

Journal of Gender, Social Policy & the Law

Volume 15 | Issue 5

Article 6

2007

Transcript: The Bar Examination

American University Washington College of Law Disability Rights Law Clinic

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Recommended Citation

American University Washington College of Law Disability Rights Law Clinic. "The Bar Examination." *American University Journal of Gender, Social Policy & the Law*. 15, no. 5 (2007): 861-879.

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THE BAR EXAMINATION

ASSISTING LAW STUDENTS WITH
DISABILITIES IN THE 21ST CENTURY:
BRASS TACKS

PANEL 3: THE BAR EXAMINATION
Washington, D.C.
Thursday, March 28, 2007

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PROCEEDINGS:

ANNOUNCER: The following podcast is a production of the Washington College of Law at American University. Any unauthorized use or distribution is strictly prohibited.

TONY TORAIN: We want to get started on our session today around the bar exam, students with disabilities and the bar exam. We have a very distinguished panel that is going to share with us today.

One of the questions that we often have to wrestle with as people who work with students with disabilities is, “How do we fashion an accommodation that is responsive to whatever the student’s disability is?” We do have broad categories that we try to work with—time-and-a-half, time-and-a-third, double-time, and that sort of thing—but how do we work with the student who has a particular issue, in such a way that we are leveling the playing field for the student without being unfair to other students, colleagues, and associates?

We are going to hear some discussion around that today, and we have three very distinguished panelists that I hope will talk for about ten minutes each, and for the last half-hour, we will open it up for questions from the floor.

So to my immediate right is Melinda Saran, she is the Vice Dean for Student Affairs, University of Buffalo Law School, and, of course, more detailed bios are included in the packet that you received at registration. Next to her is a very outstanding attorney from Brooklyn, New York, Jo Anne Simon, and she is the lead plaintiff in *Bartlett v. New York*.

JO ANNE SIMON: Lead plaintiff’s attorney.

TONY TORAIN: Lead plaintiff’s attorney. You cannot always believe what you read. She is the lead plaintiff’s attorney and her bio, in greater detail, is also in the materials.

And then thirdly, we have Barbara Hergenroeder, who is the Director of Character and Fitness for the State Board of Law Examiners for the state of Maryland, somebody with whom I have had the opportunity to work with on occasion.

So without further ado, we are going to start with Melinda and we will go right down the line and then we will then conclude with questions.

MELINDA SARAN: As someone who has worked with the students with disabilities at Buffalo for the past seventeen years, I have to say that I start early and take a very strong position with them concerning the bar

exam. What I try to make them understand is that the accommodations they get in law school may be different from what they got in undergrad, and what they get on the bar exam is probably going to be different from what they got in law school. I explain to them that the situation is different, and I try to prepare them from day one so that they do not have false expectations.

I also explain to them that they are going to need new documentation, which comes as a shock to all of them, especially because I am now getting Special Education Individualized Education Programs (“IEP”) from twelfth grade with their psychological evaluations, and when I explain to them that they are going to have to pay \$750 for a new psychological evaluation, I get stunned looks . . . I am in Buffalo, so it is cheap but they get very upset. I had one student who is blind, and I told him he needed new documentation, or at least updated documentation. He found it amusing, because the reason he is blind is that his eyes were removed shortly after birth and he said, “Well, they can obviously see I cannot see.” I said, “Yes, but they will want to know and have a doctor say it is true.”

I also urge them early on, generally in the second year, to start looking at the state’s requirements—what is the state’s application for accommodations—to make sure that they are familiar with it, for whatever state to which they are thinking about applying. I know some of them are still shopping at that point and explain to them that it’s important that they become familiar with what are the deadlines for applying. For example, in New York, you can apply for accommodation six months in advance, and that is before you can even apply for the bar exam. So sometimes if there are occasional disagreements with the bar examiners over accommodations, you might be able to address that without getting close to the bar deadline and having your nerves consumed with something other than “How am I going to learn all this law?”

I also am really careful with the students about what types of experts the state requires, because some states will have differing expectations of the credentials of their experts, and also of the extent of the report. I often get requests for extra time for carpal tunnel with a prescription pad, and I kindly hand it back to them with our documentation policy and tell them this is good practice for the bar exam, because if you think you are going to be able to type in Buffalo without an approved accommodation New York has a typing program in New York City, but you have to apply for it by lottery, and if you want to type and take the exam in Buffalo, you better have a detailed report saying you are disabled and need accommodations.

I also tell them to think about the exam. The exam in most states—sorry for those of you in California and Delaware that have three days worth—but most states are two days. One day is all multiple choice. Are you

going to need the same accommodations for that day as you are for a day that requires more essay writing? For some of our students that have physical disabilities, filling in the dots is actually harder than writing the exam. How are you going to fill it? What are the strategies for doing that?

And also the strategies for fatigue. Some of our students have had physical disabilities that result in fatigue. The bar examiners are not going to give you a day off in between the two days of the exam, even if they extend it—as some of our severely physically disabled graduates have because they needed double-time—to four days, they are not going to give you days off in between. You are going to take the exam two days in a row or four days in a row or you are going to start it at 7:00 in the morning instead of 9:00. How are you going to handle that? How are you going to handle having a proctor sitting in the room with you when in law school, you might have had a proctor sitting in the front of the room, or at the door, or checking on you periodically? Someone is going to be watching you take that exam. How are you going to handle that environment? A lot of times states use hotels for accommodating applicants with disabilities, and how are you going to handle that setting? Do you know where the hotel is? Do you know if your wheelchair is going to fit under that table? Do you know where the restrooms are? All those things are important for all bar applicants, but particularly for those students with disabilities. And to address some of the medical needs. Some of our students may not have accommodations because they can handle it in our environment. We allow people to bring snacks into exams. On the bar exam, you are limited in what you can bring in, so a student who is diabetic, who might need to bring a blood test or might need to bring in snacks to deal with an insulin crisis, you have got to deal with that on the bar exam. A student who has—excuse me for doing this after lunch—irritable bowel or some other reason that they need to be near a restroom, you may need accommodations where in law school you did not need accommodations.

It is important to consider that early and think about it carefully. Same thing goes for the bar review course. Do you need accommodated materials for the bar review course? Would it be better for you to take it in the afternoon than in the morning because you are not a good morning person, or is it important to take it in the morning because you are going to have to get up for the bar exam? And you accommodated yourself by taking all afternoon classes for your last two years of law school, the first year you could not get away with it, but the last two years you did and so now you have got to get back to reality. And is it a real tough one for some students with learning disabilities and attention deficit is . . . is that bar preparation period sufficient for you to take the exam? Or would you be better off going through that period and then studying more and taking February instead of July or July instead of February. It is a tough question,

but some people realize, “Should I flunk it once . . . I will flunk it . . . I will just take it and see if I pass.” Once you fail it the first time, your chances of passing the second time go down. Maybe you should not take that, “Oh, I think . . . let us just see if I can pass it the first time,” approach. Maybe you ought to wait and be appropriately prepared.

Then the final thing I tell them is the “what if.” What if you do not get accommodations? What are you going to do? What if they say “no?” Are you going to appeal? Are you going to try it without accommodations? How are you going to handle that? I cannot tell you the surprised look some people have. I look at their documentation and I tell them, “You will not get accommodations on the bar exam. Please . . . I hope I am wrong, but I am looking at your documentation and I think the chances are none.”

They are shocked that they do not get accommodations. Then I say what action would you like to take? And they respond, “Well, I am going so sue them.” “Well how are you going to sue them? Are you still going to take July? You know, call up Jo Anne. You want to sue them? Here you go. Call up Jo Anne. You can sue them or some other attorney.” But what is the “what if?” How are you going to handle that? And people have taken different stances. Waited a session and pursued it, got more documentation, but again, applying early helps that.

I know we are not talking about character and fitness, but I did want to say one thing about character and fitness. Some of our students with disabilities really have to be prepared for character and fitness. Some of them have had financial issues due to their disability, not due to other things. We have had students that have not had appropriate health insurance and so have gone into substantial debt to cover the cost of their medication or other things. Some of our students have psychiatric issues and are not medication compliant or have had exacerbations and have been hospitalized, and I think it is incumbent on the law school to talk candidly with them about that and about how to approach it. Also, we were talking at lunch about how to approach the question that some ask, which is, “Do you have any disability or do you have any impairment that might prevent you from practicing law?” Some of our students take psychotropic and other medication, and they say, “Well, why do you take the medication?” “So I cannot be impaired.” So what is the answer to that question? “No.” But they think because they are taking medication, that they should say they are impaired. I think we have to prepare them,—I am not telling them to be dishonest—I am saying to them, “Look at the question. You are a lawyer. You are going to be a lawyer. You want to be a lawyer. Read it carefully. Answer the question honestly. Do not read into the question. Read the words that are there. Do not anticipate what they want. Answer what they have asked you.”

JO ANNE SIMON: RTQ, you might recall. Read the question.

MELINDA SARAN: That is right.

JO ANNE SIMON: I am going to talk a little bit about the bar exam, and about the way in which I think a submission needs to be made, and the key issues that need to be addressed in submitting a request for accommodations. There are a number of students that I advise, for example, going into the accommodation process because, in my view, it is always better to do it right the first time. It is a lot cheaper. It is a lot less stressful, and who wants to be appealing a denial while you are supposed to be studying for the bar? So whenever possible, I try and advise students if they have any questions, even if they do not have questions, that it is a lot easier for me to take a look at what it is they are thinking of submitting, give them a reading on whether I might agree, for example, with Melinda that this is insufficient, that they need some additional testing, or that they should answer a question in a way that is more clear. Sometimes students are so used to their disability issues that they do not realize that the person reading it does not know what they are talking about or might read it in a different way. So the language that is used is very important in filling out these accommodation requests.

I also think what students are very surprised at is some of the attitudes with regard to submission of documentation for disability by the bar examiners and other groups. I think there is still a very strong notion that there are a lot of malingerers out there. So for example, I have a law review article that somebody happened to send to me the other day, called *Accommodations for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites*. This title comprises a lot of issues that students need to deal with. There are a number of places within this article that . . . it is almost like an intelligent design approach to learning disabilities, and it really sort of refutes and repeats lots of myths and fears and stereotypes throughout the article and reinforces this notion that it is only rich people that have learning disabilities. It is only rich people that are getting accommodations.

Now in many cases, rich people are not getting accommodations. It is also true that there are an awful lot of people who are fairly well off going to law school. It is not just people who are rich that have learning disabilities. But it is also a factor that the more we require additional documentation and more recent documentation, and Melinda's citing of cost is like a drop in the bucket in Buffalo. If you are in New York, Boston, Los Angeles, or D.C., or some other large city, it is going to cost

you several thousand dollars to get reevaluated just to get the documentation to then apply for the bar, and then you have got to pay for the bar review course, etc. There are people who do not get the accommodations they need because they cannot afford to produce the documentation that is necessary. Now it is very clear under the law that it is your obligation to produce the documentation that is necessary. On the other hand, there is a very distinct problem with it not being very equal in terms of economic justice. That is a big factor, and so I try and make sure students understand that issue. The other thing that I want to explore with . . . because we have not really talked about the disability, and I think one of the things that is important for students to understand is how much other people understand or do not understand the nature and extent of their disability. When they are applying for accommodations, they are going to have to communicate in writing, through evidence by third parties and their own reporting of this . . . just exactly what the nature and extent of their disability is. How is it that they meet the standards for disability, for example, under the ADA?

Now some of us have good state laws and local laws with less persnickety aspects of the definition, but nevertheless, how is it that your impairment substantially restricts the condition, manner, or duration in which you perform a major life activity, and which major life activities might those be? Reading, writing – is it just writing? I have just asked for writing accommodations for some students. Reading, writing, attending, focusing . . . those are . . . if you cannot concentrate or you are easily distracted, . . . you have got to be able to concentrate in life! That's a major life activity that most people do without thinking about it. It clearly meets the definition under the law. But students do not think about their disabilities in those ways, and so one of the things I encourage them to do is to think about the nature and extent of their disability a little differently than saying, "Dr. so-and-so tells me I have a disorder of cognitive processing of things that are phonemically based," for example. I am making this up. So I encourage people to explore that a little bit.

Overwhelmingly, most students would prefer to stay under the radar screen and not have to do this, in my experience. It is very important that people realize that the research indicates that students with disabilities do significantly better with extended time, but that students without disabilities do not. Again and again, that has been replicated. It has been replicated in math, it has been replicated in reading, it has been replicated in a variety of areas, with high school students, with college students, with adults. So that is very important. It is true that if you gave somebody who does not have a disability a little bit more time, they might get a point or two difference, but what we find is that they pretty much get through the test—sometimes people make the mistake and change the answer to the

wrong answer, as you know, that can happen—but on the whole, we are not finding significant differences in scores for people without disabilities. So even if one of those malingerers slips through, just like we sometimes let the murderer go free in our society, chances are that it isn't going to make a difference or a substantial difference, particularly in something like the bar exam which is you either pass it or you do not pass, the chances that it is going to make a difference are extremely slim, and not enough to drive policy because the policy really should be that we have a test. We want to know whether you know enough law to go out there and be competent in practicing law. The point of the test is to make sure that you have enough information that you know enough law to practice. It is not about, for example, whether you can sit in an artificial circumstance and take a timed test in a short period of time. Whenever you have actually vetted any of these tests, it is very clear that the real issue is about how much law do you want to know.

I will say that in the *Bartlett* case—which was against the bar examiners in New York for failure to accommodate a woman with a learning disability—one of the key pieces of testimony that I just loved from the other side's expert, was that without me even asking him, he said, "You know, I think it is ridiculous to have the bar exam timed because if what you want to know is whether they know the law, who cares how much time it takes them? And I advise them not to have any time limits." That was not the piece of advice they took. They took a different piece of advice. So the fact is that, you know, what is the purpose of the exam? I think that question really goes to the validity of the exam, and one of the things that we see is that on the whole, these tests have very low validity coefficients and so again, this whole notion of how valid is it for the purpose and are we using it for some purpose that is not necessarily the purpose for which it has been validated. I think those are issues that come up that people need to understand and appreciate as part of the analysis.

There is one other thing . . . and I am perhaps being a little flip here, but I do want to point out that in my practice of law and in being involved locally and civically, I often come across those people who have been disbarred for one reason or another. Sometimes people who have been disbarred come to me and ask me to represent them in trying to get back into the bar, and invariably, the people who are losing their licenses to practice law are not the ones who are dyslexic. It is not the people with learning disabilities. It is not the people with psychiatric disabilities that have sought treatment. It is when somebody has run afoul of either lying to the court or run afoul of something that has financial implications. They take on too much work, they take fees from people, and then they do not do the work. That is a problem, that is an ethical problem, it is a legitimate problem for somebody to come under review by the disciplinary

committee, and it is not a disability issue. But it is an issue that people worry about with people with disabilities. They worry about them billing for more hours.

Every law firm I know cuts their hours and exercises billing judgment. The courts make me do it and every law firm I know cuts back hours of new attorneys regularly, if they take too much time. So I think that some of the things that we are concerned about are valid concerns. I think we need to think them through, and we need to have those conversations with students so that, for example, when Melinda is talking to students or when I am talking to an applicant, I want to make sure that they understand those issues and that they are not going to be giving the misimpression to any of the authorities who are going to be granting them licenses. I think I will stop there. Thank you.

BARBARA HERGENROEDER: Initially, I have to apologize. I have a cold. My voice is coming and going these days. I am the Director of Character and Fitness for the State Board of Law Examiners, but I do wear many hats. I am in charge of the site for applicants with disabilities taking the bar exam in Maryland and I am also the administrator that takes care of getting the requests for accommodations, making sure the documentation is all there, sending it out to our experts, getting it back and packaging it all together and sending it to our board. Now most boards of law examiners across the country are practicing attorneys. Some of them have some public members, but most of them are practicing attorneys and do not spend their entire time working with anything to do with the bar exam except maybe creating it.

The people that deal with people who are requesting accommodations most often are people like me, administrators. I work for the Judiciary of Maryland. I work for the Court of Appeals which is the highest admitting authority. They are the ones that say, “Yea” or “Nay” in our state. One thing that I think you all have to keep in mind, mostly educators, is that there is a large difference between the goal of an educator, which is you have to help a student obtain a desirable result in law school and to ensure success, and the goal of an administrator, which is a goal to measure that success. The goal is to do this fairly and impartially—we cannot seem biased to anybody. To people like Jo Anne, we are the ogres, but we are legally bound not to be biased. We are legally bound to make sure everything is fair and impartial. The best thing you can do for a student is basically let them know that bar administrators cannot have a vested interest in any one applicant. Period. We have to be fair and impartial. That means when we have documentation requirements, those documentation requirements have to be followed to the letter. They have to

be followed by the gentleman who had his optic nerve severed in an accident ten years ago as well as the person who is diagnosed with ADHD after the LSAT. The documentation has to be equal, and it has to be there for everybody. Now while it may seem ridiculous to make the guy with the optic nerve injury go out and get a report from his doctor saying, “Yes, this guy is blind. He does not have a connection in his optic nerve,” we cannot be impartial to that guy. We cannot require it of the applicant with ADHD and not require it of the applicant with the severed optic nerve. We have to be fair to all applicants.

The best thing you can tell them is to think “evidence.” Think about your evidence class. Go through exactly what is needed in the requirements, and provide competent documentary evidence of an impairment. That is what they need. They do not need something scribbled on a prescription pad from a doctor. They do not need a report that has tons of hearsay in it about, “Well, I have always had a problem with this or a problem with that or . . . you know . . . and . . .” I actually had a report from a clinician who said that an applicant had gotten accommodated on the LSAT. She never sent anything to me saying how she was accommodated, and that is part of the documentation that was required—that she was accommodated. I called her up and asked her, “Were you accommodated on the LSAT?” “No.”

Competent documents. They need signed letters. They need somebody other than a tealeaf reader being their clinician. Histories of accommodation are invaluable. The ADA says that if somebody is recognized as disabled and you have somebody who has been accommodated since the sixth grade because of their learning disability, or because of dysgraphia, or because of dyslexia, or something like that, and you have IEPs, and you have doctors’ reports, and you have report cards, and notes from teachers, and everything else, guess what? That person is getting accommodated, because they have been recognized.

The documentary evidence is all-important. Following the guidelines, and every bar has them, we all have them on our websites now and they are in our applications. All the applicants . . . all the students have to do is go to the website and follow the instructions and that would make it easier. Then they would be granted accommodations and they would not have to appeal. Our Court of Appeals last year in a case *In the Matter of the Application of Kimmer*¹ said that nobody has a right to take any one particular bar exam. So if they are not through with the appeals process, or if their appeal has not gone back to our board’s expert and come back to the board yet, and there has not been time to send it out to all these lawyers

1. *In re Application of Kimmer*, 896 A.2d 1006 (Md. 2006).

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who are all over the state to make their decision, they do not get accommodated on that bar exam. They do not have a right to take any particular bar exam. They can ask for the accommodations for the next bar exam. But they are done. Like Jo Anne said before, they do not want to be worrying about whether or not they are going to be accommodated while they are studying for the bar. It is a bit of a distraction.

Another thing is logical connection. The boards . . . in order to look at documentation of somebody and say, “This person clearly has an impairment and this particular accommodation is going to level the playing field for this person,” there has to be a logical connection between the impairment and the request. Boards are not experts. They rely on experts. I have a couple of experts that are kind of befuddled about Obsessive Compulsive Disorder and why somebody with Obsessive Compulsive Disorder would want double or triple time to take the exam. So they can move it from this side to that side.

JO ANNE: That is exactly right.

BARBARA: . . . for two hours longer.

JO ANNE: They cannot not do it. That is the problem.

BARBARA: So it has to be a clear connection. If there is a clear connection . . . somebody is in a wheelchair, they need handicapped accessibility . . . by the way, all those hotels are handicapped accessible, that is why we do it at hotels . . .

JO ANNE: No, I know that.

MELINDA: We know that.

BARBARA: We can get a lot of private rooms. That is why we do it. But there has to be a clear connection. I had a blind applicant this past time who . . . we just instituted the MPT with our examination. Well there is a problem. The NCBE does not give its exam materials electronically. I have been putting the exam, our essay exam, on disk for this blind applicant so he can read it on his computer with the JAWS program. I could not do that with the MPT. So I had to put the essay portion on disk for him, get the MPT in Braille, and then have a reader for him for the MBE. And the expansion of our time made it too much for him to handle. So I mean even though he does not know it yet, if he does not pass this exam, he is going to get more time.

There has to be a logical connection. It has got to be something that is going to assist the applicant to make that playing field level for everybody else. But going over the line, things that look like they are over the line, people who have had enormous academic achievement until they get a psychologist to say they are learning disabled after the LSAT and just before they go into law school, of course we are going to look at that and say, "Where is the impairment here?" Let us be logical. They have to show it.

JO ANNE: Oh I have got an answer, do not worry about it! Believe me, I have got an answer!

BARBARA: But it is just logical.

JO ANNE: Well, there is logic and then there is logic.

BARBARA: You would ask the question. You would ask the question. It is logical.

JO ANNE: I will answer the question.

BARBARA: Here we go.

JO ANNE: I do not actually think you are an ogre, but I will say that there are things, for example, that are not necessarily logical in . . . if you do not know about the disability, if you are not educated about it. I think that the real difficulty here is when students are applying to receive an accommodation, whether it is the bar or some other licensing authority or a standardized test, for the most part, the people doing the reviews and frankly, some of the experts, do not know very much about some of the disabilities in real life and the way that they affect real people. So for example, I have heard people say at various times that people who are deaf should not need more time. In fact I actually know somebody in a school recently, a faculty member who said, "Well if somebody is deaf, then they do not have any distractions. They should read faster." Well of course the fact is that if you are deaf from birth—see, you are laughing—your access to English is completely different. Reading, when you are deaf, you are doing more mental gymnastics, figuring out those multiple meanings and the passive voice and the active voice and the duplicate, the redundancies in the structures of English, etc. Especially if you have been trained and you have been a user of ASL, it is very, very tiring and it also takes a lot more time to read. Most deaf adults, if you talk to them, take a long time to

read.

So the fact is that it may be somewhat counterintuitive, but it may be true. The OCD example—the thing with OCD is that they cannot stop. If they could not move the thing and square everything on the table and what have you, at will, they would not have OCD. That is the point. So the thing is, it is enormously time-consuming, it is enormously fatiguing. The physical stress of being that tense and having OCD, the racing thoughts, and the moving, and all of that is very time-consuming, very tiring. And so that is why those accommodations are needed. Now it may very well be . . .

BARBARA: Right, but documentation of that impairment, right? Competent, evidentiary documentation of that impairment.

JO ANNE: And . . . did I say no documentation? So when I look at the reports of the doctors, I say to them, “Why does this take more time? Please explain it because you have to explain it to people.” You know, people who have OCD do not understand why you do not understand it, and the doctors do not necessarily realize that people do not understand it and that they have to be clearer. So part of what I do is to make sure that the clinicians know what it is that they are being asked to do.

MELINDA: Most of the jurisdictions want letters from the law school of what accommodations they have gotten there, so we can all play a role in that by documenting when something did not work. I often include why it did not work. So for example, to use the example of the electronic versus Braille exams. We brailled an exam and we provided it electronically and this student has been blind since birth, and the Braille was much more effective method and required less time than the electronic version. So what I put in the letter was both. I said, “We have given this student exams electronically, we have also given this student exams in Braille, and we have discovered that although the student needs extra time in both instances, the one format works more effectively than the other.” The problem is if the national conference will not give you the exam, . . . but then you prepare the student. You say, “Listen, this is what you are going to have to do,” so that they go in knowing, “Okay, this is going to be discombobulated, but I will get through it.”

BARBARA: No, the National Conference actually, they are very tight with security. There have been quite a few breaches of their exams, particularly the MBE in recent years—people who ran bar review courses going to different exams, they just won a big lawsuit with regard to it—

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going to their exams and heisting their questions for their bar review courses. They are copyrighted material and they are confidential and you are not supposed to keep the questions. The National Conference has not yet found a way to put their material in electronic format where they feel secure enough to have it that way.

MODERATOR: Thank you. Let us move to questions so that we can respond to issues that you have. There is a microphone here and there is a microphone there, and who will be first? This lady please, I would like you to come to the mic because we are recording.

AUDIENCE MEMBER: One of the things we struggle with is we have an advanced bar studies course that helps prepare students to take the exam. It is mostly exam-taking skills, so the person who is in charge of this course encourages students not to be accommodated when they are doing the practice questions because our state, which shall remain nameless, is very difficult in giving out accommodations. So we struggle with the problem of should we be giving accommodations to students with disabilities because there are tests and we would normally, we in student affairs and student services, would accommodate any tests that we do for regular skills or substantive courses, but this advanced bar studies course is different because she wants to prepare the students for what it might be like on the bar. So we sort of struggle with that and then comes the question, are we over-accommodating? And Melinda said something about preparing the students. So we were kind of curious as to what everybody would say to that.

JO ANNE: I think one of the great myths out there is that we over-accommodate students, and I will tell you why. Primarily because of the research that demonstrates that if you give somebody more time and they do not need it, it does not help them. I think that the over-accommodating thing really is not about over-accommodating. It is a fear that we have that we might be engendering dependency and those kinds of things, and certainly I do not have any issue with that. I think independence is a very important skill.

But I think the danger that is feared with the over-accommodating is more fear than anything else. In terms of your pre-bar thing, I can see you are giving that advice because you are concerned about whether or not the bar will accommodate. On the other hand, I think you have to be very careful as an educational institution that has an obligation to provide accommodations, not to refuse accommodations on that theory, because frankly, you cannot be denying accommodations based on what you believe

will be somebody else's discriminatory conduct. I am just saying that I think that that is the line. Of course, you are teaching test-taking skills and to the extent that the test-taking skills show a difference before and after, that is something you want to be able to measure. Sometimes those test-taking skills things do not work as well for students with disabilities for obvious reasons—their cognitive processing is different and it may or may not be helpful—but I think, again, as an exercise, I do not think there is a legal problem with it.

MELINDA: I think what I would say is I would do both, and I have done that with mid-terms that are given during class periods where I cannot really do extended time because their classes are all backed up. So I give them a choice, I say, "You can take it . . . what I would advise you to do is take it in the room. I will note your exam book number. I will come in and look at it. I will pull your exam book out and you will have your extra time afterwards, but you are on your honor not to talk about it and not to think about it during the next class." And they say, "Well this class has the hot seat, of course I am not going to be thinking about it." They may or may not, but that is their loss if they do not take it legitimately. Then they have the extra time. This way, often they can compare what they did during the exact time, so under timed conditions, and then what the total score was to see if there is any difference. It is also good for them to see if their accommodations are realistic or not. Were they able to perform under the timed conditions or were they not? It may help them form an opinion about what accommodations to ask for. It may help them to say, "For the essays, I definitely need extra time. For the MBE, I do not." Often, I think the bar examiners, when someone is really thinking about the accommodations and makes that kind of reasoned approach in their personal statement, I think they are more likely to get accommodations because they have really thought about what they actually need versus saying, "I need all this."

MODERATOR: Right. Barbara did you want to add anything?

BARBARA: I absolutely agree. When we see somebody coming in saying, "I have a particular problem with writing the essay. Mine is a writing disability, but I have no problem filling in those little bubbles and I do not need the time-and-a-half for the MBE, I just need it to put my thoughts on paper to write the essay," it smacks more of legitimacy actually, because you are being very specific about what your problem is. "Here is my impairment, and this is how it affects how I take a test. Well it does not affect that part of the test. So I do not want accommodations on that part of the test."

MODERATOR: Okay. Next question.

AUDIENCE MEMBER: This question is mostly for Barbara . . . the head of the Maryland Bar Examiners—when you are reviewing and analyzing an applicant’s request for accommodation, are there certain circumstances when the board will farm it out or refer that to an educational expert to do an analysis?

BARBARA: We have experts. It wholly depends on the documentation that comes in and if we get the report by the guy with the severed optic nerve, I can read a doctor’s report. I am an attorney; I did personal injury, and I can read a doctor’s report that says that this guy severed his optic nerve in an automobile accident. He sends the documentation of his accommodations in college and his accommodations in law school and all the nice little requirements. Well that one the board does not even see. That is my decision. But when it is something I do not know about, that I am not an expert and that the board is not an expert in, like learning disabilities, ADHD, carpal tunnel syndrome—actually, I can do some of those too, I had some of those when I was in practice—things that we do not know about, we do have experts, national experts, we have doctors that we consult with. We have a forensic psychiatrist who does basically a lot of work not only for us, but for our attorney grievance commission with evaluation of people with depression and alcohol problems and things like that. So yes, we do send it to an expert. It is in our documentation requirements that the documentation also has to be sufficient for the expert to review it. Certain tests and things like that must be included and it must be clear clinical practices.

MODERATOR: Okay. Another question? Can you come to the mic?

AUDIENCE MEMBER: [I have a question also for] Barbara. I have several students who have recently been diagnosed in law school for a learning disability [ADHD]. It relates to what you were saying with the bar when you [almost respect it and find more legitimacy] when they say, “I do not need it for this, but I need it for that,” in terms of the essay, multiple choice. A lot of the reasons that the students have gotten those documentations later is because maybe they have not needed accommodating before. They have just been able to work with their professor personally and not use disability services and said, “I might get a little extra time on this paper,” or “this type of exam, would you stay with me for an extra half an hour?” Those kinds of things. And then in law

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school where things are more structured and it is more official, they find that they really do need the documentation. So their documentation is [brand new] then how do you treat these specific cases?

BARBARA: If their documentation clearly shows an impairment, and if let us say they needed extra time on an exam . . . what is a college exam . . . chemistry. Well, no, that does not relate to the bar exam . . .

MELINDA: There is not much reading in geography.

BARBARA: Let us say English Lit. They needed extra time in English Lit. They had an English Lit professor that said, “Okay, I understand that you write slowly and you are going to need extra time with this examination.” First of all, letting the bar examiners know about it, would be good. And second of all, getting a letter from the teacher saying, “Yeah, she was a great student but she did have these writing problems and I did have to give her an extra half an hour to finish her English Lit exam for her to get through.” If that applicant is requesting some extra time on the essay, for the writing portion of it but not requesting the extra time on the MBE, that is more competent evidence of an impairment.

JO ANNE: This goes to the clinical report and the writing of the clinical report. I have certainly read plenty of reports that are really poorly written. One of my biggest concerns is where the report is poorly written, it may not necessarily indicate that the student has a disability, it is just hard to plow through some of these reports. But I think that that is very important for the clinician to explain those kinds of circumstances because a lot of people do not get picked up by the school systems. That is why we have so much special education litigation out there. So kids do not get picked on, parents do not want their kids to be identified, they go to a private school that is largely unstructured and everybody gets whatever they need anyway so nobody keeps track of it, they do not have IDEA and 94-142 requirements for IEPs, so there is not necessarily the documentary evidence that you would have if a child was diagnosed earlier and had IEPs and that sort of thing. But it is important that the clinician put that into a report of the clinical interview and what kinds of things they looked at, because they might have looked at report cards, or they may have interviewed the mother who said, “The doctor told us not to disclose. The doctor told us not to get her evaluated because people would hold it against her. I was afraid to do that.” People sometimes make decisions that in hindsight they would not have made, so there is a reason there, and if you scratch the surface that is what you find. The teachers have been giving extra time, they gave take-

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home exams. Parents read to them at night, parents read to their kids all the time their homework. It is amazing. That kind of evidence is helpful for the clinician to make the diagnosis. It is helpful for the bar examiners when they are reviewing it to understand how this occurred.

MODERATOR: Okay. Great.

MELINDA: It is also sometimes helpful if you get a report, like I get a report for accommodation sometimes, I read it and I read it again, and I practiced special education law for fifteen years, I mean I have read tons of reports, and I say, “I don’t get it.” I can look at the scores because I know what all the tests are, and I can say, “Wow, look this person really has a disability,” because I know all these different tests they gave, but obviously the person who wrote the report—I do not know what their issue was, maybe they have a writing disability—and I say to the student, “Listen, from the scores it looks pretty much like you have a learning disability or you have this and that, but your clinician did not write that clearly. Since you paid them lots of money, go back to them and tell them to write it in plain English for stupid law administrators and we will try this again.” Sometimes, if it’s a local clinician, they can tell them, “Melinda said to fix this because I do not understand what the heck she is saying.” And they go back to them, because I have worked with a lot of the local clinicians in Buffalo, so they go back to them and most times they will rewrite it I call it “Reports for Idiots,” but that is fine. That is what I want. I want “Reports for Idiots” so that it clearly says “This person has a learning disability that affects their ability to blah-blah-blah-blah.” So sometimes you can do that. Depends on how high-falutin’ the doctor thinks they are.

MODERATOR: Other questions. Yes sir.

AUDIENCE MEMBER: Do you have any cites of research on the myth of over-accommodation?

MODERATOR: Cites for the research . . .

MELINDA: I believe there are some in the back pocket of the conference folders.

JO ANNE: I think the Whiteman studies are back there. There are several things. I did not actually bring cites with me, but for example, there is a lot of research that has been done from this seminal work by [Kay Runyon] that cites Gregg, Cohen and Meng, yeah, that is her initial study.

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Nicole Olfiesh has done a lot of research. Susan Weaver out of Toronto has done quite a bit as well. I could e-mail people some of the cites. There is current research still being done as well, and there are some studies that are forthcoming.

MODERATOR: Okay. Other questions? All right. I am getting the cut-off sign. All right, let us thank the panelists for a great, great discussion.

I am sure we have got a lot of good ideas about preparing our students to take the bar. We are glad we did not need the boxing gloves and just short of it. We will take a quick five minute break. We will have an extended break after the next panel.