

C L E A

Clinical Legal Education Association

January 30, 2015

Advisory Committee on the Uniform Bar Examination
c/o The Honorable Jenny Rivera, Associate Judge
New York State Court of Appeals
20 Eagle Street
Albany, N.Y. 12207

Re: Notice of Public Hearings: Uniform Bar Exam

Via electronic submission to:
UniformBarExam@nycourts.gov

Dear Judge Rivera and Advisory Committee Members:

The Clinical Legal Education Association (CLEA) submits this letter in response to your call for comments regarding a proposal that New York State adopt the Uniform Bar Exam (UBE). The current proposal also recommends a new fifty (50) question New York-specific multiple choice test and would require students to obtain a minimum score on this portion of the New York Bar Exam in order to pass. It is our understanding that adopting the UBE would also increase the weight of the multiple choice multistate bar examination (MBE) from 40% to 50% of the total score.

CLEA supports clinical legal education and has more than 1200 members, including many active members at each of New York's 15 law schools. We have long been dedicated to preparing students for the legal profession and are concerned about the relationships among law licensure, legal education, diversity in the legal profession and addressing the justice gap in America. CLEA welcomes the opportunity to comment on these very significant proposed changes to the New York Bar Exam.

In this comment, we raise three concerns. First, adoption of the UBE and the fifty question NY multiple choice section would continue to place undue reliance on the skill of standardized test taking as a measure of professional competence. This, in turn, will incentivize law schools to be even more rigid and narrow in their admissions decisions, thereby diminishing student diversity in all dimensions. Second, requiring students to achieve a minimum score on the New York multiple choice section of the test in order to pass the bar exam will only increase the curricular pressure to favor doctrinal "bar review" courses over clinics and other skills offerings. Third, making these proposed changes at this particular time, when there remain many unanswered questions about the significant drop in bar passage rates nationally, is ill-advised and may

preclude other, much more desirable changes, locking New York State and the entire profession into a deeply flawed system for years to come.

As we raise these concerns and urge caution, we are also mindful of the advantages greater national uniformity could offer students. But the modest degree of portability this proposal would offer is far offset by the many disadvantages of tying New York to a flawed, opaque system that stoutly resists change in the face of changing times. We urge the Advisory Committee on the Uniform Bar Examination to reject this proposal. If, however, the Advisory Committee decides to go forward, then we would urge careful, detailed further study of the real consequences on law school admissions, curricula, and licensure in New York State and nationally.

1. Creating Another Mandatory Multiple Choice Test for Bar Passage Will Only Further Distort Law School Admissions Processes and Discourage Greater Diversity and Inclusivity in our Profession.

Despite our best intentions and efforts, the diversity crisis still bedevils our profession. While we have made strides, neither our law schools nor our profession reflect contemporary America. Because law school rankings are tied to bar passage rates, this current proposal, which would create a new standardized testing hurdle by requiring a minimum score on the fifty multiple choice New York questions, will further pressure law schools to admit students who have demonstrated particular skill at taking standardized exams. In addition, adopting the UBE would exacerbate this problem since the multiple choice MBE would count for 50% of the final exam instead of the present 40%. Schools will place even greater emphasis on multiple choice LSAT scores, to the detriment of applicants who present a range of experiences, qualities and skills that students of all backgrounds bring to classrooms, student organizations, co-curricular activities and even to the pursuit of justice.¹ This, in turn, would undercut the diversity of New York's law schools, especially those schools with racial and economic diversity at the core of their missions.

We want to be very clear that it is not CLEA's view that students of all backgrounds cannot do well on standardized tests; rather, standardized testing is an acquired skill that comes, along with many other advantages, with privilege and access. This is not an argument about aptitudes or abilities; it is an observation about two documented facts. Indeed, while the racial disparity in LSAT scores, particularly for Black and Latino men, is dramatic, those students succeed in law schools that offer proper support.

Thus, CLEA is concerned that the adoption of these proposed changes would have a disparate impact on diversity candidates to law schools in New York; candidates who have the range of personal and professional experiences that would broaden and deepen the education of all law students, but whom law schools would not prioritize when making admissions decisions. Thus,

¹ According to the ABA Council on Racial and Ethnic Diversity in the Education Pipeline, "the law school admissions process over the last ten years has resulted in 60% of all African American applicants and 45% of all Hispanic applicants being totally shut-out from every ABA-approved law school they applied to, compared to just 31% of white applicants." See [June 26, 2011 letter from ABA Council on Racial and Ethnic Diversity in the Education Pipeline to Don Polden, Chair, ABA Standards Review Committee](http://www.americanbar.org/groups/legal_education/committees/standards_review/comments.html), available at http://www.americanbar.org/groups/legal_education/committees/standards_review/comments.html.

we urge the Committee to study and consider the potential disparate impact that would result from the adoption of these proposed changes.

2. The Current Proposal Would Discourage Clinical and Skills Education as Law Schools Retreat to Traditional Curricula in Perhaps Misguided but Predictable Efforts to Protect Against Lower Bar Passage Rates.

In addition, adoption of the UBE could undercut the curricular reform efforts that law schools in New York and nationwide are undertaking to better tailor legal education to the skills, values and competencies that the legal profession demands. As we have known for decades, traditional legal education has been disconnected from the realities of law practice. Members of the bench and bar understand fully that law school graduates who have no experience with how the law operates in real-world contexts have difficulty applying what they learned in law school to practice. Clinical and other experiential education fuses the doctrinal and theoretical underpinnings of legal education with the range of skills that students need to represent clients, engage in the practice of law and enhance the legal profession.

The economic downturn and its impact on the legal profession have increased awareness of the gulf between legal education and the legal profession. Clients are demanding lawyers who are trained. Law firms are no longer putting vast resources into training and, instead, are demanding that newly-minted lawyers have the foundational skills necessary to excel. Judges have talked about the writing and relationship skills they would like to see in their interns and law clerks. In turn, law schools across the United States are revamping curricula to integrate skills courses and modules throughout the three-year arc. In addition, the American Bar Association has recently revised its accreditation standards to implement outputs that are designed, in part, to better sync legal education with the realities of legal practice by requiring law schools to ensure that students learn the breadth of skills that will better equip them to enter the profession.

Adopting the UBE and NY Multiple Choice section as an independent licensure requirement will undermine the current reforms of legal education. Schools will inevitably respond to change, particularly change that makes bar passage more challenging, by focusing even more on one output—bar passage—to the detriment of the other outputs that measure, *inter alia*, skills, values, ethics and experiences. It would cause law schools, more than already occurs, to tailor curricula to bar preparation courses and to steer students to those courses. It would also cause law students to value those bar preparation and other doctrinal courses over the experiential courses that complement and deepen the analytical tools students acquire throughout the curriculum and provide the broad, well-rounded but interconnected experiences and skills necessary to engage and enhance the legal profession.

3. There Are Too Many Unanswered Questions About the UBE to Move Forward Now, Particularly Given the Strong Support for Alternative Reforms to the New York Bar Exam.

The recent national drop in bar passage rates is well documented. The causes, however, remain shrouded in mystery. As seventy-nine (79) law school deans noted,² the National Conference of Bar Examiners (NCBE) has comprehensive data that would shed light on the cause of the drop but it has refused to share that data, in any form, with schools, their representatives or the public. They have insisted that recent test takers are not as strong, although the data does not appear to support that claim.³ Similarly, the NCBE has not been responsive to calls to share their data, in any form, with groups concerned about the disparate impact of the MBE and the UBE on test takers of color. New York should not bind itself even more tightly to the NCBE, until it meets reasonable expectations of transparency and disclosure.

Beyond our deep concerns about the lack of transparency and accountability of the NCBE, CLEA also urges that this is the wrong reform of the New York Bar Exam. For years, many groups and knowledgeable individuals, including the Association of the Bar of the City of New York, the New York State Bar Association and leading academics and judges have noted that the bar exam does not measure graduates' ability to practice law. It is, at best, a psychometrically valid and reliable test of their legal knowledge and abstract reasoning skills. And some critics question even that.

Over the past fifteen years or so, advances in law school assessment tools and the development of clinical legal education have made other kinds of licensure exams practicable, as the experience of the innovative Daniel Webster Scholars Program in New Hampshire demonstrates. While we are mindful that the charge of this Committee is to examine the proposal to adopt the UBE and modify the New York specific portion of the exam, we also recognize that the adoption of this change will occupy the field for now and crowd out other, much more needed reforms.

For example, rather than adopt this proposal, New York could allow applicants who take a specified number of credits in a clinic or guided externship to have that experience substitute for a portion of the current or proposed timed, written examinations. As has been advocated by other groups, the New York Courts could establish the number of credits and any other criteria they think necessary to allow this substitution (*e.g.* require direct client contact, engagement with professional or ethical reflections, require a specific amount of document drafting, etc.). Such a program would have several benefits. It would increase the likelihood that law students would be better prepared for practice upon graduation. It would encourage law schools to provide tailored experiential learning opportunities to their students and it would increase the ethics and professionalism training law graduates who practice in New York State receive.

This is the wrong reform at the wrong time. There are too many unanswered questions for New York to tie itself more closely to a national system that is currently the subject of significant criticism. This proposal does very little to address the one problem it claims to solve, portability of bar admission and it does nothing to address the glaring deficits of a bar licensure regime that

² http://online.wsj.com/public/resources/documents/2014_1126_randletter.pdf

³ http://online.wsj.com/public/resources/documents/2014_1110_allardmemo.pdf

has failed to keep step with advances in legal education and the tectonic shifts in the legal profession. For these reasons, we ask the Advisory Committee to reject the current proposals.

Sincerely,

Mary A. Lynch, Professor, Albany Law School

Janet Thompson Jackson, Professor, Washburn University School of Law

2015 Co-Presidents of the Clinical Legal Education Association (CLEA)