the "thermometer" and hence its recommendation for independent verification is relevant.

The Task Force is not the first and only party to question the efficacy of reducing the number of live test items. Following NCBE's announcement about the increase in the number of pre-test items, the Association of Academic Support Educators ("AASE") wrote to Ms. Moeser and Robert A. Chong, Chair of the Board of Trustees, to express concerns on behalf of its membership:

We are concerned about the expansion of the pre-test items from ten (10) questions to twenty-five (25) questions. As an initial matter, we cannot evaluate this change in a meaningful way without knowing why the change was made. In addition, the change to 25 pre-test items for an exam that has only 200 items seems likely to raise some issues with respect to the efficacy of the MBE instrument in measuring minimum competency. As Dr. Susan M. Case suggested, a reduction in the number of items used to measure performance --- in this case from 190 graded questions to 175 graded questions --- negatively impacts the accuracy of the sampling measurements used within one exam to necessarily generalize from a smaller subset of questions to the larger question of minimum competency. Susan M. Case, *The Testing Column*, 81 Bar Examiner 29, 29 (2012). In her words, "for a given topic or set of topics all else being equal, the larger the sample of questions the more likely you are to have a good estimate of knowledge and skills." *Id.* In addition, the decrease in the number of items is likely to distort the reliability of the MBE exam instrument especially given the recent addition of Federal Civil Procedure material, as likewise explained by Dr. Case. *Id.* Lastly, this change conveys disrespect to bar applicants nationwide by compelling individuals who are taking likely the single-most-important test of their career to spend one-eight of their exam time (forty-five minutes out of their six hours) and considerable mental effort on unscored work.

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¹⁵⁸ Letter from Jamie A. Kleppetsch, President, Association of Academic Support Educators, to Robert A. Chong, Chair of the Board of Trustees, National Conference of Bar Examiners and Erica Moeser, President & Chief Executive Officer, National Conference of Bar Examiners (Sept. 23, 2016) [hereinafter, Kleppetsch, AASE Letter] (on file with the Task Force). AASE is an organization comprised of more than 200 academic support and bar preparation professors representing law schools throughout the country. The concerns were three-fold: public revelation of a change without explanation, failure to solicit comments and advice from law school administrators, faculty, staff, and other stakeholders, and being informed only after the decision had been implemented.

AASE identified the identical concerns that the Task Force raised in its First Report. Just as the Task Force questioned the conclusory explanation reducing the number of test-items, AASE wrote, “though the NCBE memorandum relates that the change in the number of pre-test items will not have any effects (either negative or positive), because the NCBE does not provide evidentiary support for its conclusion, we are concerned about the basis for this assertion.”¹⁵⁹ While AASE raised concerns about the NCBE’s actions, the Task Force actively questioned them and asked for the State of New York to conduct its own psychometric review.

AASE raised another critical concern:

[A]s Dr. Case addresses in her 2012 column, because of the inherent sampling, reliability, and validity issues with respect to the written portions of the bar exam (the MEE and MPT questions), we are concerned that changes in the MBE without accompanying changes in the scaling methodology used by the NCBE (and apparently by most jurisdictions) to adjust written scores to the same scale of the MBE based on jurisdictional mean, standard deviation, and range data, might result in further degradation of the efficacy of the entire exam. And unless this change was conveyed to state bar associations previously, we are also concerned that the NCBE has not given those entities time to study this change and adjust accordingly.¹⁶⁰

NCBE’s response when it added a whole other content domain to the MBE — Federal Civil Procedure — was that “[o]ur research is solidly convincing that the addition of Civil Procedure had no impact on the MBE scores earned on the February and July 2015 MBE administrations.”¹⁶¹ This response stands in contrast to Dr. Case’s statement that “[b]ut for a given topic or set of topics, all else being equal, the larger the sample of questions the more likely you are to have a good estimate of knowledge and skills.”¹⁶² Notably, like the Task Force, AASE

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Erica M. Moeser, *President’s Page, The Bar Examiner*, December 2015, at 4.

¹⁶² Case, *What Everyone Needs to Know*, at 29.

referred to Dr. Case's statements in her column when it raised concerns about changes in the MBE and the impact on scoring. Apparently, AASE did not know or appreciate the power of the limiting words, "other things being equal" because AASE did not account for them.

This phrase, "other things being equal" would seem to indicate that the addition of a seventh subject to the MBE, by decreasing the number of test items in each of the other six subjects to make room for Civil Procedure, would detract from the "good estimate of knowledge and skills" being assessed because they are no longer equal. Maybe this is where we need to learn the nuanced language of instrument design. As lawyers, judges, practitioners, and educators, we are just going by the words on the page and the logical inferences to be drawn from them. For example, on its face, when you reduce the number of Contracts questions from 34 to 25, one would think that there might be an impact, but maybe this, too, falls under the heading of "other things being equal." Perhaps this is where Ms. Moeser found the answer when she stated that: "Our research is solidly convincing that the addition of Civil Procedure had no impact on the MBE scores earned on the February and July 2015 MBE administrations."

The NCBE mentions nothing about the burden placed on examinees by an increase in time spent under exam conditions on test questions. It is not insignificant. According to Professor Merritt, an increase from 18 minutes to 45 minutes is "a substantial amount of time, especially when 'volunteered' in the midst of a stressful, tiring experience."¹⁶³ It is not simply a matter of adding more time to the test: pre-test questions add stress. They add stress because the new questions "may be more ambiguous or difficult than well-tested ones." Further, and perhaps most important, "exam-takers ...can't skip over challenging pre-test questions and focus on the 'real'

¹⁶³ Deborah J. Merritt, *The Latest Change in the MBE*, LAW SCHOOL CAFÉ, (Sept. 5, 2016), <http://www.lawschoolcafe.org/2016/09/05/the-latest-change-in-the-mbe/> (last visited Aug. 23, 2020).

questions... [because] they don't know which are which. Answering flawed pre-test items can absorb disproportionate amounts of time and raise stress levels.”¹⁶⁴

NCBE's statement that the change in the number of pre-test items had but a “negligible effect” on test scores remains unacceptable to this Task Force. Nor is a statement from Ms. Moeser that “our research is solidly convincing” enough to convince the Task Force without independent verification. The public's interest in a fair and transparent licensing process outweighs the interests of any entity. Only a review by a disinterested party will serve the public's interest.

C. Relative Grading

The Task Force Report does not question the professionalism or calibration of the graders, but rather questions a grading process that favors context over competence. As the NCBE has said, “an essay of average proficiency will be graded lower if it appears in a pool of excellent essays than if it appears in a pool of poor essays. Context matters.”¹⁶⁵ As Dr. Case explains:

So what is the outcome of such fluctuation in the meaning of written test scores? An individual of average proficiency may have the misfortune of sitting for the bar with a particularly bright candidate pool. This average individual's essay scores will be lower than they would have been in a different sitting. The same individual's MBE score will reflect his genuine proficiency level (despite sitting with a group of particularly bright candidates), but without scaling, his essay scores may drag him down. An unscaled essay score may be affected by factors such as item difficulty or the average proficiency of the candidate pool that do not reflect the individual candidate's performance.¹⁶⁶

This is where scaling the written scores to the equated MBE scores is supposed to assure us that the final results are valid and reliable, even though an “average” candidate happened to be

¹⁶⁴ *Id.*

¹⁶⁵ Susan M. Case, *The Testing Column, Frequently Asked Questions About Scaling Written Test Scores to the MBE*, *The Bar Examiner*, Nov. 2006, at 43.
http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2006%2F750406_Testing.pdf.

¹⁶⁶ *Id.*

unlucky enough to take the exam with more proficient candidates and is graded lower. Dr. Case assures us that this process does not disadvantage those who perform poorly on the MBE because “[s]caling written scores to the MBE does not change the rank-ordering of examinees on either test. A person who had the 83rd best MBE score and the 23rd best essay score will still have the 83rd best MBE score and the 23rd best essay score after scaling.”¹⁶⁷

None of this addresses the Task Force’s primary concern which is to determine whether an individual possesses minimum competency for law licensure and not whether that individual has knowledge that is stronger or weaker than another. You can be the “strongest of the weak” candidates and still not be competent to practice law. And vice versa, you can be the “weakest of the strong” candidates and still be competent to practice law. Still, in this case, the individual may be denied a law license on grounds other than a determination of individual competency.

This is because if all the candidates are weak, then the strongest of the weakest sets the “bar.” If Sarah is 70 years old and eligible for maximum Social Security benefits and considered a senior citizen by all governmental and cultural measures, she is “relatively young” when in a group of octogenarians. Does this make Sarah “young” or even “younger” than she is because she appears younger when in a group of older people? Is a bar candidate more or less competent because of the group with whom the candidate happens to take the bar exam? Minimum competence of practice law is not relative.

We were not the first to question such practices. In March 2016, Oklahoma changed its scoring model when it recognized that some examinees may have failed the bar exam when they should have passed. Oklahoma Supreme Court Chief Justice John F. Reif explained that the court’s decision came after learning that several individuals who took the bar exam in July 2015

¹⁶⁷ *Id.*

may have passed if it were not for the scaling system. According to Judge Reif, “[o]nce the scaling and adjustment took place, they no longer had a passing grade.” Further, “it didn’t have anything to do with what they had demonstrated in the way of knowledge on the essay portion. It happened to be the scaling of that score brought it below the passing grade.”¹⁶⁸

Still, the Oklahoma Board of Bar Examiners remained firm in its commitment to the scaling system. Board member Donna Smith told the Tulsa World that “scaling was meant ‘to take out the bumps in the road’ when the difficulty of essay questions or skill level of test-takers vary.”¹⁶⁹ Then she added: “If you have 10 really good papers and then a paper that’s more average, generally that average paper will get a lower score if it’s graded among really good papers, and vice-versa.”¹⁷⁰ This statement is very telling: it shows that bar examiners are very well aware that examinees may fail the bar exam not because they lack the requisite knowledge, but because they appear weaker when in the company of stronger candidates — and that they nonetheless find the practice acceptable.

D. UBE Portability and New York Candidates

NCBE misinterpreted the concern we expressed in our First Report about “forum shopping”: it is not about whether examinees might take advantage of how relative grading and scaling impacts bar scores such that an examinee might find a more “favorable” cohort jurisdiction,

¹⁶⁸ Arianna Pickard, *High failure rate on Oklahoma bar exam prompts change to state test*, TULSA WORLD (Apr. 8, 2016, 12:00 AM and updated on Apr. 11, 2016 at 11:49 AM, updated Feb 19, 2019) http://www.tulsaworld.com/news/education/high-failure-rate-on-oklahoma-bar-exam-prompts-change-to/article_b73f0e5b-0075-531a-a39e-f06e8ecad0ee.html. (last visited Sept. 18, 2020).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

but the fact that it is even possible. It is an unacceptable situation where the same person taking the same exam can pass in one UBE jurisdiction and fail in another.

We respectfully suggest that the NCBE reread BOLE’s own statements, which we quoted in the First Report, as those statements confirm that a “portable” UBE score is the product of the time and place in which it was taken: “The problem is that when a candidate goes to another jurisdiction and takes the test, the performance is judged in that context — meaning the written performance is evaluated with the specific group of papers produced for that exam. It can’t be assumed that the written score achieved on one exam would be the same as a written score achieved on another. It would be mere speculation to assume that a written score would increase by a given amount because of the perceived ability of the population with which the test was taken.”¹⁷¹

The “portable” score is just a “local” score, dependent on the pool that took that exam—and it is also “relative.” This is because of NCBE’s practice of scaling the written component to the MBE,¹⁷² which comes only from that jurisdiction. BOLE confirmed the locality of the “portable score” when it stated that “[s]caling relates to putting written scores onto a distribution of the same mean and standard deviation as the MBE scores of a given group of test-takers.”¹⁷³

¹⁷¹ BOLE Letter, at 23.

¹⁷² See Susan M. Case, *The Testing Column, Demystifying Scaling To the MBE: How’d You Do That?*, *The Bar Examiner*, May 2005, at 46. According to Dr. Case, the Director of Testing for the NCBE until November 2013, “[s]caling the essays to the MBE is an essential step in ensuring that scores have a consistent meaning over time. When essay scores are not scaled to the MBE, they tend to remain about the same: for example, it is common for the average raw July essay score to be similar to the average February score even if the July examinees are known to be more knowledgeable on average than the February examinees. Using raw essay scores rather than scaled essay scores tends to provide an unintended advantage to some examinees and an unintended disadvantage to others.”

¹⁷³ BOLE Letter, at 23.

While NCBE sees its scaling formula as necessary to “compensate for such differences and for variations among graders,” the Task Force sees it as essential to question whether scaling and scoring practices that can result in different scores for the same individual represents a fair and reliable assessment of that candidate’s minimum competency to practice law. It is not the Task Force’s intent for NCBE to feel threatened by its recommendation for an independent assessment but only part of its mission to review and assess the licensure process in New York. Whether to continue using a scaling system that ranks exams where it is a possibility that examinees may fail the bar exam not because they lack the requisite knowledge but because they appear weaker when in the company of stronger candidates is not ours to make.

E. Scoring Practices

The NCBE claims that “[Task Force Member Suzanne] Darrow-Kleinhaus...misrepresents the purposes of relative grading, stating that [t]he objective of the bar exam is not to rank-order examinees for entrance into the profession but to determine whether a particular examinee meets the requirement for minimum competency.”¹⁷⁴ According to the NCBE, we are to believe that “rank ordering of examinees is not the end of the grading process; rather, a relative grading approach that uses rank ordering is one step in a process that also includes scaling the written score to the MBE. Scaling the written score to the MBE produces a written score that harnesses the power of the equating done to the MBE.”¹⁷⁵

NCBE is deflecting attention from the main issue by dismissing a genuine concern for this Task Force — and not just for Professor Darrow-Kleinhaus — about the problem with a grading

¹⁷⁴ NCBE citing to Suzanne Darrow-Kleinhaus, *A Reply to the National Conference of Bar Examiners: More Talk, No Answers, So Keep on Shopping*, Ohio Northern University Law Review, Vol. 44, Issue 2, at 177 (2018).

¹⁷⁵ NCBE Response, p. 13.

system that ranks candidates. Apparently, the “misrepresentation” is the failure to consider the entire process where rank ordering is then scaled to the MBE to “harness the power of the equating done to the MBE.” We considered the entire process and still find it problematic.

It is unfortunate that NCBE has chosen to claim that one is misrepresenting its grading practices when one attempts to question them. Just because NCBE claims that its scaling of the written component to the MBE “harnesses” its power does not make the legitimacy of the resulting score beyond question. In fact, quite the opposite: it requires nothing less than an independent, unbiased assessment of NCBE’s scoring and scaling practices to make that determination. The use of an *ad hominem* style of reply on the part of the NCBE is, in our view, an attempt to mask the lack of substance in their reply.

Moreover, independent assessment is essential since the NCBE has decided to make its response to the Task Force a personal attack on the integrity one of its members, Professor Darrow-Kleinhaus. In questioning the validity of correlating the MEE and the MPT to the MBE, NCBE accuses Professor Darrow-Kleinhaus, and the Task Force by extension since it cites to her work, that it “use[d] false information to discredit the validity of scaling the written score to the MBE.”¹⁷⁶ The NCBE asserts that the First Report “erroneously states that correlations between the MBE score and the written score are low, falsely claiming that ‘NCBE acknowledges that there is a low correlation of the written component score with the MBE scaled score.’ NCBE made no such acknowledgement in the article referenced by the Task Force.”¹⁷⁷ Fortunately, the article by Dr. Mark Albanese in *The*

¹⁷⁶ *Id.* at 18.

¹⁷⁷ Mark A. Albanese, *The Testing Column, Let the Games Begin: Jurisdiction-Shopping For the Shopaholics (Good Luck With That)* *The Bar Examiner*, Sept. 2016, at 50, 52 -53 [hereinafter Albanese, *Let the Games Begin*], See sections entitled “The Reliability of the Written Component Total Score”, and “The Correlation of the Written Component Score with the MBE Scaled Score”).

Bar Examiner to which NCBE refers is available to the public on NCBE’s website, unlike that of Dr. Case’s earlier-cited article (which NCBE has taken down), so all interested readers can decide for themselves what NCBE has “acknowledged.”

In *The Testing Column*,¹⁷⁸ Dr. Albanese addresses the issue of forum-shopping and, in so doing, explains NCBE’s basis for assuring the reliability of the bar exam’s written component total score.¹⁷⁹

The first index we use is the reliability of the written component total score. (As a reminder, reliability estimates the extent to which a group of examinees would be rank-ordered the same if a second similar test was administered.) This index ranges from 0 to 1.0, with 1.0 meaning that there is consistent performance across the different essay questions and MPTs. If the reliability is 1.0, we could swap out different essay questions and MPTs and the score would not change for any examinee. A 0 reliability means that there is no consistency in performance from one essay question or MPT to the next. If we were to swap one essay question or MPT for another, the examinee’s score could change dramatically: theoretically, an examinee could move from having the lowest score to the highest score or vice versa if different questions were selected.

From here, Dr. Albanese provides additional information about the reliability of scores:

The reliability of the written component total score becomes larger as more scores contribute to creating the total score, because it reflects a larger sample of performance. *For comparison purposes, the 190-item MBE for recent administrations has a reliability of 0.92; for the July 2016 administration, it had a reliability of 0.93.4 For an examination like the written portion of the bar exam with only eight different scores in UBE jurisdictions (one for each of the six MEEs and two MPTs), the reliability will be much lower.* In fact, if we project the MBE reliability of 0.92 to an eight-item multiple-choice test, the reliability of such a test would be only 0.33. However, because each MEE question is a 30-minute exercise and each MPT is a 90-minute exercise, we would expect the written component total score to be substantially more reliable than the score from a handful of

¹⁷⁸ *Id.*

¹⁷⁹ We acknowledge the extensive technical nature of this portion of our Report. However, we felt it to be necessary to provide context for the proper assessment of the NCBE’s assertions.

multiple-choice items that we expect would take only about 15 minutes to answer. (The MBE has 100 questions per three-hour session, allowing 1.8 minutes to answer each question; projecting the same amount of time to answer each question in an eight-item MBE results in a session lasting about 15 minutes) (emphasis added).

And the following reliability data and explanations:

In July 2015, the reliabilities of the written component total scores for the 14 UBE jurisdictions ranged from 0.62 to 0.82 and averaged 0.73. In February 2016, the reliabilities of the written component total scores for the 17 UBE jurisdictions ranged from 0.48 to 0.77 and averaged 0.72. So, there is variability in the reliability of the written component total scores generated in the different UBE jurisdictions. *A bigger problem is that even the highest reliability achieved in any jurisdiction (0.82) does not reach 0.90, the minimum level normally considered adequate for high-stakes testing purposes. (italics added)*

At this point, a recap is necessary, if a bit repetitive, but just to be clear: Dr. Albanese reports that there is variability in the reliability of the written component total scores generated in the different UBE jurisdictions but “[a] bigger problem is that even the highest reliability achieved in any jurisdiction (0.82) does not reach 0.90, the minimum level normally considered adequate for high-stakes testing purposes.” In short, even the highest reliability achieved in any jurisdiction does not reach the minimum level normally considered adequate for high-states testing purposes.

Dr. Albanese then explains the correlation of the written component score with the MBE scaled score:

The second index we examine to monitor possible variation in grading practices is the correlation of the written component score with the MBE scaled score. Both the written component and the MBE are designed to assess knowledge, skills, and abilities required of the newly licensed lawyer. The MBE has the advantage of covering a broad range of content in the somewhat limited manner available in the multiple-choice format, while the MEE and MPT cover a more limited range of content but have the advantage of doing so by requiring the examinee to demonstrate the ability to express thoughts in writing, a critical skill for the newly licensed lawyer. *Although they have obvious differences, the two parts of the exam do fundamentally measure similar abilities, so the consistency of the two*

scores may be considered an indicator of consistency of grading of the written component. (emphasis added).

He provides the following correlations and explanations:

In July 2015, the correlations of the written component score with the MBE scaled score ranged from 0.44 to 0.81 and averaged 0.66 across the 14 UBE jurisdictions. In February 2016, the correlations ranged from 0.51 to 0.67 and averaged 0.60 across the 17 UBE jurisdictions. (When these correlations are adjusted for their less-than-perfect reliability, they are generally above 0.60, indicating that the MBE and written components “assess some shared aspects of competency, and that each method also assesses some unique aspect of competency.”)¹⁸⁰ As was the case for the reliability of the written component total score, there is variability between jurisdictions in the correlation of the written component score with the MBE scaled score. But is it a difference that makes a difference? And further, does it reflect meaningful differences in the average preparedness of examinees within a jurisdiction on particular subject areas?

And the final component about scaling the written component scores to the MBE:

The two key variables used to scale the written component scores to the MBE are the mean and the standard deviation (SD) of the MBE in the jurisdiction. (As a reminder, the mean is the sum of scores divided by the number of scores; the standard deviation can be thought of as the average deviation of scores from the mean.) In July 2015, the mean MBE scores for the 14 UBE jurisdictions ranged from 134.94 to 147.18, and the SD ranged from 12.88 to 17.62. In February 2016, the mean MBE scores for the 17 UBE jurisdictions ranged from 126.55 to 146.20, and the SD ranged from 12.68 to 16.39. Thus, UBE jurisdiction mean MBE scores varied by 12.2 points in July 2015 and by 19.7 points in February 2016. There clearly is jurisdiction variability in the mean MBE scores and the SDs as well.

While Dr. Albanese cites Dr. Case in discussing the relationship among bar exam component scores, it is helpful to consult her work to provide a more complete picture. For example, Dr. Albanese, citing to Dr. Case, informs us that when “these correlations are adjusted for their less-than-perfect reliability, they are generally above 0.60.” Dr. Case provides context

¹⁸⁰ Dr. Albanese, citing to Susan M. Case, Ph.D., *The Testing Column: Relationships Among Bar Examination Component Scores: Do They Measure Anything Different?*, *The Bar Examiner* 31–33 (August 2008).

and explanation for the numbers by sharing that in her data set from nine jurisdictions in the February 2009 bar exam, “the correlation with the MBE is 0.55 for local essay questions, 0.58 for the MEE, and 0.38 for the MPT. This shows a moderate correlation for both the locally developed essay questions and the MEE, but a weaker correlation for the MPT, indicating that the MPT is measuring different skills than the MBE, and that the MPT skills are less like those measured by the MBE than are the skills measured by the MEE”¹⁸¹ On the other hand, “[i]f two components measured exactly the same thing, the correlation would be 1.00 (perfectly related).”¹⁸²

Dr. Case explains that :

we know we are not measuring these skills with perfect precision. The MBE is long enough (i.e., contains sufficient questions) so that MBE scores are very precise (i.e., reliable). Scores on the MPT, with only two cases, and scores on the essays, with only a few questions, are less precise. However, there are statistical techniques that may be applied to estimate what the relationships would be if the scores were perfectly reliable. Our data show that, when corrected for the lack of perfect reliability, the correlation with the MBE is 0.76 for local essay questions, 0.78 for the MEE, and 0.58 for the MPT. These results show a moderately strong relationship between the MBE and the local essay questions, as well as between the MBE and the MEE, and a weaker relationship between the MBE and the MPT, as expected.¹⁸³

Some clear points emerge from this technical discussion:

First, there seems to be a difference between the experts in their evaluations of the strengths and weaknesses of the relationship between the components for reliability purposes. Dr. Albanese states that “[a]s was for the reliability of the written component total score, there is variability

¹⁸¹ *Id.* at 31.

¹⁸² *Id.*

¹⁸³ *Id.* at 32.

between jurisdictions in the correlation of the written component score with the MBE scaled score. But is it a difference that makes a difference?" This seems to be a rhetorical question where the answer is supposed to be "Of course it does not make a difference." We would answer, "well, maybe it does."

On the other hand, Dr. Case provides data and analysis that seems to indicate that there is a very real difference. She identifies a correlation of 0.38 for the MPT from her data set, "indicating that the MPT is measuring different skills than the MBE, and that the MPT skills are less like those measured by the MBE than are the skills measured by the MEE and local essay questions."¹⁸⁴

Second, that there are statistical techniques that can be applied to "correct for the lack of perfect reliability." Dr. Case advises us that "[o]ur data show that, when corrected for the lack of perfect reliability, the correlation with the MBE is 0.76 for local essay questions, 0.78 for the MEE, and 0.58 for the MPT. These results show a moderately strong relationship between the MBE and the local essay questions, as well as between the MBE and the MEE, and a weaker relationship between the MBE and the MPT, as expected."¹⁸⁵

A reasonable person reading these articles would most likely have questions. It is only reasonable to ask what it means to have correlations "adjusted for their less-than-perfect reliability." Is that an acceptable practice for a high stakes licensing exam? Is it an acceptable practice for this exam? Just because NCBE tells us that it is an acceptable practice does not make it so. If the MEE and the MPT measure different abilities and skills from the MBE — as we have been told and shown by their weaker correlations — then why are they scaled to the MBE? And

¹⁸⁴ *Id.* at 31.

¹⁸⁵ *Id.* at 32.

even if scaling and adjusting the written scores to the MBE “fixes” less than perfect reliability, this depends on the reliability of the MBE itself. Is that not to be questioned when it, too, has changed over time in the number of live questions and the populations taking the exam?

We believe it appropriate to ask these questions. The concern is whether NCBE’s grading practices might negatively impact those candidates who hover around the pass mark. Consequently, the Task Force remains firm in its recommendation for an outside, independent evaluation of these practices to determine whether candidates who should pass the bar exam are not passing because of such processes — and vice versa.

F. Some Concluding Thoughts About the NCBE’s Response

It is entirely unproductive and unnecessary to respond further to NCBE’s hostile and over the top criticisms of the Task Force and Professor Darrow-Kleinhaus for alleged lack of understanding of the intricacies of advanced psychometric practices. As Shakespeare famously said, “the lady doth protest too much, methinks.” Since NCBE’s attempts to explain the transformational process by which it scales, scores, and equates the numbers to arrive at a valid and reliable bar score are either so confusing or wanting — or both — so as to make that process clear to the practitioners, judges, and professors on the Task Force and other stakeholders, then the answer is obvious: have an outside psychometrician provide an independent assessment. We do not understand why NCBE would resist such an opportunity to have its metrics and processes evaluated and, if warranted, validated.

To make one final analogy, NCBE provides a product.¹⁸⁶ New York State purchases that product. As the purchaser, New York State has the right to inspect the goods. We believe that those law graduates who take the test, and the public which is to be served by a rigorous licensing system, may reasonably demand that inspection.

XV. CUT SCORES

In July 2020, California, which was one of two states with the highest pass score for its Bar Examination, permanently reduced its passing score from 1440 to 1390, effective as of California's October 2020 examination.¹⁸⁷ California is not a UBE jurisdiction, though California uses the MBE as part of its examination (just as New York did prior to the adoption of the UBE). Reducing the score led to a roughly 15% increase in the bar passage rate. The reduction in bar passage rate led to increases in the numbers of minority test takers succeeding on the examination. As compared to July 2019, 28.5% more Hispanics, 25.8% more Asians, 23.9% more Blacks, and 20.8% more Whites passed in October 2020.¹⁸⁸

¹⁸⁶ NCBE's Mission: "NCBE promotes fairness, integrity, and best practices in admission to the legal profession for the benefit and protection of the public. We serve admission authorities, courts, the legal education community, and candidates by providing high-quality assessment products, services, and research character investigations; and informational and educational resources and programs." See <https://www.ncbex.org/about/> (last visited September 18, 2020).

¹⁸⁷ See letter dated July 16, 2020 from Jorge E. Navarrette, Clerk and Executive Officer of the California Supreme Court, to Alan K. Steinbrecher, Chair, State Bar of California, Board of Trustees, available at: https://newsroom.courts.ca.gov/sites/default/files/newsroom/document/SB_BOT_7162020_FIN_AL.pdf.

¹⁸⁸ Skolnick, Bar Exams May Soon Be Easier to Pass, as States Eye Changes, March 29, 2021, available at: <https://news.bloomberglaw.com/business-and-practice/bar-exams-may-soon-be-easier-to-pass-as-states-eye-changes> (hereinafter "Skolnick").

Rhode Island is a UBE jurisdiction and it recently reduced its UBE cut score from 276 to 270, effective with the February 2021 UBE.¹⁸⁹ This reduction was made on recommendation of the Rhode Island Board of Law Examiners. One justice dissenting, stating: “In view of the fact that the professional services of lawyers are often sought by members of the public, who come from a wide diversity of backgrounds, I believe that society is better served by the maintaining of demanding (but nevertheless reasonable) standards for entry into the legal profession.”¹⁹⁰ Even with the reduction to 270, Rhode Island’s cut score remains higher than New York’s, which is pegged at 266.

In the wake of reductions in cut scores by California and Rhode Island, other states have expressed an interest in considering reducing their passing scores. The primary benefits to be derived from such a reduction are said to be a narrowing of the “achievement gap” between white and minorities and an increase in the number of newly admitted minority attorneys.¹⁹¹ States said to be willing to consider a reduction in cut scores include New York, Pennsylvania, Connecticut, North Carolina, Idaho, and Utah.¹⁹² No person is identified as the source of the information concerning New York’s interest in reducing cut scores.

The Task Force notes the existence of this issue and believes that it warrants further study. We remain concerned that the scoring practices of the NCBE -- equating scores against persons taking the test in the same locale, as opposed to equating the scores of all persons taking

¹⁸⁹Order of the Rhode Island Supreme Court, In re the Rhode Island Bar Examination (Reduction of Minimum Passing Score), dated March 25, 2021, available at [https://www.courts.ri.gov/Supreme Court/SupremeMiscOrders/RIBarExamination-ReductionMinimumPassingScore3-25-21.pdf](https://www.courts.ri.gov/SupremeCourt/SupremeMiscOrders/RIBarExamination-ReductionMinimumPassingScore3-25-21.pdf).

¹⁹⁰ *Id.* (Robinson, J., dissenting at 5).

¹⁹¹ Skolnick, note 191, *supra*.

¹⁹² *Id.*

the test – and the divergent cut scores of the various states make the scoring of the UBE arbitrary and unfair. We are also concerned that there are indications, discussed in Section XIV (B), *supra*, that students taking the bar examination today are “less able” because law schools are admitting less qualified students.

If New York stays with a national test, the issue of how to score that test fairly must be carefully evaluated. We should not be content with simply taking whatever score the NCBE gives and applying it. There should be a serious conversation about how to be sure that the minimum passing grade truly reflects that the examinee has at least the minimum competency to practice law.

XVI. CONCLUSION

Based on the consideration of the matters previously set forth in this Report, and as set out in more detail in Section III, *supra*, we propose that New York adopt its own bar examination. We advise against following the NCBE blindly down its seemingly irrevocable choice to create a new entirely-computer delivered bar examination. Rather than leave New York in the lurch by not planning for the day, which is coming, when the NCBE abandons the UBE, we call upon the Court of Appeals to appoint a working group of law school faculty and practitioners, aided by a professional psychometrician, to work with BOLE to develop the new test.

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 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. New York should use the four-to-five-year period during which the NCBE is working to replace the UBE to develop its own examination, to work with the law schools to facilitate their transition to the new New York test, and to reach out to other states (New Jersey, Connecticut, Massachusetts, and the District of Columbia in particular) to explore arrangements for reciprocity under appropriate terms and conditions.

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Respectfully submitted,

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