

Task Force on the New York Bar Examination

Third Report

**Hon. Alan D. Scheinkman,
Chair**



TASK FORCE CREATED APRIL 2019, UNDER THE LEADERSHIP OF NYSBA PRESIDENT MICHAEL MILLER, TO REPORT ON THE IMPACT OF NEW YORK'S ADOPTION OF THE UNIFORM BAR EXAMINATION

FIRST REPORT WAS ISSUED ON MARCH 5, 2020 AND WAS APPROVED BY THE EXECUTIVE COMMITTEE ON APRIL 3, 2020 AND BY THE HOUSE OF DELEGATES ON APRIL 4, 2020.

KEY RECOMMENDATIONS OF THE FIRST REPORT:

- Eliminate the New York Law Examination("NYLE"), an open book, online, on demand exam, consisting of 50 multiple choice questions. A score of 30 correct out of 50 is passing. The purpose of the NYLE, and the associated 17 hour of lecture videos, called the New York Law Course, is simply to inform candidates of areas where New York law differs from the general principles tested on the Uniform Bar Examination ("UBE").
- Require passage of a rigorous examination on New York law as a prerequisite to admission to the New York bar.
- Require candidates who wish to practice in New York exclusively to take: (a) the Multi-State Bar Examination ("MBE"), (b) the Multi-State Performance Test ("MPT"); and (c) the rigorous New York test.

KEY RECOMMENDATIONS OF THE FIRST REPORT (continued):

- Offering candidates who do not intend to practice in New York the opportunity to take the full UBE without the rigorous New York test.
- Consider a New York Law Certification program under which students who graduate from law schools accredited by the American Bar Association (“ABA”) with enough credits in courses with New York law conduct, earned with sufficient grades, to forego the a bar examination in New York entirely.
- Consider a program under which students who spend significant time during their] second and third years of law school in supervised practice in New York, and whose activities are monitored and graded by law school faculty, gain admission without examination.
- Retain an independent psychometrician to analyze the grading and scoring of the UBE. There are many issues with the grading and scoring; one of the most notable is that persons who answer the same questions the same way in two UBE jurisdictions can earn different scores. This is because candidates are measured in relation to how others do who take the test in the same jurisdiction. This is apart from the fact that differing jurisdictions having different passing scores.

AS THE FIRST REPORT WAS BEING PRESENTED, THE COVID-19 PANDEMIC STRUCK NEW YORK IN FULL. BY WAY OF CONTEXT, STATE COURTS CEASED IN-PERSON OPERATIONS ON MARCH 16, 2020.

NYSBA PRESIDENT HENRY GREENBERG REQUESTED THAT THE TASK FORCE CONSIDER THE IMPACT OF THE PANDEMIC ON THE JULY 2020 ADMINISTRATION OF THE BAR EXAMINATION.

THE TASK FORCE ISSUED ITS SECOND REPORT ON MARCH 30, 2020.

KEY RECOMMENDATIONS OF THE SECOND REPORT:

- Postpone the July 2020 Bar Examination to proximate to Labor Day 2020.
- Expand the use of “student practice orders” to give law graduates the opportunity to practice under supervision in the event a bar examination could not be timely administered.
- Grant a general waiver of distance-learning limitations for all ABA-accredited law schools for the Spring 2020 semester;
- Refrain from implementing online testing;
- Refrain from granting “diploma” privilege, i.e., admission based solely on graduation from law school.

AS PRESIDENT GREENBERG INFORMED THE EXECUTIVE COMMITTEE AND THE HOUSE AT THE TIME THE FIRST REPORT WAS PRESENTED, THE RECOMMENDATIONS OF THE SECOND REPORT WERE ADOPTED WITHIN 48 HOURS BY THE COURT OF APPEALS. HOWEVER, SOME OF THE RECOMMENDATIONS WERE OVERTAKEN BY EVENTS.

NEW YORK PLANNED FOR AN IN-PERSON BAR EXAMINATION IN SEPTEMBER BUT IMPOSED CAPACITY LIMITS. DUE TO CAPACITY LIMITS AND UNCERTAINTY AS TO WHETHER THE EXAMINATION COULD GO FORWARD, APPLICANTS WERE ENCOURAGED TO REGISTER FOR THE UBE IN OTHER UBE STATES. A SCRAMBLE FOR SEATS ENSUED. AS BAR AUTHORITIES STRUGGLED TO FIND A WAY TO ALLOW 2020 LAW GRADUATES TO ENTER PRACTICE, MANY LAW SCHOOL DEANS, FACULTY AND STUDENTS ADVOCATED FOR DIPLOMA PRIVILEGE. LEGISLATION TO COMPEL DIPLOMA PRIVILEGE WAS INTRODUCED IN THE NEW YORK LEGISLATURE.

THE NATIONAL CONFERENCE OF BAR EXAMINERS (“NCBE”) AGREED TO PRODUCE A SCALED-BACK ITERATION OF THE BAR EXAMINATION TO BE ADMINISTERED REMOTELY IN OCTOBER 2020. GRADES WERE NOT PORTABLE BUT NEW YORK REACHED RECEIPROCITY AGREEMENTS WITH A NUMBER OF OTHER JURISDICTIONS.

THE EFFICIACY OF THE OCTOBER 2020 REMOTE EXAMINATION WAS QUESTIONED BOTH BEFORE AND AFTER IT WAS ADMINISTERED.

A REMOTE EXAMINATION ALSO ADMINISTERED IN NEW YORK IN FEBRUARY 2021, THIS TIME A FULL UBE.

THE JULY 2021 EXAMINATION WILL BE REMOTE. THE NCBE HAS JUST ANNOUNCED THAT IT WILL NOT PRODUCE ANY FURTHER REMOTE EXAMINATIONS.

AS THESE DEVELOPMENTS OCCURRED, NYSBA PRESIDENT SCOTT KARSON REQUESTED THAT THE TASK FORCE REMAIN IN ENGAGED ON THE VARIOUS ISSUES IMPACTING THE BAR EXAMINATION. HE SPECIFICALLY ASKED THAT WE UPDATE THE TWO PRIOR REPORTS IN LIGHT OF THE DEVELOPMENTS. HE ALSO REQUESTED THAT THE TASK FORCE STUDY AND REPORT ON THE RESPONSES TO THE FIRST REPORT THAT CAME FROM THE NEW YORK STATE BOARD OF LAW EXAMINERS (“BOLE”) AND THE NCBE.

TO FULFILL THIS CHARGE, THE TASK FORCE STUDIED THE DEVELOPMENTS CONCERNING THE SHORT-TERM ISSUES POSED BY THE CHALLENGES TO TEST ADMINISTRATION DURING THE PANDEMIC. I, TOGETHER WITH MEMBERS OF THE COMMITTEE ON LEGAL EDUCATION AND ADMISSION TO THE BAR (“CLEAB”), PARTICIPATED IN A VIRTUAL FORUM WITH LAW STUDENTS ON THE ISSUES OF DIPLOMA PRIVILEGE AND BAR EXAMINATION. WE HAVE CONTINUED THAT DIALOGUE.

WE MAINTAINED OUR FOCUS ON THE LONG-TERM ISSUES, RECEIVING A THOROUGH BRIEFING FROM PROFESSOR DEBORAH MERRITT ON HER OCTOBER 2020 REPORT “*BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE*”, A WORK SHE PREPARED IN CONJUNCTION WITH THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (“IAALS”). PROFESSOR MERRITT ALSO GAVE US A DETAILED PROPOSAL AS TO THE FORM AND CONTENT OF A PROPOSED NEW NEW YORK BAR EXAMINATION.

PROFESSOR MERRITT'S STUDY MADE FOUR IMPORTANT FINDINGS AS TO THE WORK OF NEW LAWYERS:

- State and local law plays a prominent role in the work of young lawyers. Most were more likely to rely upon state and local law in their work than federal law. About 50% work only with state and local law; 50% with a mix of federal, state and local law.**
- New lawyers engage frequently with clients;**
- New lawyers rarely rely on memorized rules;**
- New lawyers assume substantial responsibility for client matters during their first year of practice, often with little or no supervision.**

The Study identified 12 Building Blocks – key components of what new lawyers do:

1. Ability to act professionally and ethically
2. Understanding of legal process and sources of law
3. Understanding of threshold legal concepts
4. Ability to identify legal issues
5. Ability to interpret legal materials
6. Ability to interact effectively with clients
7. Ability to conduct legal research
8. Ability to communicate as a lawyer
9. Ability to see the “big picture” of client matters
10. Ability to manage a law-related workload responsibly
11. Ability to cope with stress of legal practice
12. Ability to pursue self-directed learning

THE MERRITT STUDY RECOMMENDS:

1. Written examinations assess only about one-half of the twelve building blocks. For example, a written test does not evaluate basic listening comprehension or project management skills. Written tests should therefore be complimented with other forms of assessment.
2. Multiple-choice questions, while more efficient to grade, do not measure the cognitive skills that lawyers use in practice. Questions should require applicants to answer in their own words. Multiple choice questions should be limited.
3. Performance tests should be used.
4. Multiple-choice and essay questions should be open book.
5. Applicants should be given more time to answer questions.
6. Candidates should be required while in law school to successfully complete courses in client interaction, in negotiation skills, and in the lawyer's role as a public citizen.
7. Law students should be required to successfully complete eight credits of clinical work.
8. Jurisdictions should form working groups of legal educators, judges, practitioners, law students and clients to design reliable licensing systems.

IN JANUARY 2021, THE NCBE ISSUED ITS OVERVIEW OF PRELIMINARY RECOMMENDATIONS FOR THE NEXT GENERATION OF THE BAR EXAMINATION. THE NCBE'S NEW BAR EXAM:

1. Eliminates the MBE, MEE, and MPT and replaces them with a single, integrated examination. While still a 2 day test, candidates would receive only 1 grade (i.e., each day will not be graded separately).
2. Exam would use both stand-alone questions and item sets and a combination of formats, e.g., multiple-choice, true/false, essay and performance tests.
3. Test “foundational concepts” common to numerous practice areas, consistent with the regulatory framework of a “general license”. The new examination would drop from subjects now tested: family law, trusts and estates, the Uniform Commercial Code (except for Article 2), and conflict of laws.
4. Examination would be closed book.
5. Examination would be “computer based”, administered either on candidates’ laptops at facilities supplied by the jurisdictions or at computer testing centers.
6. 4-5 years to develop and implement new examination.

ON APRIL 12, 2021, THE TASK FORCE ISSUED ITS THIRD REPORT WHICH CONTAINS OUR UPDATED RECOMMENDATIONS. IT IS THIS REPORT THAT IS NOW BEFORE YOU FOR YOUR CONSIDERATION AND APPROVAL.

KEY RECOMMENDATIONS:

1. Reaffirm our prior central recommendation that applicants for admission to practice in New York be required to demonstrate basic knowledge of New York law as measured by the passage of a rigorous test on matters of New York or by extensive law school study of New York law or by extensive supervised clinical practice of New York law.
2. While we had proposed, essentially, that New York return to the pre-UBE system of one-day of multi-state testing and one day of New York testing, the NCBE's decision to eliminate the MBE effectively, and to issue 1 unified score for its 2 days of testing, forecloses that option.
3. We recommend against the continuing de-emphasis on state law, particularly since the Merritt study shows that newer lawyers rely more heavily on state and local law than federal law. We recommend against the elimination of testing of family law, trusts and estates, most of the Uniform Commercial Code and conflicts of law. The experience in New York shows that when subjects are dropped from bar exam testing, students do not take courses in those subjects, law schools discontinue faculty who teach those subjects, academic interest and scholarship in those subjects drops.

4. Do not administer the bar examination by computer at this time.

While we support allowing candidates to use computers to submit answers (which has been permitted for years), we have serious concerns about providing the question material by computer delivery only. While computer-based tests have been used for the October 2020 and February 2021 remote examinations, the NCBE made its recommendation to make this format permanent in January 2021, without study of the impact of the use of this format. Performance tests may be daunting for anyone to answer when the questions are provided solely by computer. Test-takers are provided a 25 or so page library of materials to use to answer the question. In answering the question, then the candidate may need to have open on a computer the 25 or so pages of pdf material, a word processing document containing the answer, and a separate area for notes. For any one interested, on page 61 of our Report, we provide a internet citation to a demonstration made by an academician to show other academicians what candidates experience.

The use of a computer only delivery format may be unfair to persons with cognitive disabilities.

If candidates use their own computers, applicants with better, more-up-to-date equipment may have unfair advantages. If candidates use standard equipment at test centers, they may be unfamiliar with such equipment and cost of administration may be prohibitive.

The timed examination may be more a test of computer skills than of legal knowledge.

KEY RECOMMENDATIONS CONTINUED

4. Do not administer the bar examination by computer at this time.

Scientific studies have reported that shifting from distributing test materials by print to digital (in the form of pdf files) has negatively impacted comprehension. Comprehension from computer-based reading is not as good as it is when derived from paper-based reading. Issues about navigating within a document may be at play. Moreover, some forms of computer-based reading may be better than others. For example, 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.

Inevitably, as well, there will be concerns with potential power-source interruptions and internet signal strength.

KEY RECOMMENDATIONS CONTINUED

5. We remain concerned about NCBE's scoring practices.

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 stronger or weaker than another. Under the NCBE's scoring processes, a person can be the “strongest of the weak” candidates and found competent and vice versa, a candidate can be the “weakest of the strong” and still be found not competent.

We continue to object to the NCBE's use of a scoring mechanism which may result in the grant or denial of a law license on grounds other than whether the individual in question has demonstrated competency. Unfairness is compounded by states setting their own, and different, passing scores under which a score can be a “pass” in one jurisdiction but a “failure” in another.

KEY RECOMMENDATIONS CONTINUED

6. New York should use the 4-5 years, during which the NCBE is retooling its examination, to develop its own examination. If we don't, we will be stuck with whatever the NCBE chooses to develop.

We call on the Court of Appeals to appoint a working group to develop the new test.

- The examination should include at least one performance test, based on New York law.
- The examination should include essays to test New York law as well as emerging areas, not presently tested by the NCBE, such as health law, immigration and cybersecurity. New York subjects to be tested include family law, trust and estates, conflict of laws, landlord/tenant, and the law of employment and discrimination.
- Test sessions should be longer than the 90 minute sessions allowed by the NCBE. Candidates should have more time to answer more thoughtful questions.

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- There should be a test on New York civil procedure. Too many lawyers have been admitted to practice without knowing much, if anything, about our complicated court system. However, rather than perpetuate rote memorization and the discriminatory impact that multiple-choice questions have upon women, we recommend that the civil practice portion of the examination use either short-form or traditional essay questions and that candidates be permitted access to statutory materials during the test.
- The test should not be delivered solely by computer. Candidates should at least have the option to have the test material in hard copy.

7. WHILE A NEW YORK BAR EXAMINATION SHOULD BE THE PRIMARY PATHWAY TO PRACTICE, WE FAVOR THE DEVELOPMENT OF TWO ALTERNATIVE PATHWAYS:

- A. A pathway for admission through concentrated study of New York law while in law school. ABA-accredited law schools would be encouraged to offer courses in New York law. Law schools located in New York would be encouraged offer courses in New York law to students in other jurisdictions, which courses could be offered either in the summer or through distance learning. Taking enough credits with sufficiently high grades would enable students to gain admission without examination.
- B. A pathway for admission through clinical, supervised practice while in law school. This program could be either a compliment to, or an expansion of, the existing Pro Bono Scholars program. The goal would be to produce practice-ready attorneys and also increase the legal service assistance available to underserved populations. Student practice activities would take place in the context of law school internship or externship programs, with the student's work being supervised by an admitted 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.

KEY RECOMMENDATIONS CONTINUED

7. WHILE A NEW YORK BAR EXAMINATION SHOULD BE THE PRIMARY PATHWAY TO PRACTICE, WE FAVOR THE DEVELOPMENT OF TWO ALTERNATIVE PATHWAYS:
 - C. The working group to be created by the Court of Appeals should develop parameters for these two alternatives.
 - D. Recognizing that a written examination can only assess some of the foundational knowledge and skills that new lawyers need to practice competently, we foresee that, in the future, new attorneys should be admitted only after passage of both a written test and completion of one of the two alternate passageways.
8. For as long as the UBE is with us, “vouching in” through years of practice should become available at the time UBE scores become stale.
9. Attorneys “vouching in” should be required to take a course in New York law as a prerequisite for admission.