

1987

# In Re: Pace Jefferson McConkie : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT  
BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

Clerk, Supreme Court, Utah

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In Re:	:	
	:	Brief of Respondent
PACE JEFFERSON MCCONKIE	:	
	:	No. 870416
	:	Category No. 5

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APPEAL FROM THE ADVERSE DECISION  
OF THE BOARD OF BAR COMMISSIONERS  
OF THE UTAH STATE BAR

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Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975)

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#### STATEMENT OF THE CASE

The Appellant failed the Multi-State Bar Examination (MBE) portion of the Utah State Bar Examination and was subsequently denied admission to the Bar. Upon the recommendation of the Grievance Committee, his Petition was denied by the Board of Bar Commissioners and he now appeals to the Utah Supreme Court.

#### STATEMENT OF THE FACTS

The Appellant sat for and failed the July 1987 state bar examination. He passed 16 of the 18 essay questions and achieved a scaled score of 124 on the MBE portion of the examination, for which the minimum passing scaled score in Utah is 125. (R.6) He filed a Petition for Review and Admission to the Utah State Bar before the Board of Bar Commissioners Grievance Committee which reviewed and considered the matter on or about October 16, 1987. Appellant was represented by counsel and presented his arguments to the Committee. The Committee recommended that the Board of Bar Commissioners deny Appellant's petition, stating it was unpersuaded that he had demonstrated arbitrary or capricious action in connection with the administration of the examination or the examination itself or that his denial of admission would be manifestly unjust. (R.28) The Board of Bar Commissioners adopted the

recommendation of the Grievance Committee and denied Appellant admission to the Bar. (R.29)

#### STATEMENT OF THE ISSUE

Did the Board of Bar Commissioners abuse its discretion in denying Appellant admission to the Bar, where Appellant failed to meet minimum standards of competence?

#### SUMMARY OF ARGUMENT

The Board of Bar Commissioners of the Utah State Bar acted properly in denying Appellant's petition to be admitted to the Bar. He has no fundamental right to practice law if he fails to meet the minimum requirements for admission established by this Court, which has the authority to set minimum qualification standards and a responsibility to the public to admit only those persons who have demonstrated their achievement of the minimum qualifications to practice law.

The MBE is a proper and reasonable means to test the Appellant's qualifications and it is not arbitrary or unreasonable for the Court and the Commissioners, who implement the Rules of Admission, to place determinative importance on the MBE portion of the bar exam in calculating whether Appellant has successfully passed or failed the bar examination.

Appellant was afforded a meaningful and fair hearing in which he had the opportunity to present his arguments for

admission. No unusual or extraordinary circumstances have been alleged which would distinguish Appellant from other applicants who fail the MBE portion of the examination and are denied admission to the Bar.

#### ARGUMENT

##### POINT I

THE BOARD OF BAR COMMISSIONERS DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT ADMISSION TO THE UTAH STATE BAR, WHERE APPELLANT DID NOT MEET MINIMUM ADMISSION STANDARDS AND HAS DEMONSTRATED NO MANIFEST INJUSTICE IN THE DENIAL OF HIS PETITION.

A. APPELLANT HAS NO FUNDAMENTAL RIGHT TO PRACTICE LAW WITHOUT MEETING THE MINIMUM STANDARDS OF COMPETENCE ESTABLISHED FOR ADMISSION.

There is no fundamental or constitutionally protected right to practice law in any given state. Younger v. Colorado State Board of Bar Examiners, 482 F.Supp. 1244 (D. Colo., 1980); Attwell v. Nichols, 608 F.2d 228 (5th Cir. 1975). Furthermore, there is no constitutionally guaranteed right to practice law without being required to take a bar examination. Pace v. Smith, 286 S.E.2d 18 (Ga. 1982).

The state has a legitimate and substantial interest in excluding from the practice of law any person who does not meet its minimum standards of competence. Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975). "A state can require high standards of qualification, such as . . . proficiency in the law, before it admits an applicant to the bar, but any



qualification must have a rational connection with the applicant's fitness or capacity to practice law." Schwartz v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232 at 239 (1957), Douglas v. Noble, 261 U.S. 165 (1962).

The Utah State Bar has a fundamental interest in requiring any person aspiring to practice law to demonstrate a minimum level of competence. This is achieved through testing the applicants on their skills and knowledge of the law. The bar examination combines essay and standardized test formats to test different types of skills. All the skills tested are considered important and the examination is reviewed each year for fairness and accuracy in testing.

The bar examination must have a passing standard to assure the public that persons admitted to practice law in Utah have met minimum standards of competence and to ensure fairness to the examinees. It would be arbitrary and capricious to leave the minimum passing score uncertain for those aspiring to practice law. Once established, the minimum score must be respected or the bar exam will become an exercise in futility. Establishing a minimum passing standard is rational and furthers a legitimate state goal.

"In any test there obviously must be a passing line." In Re Fischer, 425 A.2d 601, 602 (Del. 1981). In Fischer the appellant had achieved a scaled score of 129 on the MBE

where passing was 130. In denying the petition the Court commented:

Notwithstanding all the questions that may be raised about standardized tests, we do not believe that this is the time to lower the standards for admission to the Delaware Bar. If we glean any trend or tenor of commentary, it is toward more strict admission requirements. Thus a scaled score of 129 on the MBE cannot constitute a passing grade in Delaware.<sup>1</sup>

The bar examination now gives the public an assurance and protection that persons admitted to practice law have meet the minimum requirements of knowledge and skill necessary to practice. Dinger v. State Bar Board, 312 N.W. 2d 15 at 18 (N.D. 1981). This demonstrated minimum level of competence should not be lowered for Appellant, whose performance fell on the other side of the line that must be drawn.

B. THE MBE PORTION OF THE BAR EXAMINATION IS A PROPER MEANS OF TESTING AN APPLICANT'S QUALIFICATIONS NECESSARY TO PRACTICE LAW.

Established case law has recognized the MBE as a proper means of testing an applicant's qualifications and is considered to be rationally related to measuring an applicant's minimum competence to practice law. Delgado v.

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<sup>1</sup>On December 18, 1987, the Board of Bar Commissioners approved a recommendation to this Court that the minimum passing score be raised to 135 as Utah's current passing score is one of the lowest in the nation.

McTighe, 522 F.Supp. 886, 898 (1981); Pettit v. Gingerich, 427 F.Supp. 282, 294 (D.Md. 1977); aff'd. 582 F.2d 869 (4th Cir. 1978)(per curiam).

The MBE tests an applicant's ability to understand a set of facts, disregard irrelevant facts and apply a rule of law to the issue raised by the question. The MBE is not a memory test and every question presents a factual situation requiring analysis by the applicant. The questions are designed primarily to test the applicant's ability to apply basic principles of law and do not call for a mastery of esoteric legal rules.

Anyone challenging the effectiveness of a bar examination, whether it be in essay, multiple choice or other format has the burden of establishing its unreliability. A mere allegation that it is not reliable is not sufficient to place the examination in jeopardy. Dinger v. State Bar Board, 312 N.W.2d 15 (N.D. 1981). McGin v. State Bar Bd. of State of N.D., 399 N.W.2d 864 at 867 (N.D. 1987). The appellant has not met his burden of establishing the MBE portion of the bar examination or its administration was unreliable, arbitrary or capricious.

In Utah the equal weight attached to the essay and MBE portions of the examination is a reflection of the importance of the skills required for each type of test question and should not be disregarded when an applicant

scores high on one portion but fails the other. Both types of skills are necessary to the competent practice of law. Although other states may weight them differently or require a certain combined score, this Court has adopted a reasonable rule that gives substantial benefit to the applicant, for an unsuccessful applicant need only retake the portion of the examination that was failed. The states that require a combined score require the retaking of the entire examination by an unsuccessful applicant.

The appellant cites Petition of Thompson, 342 N.W.2d 393 (N.D. 1983) as support for his argument to disregard his failing MBE score. This case is distinguishable from that of appellant. In Thompson, there was a noise disturbance while the MBE portion of the bar examination was administered and the applicant that portion of the exam by three points. The disturbance was beyond Thompson's control and his request to move to a quieter location was denied by the proctor. Thompson received one of the top scores on the essay portion of the examination. Considering the totality of the circumstances, the Court granted his application for admission to the Bar. In the instant case, Appellant has not claimed that noise or any other unusual circumstance prevented him from achieving a passing score. He simply failed to achieve the minimum competence level on the MBE portion of the examination.

C. IT IS NOT ARBITRARY OR UNREASONABLE FOR THE BAR COMMISSIONERS TO PLACE DETERMINATIVE IMPORTANCE ON THE MULTI-STATE BAR EXAMINATION.

Utah Code Ann. Section 78-51-10 (1953 as amended) gives the Board of Bar Commissioners the authority to determine the qualifications and requirements for admission to the practice of law and to conduct examinations to test these qualifications. From this authority the Board derives its power to determine how much weight each portion of the bar examination should have. The Board has decided that failure of either the MBE portion or the essay portion will result in denial of admission to the Bar.

In a challenge to a similar rule, the Massachusetts Supreme Court held that determinative weighting of the MBE and essay portions of the bar examination does not constitute an abuse of discretion. In Re Mead, 361 N.E.2d 403 (Mass. 1977).

It is not manifestly unjust, within certain guidelines, to enforce a cutoff point when passage of the bar examination is denied. Petition of Randolph-Seng, 669 P.2d 400 (Utah 1983). In Randolph-Seng, the court held that if the examinee's overall score was as high or higher than that of the lowest scoring applicant admitted, due process and equal protection would require that he too be admitted. However, the court observed that if his weighted score fell below the lowest passing score, then the procedure was fair

and his petition for admission to the practice of law would be denied.

## POINT II

### APPELLANT RECEIVED A FULL AND FAIR HEARING BEFORE THE GRIEVANCE COMMITTEE.

In order to establish a due process violation, Appellant must establish that the challenged procedures are either irrational or arbitrary, or so lacking in fairness that they shock the universal sense of justice. Bachner v. Pearson, 479 P.2d 319, 334 (Alaska 1970).

Appellant was afforded an opportunity to submit his petition to the Grievance Committee and to offer oral arguments at the Committee's hearing to review and consider his case. He declined to use available procedures to review the questions and answers on the MBE, claiming it would involve an unreasonable time delay. The MBE examination is highly is highly confidential and proper procedures must be followed to ensure the continued confidentiality of the examination questions and answers. Appellant has failed to establish that the procedures in place to protect that confidentiality are irrational or arbitrary.

No due process violation occurred because Appellant elected not to request disclosure of the MBE questions and answers. Therefore, the issue is not ripe and should be

disregarded by the Court. Petition of Randolph-Seng, 669 P.2d 400 (Utah 1983).

CONCLUSION

Appellant's request for admission to the Bar should be denied. He has failed to demonstrate the minimum levels of competence on the MBE portion of the bar examination, which tests important skills and knowledge necessary to the competent practice of the law. Appellant has offered no evidence of an extraordinary event or circumstance beyond his control which prevented him from passing the exam, and an impartial Grievance Committee and Board of Bar Commissioners used sound discretion in denying his petition. He is not the first to be disappointed in failing the bar examination and will likely not be the last whose score will fall short of the passing line. The appropriate remedy in this case is not to grant Appellant's application for admission, but for the applicant to retake the MBE in February 1988 and demonstrate that he does possess the minimum competence necessary to practice law.

Dated this 11<sup>th</sup> day of January, 1988.

Respectfully submitted,

OFFICE OF BAR COUNSEL:

  
Jo Carol Nesset-Sale  
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that four (4) copies of the foregoing Brief of Appellant were mailed to Richard H. Nebeker, Counsel for Appellant at 800 Kennecott Building, Salt Lake City, Utah 84111 and a courtesy copy to Pace Jefferson McConkie at 1304 East 900 South, #4, Salt Lake City, Utah 84105, this 11<sup>th</sup> day of January, 1988.

James - Sale