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November 3, 2014

Diane Bosse, Chair
New York State Board of Law Examiners
Corporate Plaza, Building 3
254 Washington Avenue Extension
Albany, NY 12203-5195

Dear Ms. Bosse:

This letter is submitted on behalf of the Society of American Law Teachers (SALT) in response to the proposal to adopt the Uniform Bar Exam in New York, effective with the July 2015 administration of the exam. SALT is a national organization of law professors and law school administrators committed to advancing teaching excellence, social justice, and diversity. Among SALT's highest priorities is working to create more diversity within the legal profession. It is that mission that prompts this letter asking the New York Court of Appeals to delay implementation of the Uniform Bar Exam until more information is available to assess whether the UBE is likely to increase the current test score disparity and thus produce an even greater disparate impact on racial and ethnic minorities than does the current bar exam. The idea of a national licensing exam has great appeal, but carries risks that should be addressed before adoption of the exam for the state.

New York has long been concerned about disparate bar pass rates and their impact on the profession's diversity¹ and we hope that such concern will translate into caution about a precipitous adoption of the UBE that may result in further disparate impacts. Several years ago, after SALT and others urged further study about disparate impact before New York raised its passing score on the bar exam, the resulting study revealed a disproportionate racial impact and the increase was not implemented. Given what we know about disparate test results from the LSAC National Longitudinal Study² and the New York study,³ New York should study the proposed change more fully to understand the implications of the change before acting on it.

New York is in the fortunate position of being able to study what has happened in other jurisdictions before deciding whether to adopt the UBE. Initial data indicates such a

¹ See e.g. 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); 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 4 (June 14, 2002), available at <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26667>.

² *Wightman*, LSAC National Longitudinal Bar Passage Study (1998).

³ The study reported "the Caucasian/White group having the highest pass rates (about 88% for a passing score of 660 and about 85% for a passing score of 675), and the Black/African American group having the lowest passing rates (about 58% for a passing score of 660 and about 50% for a passing score of 675). *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.

study is necessary. Fourteen states currently use the UBE and the majority of those states has experienced a significant decline in passing rates.⁴ Before adopting the exam, New York should seek to determine why the UBE has resulted in lower pass rates and whether there is a disparate impact in who has been impacted by those lower rates. New York should endeavor to determine whether the UBE exacerbates test score disparities before deciding to adopt the exam.⁵

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.

Finally, we should note that a uniform bar exam cannot really be uniform without a uniform passing score. New York's passing score is lower than ten of the fourteen states currently using the UBE. There is reason to be concerned that a move toward adoption of the UBE would inevitably result in an effort to standardize the passing score, which would almost surely mean a higher passing score in NY. On that issue, we *do* have hard data and that data tells us that an increase in the passing score will fall disproportionately harshly on racial and ethnic minorities. That is simply an unacceptable outcome, given New York's longstanding commitment to increasing the diversity of the Bar.

For all of these reasons (plus a concern about the cost of the UBE⁶ and its limited portability⁷ and the unfairness to students who have prepared for a different bar exam),

⁴ The decline was 22% in Montana, 15.2% in Idaho, 13% in North Dakota, 7.7% in Arizona and 7.5% in Washington. Alabama, Wyoming and Utah also reported a lower pass rate. *Declining Nationwide Bar Exam Pass Rates, Above the Law*, October 27, 2014.

⁵ To the extent New York is concerned about overall passing rates, the UBE raises an additional concern. The July 2014 bar exam saw a significant drop in scores on the MBE nationwide. (Letter from Erica Moeser, President of the National Conference of Bar Examiners to Law School Deans dated October 23, 2014.) 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%.

⁶ New York currently charges \$250 but UBE jurisdictions typically charge three or four times that amount. We understand that any increased cost would not be passed on to students in 2015, but there is no guarantee that the higher cost would not eventually be borne by NY test-takers. Plus, there is a significant cost of transferring UBE scores to other jurisdictions (\$400 - \$1240). And, we do not know what the charge will be to re-take the *New York Law Exam*.

we urge the Court of Appeals to delay implementation until there has been an opportunity to seriously assess the impact of this exam on all students and, more particularly, to assess whether or not its adoption would exacerbate the persistent disparate impact of the bar exam on racial and ethnic minorities. We can see no urgency in proceeding without first conducting this essential research.

Sincerely,

Handwritten signatures of Olympia Duhart and Ruben Garcia in blue ink.

Olympia Duhart & Ruben Garcia
SALT Co-Presidents

cc Honorable Jonathan Lippman, Chief Judge, State of New York

⁷ Only 14 states currently use the UBE. Of those 14, five require a state-specific assessment prior to admission. All UBE states limit the portability of scores to between 2-5 years with most states restricting it to 2-3 years. Finally, since there is no uniform cut score and only 4 of the 14 states have a cut score lower than NY, a student passing the UBE in NY would not be guaranteed admission in the other 10 states unless that student achieved a score that met or exceeded the required score in that jurisdiction.