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January 16, 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, NY 12207

Dear Judge Rivera:

This statement is submitted on behalf of the Society of American Law Teachers (SALT) in response to a call for comments on a proposal that New York adopt the Uniform Bar Exam [UBE]. SALT is a national organization of law professors and law school administrators committed to advancing teaching excellence, social justice, and diversity. That commitment prompts this statement in which we address concerns that New York's adoption of the UBE would have negative impacts on efforts to diversify the profession and hamper law schools' ability to adequately equip tomorrow's lawyers for law practice.

### **I. New York Has Long Critiqued Both the Bar Exam Format and the Exam's Disparate Impact**

Over the course of more than two decades, a wide range of New York lawyers and judges have questioned whether the existing bar exam format and its narrow focus accurately reflect the skills new lawyers should possess, and they have expressed grave concerns about the bar exam's disproportionate impact on minority applicants. In numerous studies and reports, New York lawyers and judges have advocated for an exam that relies less on memorization and tests a wider range of lawyering skills and that avoids the unjustified disparate impact seen of the existing exam. New York's long-standing concerns about the problems provide ample reason for New York to reject adoption of the UBE at this time.

In 1992, the Committee on Legal Education of the New York City Bar Association raised concerns that the bar exam failed to adequately test minimal competence to practice law and that it creates a disparate impact

on minority bar applicants.<sup>1</sup> In 1993 and again in 1996, the exam was studied and questions were raised about its content and format and its disparate impact.<sup>2</sup> In 2002, the Committee of Legal Education and Admissions to the Bar of the State Bar Association and the Bar of the City of New York issued a joint report criticizing the bar exam for testing only a few of the skills lawyers need and for its significant and serious disparate racial impact.<sup>3</sup> In 2005, a special committee was formed to study the exam and after five years of study and debate, the committee issued a report recommending the exam shift from a focus on rote memorization so that it could include assessments of a wider range of lawyering skills.<sup>4</sup> In 2012, yet another report was issued recommending the exam be linked to more skills lawyers need.<sup>5</sup> Most recently, a 2013 report by the New York City Bar Association Task Force again recommended the exam be re-vamped to include a wider range of the skills new lawyers need and suggested that the exam move toward a more innovative practice-oriented testing format.<sup>6</sup>

This long history illustrates New York's concern about both the breadth and depth of the exam and its disparate impact. Adopting the UBE does nothing to address either of those concerns. Rather than adopting the UBE, another version of the same highly criticized exam, New York should take the lead in pressuring the National Council of Bar Examiners to devise a better exam, as further described below.

## **II. Study Is Necessary to Determine the Impact of Adopting the UBE on Bar Passage for All Applicants and for Particular Subgroups of Applicants.**

While it is presently unclear what impact adoption of the UBE will have on overall bar pass rates and whether it will result in exacerbating the existing disparate impact, there are reasons for concern. First, the July 2014 bar exam saw a significant drop in MBE scores nationwide. Should this trend in MBE scores continue, overall pass rates in New York could be negatively affected by adoption of the UBE. As SALT noted in its November 3 letter to Diane Bosse, commenting on the proposal to adopt the UBE: "Since the entire bar exam is scaled to the MBE, it is not surprising that many states, including New York, saw a decline in passing scores. Adopting the UBE would only exacerbate this problem since the MBE would count for 50% of the exam instead of the present 40%."<sup>7</sup> The overall decline in pass rates may have a more significant impact on certain subgroups of test-takers. While we don't have statistics for New York, in California the impact of declining pass rates had a

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<sup>1</sup> Ass'n Of The Bar Of The City Of N.Y., Report On Admission To The Bar In New York In The Twenty First Century: A Blueprint For Reform 467 (1992).

<sup>2</sup> Jason Millman Et Al., An Evaluation Of The New York State Bar Examination (May 1993); Prof'l Educ. Project, Legal Education And Professional Development in New York State (1996). This study was commissioned by Chief Court of Appeals Judge, Judith Kaye.

<sup>3</sup> See Comms. On Legal Educ. & Admission To The Bar Of The Ass'n Of The Bar Of The City Of N.Y. & The N.Y. State Bar Ass'n, Public Service Alternative Bar Exam (June 14, 2002), *available at* <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26667>

<sup>4</sup> Report of the Special Committee to Study the Bar Examination and other Means of Measuring Lawyer Competence, New York State Bar Association, September 13, 2010.

<sup>5</sup> N.Y. State Bar Ass'n Comm. On Legal Education And Admissions To The Bar, Recommendations For Implementation Of The Report Of The Special Committee To Study The Bar Examination And Other Means Of Measuring Lawyer Competence (Feb. 12, 2013).

<sup>6</sup> New York City Bar, Developing Legal Careers And Delivering Justice In The 21<sup>st</sup> Century, New York City Bar Association Task Force On New Lawyers In A Changing Profession (Fall 2013)

<sup>7</sup> Letter from Olympia Duhart and Ruben Garcia, SALT Co-Presidents, to Dianne Bosse, Nov. 3, 2014.

disproportionate effect on African American and Latino/a test takers.<sup>8</sup>

We also do not have statistics available to compare the decline in pass rates in UBE states with the decline in pass rates in non-UBE states and how those respective declines impacted various subgroups of test-takers. That data is available to the NCBE and should be made public so that those considering adopting the UBE can study it to determine the impact of the UBE on pass rates generally, and whether the UBE increases test score disparities. The study should be done over multiple exam administrations to ensure reliability, and New York should not adopt the UBE until those consequences are better understood.<sup>9</sup>

One often-touted advantage of the UBE is that it allows for portability of scores. Mobility of lawyers is an important concern, especially for new lawyers, but that portability is limited<sup>10</sup> and depends upon achieving a score set by the admitting state. New York's passing score is lower than ten of the fourteen states currently using the UBE. To achieve true portability, adoption of the UBE would inevitably result in an effort to standardize the passing score, which in all likelihood would mean increasing New York's passing score. On that issue, we do have hard data that tells us that increasing the passing score has a disproportionately harsh impact on racial and ethnic minorities.<sup>11</sup>

As early as 1992, New York lawyers and judges studying the bar exam noted that any changes to the bar exam should be made with an eye toward reducing test score disparities while enforcing reasonable standards of attorney competence, a concern echoed by numerous commissions and reports. We urge New York to proceed slowly and cautiously to ensure adoption of the UBE will not undermine New York's commitment to developing a diverse bench and bar.

### **III. Rather than Adopt the UBE, New York Should Work With the NCBE To Develop A Better Licensing Exam**

The New York bench and bar has studied the bar exam and issued report after report advocating it be

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<sup>8</sup> Vikram David Amar, *Additional Thoughts (and Concerns) About Low Bar Pass Rates in California and Elsewhere in 2014*, Verdict, Legal Analysis and Commentary from Justia, available at <http://verdict.justia.com/2015/01/02/additional-thoughts-concerns-low-bar-pass-rates-california-elsewhere-2014>.

<sup>9</sup> We do know that the UBE is likely to increase costs for bar applicants. Although New York has said it initially will not raise costs, New York currently charges \$250 but UBE jurisdictions typically charge three or four times that amount and there is a significant cost to transfer UBE scores to other jurisdictions (\$400-\$1240). These increased costs will be felt by all applicants, but those most significantly affected likely will be lower income applicants, a disproportionate number of whom may be people of color.

<sup>10</sup> Of the 14 states that use the UBE, five require state-specific assessment prior to admission. All limit portability to between 2 and 5 years after taking the exam and most limit it to 2-3 years. With no uniform cut score and only 4 of 14 states having a cut score lower than New York, a lawyer passing the UBE in New York would not be guaranteed admission in 10 other states unless the students achieved a score that met or exceeded the required score in that jurisdiction. Even that limited portability comes at a price. States administering the UBE often charge three to four times what New York charges and the cost of transferring UBE scores to other jurisdictions ranges from \$400 to \$1240.

<sup>11</sup> *Impact of the Increase in the Passing Score on the New York Bar Examination*, Report Prepared for the New York Board of Law Examiners, October 4, 2006.

changed to better reflect the skills lawyers need.<sup>12</sup> Law schools have recognized the need to expand skills taught and assessed, and have begun to integrate a wider range of skills development into their curricula. However, since the introduction of the Multi-State Performance Test decades ago, the bar exam has not made any significant changes in how potential licensees are tested. SALT believes New York is in a unique position to encourage changes that have been suggested by its bench and bar for decades and that now is the time to do so.

Historically, the bar exam has driven both law school curricula and assessment methods. Schools have offered courses because they are tested on the bar, whether or not they believe those subjects are important for new lawyers to know, and have advised students to take those courses. Schools also have modified their testing to parallel bar-exam testing, whether or not they view those tests as appropriate assessments of student achievement. Despite those pressures, law schools have begun integrating more skills development and training into their curriculum, partly in response to suggestions from students and the bench and bar. While the academy moves forward, the bar exam is mired in the past. Especially in light of the recent drop in bar pass rates, schools may begin to re-think innovations designed to better prepare students for practice and revert to courses that focus mainly on doctrine tested via multiple choice and bar-exam style essay questions in order to “teach to the test.” Students, fearful of bar exam failure, may choose to take more traditional courses in lieu of clinics, externships, and other courses that engage students in a wider range of skills development and in more “real world” application of legal doctrine and analysis.

Joining the UBE states simply entrenches the existing exam and its over-emphasis on memorization of large bodies of doctrinal knowledge tested via multiple choice questions. The NCBE recognizes that New York is influential and a leader in legal education reform, including such innovations as the 50 hour pro bono requirement. The New York imprimatur would go a long way toward legitimizing the UBE. SALT respectfully suggests that instead of endorsing the status quo, New York is in a unique position to push for a better test that encompasses a wider range of skills and testing methodologies. Much of the background work has already been done via the numerous New York studies and reports already in existence.

Bar exam reforms are possible, as evidenced by the Daniel Webster Scholars Program in New Hampshire. Students who successfully complete a two-year, practice-based, and client-oriented program at the University of New Hampshire School of Law are certified by the Board of Law Examiners and are admitted to the N.H bar upon graduation. The Institute for the Advancement of the American Legal System at the University of Denver has found that students who graduated from the program outperformed lawyers who had been admitted to practice in the state within the past two years who had not participated in the program but who had taken the traditional bar exam. While the Daniel Webster Scholars Program may not be a model for all bar admissions in all states, it illustrates the potential for modifying the bar admissions process, and the need to invite rather than discourage such reforms.<sup>13</sup>

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<sup>12</sup> The NCBE itself has conducted a significant study about the skills new lawyers need, many of which are not tested. Steven Nettles & James Hellrung, *A Study of the Newly Licensed Lawyer*, available at [http://www.ncbex.org/assets/media\\_files/Research/AMP-Final-2012-NCBE-Newly-Licensed-Lawyer-JAR.pdf](http://www.ncbex.org/assets/media_files/Research/AMP-Final-2012-NCBE-Newly-Licensed-Lawyer-JAR.pdf).

<sup>13</sup> For a discussion of some potential reforms, see, e.g., Andrea A. Curcio, Carol L. Chomsky and Eileen

#### **IV. The new New York Law Exam Requires Additional Study**

The proposal under consideration raises other concerns as well. It calls for a new New York Law Exam that would consist of 50 multiple-choice questions. This exam would be graded separately from the UBE and bar applicants would not be eligible for licensing in New York if they scored less than 30 out of the 50 questions on the New York Law Exam. Ordinarily, multiple-choice questions are not used on high stakes testing unless they have been pre-tested. The questions that would appear on the NY exam, which we understand will utilize a completely different format from the multiple choice questions used on the current NY bar exam, have not yet been written or reviewed, much less pre-tested. No study has been conducted to assess the impact that the requirement of passing both the UBE and the New York Law Exam will have on overall pass rates and whether it will increase test score disparities. It has been reported that the average score on the current New York multiple-choice section is roughly 50% (25 out of 50 questions correct), not the 60% (30 out of 50 questions correct) that will now be required as a stand-alone measure. If that is accurate and if it persists with the administration of the new exam, the result will disqualify candidates who previously would have been admitted. This too requires further study.

#### **V. Conclusion**

For the reasons stated above, SALT respectfully suggests that rather than jump on the UBE bandwagon and entrench the status quo, New York should use its considerable influence to encourage changes to the bar exam so it better reflects skills needed in practice. If the UBE tested a wider range of skills and values and tested applicants in ways more reflective of practice, it would be a better bar exam and potentially worth adopting.

We thank the Committee for the opportunity to present these views and we offer our assistance should New York seek to work with the NCBE to explore better ways to assess bar applicants and ensure that the bar exam does not further exacerbate test score disparities that negatively affect our ability to develop a diverse bench and bar.

Sincerely,



Olympia Duhart and Ruben Garcia

SALT Co-Presidents

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Kaufman, Testing Diversity and Merit: A Reply to Dan Subotnik and Others, 9 U. Mass. L. Rev. 206, 244-51 (2014) (discussing the New Hampshire licensing program and other alternatives to the bar exam); Andrea A Curcio, A Better Bar: Why and How the Existing Bar Exam Should Change, 81 Neb. L. Rev. 363, 393- (2002) (discussing testing via computer simulations and other methods that encompass a wider range of skills); Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 Colum. L. Rev. 1696 (2002) (discussing an experientially based bar exam, the public service bar exam).