

2001

Kathleen G. Arnovick, Valerie L. Cox, and Henry B. Wansker v. Petitioners : Brief of Petitioner

Utah Supreme Court

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IN THE UTAH SUPREME COURT

In re: KATHLEEN G. ARNOVICK,)
VALERIE L. COX, and)
HENRY B. WANSKER,)
)
PETITIONERS.)

Priority No. 06
Supreme Court Case No. 20010136-SC

On Appeal from the Findings of Fact and Final Determination
of the Executive Committee of
the Utah State Bar

OPENING BRIEF OF PETITIONERS

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FILED

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JURISDICTION

The Supreme Court has jurisdiction in this matter pursuant to the Bar Examination Review and Appeal Procedure, Revised March, 1991.

STATEMENT OF ISSUES

- A. Did the manner in which the July 2000 Utah State Bar Examination was constructed, administered and/or graded fail to provide a reliable, valid and fair assessment of the applicants' competency to practice law, constituting a substantial irregularity in the administration of the Exam resulting in manifest unfairness and/or mathematical inaccuracy in the scoring of the examination?
- B. Did the admission to the Utah State Bar of five (5) applicants who had originally failed the Exam deny to the Petitioners Due Process and Equal Protection under the Fourteenth Amendment of the United States Constitution?
- C. Did the failure of the Utah State Bar to adopt and implement rules and procedures to govern the process of appeal from a denial of admission to the Utah State Bar deny to the Petitioners Due Process under the Fourteenth Amendment to the United States Constitution?

STANDARD OF APPELLATE REVIEW

The standard of review in an appeal from the findings and decisions of the Bar

Commission is set forth in the case of In re Thorne, 635 P.2d 22 (Utah 1981). “[T]he Court may, when it is deemed appropriate, exercise its judgment independent of that of the Bar Commission.” Id. at 23.

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND RULES

- A. United States Constitution; Fourteenth Amendment.
- B. Rules Governing Admission to the Utah State Bar.
- C. Bar Examination Review and Appeal Procedure, Revised March, 1991.
- D. Utah Bar Examiners Committee Grading Handbook.

STATEMENT OF THE CASE

This case is a petition for review of the Findings of Fact and Final Determination of the Executive Committee of the Utah State Bar denying Petitioners’ admission to the Utah State Bar. Petitioners sat for the July 2000 Utah State Bar Examination (the “Exam”). After receiving notice that they had not passed the Exam, Petitioners filed individual Petitions for Review pursuant to the Bar Examination Review and Appeal Procedure. The Admissions Committee Panel of the Utah State Bar (the “Admissions Committee”), after considering the Petitions, prepared and submitted its Findings of Fact and Recommendation in each of Petitioner’s cases, recommending that the petitions be denied.

Petitioners each filed a Response to Admissions Committee Panel’s Findings of Fact and Recommendations (“Response”). These Responses, along with the Committee Panel’s Findings and Recommendations were submitted to the Executive Committee of

the Utah State Bar (the “Executive Committee”). The Executive Committee prepared its own Findings of Fact and Final Determination for each of the Petitioners, denying the Petitions for Review. Pursuant to the Bar Examination Review and Appeal Procedure, Petitioners filed a timely written notice of appeal in the Supreme Court for the State of Utah, seeking review of the Executive Committee’s Findings of Fact and Final Determination.

STATEMENT OF FACTS

Petitioners were approved by the Utah State Bar (the “Bar”) to take the July 2000 Exam, having fulfilled all requirements regarding education, character and fitness. Petitioner Wansker, as an attorney licensed to practice in two other jurisdictions, was an “Attorney Applicant” and sat for the Exam on July 25, 2000. Petitioners Arnovick and Cox, as “Student Applicants”, sat for the Exam on July 25 and 26, 2000. See, Findings of Fact and Final Determination (“Final Determination”); Tab 11 at p. 1; Tab 10 at p. 1; Tab 9 at p. 1.

Approximately one week before the Exam, each applicant was assigned a four digit identification number. Student Applicants were assigned a “1000” series identification number and Attorney Applicants were assigned a “3000” series identification number. Within each category, the numbers were assigned in alphabetical order, beginning with 1001 and 3001, respectively. See, Bar’s Response Letter dated January 29, 2001; Tab Q at p.2.

Grading of all essay examinations took place on August 18, 2000, beginning at

8:00 a.m. and concluding by 5:00 p.m. There were 14 grading subcommittees; each subcommittee had between four and six members for a total of between 56 and 84 graders. There were a total of 232 examinations, each examination containing 12 essay questions for a total of 2,784 questions. See, Bar's Response Letter dated December 14, 2000; Tab I at p.1-2. Each subcommittee spent various amounts of the time available (from one to three hours) calibrating exam answers before the actual grading process began. The Bar acknowledges that it has no way to ascertain how much of the remaining time any particular subcommittee spent on grading individual exam answers. See, Bar's Response Letter dated December 14, 2000; Tab I at p.2.

The Grading Committee assigned to grade the Torts question conducted the scoring calibration process. However, after completing that process, the Committee concluded that the Torts question lacked statistical validity and it was determined to be defective. See, Final Determination; Tab 11 at p. 4; Tab 10 at p. 3-4; Tab 9 at p. 3-4.

Faced with the defect occasioned by the invalid Torts question, the Bar considered what it asserted were its three alternatives: 1) declare the examination invalid and require all applicants to re-take the test; 2) admit everyone who took the examination; and 3) eliminate the invalid question and score the remainder of the examination. Respondent decided to grade only eleven essay questions, determining that discarding the defective question was its "least problematic resolution." Final Determination; Tab 11 at p. 4; Tab 10 at p. 4; Tab 9 at p. 4.

The essay questions were graded on a "curve" geared to the performance of the

test-taking group. See, Rules Governing Admission to the Utah State Bar, Section 7-4; Bar's Response Letter dated December 14, 2000; Tab I at p.3. Various essay questions contained from five (5) to eleven (11) legal issues that applicants were expected to analyze and answer. Questions and Model Answers Provided to Applicants after Notification of Failure to Pass Sent; Tab A.

Of the 232 applicants who sat for the Exam, 199 were initially given a passing grade. See, Bar's Response Letter dated January 17, 2001; Tab O. These numbers, "232" and "199," were utilized in the "Standard Deviation Formula" which was used to scale the applicants' essay scores to the Multistate Bar Examination. See, Bar's Response Letter dated November 16, 2000; Tab D. However, subsequently, five additional applicants were deemed to have passed the Exam. See, Bar's Response Letter dated January 17, 2001; Tab O.

By letters dated September 27, 2000, Petitioners were informed that they had not passed the Exam and would not be admitted to the Utah State Bar. See, Applicants' Pass/Fail Notification Letters; Tab 1.

SUMMARY OF ARGUMENTS

- A. THE MANNER IN WHICH THE JULY 2000 UTAH STATE BAR EXAMINATION WAS CONSTRUCTED, ADMINISTERED AND GRADED FAILED TO PROVIDE A RELIABLE, VALID AND FAIR ASSESSMENT OF THE APPLICANTS' COMPETENCY TO PRACTICE LAW, WHICH CONDUCT CONSTITUTED SUBSTANTIAL IRREGULARITY IN THE ADMINISTRATION OF THE EXAM RESULTING IN MANIFEST UNFAIRNESS AND/OR MATHEMATICAL INACCURACY IN THE SCORING OF THE EXAM.**

- B. THE ADMISSION TO THE UTAH STATE BAR OF FIVE (5) APPLICANTS WHO HAD ORIGINALLY FAILED THE EXAM DENIED TO THE PETITIONERS DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.**
- C. THE FAILURE OF THE BAR TO ADOPT AND IMPLEMENT RULES AND PROCEDURES TO GOVERN THE PROCESS OF APPEAL FROM A DENIAL OF ADMISSION TO THE UTAH STATE BAR DENIED TO THE PETITIONERS DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

ARGUMENTS

- A. THE MANNER IN WHICH THE JULY 2000 UTAH STATE BAR EXAMINATION WAS CONSTRUCTED, ADMINISTERED AND GRADED FAILED TO PROVIDE A RELIABLE, VALID AND FAIR ASSESSMENT OF THE APPLICANTS' COMPETENCY TO PRACTICE LAW, WHICH CONDUCT CONSTITUTED SUBSTANTIAL IRREGULARITY IN THE ADMINISTRATION OF THE EXAM RESULTING IN MANIFEST UNFAIRNESS AND/OR MATHEMATICAL INACCURACY IN THE SCORING OF THE EXAM.**

Bar examinations have been universally upheld as proper tests of fitness and qualification for the practice of law. In re Petition of John Randolph-Seng, 669 P.2d 400 (Utah 1983). The state has a strong interest in assuring that those licensed as attorneys are capable and fit to practice law; however, no applicant may be excluded from licensure in a manner inconsistent with the requirements of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. Schwarz

v. Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L. Ed. 2d 796 (1957).

While a state can require high standards of moral character and legal proficiency, any qualification imposed must have a rational relationship with an applicant's fitness and/or capacity to engage in the practice of law. Schwartz v. Bar Examiners, at 239; In re Petition of John Randolph-Seng, at 402. This standard requires that the construction, administration and grading of the Bar Examination be consistent with Due Process and Equal Protection. Further, the Bar Examination Review and Appeal Procedure states that a determination that an applicant has failed the Bar Exam may be reversed upon a showing of a substantial irregularity in the administration of the Exam resulting in manifest unfairness or mathematical inaccuracy in the scoring of the Exam.

In an effort to comply with Constitutional requirements, as well as its own mandates, the Bar has promulgated certain rules: Rules Governing Admission to the Utah State Bar (the "Rules"); Bar Examination Review and Appeal Procedure, Revised March, 1991 (the "Review and Appeal Procedure"); and Utah Bar Examiners Committee Grading Handbook (the "Grading Handbook").

It is well-settled that administrative agencies must abide by the letter of the rules they themselves promulgate for their own governance. Vitarelli v. Seaton, 359 U.S. 535, 539-540(1959). The Rules, the Review and Appeal Procedure and the Grading Handbook are detailed and specific regarding the mandatory conduct that is required of the Bar with respect to the content, composition, administration and grading of the Exam. However, in this case, the Bar has committed numerous violations of its own rules and regulations

and thereby failed to meet the required legal standard.

1. The Construction of the Exam.

a. Deletion of the Torts essay question.

Rule 7-1 of the Rules states: “The essay portion of the examination **shall** consist of twelve questions.” (Emphasis added.) The Exam, as administered, contained twelve questions and the applicants answered twelve questions. However, the Bar made the decision to delete the Torts question from the scoring of the Exam and so the applicants’ final scores included only eleven questions.

The Bar’s deletion of the Torts question violated the clear language of Rule 7-1. It is undisputed that the Exam was deficient in that only eleven questions were included in the scoring of the Exam, the Torts Question having been determined to be “defective.” See Final Determination, Tab 11 at ¶¶ 9, 10 and 11. The Bar has attempted to justify its decision to delete an essay question by characterizing it as “the least problematic resolution” to the quandary presented by the defective question. *Id.* at ¶ 11. As a result of this substantive defect, the Bar concedes that two other options were available: 1) to declare the examination invalid and require all applicants to re-take the test, or 2) to admit everyone who took the examination. *Id.* at ¶ 10.

As a direct result of the deletion of the Torts question, Petitioners were denied an opportunity to accrue as many as five points upon a properly crafted Torts Question for use toward passage of the Exam, which others who took the Exam might not have

accrued. Further, in answering twelve essay questions, the Petitioners were compelled to expend time attempting to answer an incompetent question, which deprived them of time in which they might have accrued additional points towards passage of the Exam. Again, these are points which other applicants might not have accrued.

The Bar's decision to delete the Torts question compromised the validity of the Exam. See Report of David J. Gustafson, Appendix, Item 2, page 6. Reduced validity in an exam results in an increase in the number of erroneous grades (false fail and false pass). Where an exam is defective, it is impossible to use that exam as the basis for an accurate determination regarding the applicants' competency or incompetency in the area that is purportedly being tested. The Bar's good intentions in attempting to find what it terms "the least problematic resolution" does not preserve the validity of the Exam.

b. Composition of essay questions.

The problems occasioned by the deletion of the Torts question could have been avoided if the Bar had originally constructed a proper question. Rule 7-3 of the Rules provides a detailed procedure for constructing essay questions for inclusion in the Exam. A practitioner or law professor must compose a question and a model answer or outline which is then submitted to the Bar Examiner Review Committee. This Committee must be independent of the Bar Examiners and determines the adequacy and appropriateness of all questions and model answers. All involved must possess the requisite "demonstrated professional expertise" as required by the Grading Handbook. See, Grading Handbook, Section III, page 3.

Petitioners have requested information regarding the actual process followed by the Bar in constructing the Exam essay questions but have been denied the opportunity to determine whether the requirements of Rule 7-3 were properly followed. See Petitioners' Initial Discovery Requests, Tab B; and Petitioners' Supplemental Discovery Requests, Tab N. Without access to the facts, the Petitioners are justified in assuming that the appropriate procedure was not followed. On the other hand, perhaps the procedure was followed but the procedure, as promulgated, is ineffectual to produce appropriate essay questions for inclusion on the Exam. In either case, the result for Petitioners is a substantial irregularity in the administration of the Exam.

c. Excessive number of issues in essay questions.

Part III of the Grading Handbook is entitled "Bar Examiners Committee Composition and Question Preparation." Subsection (1) provides that each essay question should be designed to be analyzed and answered in approximately 30 minutes. In order to comply with this time requirement, Subsection (5) states that the essay question "should include no more than 3 or 4 issues which the applicant can identify and analyze fully." While denominated "guidelines," this question preparation is clearly an important component of the construct of the Exam. Several of the question committees failed to comply with the directives of the Grading Handbook, some demonstrating significant variance.

By way of example, the subcommittee assigned to prepare the Ethics question submitted a question and a model answer to the Bar Examiner Review Committee.

Although it is unknown what process may have transpired with respect to modification or revisions, eventually the question and model answer were approved by the Bar Examiner Review Committee. The question became part of the Exam and the graders were provided with the model answer. The model answer, as approved, listed four issues that the applicants were expected to identify and analyze. See, Questions and Answers Provided to Applicants After Notification Letters of Failure to Pass Sent, Tab A.

However, at some point, the graders took it upon themselves to increase the required issue identification from four to nine, in contradiction of the Grading Handbook directive. The graders then required that an applicant identify and analyze all nine issues in order to receive a score of “5” on the question. See, Bar’s Response Letter dated December 1, 2000, Tab H. The original four issues were: 1) Conflict of interest; general rule; 2) Fees; 3) Scope of representation; and 4) Client under a disability. The expanded issues included the following:

1. Conflict exists
2. Waive conflict
3. Mom as driver (conflict)
4. Fee reasonable
5. In writing-contingent fee
6. Permission to share/split fees
7. Proportionate responsibility
8. Client's choice to settle

9. Judge - conference - improper influence

Another example: the criminal law subcommittee prepared a question and model answer which was apparently approved by the Bar Examiner Review Committee, containing eleven (11) issues:

1. Aggravated assault
2. Manslaughter
3. Automobile homicide
4. Leaving the scene of accident
5. DUI
6. Theft
7. Intoxication
8. Conspiracy/withdrawal
9. Accomplice liability
10. Felony murder rule
11. Rendering of reasonable assistance to injured person

See, Questions and Answers Provided to Applicants After Notification Letters of Failure to Pass Sent, (Tab A).

This blatant disregard of the Grading Handbook by various Bar Examiner Subcommittees and/or by the Bar Examiner Review Committee constitutes a substantial irregularity in the construct of the Exam. The unrealistic expectation that applicants could address the voluminous number of issues in a 30 minute time period results in

manifest unfairness to Petitioners and all applicants.

2. The Administration of the Exam.

a. Assignment of identifiable Exam numbers.

Petitioners have alleged that the anonymity of applicants was compromised in connection with the administration of the Exam. Petitioners have requested through discovery, various documents, facts and information that would address this issue. To date, these requests have been denied. See, Petitioners' Initial Discovery Requests, Tab B; and Petitioners' Supplemental Discovery Requests, Tab N.

From the sparse information that was provided, Petitioners have discovered that under the Bar's identification scheme, applicants are first sorted by status as lawyers (and therefore out-of-state lawyers) versus non-lawyers. Lawyers are given 3000 series numbers and student applicants are given 1000 series numbers. Thereafter, numbers within each series are assigned alphabetically. In practice this would mean, for example, that among 25 lawyer applicants, lawyer applicant Able would be assigned the number 3001 and lawyer applicant Zeta would be assigned the number 3025. The 1000 series numbers would be similarly assigned. Under this system, if a grader were to have even limited and cursory access to a list of applicants, anonymity, the *sine quo non* of a fair and impartial examination process, would be immediately and fatally compromised.

The Bar has justified its identification system as necessary for administrative convenience; the accounting of fees and seating assignments. See, Letter Response from

Bar dated January 29, 2001, Tab Q. However, this *post hoc* explanation fails even cursory scrutiny. As one example, examination fees are paid by applicants months before the Exam is administered. However, the Exam identification numbers are assigned only one week before the Exam is administered.

The Bar's identification procedure creates, at the very least, the opportunity for discrimination, which procedure is highly suspect under Constitutional concepts of Equal Protection. Parrish v. Board of Commissioners of the Alabama State Bar, 533 F.2d 942, 950 (5th Cir. 1976), citing Avery v. Georgia, 345 U.S. 559, 73 S. Ct. 891, 97 L. Ed. 1244(1963). Where the opportunity for discrimination is coupled with a discriminatory motive, the result is a Constitutional violation. Tyler v Vickery, 517 F.2d 1089, 1093 (5th Cir. 1975), citing Palmer v. Thompson, 403 U.S. 217, 91 S. Ct. 1940, 29 L.Ed.2d 438 (1971). The Bar's lack of candor in failing to respond to discovery requests, coupled with allegations of past wrongdoing, create a strong presumption that discriminatory motive was present in the administration of the Exam.¹

Even if the Bar had no ill-intent as regards the anonymity of the applicants during the grading process, it could scarcely have chosen a method that was more poorly designed to preserve anonymity than that which it has implemented. In Alaska, numbers

¹On October 21, 1976, The Deseret News reported that one of the graders of the Utah Bar Examination had admitted that a list of applicants which included each applicant's assigned exam number, had been available to all graders. The Daily Utah Chronicle reported that at least one unsuccessful applicant had been improperly passed and that numerous applicants had been improperly assigned failing scores. *See*, Volume 86, No. 47, November 9, 1976; Volume 86, No. 65, December 7, 1976.

are replaced with codes during the grading process. In the Matter of the Petition of Thomas S. Obermeyer, 717 P.2d 382, 389 (Alaska 1986). In Louisiana, applicants assume fictitious names, letters and numbers, with actual information being inaccessible to graders. Singleton v. Louisiana State Bar Association, 413 F.2d 1092, 1095 (E.D.La. 1976). In Georgia, numbers are not assigned until the moment of examination at which time, numbered cards are randomly drawn by the applicants who themselves write their names upon the cards. Thereafter, the cards are placed in a sealed envelope, inaccessible to examiners. Tyler v. Vickery, 517 F.2d at 1093. These cases are merely illustrative of the additional steps which states, truly interested in preserving anonymity, have taken which are clearly over and above those taken by the Bar.

The Code of Conduct for the Law Examiners Committee promulgated by the Alaska Bar Association provides that committee members who find themselves able to identify applicants in the grading process shall not further participate in that process. 2 ABA 02.070(3) as cited in In the Matter of the Application of Thomas S. Obermeyer, 717 P.2d. at 389. The obvious purpose of such a rule is to prevent the occurrence of discriminatory conduct. If graders of the Utah State Bar Examination had access to identifying information but did not recuse themselves, it would clearly constitute a substantial irregularity in the administration of the Exam resulting in manifest unfairness.

The Fifth Circuit has ruled that where there is the potential for identification of bar exam applicants, it is necessary to review all applicants' scores and the entire grading process, including model answers, grading notes and calibration. Parrish v. Board of

Commissioners of the Alabama State Bar, 533 F.2d 942. The instant case demands no less.

3. The Grading of the Exam.

a. Overweighting of remaining eleven essay questions.

Rule 7-4 of the Rules states that each essay question shall be accorded a weight of no more than five points. The Bar asserts that even though one essay question was deleted, the remaining questions were given a weight of five points each, for a total of 55 points. However, this simple formula of 5×11 does not translate when the essay scores are scaled to the Multistate Bar Examination (the “MBE”) scores.

Scaling is a statistical technique which converts scores on the essay portion of the Exam to the same scale of measurement as the MBE. See, Grading Handbook, Section VI. Where twelve questions are graded, there are a possible total of 60 points to be spread across the range of MBE scores. Where only eleven questions were graded, there were only 55 points to cover that same range. As explained in the Report of David J. Gustafson (See, Appendix, Item 2, page 6), scaling the scores from the eleven essay questions to the scores from the MBE results in each of the essay questions being worth more than five points. Again, the Bar has violated its own rule. Failure to follow grading mandates surely constitutes a substantial irregularity in the administration of the Exam and this irregularity results in both manifest unfairness and mathematical inaccuracy in the scoring of the Exam.

b. Lack of professional expertise of graders.

Petitioners have questioned whether the various attorneys who acted as graders for the Exam had the requisite qualifications required by the Grading Handbook. Section III requires that bar examiners be “active members of the Utah State Bar in good standing ... who have been selected by the Board of the Commissioners on the basis of demonstrated professional expertise.” Petitioners requested factual information regarding this issue in their discovery requests. To date, the Bar has refused to divulge this information. See Petitioners’ Initial Discovery Requests, Tab B; and Petitioners’ Supplemental Discovery Requests, Tab N.

Faced with this stonewalling, Petitioners are justified in assuming that at least some of the graders were not qualified. At the very least, this matter should be remanded with directions to the Bar to respond to Petitioners’ discovery requests and provide appropriate information which would allow a determination regarding the Bar’s compliance or non-compliance with this directive. A failure to provide graders with the requisite level of professional expertise constitutes a substantial irregularity in the administration of the Exam.

c. The calibration process.

The calibration process is an integral part of the overall grading process and is defined in Section V of the Grading Handbook as “the method of establishing a single scoring system among several graders on one question.” The process itself is described in great detail in subsection D of Section V.

According to Subsection D, the grading team members must first compare the outlines of issues that each has prepared and the model answer that was prepared by the drafter. (The model answer and the outlines should have been prepared and circulated prior to the calibration session pursuant to Section III of the Grading Handbook.) The comparison of the outlines and the model answer should include a discussion of the issues raised by the exam question and a formulation of a consensus model answer and consensus issue outline. Next, each member of the grading team must read five randomly selected applicant answers without assigning grades. After all members have read the five papers, they must discuss any additional issues or problems which have been raised by the review of the five answers.

The grading team must then agree on the main issues that will receive credit and how to treat lesser issues. After resolving all ambiguities and other problems, each member of the grading team must individually assign grades to the five answers. The graders should reread the entire answer before forming an opinion as to the grade to be assigned. After reading each individual answer, the grader should assign a grade to the answer according to the grading scale agreed upon. Then the graders will compare the grades assigned to each individual answer and discuss the differences in grading, if any. “The discussion is intended to promote uniformity among the graders. The reliability of the grading procedure depends on uniformity.” (Emphasis in the original.) See, Grading Handbook, Section V.D.

After the first round of answers has been thoroughly discussed, the graders must

grade another five answers in the same manner, again followed by a discussion of the grades assigned. This process should continue until the graders have reached uniformity on the grades which are assigned.

When asked to describe the calibration process employed in connection with the July 2000 Exam, the Bar stated that each subcommittee spent varying amounts of time; from one to three hours. See, Bar's Response Letter dated December 14, 2000, Tab I. However, the graders' calibration process, as described, does not satisfy the specificity required by the Grading Handbook. Further, it is not clear whether the model answers and outlines were prepared in advance of the calibration session or whether that activity was also included in the one to three hour time periods.

It is difficult to image how a grading team could complete the detailed calibration process in three hours, let alone one hour. The State of Florida, recognizing that constitutionally sufficient grading requires a substantial expenditure of graders' time and maximum uniformity in the grading process, does not attempt to conduct calibration and grading on the same day. Instead, the graders attend a weekend conference after the administration of the exam but before the actual grading of the exam. 18 Nova L. Rev. 1313, 1319, citing Florida Supreme Court Bar Admission Rules, Article VI, Section 7.b.

The National Conference of Bar Examiners (the "NCBE"), which composes and administers the Multistate Essay Examination (the "MEE"), holds a two-day workshop following the administration of the exam. See Grading Handbook, Section III A. The NCBE contemplates that state graders will grade MEE essay questions. It sends, by

overnight courier, material to be reviewed and assimilated by the graders in advance of the workshop. In recognition that the process of calibration is complicated, time consuming and difficult, the NCBE considers its workshop to be a “pre-calibration session” which is to provide local graders with a “starting point” for local calibration. See, Grading Handbook, Section III B. Amazingly, there is no documented requirement that the Bar’s graders ever attend the workshop.

Again, there is a failure, on the part of the Bar, to comply with standards that were created by the Bar for the very purpose of ensuring a proper administration of the Exam. The calibration process goes to the very heart of the reliability of the Exam. Inadequate calibration training causes arbitrary and capricious grading; inadequate time allotted for calibration which consumes precious grading time, exponentially compounds the problem. The Bar’s deviation from its own specific directives for the calibration process constitutes a substantial irregularity in the administration of the Exam and results in manifest unfairness and mathematical inaccuracy in the scoring process.

d. Time allocated for grading.

The time allotted for the grading of the July 2000 Exam consisted of roughly one eight-hour day. There were fourteen subcommittees, each composed of from four to six members, for a total of between 54 and 86 persons. These graders had the task of evaluating 12 essay answers from 232 different applicants for a total of 2,784 items. As described above, from one to three hours of the eight hour day was consumed by the calibration process. See, Bar’s Response Letter dated December 14, 2000, Tab I. As

calculated by Mr. Gustafson (See, Appendix, Item 2, pp. 7-9), the time allocated to each item was no more than 14.5 minutes and could have been as little as 6.0 minutes. It strains credulity to suggest that there could be anything resembling thoughtful consideration of responses, much less uniformity in essay examination grading, given so many different graders attempting to grade so many responses in so little time. Such a scenario reasonably implies arbitrary and capricious conduct, even if one assumes that those performing the grading possessed the requisite “demonstrated professional expertise” to do so.

e. Failure to adopt and apply appropriate grading scale.

Rule 7-4 states that essays shall be graded upon a five-point scale, each answer being graded in a prescribed manner. This prescription utilizes terms such as “non-responsive,” “well below average,” “below average,” “average,” “above average” and “well above average.” None of these terms is defined in the Rules. In consequence, the grading process utilized in the scoring of the Exam was rendered unacceptably subjective and susceptible to arbitrary, capricious and discriminatory implementation.

Further, Rule 7-4(A) provides: “No credit shall be given to an unanswered question or to a non-responsive answer.” In response to discovery requests, Petitioners were provided notations from the graders of the Ethics question. (Although Petitioners requested all notations from all graders, this information has not been supplied.) As described above, the graders of the Ethics question unilaterally decided to require applicants to respond to nine issues. Their notations indicate that only if an applicant correctly responded to all nine issues would the graders assign a score of “5” to that

answer. Conversely, an applicant could correctly respond to as many as three issues and still receive a score of “0”! Such a system completely fails to follow the grading scale set out in the Rules and the Grading Handbook, assigns a totally illogical definition to the term “non-responsive”, and constitutes a mathematical inaccuracy in the scoring process.

To the extent Petitioners were accorded a score of zero on an answer that at least responded to the question, that answer must be accorded at least one point to comply with the provisions of Rule 7-4. The terms “incorrect” and “non-responsive” are not synonymous and since neither term has been defined as synonymous by the Rules, any failure to award points to a response, even if the response provided was deemed incorrect, violates the Bar’s own Rules and Grading Handbook.

f. Grade compression through use of “curving” procedure.

The Petitioners take no issue with the well-settled principle that states may utilize essay-type questions in the bar examination process, despite the significant subjectivity of these types of questions. Tofano v. Supreme Court of Nevada, 718 F.2d 313 (9thCir. 1983); Chaney v. State Bar of California, 386 F.2d 962 (9thCir. 1967), cert denied 390 U.S. 1011, 88 S.Ct. 1262, 20 L.Ed.2d 162 (1968).

Petitioners do challenge, however, the Bar’s procedure of submitting answers received on essay-type questions to a grading process that curves those answers. Several courts have considered the curving process and rejected it as an appropriate method of grading bar examinations. In the case of In re Dennis T. Reardon, 378 A.2d 614 (Del. 1977), the Delaware Supreme Court heard the appeal of an aggrieved bar applicant who

asserted that the grading formula should utilize a curve. The Court disagreed, instead concurring with the Delaware Bar's contention that to curve grades upon bar examinations would be arbitrary and irrelevant to the task of measuring minimal professional competency. Unless the purpose of an exam is to allow admittance on quota basis, curving has no appropriate place. *Id.* at 618. In Richardson v. McFadden, 540 F.2d 744 (4th Cir. 1976), the Fourth Circuit was even more direct in finding that utilization of a curving system would make the determination of minimal competence a "...matter of luck...". *Id.* at 750.

The Grading Handbook (Section V. F.) and the Rules (Rule 7-4) both describe a grading process that implements curving; the grades to be assigned various answers are determined by reference to the performance of the test-taking group as a whole. Even the terminology utilized to describe numeric grades to be assigned refers to average, above-average and below-average responses. Moreover, lest there be any confusion as to whether or not Exam grades are, in fact, subject to being curved, reference is made to the Record of Proceedings, Bar's Response Letter dated December 14, 2000, p.3; Tab I, wherein the Bar provides not merely confirmation that the essay grades are curved, but explication as to the manner in which those grades are curved.

In scientific parlance, the curving process is known as "norm referenced" testing and is described by Mr. Gustafson in his Report. See Appendix, Tab 2, page 4. Also as explained by Mr. Gustafson, the use of "norm-referenced" testing establishes a fixed number of applicants who will fail the test. Only if the minimal passing score is based

upon competency studies will the exam have the necessary attributes to be considered a valid exam.

Based upon what the Petitioners have been able to discover, no competency studies were performed with respect to the state prepared essay questions. Such studies would determine whether questions test for a level of knowledge reasonably to be expected of all bar applicants as opposed to testing for some level of esoteric or arcane understanding. Esoteric or arcane questions do not accurately test competency and scoring of such questions is worthless as a measure of competence, absent curving of responses. While curving might theoretically "save" defectively obscure and oblique questions from the wastebasket, it does so in an impermissible, irrational, arbitrary and capricious manner. If responses to bar examination questions must be curved in order to obtain "acceptable" pass rates, the underlying questions are, by definition, defective and inappropriate. Most importantly, curving of grades has the Kafkaesque effect of making a competent applicant and/or answer seem wholly inadequate if the test-taking group is exceptionally capable and vice versa.

The curving dilemma could have been avoided had the Bar not discarded that method of analyzing and grading applicants' essay responses suggested by the National Conference of Bar Examiners (the "NCBE") for use in connection with the Multistate Essay Examination (the "MEE") as set forth in Section III. A. of the Grading Handbook. The NCBE protocol instructs graders to assign grades with reference to a competency standard, rather than with reference to the performance of the test-taking group. To gear

assignment of grades to the performance of the test-taking group, as the Bar did in this case, results in the arbitrary, capricious and unconstitutional rationing of passing scores.

g. Failure to adopt and apply procedure for review of grading process.

Finally, Petitioners assert that the lack of procedures and standards for the review of the grading process, including a means to remedy errors in the grading process, constitutes a substantial irregularity in the administration of the Exam, as well as a denial of procedural Due Process. All Exam applicants are entitled to an administrative procedure which can protect against arbitrary and capricious conduct on the part of graders. If such a procedure is not in place and properly implemented, there can be no assurance of fairness in the grading process.

The United States Supreme Court, in Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976), set forth a three-tiered test by which to determine whether an individual is constitutionally entitled to a particular judicial or administrative procedure to assure fairness and propriety of an administrative action. The test is implemented upon a case-by-case basis, with the interests involved being balanced against each other. The Court must consider:

1. The private interest being affected by the action;
2. The risk of an erroneous deprivation of the private interest under existing procedures, considering the probable efficacy of alternate or additional measures; and
3. The governmental interest in minimizing monetary and administrative

burdens entailed by additional or substitute procedures.

In the instant case, the Petitioners assert that it is beyond dispute that, having invested years in study and thousands in dollars in pursuit of an opportunity to serve the public as members of the legal profession, they have a substantial interest at stake in obtaining licensure. The myriad of deficiencies discussed above, with respect to the construct, administration and grading of the Exam, establishes not only the risk of an erroneous deprivation of Petitioners' private interest in practicing law, but the occurrence of that deprivation.

Alternate and additional procedures are suggested by Mr. Gustafson (See, Appendix, Item 2). The efficacy of these suggestions appears clear, while the monetary and administrative burden is slight. Implementation of additional measures would also reduce the risk of multiple grievances in the future which would otherwise squander fiscal resources and create unnecessary administrative burdens.

Bar examination procedures are always reviewable to determine compliance with the requirements of due process and equal protection. In re Dennis T. Reardon, 378 A. 2d 614, 618, (Del. 1977), citing Schwartz v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed. 2d 796 (1957). Indeed, the purpose of establishing rules to govern the grading of bar examinations, to allow for review of the grading process and to remedy errors in that process is to assure that standards of due process and equal protection are not violated, even if, in consequence, this creates some marginal additional administrative responsibility.

In the instant case, the Bar could have authorized and constituted a dispassionate and qualified committee to review and remedy inaccuracies and irregularities in the grading protocol. This action would have sufficed to provide the administrative relief necessary to accord to Petitioners those constitutional safeguards which, in this case, were denied them.

To correct the deficiencies in the current grading protocol would provide a definitive road map for future Bar conduct, thereby reducing the likelihood of challenges to the Bar actions. To do otherwise would have an *in terrorem* effect upon legitimate challenges to improper Bar conduct. To establish guidelines for administrative review of the current grading protocol would serve to assure those rights currently denied the Petitioners, would conserve resources and would ease administrative burdens, not the least of which is that imposed upon this Court, upon whom the duty to review the Respondent's actions ultimately rests. The failure to establish, implement and utilize guidelines for review of the grading process has resulted in a denial of Petitioner's rights to Due Process.

The Bar's failure to construct competent questions for consideration by applicants, its failure to properly administer the Exam, and its myriad failures related to grading the Exam resulted in a defective Exam. Petitioners were deemed to have failed the Exam while other applicants were deemed to have passed the Exam. However, where the Exam itself is defective, it is impossible to make a determination as to an applicant's score on the Exam without acting in an arbitrary and capricious manner. The only determination which fairly can be made upon the facts of this case is that the Exam failed the Petitioners.

To deny them admission to the Utah State Bar on the basis of such an exam denies them Fourteenth Amendment Due Process. To admit others under such circumstances, while denying the Petitioners admission, denies them Fourteenth Amendment Equal Protection.

B. THE ADMISSION TO THE UTAH STATE BAR OF FIVE (5) APPLICANTS WHO HAD ORIGINALLY FAILED THE EXAM DENIED TO THE PETITIONERS DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

According to the Bar's own Summary of Bar Examination Results dated August 31, 2000 (See Bar Response Letter date November 16, 2000, Tab D), 199 of the 232 applicants passed the Exam. However, at some later date, five (5) additional applicants were deemed to have passed the Exam. (See Bar Response Letter dated January 17, 2001, Tab O). The Bar's explanation states that after the grading and scaling of the Exam, five applicants scored between 129 and 130 (130 being the cut off point for passing). The Bar then reappraised all of the essay questions for these five applicants and determined that all five should pass.

Petitioners have requested, through discovery, all applicants' raw scores for both the MBE and the essay portion of the Exam. This information has not been produced, but if produced, would allow Petitioners' psychometrician to review and evaluate the method and standards used by the Bar in determining which applicants passed and which failed. In the Randolph-Seng case, 669 P.2d 400, this Court remanded an appeal of a determination of denial of admission to the Utah State Bar for the express purpose of

instructing the Bar to make available to the petitioner detailed information regarding applicants who had originally failed the exam but were subsequently passed.

This Court went on to state that unless the decision to admit applicants after an initial determination of failure was supported by objective criteria, it could constitute arbitrary conduct. Any individual review of exams must be done pursuant to standards that are fair to all and the opportunity to retake the exam is not the applicable remedy. Id. at 402, citing Richardson v. McFadden, 540 F.2d 744 (4th Cir. 1976).

Based upon the Bar's explanation, it appears that five applicants were awarded additional points on their essay answers; or conversely, the passing score was lowered from 130. In either event, the standard deviation formula that was originally utilized by the Bar became inaccurate. See, Exam Score Summary, attached to Bar's Response Letter dated November 16, 2000, Tab D. As defined in the Grading Handbook, the standard deviation is "A measure of the spread of scores in a distribution." A review of the formula used in the Exam shows that an applicants scaled or converted essay score is determined by reference to the standard deviation of the raw essay scores. If those raw scores are changed by subsequent Bar action, the entire formula and its application are changed.

The Bar's failure to reconsider all applicants under the revised standard deviation formula results in arbitrary and capricious treatment for all applicants, not just Petitioners. The changed formula could mean that some applicants who had previously "passed" the Exam would now have a "failing" grade or vice versa. This is clearly a substantial irregularity in the grading of the Exam and has resulted in manifest unfairness and a

mathematical inaccuracy in the scoring process.

C. THE FAILURE OF THE BAR TO ADOPT AND IMPLEMENT RULES AND PROCEDURES TO GOVERN THE PROCESS OF APPEAL FROM A DENIAL OF ADMISSION TO THE UTAH STATE BAR DENIED TO PETITIONERS DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Rule 11-2 of the Rules provides that the Board of Commissioners will review petitions of applicants who have been determined to have failed the Utah Bar Examination and who allege substantial irregularities in the administration of the Examination resulting in manifest unfairness or mathematical inaccuracies in the scoring of their examinations. Petitions are to be written and filed with the Respondent within 30 days following notice of determination of failure.

Pursuant to a one-page document entitled, Bar Examination Review and Appeal Procedure, revised March, 1991, a review committee is to recommend disposition to the Board of Commissioners after such inquiry as it may deem relevant and necessary. The Board thereafter issues a written determination upon the petitions filed, subject to a right of appeal to this Court. Apart from the foregoing, the Rules give no further details as to what will constitute "review", what procedural safeguards will be implemented to assure that the review complies with due process or what substantive rights will be accorded petitioners during the review process, if any.

In practice, at least insofar as the Petitioners are concerned, those procedural and substantive protections have been only those which the Bar has determined, on an *ad hoc*,

arbitrary and capricious basis, to be available. By way of example, but not of limitation, the Petitioners sought, but were denied, essential discovery of the qualifications of those who had composed and graded the essay portion of the Exam in order to establish whether or not those individuals met with the Bar's own stringent qualification requirements of "...demonstrated professional expertise..." Grading Handbook, Section III, p.3. In other instances, discovery responses were propounded by the Respondent, but were unsworn, incorrect and contradictory. See, Letter Response from Bar dated January 29, 2001, Tab M.

In the case of Parrish v. Board of Commissioners of the Alabama State Bar, 533 F.2d 942 (5thCir. 1976) certain bar applicants filed suit seeking declaratory relief and injunctive relief under 42 U.S.C. §§ 1981-1983 and 28 U.S.C. §§ 2201-2202, respectively. Among other matters before the Fifth Circuit Court of Appeals was whether the Alabama Bar's refusal to provide certain discovery was substantive. The Court characterized the Bar's position on the issue as amounting to an assertion that a mere denial of improper conduct by a party from whom discovery is sought is sufficient to sustain a refusal to provide that discovery.

The Fifth Circuit rejected this assertion, stating that such a rule would frustrate the discovery process and erect an unreasonable barrier around those concealing relevant information necessary to fair litigation. Id. at 947. The Parrish case is analogous to the instant case in that important information solely in the possession of the Bar has been denied to Petitioners as a result of the Bar's unilateral decision to withhold the

information. The Bar is concealing relevant information and has erected an unreasonable barrier to fair litigation. Petitioners have requested and been refused access to the following:

1. Process involved in composing essay questions and model answers;
2. Identification of graders and their level of professional expertise;
3. Training received by graders;
4. Details regarding reliability and validity testing done on the Exam, including cut score and competency studies;
5. Mathematical and statistical protocol employed in the grading process, including scaling of scores;
6. Raw essay scores and raw MBE scores for each applicant taking the Exam.

The Matthews test, 424 U.S. 319 at 335, as described above, is useful in determining what the Bar should have done to guarantee procedural and substantive safeguards that were denied the Petitioners. First, the interest of the Petitioners in licensure is great. Second, to enact and implement procedural and substantive rules governing review would certainly be more efficacious than the current regimen which consists of one page and then only such rules as the Bar may arbitrarily choose to recognize and enforce. Finally, the Respondent has no legitimate interest in other than assuring due process and equal protection to those who appear before it. There would be minimal adverse fiscal or administrative consequence to the implementation of explicated,

reasonable rules by which to govern appeals from a denial of admission to the Bar.

Indeed, the Bar's own interests are best served by measures that minimize the possibility of arbitrary and capricious conduct on its part as well as the likelihood of appeals.

CONCLUSION

There is no dispute that the Torts question was excluded from the scoring of all applicants' exams. The Bar has acknowledged that the deletion of this question constitutes a substantial irregularity in the administration of the Exam. While those specific words, "substantial irregularity," have not been used by the Bar, its conduct can admit to no other conclusion. The Bar suggested three different courses of action in its attempt to rectify what is obviously perceived as a serious problem. The extraordinary nature of these suggested alternatives underscores the magnitude of the problem occasioned by the deletion of the Torts question.

The Bar considered having all applicants retake the Exam and it considered admitting all applicants regardless of assigned scores. These options are drastic, but would have treated all applicants in the same manner. Instead the Bar chose the one alternative that required a ratification of various rules violations, the one alternative predicated upon its intuitive capacity to divine who did or did not pass a defective exam, and the one alternative that resulted in a denial to Petitioners of Due Process and Equal Protection. Somehow the Bar determined that it was not acceptable to make all applicants bear the burden of a defective exam by having to retake the exam, but it was acceptable for a small group of the applicants to suffer the consequences of those deficiencies by

denying their admission to the Bar.

Apart from what the Bar has conceded, there are numerous rules violations that constitute independent grounds to reverse the Bar's Findings and Final Determination and grant relief to Petitioners. The composition, administration and grading of the essay questions was flawed. For example, it is unknown whether the Bar's own directives were followed regarding the method and manner of question preparation. Several of the drafters totally ignored the Grading Handbook directives regarding length of questions and number of issues presented. Applicants were assigned exam numbers that could easily be distinguished as to attorney/student status and the Bar has refused to disclose information regarding other possible breaches of anonymity.

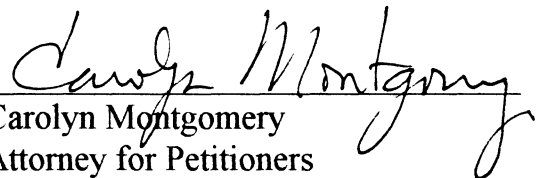
The Bar's grading of the Exam presents numerous issues that affect the validity and reliability of the Exam: Questions regarding the graders' "demonstrated professional expertise"; the calibration process; whether the appropriate grading scale was utilized; whether there was sufficient time allocated for grading; grade compression through the use of "curving"; and the lack of a procedure for review of the grading process itself.

As this Court astutely observed in the Randolph-Seng case, judicial concern is with the flaws or weaknesses inherent in the administration of an exam, not with the occasional exception to the rule that admits an unsuccessful candidate under extraordinary circumstances to prevent manifest injustice. In re Petition of Randolph-Seng, 660 at 402. Petitioners acknowledge that they are not entitled to a perfect exam. They are, however, entitled to an exam that comports with the constitutional mandates of Due Process and

Equal Protection.

Wherefore, Petitioners pray that they be deemed to have passed the July 2000 Exam and that they be admitted to the Utah State Bar, effective as of that date upon which other applicants, deemed to have passed the Exam, were admitted. In the alternative, Petitioners request that all scores from the July 2000 Exam be vacated and that all applicants be required to take an examination that is valid, reliable and fair.

DATED this 14th day of June, 2001.


Carolyn Montgomery
Attorney for Petitioners

CERTIFICATE OF SERVICE

The undersigned certifies that on the 15th day of June, 2001, I served a copy of the attached OPENING BRIEF OF PETITIONERS upon Katherine A. Fox, counsel for the Utah State Bar, by personally hand delivering it to her at the following address:

Katherine A. Fox
General Counsel
Utah State Bar
645 South 200 East
Salt Lake City, UT 84111

A handwritten signature in cursive script, reading "Carolyn Montgomery", written over a horizontal line.