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## **“Portability of the UBE: Where Is It When You Need It and Do You Need It at All?”**

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## **“PORTABILITY OF THE UBE: WHERE IS IT WHEN YOU NEED IT AND DO YOU NEED IT AT ALL?”**

*Suzanne Darrow-Kleinhaus\**

### **I. SHUTTING THE DOORS**

Nothing went right for May 2020 law school graduates and all others who planned to take the bar exam in July. Living with COVID-19 is stressful. Preparing for the bar exam is stressful. Now put the two together and add the uncertainty that no one really knew when, where, or even if, there would be a bar exam to take. Still, there was another factor adding to the anxiety for Uniform Bar Exam (UBE)<sup>1</sup> candidates: just when “portability” was needed so they could

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<sup>1</sup> *Uniform Bar Examination*, NAT’L CONF. B. EXAM’RS, <http://www.ncbex.org/exams/ube/> (last visited May 3, 2021). The UBE is a two-day, law licensing exam that is used across multiple jurisdictions and is coordinated by NCBE. Every UBE jurisdiction uses the same essay questions, the same performance tasks, and the same grading guidelines. As long as the candidate sits for all portions of the UBE in the same UBE jurisdiction and in the same administration, a “portable” UBE score is earned that can then be transferred to other states that have joined the UBE network. In short, the UBE allows a candidate to sit for one bar exam and use that score to gain admission in other states without having to take another bar exam. It is important to note, however, that a candidate must still meet the passing standards set by the other UBE jurisdiction and any state-specific licensure requirements.

sit for the bar exam in one UBE jurisdiction and transport that UBE score to their home jurisdiction for licensure, the door slammed shut.

Since March 2020, when the onset of COVID-19 forced most law schools, colleges, public schools, businesses, and government offices to shut their doors and move online, bar candidates have been on a roller-coaster ride of daily insecurity about their future. Putting aside what it means to live with the ever-present fear, trauma, and pain caused by the pandemic, bar candidates were bombarded with updates and alerts from their state boards of law examiners and the National Conference of Bar Examiners (NCBE), the entities charged with creating, administering, and scoring the bar exam. Instead of being helpful, however, these missives only added to the frustration and anxiety. This is because each pronouncement was accompanied by a disclaimer that nothing was guaranteed—not the date of the exam, whether you would be seated for the exam, whether there would be an in-person or online exam, or even whether there would be a bar exam.<sup>2</sup>

There is no denying the seriousness of the virus and its threat to health and safety, but the disruption to the lives of bar candidates was compounded when each jurisdiction had a different plan, and that plan was constantly changing.<sup>3</sup> No one expected the bar examiners to know what is unknowable—such as when a public health crisis will end, and a normal life may resume. But, bar candidates have a right to better than what they were given. Candidates need to know where they stand. Whatever decision a jurisdiction makes, candidates are entitled to decisive and definite action and that decision must be final, subject only to the most compelling change in circumstances due to the pandemic.

The situation was especially acute for candidates in Uniform Bar Exam (UBE) jurisdictions who painfully discovered that the promoted benefits of a “portable” UBE score were highly overrated. Just when “portability” was urgently needed so candidates could sit for the bar exam in one UBE jurisdiction and transport that UBE

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<sup>2</sup> See N.Y. ST. BD. L. EXAM’RS [hereinafter BOLE], <https://www.nybarexam.org/> (last visited May 1, 2021). “Candidates are also reminded that public health concerns may ultimately preclude the administration of the September bar exam in New York. Please continue to monitor this website for updates.”

<sup>3</sup> See *July 2020 Bar Exam: Jurisdiction Information*, NAT’L CONF. B. EXAM’RS, <http://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/> (last visited July 9, 2020).

score to their home jurisdiction for licensure, the door was slammed shut. No candidates were more deeply affected than those from New York. This is because New York tests more candidates than any other state with over 14,000 bar candidates annually and over 10,000 for the July bar exam alone. In 2019, a total of 14,200 candidates sat for the bar exam in New York: 10,071 candidates sat for the July bar exam and 4,129 sat for the February bar exam.<sup>4</sup> The only jurisdiction that even comes close is California which saw a total of 12,404 candidates in 2019.<sup>5</sup> However, California is not a UBE jurisdiction. At the other end of the spectrum is North Dakota, a UBE jurisdiction, that hosted a total of 119 candidates in 2019, with 82 sitting for the July 2019 administration.<sup>6</sup>

New York's inclusive policies attract candidates from other jurisdictions, including a large number of foreign educated and LL.M. applicants. In 2019, a total of 5,445 foreign educated candidates sat for the bar exam in New York.<sup>7</sup> This number far exceeds any other jurisdiction. Far more interesting, however, is that of this total, only 1,297 LL.M. candidates were from New York law schools, whereas 2,879 were LL.M. candidates from out-of-state schools.<sup>8</sup> New York has been a most generous host to those outside its borders seeking to sit for the bar exam. Unfortunately, this generosity is not reciprocated.

## II. NO PLACE TO SIT FOR THE BAR EXAM

When New York candidates subject to the priority seating protocol necessitated by the pandemic were encouraged to sit for the bar exam in another UBE jurisdiction, they learned that not all UBE

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<sup>4</sup> See *Persons Taking and Passing the 2019 Bar Examination*, B. EXAM'R, <https://thebarexaminer.org/2019-statistics/persons-taking-and-passing-the-2019-bar-examination/> (last visited July 1, 2020).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Letter from New York State Board of Law Examiners, to Honorable Alan D. Scheinkman, Chair NYSBA Task Force on the N.Y. B. Examination (Dec. 16, 2019) [hereinafter BOLE Letter]; Exhibit A in *Report of the New York State Bar Association Task Force on the New York Bar Examination*, N.Y. ST. B. ASS'N, (April 2020) [hereinafter Task Force] <https://nysba.org/app/uploads/2020/04/Report-Task-Force-on-the-New-York-Bar-Examination-April-2020.pdf>). The report is dated May 5, 2020 and was approved by the House of Delegates on April 4, 2020. *Id.*

<sup>8</sup> *Id.*

jurisdictions are hospitable to candidates from a fellow UBE jurisdiction. While you can take your UBE score once you've earned it in your home UBE jurisdiction and use it to seek admission in another UBE jurisdiction, you can't necessarily earn that score in another UBE jurisdiction and take it home. This may be just another unintended consequence of portability like forum shopping,<sup>9</sup> but it has added immeasurably to the challenges facing candidates, especially repeat-takers, and might just prove to be the beginning of the end for the UBE.

In New York, the problem became evident when re-takers followed the advice that they were given by New York's Court of Appeals and Board of Law Examiners. In a letter to New York's law school deans, the Honorable Janet DiFiore, Chief Judge of the Court of Appeals, recommended that because 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, "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."<sup>10</sup> Confident in making this recommendation, Judge DiFiore noted that "[t]he primary advantage of the UBE is portability—candidates can take the UBE anywhere in the United States and transfer that score to support admission to the bar in New York."<sup>11</sup>

New York's Board of Law Examiners (BOLE) reiterated this advice on its website. Candidates going to register for the bar exam were "strongly urged to consider sitting for the UBE at a later date or in other jurisdictions that may be better positioned to accommodate test-takers" because "seating capacity for the September 9-10, 2020

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<sup>9</sup> See generally Suzanne Darrow-Kleinhaus, *UBE Shopping: An Unintended Consequence of Portability?* (Touro Coll. Jacob. D. Fuchsberg L. Ctr., Working Paper No. 16-14, 2016), <http://ssrn.com/abstract=2756520>. Where a candidate takes the UBE may make the difference between passing and failing because of the convergency bar exam test practices of "portability," "relative grading," and "scaling" of scores. As a result, the UBE presents a candidate with the opportunity to "UBE shop" and "game the system" by taking the UBE in a jurisdiction where the same essay and MPT performance would result in a higher score and then transferring that inflated score for admission in a "harder" jurisdiction.

<sup>10</sup> Letter from Judge Janet DiFiore, C.J. of the St. of N.Y. Ct. of Appeals, to Deans of New York Law Schools (Apr. 30, 2020) [hereinafter Letter from Judge DiFiore] (on file with author).

<sup>11</sup> *Id.*

bar exam will be sharply limited, and the Board will not be able to seat all candidates who wish to take the exam in New York.”<sup>12</sup>

Taking New York at its word, candidates who failed to qualify for seating under its “temporary priority seating protocol”<sup>13</sup> sought out other UBE jurisdictions. Instead of finding a seat for the bar exam, they found barriers: closed application periods, seating for only in-state law school graduates or other preferential considerations,<sup>14</sup> and burdensome application processes with exorbitant fees, even from “courtesy seating” jurisdictions.<sup>15</sup>

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<sup>12</sup> See *\*New June 17, 2020\* Fourth Application Period for the September 2020 Bar Examination*, N.Y. ST. BD. L. EXAM’RS, <https://www.nybarexam.org/> (last visited June 19, 2020).

<sup>13</sup> See Letter from Judge DiFiore, *supra* note 10.

<sup>14</sup> See *Announcements, UPDATE (4/28/2020) Information about Bar Admissions and COVID-19*, MO. BD. L. EXAM’RS, <https://www.mble.org/news.action?id=1700> (last visited June 20, 2020). Typically, priority is given to graduates of law schools in the jurisdiction who are first-time takers. Candidates outside the jurisdiction and repeat takers are lower down on the list. The lower down on the list one goes, the less the likelihood of an available seat. As an example, consider Missouri’s directions to applicants:

Pursuant to the authority provided in the Court’s order, the board is limiting the number of July 2020 exam applications that will be accepted for filing, effective April 30. The Board will accept no more than 760 applications, and if the maximum number is reached prior to the June 1 application deadline, the registration period for the July 2020 exam will be closed. At this time, the July 2020 exam registration period is open and the deadline remains June 1. Applications properly filed on or after April 30 will be accepted in the order received, up to the maximum number, with priority afforded equally to Missouri residents, graduates of ABA-approved law schools located in Missouri or a contiguous state, licensed attorneys for an employer located in Missouri, and recipients of an offer of employment as a licensed attorney for an employer located in Missouri. No application to retake the exam will be accepted for filing on or after April 30 if the applicant has sat for four or more prior administrations of the Missouri bar exam.

*Id.*

<sup>15</sup> See *Bar Examination Application Instructions*, N.M. BD. L. EXAM’RS, <https://nmexam.org/wp-content/uploads/2019/12/1219a-Bar-Exam-Application-Instructions.pdf> (last visited July 3, 2020) (“Examinees who only wish to sit in New Mexico in order to transfer their scores to other states must submit all required items listed under ‘The following documents must be submitted by the filing deadline’ and ‘The following documents must be submitted before you can be approved to sit for the exam,’ found on the website, except for those items that are explicitly listed as not necessary for UBE Courtesy Seating.”).

In short, candidates found themselves without a home in which to sit for the bar exam and hard pressed to find a place that would take them in. Almost everywhere they turned they were sent away; politely, of course, but turned away, nonetheless. While “courtesy” seating may be prohibitively expensive and have additional requirements, they learned that “non-courtesy” seating in UBE jurisdictions, like Vermont, comes with consequences. This is because Vermont requires candidates to certify that they intend to become licensed in Vermont upon passing the bar exam and reminds them that “false statements on a bar application can form the basis of professional disciplinary action.”<sup>16</sup> Therefore, a candidate who seeks to sit for the bar exam in Vermont for the sole purpose of transporting that score back home may be committing an act that might preclude him or her from practicing law altogether.

There is an implicit assumption that if a candidate is applying to take its bar exam, he or she intends to practice in that jurisdiction. This is also the case in New York where the BOLE requires each candidate to certify that he or she is a bona fide candidate for admission.<sup>17</sup>

Apparently, jurisdictions like Vermont require candidates to sign an affidavit to make that intent express, and possibly actionable. If a candidate takes the UBE in Vermont with the intent to practice in New York and thus transfers that score to New York, is the candidate subject to professional disciplinary action? And if so, where? Vermont? New York? Both?

This is problematic for a UBE jurisdiction since taking the UBE in any particular jurisdiction should not require a commitment to practice in the testing jurisdiction. It goes to the basic premise of a UBE score and the intent of jurisdictions in becoming UBE jurisdictions. Requiring such a commitment from an applicant undermines the concept that an earned UBE score is “portable.” Such a commitment also is contrary to the understanding of many jurisdictions when they chose to become a UBE jurisdiction.

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<sup>16</sup> See *Admission to the Vermont Bar*, VT. JUDICIARY, <https://www.vermontjudiciary.org/attorneys/admission-vermont-bar>, (last visited July 3, 2020) (“For those applying to sit for the Vermont Bar Exam in September, we do not allow courtesy seating. By submitting an application to sit for the Vermont bar, applicants are certifying that they intend to become licensed in Vermont upon passage of the bar exam. Recall that false statements on a bar application can form the basis of professional disciplinary action.”).

<sup>17</sup> BOLE Letter, *supra* note 7, at 11.

The promised mobility of scores is inherently antithetical to barriers in achieving those scores. A major selling point to join the UBE network was its portability and with it the ease of movement between jurisdictions. The New York Board of Law Examiners clearly thought so when it encouraged candidates to pursue this option during the current crisis. Maybe it should have known better. Maybe we all should have known better when individual UBE jurisdictions retained control over every aspect of qualifying candidates for the exam. While this raises federalism issues and constitutional constraints on states under Article IV's Privileges and Immunities Clause and the Dormant Commerce Clause, this discussion is limited to the mobility question under the UBE because UBE jurisdictions are supposedly bound by a common undertaking: the transfer of bar exam scores between them.

NCBE made it clear in marketing the UBE that individual jurisdictions would remain autonomous in establishing their own requirements for admission, setting their own passing scores, administering the UBE and grading the written components, setting the requirements for accepting transferred UBE scores, making character and fitness decisions, making testing accommodations decisions, and determining whether to administer a separate specific state-law component.<sup>18</sup> While every jurisdiction and every UBE jurisdiction should remain autonomous in its requirements for licensure, there is an issue as to whether a UBE jurisdiction should be able to place different requirements on candidates who are sitting for a UBE score. Sitting for an exam as part of a licensure process is not the same as licensure itself. If the UBE is truly "portable," then part of that portability would be consistency in not just the exam components but the requirements for taking the UBE to acquire a score. In answering the question, "What is the UBE,?" NCBE answered, "It is a uniformly administered, graded, and scored bar examination that results in a portable score, not a portable status."<sup>19</sup> If taking the UBE is only to acquire a "score," then UBE jurisdictions should not be able to place different requirements on candidates who are just there to sit for a score.

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<sup>18</sup> See *Understanding the Uniform Bar Exam*, NAT'L CONF. B. EXAM'RS, <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F209> (last visited July 10, 2020).

<sup>19</sup> *Id.*



### III. “COURTESY SEATING” AND THE CRISIS OF THE PANDEMIC

The concept of “courtesy and non-courtesy” jurisdictions may not be new. It may have begun with the administration of the first UBE in 2011 or it may have always existed, but many of us did not know about it until now. NCBE explains that “courtesy seating allows an applicant to sit for the UBE in the jurisdiction for geographical convenience without having the intention to seek admission in that jurisdiction, as long as the jurisdiction is satisfied that the applicant is a bona fide candidate for admission in another UBE jurisdiction.”<sup>20</sup>

Candidates have been using the UBE as a matter of convenience for the past several years, but not in great enough numbers to cause concern. For example, since jurisdictions have different application deadlines, if a candidate misses a deadline in his or her home jurisdiction, it is possible to find another UBE jurisdiction where the application period is still open. The same is true if the deadline for filing to use your laptop has passed—find another UBE jurisdiction where the date is still open. A savvy UBE shopper has been known to find other opportunities. One such opportunity is a jurisdiction that permits a candidate to sit for an “Early Examination.” Here, the candidate need not have even graduated from law school but merely completed the equivalent of five semesters of full-time study.<sup>21</sup>

It is not likely that these individual instances when candidates used the UBE for “convenience seating” presented an issue. This might have continued without notice but for the emergency created

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<sup>20</sup> NCBE Comprehensive Guide to Bar Admission Requirements, Chart 6: Uniform Bar Examination Jurisdictions—MPRE Requirements, MBE Score Transfers, Courtesy Seating, and Attorneys’ Exams *See* <https://reports.ncbex.org/comp-guide/charts/chart-6/> (last visited May 11, 2021).

<sup>21</sup> *Rules of Admission to the Bar of the Vermont Supreme Court*, VT. JUDICIARY (Aug. 15, 2019), [https://www.vermontjudiciary.org/sites/default/files/documents/900-00014\\_5.pdf](https://www.vermontjudiciary.org/sites/default/files/documents/900-00014_5.pdf) (Rule 9(c)(5) provides for early examination “[a]n Applicant studying at an Approved Law School may apply to take the UBE before graduation. The Applicant must successfully complete the equivalent of five semesters of full-time study prior to taking the UBE and must submit an official law school transcript documenting that study before sitting for the examination. To qualify for admission, the Applicant must graduate from an Approved Law School within six months after sitting for the UBE. The Applicant must also satisfy all other requirements for admission.”).

by COVID-19 and the imposition of seating limitations. But we know it now and it raises a very thorny issue: given the crisis of the pandemic and the genuine need to mitigate risks to health and safety by restricting the size of public gatherings, are some jurisdictions using the pretext of the pandemic to disproportionately limit the number of candidates they will seat for their bar exam? It raises a further issue of whether UBE jurisdictions have a duty to seat candidates from UBE jurisdictions beyond what they might otherwise provide to candidates from non-UBE jurisdictions.

These issues arise because seating limitations are not limited to the larger jurisdictions but have been imposed in jurisdictions of all sizes, even the smallest. North Dakota limited the number of examinees to 85.<sup>22</sup> The Oregon State Board of Bar Examiners announced on May 11 that it would hold a July bar exam, but with a maximum seating capacity of 500 applicants and reached its max by May 15.<sup>23</sup> On May 6, Connecticut announced that it was accepting a maximum of 500 applications for the bar exam.<sup>24</sup> On May 8, Maine

<sup>22</sup> See *Policy – July 2020 Bar Exam*, ST. N.D. CTS., <https://www.ndcourts.gov/supreme-court/committees/board-of-law-examiners/bar-exam-application> (last visited July 11, 2020). North Dakota has limited its examinees for the July 2020 exam to 85 with its own schedule of priority seating and it may even need to be less. *Id.* How North Dakota would settle on such a number is not without a basis. *Id.* According to the ABA Standard 509 Information Report, North Dakota enrolled 71 students for the first-year class in 2017, the class which is to sit for this July's bar exam. *University of North Dakota University – 2017: Standard 509 Information Report*, UNIV. N.D. SCH. L., [https://law.und.edu/\\_files/docs/future-students/pdf/2017-aba-509-report.pdf](https://law.und.edu/_files/docs/future-students/pdf/2017-aba-509-report.pdf) (last visited July 11, 2020).

<sup>23</sup> See *July 2020 Bar Exam Applications*, OR. ST. B., <https://www.osbar.org/admissions> (last visited July 10, 2020).

<sup>24</sup> *Connecticut Bar Examining Committee*, ST. CONN. JUD. BRANCH, <https://www.jud.ct.gov/CBEC/> (last visited July 11, 2020). The Connecticut Bar Examining Committee announced on May 6, 2020 that the bar exam would be administered on September 30 and October 1; the maximum number of total applications that would be accepted for the Fall 2020 bar examination is 500; and applications would be accepted from June 1 to June 30, 2020, and this was a firm deadline where late applications would not be accepted. *Id.*

Further, applications were prioritized as follows:

- a. *“June 1 to June 12 – Applications will **only** be accepted from those graduating from University of Connecticut School of Law, Quinnipiac University School of Law, Western New England University School of Law, Yale Law School, or Massachusetts School of Law in Spring 2020.*
- b. *June 15 to June 30 – Applications will be accepted on a *first come, first served* basis until June 30 or until 500 total have been received, whichever*

announced that its seating for the September 30-October 1 bar exam would be limited and that there would be tier seating for those who were not yet on the seating list.<sup>25</sup> As of June 3, all the available seats had been filled and a waiting list was established for applications received until June 15. While Maine provided great specificity regarding the application process, it did not state a seating limit—only that it had one and it was reached. If the number is based on prior administrations of the bar exam, then it might be helpful to know that the number of candidates who sat for the July 2019 bar exam was 130<sup>26</sup> and the number of candidates who sat for the July 2018 bar exam was 117.<sup>27</sup>

Before canceling the July 28-29 administration of the bar exam on July 2 due to the increase in confirmed COVID-19 cases,<sup>28</sup> Tennessee offered two administrations of the UBE so that examinees who could not sit for the July administration due to seating limitations could take the exam in October.<sup>29</sup> Even with two administrations of the UBE, Tennessee had limited seating at each July exam location “based in the number of applicants from

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*occurs first.* However, if the maximum number of applications has been received by June 12, 2020, then additional applications will **not** be accepted after that date.”

*Id.*

<sup>25</sup> See ME. BD. B. EXAM’RS, <https://mainebarexaminers.org/> (last visited July 11, 2020) (“Tier 1: May 8, 2020 – May 22, 2020: 2018 and 2019 Graduates of Maine Law and current 3Ls of Maine Law. Tier 2: May 23, 2020-June 15, 2020: Graduates of Maine Law prior to 2018 and graduates from any other ABA accredited law school seeking admission to practice in Maine. Tier 3: June 16, 2020-July 17, 2020: All other applicants (including courtesy seat applicants) if available.”).

<sup>26</sup> See *Persons Taking and Passing the 2019 Bar Examination*, B. EXAM’R, <https://thebarexaminer.org/2019-statistics/persons-taking-and-passing-the-2019-bar-examination/> (last visited July 11, 2020).

<sup>27</sup> *Id.*

<sup>28</sup> See *Supreme Court Orders Cancellation of July 2020 Bar Examination*, TENN. BD. L. EXAM’RS, <https://www.tnble.org/?p=792> (last visited July 11, 2020).

<sup>29</sup> See *COVID-19 Announcements*, TENN. BD. L. EXAM’RS, [https://www.tnble.org/?page\\_id=667](https://www.tnble.org/?page_id=667) (last visited July 11, 2020); See also *Statement of Policies and Procedures: P-4.03 Dates and Places of Giving the Examination*, TENN. BD. L. EXAM’RS, [https://www.tnble.org/wp-content/uploads/2020/05/BLE\\_Policy\\_Revision\\_P-4.03.pdf](https://www.tnble.org/wp-content/uploads/2020/05/BLE_Policy_Revision_P-4.03.pdf) (last visited May 3, 2021).

Tennessee law schools.”<sup>30</sup> The July bar would have been administered in Knoxville, Memphis, and Nashville. The seating policy set seating priorities with first priority given to applicants who were first-time takers and graduates from Tennessee law schools in 2019 or 2020.<sup>31</sup> There were second and third priorities and finally priority based on remaining seat availability.<sup>32</sup>

It is important to note that all of these jurisdictions with limited seating—North Dakota, Oregon, Connecticut, Maine, and Tennessee—are UBE jurisdictions, and Maine is a “courtesy seating” jurisdiction. As of June 2020, nine UBE jurisdictions provide courtesy seating and twenty-five jurisdictions do not. Texas did so with its first UBE administration in February 2021.<sup>33</sup>

Courtesy seating should be the standard for all UBE jurisdictions. Seating to take the UBE in a UBE jurisdiction should be a “right” and not a “courtesy.” The American Bar Association urged nationwide adoption of the UBE because it “would have numerous benefits for new law graduates and young lawyers, jurisdictions, and the legal profession as a whole.”<sup>34</sup> The inclusion of the “new law graduates” in the group of UBE beneficiaries only makes sense if it is for the convenience of taking the UBE in one jurisdiction and then using it in another. Since even “rights” are not without limits, the “right” to sit for the UBE in a jurisdiction would be subject to all reasonable requirements under the circumstances. Unfortunately, it is impossible to determine whether such a standard is being applied by UBE jurisdictions in the current situation.

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<sup>30</sup> *Statement of Policies and Procedures: P-4.03 Dates and Places of Giving the Examination*, TENN. BD. L. EXAM’RS, [https://www.tnble.org/wp-content/uploads/2020/05/BLE\\_Policy\\_Revision\\_P-4.03.pdf](https://www.tnble.org/wp-content/uploads/2020/05/BLE_Policy_Revision_P-4.03.pdf) (last visited May 11, 2021).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *See* COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2020, 24-27 (Judith A. Gundersen & Claire J. Guback eds., 2020), [http://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020\\_021820\\_Online\\_Final.pdf](http://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020_021820_Online_Final.pdf) [hereinafter COMPREHENSIVE GUIDE].

<sup>34</sup> AM. BAR ASS’N, RESOLUTION 109, 3, (2016) <https://flayld.org/wp-content/uploads/2016/01/Resolution-109-UBE-Midyear-2016.pdf> (last visited May 11, 2021).

### III. NON-UBE JURISDICTIONS DURING COVID-19

During the COVID crisis, it appears that non-UBE jurisdictions were in a much better position than UBE jurisdictions because they had not given up control over their bar exam. They were not restricted to a common set of questions that are created, coordinated, and controlled by NCBE. Instead, they had the freedom to decide what type of exam to give, when to give it, and what form it would take. They had the flexibility to respond to the needs of their candidates and all those involved in the exam process during this emergency.

The one obstacle is the Multistate Bar Exam (MBE), the two-hundred multiple-choice question exam, created by NCBE, and a part of all jurisdictions' bar exams, except Louisiana and Puerto Rico.<sup>35</sup> While only UBE jurisdictions are required to use the MBE to produce a portable UBE score, non-UBE jurisdictions still rely on the MBE for what NCBE has told them is needed to ensure the reliability and validity of their bar exam scores.<sup>36</sup>

The Nevada Board of Law Examiners, however, did not allow NCBE to dictate any terms to it, including the need for the MBE. The Board sought and received approval from the Supreme Court of the State of Nevada to completely re-configure Nevada's bar exam for July 2020.<sup>37</sup> Since the Board concluded that it could not administer

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<sup>35</sup>See COMPREHENSIVE GUIDE, *supra* note 32, at 28.

<sup>36</sup>NCBE contends that scaling and equating the written scores to the MBE assures reliability. See Susan M. Case, *The Testing Column, Demystifying Scaling To the MBE: How'd You Do That?* 74 B. EXAM'R 45, 46 (2005) [hereinafter *Demystifying Scaling to the MBE*]. According to Dr. Susan Case, former Director of Testing for the National Conference of Bar Examiners,

scaling 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.

*Id.* Dr. Case was the Director of Testing until Nov. 1, 2013.

<sup>37</sup>See *Nevada Supreme Court Approves Modified Bar Exam for July 2020*, ST. B. NEV. (May 21, 2020), <https://www.nvbar.org/nevada-supreme-court-approves-modified-bar-exam-for-july-2020/>; See also *Order Approving Modified July 2020 Nevada Bar Examination* (2020) [hereinafter *Nevada Court Order*],

the bar exam in person and meet COVID-19 social distancing requirements, and NCBE has not approved the remote administration of the MBE, it decided to eliminate the MBE, go completely online, and use only a written exam.

The Board did not make its decision lightly, but did so after consulting with its own psychometrician, Dr. Roger Bolus, "to address concerns regarding the reliability of the Nevada exam in the absence of the MBE"<sup>38</sup> and stated that it would continue its consultation with Dr. Bolus and "take all reasonable measures to address the reliability of an essay only exam."<sup>39</sup> Further, the Board made special note of its prior discussions

with the Court, [that] the essay portion is the valid measure of minimum competence, something the MBE lacks. More important, under the proposed format Nevada will be testing knowledge, analytical ability, and writing skills, all which are accepted measures of attorney competence. In addition, the open-book component also incorporates what we as lawyers do every day: look up the applicable law.<sup>40</sup>

Nevada was not alone. Indiana also administered an online exam without the MBE.\* Concerned about the safety of administering an in-person exam during the pandemic, the Indiana Supreme Court ordered the Indiana State Board of Law Examiners to conduct a one-day, online bar exam on July 28, 2020 that "shall consist of the Indiana Essay Examination and a series of short answer questions on the topics tested on the Multistate Bar Examination."<sup>41</sup> On May 18, 2020, Michigan, too, announced an essay-only bar exam when the Michigan Supreme Court ordered a revised format for its July 2020 Michigan Bar Exam to be administered online in one day and "consist solely of the essay portion of the traditional exam."<sup>42</sup> As

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[https://www.nvbar.org/wp-content/uploads/ADKT.558.order\\_.modified.bar\\_exam\\_.pdf](https://www.nvbar.org/wp-content/uploads/ADKT.558.order_.modified.bar_exam_.pdf)

<sup>38</sup> *Nevada Court Order*, *supra* note 36.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *In re July 2020 Ind. Bar Examination*, 143 N.E.3d 300 (Ind. 2020).

<sup>42</sup> *July 2020 Bar Exam to Be Remote Online Essay Test*, ST. B. MICH. (last updated May 19, 2020) <https://www.michbar.org/News/NewsDetail/nid/5706/July-2020-Bar-Exam-to-be-Remote-Online-Essay-Test>; *See also* Revised Format for July 2020 Michigan Bar Examination, (2020),

Florida continued to hit new COVID records, the Florida Board of Bar Examiners announced on July 1, 2020 that the in-person scheduled bar exam for July 28-29 was canceled and would be replaced by the administration of an online exam on August 18.<sup>43</sup> This exam consisted of one-hundred multiple-choice questions and three essay questions.<sup>44</sup> In making this major change, the Board advised applicants that only for the August 2020 bar exam would applicants “not be required to take the Multistate Bar Examination to establish technical competence.”<sup>45</sup> The Supreme Court of Texas issued its Nineteenth Emergency Order Regarding the Covid-19 State of Disaster on July 3 when it ordered the cancellation of the July 2020 in-person bar exam and offered applicants options for licensure: an in-person Texas Bar Exam as scheduled for September 9-10, 2020, subject to guidance from public health authorities or an online administer, an online Texas Bar Exam on October 5-6, 2020.<sup>46</sup>

And then there’s California: its law schools’ deans met on July 2, 2020, by Zoom with members of the California Supreme Court and representatives from the California State Bar. Four deans represented the ABA deans on the call and advocated for an emergency diploma privilege for California’s 2020 candidates because of the current health and societal crisis and its unprecedented impact on the mental, physical, and financial health of the bar candidates.<sup>47</sup> While the preference was for a “diploma privilege with

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[https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Documents/2020-08\\_2020-05-18\\_FormattedOrder\\_AO2020-15.pdf](https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Documents/2020-08_2020-05-18_FormattedOrder_AO2020-15.pdf).

<sup>43</sup> See *Florida Bar Exam Moves to Online Format in August*, FL. BD. B. EXAM’RS. (July 1, 2020),

<https://www.floridabarexam.org/web/website.nsf/52286ae9ad5d845185257c07005c3fe1/5a96721e1a13b40b85258598005bbf7a?opendocument>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *All Announcements: Supreme Court Order*, TEX. BD. L. EXAM’RS, <https://ble.texas.gov/allnews.action> (last visited July 11, 2020); See also *Nineteenth Emergency Order Regarding the Covid-19 State of Disaster*, (2020), <https://www.txcourts.gov/media/1448432/209083.pdf>.

<sup>47</sup> Paul Caron, *California Law School Deans Report on July 2 Meeting with State Supreme Court and Bar*, TAXPROF BLOG, (July 5, 2020), [https://taxprof.typepad.com/taxprof\\_blog/2020/07/california-law-school-deans-report-on-july-2-meeting-with-state-supreme-court-and-bar.html](https://taxprof.typepad.com/taxprof_blog/2020/07/california-law-school-deans-report-on-july-2-meeting-with-state-supreme-court-and-bar.html) (Letter from Deans Chemerinsky (UC-Berkeley), Faigman (UC-Hastings), Jennifer Mnookin (UCLA), and Song-Richardson (UC-Irvine) to the Class of 2020).

guardrails,” the deans also addressed other options, concluding with “the absolute need for certainty on a plan as soon as possible ....”<sup>48</sup>

#### IV. IS THE UBE NECESSARY?

It is hard to read Nevada’s declaration that “the essay portion is the valid measure of minimum competence, something the MBE lacks” as anything other than “fighting words” as far as NCBE is concerned. Such words may also portend the fate of the NCBE itself. Since the NCBE’s introduction of the MBE to the bar exam in 1972, the MBE has taken center place in its growing roster of exams—the Multistate Essay Examination (MEE), first offered in 1988, the Multistate Professional Responsibility Exam (MPRE), first offered in 1980, and the Multistate Performance Test (MPT), first offered in 1997. The MBE is the “equating” linchpin to assure the validity and reliability of bar exam scores over time. According to Dr. Susan Case, former Director of Testing for the National Conference of Bar Examiners, “[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.”<sup>49</sup>

If jurisdictions adopt the position taken by Nevada, Indiana, Michigan, and Florida — that the MBE is unnecessary to ensure the reliability of the bar exam — then where does that leave the current bar exam configuration of a written component that must be scaled to the MBE? While three states are non-UBE jurisdictions, the implications of their decision transcend borders and classifications. If the MBE is not essential to ensure reliability of bar exam scores, then UBE jurisdictions do not need it either.

This seismic shift in thinking about the MBE has not been lost on NCBE. In keeping step with the changing public health situation, NCBE made regular COVID-19 updates on its website and changes in its plans for the bar exam in consultation with jurisdictions.<sup>50</sup> At

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<sup>48</sup> *Id.*

<sup>49</sup> Susan M. Case, *The Testing Column: What Everyone Needs To Know About Testing, Whether They Like It Or Not*, 49 B. EXAM’R 30, 29 (2020) [hereinafter Case, *What Everyone Needs To Know*].

<sup>50</sup> See *NCBE Announces Initial Plans for Remote Option for February 2021 Bar Exam*, NAT’L CONF. B. EXAM’RS, (Oct. 19, 2020),



the onset of the crisis, NCBE posted on its website that the threshold decision of whether there would be a July 2020 bar exam administration depended on whether there would be a sufficient number of jurisdictions and examinees to support equating of scores (referring to the MBE number), and all the scoring support and grader training associated with the exam.<sup>51</sup> After determining on May 5 that the requisite number was achieved, NCBE announced that it planned to make its exam materials available to jurisdictions for a July administration.<sup>52</sup> This announcement included a reiteration of NCBE's earlier announcement on April 3 that it would make bar exam materials available for two fall administrations in addition to the materials for a July bar exam.<sup>53</sup>

NCBE's flexibility and responsiveness in providing additional sets of exam materials to jurisdictions is commendable. In short order, NCBE made three options available to jurisdictions, thus allowing them to choose when it would be best to administer their bar exam. Notably, none of these options altered the exam's content or delivery. The integrity of the bar exam, whether for UBE or non-UBE jurisdictions, remained intact because it included the MBE. However, on June 1, NCBE announced its most radical move of all—

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<https://www.ncbex.org/news/ncbe-announces-initial-plans-for-remote-option-for-february-2021-bar-exam/>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* "As of May 5, 19 jurisdictions have announced that they intend to cancel or postpone the July bar exam; the other jurisdictions either plan to go ahead with the July exam or have not yet made a decision. Based on this information, NCBE has determined that there will most likely be a sufficient number of July examinees to administer the bar exam. Accordingly, we plan to make our exam materials (MBE, MEE, and MPT) available to those jurisdictions that choose to administer an exam in July." *Past NCBE COVID-19 Updates*, NAT'L CONF. B. EXAM'RS (May 5, 2020), <http://www.ncbex.org/ncbe-covid-19-updates/past-updates/>.

<sup>53</sup> *Id.* "To provide needed flexibility for jurisdictions and candidates, in addition to preparing materials for a July bar exam, NCBE will make bar exam materials available for two fall administrations in 2020: September 9-10 and September 30-October 1. Each jurisdiction will determine whether to offer the exam in July, in early September, or in late September." *Past NCBE COVID-19 Updates*, NAT'L CONF. B. EXAM'RS (Apr. 3, 2020), <http://www.ncbex.org/ncbe-covid-19-updates/past-updates/>.

the creation of a limited set of questions for an emergency remote testing option.<sup>54</sup>

Remarkably, NCBE offered to provide jurisdictions with an exam to be administered remotely on October 5-6 after all three administrations of the bar exam/UBE had occurred. The intent was to “provide jurisdictions an emergency option should administering the in-person bar exam not be possible.”<sup>55</sup> NCBE pointed out that this testing option would not be the same as the full bar exam or the UBE so that scores earned would be used for local admission only and will not qualify as UBE scores.<sup>56</sup> The result is that such earned scores would not be portable.

In making this announcement, NCBE was quick to let jurisdictions know that it was making this option available just as it had taken previous steps to “support our stakeholders in light of the COVID-19 crisis.”<sup>57</sup> NCBE reminded everyone of its flexibility because it stated that “[i]n providing the remote testing option, NCBE is responding proactively to the continuing uncertainty the upcoming months will bring, and the possibility that local or state health and safety restrictions will prohibit in-person testing.”<sup>58</sup>

NCBE’s decision to provide an online, abbreviated option to jurisdictions is laudable, but it may be too little and too late to save the UBE. The harm has been done. While some non-UBE jurisdictions have opted to create their own exam, even some UBE jurisdictions have bristled against the constraints of the UBE for this administration of the bar exam.

Putting the needs of their candidates first during this tumultuous time, on April 23, 2020, Massachusetts announced its intent to administer an online exam even before NCBE made an

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<sup>54</sup> *NCBE to Provide Additional Support for Jurisdictions During COVID-19 Crisis*, NAT’L CONF. B. EXAM’RS (June 1, 2020, 4:00 PM), <http://www.ncbex.org/ncbe-covid-19-updates/>.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (“This remote testing option will not constitute the full bar exam or the UBE. Scores earned on the remotely administered test will be used for local admission decisions only and will not qualify as UBE scores. The scores will not be eligible to be transferred as UBE or MBE scores to other jurisdictions or released to candidates via NCBE Score Services.”).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

online option available.<sup>59</sup> The Justices of the Supreme Judicial Court and the Massachusetts Board of Bar Examiners (BBE) stated that if the UBE could not be conducted safely in-person on September 30 and October 1, an alternative exam would be administered remotely.<sup>60</sup> This exam would grant admission only to the bar of Massachusetts and the BBE would be preparing the exam, and it would be “similar in content to the subjects tested on the UBE.”<sup>61</sup> This announcement was followed by another on July 1 that set October 5-6, 2020 as the date for the Massachusetts bar exam.<sup>62</sup> And now the BBE had decided on the content for its online exam: it would consist of testing materials provided by the National Conference of Bar Examiners and be the “same in substantive content as the UBE” but not a full UBE so it would not be portable.<sup>63</sup> As to this issue, Massachusetts noted that the “Board of Bar Examiners (BBE) is working with other jurisdictions that administer the same remote exam to explore possible reciprocity agreements.”<sup>64</sup>

NCBE’s announcement on June 1 to provide an online exam must have been motivated—at least in part—in response to Massachusetts’ move on April 23 to go rogue.<sup>65</sup> And Massachusetts’ decision on July 1 to adopt NCBE’s online version of a modified UBE is the result that NCBE intended with its offer.<sup>66</sup>

But it did not end here. As of July 8, Massachusetts, Maryland, and the District of Columbia, all UBE jurisdictions, entered into reciprocal agreements for the portability of scores earned

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<sup>59</sup> Press Release, Massachusetts Supreme Judicial Court, Massachusetts Board of Bar Examiners, SJC Clerk’s Office for the County of Suffolk, Massachusetts Court System, Plan for Law School Graduates Announced (Apr. 23, 2020), <https://www.mass.gov/news/plan-for-law-school-graduates-announced>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Massachusetts Supreme Judicial Court Press Release July 1, 2020: Massachusetts State Bar Exam to be Conducted Remotely. See <https://www.mass.gov/news/massachusetts-state-bar-exam-to-be-conducted-remotely> (last visited May 11, 2021).

<sup>63</sup> *FAQs Related to October 2020 Examination for Admission to Massachusetts Bar*, MASS.GOV, <https://www.mass.gov/guides/faqs-related-to-october-2020-examination-for-admission-to-the-massachusetts-bar> (last visited Aug. 4, 2020).

<sup>64</sup> *Id.*

<sup>65</sup> NCBE to Provide Additional Support for Jurisdictions During COVID-19 Crisis (*June 1, 2020*). See <https://www.ncbex.org/ncbe-covid-19-updates/past-updates/>.

<sup>66</sup> *Supra* note 62.

on the remotely-administered October 2020 Bar Examination.<sup>67</sup> Maryland intends to “continue to seek reciprocity with other jurisdictions offering the October 2020 Remotely-Administered Bar Examination and will announce additional agreements as they are made”<sup>68</sup> and the District of Columbia intends to do so as well.<sup>69</sup> This is an especially sharp rebuke to NCBE’s reminder to UBE jurisdictions that the October remote exam would not be portable. Well, the jurisdictions made it portable by themselves.

It is very possible that NCBE is afraid of losing its hold on the bar exam, so it tried to show its responsiveness to the pandemic by being flexible. NCBE must be desperate to hold onto the UBE jurisdictions through this crisis by offering a limited option. For NCBE, it is a major concession to allow an online exam and abbreviated materials. It is even more shocking to see NCBE concede portability, even if it is for a once-in-a-lifetime emergency like the pandemic. Perhaps NCBE is hopeful that this concession will be sufficient to maintain control over the bar exam. However, given the rapid pace by which UBE jurisdictions are taking the lead in forming their own reciprocity agreements, NCBE should be deeply concerned.

The COVID-19 pandemic has exposed serious limitations and vulnerabilities to the UBE, even beyond its questionable scoring and equating practices that can lead to the preposterous result that “a candidate might receive different scores in two different UBE jurisdictions.”<sup>70</sup> NCBE’s very future is at stake. It is being challenged by calls for a diploma privilege while non-UBE jurisdictions are creating their own bar exams and not including the MBE. NCBE has everything to lose, especially since the UBE has not turned out to be very portable. If, as we have learned, the UBE is not particularly useful during a pandemic when you might need it to sit for the bar exam in one UBE jurisdiction and transfer that score, then perhaps its value lies solely in its use for career portability. This

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<sup>67</sup> *Maryland State Board of Law Examiners COVID-19 Emergency Response*, MD. CTS., [hereinafter *Maryland State Board of Law Examiners*], <https://www.courts.state.md.us/ble> (last updated Feb. 26, 2021); *Notice to October 2020 Remote Bar Exam Applicants*, D.C. CTS. (July 7, 2020), [hereinafter *Committee on Admissions, District of Columbia*], <https://www.dccourts.gov/court-of-appeals/committee-on-admissions>.

<sup>68</sup> *Maryland State Board of Law Examiners*, *supra* note 59.

<sup>69</sup> *Committee on Admissions, District of Columbia*, *supra* note 59.

<sup>70</sup>BOLE Letter, *supra* note 7, at 16.

was the strongest argument made to support its adoption.<sup>71</sup> The theory was that the UBE would allow an attorney to seek employment in other states without having to sit for another bar exam. This would save time, effort, and money, thus making it easier for attorneys to have career mobility.

The question, therefore, is whether UBE scores have been used in this way by attorneys seeking employment in other jurisdictions. According to the findings by the New York State Bar Association Task Force on the New York State Bar Examination (hereinafter, “Task Force”), “portability provides only a small benefit to only a minority of test takers.”<sup>72</sup> Relying on data supplied by the BOLE, the Task Force reported that “the overwhelming majority of New York UBE score earners do not transfer the scores to other UBE jurisdictions.”<sup>73</sup> With respect to the value of portability for New York score earners, the Report concluded “that no meaningful ‘portability’ benefit ensures to most law school graduates who take the bar examination in New York to gain admission here.”<sup>74</sup>

The Task Force identified several other concerns about the UBE that are relevant to a determination of whether remaining a UBE jurisdiction is advantageous for New York. In addition to failing to provide any meaningful portability benefit, there is evidence that the UBE’s scaling and scoring practices may make a UBE score inherently unreliable, and therefore, not an appropriate measure of an individual’s minimum competency to practice law.<sup>75</sup> This is especially problematic when the UBE score is earned in another jurisdiction and then transported to New York. Although Diane Bosse, Chair of the BOLE,<sup>76</sup> assured the Task Force that a passing score earned in any UBE jurisdiction is a reliable test of

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<sup>71</sup> See Task Force, *supra* note 7, at 65.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 66.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 72 (citing Suzanne Darrow-Kleinhaus, *Testing the UBE: Portable But Inaccurate Bar Exam Scores*, LAW360 (July 26, 2016, 11:11AM), <https://www.law360.com/articles/806049/testing-the-ube-portable-but-inaccurate-bar-exam-scores>).

<sup>76</sup> Diane Bosse retired as Chair of the Board of Law Examiners on September 2, 2020; Justice Carmen Beauchamp Ciparick was appointed Chair on September 3, 2020. See Bryan R. Williams, *Tribute—On the Retirement of Diane F. Bosse from the New York Board of Law Examiners*, 89 B. EXAM’R 88 (2020); Brandon Vogel, *Judge Ciparick To Head Board of Law Examiners*, NYSBA (Sept. 2, 2020), <https://nysba.org/judge-ciparick-to-head-board-of-law-examiners/>.

competency despite differences in cut scores because of the validity of the test itself,<sup>77</sup> this is only true if one accepts NCBE's basic assumption that the MBE controls the uniformity of the candidates' scores across jurisdictions and over time. This assumption is flawed.

There is a difference between an exam score earned by an examinee in an individual jurisdiction scoring its own written exam and an exam score earned in another jurisdiction where it is based on a different cohort. This may result in a "portable" score but not a "true" one because the written score—50% of the total—depends on the strength of the applicant pool in the jurisdiction where the candidate wrote the exam. Additionally, the Board has acknowledged in its Letter that it is "a theoretical possibility that a candidate might receive different scores in two different UBE jurisdictions."<sup>78</sup>

This is a stunning admission in itself, but it is followed by an explanation that only confirms that a "portable" UBE score is the product of the time and place in which it was taken because the performance of a candidate varies according to the specific group of papers against which it is evaluated.

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.<sup>79</sup>

It is indeed a "problem" because the "portable" score is just a "local" score, dependent on the cohort which took that exam—and "relative" at that. NCBE's practice of scaling the written component to the MBE<sup>80</sup> which comes only from that jurisdiction is the basis of the problem. The Board confirmed the locality of the "portable

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<sup>77</sup> BOLE Letter, *supra* note 7, at 23.

<sup>78</sup> *Id.* at 16.

<sup>79</sup> *Id.* at 18.

<sup>80</sup> *Demystifying Scaling to the MBE*, *supra* note 35, at 46.

score” in its Letter 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.”<sup>81</sup>

The BOLE’s acknowledgment that it is possible for the same candidate to receive different scores in two different UBE jurisdictions leads to a shocking result that undermines the licensing test itself where the same person can be found “competent” to practice law in one UBE jurisdiction and “incompetent” in another, when it is the same person with the same skill level taking the same test.

NCBE must be very uneasy about the Task Force’s findings. If New York received no discernible benefit for its attorneys in portability “out” of New York or “in” to New York, and no benefit to portability when faced with an urgent need for its candidates to be seated in another UBE jurisdiction, then the next logical question is whether there is any benefit at all to remaining a UBE jurisdiction. Moreover, it is unlikely that New York is alone in questioning the viability of the UBE—other jurisdictions must be doing the same, especially those creating, administering, and grading their own bar exams this year without NCBE’s assistance.

In the race to adopt the UBE, much was overlooked. It may be true that there was a difference between what UBE jurisdictions expected when they joined the UBE community and what they were entitled to receive, but that is of little consequence now. The pandemic exposed critical limitations to the UBE’s portability that cannot be ignored. When combined with the evidence that the UBE’s scaling and scoring practices may make its score unreliable, so as to achieve its primary purpose of assessing minimum competency,<sup>82</sup> there is no choice but to reconsider using the UBE.

As a result of such scrutiny, it is very likely that jurisdictions will leave the UBE and prospective jurisdictions will place their plans to join the UBE on hold. There will be many changes in the wake of COVID-19 and no doubt the UBE will be one of them. The current situation is extremely fluid with daily changes in jurisdictions’ plans for administration of their bar exam in light of the changing health crisis. No matter what is eventually decided for bar exam day, it will

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<sup>81</sup> BOLE Letter, *supra* note 7, at 23.

<sup>82</sup> Task Force, *supra* note 7, at 47.

not change the fact that when portability of the UBE was truly needed, it was not there.

## V. WHAT'S NEXT FOR THE UBE

We knew that changes were coming when, in 2018, the NCBE appointed a Testing Task Force charged with undertaking a three-year study “to ensure that the bar exam continues to test the knowledge, skills, and abilities required for competent entry-level legal practice in a changing legal profession.”<sup>83</sup> What we did not see coming, however, was elimination of all three components of the UBE. But is it really a surprise—especially for the MBE?

During the pandemic, a number of jurisdictions found that they could dispense with the MBE and still provide its candidates with a reliable and valid licensing exam. Even NCBE provided an abbreviated online bar exam with only 100 MBE questions to jurisdictions.<sup>84</sup> It was just a matter of time before jurisdictions

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<sup>83</sup> NAT'L CONF. OF B. EXAM'RS TESTING TASK FORCE, YOUR VOICE: STAKEHOLDER THOUGHTS ABOUT THE BAR EXAM PHASE 1 (2019). The NCBE has now entered into phase two of its study, “a nationwide practice analysis [designed] to collect information about the importance and frequency of tasks performed by [newly-admitted attorneys], as well as the importance of related knowledge, technologies, skills, abilities, and other characteristics necessary for competent entry-level practice.” *Id.* at 5. The final phase of the study will “develop[] recommendations for the next generation of the bar examination and MPRE.” *Id.* “The Task Force aims to have its final recommendations in place sometime in 2021.” Karen Sloan, *Overhaul the Bar Exam? Two Major Studies Focus on the Test's Future*, LAW.COM (July 31, 2019, 1:21 PM), <https://www.law.com/2019/07/31/overhaul-the-bar-exam-two-major-studies-focus-on-the-tests-future/>. Additionally, the Institute for the Association for the Advancement of the American Legal System (“IAALS”) is working on its own study of the exam. See *Building a Better Bar: Capturing Minimum Competence*, IAALS, <https://iaals.du.edu/projects/building-a-better-bar> (last visited May 4, 2021). IAALS aims to speak with new attorneys across the country to pinpoint the knowledge and skills that make them effective, as well as more seasoned attorneys who supervise newly admitted attorneys. See *id.* The Task Force will be monitoring both groups of reports closely.

<sup>84</sup> Although the NCBE provided exam questions for an exam, it advised jurisdictions that they “will be responsible for scoring the tests and interpreting candidate performance. NCBE will not equate the MBE portion or scale scores from the written portion of the test to the standardized MBE portion as we would do for the standard, full-length bar exam. Without further research, scores from an abbreviated version of the MBE administered by remote testing cannot be considered comparable to the standard, paper-based, full-length MBE



realized that they did not need the MBE. If jurisdictions found that they could do without the MBE, could NCBE afford to ignore this new reality and remain the legal licensing clearinghouse that it has become? Not likely, and the NCBE Board of Trustees voted to make it official: the bar exam of the future will not look like that of the past, and there will be no MBE.<sup>85</sup>

The changes impact content as well as structure. NCBE is trimming the number of doctrinal subjects that will be tested on the bar exam to the following: Contracts, including Article 2 of the Uniform Commercial Code; Torts; Evidence; Business Associations, including Agency; Constitutional Law; Criminal Law and Constitutional Protections impacting Criminal Proceedings (excluding coverage of criminal procedure beyond constitutional protections); Real Property; and Civil Procedure (including constitutional protections and proceedings before administrative agencies).<sup>86</sup> Family Law, Trusts and Estates, Secured Transactions, and Conflict of Laws will not be tested—at least not directly. Since the next generation bar exam will be “integrated,”<sup>87</sup> where legal scenarios provide a background to support a range of tasks including multiple-choice and short answer questions, among others, it is possible that these subjects will find their way into the fact patterns.

New skills will be integrated into the bar exam, including client counseling, advising, and negotiations.<sup>88</sup> According to NCBE, such “performance-type skills will be assessed using uniform text- or video-based scenarios to which candidates will respond in writing or by choosing correct answers from multiple options.”<sup>89</sup> We won’t

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administration, such comparability being an essential requirement for equating and scaling.” *Past NCBE COVID-19 Updates*, NCBE, <https://www.ncbex.org/ncbe-covid-19-updates/past-updates/> (last visited Feb. 15, 2021).

<sup>85</sup> *NCBE Board of Trustees Votes to Approve Testing Task Force Recommendations*, NCBE (Jan. 28, 2021), <https://www.ncbex.org/news/ncbe-bot-vote-approves-ttf-recommendations/>.

<sup>86</sup> *Final Report of the Testing Task Force*, April 2021, NCBE, Testing Task Force Recommendations, Content, p. 20. <https://nextgenbarexam.ncbex.org/reports/final-report-of-the-ttf/#ftoc-heading-36> (last visited May 12, 2021).

<sup>87</sup> NCBE refers to this next generation of bar exam as an integrated exam because its new questions integrate testing of knowledge and skills.

<sup>88</sup> *Supra* note 86 at 21.

<sup>89</sup> *FAQs about the Preliminary Recommendations*, NCBE, <https://testingtaskforce.org/research/faqs/> (last visited Jan. 29, 2021).

know what these questions will look like for some time since NCBE projects that the entire implementation process of developing and delivering the new exam “will take up to four to five years, which will allow time for notice to candidates of what to expect and for law schools to help students prepare.”<sup>90</sup>

Still, some things remain the same: the bar exam will be given at the end of law school, in multiple timed-sessions over two days, two times a year, and be a closed book exam. Examinees will receive a single combined score based on “compensatory scoring” indicating passage or failure.<sup>91</sup>

What also remains the same is NCBE’s practice of making decisions and then giving us notice of what it decided to do. It matters little that NCBE appointed a Testing Task Force that produced voluminous reports to the public during its three-year study because, in the end, NCBE decided: it decided that the portability problem that has plagued examinees during the pandemic does not require further review; it decided that the transition to an online testing platform for the next generation bar exam is the way to go without providing data to show that there is no difference in examinees’ performance between online and paper exams; and, it decided that the MBE is no longer necessary when we have been told for decades that it is the lynchpin to ensure test score reliability.

### A. Portability of the UBE

The portability issues for the UBE remain the same even if its components are different. The crisis we witnessed in the bar exam cycle for July through October 2020 is ongoing because we have no idea when it will be safe to hold an in-person bar exam, whether on paper or online.<sup>92</sup>

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<sup>90</sup> *Overview of Preliminary Recommendations For The Next Generation of the Bar Examination*, NCBE, [hereinafter *Preliminary Recommendations*], <https://testingtaskforce.org/research/preliminary-recommendations-for-next-generation-bar-examination> (last visited Jan. 29, 2021).

<sup>91</sup> *Id.*

<sup>92</sup> *See February 2021 Bar Examination*, N.Y. ST. BD. L. EXAM’RS (Oct. 26, 2020), <https://www.nybarexam.org> (“The New York Court of Appeals announced on October 21, 2020 that because the threat posed by the pandemic has not abated sufficiently to conduct in-person testing of large numbers of applicants the Court has determined that New York will administer a remote bar exam in February 2021.”).

Still, it does not matter whether UBE jurisdictions prioritize seating due to the pandemic or for any reason: UBE jurisdictions should be hospitable to candidates from a fellow UBE jurisdiction or the promise of “portability” is an empty one. Since NCBE is creating the next generation of the bar examination and the pandemic exposed serious limitations to the UBE’s portability, these issues cannot be ignored. Now is the time for NCBE to deal with them. If NCBE ignores these issues, then UBE jurisdictions and any jurisdiction contemplating becoming one must take up this issue and decide whether the price of “portability” is worth it.

### **B. The Move to an Online Testing Platform**

NCBE also remains silent when it comes to providing data in support of moving a two-day, high-stakes licensing exam involving dense reading materials and extensive writing to a fully online platform. The NCBE Board of Trustees simply announced that the next generation of the bar exam would be computer-based.<sup>93</sup> Has NCBE conducted studies and compiled data assessing examinee performance on a paper-based versus a computer-based exam? Are there differences in performance? Are there differences based on gender? On race? On age?

One would expect that a momentous decision to change the modality of the bar exam would be data-driven and that the data would be subject to outside review. In fact, when NCBE notified jurisdictions that the remote testing option it provided in October 2020 could not be used for portability purposes, it explained that “[w]ithout further research, scores from an abbreviated version of the MBE administered by remote testing cannot be considered comparable to the standard, paper-based, full-length MBE administration, such comparability being an essential requirement for equating and scaling.”<sup>94</sup> In recognizing the need for further research, is NCBE asserting that the “standard” for comparable testing requires

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<sup>93</sup> *Preliminary Recommendations*, *supra* note 80. Phase 3 Report of the Testing Task Force, “[a]s noted in the TDC’s reading materials, the TTF decided that the next generation of the bar exam will be a computer-based test, administered either at testing centers or on examinees’ laptops, so the TDC did not discuss the issue of delivery mode.” *Id.*

<sup>94</sup> See *NCBE to Provide Additional Support for Jurisdictions During COVID-19 Crisis*, NCBE, <https://www.ncbex.org/ncbe-covid-19-updates/past-updates/> (last visited Feb. 15, 2021).

the MBE to be full-length and paper-based, or only full-length? The answer to this question, among others, is critical.

To date, NCBE has not released any research on this question. Perhaps it is relying instead on its experience with the MPRE's move from a paper-based exam to one that is fully online as sufficient for a future online bar exam. As of March 2020, all MPRE examinees were required to take the computer-based exam at a Pearson VUE testing center.<sup>95</sup> NCBE's phased approach to transition from paper-to-computer took one year.<sup>96</sup>

NCBE wrote about this transition in *The Bar Examiner* where it identified the MPRE transition schedule and presented and answered "Frequently Asked Questions" about the transition.<sup>97</sup> NCBE's response was predictable:

Yes. The only difference between the computer-based MPRE and the paper-based MPRE will be the delivery platform. No matter how the test is delivered, NCBE analyzes and equates scores so that they accurately reflect examinee performance and can be compared meaningfully with scores achieved on other administrations of the exam. During the transition to computer-based testing, NCBE will continue to analyze all exam results for accuracy and comparability of scores regardless of the delivery platform.<sup>98</sup>

NCBE simply affirmed the validity of its scoring practices and avoided the question of whether the difference in the exam's platform might result in a difference in an examinee's performance if that examinee took the MPRE on paper instead of on computer. Perhaps NCBE's less than one-year experience with the online MPRE was sufficient to move the entire bar exam online. However, the MPRE is only a two hour, sixty-question multiple-choice exam. Where is the data comparing student performance on online exams versus. paper exams for high-stakes licensing exams, when a large portion of the exam requires an extensive written work product?

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<sup>95</sup> *MPRE Computer-Based Testing Transition Schedule and FAQs* Winter 2018-2019 87 B. Exam'er, (Vol. 87, No. 4).

<sup>96</sup> See *MPRE Computer-Based Testing Transition Schedule and FAQs*, 87 B. EXAM'ER (2018).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

While NCBE could make the decision unilaterally to move the MPRE online because NCBE administers this exam, the bar exam is administered by the individual jurisdictions. Have state boards of law examiners and all relevant constituencies been consulted on the planned move to a fully online platform for the bar exam? Will they be consulted before the final implementation?

Currently, jurisdictions and bar candidates may not have a choice in exam modalities because the pandemic does not allow for in-person exams, but there are critical choices to be made for the future. The move to a fully online bar exam is not a “done deal.” Not all candidates may be comfortable with the technology to the level required for confidence in taking the bar exam online and it is inappropriate and presumptuous to assume so.<sup>99</sup> Even with more scheduled break times for an online exam<sup>100</sup> to assist with eyestrain and other matters, the most serious problem remains with the written portion of the bar exam, and especially with the MPT, where the documents can number over 50 pages. The software program used for the bar exam requires navigating pages of pdf documents into position on one portion of the computer screen while simultaneously composing an answer on another portion of the screen in a small writing box. Enlarging the viewing box reduces the size of the

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<sup>99</sup> It is also important to note that not all millennials are comfortable with technology to the level required for comfort in taking the bar exam online. I teach a large section of first-year students and there are varying degrees of comfort and familiarity with the basics of online instruction. This generation may be the first to grow up with computers, so-called “digital natives,” but 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 a wiz on social media and quite another to use the technology for 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. Bar candidates come in all ages and with all backgrounds. Many are more comfortable with reading materials, especially complex materials, in hard copy.

<sup>100</sup> The online February 2021 UBE in New York for standard-time applicants, consisted of eight (8) ninety-minute test sessions administered over two days (February 23-24, 2021). On day one, there was a thirty-minute break between MPT 1 and MPT 2, followed by a ninety-minute lunch break. In the PM session, there was a thirty-minute break between MEEs 1-3 and 4-6. On day two for MBE testing, there was a thirty-minute break after each set of fifty MBE questions in the AM and PM sessions with a ninety-minute lunch break. *See Frequently Asked Questions for the February 2021 New York Bar Exam*, N.Y. ST. BD. L. EXAM’RS (Jan. 12, 2021), [https://www.nybarexam.org/Content/Updated%20Final\\_FAQs%20NY%20Remote%20Exam%20UBE\\_01.12.2021.pdf](https://www.nybarexam.org/Content/Updated%20Final_FAQs%20NY%20Remote%20Exam%20UBE_01.12.2021.pdf).

writing box, and vice versa. The process for taking the bar exam should not be so daunting when its substance is daunting enough.

Still, we will not know whether a difference in exam modality actually makes a difference in performance outcome until there is data. Fortunately, data collection and analysis have begun: three states offered both online and in-person exams in summer/fall 2020 and assessed the data. Their data show that online test-takers did not perform as well as in-person takers.<sup>101</sup> While this is a sample from only three jurisdictions, one thing is certain: more data and an independent psychometric analysis of that data is required before a decision can be made about the modality of the future bar exam. Even with a small sampling from three jurisdictions, the difference in pass scores between in-person and online pass rates is too great to be ignored.

**Table**  
**Comparison of Bar Pass Rates between In-Person and Remote Bar Takers July and September 2020<sup>102</sup>**

State	In-person Pass Rate (# Takers)	Online Pass Rate (# Takers)
Arizona UBE	80.7% (399) July 28-29 exam	44% (189) October 5-6 exam
Idaho UBE	76.7% (120) July 28-29 exam	32.1% (32.1%) October 5-6 exam
Texas (Non-UBE)	76.66% (1,037) September exam	60.13% (1,116) October 5-6 exam

**Note:** Arizona and Idaho administered the full, two-day UBE exam in July while its online October exam was only half the exam. The only substantive difference between the two Texas exams

<sup>101</sup> Stephanie Francis Ward, *Did Bar Candidates Who Had a Choice Do Better on in-Person or Remote Exams?*, ABA J. (Feb. 9, 2021, 9:58 AM), <https://www.abajournal.com/web/article/when-given-the-choice-did-bar-candidates-do-better-on-in-person-or-remote-exams>.

<sup>102</sup> Format for the Table attributed to Dean Paul Caron. See Paul Caron, *Bar Applicants Do Better on In-Person Exams Than Online Exams*, TAXPROF BLOG (Feb. 14, 2021), [https://taxprof.typepad.com/taxprof\\_blog/2021/02/bar-applicants-do-better-on-in-person-exams-than-online-exams.html](https://taxprof.typepad.com/taxprof_blog/2021/02/bar-applicants-do-better-on-in-person-exams-than-online-exams.html).

was that the September exam had six essays and the October exam had the usual 12 essays.<sup>103</sup>

In seeking an explanation for the differences in performance, Professor Zoe E. Niesel at St. Mary's University School of Law suggested that the amount of screen scrolling required in taking the online October bar exam could be one reason why Texas remote examinees did not do as well as those who sat for the exam in-person. According to Professor Niesel,

[t]he act of writing in a booklet and taking notes the way people have been practicing to do, it's so much 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.<sup>104</sup>

Professor Niesel also noted that her experience with former students in preparing for the online bar exam showed that they wrote shorter, less detailed answers in their practice sessions and that they were slower on the online platform.<sup>105</sup>

Bar candidates are already working within serious time constraints when taking the bar exam. If the difference in test modality raises even the slightest question as to whether it impacts candidate performance—which this preliminary data indicates—then additional research is required. All we have now is an assumption that there is no difference in student performance whether the test modality is in-person or online. Such an assumption warrants substantiation since a licensing exam should not be based on conjecture and impressions. It is important but insufficient for NCBE, or any jurisdiction, to simply gather candidate feedback after the administration of online exams.<sup>106</sup> It is not enough to question the examinee's experience but to assess it.

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<sup>103</sup> See *Past Exams*, TEX. BD. L. EXAM'RS, <https://ble.texas.gov/past-exams> (last visited May 4, 2021) (Note: Due to the COVID-19 pandemic, the September 2020 exam only contained 6 essay questions).

<sup>104</sup> Ward, *supra* note 90.

<sup>105</sup> *Id.*

<sup>106</sup> *Survey of Remote Test Takers Continues Through November 11*, NAT'L CONF. B. EXAM'RS (Oct. 30, 2020), <https://www.ncbex.org/news/survey-of-remote-test-takers-continues-through-november-11/>.

This is especially the case when measurement experts who study the impact of timing on power tests in educational settings have identified time-limited tests as

less equitable . . . in addition to excluding students with documented disabilities, . . . tests can also impede students who are learning English, students from underrepresented backgrounds, students who are older than average, and students with disabilities who encounter barriers (e.g., stigma and financial expense) in obtaining disability documentation and legally mandated accommodations.<sup>107</sup>

While test-taking speed is a variable in timed exams,<sup>108</sup> it cannot be that the examinee's facility with the exam's modality has any more than a negligible effect on that examinee's score. While the argument is not being made here that the bar exam should not be a timed exam, the concern is that any difference in the exam's delivery method that may impact performance, and timing is an essential part of performance, cannot be left unknown. Too much is at stake for too many.

*i. Eliminating the “Lynchpin”*

It would be hard to find anyone in the bar exam world of test takers who was not happy to learn about the MBE's planned demise. NCBE's announcement was met with gleeful surprise. But what surprised me at the Association of American Law Schools (“AALS”) meeting with NCBE on January 5, 2021 was that no one asked NCBE presenters how it could assure a reliable and valid exam when it would not be scaling and equating the written scores to the MBE. Apparently, something has changed, and the MBE is not needed to do the work that it has done since 1972 when it was adopted.<sup>109</sup>

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<sup>107</sup> Morton Ann Gernsbacher et al., *Four Empirically Based Reasons Not to Administer Time-Limited Tests*, 6 TRANSLATIONAL ISSUES PSYCH. SCI. 175, 175 (2020).

<sup>108</sup> William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 975 (2004).

<sup>109</sup> The MBE became part of the New York Bar Exam in 1979. *The Multistate Bar Examination (MBE)*, B. EXAM'ER, <https://thebarexaminer.org/2019-statistics/the-multistate-bar-examination-mbe/> (last visited May 5, 2021).



NCBE must have found a new way, or according to its Preliminary Recommendations, has confidence that it will be able to do so.<sup>110</sup> The question is how it will replicate the reliability that we were told was only possible with 175 MBE questions.

Perhaps the next generation bar exam will not be all that different from the current one. All we know is that NCBE plans an integrated exam, “using both stand-alone questions and items sets, as well as a combination of item formats (e.g., selected-response, short-answer and extended constructed-response items).”<sup>111</sup> Simply because the words ‘multiple-choice’ and ‘MBE’ are not being used does not mean that they will not be part of the exam.

If this next generation of the bar exam is truly to be the “next generation” and not a lost opportunity, then every effort must be made by every stakeholder to address the fundamental questions raised in this paper, including but not limited to those involving the portability of the UBE, its test modality, and its scaling and scoring practices. The answers will profoundly impact the future of legal education and access to the profession.

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<sup>110</sup> *Preliminary Recommendations*, *supra* note 80. The Next Steps include “establishing scoring processes and psychometric methods for equating/scaling scores.”

<sup>111</sup> *Preliminary Recommendations*, *supra* note 80.