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NEW YORK STATE JUDICIAL INSTITUTE ON
PROFESSIONALISM IN THE LAW
AND
THE NYSBA COMMITTEE ON LEGAL EDUCATION
AND ADMISSION TO THE BAR

FOCUS GROUP ON THE UNIFORM BAR EXAMINATION

February 13, 2015
9:00 a.m. - 12:00 p.m.
Albany Law School

MODERATORS: JOHN McALARY
MARY LYNCH

PARTICIPANTS: JIM AYERS
NICHOLAS BARRANCA
MELISSA BREGER
HON. WILLIAM CARTER
JONATHAN GRADESS
MICHAEL HUNTER
MICHAEL LIEBERMAN
CONNIE MAYER
LILLIAN MOY
ROBERT RAUSCH
HON. JENNY RIVERA
CHRISTINA RYBA
PATRICK WILDES
JAMES WISNIEWSKI
MARGARET NYLAND WOOD

REPORTED BY: LORA J. CURATOLO, CSR

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2 MODERATOR LYNCH: So first of all I
3 just want to welcome everyone for coming out on
4 such a balmy day. I know you'd be going to the
5 beach otherwise or having a picnic in the park,
6 so I'm really delighted that you prioritized.

7 And seriously, John and I were
8 amazed that we could assemble such a group of
9 what we know are very, very hard working
10 individuals of excellence who care enough about
11 the future of lawyers legal education to
12 probably have to work this weekend to make up
13 for what they're not doing over the next couple
14 of hours. So thank you.

15 Also, Dean Ouellette, who last year
16 was part of the focus group that we had on the
17 reform of legal education really wanted to be
18 here but today is our Board of Trustees meeting,
19 folks come in from all over the country. She
20 right now, I believe, I hope, is probably making
21 really fabulous asks to the board of trustees
22 about the future of our law school and our
23 strategic plan. She does hope that in between
24 meetings with board committees she can come in
25 and welcome everybody. But she asked me

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2 particularly to express her deep regret because
3 she thinks this is such an important discussion.

4 And so I'm Mary Lynch, who you've
5 been getting e-mails from. And I'm going to now
6 toss the ball to John McAlary, my co-moderator.

7 MODERATOR McALARY: Thank you. My
8 name is John McAlary, I'm the executive director
9 for the New York State Bar of Law Examiners.
10 But I am here today as co-moderating with Mary
11 Lynch in my capacity as a member of the New York
12 State Bar Association Committee on Legal
13 Education and Admission to the Bar.

14 This focus group is a joint measure
15 sponsored by the New York State Bar Association
16 Committee on Legal Education and the New York
17 State Judicial Institute of Professionalism.

18 But before I go further I do want to
19 introduce and thank Associate Judge of the New
20 York State Court of Appeals Jenny Rivera for
21 being able to make it here today.

22 And now I'd like to just go around
23 the room and for the purposes of the
24 stenographer and of everyone else just to allow
25 you to introduce yourselves, your name, just a

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1 little bit about where you're currently
2 employed, what kind of work you're doing just so
3 we can get a good record for the transcript of
4 what everyone's background is. And why don't we
5 start to my right.
6

7 MODERATOR LYNCH: And another thing,
8 John, we have on the agenda, that as you are
9 telling, if you look at the 9:00 to 9:15, which
10 we're a little behind on, your background, your
11 current position, one issue you'd like to
12 discuss so that we make sure what you feel you
13 can contribute so we can prioritize that, we can
14 change this working agenda.

15 Also, some of you have indicated
16 that you have 11:00 or 11:15 appointments, that
17 you have to leave, so it would be good for us to
18 get a sense, we might rejigger the agenda if we
19 recognize a lot of folks have to leave at a
20 certain time or rejigger where we prioritize
21 things. So if you could on the second point add
22 to the one issue when do you have to leave. And
23 it really better be a good excuse because, as
24 Michael knows, there are very few good excuses
25 in my class. So anyway.

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2 MODERATOR McALARY: We'll start to
3 our right.

4 MODERATOR LYNCH: You don't have to
5 tell us the excuse.

6 (Laughter.)

7 JUDGE RIVERA: Good morning. As
8 John indicated, I'm Jenny Rivera I'm from the
9 Court of Appeals. I'm also chair of the
10 committee that is very fortunate that the New
11 York State Bar and the Judicial Institute host
12 this, the last, as far as I know, of four focus
13 groups, the last focus group, you are wrapping
14 it up for is, the focus group to provide us with
15 information so we can comply with our mandate
16 from the chief judge, which is to review the
17 proposal to adopt the last remaining portion of
18 the Uniform Bar Exam, which is the multi-state
19 essay exam in New York, replacing the first day
20 of the Bar's New York based exam essay
21 questions.

22 And so I'm here really just to
23 listen and learn from you. We will be getting
24 the transcript, which will be very helpful to
25 the committee. So I really thank you all. And

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2 I hope you all will be extremely candid and
3 open. Feel free in this safe space to speak
4 about what your concerns are, ask any questions,
5 no question is foolish or inappropriate I think
6 considering the complexity of the issue and its
7 impact.

8 I have to leave at 10:30, I have an
9 11:10 train, I've got to get back to the city.
10 So my apologies that I will not be here for the
11 entire session but we will have a transcript.
12 Thank you.

13 JUDGE CARTER: Good Morning. My
14 name is William Carter. I'm one of the Albany
15 City Court judges, I'm a criminal court and
16 domestic violence court judge.

17 I apologize, I have to leave at 11
18 o'clock myself, I have a family meeting with
19 regard to my father who's in rehab after a fall.
20 So I do apologize.

21 I was part of the focus group with
22 regard to helping our students become more
23 practice ready upon graduation and I'm
24 interested in how the UBE is actually beneficial
25 to that. I don't have any comments on it, I'm

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2 actually here to listen and then perhaps later
3 comment after I've heard more.

4 MS. MOY: I'm Lillian Moy, my job is
5 as the executive director of the Legal Aid
6 Society of Northeastern New York here in Albany.

7 I am interested in how we can weave
8 access to justice issues into whatever Bar Exam
9 we end up taking here in New York. And it seems
10 like we were making some progress on that with
11 the Board of Law Examiners. I'm a little
12 concerned that transition to the MEE, I'm going
13 to try to remember these acronyms, I'm a little
14 concerned that even if we could go to the MEE we
15 won't have any ability to raise those issues.
16 And I feel like -- I feel, I believe that that's
17 very important that we, as justice advocates,
18 want to have an impact on legal education as
19 well.

20 And I'm interested in the impact on
21 minorities as well. Always.

22 MR. WILDES: My name is Pat Wildes,
23 I'm a 2L here at the law school. So my
24 full-time occupation is studying. I work at a
25 law firm downtown part-time but I'm here

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2 full-time. So I'm trying to give a student
3 prospective.

4 I grew up in Connecticut. So I'm
5 planning on taking the New York Bar but I am
6 interested in other jurisdictions, kind of
7 feeling out how this will play into my future,
8 having never taken the Bar.

9 MR. WISNIEWSKI: My name is James
10 Wisniewski. I, like Pat, am a second year law
11 student here at Albany Law School. I currently
12 work in the New York State Senate but this year
13 I will be working at a firm down in Long Island.

14 I guess what my concern is is how
15 will legal education change and how will it
16 change through preparation if we do decide to
17 move from a New York State Bar Exam that we
18 currently have to the UBE. How will teachers
19 implement that change. And teaching styles and
20 preparations for students is one of the key
21 things I'm trying to get out.

22 MR. BARRANCA: My name is Nick
23 Barranca. I'm a 3L here currently. My
24 full-time occupation is, like Pat, studying and
25 finishing the requirements for graduation, of

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1 course, and engaging in a job search. In the
2 past I actually worked in the senate with Jim as
3 well as I participated in the DVPH clinic lead
4 by Professor Lynch.
5

6 And to be honest, if I were to name
7 an issue it would be the same as Judge Carter,
8 that was my primary concern, looking at how this
9 shift could prepare or fail to prepare law
10 students for actual practice.

11 MS. WOOD: Maggie Wood, court
12 attorney for professional matters at the Court
13 of Appeals. And in that role I work closely
14 with Judge Rivera on attorney admission matters.
15 Also work closely with John McAlary.

16 I'm here mostly just to observe. If
17 you have any questions, I'd be happy to answer
18 them.

19 MS. MAYER: My name is Connie Mayer,
20 I am the interim associate dean for academic
21 affairs here at the law school. I've actually
22 been here since 1986 so I've been teaching for a
23 long time, so I actually have concerns that I
24 think Judge Carter expressed and Nick had
25 expressed about the practice ready aspect and

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2 how UBE actually connects with practice ready,
3 maybe it doesn't. But I do think that there was
4 some progress being made or at least more
5 sensitivity about the issue of practice ready,
6 and I'm not sure that that would still be the
7 case if we move to UBE, so I have concerns about
8 that.

9 And then of course I'm interested in
10 the effect on law school programs. How do we
11 prepare students for this? How do we change our
12 teaching? Do we have to? Do we need to cover
13 other things if we're not going to be New York
14 specific?

15 And then I have a concern from the
16 New York law schools' perspective. Does this
17 mean that I have a student who is from Virginia
18 and she said if the UBE were here I wouldn't
19 have come to a New York law school because I
20 wouldn't have needed to. I wonder what impact
21 that has on the New York law schools as well.

22 MS. RYBA: I'm Christine Ryba, I'm
23 special project counsel to Justice Peters in the
24 Appellate Division. I just want to say that my
25 opinions today are my own and not those of

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Justice Peters.

But I do have a few concerns. The first, I wanted to look at the cost of the UBE compared to the current Bar Exam.

Also I wanted to discuss if there's a need to adopt such a drastic need with such speed.

MR. AYERS: I'm Jim Ayers, chair of the State Planning and Administration Practice Group at Whiteman, Osterman & Hanna. I am a former treasurer of the State Bar Association and been active with the State Bar in many different capacities for many years.

I have I guess so far, there may be more private practitioners here, but there's a different certain perspective as a practitioner. Quite frankly, I'm not quite sure, in terms of practice ready and such, as to whether that is in fact a goal that I would say for graduating law students, but we'll talk about that.

But I have a specific, couple of specific questions to begin with in terms of the passing grade, how that was -- the 266 out of 400, how that was arrived at. Frankly I was

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2 very troubled about that, that appears to be
3 irrational, but we can get to that and see.

4 MS. BREGER: Good morning, I am
5 Melissa Breger and I teach here at Albany Law
6 School and have since 2002.

7 In terms of how long I'll stay, as
8 long as that coffee is there I'll be here.

9 My concerns mirror some of what my
10 colleagues have said. Certainly number two in
11 terms of impact on diversity. Certainly number
12 four, how will this affect teaching in law
13 school. And then I second what Ms. Ryba said in
14 terms of my concerns, I felt as though there was
15 reform going in a particular direction and this
16 to me sounds liked we might be backtracking a
17 bit and I'm just wondering again why such change
18 with such speed. That's a concern for me.

19 MR. HUTTER: Mike Hutter, I'm on the
20 faculty here at the law school.

21 I'd also note, and I've had this
22 discussion with John the other day, after this
23 committee was set up I signed on and agreed to
24 be a lecturer for FEMA's bar review. And I'm
25 not representing them at all, it's my own

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1 thoughts. If anyone is uncomfortable with me
2 being here, please say so. I just wanted to
3 make that disclosure.
4

5 But my thought on this is related to
6 what Will talked about, Judge Carter talked
7 about, with the practice ready.

8 I've been here teaching at Albany
9 Law School for 38 years. And one thing we know
10 is that New York Law is so unique in so many
11 respects, criminal and civil. And wherever we
12 go with UBE, I think we have to make sure that
13 applicants of the Bar and those that take the
14 Bar and are admitted to the Bar are well aware
15 of these unique New York rules. You can start
16 practicing without any awareness of that, you
17 think that New York law is like everything else,
18 I think that would be disastrous for the Bar.
19 Whether that's a practice ready issue or not, I
20 think we have to maintain and recognize and get
21 across to students and applicants that New York
22 law is a unique body of law.

23 MR. RAUSCH: Rob Rausch. I'm from
24 the class of '94. I'm a partner of Maynard,
25 O'Connor, Smith & Catalinotto. Immediate past

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2 president of the Alumni Association. And I'm
3 actually the co-chair of a Bar Exam task force
4 here at the law school.

5 And like Judge Carter and Lillian
6 and several others, I was part of the focus
7 group here last year.

8 I certainly echo many of the same
9 concerns. Mr. Hutter very succinctly summarized
10 some of the concerns about whether this will
11 adequately prepare applicants for practice in
12 New York. I'm concerned, with my perception it
13 seems to be fast tracked. So I think we need to
14 discuss about the time frame and the limitation
15 of any changes. And I'm also concerned about
16 the economic impact this would have and whether
17 this would be a problem already for the
18 difficult job market and applicants, whether
19 they're going to be competing with out of state
20 folks as well.

21 MR. LIEBERMAN: My name is Michael
22 Lieberman, I'm a third year law student here at
23 Albany Law School and I just want to go on the
24 record and say I'm honored to be a part of this
25 really important discussion.

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2 And from a student's perspective, I
3 guess there's not much I can say that hasn't
4 already been said around the room here but I
5 would just kind of want to mirror what's already
6 been said about the unique standing of New York.

7 And my concerns are that as a law
8 student I made a decision to go to a New York
9 law school to hopefully learn New York law. But
10 also I'm concerned that the CPLR is downplayed
11 significantly and I don't think other students
12 from other out of state law schools should be
13 able to come here with essentially no knowledge
14 of the CPLR and be considered practice ready.

15 I'm also concerned that, you know,
16 what's good for the rest of the nation isn't
17 necessarily good for New York. When you look at
18 the UBE states, they have much more in common
19 with each other than they do with New York.

20 And I guess my largest concern, to
21 sum it up, is that we should be protecting New
22 York's unique standing in the nation as a leader
23 and we should not necessarily concede any of
24 that, at least not in such a hurry.

25 MR. GRADESS: I'm Jonathan Gradess,

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2 I'm a director of the New York State Defenders
3 Association. I've been in that position for 37
4 years and probably have done backup services for
5 New York lawyers in maybe 75,000 or more cases
6 and probably have done 600 or more training
7 programs for lawyer. So I, like Jim, am very
8 interested in the phrase of "practice ready."
9 I'm hoping some day it will actually occur.

10 And I think a lot of what I have to
11 say about the UBE is very similar to what I
12 would say, forgive me, about the current Bar
13 Exam and whether it really does what we say it
14 does. And so if I had to pick one item that I
15 want to talk about with all the things I think
16 about, it's really not seeing a lot of the word
17 "client" in all of the things that I've read in
18 the last week. And that's my particular
19 concern. If law schools are supposed to prepare
20 lawyers to represent clients, I'm particularly
21 concerned about poor people, as is Lillian. I
22 don't see their representation a particularly
23 good function of law school preparation and I'd
24 very much like not to lose this moment, which is
25 a thematic I see in some of the criticisms, that

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2 this could undercut both changes but could also
3 foreclose us from changes that are absolutely
4 necessary. I don't know if they're recommended
5 yet but they certainly need to be made.

6 MODERATOR LYNCH: So I don't know
7 that I've accurately -- well, John is a
8 co-moderator. Just so you know I did this
9 behind you, so go ahead.

10 MODERATOR McALARY: Let me just
11 briefly give a little background as to how we
12 got here. Perhaps maybe I should have done that
13 before we introduced but I really wanted
14 everyone to get to know each other.

15 Back in September, the New York
16 State Board of Law Examiners, which is an agency
17 of the New York State Court of Appeals. First
18 of all, the New York State Court of Appeals
19 through its rules is responsible for setting the
20 requirements for legal education in New York and
21 the requirements for sitting for the New York
22 State Bar Exam and being admitted in New York.

23 The Board, as an agency of the Court
24 of Appeals, is responsible for administering the
25 Bar Exam. The Board made a recommendation to

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1
2 the Court of Appeals to adopt the Uniform Bar
3 Examination, which I will summarize for you in a
4 few moments.

5 The court, Chief Judge Littman, had
6 put out a public comment that asked for comments
7 to be provided through November. That comment
8 period was subsequently extended through March
9 1st of this year. And the Chief Judge appointed
10 an advisory committee on the Uniform Bar
11 Examination chaired by Judge Rivera. And he had
12 appointed members of that committee to work with
13 Judge Rivera and to basically conduct some
14 public hearings, which they have done. I
15 believe they've done two or three of them so far
16 and we have another one later this month in
17 Rochester.

18 And then Judge Rivera, when she
19 became aware that these focus groups -- we had
20 conducted them last year and all around the
21 state and they culminated in a convocation on
22 legal education that was done at the New York
23 State Judicial Institute in White Plains. And
24 Judge Rivera had asked the two groups who
25 sponsored those focus groups, the State Bar

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2 Association and the committee, the Judicial
3 Institute on Professionalism, if they could
4 reconvene the focus groups. Some of you as you
5 mentioned, were here last year, others who were
6 here couldn't make it. And Mary and I put our
7 heads together and thought about adding a few
8 others to really get a good mix and I really
9 think we've accomplished that. And again, I
10 very much appreciate you being here.

11 As Judge Rivera mentioned, a
12 transcript is being prepared, it will be
13 provided to the Advisory Committee. And we
14 really do encourage you to be frank, open about
15 your conversations. I don't want to dictate
16 where this conversation is going. I don't want
17 to throw out questions to you unless we really
18 need to get the conversation going. I think,
19 based upon what we've heard, I think we have a
20 lot to discuss about.

21 Why don't we -- let me just briefly
22 summarize for you what the UBE is. First of
23 all, I guess we should start with what the
24 current format of the New York State Bar Exam
25 is. It's a two day examination.

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1 We like to call the first day the
2 New York law day and the second day is the
3 national day, which is the MBE. On the first
4 day we have 50 New York multiple choice. New
5 York is unique in that. Very few jurisdictions
6 have its own multiple test on New York law and
7 we've been doing that for decades. And then we
8 have five specific New York essays which
9 cover -- and unless you want me to, I don't know
10 if it's necessary to go through all the topics
11 we cover, we have about 20 different topics that
12 we're covering on the Bar Exam. And we
13 currently use one MPT question. It's called a
14 Multistate Performance Test. It's probably
15 what's been described as probably the most
16 unique practice type of question where you've
17 got a closed set of books, they'll give you a
18 booklet that may have a statute, it may have
19 some cases, it may have memos from a partner, of
20 a client. And then the applicant is asked just
21 using the materials in that booklet they're
22 asked a task. They may be asked to prepare a
23 complaint, a will, a memo to the client or the
24 partner summarizing the case. We only use one,
25

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1
2 there are two of them that are prepared by the
3 National Conference of Bar Examiners, we
4 currently use one.

5 Now, on the second day of the exam
6 we have a 200 question Multistate Bar
7 Examination, and that is prepared by the
8 National Conference of Bar Examiners. It's
9 administered in I believe 48 or 49 jurisdictions
10 throughout the United States. And that is used
11 as part of our exam.

12 We scale our local portion to the
13 scores on the MBE. And we come up with our
14 current exam. Where the weight, the current
15 weight on that exam is the MBE is 40 percent,
16 the New York multiple choice is ten percent, the
17 New York essays are 40 percent and the one MPT
18 item is ten percent.

19 Now, the proposal under the UBE is
20 that we would replace -- the second day wouldn't
21 change, that's the MBE day, however the weight
22 of the MBE would be increased from 40 percent to
23 50 percent to match what's required for
24 participation in the UBE. And on the first day
25 our New York essays would be replaced by six

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1 multistate essay questions. And of course
2 they're not on New York law, they're on laws --
3 and it's developed by the National Conference of
4 Bar Examiners. And we would add a second MPT,
5 so we would have two MPT items. And that is
6 what becomes the Uniform Bar Examination, where
7 the weight of the MEEs are 30 percent and the
8 two MPTs combined is 20 percent to get to our
9 hundred.

11 The proposal that the Board provided
12 to the Court of Appeals would continue to have
13 the 50 New York multiple choice questions. That
14 would be a separate component. And that, as
15 proposed, it would be we would administer that
16 for one hour on the morning of the MBE day,
17 right before the MBE, we would put it in there
18 and do it, however, there has been some
19 discussion about maybe that should be spun off
20 on a separate day. I know the Board was very
21 careful not to have -- we were concerned about
22 doing a three day exam because two is certainly
23 enough for us, let alone the people taking the
24 examination. So ultimately I think that will be
25 up to the Advisory Committee, Judge Rivera's

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1
2 advisory committee to make a recommendation on
3 whether we have that New York component and, if
4 we do have it, where we're going to put it in.

5 But that would be separately graded
6 because we cannot make that as part of the UBE.
7 Part of the agreement with becoming a UBE state
8 is that you have a UBE score, one score that
9 then would be portable to any state that accepts
10 the UBE.

11 I do want to mention costs because
12 there's been some concern about costs. Right
13 now to take the Bar Exam in New York is \$250.
14 The proposal from the Board would be that one
15 would still take the bar examination for \$250.
16 That is a statutory fee and we don't have -- the
17 judiciary doesn't have the authority to raise it
18 without legislative intervention. So that would
19 be \$250.

20 However, of course, if somebody is
21 looking to transfer their UBE score into another
22 state, other states have fees for accepting a
23 UBE score, which could range anywhere from I
24 think \$400 up to \$1,200 for that. And I think
25 states vary on how long a UBE score is good for,

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1
2 anywhere from 18 months up to I think many
3 states have three years, a few other may have
4 five years.

5 And in your notes here it mentions I
6 think there are 14 UBE states, I believe that's
7 now 15 with the addition of Kansas just last
8 week.

9 I think I've spoken enough and I
10 don't want to take time from everyone.

11 JUDGE RIVERA: On the New York law
12 exam, if you want to talk about the areas that
13 would be covered.

14 MODERATOR LYNCH: Okay. The areas
15 that we would cover on that New York law
16 examination part are still the same topics that
17 we currently cover.

18 JUDGE RIVERA: CPLR.

19 MODERATOR McALARY: CPLR, we've got
20 administrative law, criminal law, contracts,
21 family law, evidence, professional
22 responsibility, we also test on there's
23 conflicts, there's remedies. That whole group
24 would still be subjects that we would test on
25 the New York law exam.

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2 But what we would be changing on
3 that is trying to get at where those
4 distinctions, New York distinctions are and
5 focus on those distinctions. We do that now but
6 on the proposal under this New York Law Exam,
7 that 50 multiple choices, that we continue to do
8 that to make sure that people are still
9 competent in the New York law, particularly the
10 CPLR. Actually, right now the 50 multiple
11 choice, many of those questions are on the CPLR
12 and evidentiary issues.

13 We also recently, as Lillian alluded
14 to, access of justice, that was an area that we
15 worked with her group on in the last year or
16 two, started adding some questions on that area.

17 JUDGE RIVERA: I'd like to clarify
18 one other point.

19 MODERATOR LYNCH: Yes, please. And
20 I was going to tell you, Judge Rivera, we did
21 send around a number of e-mails linking to the
22 content outlines, so they've gotten a lot of
23 e-mails that we didn't send back to the judicial
24 institute because we didn't think they needed to
25 be on that. So I wanted to make you aware of

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1 that.

2
3 JUDGE RIVERA: Thank you. I just
4 want to advise the people of two things.

5 One is that there is a working group
6 in formation, faculty members who are well
7 versed in New York law, to advise the Board of
8 Law Examiners on what would be the most
9 significant rules and distinctions of New York
10 law that should be covered on the New York Law
11 Exam. It's to further flesh out for the
12 committee what this proposal would really look
13 like in application.

14 And in addition to the faculty we
15 have reached out to the American Law Institute
16 and we have someone who is coming from there.
17 We have reached out to the Uniform Laws
18 Commissioners and we have a couple of
19 commissioners, I'm waiting to hear from them.
20 And I've yet to find the people who do the
21 commentaries and so forth to see if they can
22 provide us some wisdom from their perspective to
23 better inform the Board of Law Examiners. And
24 of course the law schools always have the
25 opportunity to look at the outline and we hope

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1 that there's feedback. I just want to give that
2 update because that was a request that we made a
3 few weeks out and so it is in formation.
4

5 The other thing, just to clarify,
6 because I think at least for me this was
7 important to understand as I was bringing myself
8 up to speed on the proposal. The reality is
9 that New York, the concept of the proposal to
10 adopt the UBE is somewhat not fully accurate.
11 The reality is that New York adopts every
12 portion of the UBE but one, and that's what
13 we're talking about, which is the essay exam,
14 the first day Multistate Essay Exam. We have
15 adopted every other portion, we do the MBE the
16 second day, the MPRE. So every other portion
17 which the National Conference of Bar Examiners,
18 the people who draft and administer that exam,
19 identify as the uniform exam, all of those
20 components have been adopted already by New York
21 and used for many, many years. This is the one
22 remaining component.

23 And this particular component, as
24 John was saying, has several essays. And what
25 it does, its purpose and goal is to test general

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1 principles of law. So in that way just to
2 clarify, because it was important for me to
3 understand this, and I don't think it's fully
4 clear in the way the proposal has been
5 understood, the exam does not test everything
6 but New York law, because New York law of course
7 overlaps the general principles. So there's
8 tremendous overlap on the MBE and what many
9 people in this room and in our profession and on
10 the bench would say is New York law. So NYLE,
11 the New York Law Exam, is an attempt to pick up
12 particular distinctions, as you were saying,
13 that unique aspect of New York law so that we
14 can test that. But the point of the MBE, you
15 have to understand, it's swapping essays but it
16 is changing philosophically to testing general
17 principles that the bar examiners, the Board of
18 Law Examiners, excuse me, and the Court of
19 Appeals would say that is what you need to know
20 for minimum competence. I just want to clarify.

21
22 MODERATOR LYNCH: Yes.

23 JUDGE RIVERA: We don't test
24 practice readiness. It think that that's a
25 misnomer. In the sense of the professional,

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2 what you all would think is practice ready,
3 we're testing a certain amount of minimal
4 competence.

5 The other thing about the MBE. As I
6 mentioned, the current bar exam has that one
7 sort of closed universe, supposed to be closer
8 to practice, and that's what I would think of as
9 practice ready. It's a response to the very
10 deep and very important and serious concerns
11 that we need to get a sense of people, again in
12 terms of minimum competence, of what a lawyer
13 does and how to do it.

14 The MEE has a second essay, we call
15 it an essay component. So there would be two of
16 these on the MBE. So it's also our attempt to
17 say that we're trying again to respond to those
18 concerns that we recognize, which is not to just
19 test like a law school exam, although the Bar
20 Exam questions are not like law school exam
21 questions, not to just have someone write on the
22 exam but to do something that is at some point
23 not exactly like practice, we all understand
24 that, but gets you a little bit closer to that
25 practice experience.

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2 So I just wanted to clarify that
3 because you are so well versed in it and now I
4 have to be well versed in it, I forget that when
5 you are coming to this, trying to process it
6 all, you miss sort of the nuances. And I think
7 that these are important because all of the
8 questions and comments we read made it clear
9 that you need to understand the other components
10 of this. So now hopefully I will not take up
11 any more of your time.

12 MODERATOR LYNCH: No, it's
13 important. And it's actually on our agenda,
14 Judge. We said preliminary questions about the
15 proposal.

16 So what I am going to suggest we do,
17 because I'm very mindful of time and I'm the
18 time taskmaster in this, is I want us to get to
19 the points that you really care about. So
20 preliminarily are there any things, and believe
21 me this is confusing, I have to keep going back
22 and looking at it to recognize, is there any
23 preliminary questions that you need answered
24 about the changes that would help you contribute
25 to the discussion that we're about to turn to?

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2 Is there anything like I didn't
3 really understand what this 40 to 50 percent is.
4 There was one question raised, how was the 266
5 out of 400 arrived at. That seems to me to be
6 the only question that's a preliminary question.
7 And I don't know if there's an answer to that.

8 MR. AYERS: If I could, I'll restate
9 the question. Page four of the State Bar's
10 original report indicates that the 266 was
11 arrived at by simply taking 665 out of a
12 thousand and applying the same percentage to the
13 400, and that was the reason, that that was why
14 the 266 was chosen.

15 I don't do testing, that's not part
16 of my practice, but it seems to me that doesn't
17 make any sense. That only makes sense if we
18 knew that the degree of difficulty of the new
19 exam was the same as the old. If it's either
20 easier or harder, it means either more people as
21 opposed to minimum level of competence, either
22 more people are going to pass, less people are
23 going to pass. And it seems to me it doesn't
24 make sense to adopt this exam without doing
25 testing over several years to find out if in

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1 fact we're going have a higher pass rate or
2 lower pass rate.
3

4 So it seems to me that, I guess the
5 basic point would lead me to, unless you folks
6 can tell me why, is that we shouldn't be rushing
7 this, we should really delay this for three or
8 four years and have sample questions on tests to
9 correlate are we going to have more people with
10 a higher pass rate, lower pass rate.

11 And a sort of corollary to that is
12 in terms of diversity. Again, how do we know
13 what the impact is going to be with respect to
14 the diversity unless we do testing to see. Is
15 this going to have a different impact on a
16 diversity basis. And how in the world can we
17 jump into something like this that we don't know
18 the answers to.

19 MODERATOR LYNCH: So I'm going to
20 defer the second part of the question to the
21 discussion. But the first part of the question,
22 is there information about how the 266 out of
23 400 was arrived at?

24 MR. AYERS: That means we have a
25 higher passing score of only four states; North

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1
2 Dakota, Missouri, Minnesota and Alabama. Which
3 puts us instead of New York was always something
4 sort of to be proud of I passed New York Bar
5 Exam, California Bar Exam, and now we are a
6 tougher state than only four of the 14.

7 MODERATOR McALARY: And I know
8 there's a list out there on the website of the
9 National Conference of Bar Examiners, there's a
10 publication that actually has the passing score
11 that's the cut score that's required for every
12 jurisdiction. And actually New York I think
13 falls pretty much in the middle. We don't have
14 a higher standard than most of the states in the
15 country.

16 But to get to your point of where
17 that score came up. Right now you needed 665
18 out of a thousand point scale to pass the Bar
19 Exam. That 665 -- and first of all, our whole
20 New York section is scaled to the MBE, and I'm
21 by no means a mathematician or a statistician,
22 which is why I went to law school. That has
23 always scaled, our 665 scales to a 133 on the
24 MBE. And this is how all of the jurisdictions
25 who went to the UBE have taken what would have

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2 been their parsing score on the MBE and they
3 just doubled it, that's how NCBE has come up
4 with it.

5 And I don't know the science behind
6 that, I wasn't privy to that, but that's what we
7 were told is how we would set the passing score
8 on the UBE. And I know it's not enough
9 information but that's about the best I can give
10 you.

11 MODERATOR LYNCH: That answers
12 something that many of us should know.
13 Christina?

14 MS. RYBA: I have a question about
15 if any studies have been done with regard to New
16 York State -- people taking New York State Bar
17 and where they intend to practice. Because I've
18 noticed that a lot of the states that have the
19 UBE are in the Midwest. So I'm not quite sure
20 if these are states where people who tend to go
21 to school in New York want to practice. I know
22 I would never go to Nebraska and practice.
23 Maybe that's just me. But I think there's a lot
24 of students who go to New York and want to
25 practice in Massachusetts, New Jersey,

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1 Connecticut and they always have the ability to
2 drive the next day and take the essays on the
3 MEE. I just don't understand. It would make
4 more sense there are other states that are
5 similarly situated that are taking the UBE
6 because that would make sense. Like if
7 Massachusetts were on board or Connecticut, but
8 these states don't seem to really be on par with
9 New York. California perhaps. To me I just
10 want to know have there been studies, have there
11 been people who take the Uniform who want to
12 practice in other states?
13

14 MODERATOR McALARY: Christina, I
15 don't think there's ever been any study to look
16 at where people are going. I do know from
17 administering the Bar Exam that we have a number
18 of people taking the New York Bar Exam along
19 with New Jersey or the New York Bar Exam along
20 with Massachusetts. Years ago they used to take
21 it with Connecticut but now Connecticut is the
22 same day as us here.

23 But the one thing I do know is that
24 if New York adopts the UBE, that's going to
25 probably drive a lot of the other states in the

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2 same direction.

3 MS. RYBA: But has that discussion
4 taken place?

5 MODERATOR McALARY: I do know that
6 Massachusetts is already discussing it. I've
7 had calls from individuals in New Jersey,
8 Pennsylvania, others, already looking, saying if
9 New York goes, our court will probably take a
10 closer look at the UBE and go in that direction.

11 MODERATOR LYNCH: But I think the
12 answer to your question, was there a study done
13 of where people coming from New York law schools
14 want to practice afterwards. I am not aware
15 that that information is the genesis for why
16 this happened. I don't think that that -- if it
17 is data that's out there, our committee in the
18 New York State Bar was not made aware of that.
19 And I know at the public hearing a week or so
20 ago, the State Bar asked that question. So I
21 think that the narrowness of your question, I
22 think I'm not sure, unless Maggie or the judge
23 knows differently, that that information had
24 been given to any of those things.

25 MR. RAUSCH: John, can I ask a

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2 follow-up question to a point you made? Are you
3 getting initial feedback from your counterparts
4 in other states that they are looking for New
5 York to take the lead and once New York falls?

6 MODERATOR McALARY: I belong to a
7 group of administrators, something called the
8 Council of Bar Exam Administrators, who handle
9 the exams throughout the country. And I have,
10 I've heard from several of them asking us for
11 what information is available that our court was
12 looking at. And particularly I know
13 Massachusetts, New Jersey is always a tough one
14 but they will look at it because it may be that
15 if New York goes to the UBE I think -- in my
16 view, they'll probably have no choice but to
17 also go in the same direction.

18 MR. RAUSCH: But are they having the
19 same questions right now parallel to us or are
20 they looking for us to be first?

21 MODERATOR McALARY: No, I think
22 they're waiting to see what the New York does.
23 When I was last at a conference people had
24 looked to me, what's going on in New York. And
25 I had advised them what I just told you, is that

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2 there was an advisory group established that
3 will be reporting back to the Court of Appeals
4 and then the court will make their decision on
5 what to do about it.

6 MR. RAUSCH: Do you have some
7 understanding or perception why these states
8 around us aren't taking the initiative and doing
9 it themselves first?

10 MODERATOR McALARY: They may very
11 well be doing it. They are going to wait for
12 New York to do it. I don't know why but that's
13 where they tend to look, towards us. And it
14 really is -- I think a lot of it is going to be
15 because we have so many shared applicants in the
16 northeast here who are taking bar examinations
17 that they feel that that -- I know
18 Massachusetts, and I've had individuals I spoke
19 to on their Board of Law Examiners, who have
20 told me that in no uncertain terms that if New
21 York goes to the Uniform Bar Examination that
22 they will most likely go as well, but they were
23 going to wait and see what New York does.

24 JUDGE CARTER: This may sound like
25 an odd question but did those inquiries from our

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2 neighboring states begin when they learned that
3 New York was thinking about it or did it start
4 before that?

5 MODERATOR McALARY: I think this
6 discussion has gone on for a couple of years now
7 on it. New Hampshire is a UBE state. When New
8 Hampshire became the first state in the
9 northeast, then surrounding states started
10 having that discussion. I'm not privy to what's
11 going on in their courts but I do know that
12 there was some discussions going on as to
13 whether they should also be going in that
14 direction as well.

15 New Hampshire already has some
16 shared agreements with Maine and Vermont as far
17 as admitting candidates and I know that those
18 jurisdictions have had some discussions. I
19 don't know how far they've gotten or exactly
20 what they've resulted in, I'm not privy to. But
21 I do know just from my counterparts in other
22 states is that they feel that when New York
23 goes, if New York goes in that direction that
24 their conversations will pick up and they'll
25 come to a final decision on what they want to

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1 do. I think ultimately a lot of them is waiting
2 to see what New York wants to do.
3

4 MODERATOR LYNCH: I will say, just
5 as a piece of information, I do think the
6 National Conference of Bar Examiners would like
7 New York to lead the way. I know through the
8 ABA and other committees I'm on, that their
9 advisory task force and those who are committed
10 to that organization thinks that this is a good
11 idea. And so there has been a lot of presence
12 of the NCBE at national conferences of the ABA
13 on some of the committees and the accreditation
14 committee, etcetera. So I do think that there
15 is interest and a belief that this is a good
16 thing for the future of the law.

17 MODERATOR McALARY: And to add, with
18 New York's standing in the legal community, it's
19 not surprising that other jurisdictions would
20 look to us to see what do you think about the
21 UBE. What are we going to do with it.

22 MS. BREGER: I was going to say that
23 information is very helpful because it does seem
24 like we're the so-called tipping point at which
25 point when we go other states might go. It just

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makes this work that much more powerful.

MODERATOR McALARY: It doesn't mean every state is going to go. California marches to its own beat. A lot of the southern states, there's states there that don't even allow admission on motion, like Florida. New Jersey doesn't either. So I can't speak for how they're going to react to this.

MODERATOR LYNCH: But we are a leader. I think Melissa is right.

MS. BREGER: I think that puts pressure on us to really thoughtfully think of these questions because if we do it and other states follow, it's making a big impact.

MODERATOR McALARY: I think Jonathan.

MR. GRADESS: I may have missed this because I'm having a slow day here. But when you made the recommendation to the Court of Appeals, what was at the core of that? What goal were you trying to achieve?

MODERATOR McALARY: Well, the main motivator for this is the term portability. And what I mean by portability is just helping the

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1 current class of law students, people graduating
2 law school. As you know in the recent years the
3 market, the job market, has been absolutely
4 terrible for them. Many of them are coming out
5 and they don't have opportunities. So right now
6 they may plan and they've got to make a decision
7 during their third year what Bar Exam they're
8 going to take, and then apply to the New York
9 Bar Exam and then perhaps as they get closer to
10 graduation or maybe even after the Bar Exam they
11 may get an offer in a state where they didn't
12 take that examination. So now they've got to go
13 to New Jersey or Pennsylvania or Ohio or
14 wherever they go to now take that bar
15 examination.
16

17 So the genesis behind this is
18 portable, that you would have a score for that
19 exam and now you can use that score to transfer
20 into other jurisdictions and create more
21 opportunity for a bigger job market essentially
22 for them. So that has really been the real
23 genesis behind this.

24 And then because we're now in a
25 market where the legal industry is global. It's

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2 global, it's also we've got cross border
3 practices going on. The thought is that this
4 will allow people -- as more states sign on to
5 the UBE, it comes close to what is going to be a
6 national bar examination.

7 MR. HUTTER: But the portability
8 will only really become advantageous as more and
9 more states sign on to the UBE. Quite frankly,
10 I don't see many students at New York law
11 schools, whether it's Albany, NYU or Columbia,
12 are going to be now all of a sudden thinking
13 about South Dakota, Montana. They may be
14 thinking about Massachusetts, New Jersey,
15 Illinois.

16 And I think there, certainly the
17 more states that sign on -- and I think I'm very
18 much impressed by the fact now that the New
19 England states are thinking about joining the
20 UBE, that would make more of a reason for
21 adopting the UBE.

22 But I think right now my concern
23 would be that that portability aspect does not
24 have much benefit to students in their third
25 year. Because I don't think quite honestly,

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2 John, my experience teaching, I don't see that
3 many students in New York that are thinking
4 about going to these other states that are
5 presently UBE. May be different in five years
6 but right now I just don't see that happening.

7 MODERATOR McALARY: I just want to
8 clarify, as I said I've had conversations with
9 many administrators. I can't say for certain
10 that they will, I know they're having those
11 conversations. So I don't want to misrepresent
12 that New England states are definitely going to
13 go.

14 MR. HUTTER: Well, I think that it's
15 terrific that they're doing that.

16 MODERATOR LYNCH: I have Lillian,
17 Pat, Rob, Mike. Anyone else want to get on the
18 list? Oh, wow. Okay.

19 MS. MOY: Then I'm going to ask my
20 two questions. One was whether in the 14 states
21 that have the UBE, has there been any study
22 about the impact on passage rate for people of
23 color?

24 MODERATOR McALARY: No.

25 MS. MOY: Because it seems like from

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2 the reading, that passage rates declined in the
3 states that adopted it, at least initially.

4 MODERATOR McALARY: Well, this past
5 year the passage rate pretty much declined in
6 every state. But Lilly, let me talk. One of
7 the reasons why, they don't have the data. Very
8 few jurisdictions are collecting demographic
9 data on people taking the bar examination.

10 MODERATOR LYNCH: Can I ask a
11 question about it just to make sure we're saying
12 it completing accurately. My understanding of
13 the NCBE is that, and this was explained to us
14 at the public hearing, is that certain states
15 request them to collect the data. Right?

16 JUDGE RIVERA: Who's the "them" in
17 that sentence?

18 MODERATOR LYNCH: I'm sorry, NCBE.
19 And the NCBE is a test taking organization. I
20 don't know how to accurately describe who they
21 are.

22 MODERATOR McALARY: Well, it's a not
23 for profit organization that's been actually in
24 existence for probably 70, 80 years, but really
25 became primarily active in the '60s and '70s,

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2 who formulated the -- they came up with the MBE
3 and they own the rights to it and they sell that
4 back.

5 JUDGE RIVERA: Like the ETS.

6 MODERATOR LYNCH: Exactly.

7 JUDGE RIVERA: If you want to think
8 about it that way.

9 MODERATOR LYNCH: And my
10 understanding, and I think Judge Rivera and
11 others can help me further my knowledge so I can
12 answer questions, is that currently they are
13 asked by certain states to match racial or
14 ethnic identity factors to the scores, right?

15 JUDGE RIVERA: No.

16 MODERATOR LYNCH: Certain states?

17 JUDGE RIVERA: NCBE has no data, the
18 states have the data. Am I incorrect about
19 that?

20 MODERATOR LYNCH: I thought that
21 what was said by Diane Bosse is that the states
22 have to want that. Like California --

23 JUDGE RIVERA: The state would have
24 to collect it itself. If the states don't, no
25 one has that data but the deans of the law

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2 school. You're the only ones who will have that
3 data, unless the state had some requirement.

4 MODERATOR LYNCH: And New York does
5 collect data.

6 JUDGE RIVERA: New York does collect
7 data.

8 MODERATOR LYNCH: So we do have data
9 on the other parts of the UBE that could be
10 looked at that has racial identity. And there
11 are some states that do collect the data. So
12 that analysis, it wouldn't be perfect, could be
13 done but has not been done, is that true?

14 JUDGE RIVERA: I don't know if it
15 can be done because I don't know if you have the
16 states that you are looking for in the UBE who
17 would collect that data in a way that it would
18 be compared.

19 But the New York Bar Exam, and
20 correct me, the last -- when the Court of
21 Appeals was considering, the Board of Law
22 Examiners were considering increasing the
23 passing score, there was a whole run of data
24 done at that time. That's on the website,
25 people can see it. So no one is going to hide

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1 the ball here. We don't need to repeat this a
2 million times.
3

4 There is a disparity impact.
5 Period. There's no need to discuss, we know
6 that that is true, to discuss what that means to
7 us in the context of this proposal but no one
8 needs to convince this committee or the Board of
9 Examiners that there is a disparity. We know
10 it, we understand that, but there's much more
11 nuances in the bar exam, however, which is where
12 it's relevant to us and what we do.

13 But let me just say that the
14 committee has been very aggressive in
15 identifying ways that it might come up with a
16 way to collect data and compare data to try and
17 answer what is the ultimate question, which is
18 will the proposal result, for purposes of this
19 question, a greater impact than the one that
20 currently exists. The one that currently exists
21 is unacceptable but this is where we are, this
22 is the world we're in. The question is will the
23 proposal result in a greater impact. So we are
24 trying very aggressively find a way to answer
25 this question if we can with the existing data

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2 so that we have an answer to that. Certainly
3 been a lot of questions to that.

4 My own sensibility, the data has its
5 limits, as you all know. Data has its limits.
6 And there will not be a satisfactory answer but
7 there will be a way to try and respond in a way
8 that is absolutely authentic, and as deeply
9 concerned as everyone who raised an issue, to
10 try to respond to it.

11 But I think at the end of the day
12 what drives that train, of course, is that we
13 know there's a disparity. And that is an issue
14 that, again, is somewhat beyond the mandate of
15 the committee but it is not something that we
16 are unaware of or uninterested in thinking about
17 in the context of what we are doing. I hope
18 that responds to the question.

19 MS. MOY: Yeah, I get it. And if
20 the imperfect data shows less of an impact on
21 people of color, I would be all in.

22 JUDGE RIVERA: Of course. I think
23 will it be less? I'm not so optimistic about
24 that, but one will never know until the end
25 game, unless you adopt it and put it in place.

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2 Is it not a greater impact or is the
3 impact, and take this in the spirit in which it
4 was made, so de minimis that it is the
5 functional equivalent of not a change in
6 disparity.

7 But I understand what you mean, I
8 do.

9 MR. AYERS: When you say the data
10 isn't available, do you mean at the present
11 moment? When you say the data isn't available,
12 do you mean at the present moment as opposed to
13 delaying implementation for three years and
14 putting test questions on it and then --

15 JUDGE RIVERA: You can't do exactly
16 what you are describing because what you have to
17 do is give the actual test and you cannot do
18 that, because to develop testing in order to do
19 that in the way you are suggesting. What you
20 can do or attempt to do, is as we have now done,
21 is reach out to those unique jurisdictions, see
22 if we can get data. Because remember we
23 function in a very public environment. Some
24 people may not want to give us data that they
25 have and some may not have the data at all.

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1 We've reached out to schools to see if there's a
2 way to get data because, again, that's for
3 schools to decide whether or not they're willing
4 to give that data. Some of them may not collect
5 it, whether it's by choice or otherwise I cannot
6 say. So we're left in that unfortunate
7 situation.

8
9 We have other positive ways, of
10 course, of running the data which, as I
11 mentioned before, there are members of the board
12 who can certainly speak to this in greater
13 detail with greater wisdom than I. When the
14 Court of Appeals increased the passing score,
15 ran a lot of data simulation, there's a way to
16 try and run simulations but, again, they all
17 have their limits. I'm not a psychometrician.
18 I too went to law school not for that particular
19 profession. But the psychometricians will admit
20 there are limits to what we can say. We can
21 predict as far as we can do. Whether or not
22 that would be enough for a comfort level for the
23 committee on its recommendations, enough for the
24 Court of Appeals, I can't make that call now.

25 But all I can say is there's been

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2 many requests for exactly what everyone or many
3 of you around the table have asked for and we
4 have tried to think very seriously and act very
5 aggressively to try to come up with data run and
6 attempt to make comparisons that would help us
7 answer these questions in a way that doesn't
8 feel that we've avoided them or in a way that
9 someone will say that's a ridiculous comparison,
10 it's nonsensical, you can't rely on that.

11 It's not an easy task,
12 unfortunately, again, because we don't have
13 access to the kind of data that we would need.
14 We have been told, and we accept that at face
15 value, the people in the UBE jurisdictions and
16 the MBE executive administrators, that they have
17 not heard that there has been a disparate impact
18 that is in any way different from whatever
19 existed in those jurisdictions before they
20 adopted the UBE.

21 Now the natural question, then I'll
22 stop --

23 MODERATOR LYNCH: We're asking.

24 JUDGE RIVERA: -- when you hear that
25 is did you ask. Did you make a concerted effort

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2 to identify such a disparity. And in candor
3 many of them will say well, no, I don't know if
4 we asked.

5 So we are again aggressively trying
6 to see, reaching out to organizations of color,
7 bars of color, in those jurisdictions to see if
8 they have some sensibility. The nationals, do
9 they have some sensibility.

10 My own sense is I'm probably not
11 going to get any answer that's useful.
12 Ultimately, and I'm not testifying as a
13 psychometrician, that's for sure, but to us it's
14 important to do the outreach and to see if maybe
15 there's something in there that we're
16 comfortable enough for us to run with and think
17 more deeply about.

18 I can only tell you what we're
19 trying to do. It's a tough question.

20 MODERATOR LYNCH: And I just want to
21 say I think we're so appreciative of those
22 efforts you are making because it's really hard.

23 JUDGE RIVERA: And we welcome other
24 suggestions. Again, I'm not a psychometrician,
25 as I say these suggestions are about trying to

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get the data.

MR. GRADESS: Before we go on can I just get a clarification because it's relevant to something I think I heard you say.

There is a reference in the CLEA letter -- I mean the disclaimers about not being researchers is important. When I opened our office I hired a researcher because I figured put seven lawyers in a room and they'll decide anything they want. But I know that six or seven times a year I will ask for something like what's the racial impact. And my research director will come back and say that data is not available but I'm not trying to do ba-ba-ba-ba-ba.

And there is a reference in this letter that people interested in this issue of disparate impact have asked the NCBE to share their data in any form, and I assume that includes forms of other kinds of things that third-party researchers could extrapolate, and it says they have been unresponsive to that. Is that an accurate statement?

MODERATOR LYNCH: That's a reference

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2 to the fact when the California -- I'm sorry,
3 when the Bar Exam rates went down last year
4 deans of law schools, like 49 deans, signed
5 something because there was a disagreement about
6 the reason for that. Was it that. And at one
7 point the head of the NCBE made the unfortunate
8 statement, which she now regrets, there were
9 less able students versus was it something about
10 the exam itself.

11 JUDGE RIVERA: Could I clarify
12 something. You correct me if I am wrong. What
13 drove that was the MBE, we're not talking about
14 the ME.

15 MODERATOR LYNCH: I think that's
16 true, yes. So a part of it --

17 JUDGE RIVERA: This particular
18 controversy was about the 200 questions.

19 MODERATOR LYNCH: Right, was about
20 the multiple choice questions of MBE, which we
21 currently have in New York, and which is
22 administered by that NCBE organization.

23 JUDGE RIVERA: Drafted.

24 MODERATOR LYNCH: Drafted, right,
25 and administered. Thank you. I know, this is

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1 so hard to get into all of details of it.

2 So the deans have asked, okay, you
3 are saying they are less abled, we think there's
4 something wrong with the test. So they're
5 having a disagreement. And they are saying that
6 the NCBE is not sharing their data with us. So
7 that is what CLEA was able to find from public
8 documents.
9

10 MR. GRADESS: Well, that's a
11 problem. A big problem.

12 MODERATOR LYNCH: I'm supposed to be
13 a moderator.

14 MS. MOY: Can I say the second point
15 now?

16 MODERATOR LYNCH: Then we have to
17 get to people on the list. But go ahead,
18 Lillian, I can't refuse you anything.

19 MS. MOY: If New York goes with the
20 UBE, New Jersey, Connecticut are going to be
21 very likely and then the portability argument is
22 gone as far as I'm concerned. Because as a
23 person who waived into two states and took tests
24 in two states, you'll pay anything to get in
25 where you want and not take a bar exam.

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2 So in the long run portability is a
3 real plus and it's just a short term. I'm
4 honestly not really -- I won't say I'm
5 speechless, but it's a poor argument we will not
6 give up.

7 MS. RYBA: However, if we have 14
8 states, we have the UBE now in 14 states, we
9 have all of those admitted to the bar. Does
10 that flood the job market? We already have a
11 hard time finding jobs.

12 JUDGE RIVERA: Well, similarly, in
13 South Dakota you're probably not going to have
14 --

15 MS. RYBA: I think there's more
16 likely you could have South Dakota come to New
17 York.

18 JUDGE RIVERA: Get out of South
19 Dakota and come to New York attitude.

20 (Laughter.)

21 JUDGE RIVERA: Let me just respond
22 in part, if I can, to that. One is those people
23 will come anyway, whether it's a New York exam
24 as it currently exists or some other version. I
25 understand your point that it's greater

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2 inferences and more fast knowledge, the thing is
3 they still have to pass the New York Law Exam.
4 You can't just pass what the National Conference
5 of Bar Examiners calls the UBE, all we have to
6 adopt is the essay and then we have all the
7 components of the UBE. But I don't know that
8 that is something to be concerned about. But
9 I'll leave it to the practitioners in the room
10 to tell me otherwise but when I was in practice
11 and we hired, New York students always had the
12 edge. They did, because they went to a New York
13 law school, they learned New York law, they had
14 the New York internships, some of them came to
15 us to work for us and they had the edge. The
16 students who come from the other schools, who
17 are schools that see themselves and consider
18 themselves and certainly the New York Court of
19 Appeals sees them as national, they're going
20 anywhere.

21 So I don't think -- I didn't think
22 the question on the concern that we've heard in
23 the past about this to be about those particular
24 students. And that is also my response as a
25 former educator for two decades that I taught

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1 law school, that New York schools will not be
2 changing the way they teach.
3

4 MS. RYBA: They have to.

5 JUDGE RIVERA: Will not. I taught
6 main subject areas and I taught New York subject
7 areas. You teach general principles in these
8 courses, they are the same textbooks everybody
9 uses except for the New York courses. It's the
10 same thing. And if New York schools changed
11 they would be doing a great disservice to their
12 students because I don't know how then the
13 students would be satisfied paying all that
14 money and not being thought New York law.

15 MS. RYBA: But they have to pass the
16 bar.

17 JUDGE RIVERA: And again, they have
18 to pass the bar and they have to pass the New
19 York Law Exam, a portion of the Bar Exam, and
20 again the UBE has tremendous overlap with New
21 York law. You cannot escape that. You cannot.

22 You're in South Dakota and you don't
23 study New York law at all, you are going to do
24 exactly what you do now, which is take a bar
25 course and read the CPLR and try to learn it in

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1 time to take the current exam.

2
3 Now, if you are in a New York law
4 school, usually you are taking the CPLR course,
5 right, New York practice, you are taking other
6 courses. You are constantly dealing with
7 clinics and otherwise with New York law. You
8 are emersed in New York law. And that's how you
9 get the job, that's how you're able to succeed.
10 That is just truth. So I, as a former educator
11 in particular, find this question of the
12 curricular change one that I'm still not clear
13 as to why schools believe that they must make
14 dramatic changes in what they do in the
15 classroom and in the way they craft their
16 syllabi.

17 I had students who were not staying
18 in New York and I had students that came to New
19 York Law School to stay in New York. You're all
20 going to pay all of those thousands of dollars
21 and there will be a teacher in your school who
22 will not teach you New York law? Really?
23 Really?

24 MS. RYBA: I think they're going to

25 --

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2 JUDGE RIVERA: Really? Excuse me.
3 Because five essays change? Really? It's very
4 troubling, that's all I'm going to say about
5 this.

6 MS. RYBA: A large portion of the
7 New York State Bar Exam is the essays and
8 they're on particular nuances of New York law.
9 And so when this changes, you have to teach to
10 understand how they're going to pass. I'm not a
11 teacher, but I think it makes sense that if the
12 majority, if all of the essays are changing and
13 they're no longer issues binding on New York
14 State law, there has to be some sort of a
15 change.

16 JUDGE RIVERA: Yes. So let's take a
17 typical --

18 MODERATOR LYNCH: So can I just.
19 You have to leave in like 15 minutes.

20 JUDGE RIVERA: I do have to leave,
21 so I'm just going to quickly answer that.

22 MODERATOR LYNCH: So answer that but
23 then I'd like you to hear some other things.

24 JUDGE RIVERA: Yes, that's all
25 right. Let me quickly. The majority of

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1 teaching in law school has to be general
2 principles. There are New York courses, there
3 are New York rules. Every professor in this
4 room cannot possibly be in disagreement with me
5 because that is just simply truth. As you get
6 closer to third year you're more deeply imbedded
7 in New York law. That cannot change because you
8 are getting closer to the experiential portion
9 of being in a New York law school environment
10 and we're just learning New York law.

12 But again, it is not completely
13 accurate, and this is I think something that is
14 really the challenge to the committee, this is
15 our challenge, to fully appreciate and
16 understand and communicate that the proposal is
17 to adopt particular essays that test general
18 principles, those principles overlap with New
19 York law. You are not, when you take this
20 portion, taking non New York law, which is I
21 think where people believe, all of the
22 curriculum has to change because you are going
23 to teach uniform rules. No. It is principles
24 that will be tested.

25 MODERATOR LYNCH: So since Judge

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2 Rivera is interested in this question, I'm going
3 to ask that for the next couple of minutes those
4 folks who are in law school, and we'll move on
5 to other things, either students or faculty,
6 talk about their questions or their comments or
7 perspective of what drives what you take in the
8 curriculum, what do you see in teaching and what
9 happens. Professor Breger teaches bar courses
10 and then I'll move onto students.

11 MS. BREGER: I agree -- I teach all
12 sorts of federal, I teach New York. But I guess
13 the question, or maybe if I could re-write that
14 outline, would be less about how will this
15 affect teaching in law school, how will this
16 affect what students choose to take. That's
17 more of a concern. Because for example, I may
18 not change how I teach a particular course, I
19 could do less New York law, do more New York
20 law, but will students not take the clinic, will
21 students not take particular courses because
22 they no longer find them useful or no longer
23 find them helpful in passing the law; New York
24 practice, whatever it may be. So it's less
25 about how will it affect on our end but more

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2 what will the students do.

3 MODERATOR LYNCH: Pat, you were the
4 first student.

5 MR. WILDES: I think I was in line
6 first.

7 MODERATOR LYNCH: You were way back,
8 we ignored you. All of us jumped ahead of you.
9 I apologize.

10 MR. WILDES: So I apologize, I
11 neglected to mention that I'm actually the
12 president of the second class here. So I've
13 gotten a lot of feedback on this, a lot has been
14 going on in the hallways here, barring this, but
15 this has obviously come up as kind of a major
16 issue.

17 Timing is huge for current students.
18 And I know the third year students, my
19 understanding is this will not affect this
20 upcoming Bar Exam, so you guys are safe.

21 Moving forward to the next year
22 students, first year students. There's a lot of
23 people who are now thinking well, I came here
24 thinking it was going to be one way and now it's
25 changing. So I know people have mentioned

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2 earlier maybe delaying this a year or two so
3 that when people are applying to law school they
4 know what they're getting themselves into.

5 Now, I'm completely content with
6 being her but I know people for a fact who are
7 not very happy about it. You know, we have
8 professors like Professor Hutter, Professor
9 Connors, who have this great reputation for
10 teaching New York areas of law and now people
11 feeling like maybe that's not going to be as
12 important when they're taking the exam. Not for
13 practice, I know it's going to be useful when we
14 get out of here, but we have to pass the exam so
15 we can practice. And people are really scared
16 about that. I wanted to get that on the record
17 before I have to leave and before you get out of
18 here.

19 MODERATOR LYNCH: Okay, the next
20 person was Mike -- no, Rob.

21 MR. RAUSCH: You want to go to
22 Professor Hutter?

23 MODERATOR LYNCH: Yes, Professor
24 Hutter and then Mike. We'll get back to the
25 students.

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2 MR. HUTTER: I teach New York
3 oriented courses, I also teach national courses.
4 And I would fully agree with Judge Rivera, I'm
5 not going to change. Not because I've been
6 doing it for 40 years but I'm not going to
7 change. I want students to know the law and I'm
8 not going to change because of whatever goes on
9 on the UBE, that would be insane. I think the
10 students, in fact it was Melissa saying it, may
11 adjust what they're going to take but I think
12 that's more going to be the onus of the law
13 schools to get that message across to students.
14 But I think it's a strong man type of argument
15 that I think Judge Rivera just knocks down
16 perfectly, that we're not going to change. I
17 just don't see it.

18 I know a lot of law schools are
19 saying the sky is going to fall, we have to
20 change everything. It's not going to happen.
21 At least that's my perspective. Maybe others
22 will disagree with that. I just don't see that
23 happen.

24 MODERATOR LYNCH: All right. Mike
25 the student.

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2 MR. LIEBERMAN: I agree with
3 Professor Hutter, I don't think that the
4 professors will necessarily change, in my
5 experience, and Judge Rivera. But I would also
6 say that I don't think we're going to change.
7 Because as we've already heard there's
8 substantial overlap -- well, the subjects are
9 the same essentially. So we're going to take
10 the same subjects that we are already taking to
11 prepare for the bar.

12 And from a student's perspective I
13 think it's really maybe up to the professors and
14 to the bar prep courses to make any adjustments
15 that they feel necessary to prepare us for the
16 Bar Exam. But otherwise, and to Professor
17 Breger's point, I don't think it will change
18 what extracurricular activities, what clinics
19 and other things we're involved in, because it's
20 all about time management and other things in
21 the life of a law student and those things will
22 remain the same.

23 So I don't see this making much of a
24 difference in the choices that law students make
25 about what courses to take. And really this is

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2 sort of a hands off thing for us in terms of
3 we're counting on the professors and the faculty
4 to make the necessary adjustments, if any need
5 to be made, to prepare us.

6 MODERATOR LYNCH: Connie.

7 MS. MAYER: I want to go back to I
8 think what Pat was talking about in terms of the
9 timing issue because I completely understand.
10 Most of us teach national law, general
11 principles and then we also focus on New York
12 specific issues. But I teach a family court --
13 family law practicum, which really is a mat law
14 course. And it is really a New York mat law
15 course. We talk about the uniform codes but the
16 real focus is on New York. That's perfectly
17 fine, I can change that up.

18 But if the students were forced in
19 July of this year to take the UBE, I mean they
20 wouldn't have gotten anything very useful from
21 me about family law because I don't think many
22 of the things that we did in family law probably
23 you wouldn't find on the UBE. So I think that
24 it's more of a timing issue.

25 The best thing would be if this

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2 change is going to happen, if you gave us enough
3 notice so that first year students when they
4 come in the door they know they're taking the
5 UBE. Because I'm going to change my criminal
6 course too.

7 MODERATOR LYNCH: Yeah, I'm going to
8 change my courses.

9 MS. MAYER: If you're changing to
10 UBE, I'm not going to talk about second degree
11 murder because it's -- of course New York State
12 is the only place where intentional murder is
13 second degree murder.

14 JUDGE RIVERA: But you risk that
15 that would be on the New York Law Exam when you
16 do that.

17 MS. MAYER: And you would want to
18 point that out. But you would want to make
19 those distinctions so the students more clearly
20 understood what are those general principles,
21 what is it that they need to know for the UBE.
22 And I think it's just in fairness to the
23 students.

24 So I would really love to see a
25 three year window on this before it goes into

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1 effect because I think it's the only fair thing
2 for the students.
3

4 MODERATOR LYNCH: Nick.

5 MR. BARRANCA: I thought Jim was
6 next. I just want to give him time because I
7 know he has to leave before me.

8 MODERATOR LYNCH: Okay, Jim.

9 MR. WISNIEWSKI: I certainly hope
10 Professor Hutter doesn't change how he teaches
11 his classes because I enjoy that style. But I
12 think a concern is, this may be forward looking,
13 admissions. If New York adopts the UBE, I think
14 that New York admissions would go down because
15 if I could get a cheaper education in Nebraska
16 or North Dakota, I'm going to go to that school
17 so I can pay \$2,000 and I'll learn New York law
18 at some point and prepare myself and pay the
19 four or \$5,000 to learn New York and then I'll
20 take the bar, and I save myself money. I think
21 that's important but I think it loses the value
22 of a New York education at a New York law
23 school.

24 I want to jump off Pat's point, I
25 took Professor Hutter, I think he's one of the

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2 better professors not only at the school but
3 probably in the country, and I took Professor
4 Mayer as well.

5 MR. GRADESS: She's the second best
6 in the country.

7 (Laughter.)

8 MR. WISNIEWSKI: But I certainly
9 think that's certainly a factor because law
10 school admissions are down, I think there's no
11 denying that. And I think we want to encourage
12 law students to go to New York's law schools.
13 So I think by moving the system you encourage
14 kids to take their law school and get their
15 degrees out of state and then spend the money to
16 somehow incorporate New York law into their
17 preparation for the bar. I think that's a
18 certain factor we need to think about.

19 MODERATOR LYNCH: I'm going to say
20 one faculty thing and then I'm going to bounce
21 it back to Nick and then Pat.

22 I would change and this is why. I
23 have been, as you know, a leader in the
24 educational reform movement and what learning
25 theory tells us is that it's not about coverage,

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2 it's about picking the concepts that have
3 psychological anchors and motivation so I create
4 in each of your heads those crater pits and I'm
5 not going to cover everything. I am going to
6 risk that because I want you to learn and I want
7 to have your brains on fire so that I prepared
8 you that you are going to study for the bar in
9 the bar course, that's what you're going to do.
10 But I'm going to get you to conceptually, so I
11 give up coverage and guess what, they do better.
12 I give up that in order to drill down deeply and
13 incorporate the experiential learning not to
14 prepare them to go work for Jonathan, I do that
15 in the clinic. I do that so that you guys will
16 then learn not just for the Bar Exam, that you
17 will have deep learning of these concepts.

18 If I now in crim pro, as you know,
19 we do the federal, we then do the big apple for
20 New York and then we kind of talk about the
21 concepts of majority jurisdictions but I'm not
22 stressing are there 49 versus 51, which is the
23 majority jurisdiction. I'm not stressing
24 majority jurisdictions. And so you do need to
25 know if you are answering a question about

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1 majority jurisdictions.

2 And so I do think, like Connie, I am
3 looking to what you are going to do and I'm
4 going to get rid of some of my deep learning,
5 I'm going to get rid of some of my ethics and
6 professional responsibility in crim pro because
7 I now have an additional responsibility. So I
8 do feel I'll change.

9 Nick and then Pat.

10 MR. BARRANCA: I have two points.
11 First going off this issue. I actually will one
12 up Jim here. I have actually had Professor
13 Lynch, Professor Hutter, Professor Breger and
14 Professor Mayer. So there you are.

15 (Laughter.)

16 MR. BARRANCA: But I would like to
17 say that --

18 MR. HUTTER: What was your exam
19 number again?

20 MR. BARRANCA: I'll e-mail you.

21 (Laughter.)

22 MR. BARRANCA: I think it would be
23 premature to say that we won't see a change in
24 the curriculum or have certain professors teach
25

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2 differently. I certainly hope Professor Hutter
3 does not change his style of teaching.

4 But I think that -- first off I
5 think there's sort of this presumption that
6 there's uniformity in I believe 18 law schools
7 in New York. And I was actually talking to a
8 friend of mine who is the editor and chief of
9 the Law Review at Cornell. And we were talking
10 about how we've had very different learning
11 experiences. There they focus a lot on
12 theories, abstract theories of law, progressive
13 type laws that, I don't know how to phrase it,
14 but they focus more on theory over New York
15 distinctions. They focus on the general
16 principles and then on theory.

17 JUDGE RIVERA: With a very high pass
18 rate.

19 MR. BARRANCA: Yes. But my point is
20 that's very different than what you might
21 experience at Albany Law, where we are going to
22 get a lot of New York distinctions.

23 So I think that regardless there are
24 going to be law schools and faculty that are
25 going to have to change to meet this.

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2 And I just really quickly also
3 wanted to address a matter of precedent because
4 I believe it's accurate to say that when New
5 York speaks the nation listens. I think that's
6 accurate. And I think that we are one of the
7 more progressive states and other states will
8 follow.

9 But with that said, when Judge
10 Rivera was speaking you had mentioned that the
11 essays would test minimum competency and I
12 just -- I'm a little leery of New York State
13 setting a precedence of like the state being one
14 of the leaders in the nation setting a precedent
15 for adopting a Bar Exam that only has the
16 minimum -- a standard where a person that passes
17 it is only really meeting a minimum competency
18 standard.

19 MODERATOR McALARY: Which is the
20 standard currently though. I just want to say,
21 the Board tests the minimum competence.

22 MODERATOR LYNCH: Competence is
23 actually a strong word. Don't think about the
24 minimum, think about the competence. Think
25 competence is hard.

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2 JUDGE RIVERA: Think of it as a
3 pass/fail exam. No matter how much higher you
4 pass, it doesn't matter, you just passed. Those
5 who fail by one point, to them it matters. But
6 to pass by 25 points, it doesn't matter, you
7 just passed.

8 MR. WILDES: And again getting back
9 to that portability point. Now, say this was to
10 happen next year. Just theoretically next
11 summer who is taking the bar, I'm taking this
12 new UBE, at that point, even if we make a
13 decision relatively soon, I don't know what the
14 ballpark is for making the decision, these other
15 states, your Massachusetts and New Jerseys and
16 Connecticut, they're not just going to say in
17 three months, okay, we're going to do it too.
18 So in terms of short term like, I don't know,
19 short term for me, like Connecticut, it's not
20 going to benefit me immediately, I'm not trying
21 to be selfish, but a lot of people here just
22 want to make more than one state. New York
23 primarily. When you're in your practice, you're
24 going to enter into other states.

25 So I'm thinking if there was a time

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2 frame here where we said we're going to do this
3 in two or three years but we're definitely doing
4 it, that's giving these other states an
5 opportunity to say okay, we have time to figure
6 this out. Now, that's where it would benefit
7 students that are currently in law school
8 because I don't know that's what I find issue
9 with, if we do it now that the other states
10 aren't going to conform just because we did it.
11 They're going to think about it and they'll
12 probably, believe it or not, definitely got to
13 it too. So if there's more time involved,
14 students have more of a chance to have that
15 opportunity to go into states they actually want
16 to practice in.

17 MS. RYBA: Judge Rivera, is there a
18 reason to adopt the change so quickly? Is there
19 a purpose behind making the change without
20 waiting?

21 JUDGE RIVERA: Why now is what you
22 said.

23 MS. RYBA: Right.

24 MODERATOR McALARY: And the theory
25 is that if portability is such a value to

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1 students, why wait. Why wait two years from
2 now. You raised a very good point but on the
3 reverse is now okay, if you don't take the UBE
4 next year and the students the following year or
5 the year after that, well now you're in a
6 position that well, if I do want New Jersey
7 admission or Massachusetts admission I have to
8 go take the Bar Exam. The students who follow
9 you may be in a better position with having that
10 portable score.
11

12 And peoples life changes. You could
13 have a year or two after that you meet someone,
14 you have a significant other and now has to move
15 to another state. And I hear it all the time, I
16 have lawyers who come to me well, I don't have
17 five years of practice, how can I get admitted.
18 My significant other just moved to New York, I'm
19 moving there too and now I'm in a bind, I can't
20 get admission on motion without the five years.

21 MODERATOR LYNCH: I want to open it
22 up to the practitioners and everyone else
23 because the law school and students dominated
24 it.

25 MR. RAUSCH: John, to your point

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1 about portability. Although I guess it's
2 wonderful that New York students may have an
3 opportunity to apply elsewhere, have there been
4 any assessments as to whether this is going to
5 lead to a significant increase in applications
6 from out of state?
7

8 I do character and fitness
9 interviews so I see students from other states
10 wanting to practice here. But my concern with
11 New York being a leader and these other states
12 waiting for New York to follow our lead, if we
13 go this route are we suddenly going to have a
14 huge influx of applications and how is that
15 going to affect the job market.

16 MODERATOR McALARY: And the answer
17 is we don't know. But I can tell you that under
18 the current exam, for instance, this past
19 summer, July, we had applicants take the New
20 York Bar Exam from 48 out of the 50 U.S. states,
21 from over 185 of the 200 somewhat approved law
22 schools in the United States, from over a
23 hundred different countries. So they are coming
24 here anyway and they are coming in large droves
25 now.

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2 But there really is no way to
3 predict what's going to happen. It's a very
4 valid question. It's one that I wish I had the
5 answer for because I'm the one that has to
6 predict how many people are going to be taking
7 the exam next year, the year after that and
8 where I'm going to test them. So I don't know.

9 If there's more jurisdictions that
10 sign on to the UBE perhaps people will make --
11 maybe we'll get less. I say "less" taking the
12 exam in New York, they may take it elsewhere if
13 they know they can transfer that score. We may
14 ultimately end up with more people becoming
15 admitted here in New York.

16 As I said, we're already getting a
17 number of people coming here, they want the New
18 York Bar admission but they may never come to
19 New York to practice. I have a lot of
20 international lawyers who just want that
21 license, so they look at this like a credential
22 that's going to open the doors in Hong Kong and
23 London and elsewhere in the world.

24 It's a very valid question.
25 Unfortunately, I don't have the answer for you.

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2 JUDGE RIVERA: Thank you so much.

3 Really, we so much appreciate this. Now you can
4 say more.

5 MODERATOR LYNCH: Thank you, Judge.

6 JUDGE RIVERA: Thank you.

7 (Judge Rivera left the Focus Group.)

8 MR. AYERS: Could I just ask a
9 narrow question?

10 MODERATOR McALARY: Sure.

11 MR. AYERS: As far as the 266, does
12 that mean it's portable only to the four states
13 with lower scores and that's the only states
14 where they can be hired?

15 MODERATOR McALARY: That's correct.

16 MR. AYERS: What are we talking
17 about then? And the states that are going to be
18 hit with higher scores are going to be swarming
19 in here. Our portability goes no place.

20 MS. WOOD: Of course if you get a
21 266 you can only go to those four jurisdictions.
22 The vast majority of people that will be taking
23 the exam will score higher than a 266.

24 MR. AYERS: You mean you can take
25 your particular score, not just that you passed?

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2 MODERATOR McALARY: Right. You
3 don't just take your 266. Somebody has a 280,
4 over 300. That scale is on a 400.

5 MR. AYERS: I didn't understand
6 that, I thought you were just pass/fail and say
7 I passed New York, which means you get 266.

8 MS. WOOD: You will get a specific
9 score. And our board will tell you your score.
10 If you get a 280 you can go to any other UBE
11 jurisdiction.

12 MR. RAUSCH: But there are other
13 jurisdictions that have their own, right?

14 MODERATOR LYNCH: There are also
15 some that have their own -- you probably know.
16 How many members have their own --

17 MS. WOOD: Four other jurisdictions
18 have their own jurisdiction.

19 MS. RYBA: Alabama, don't you have
20 to take a course in Alabama?

21 MS. WOOD: Alabama I think recently
22 changed. There's one state you do take a course
23 the day after the exam. There's another state
24 that has an open book online exam. Another
25 state has essentially a CLE that you have to

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2 take. Nothing quite as -- nothing similar to
3 what we're proposing, what the board is
4 proposing, have a 50 question multiple choice
5 separate test.

6 MR. AYERS: I think it would be
7 helpful to make that clear that your score is
8 portable, it's not just pass/fail and not 266, I
9 don't think it said that. I guess I'm not the
10 only one.

11 MODERATOR McALARY: Currently people
12 who take the Bar Exam, if you pass you are told
13 you pass. We don't give out their score. I'm
14 asked. Over the year people ask why do you want
15 it. Well, I want to put it on my resume.
16 That's not the purpose of the exam, the exam
17 tests minimum competence. You pass, you pass.
18 You fail, you get your score and the breakdown
19 of it. But of course going forward on the UBE
20 they would get their score so that way they know
21 what that is and they can look at all the
22 jurisdictions, what state will accept that
23 score.

24 MODERATOR LYNCH: I want us to come
25 back to the list that we made at this point.

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2 It's about almost 10:40 and some folks have to
3 leave at 11 or 11:15. If you look, I'm going to
4 say them out loud, and think about is there
5 something we haven't talked about at all or
6 something that some of you really feel like we
7 need to get to.

8 So how UBE connects with practice.
9 We had about four people saying that. How do we
10 weave access to justice with bar licensure.
11 Impact on minorities. I didn't even put enough
12 of those. How does this play into my future.
13 How will this affect teachers in law school.
14 Affect on law school programming. Affect on
15 admissions at New York law schools. The cost of
16 the UBE. Should we move so quickly. The
17 266/400 issue. Disastrous to not know the
18 uniqueness of New York law. CPLR is downplayed
19 significantly. We look different than other UBE
20 states. We are leader. Adequate prepare for
21 practice in New York. Not enough focus on
22 representation of clients. And some poverty
23 issues.

24 So who feels that or we can either
25 vote or someone can say I'd really like to talk

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2 about this? Jonathan.

3 MR. GRADESS: Well, I've learned an
4 awful lot about the Bar Exam and the world
5 around me in the last ten days and I have
6 absolutely no expertise in the area that you are
7 talking about. But I think that's given me a
8 slight advantage, at least to listen to this
9 conversation, in that here's what I'm hearing.

10 I hear that the goal of this, lawyer
11 portability, is a very lawyer centered basis for
12 change. I hear that the timing really has
13 ramifications that don't seem to be looked at.
14 I hear the possibility from Judge Rivera that
15 the racial impact might be de minimis. Which
16 when you look at the figures of what it is right
17 now, I don't want a de minimis change. It's
18 like 60 percent of African Americans and 45
19 percent of Hispanics are shut out of admission,
20 while 31 percent of white people are shut out of
21 admission. A de minimis change in those numbers
22 would be an absolute disaster.

23 So I think that if the students
24 might change, which I've heard here, might
25 change their approach, and the faculty might

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1 change, which has been asserted here, and the
2 race numbers may stay the same and there might
3 be, from that corner, a gap in the curriculum, I
4 think it was you, that might be filled by people
5 avoiding clinical education, I've got to say --
6 I love Dick Bartlett, when I know you, I love
7 you -- but I don't get it. But I want to say
8 next to that that I don't know that it matters.
9 And I just want to take a second to say why.
10 This stuff has been bubbling up for several days
11 as Mary invited me.

12
13 I was in the charter class of
14 Hofstra Law School in the year 1970. It was a
15 class of 69 people. Now, Eric Lane, the dean of
16 Hofstra, has been commenting on the UBE and
17 essentially says -- and I graduated fourth in my
18 class and I passed the bar. Although I got news
19 the week before that I hadn't, because I worked
20 at Legal Aid to get early dues and I made a
21 mistake and I practically killed myself, but I
22 did pass it.

23 (Laughter.)

24 MR. GRADESS: I had spent a year as
25 a paralegal. I came to law school and I really

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2 wanted to be a criminal defense attorney. And
3 what Eric has said is that good students pass
4 the bar. And I don't know that that's
5 necessarily enough, from my point of view, given
6 the disparate impact. But I know that in a
7 traditional law school -- and Hofstra is hardly
8 traditional but I think you could probably do it
9 in many places. We argued law on the very first
10 day that we were in class.

11 I did during the course of that time
12 do a brief for the Legal Aid Society that was
13 used in the Court of Appeals. With a lawyer on
14 that faculty I brought a 1983 lawsuit against
15 Camp Hill in Pennsylvania, which at that time
16 was jointly incarcerating juveniles and adults.

17 I spent time in a clinic, which I
18 was in my second year, I think it may have been
19 the whole semester, it may have been six
20 credits, I don't remember. I spent a whole
21 semester in my third year. In our evidence
22 class we argued a preliminary injunction, we
23 also argued a trial.

24 And I say all of that to say that
25 within the confines of a curriculum, I think the

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1 things that I'm hearing about practical
2 experience, really have room to be incorporated
3 but we don't. And my experience with the bar
4 exam is similar because I spent my time doing
5 that, I spent seven weeks and learned New York
6 law. That's what I did. It was an absurdity.
7 It still to me sounds like an absurdity that one
8 would be unleashed on clients with that kind of
9 an absurd background.
10

11 So experiential learning and some
12 form of -- how I've always viewed it. I've
13 always viewed the first year in law school is
14 like the year you learn the law. The second
15 year, the year you learn the substance -- I mean
16 the kind of basic law and then substance. And
17 then the third year, the law school is deriving
18 income, you're bored, the competition for jobs
19 seems to grow in you and other things happen.
20 But why is that year not an internship? I'm not
21 suggesting that the medical model is the best
22 thing for that, working 90 hours a week.

23 But I do think, from my observation
24 of the practice, which includes training young
25 lawyers -- we run the only basic trial skills

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2 program for entry level public defenders right
3 at RPI every year, run it since 1987. So some
4 of those people are out a year, some of those
5 people are out two years, some of those people
6 actually have been invited who are chief
7 defenders and they get their basic grounding in
8 practice that week.

9 That is a tragic set of
10 circumstances for my clients, for Lillian's
11 clients, for all of our clients. But now, Jim,
12 forgive me, but I don't worry about Whiteman,
13 Osterman & Hanna's clients. I'm one of
14 Whiteman, Osterman & Hanna's clients, I
15 definitely don't worry about them.

16 But I think what I am hearing, given
17 all of these things, is that we're missing a
18 real opportunity. I may be wrong on this. But
19 I don't know how you move -- this seems like the
20 last of the changes that we're going to make and
21 I'm scared that we would foreclose something
22 much more creative.

23 I read the stuff from New Hampshire.
24 Look, a week ago I didn't even know it existed.
25 But it does seem brilliant. And that seems to

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2 me to be -- what's the program called?

3 MODERATOR LYNCH: The Daniel Webster
4 Program.

5 MR. GRADESS: That's a great idea.
6 That's the direction that law school education
7 needs to move. And I saw it in my own career
8 and it moved that way, I see it in clinics, I
9 see it across the river, and I also see the
10 failure of it every day in my job.

11 And so the bar exam to me is like
12 almost a non-issue. We could switch it
13 tomorrow, we could keep it the same. I don't
14 like a number of the things I've heard here
15 about the switch, and I wasn't sensitive to them
16 a week ago. But I do think that if it
17 forecloses real change in certifying people for
18 the practice of law, particularly for poor
19 people, then I'd be very much opposed to it.

20 And I wasn't going to comment on
21 this but I now have been moved by this
22 conversation, I think I may feel like I should,
23 because that's where we need to go. And I don't
24 seem -- I don't hear this moving us there.
25 That's what I think.

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2 MODERATOR McALARY: Jim.

3 MR. AYERS: I agree with some of the
4 things you said.

5 (Laughter.)

6 MR. GRADESS: But not with what I
7 said about Whiteman, Osterman & Hanna.

8 (Laughter.)

9 MR. AYERS: And in terms of the Bar
10 Exam, in some sense this doesn't matter, in the
11 sense that I suspect that 95 percent or higher
12 of the people who presently pass the Bar Exam
13 will pass the new Bar Exam and the flip, those
14 who fail, etcetera. So probably changing the
15 Bar Exam in terms of the impact on those who
16 take it is only going to affect the very small
17 group. So in your real scheme of things, that
18 aspect of it is really not earthshaking.

19 But I think what Jonathan was
20 talking about is in terms of what the emphasis
21 on law school training is. And yes, I have a
22 different perspective on it. As well as being
23 in a large firm, I've been in a small firm, I've
24 been in a medium sized firm. When you practice
25 for a hundred years you get a chance to do that.

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2 But I think I would feel the same
3 way at any of those law firms. And that is that
4 I strongly disagree with this practice ready
5 concept. I don't care if there's somebody in
6 the first year that is better than somebody else
7 because they had clinical training and stuff
8 like that. I'm looking for somebody who in 40
9 years is going to be a good attorney, associate,
10 partner, etcetera. And I'm looking at the
11 skills that they need to be a good lawyer ten
12 years after graduation from law school. And
13 whether they've had clinical training or not,
14 they can draft a will in the first year or I
15 spend a year or two with them working with our
16 samples that we use showing them how to do it,
17 etcetera, that's what matters. I don't want
18 people to waste their time in law school
19 learning what paralegals can learn in the first
20 year that they're practicing.

21 I want them to learn to think
22 analytically. I want them to be able to write
23 well. I want them to be able to talk well. And
24 those are the skills that I hope law schools
25 give students. And I would not want students to

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2 be distracted by thinking about, gee whiz, I
3 want to be practice ready. I want clinical
4 training, etcetera.

5 MR. GRADESS: If we don't get
6 rebuttal, can I go on the list?

7 MODERATOR LYNCH: Christina, Rob,
8 you wanted to speak, and Jonathan.

9 MS. RYBA: The top ten percent of
10 the class who are going to be successful are not
11 in the top ten now. But I think that the
12 dynamic of graduates has changed so
13 significantly that students don't even have the
14 option of working in medium sized firms. They
15 actually have to hang a shingle sometimes and
16 practice because they have to pay their student
17 loans.

18 So you know, this Bar Exam I think
19 has to have more practice ready for the clients,
20 as you mentioned earlier, because some students
21 have to practice right out of law school and
22 they might have a mentor, they might not, and
23 they should be able to understand New York law
24 and go into the courtroom and have some ability
25 to function, because if they don't the clients

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2 are going to suffer. And I think that's the
3 reality unfortunately.

4 The job market is not what it was,
5 it's not really changing significantly and
6 students are graduating having to be prepared,
7 unfortunately. It wasn't like that when I
8 graduated in '01 but it is now in 2015.

9 MODERATOR LYNCH: Rob, Jonathan,
10 Will.

11 MR. RAUSCH: I agree with a lot of
12 what Jim said. He really spearheaded a
13 discussion about this last year and I remember
14 Jim, a comment that you made that's really
15 resonated with me, that the purpose of law
16 school is really to make you think like a
17 lawyer. And I am struggling with this concept
18 of practice ready. I'm not sure if it's not
19 necessarily something that needs to be taught in
20 law school or tested on the bar. This concept
21 of testing experiential learning troubles me.
22 It's just what exactly are you testing people
23 on? Not everyone leaving law school wants to go
24 into the same area. I would want the bar to
25 test people on to make sure they think like a

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lawyer, understand concepts, can read and comprehend.

So this whole Daniel Webster program is fascinating, very unique, but it struck me as something so alien with the concept of the bar that I was uncomfortable going that route.

MR. GRADESS: I'm glad you said what you said because I realize I didn't articulate the important part of what I wanted to say. It isn't practice ready in the sense that you are describing it that I'm interested in, in fact I would say that I agree with you on this.

I would also say that you are wasting the third year if that's your interest because you don't need three years to accomplish what you two are describing. There may be an economic interest for the law schools but it doesn't take three years to accomplish what you need.

What I'm interested in is the experience of a person in law school going up a staircase in a house where the roof is leaking, or they go into an apartment that they've never been in that's stinky and dirty and describes in

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2 more ways than any casebook ever what it means
3 to be poor. And here's a story from that client
4 that is compelling that requires a factual
5 investigation that you do not limited by what's
6 in a little packet but it's limited by the fact
7 that you see in the end that you could do
8 something for this person to change their life
9 and you'll go to hell and high water to
10 accomplish it. And it may be a court, and may
11 be administrative, and it may be the
12 legislature, but you will do for that client
13 what being a lawyer means because you will have
14 developed the client/attorney relationship. I
15 think that clinical experience is what I'm
16 talking about.

17 The clinic at Hofstra was over a
18 fish store, which in summer semester was really
19 a weird place to be. And I ended up being a
20 clinical professor at Hofstra, which is the same
21 place that office was, and so you had to be
22 there every day and fish stink. But it also was
23 the terminal where poor people came because it
24 was Hempstead. And the beauty of that
25 experience for lawyers, young lawyers, was that

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2 when their clients didn't show up and they were
3 angry, as many lawyers continue to be in
4 practice, you're able to teach the idea that
5 there are clients you have that are afraid to
6 take buses because they can't read and what does
7 that mean for how you become a lawyer and what
8 does it mean for how we become a law office.
9 That experience is what I think law schools
10 ought to be about.

11 And I say this with a full
12 disclosure that my almost exclusive interest in
13 this is as provincial as you can make it. I
14 want more lawyers fully capable of being full
15 service representatives of the poor because the
16 poor are being screwed in this country every day
17 by the legal institutions we have and anything
18 we can do about that in my view is a real good
19 thing. And I thank you for raising it.

20 And I'm not talking about the
21 pedagogy of this, I'm talking about the
22 experiential value of transforming people who
23 may have come in, you know, I might want to be
24 in entertainment law, my father was a, and then
25 they have this transformative experience; this

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2 is the practice of law, that was business. I
3 don't need a law degree to do business, I want
4 to do this. That's what I'm interested in.

5 MR. AYERS: As modified, I agree.

6 MR. GRADESS: Okay. Thank you.

7 MODERATOR LYNCH: Will.

8 JUDGE CARTER: I apologize for
9 saying "practice ready" when this started. I
10 mean I didn't coin that phrase and I actually
11 agree with both of you and Jonathan.

12 I see terrible lawyering on a daily
13 basis and there's only so much that I can do
14 about it. So when I say practice ready, I mean
15 like Professor Tymann used to say, lawyer is a
16 verb. And I want the law school to teach the
17 duties and responsibilities to the students,
18 what it means to go out and represent the
19 profession and be a lawyer. And I don't know
20 how that would happen on any Bar Exam. I really
21 think it's the responsibility of the school to
22 instill that.

23 But what we talked about before in
24 that other forum I think really goes in part to
25 what Christina was saying because the students

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1 that are coming out now don't really grasp that.
2 A lot of the students that I see think it's all
3 about them and they're going to go out there and
4 everybody is going to be wowed just because they
5 have this degree, and that's simply not the
6 truth anymore. You have to do something to
7 distinguish yourselves from the other students.
8 Now, I don't know how that plays into this
9 change, if at all. But just as a point of
10 clarification, that's what I mean when I say
11 practice ready.
12

13 MODERATOR LYNCH: Connie.

14 MS. MAYER: Going back to practice
15 ready, just one more point. We changed it to
16 profession ready once upon a time. We actually
17 went through all of our materials and did the
18 find and replace button because practice ready
19 send a message that we're really not talking
20 about. You really want students to learn how to
21 speak like a lawyer but then in the clinic when
22 they have a real client, put them in the
23 stairwell that Jonathan is talking about because
24 nobody is telling them what it is they need to
25 do, they need to figure it out for themselves

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1 with the help of the faculty that they're
2 working with.

3
4 And to learn how to think like a
5 lawyer, of course, you have to figure out what
6 the problem is, you have to do the research, you
7 have to do the writing, you have to do the
8 analysis of how you help this client. So
9 there's nothing that makes you think like a
10 lawyer more than being in that client's
11 stairwell and has nothing to do with the Bar
12 Exam. And I know that's why we're here and
13 we're sort of off on a different tangent.

14 But I do think in terms of legal
15 education it is a critical issue and we are in
16 the process of allowing students to take more
17 credits in the clinic for that reason.

18 MS. MOY: May I ask a question of
19 people who have seen or taken the MPT. Do you
20 think it tests a little bit can you think like a
21 lawyer? Is that how it's created? Do you grade
22 the MPT?

23 MODERATOR McALARY: Yes, in New
24 York -- I don't grade it myself, I have a staff
25 of attorneys who do it. That is one aspect of

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2 grading on it. And by no means it's not a
3 perfect measurement. There are many skills I
4 think we'd love to test on the Bar Exam but you
5 are limited in time and resources and what you
6 can do on it. But I personally believe it does
7 test more skills than a typical essay and it is
8 one where you don't have to cram a whole bunch
9 of substantive law into it.

10 MS. MOY: It's what you do with what
11 you get, right?

12 MODERATOR McALARY: When I speak to
13 students, if it tells you to write a memo to the
14 partner, write it as a memo to the partner.
15 Some are just throwing stuff down. You're
16 graded on your ability to present, analyze all
17 of the issues, that's one of the skills that are
18 being tested. I think it does.

19 I actually like that part of it. I
20 think I've seen students -- when it first came
21 into being, there were students that failed the
22 exam for a few years and that made a difference.
23 They were able to excel, and I saw scores being
24 higher on that part of the exam.

25 MS. MOY: As I understood more about

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2 this proposal, if we're not going to go the
3 whole way, like Daniel Webster or public
4 interest alternative, then I saw a value in
5 doubling the MPT. At least I think it drives --
6 if we believe that the bar drives what students
7 have, although I'm not sure that it does, if we
8 believe it does, and that teaches students
9 conventional wisdom, at least it's driving
10 people towards more like thinking like a lawyer.

11 MODERATOR LYNCH: And I will just
12 give a point of information on both sides of
13 that issue. I think that's part of the reason
14 for the MPT that was adopted in other places was
15 that hope, that there would at least be -- in
16 going back to what Jim and Rob were talking
17 about, it's not about filling out a will, it's
18 about can you demonstrate the knowledge that you
19 acquired in law school in a way that is skillful
20 enough, at least immerging competence. And
21 that's what clinic is about. They're graded on
22 the preplan, the preparation, etcetera. They're
23 graded on the reflection and can you incorporate
24 the lessons you learned. And it's about really
25 the long term, recreating the habits of

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1 reflection, critical thinking, analysis and
2 planning. It's not did you fill out the will
3 the right way. So I think we have not done a
4 good enough job explaining that. But going back
5 to your point, so MPT, the hope is that it would
6 do that.
7

8 The Committee on Legal Education and
9 Admission to the Bar has actually -- one of the
10 members of it drafted a proposal in which she is
11 the academic something, dean or whatever, and
12 she simply says that she feels, or not just she
13 but members of that committee are recommending
14 that -- their feeling is not just that it
15 doesn't test all of the skills but it actually
16 ends up, the way it's evaluated, ends up
17 repeating the kind of assessment that is done on
18 essays already on the MEE. So they don't see it
19 realizing that hope. I'm taking no position on
20 that but that is the criticism that has come
21 from that committee. And what was the proposal
22 they had, the committee's proposal was to
23 replace --

24 MODERATOR McALARY: They would like
25 to see it replaced with I think a certain

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2 minimum number of clinical or experiential
3 learning credits in law school.

4 MODERATOR LYNCH: Where someone
5 would be evaluating and assessing sort of a
6 wider range of skills.

7 MR. RAUSCH: From the states that
8 have adopted the UBE, have students in those
9 states, have they affected the curriculum
10 choices? I think the clinics are the single
11 best experience anyone can have in a law school.
12 I'm a victim of the clinics.

13 MODERATOR McALARY: I know Judge
14 Rivera alluded to her committee trying to get at
15 that.

16 MR. RAUSCH: I would be very
17 concerned if there's changes being made there
18 that are affecting -- the students are under the
19 perception they're not being tested on
20 experiential learning, if they are now going to
21 be moving away from the wonderful practical
22 experiences.

23 MODERATOR McALARY: That's actually
24 a question I just had right now because I'm
25 curious. We've talked about the importance of

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1 clinics and experiential learning and folks
2 alluded to expressing concerns.

3
4 And what I guess I'm trying to get
5 at is how do you think if we went to a UBE
6 state, how would that impact people taking
7 clinics? In my personal sense, I don't know if
8 that's going to change. Students are taking it
9 now and they're not a typical course that's
10 going to prepare you necessarily for the bar
11 review.

12 MODERATOR LYNCH: They don't take
13 in-house clinics in great numbers here.

14 MODERATOR McALARY: And I think that
15 may be the case throughout.

16 MODERATOR LYNCH: They do at other
17 places but I think we are very much a bar
18 focused school and we do not do clinics the way
19 the national average does.

20 MODERATOR McALARY: Just a couple of
21 years ago the Court of Appeals revised its rules
22 to allow schools to take -- students to take
23 more clinical experiential learning credits with
24 the hope that they will. For years when I was
25 reviewing, I would review transcripts coming

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1 from school, and I didn't see many people taking
2 it. And I know certain schools promote it more
3 than others and it certainly seems to be the
4 trend in legal education. I know you expressed
5 that concern, is this Uniform Bar Exam going to
6 impact it. I would like to throw that out there
7 on the floor. If you think it will, you tell us
8 why.
9

10 MS. MAYER: Pat had his hand out, he
11 probably can address that. I have an opinion
12 but I want to hear you guys.

13 MR. WILDES: I don't think that --
14 and again, this goes back to the point I made
15 earlier, that you still have to practice after
16 you take the exam. So I think that students
17 that are using the clinics, the students that
18 are in there now are the same students that are
19 going to take the steps necessary to follow the
20 line of work they want to do. I think a lot of
21 the work that's done in the clinics are
22 indicative of where those students are going to
23 practice after the bar exam. I don't see a
24 change in students enrolling in clinics.

25 I also think that it's possible with

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2 the way the school is set up that you can do a
3 clinic and take the necessary classes to pass
4 the Bar Exam. I don't think it's an either or.
5 And I think it's a great experience to have in
6 field placements. There may not be as much to
7 it, you won't have the time in it as you do the
8 clinic, but I don't think you are going to stop
9 doing those.

10 It looks good on a resume. The way
11 the job market is, you still need all of this
12 experience and that looks good on a resume,
13 having the clinic in there. To me it's all
14 about you have to do something after you take
15 the exam and pass the exam and I think it's
16 going to help the people out long term even if
17 there are changes.

18 MS. MAYER: I was going to say,
19 first of all we now require people to take a
20 clinic, so they're going to have to whether they
21 want to.

22 MODERATOR LYNCH: We are about to
23 require them to take a clinic or a field class.

24 MR. GRADESS: God bless you.

25 MS. MAYER: All I'm saying is that

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2 the fact that they are doing that anyway, and I
3 think the majority of our students take a field
4 placement or an in-house and now they all will
5 regardless. But I think the question is does
6 the UBE change, like the other courses are going
7 to change. Are you going to have to kind of do
8 more courses because of the UBE. And I don't
9 think that's true at all. I think actually you
10 are going to sign up for fewer courses because
11 the New York Bar now tests 21 different subject
12 matter areas, that's going to really
13 dramatically change with the UBE. So there are
14 some courses that maybe you are taking now
15 because of our prep that you probably wouldn't
16 take. I mean I think that there are, especially
17 some of the New York specific bar courses, that
18 you might not take those because they're not
19 going to be tested the same way with the UBE.
20 If you've got FCCC stuff from your first year
21 contracts stuff maybe you're not going to take
22 sales. I wouldn't advise that.

23 MODERATOR LYNCH: So you mean the
24 content outlines with the New York bar has been
25 reduced?

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2 MS. MAYER: Yes, it has.

3 MODERATOR LYNCH: But that could
4 happen without the UBE.

5 MS. MAYER: Yes.

6 MR. HUTTER: I think Connie has a
7 good point. With the UBE coming in and with all
8 the areas that are going to be covered, students
9 may say that gee, sales, that may be a really
10 important course when I'm out in practice but
11 it's a damn hard course and probably going to be
12 a question on that and I'll just blow it, just
13 forget it immediately. I think that may have an
14 adverse impact on student selection in law
15 school, that they're more geared to gee, I don't
16 have to really -- this New York part, they may
17 now be thinking differently.

18 Let me change the focus one bit, and
19 I'm more mulling it over with the minority
20 impact, this is a point that the agenda is
21 getting at, as to the need for studies on this.

22 And as I read Judge Rivera,
23 unfortunately she's still not here, I want to
24 make sure I read her correctly. I think Jim has
25 a good point to do some testing on this to

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1 figure out what's going on. But as I understand
2 it, it looks like the Board's position and Court
3 of Appeals' position may be we're going to use
4 the applicants and take an exam, they're going
5 to be the guinea pigs.
6

7 MODERATOR McALARY: And whenever you
8 have changes, that's unfortunately the case.

9 MR. HUTTER: The percentage, with
10 the disparate impact, if it gets even worse,
11 even a small percentage downwards, I think
12 that's disastrous. I think the Board really
13 needs to think about it and maybe this idea, the
14 three years and doing what Jim is suggesting
15 really should go the way. I'm not sure if law
16 students are going to want to stand there taking
17 three days of Bar Exams. But not for nothing,
18 maybe they need to put a focus group together to
19 do that. I think the Board has to really think
20 more about how to do that testing and that three
21 year grace period I think allows that
22 opportunity to experiment on that.

23 But the other question, I'm not well
24 versed in this area, have there been any
25 lawsuits brought against state board bar

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2 examiners based on disparate impact theory? Are
3 you aware of that?

4 MODERATOR McALARY: Not that I'm
5 aware of.

6 MR. WISNIEWSKI: Would it make sense
7 if we are going to conduct some studies to see
8 how this is going to impact students, we're
9 required -- second year students at this law
10 school take a diagnostic exam to see what we
11 retained from the first year to determine
12 whether we need to take bar review courses.
13 Would it be in the Board's best interest to
14 create a test or a practice test that says okay,
15 every two year student at Albany Law School
16 starting next year, as an example, we will need
17 to take a sample or model MBE course and then
18 you could basically determine these are the
19 students we have and based off these students
20 results, this seems like a good idea, people are
21 performing better than they would normally
22 perform had we just thrown people right into the
23 fire. If I had to take it next year I may not
24 be as prepared as someone who saw an example of
25 what that brought and took it after in the third

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year.

Would that make sense or would that be something that the Board would be looking into as part of getting a focus group which, willing or not, you will still have numbers to base off whether this would be a success and doing it rather than just saying this year we're going to pass this.

When I came to school I had the expectation of taking a New York specific bar. Had I learned my first year and a half or two years New York specific stuff, kind of get those kids prepared for what is to come and create an expectation to say you'll be taking the UBE. I don't know if that's something the Board can consider or if it's a viable option.

MODERATOR McALARY: And I can't answer that. I can't speak for my Board on that. Ultimately right now it's in the hands of the Advisory Committee and they're going to get this transcript and read what you just said there. So if that's an option, that's something they could look at.

In one sense I don't know if they

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2 are looking to create more testing than we
3 already are doing now for students because I
4 think it already is a challenge enough for
5 people admitting to the bar. California does
6 what's called a baby bar after the first year of
7 law school. And unfortunately I think what that
8 does is it weeds out more people going to law
9 school than we might want. I don't know if
10 that -- if there's going to be negatives with
11 anything, with that, and I don't know if that's
12 the way to go. That's just my personal opinion.

13 MS. BREGER: I think it's a
14 brilliant idea. I have a couple of thoughts. I
15 think Patrick, sorry he's not here, is actually
16 right about that he is not going to do anything
17 differently, and he's a very thoughtful student.
18 But I think it's naive to assume that the
19 students are not going to change because there
20 are a large contingent of students that are
21 panicked in their first year about the bar.
22 They're already panicked. As an advisor,
23 they're already asking me what should I do about
24 the bar. You shouldn't be talking about the
25 bar, you should be taking your first year of law

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1 school, don't even think about it. So I think
2 he represents a particular enlightened group of
3 students. But I think it makes you think that
4 students won't give up clinics and give up
5 particular demonstrations in thinking that
6 they're preparing for this situation.
7

8 MODERATOR LYNCH: One point of
9 information to Christina and Jonathan, and I
10 don't know if folks who are not in the law
11 school know this, but in many law schools now
12 the bottom quarter of the class are required to
13 take a large number of bar courses. So back
14 when we all went to law school there was much
15 more choice. Now if you don't grade well on law
16 school exams, because we know that they need
17 practice with these kinds of exams because we
18 want people to succeed, there have been
19 decisions made at many law schools that certain
20 students that don't get a certain grade point
21 average are required to take a selection of bar
22 courses.

23 MR. GRADESS: Really?

24 MODERATOR LYNCH: Yes.

25 MS. MOY: And here it's the same?

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2 MODERATOR LYNCH: Oh, yes.

3 Absolutely.

4 MODERATOR McALARY: I have to say
5 most schools, all of those know, those are the
6 people that are most at risk of failing the bar
7 exam. That's an indicator of how you're going
8 to do on the bar exam in law school and perform
9 on it.

10 But Mary, and I don't mean to get
11 into a long discussion, I know schools have done
12 that and I know this school has set up
13 particular curriculums for them, but from what
14 I've heard that hasn't made a difference and the
15 passing rate hasn't changed from this.

16 MS. MAYER: It hasn't made any
17 difference?

18 MODERATOR LYNCH: Right.

19 MS. MAYER: If it makes no
20 difference at all, we shouldn't do it.

21 MODERATOR LYNCH: But everybody
22 pressures law schools to do that to get students
23 to pass the bar. My personal instinct is put
24 them in the clinic, we'll motivate them, we'll
25 create those brain cells and we'll give them

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2 substantive classes and we can get them to that
3 point. But the bar exam rules legal education
4 right now.

5 I'm sorry, Christina.

6 MS. RYBA: So if the UBE goes into
7 full swing without being fully vetted and it's
8 discovered that there's an adverse impact on
9 minorities, will the Board go back to the New
10 York State Bar? How do you transition back if
11 you transition forward without being fully
12 vetted?

13 MODERATOR McALARY: I can't answer
14 that. I'm not the person that would make that
15 decision. Right now it's in the hands of the
16 advisory committee.

17 MODERATOR LYNCH: But Diane Bosse,
18 who's the chair of the Board of Law Examiners,
19 is on the Advisory Committee and will be
20 listening to this transcript. So I think that
21 that's a really important question to ask, what
22 measures are going to be taken to do a disparate
23 impact analysis. What standard are they going
24 to hold themselves to in terms of saying what
25 they are going to do.

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2 MS. WOOD: To provide an answer to
3 that. If we go to the UBE and we see that there
4 is a disparate impact and it's determined that
5 we want to go back, there's nothing
6 contractually that's holding us to staying with
7 the UBE. There can be change after that.

8 MS. RYBA: Are there a lot of
9 resources to go into transition to the UBE now?
10 Is it an expensive transition?

11 MS. WOOD: Well, our time that we
12 spend studying this certainly is. Maybe John
13 could speak better to that.

14 MODERATOR McALARY: The bigger
15 expense is the purchase of exam materials. The
16 National Conference of Bar Examiners, they are
17 the ones that develop, and it takes a great deal
18 of research and development to come up with
19 testing items and they charge the jurisdiction.
20 They charge for using the MBE. They charge for
21 using the MPT. They charge for using the MEE.
22 If you go through the UBE currently, I think
23 that price is, New York would have to pay them
24 \$114 for every applicant that we get the
25 materials for. And then of course we've got

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2 they'll have six MEE essay questions plus two
3 MPT, so I've got to hire two additional grading
4 teams for the July and the February exams. So
5 those are the expenses.

6 And then the unknown, is it going to
7 result in more applicants. If it's more
8 applicants taking the test in New York, I've got
9 to have more seats and that's a great expense.
10 Those are the expenses you had.

11 MS. MAYER: Just a quick question
12 because someone raised this with me a couple of
13 weeks ago, that there is a potential conflict of
14 interest here because some of the members of the
15 Board of Bar Examiners are also on the Board of
16 Directors For the National Conference. And I
17 don't know how many people that includes but
18 that does seem like -- it feels uncomfortable.
19 And I don't know if anybody has said that out
20 loud, nobody yet today has. So I just want to
21 raise that, is that a concern? I would think
22 the Court of Appeals would be a little
23 concerned.

24 MODERATOR McALARY: Let me clarify,
25 there's one member of the Board of Law Examiners

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2 who is on the Board of Trustees for the National
3 Conference of Bar Examiners and he's currently
4 their chair this year.

5 New York has traditionally always
6 had a member of its Board of Law Examiners on
7 the Board of Trustees and we view it as an
8 opportunity to get input into the direction that
9 NCB is doing. So that goes back to as far as
10 into the '70s, the '60s, there's always been a
11 member of the Board.

12 MODERATOR LYNCH: And that is the
13 member who --

14 MODERATOR McALARY: And that is a
15 former member of the Board of Trustees, that's
16 what it is.

17 MS. MAYER: Diane? I must have
18 picked up her name.

19 MODERATOR McALARY: She's a former
20 member of the Board of Trustees.

21 MS. MOY: Then that person should
22 abstain.

23 MODERATOR LYNCH: But she's also on
24 the Uniform Advisory Committee. So she's on
25 Judge Rivera's committee. Right, isn't that the

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2 same person?

3 MODERATOR McALARY: That's correct.

4 MODERATOR LYNCH: And that the
5 Missouri judge who advised at the public hearing
6 is also on their advisory board, I believe.

7 MODERATOR McALARY: NCB's Board of
8 Trustees, that's correct.

9 MR. RAUSCH: A question that maybe
10 Connie could shed some light on. Assuming
11 students are going to change their curriculum
12 choices to focus only on what is tested on the
13 bar, I personally disagree with that, we can
14 assume that's going to happen. What effect is
15 that going to have here on administration and
16 faculty choices and how long it would take a law
17 school to reach that point to be ready for this
18 shift?

19 MS. MAYER: I guess my opinion was
20 honestly that I didn't really think it would
21 have that kind of an impact. Again, the MBE
22 topics, they are already preparing for in
23 whatever way they are preparing for those, and
24 so the MEE questions I don't think cover any
25 additional topic areas. So I don't think

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there's going to be a dramatic change.

Honestly I think if anything happens maybe they're not going to be taking surrogates court, and they're not going to be taking Professor Lytton's mat law because it's so New York specific that I think what they'll be doing is backing out of some of the New York specific courses. I guess I don't feel like that's a huge problem, as least from the law school's point of view. I think individual faculty members may have to change the balance of what they're teaching to maybe put more emphasis on the MBE --

MODERATOR LYNCH: The MEE.

MS. MAYER: But I think MEE, it's the same coverage, isn't it?

MODERATOR LYNCH: But isn't majority jurisdictions versus the essays right now that the students take are New York specific that --

MS. MAYER: No, but I'm talking about what they will be studying now. They will be studying the same topic areas for the MBE that they would for the MEE.

MODERATOR LYNCH: That they would

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1 for the MEE. Got it.

2 MS. MAYER: As they would for the
3 multistate MSA examination. So I don't think
4 we're adding more courses for them. In fact
5 because the focus will go away from New York
6 law, they probably don't have to take some of
7 the New York specific courses that they're
8 taking and they can sneak by. Because you know
9 the professional bar companies are going to
10 treat these New York distinctions with five hour
11 lectures and then outlines and maybe they can
12 cover those 50 questions. When you think about
13 it, 50 questions covering 20 subject matters
14 areas in New York bar, it's two questions.

15 To go back to Mike's point,
16 administrative law, I don't know if it would be
17 covered, I don't know if it's in the new content
18 outline, but if it is maybe there would be one
19 or two questions. I wouldn't take
20 administrative law, unless I really loved
21 administrative law, I wouldn't take it for that
22 reason.

23 So I don't know if it would make a
24 huge difference in terms of course selection in
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2 that way, I think this would create a burden. I
3 think students would back out of those courses.
4 And maybe they would go to the clinic and that
5 may be a better choice anyway.

6 MODERATOR LYNCH: I keep thinking of
7 Tom Burnsy saying "we teach law school as if FDR
8 was never president." Because administrative
9 law is really what ruled every -- right. Once
10 we had FDR we actually created agencies and
11 bodies, so it would be too bad if folks stopped
12 taking administrative law.

13 MS. GRADESS: Could I go back to the
14 race study for a minute?

15 MODERATOR LYNCH: Yes.

16 MR. GRADESS: Mike said something
17 that I thought ought to be reflected clearly in
18 the record. I thought it was but it bears
19 repeating. This kind of what you call shoot
20 fire aim approach that suggests you can't study
21 change until after you have guinea pigs is
22 really -- I think this idea for 2L students is
23 brilliant.

24 But if I gave \$400,000 or four
25 million to Lockheed Martin, they could come up

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2 with 120 different ways to study this phenomenon
3 within six months and have an answer.

4 The reality is, you know, at the
5 risk of citing the FDA who yesterday appointed a
6 doctor as their deputy who's been a consultant
7 to Big Pharma, clinical trials in medicine don't
8 proceed that way, at least not since
9 thalidomide. You take an informed consent, you
10 study people, you study them carefully and you
11 don't kill them first. And it seems to me this
12 is in a very real way, I don't know that it's
13 more important but it's equally important to
14 death. This is about the substantial exclusion
15 from the practice of law of people of color
16 without evidence and the possibility that these
17 terrible numbers could be made worse by a change
18 that is arguably wholly unnecessary except in
19 the interest of the class of lawyers who want to
20 have portability. I find that disheartening.

21 I'm not suggesting it can't be done.
22 I'm not suggesting it can't be done in three
23 years. I do suggest that it ought to be studied
24 before it's done. I think there's many ways
25 that it could be looked at, I'm sure. I don't

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2 possess them, I'd be happy to think through
3 them. But there are people who do this for a
4 living. So I just think that the point that was
5 made was really important.

6 If you look at the New York
7 Commission on Judicial Minorities, which I think
8 made its first report in 1990, it was a quarter
9 century ago. If you go back and read that
10 report, there's a number of things not yet done
11 in this area. We studied at a point in time and
12 not implemented. And this is another similar
13 thing and I would not like it to be repeated.
14 I'm sorry.

15 MR. AYERS: My sense is there's a
16 consensus that we agree with what Jonathan said.
17 And I'm a little concerned in terms of the
18 disparate impacts but the minimal impacts
19 apparently that our transcript is going to make
20 on the deliberations of the committee, because
21 of the quality of the transcript. And with all
22 due respect, I don't think that every member of
23 that committee is going to sit here and listen
24 to three hours of our transcript.

25 So what I would like to do, whether

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2 this is permissible or not, is to make a motion
3 that we -- Jonathan, we can start with you.
4 That we make a motion on this point and that we
5 actually take a vote on it so that rather than a
6 three hour transcript we actually have not every
7 point, but at least this one, which I think we
8 all feel is terribly important, therefore delay,
9 study and don't jump the gun and shoot and find
10 out whether we hit somebody or not but in fact
11 go ahead.

12 And I think Jonathan is right, those
13 who are experts in testing must be able to come
14 up with a way. If it takes two or three years,
15 whatever. I think your point was excellent in
16 terms of an idea because if you think about the
17 new changes, what are we going to do, ask people
18 to spend another day? We can't do that. And
19 can we slip in enough questions so it's valid,
20 I'm not sure. Your idea of having it as a test
21 for law students, that's a way to do it, some
22 methodology to test before we go ahead.

23 MR. RAUSCH: Jim, I would second
24 such a theoretical motion. But there's a great
25 deal of data to be mined from states that have

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2 the UBE already and I think so many of the
3 questions that we've raised today, there's
4 information out there that can be gleaned, I
5 think can be very valuable in the process. I
6 think it's an excellent proposal.

7 MS. WOOD: I don't speak for the
8 committee but I think the committee would really
9 appreciate any suggestions like the one we
10 already have about how we could study that
11 issue. There's been this idea that it's really
12 almost impossible to compare how students --
13 what the impact would be, because you're never
14 going to have the same pool of applicants taking
15 the New York Bar Exam and the UBE. But the
16 committee would love any suggestion as to how we
17 can study that.

18 They have reached out to schools in
19 other jurisdictions, because schools sometimes
20 track their demographic and the passage rate of
21 those students. That's at least one way we're
22 trying to look at it. Any other suggestions as
23 to how they could study this and how it could be
24 tested would be appreciated.

25 MODERATOR LYNCH: I would love

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2 someone to write the motion. Probably John and
3 I can't vote as moderators. But the other
4 question I have to ask you, California has
5 adopted the UBE? No, they do the MBE? Which
6 parts have they adopted?

7 MODERATOR McALARY: California uses
8 the MBE.

9 MODERATOR LYNCH: And the MPT.

10 MODERATOR McALARY: They have their
11 own MPT. California was the first jurisdiction
12 in the country to use an MPT. They were the
13 innovators of it.

14 MODERATOR LYNCH: They do publish --
15 they collect the data on race and disparate
16 impact and they do publish it. And the last
17 iteration of it was particularly troubling from
18 July 2014. But I wasn't able to get data that
19 distinguished whether it was the MBE. My
20 personal thing, I think multiple choice is
21 inherently more biased. But I was not able to
22 get the data. I was trying this past week by
23 e-mailing professors in California to get the
24 data that separates, Judge Rivera I think or
25 someone asked, between the breakdown on the MPT,

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1 the MBE. What parts of it would have been
2 relevant or not. It's not a perfect analysis
3 but most lawyers have to make judgements all the
4 time with imperfect data analysis.
5

6 So I do think since California has
7 been consistently publishing disparate impact
8 data over time, there is information there to at
9 least examine and compare the New York
10 information and to make a judgment about.

11 MS. MOY: So can I ask a question
12 about the theoretical motion? How would the
13 movement, you Jim, feel about the fact that the
14 committee, and I heard from the judge, is
15 already gathering what imperfect data they can
16 from the minority law student associations at
17 law schools in the states where the UBE is used?
18 Is that right?

19 MS. WOOD: We're reaching out to
20 schools to ask if they keep data on the past
21 rates for every demographic group both before
22 and after the adoption of the UBE to see if
23 there was any impact. There are limitations to
24 that data but we thought it might illuminate
25 that issue.

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2 MS. MOY: For me that data, as
3 imperfect as it is, would be very important.
4 And I'm not sure I'd say delay for -- you know,
5 I'm not even sure we would get that data,
6 because there would be a lot of steps to go
7 through, even from the current UBE states. So I
8 don't want to say that I would support what
9 could in effect be permanent delay, in light of
10 the fact that -- there's going to be data, the
11 committee is going to get what they can get and
12 it will be, I believe, you know, imperfect is
13 maybe accurate but it might be reliable too.
14 Because the majority of law students have a
15 feeling about the impact on their group and
16 their state and their school and I wouldn't
17 doubt that accuracy.

18 MR. HUTTER: The committee should be
19 really applauded for the reach out that they're
20 doing. My question would be, and I don't want
21 to try to intrude on the committee's
22 deliberations. When that information is
23 obtained, and I think it's so important,
24 imperfect or not, can that be distributed and
25 made available to us before the committee

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2 actually acts on it? Maybe we can look at it
3 and the state bar, the minority associations can
4 say look at this, maybe give our input at that
5 point on the raw data?

6 MS. WOOD: I will certainly float
7 that idea to the committee and they'll make that
8 determination. I don't want to speak for them.

9 MR. HUTTER: I understand.

10 MS. WOOD: But we have told the
11 schools that we're reaching out to that if they
12 give us this data it may be subject to these
13 other --

14 MODERATOR LYNCH: I have a question,
15 Maggie. Why can't -- so not as moderator, this
16 is just someone who likes to strike deals. The
17 NCBE is desperate for New York to adopt this.
18 They want it more than we do. They have
19 psychometricians, they have more staff than any
20 of us public interest, minority group, Board of
21 Law Examiners, poor Maggie would at the Court of
22 Appeals. They should be gathering the data
23 before New York -- I don't come cheaply --
24 before New York is going to put it's imperator
25 on the NCBE. Why don't they? With all of their

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1
2 staff and because they want this so much, they
3 should be reaching out to law schools.

4 And the Advisory Committee could use
5 their weight and their persuasion to ask the
6 NCBE to go get it for them and to come back and
7 say whether or not they could get it or not
8 because they're the people positioned to do
9 that.

10 MR. GRADESS: Mary.

11 MODERATOR LYNCH: Yes.

12 MR. GRADESS: I want to clarify
13 something at least that I'm saying. And I know
14 that whenever a railroad is getting close to the
15 station it's hard to ask these kinds of
16 questions.

17 If all of these schools are
18 collecting data and they're not collecting data
19 with this issue in mind or their data is
20 insufficient with this issue, what I am really
21 talking about is a research design that will ask
22 and answer this question. The way this is done
23 in the real world is to design a hypothesis, to
24 create a flow chart that starts somewhere before
25 the LSAT and goes all the way to the practice

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1 line and it looks at it across the range of
2 potential variables, some of which will be
3 dependent, some of which will be independent,
4 all of which will be controlled for and upon
5 which chi-squares will be run and real
6 scientists will examine the proposition.
7

8 No collecting from gratuitously
9 interested or non-interested schools that never
10 even asked this question, collecting the data
11 and then we impose on BALSAs chapters their
12 self-reported opinion of how bad it is for them.
13 That's not the study I'm talking about. I'm
14 talking about an actual study.

15 And the generation of resources. I
16 love Mary's idea, because if they are that
17 hungry they ought to pay for it.

18 And when I referenced Lockheed
19 Martin for the research, this is done every day
20 in all of the fields that we interface in. It's
21 not a new idea. It's not rocket science. It's
22 the way it ought to be done. And for that
23 reason the delay ought to be as long as it takes
24 to do it right and no longer. That's what I am
25 talking about.

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2 MODERATOR LYNCH: And the other
3 issue is I think some of the states, and this
4 could be a New York position, but I don't know
5 how many diverse test takers there are in North
6 Dakota, South Dakota, Nebraska. I'm sorry, but
7 I don't know if we're going to get the same pool
8 that we're getting in New York. The
9 statistician in Connie, who has like a masters
10 in this, there has to be an appropriate pool.

11 MS. MOY: A sample.

12 MODERATOR LYNCH: So I do think
13 though that the NCBE can give us the data
14 nationally on the MBE, they can give us what
15 they can get from what they have. So they don't
16 have to answer this question but they can give
17 us data about the MEE, if there's a disparate
18 impact on that versus the MBE. And if not,
19 where and how does it compare. And if they
20 don't have it then they have to say we don't
21 know.

22 MS. MAYER: It is funny to try to
23 basically sell a product without any backup of
24 the value of it. I think it really feels like
25 that's what's happening.

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2 MR. GRADESS: And, you know, there's
3 one other thing. This whole thing about
4 licensure is not uniquely restrictive to the
5 law.

6 MODERATOR LYNCH: Right.

7 MR. GRADESS: The certification of
8 professionals is a business everywhere it
9 exists. And there are underlying economic
10 interests. When you compare this conference to
11 ETS and you look at the impact of ETS, they are
12 still looking for my math SAT somewhere in the
13 bowels of Princeton, New Jersey.

14 MODERATOR LYNCH: They lost my bar
15 exam. Okay, I just want to put that on record.

16 MR. GRADESS: It strikes me that
17 there has got to be social science research on
18 just the question of test taking. And I'm sure
19 that there are critiques of test taking the LSAT
20 that would impeach it and if there is a
21 relationship between the LSAT and bar passage,
22 as there is between bar acceptance. These are
23 all questions that need to be answered. I would
24 like that they be answered across the range of
25 all the issues.

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2 I'm really not an antagonist of UBE,
3 I'm an antagonist of bar examinations and
4 certifications and stuff. But it strikes me you
5 have a moment in time when if there could be a
6 disparate impact here, we ought to staunch the
7 bleeding, if that's the right word.

8 MODERATOR LYNCH: Michael.

9 MR. LIEBERMAN: I kind of want to
10 just shift gears here for a minute. And I
11 wanted to address the issue of portability. And
12 this was alluded to earlier.

13 So I mean of course it's been said
14 that this new format allows New York law
15 students to apply for jobs in other
16 jurisdictions. But as was mentioned earlier, I
17 don't know how many people, just anecdotally,
18 most people, the overwhelming majority of New
19 York law students want to practice in New York.
20 Whereas students in other states do have an
21 interest in coming here. In fact, we have the
22 data here.

23 In 2012 half of New York Bar Exam
24 test takers came from out of state law schools.
25 And I would be willing to bet, although I don't

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2 have the data in front of me, that that's not
3 the case in other jurisdictions. That most are
4 instate test takers that went to instate law
5 schools.

6 So the flip side of allowing New
7 York law students to apply and to have more
8 mobility and portability to other jurisdictions
9 is what's mentioned here in the arguments in
10 this report, bullet point number four on page
11 six. The arguments in favor of this is that law
12 firms in New York will be able to recruit from a
13 more geographically diverse applicant pool. But
14 what about us? What about the New York law
15 students? We already have so much competition
16 and the idea that we need to reach beyond New
17 York for qualified applicants is to me just --
18 there's no basis for that assumption.

19 So beyond that I think, and as Judge
20 Rivera mentioned earlier, they're already coming
21 to New York to take the exam. And I agree, I
22 think that's true. But I think there's no
23 denying that this would make it easier to do
24 that. So I think it would encourage more out of
25 state law students to take advantage of this

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2 opportunity and I think we would see an increase
3 not only in students taking the New York Bar
4 Exam but then, as a consequence, applying for
5 jobs in New York.

6 And so I'm just really concerned
7 about -- portability for whom I guess is my
8 question. There is not as much of a concern for
9 portability of New York law students, it's
10 really just allowing other students to come to
11 New York and make it tougher for us to get jobs
12 in an already very difficult job market.

13 MR. GRADESS: May I call the
14 question? Because I think this motion, which
15 has been seconded, really should be part of the
16 record.

17 MR. AYERS: We haven't really made
18 the motion yet. Jonathan, have you drafted
19 something?

20 MR. GRADESS: I started and got side
21 tracked.

22 MR. AYERS: I have the first whereas
23 -- one whereas. Whereas --

24 MODERATOR LYNCH: Capital region
25 focus group.

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2 MR. AYERS: -- is concerned about
3 the possible disparate impact of adopting the
4 Uniform Bar Exam on minority students;
5 therefore, we request that the task force -- and
6 that's as far as I got -- in effect do this.
7 Now we have to figure out in terms of what we
8 want them to do. Do whatever studies are
9 necessary to be as certain as is possible that
10 adopting the Uniform Bar Exam will not in fact
11 have a significant disparate affect on minority
12 students. Please modify.

13 MR. RAUSCH: I wonder if we want to
14 add to this at all to request that there be
15 studies of states that have adopted this and the
16 other topics we've raised.

17 MR. AYERS: Such studies could
18 include such things as.

19 MR. RAUSCH: Disparate impact,
20 curricular choices and whether there's minimized
21 participation in clinical or externships.

22 MR. AYERS: What are the sort of
23 things that we can suggest in terms of studies?
24 You're already trying to find out but I don't
25 have in front of me the words but I do have the

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1
2 concept of what you're doing. But also I'd like
3 to include a reference to your suggestion as to
4 having student --

5 MR. GRADESS: Jim, would you accept
6 an idea that one of my host advisors has just
7 suggested to me? Why don't we make the motion
8 and then include in it that we'll put in writing
9 a more formalized expression of what we're
10 talking about, which we'd have a small little
11 group do it, can even be done today. What you
12 said, take all steps necessary to secure a
13 properly designed methodologically sound study
14 of the question of disparate impact, the
15 suggestions for which design we will forward
16 directly to the committee. Does that do it?

17 MODERATOR McALARY: I just thought
18 that if it's something this important that you
19 want the Advisory Committee to see, rather than
20 just be buried in the transcript. The committee
21 is still taking comments and I think this
22 certainly would be a comment. And if it's
23 something that the members of this group want to
24 sign onto, Mary and I have everybody's e-mail,
25 you can exchange it and send the document around

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1 and whoever wants to sign on can sign on or
2 abstain or whatever they want to do.
3

4 MR. AYERS: Jonathan, just
5 modification, you are suggesting that the only
6 thing that can be done, and the way you phrased
7 it, the only thing we're suggesting that should
8 be done is a specific design study. I think
9 we've heard some other valuable opinions. It's
10 possible that they can take a look at this and
11 say we can't do that. I think we ought to have
12 things to determine whether there's a disparate
13 impact including such things as number one would
14 be yours and then have number two, which would
15 be the references of study or what's being done,
16 getting gathered, and number three doing such a
17 thing as yours. So that would be examples of
18 things that could be done.

19 MODERATOR LYNCH: That would be
20 qualitative and quantitative.

21 MS. MOY: I'm good with that. Mary,
22 I have to leave at 11:45.

23 MODERATOR LYNCH: I think most
24 people do. I know you have a board meeting,
25 Christina.

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2 MS. RYBA: Yes. So should we vote?

3 MODERATOR LYNCH: Should we vote
4 now?

5 MS. RYBA: I think we can vote now
6 and then probably put something more formal in
7 writing.

8 MR. GRADESS: I think you should say
9 it again, we should make it clear in the record
10 that we're going to submit something and then we
11 should plan how we write it.

12 MODERATOR LYNCH: Okay.

13 MS. MOY: Jonathan, you are going to
14 talk to your researcher, is that what you're
15 saying, to frame it up right?

16 MR. GRADESS: No, I think we can
17 frame it up right.

18 MODERATOR LYNCH: So say it again.

19 MR. GRADESS: Jim is going to say it
20 again.

21 MR. AYERS: I'm going to say it
22 again, but when I say it I'm going to say such
23 things as one, and then you can do yours for
24 what yours is. And is there somebody that could
25 do number two, talking about various things that

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2 we are arguing or could be doing in terms of
3 other states and examining stuff? Is there
4 somebody else that can describe what that
5 suggestion is going to look like?

6 MODERATOR LYNCH: Number two, Rob
7 and I just talked about, I think it clouds your
8 issue. So I think that although that's an
9 important thing --

10 MR. AYERS: You do?

11 MODERATOR LYNCH: I do.

12 MS. MOY: Wait, you just sold it,
13 qualitative and quantitative.

14 MODERATOR LYNCH: No, we were
15 talking about -- you meant number two --

16 MR. RAUSCH: I had raised the point
17 of one discussion we had today of whether
18 there's any data from other states that can
19 reflect upon whether changes to the UBE will
20 reflect students curricular choices, whether
21 this is going to have students make decisions
22 away from experiential learning and clinical
23 programs. Maybe that's a separate issue to
24 leave on the side. My point is there's data to
25 be mined from the other states. We're leaving

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that question out of our motion.

MODERATOR LYNCH: We can do a second motion if we want on that.

MR. AYERS: You want to say number three?

MR. WISNIEWSKI: Sure.

MR. AYERS: Whereas, the task force --

MODERATOR LYNCH: The capital region focus group on the UBE.

MR. AYERS: -- in the course of its discussions has agreed that we're all concerned about the possible disparate impact of adopting the UBE on minority students. Therefore, the focus group requests the task force before -- do they adopt or recommend?

MS. MOY: They recommend.

MR. AYERS: -- before the task force recommends --

MODERATOR LYNCH: To the court.

MR. AYERS: -- to the court adoption of the UBE undertake sufficient studies to be sure that adoption of the UBE will not in fact have a significant disparate impact on minority

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2 students. For example, we could --

3 MR. GRADESS: -- take all steps
4 necessary to secure properly designed
5 methodologically sound study of the question.

6 MR. AYERS: Number two.

7 MODERATOR LYNCH: No longer.

8 MR. AYERS: Number two, of taking
9 data from other states that have adopted the UBE
10 or have other information available that might
11 be informative as to whether adoption of the UBE
12 will in fact have such disparate impact.

13 Number three --

14 MR. WISNIEWSKI: Creating a sample
15 UBE exam to be administered to all second year
16 students at New York law schools which will
17 acquaint them with the testing conditions that
18 the UBE would bring to New York students and
19 then compiling that data to insure
20 administrators of the law schools of the
21 ramifications of adopting the UBE.

22 MODERATOR LYNCH: And how about
23 Lillian's point?

24 MS. MOY: I think my point might be
25 similar to what he ditched, which is the

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2 imperfect data that the judge referred to that
3 the committee is already gathering from law
4 schools in states where the UBE is currently
5 being administered.

6 MODERATOR LYNCH: No, we were
7 ditching clinical assessment, had nothing to do
8 with that. We want to include your thing, so go
9 ahead.

10 MS. MOY: Well, I'm not sure of the
11 form but it would refer back to the data that
12 the committee is considering, the results
13 demonstrated by the data that the committee is
14 already gathering from law schools and states
15 where the UBE is currently.

16 MODERATOR LYNCH: Law schools,
17 minority bar associations and other minority
18 student organizations.

19 MS. MOY: In law schools in states
20 where the UBE is currently administered. And
21 can I just say --

22 MR. AYERS: Is that a rephrasing of
23 number two?

24 MS. MOY: It's number two, or three,
25 or four. It doesn't matter what number it is.

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2 MODERATOR LYNCH: Off the record.

3 (Off the record.)

4 MODERATOR LYNCH: The modification
5 would be to change the word minority to law
6 graduates of color and test takers of color.

7 MS. MOY: Sure, that sounds good.

8 MR. GRADESS: That's good.

9 MS. BREGER: Do we need to second?

10 MR. RAUSCH: I second.

11 MODERATOR LYNCH: Rob Rausch seconds
12 it. All in favor.

13 MR. GRADESS: Aye.

14 MS. MOY: Aye.

15 MR. WISNIEWSKI: Aye.

16 MR. BARRANCA: Aye.

17 MS. MAYER: Aye.

18 MS. RYBA: Aye.

19 MR. AYERS: Aye.

20 MS. BREGER: Aye.

21 MR. HUTTER: Aye.

22 MR. RAUSCH: Aye.

23 MR. LIEBERMAN: Aye.

24 MR. RAUSCH: We were not ditching my
25 point, it just was not part of the application

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2 for this moment.

3 MODERATOR LYNCH: Are there any
4 abstentions? Maggie, John and Mary Lynch.
5 Anybody else?

6 MR. GRADESS: So may I ask a
7 technical question? Can we get the transcript
8 of this conversation to put something in writing
9 before the transcript is given to anybody else?

10 MODERATOR LUNCH: That's between
11 John --

12 MR. GRADESS: So when we get it we
13 can put it in writing?

14 MODERATOR LYNCH: Or at least the
15 end of it you mean?

16 MODERATOR McALARY: The transcript
17 is going to be sent to me and I have to send it
18 on to the New York State Bar Association and the
19 Committee on Professionalism and I don't know if
20 I'm allow to send it around, but certainly that
21 portion of it, at a minimum.

22 MR. GRADESS: That's what I'm
23 talking about. We can probably do it without
24 it.

25 MR. AYERS: I think it would be

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helpful to have it.

MR. GRADESS: It got a little complex there.

MR. AYERS: I will try and get that.

MR. GRADESS: And I will be happy to look at it.

MR. AYERS: Does everybody have everybody's e-mails?

MS. BREGER: We were all on the same e-mails.

MODERATOR McALARY: Let me make a point too, that the Advisory Committee, the task force on the Bar Exam, is still taking comments. So if anybody here wants to expand on anything they said here today or any issues, I would strongly encourage you to put that into a writing. It could even be an e-mail. Am I correct, Maggie, that e-mail account is still open?

MS. WOOD: Yes.

MODERATOR McALARY: I don't have it right in front of me, I will circulate the link to the task force website when we're done here today and that has the address on it where you

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1
2 can send comments to, it has the e-mail address
3 where to send comments to. There's been a
4 number of really wonderful things that were said
5 here today and if anybody wants to really expand
6 on it, I would certainly encourage you to do so.

7 MR. HUTTER: And the cut off date is
8 March 1st?

9 MS. WOOD: March 1st.

10 MODERATOR McALARY: March 1st. And
11 if you know anyone else that you would like to
12 encourage, feel free to do so. Share that
13 information with them.

14 MR. RAUSCH: I guess to that point,
15 I think it would be great to see more publicity
16 about these issues, more clarification. Even in
17 the comments in our group today, there was a
18 misconception of what, for example, what 266
19 means.

20 When I was telling my contemporaries
21 about this, our focus group, many had no clue at
22 all that this thing was coming. So I do think
23 we need more time for public -- I'd like to see
24 more time for public comment, I'd like to see
25 more publicity and clarification and

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explanation.

MODERATOR McALARY: I know Maggie, who is working with the committee, the Board of Law Examiners, we've tried to send it out to who we can. We did the law schools, it's on the New York State Bar Association website. If someone is not involved in the State Bar Association and at a law school, I certainly understand that they may not see. It's been in the Law Journal, but it's always a challenge to try and get it out to everybody.

MS. WOOD: Do you have any suggestions on how to reach them?

MS. BREGER: Mainstreaming.

MS. WOOD: It's been in the Law Journal and there's a legal publication out in Rochester.

MR. GRADESS: New York Daily Record.

MS. WOOD: Yes.

MODERATOR McALARY: The New York Times has written a little bit about it.

MS. WOOD: And we've contacted all of the local bar associations, all the New York law school deans but if you have any suggestions

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2 for a better outreach, we'd be open to that.

3 MODERATOR McALARY: And frankly the
4 local, like the Times Union, not to pick on the
5 Times Union, but the local media just isn't
6 interested in what's going on in the legal
7 profession.

8 MR. RAUSCH: I think more along the
9 line of local bar association, maybe it's not
10 necessarily the local bar association, maybe
11 it's a reflection on them that they're not
12 disseminating this information.

13 MODERATOR McALARY: Because some
14 county bar associations have put in comments to
15 it and others maybe have been more active in
16 sending it out to their members and others may
17 not have. It's unfortunate. It is certainly,
18 as you mentioned, a very important issue.

19 MODERATOR LYNCH: Do you go to the
20 Conference of Bar Leaders directly to
21 distribute.

22 MS. WOOD: So Judge Prudenti, a
23 member of the task force, sent this information
24 to either the director or the president of every
25 county bar association in New York State.

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2 MR. GRADESS: There is a collective
3 entity called the Conference of New York State
4 Bar Leaders, which has a little bit more of a
5 proactive stance. And I'm sure if any of you
6 called and asked they would put it higher on
7 their agenda. I'm not sure that people are that
8 much more responsive but it's a different entry
9 point.

10 MODERATOR LYNCH: Okay. We promised
11 to try to get you out of here a little bit
12 early. Is there anything else that's left that
13 we can change the world with between now and in
14 the next two minutes that we need to do?

15 MR. RAUSCH: It's a different focus
16 group.

17 MODERATOR LYNCH: First of all, I
18 just want to thank everybody. You came so
19 prepared, you clearly read -- you highlighted
20 that stuff, you don't do that in my class.

21 (Laughter.)

22 MODERATOR LYNCH: But you all were
23 so prepared on this topic; your passion, your
24 commitment. Actually I feel rejuvenated. I was
25 very jaded at one in the morning but now I feel

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1
2 good again. So I just want to thank you all for
3 contributing to what I think is a really, really
4 good discussion and we'll make sure that the
5 highlights are communicated on.

6 MS. WOOD: I will report to the
7 judge this afternoon.

8 MR. RAUSCH: Kudos to our
9 moderators. It was a dynamic and great
10 discussion.

11 MR. GRADESS: Thank you for inviting
12 us.

13 DEAN OUELLETTE: Thank you all.
14 Just coming in and hearing the recommendations,
15 you did a lot of work today, so well done.

16 MODERATOR McALARY: Thank you for
17 hosting us. It's always a pleasure coming back
18 to the law school. It's one of my favorite
19 places, now. Thank you.

20 (Whereupon, the Focus Group was
21 concluded.)

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