

2001

# Kathleen g. Arnovick, Valerie L. Cox, Henry B. Wansker v. Respondent : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

Civil No. 20010136-SC

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

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BRIEF OF RESPONDENT UTAH STATE BAR

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UTAH

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## **JURISDICTION**

The Utah Supreme Court has original jurisdiction over this appeal pursuant to article VIII, section 4 of the Utah Constitution wherein the Court is vested with the inherent power to regulate all matters concerned with the practice of law, including admission of persons to practice law within the State of Utah.

## **STANDARD OF APPELLATE REVIEW**

The most recent application of the standard of review in an appeal from a failure to pass the Bar examination may be found in In re Petition of John Randolph-Seng, 669 P.2d 400, 401 (Utah 1983) wherein the Court stated: *“Relief is granted only where [he can prove] arbitrary or capricious conduct on the part of the Bar Examiners or in the administration of the examination, or [he can show that] extraordinary circumstances [of his case] require passage to prevent manifest injustice.”*

This standard was slightly modified in March 1991 and incorporated into the Bar Examination Review and Appeal Procedure which was approved by the Court: *Relief shall be granted only upon showing that the Petitioner failed the examination because of a substantial irregularity in the administration of the examination which resulted in manifest unfairness or because of mathematical inaccuracy in the scoring process.*

Under either variation, the burden of proof is on the Petitioners. In re Randolph-Seng, 669 at 401 (citing In re Thorne, 635 P.2d 22 (Utah 1981)); see also Younger v. Colorado State Board of Bar Examiners, 482 F. Supp. 1244 (D. Colo. 1980); Petition of Wayland, 510 P.2d 1385 (Okla.1972).

### **DETERMINATIVE CONSTITUTIONAL PROVISIONS AND RULES**

- A. United States Constitution, Fourteenth Amendment.
- B. Utah Constitution Article VIII, Section 4.
- C. Utah State Bar Rules Governing Admission.
- D. Bar Examination Review and Appeal Procedure, Revised March 1991.
- E. Utah Bar Examiner Committee Grading Handbook.

### **STATEMENT OF THE CASE**

Initially, mention should be made that petitioner Kathleen G. Arnovick took and successfully passed the February 2001 Bar examination. She was admitted by this Court to practice law on May 16, 2001 and thus her claims should be considered moot. Petitioner Cox and Petitioner Wansker's claims remain.

This matter is a petition for review of the Findings of Fact and Final Determinations of the Board of Bar Commissioner's (the "Commission")

Executive Committee denying Petitioners' admission to the Utah State Bar. Petitioners sat for the July 2000 Utah State Bar Examination (the "July Exam"). After receiving notice that they had failed, they filed their Petitions for Review shortly before the November 3, 2000 deadline. The Bar's Admissions Committee prepared Findings of Fact and Recommendations on December 29, 2000, recommending to the Commission that the Petitions be denied. Petitioners filed Responses to Admission Committee's decision ("Responses"). These Responses, along with the Admission Committee's Findings and Recommendations, were submitted to the Commission's Executive Committee. The Executive Committee heard argument from Petitioners' attorney and the Bar's General Counsel at a specially scheduled meeting on January 8, 2001 and later issued Findings of Fact and Final Determinations on January 19, 2001, denying Petitioners' claims for relief. Pursuant to the Bar Examination Review and Appeal Procedure, Petitioners filed timely written notice of appeal seeking the Court's review of the Executive Committee's decisions.

### **STATEMENT OF FACTS**

Petitioners were among the 232 applicants who took the July Exam. [R. at TAB O & Addendum 7] They were not among the 204 applicants who passed. [R. at TAB 1 & TABS 9,10,11 & Addendum 3] The July Exam's pass rate of

87.9% is comparable to the average pass rate of 87.85% for the last 20 Bar examinations and well within the range of pass rates over the past 10 years. [R. at TAB E & Addendum 4] The July Exam consisted of one day of 200 multiple choice questions on the Multi-State Bar Examinations (the "MBE") and 11 essay questions. [R. at TABS 9,10,11 & Addendum 3] The essay portion of the Bar examination generally consists of 12 essay questions and each question is worth five points for a total of 60 raw essay points. [R. at TABS 9,10,11 & Addendum 3] A total of 55 raw essay points were possible on the July Exam due to the elimination of the torts question after the examination was administered. [R. at TABS 9,10,11 & Addendum 3]

The Bar Examiner Grading Committee ("Grading Committee") met on August 18, 2000 to grade the essay questions. [R. at TABS 9,10,11 & Addendum 3] The Grading Committee assigned to grade the torts question attempted to conduct the scoring calibration procedure set forth in the Utah Bar Examiner Committee Grading Handbook ("Grading Handbook") to ensure the validity of the question. [R. at TABS 9,10,11 & Addendum 3] The Grading Committee determined that the question was defective and that it did not fairly assess the applicants' knowledge. [R. at TABS 9,10,11 & Addendum 3] The graders consulted with Bar staff as well as the Director of Testing for the National

Conference of Bar Examiners and the torts question was eliminated from consideration from the July Exam. [R. at TABS 9,10,11 & Addendum 3]

A final score of 130.0 is required to pass the Bar examination. [R. at TAB 1] The average raw essay score was 28.96 on the July Exam. [R. at TABS 9,10,11 & Addendum 3] The average MBE score for all applicants was 144.17 on the July Exam. [R. at TABS 9,10,11 & Addendum 3] The average passing final score for all applicants was 147.69 on the July Exam. [R. at TABS 9,10,11 & Addendum 3]

Mr. Wansker, an Attorney Applicant who was not required to take the MBE, had a final score of 120.94. [R. at TAB 11 & Addendum 3] He scored 21 raw essay points out of 55 possible points. [R. at TAB 11 & Addendum 3]

Ms. Cox, a Student Applicant, had a final score of 127.81. [R. at TAB 9 & Addendum 3] She scored 23 raw essay points out of 55 possible points and had a MBE score of 123. [R. at TAB 9 & Addendum 3]

Ms. Arnovick, a Student Applicant, had a final score of 126.39. [R. at TAB 10 & Addendum 3] She scored 21 raw essay points out of 55 possible points and had a MBE score of 126. [R. at TAB 10 & Addendum 3]

Under the Bar's reappraisal procedure, applicants who fall in a range just below the passing mark of 130, i.e., those with final combined scaled scores between 129.00 and 130.00 are entitled to have their essay answers re-graded.



[R. at TAB G & Addendum 5] After the Bar received all applicants' final combined scaled scores for the July Exam from the National Conference of Bar Examiners, there were five applicants who had scores between 129.00 and 130.00. [R. at TAB Q & Addendum 7] Those applicants' essay answers were reappraised and subsequently resulted in passing scores. [R. at TAB Q & Addendum 8] Petitioners' final scores of 120.94, 126.39 and 127.81 did not qualify for reappraisal. [R. at TABS 9,10,11 & Addendum 3]

### **SUMMARY OF ARGUMENTS**

In order to prevail on their claims, Petitioners must demonstrate that the content and/or the administration of the July Exam violated their due process and/or equal protections rights. The test to be applied to such claims in a bar examination context is a rational basis test. The record reflects that the Utah State Bar had a rational basis for their actions in conjunction with the July Exam and that their conduct was neither arbitrary, capricious or fraudulent. Petitioners must also show that that their failure to pass the July Exam was because a substantial irregularity resulted in manifest unfairness or that there was a mathematical inaccuracy in the examination scoring process without which they would have passed. That standard does not require that an examination be flawless. In fact, the July Exam was not perfect, but any irregularities did not

result in “manifest unfairness” to the applicants, including Petitioners. An entire Bar examination where nearly 90% of the test-takers are successful should not be declared invalid because there may be alternative or even better methods available to the Bar in the examination or appeal process. Petitioners’ failure to pass the July Exam was due to their poor performance and low test scores.

### **ARGUMENT**

Bar examinations have been universally upheld as proper tests of fitness and qualification for the practice of law. Schwartz v. Board of Bar Examiners of N.M., 353 U.S. 232 (1957); see also Chaney v. State Bar of California, 386 F.2d 962 (9<sup>th</sup> Cir. 1967), *cert. denied*, 390 U.S. 1011, *reh. denied*, 391 U.S. 929; In re Thorne, 635 P.2d 22 (Utah 1981); In re Petition of Pacheco, 514 P.2d 1297 (N.M. 1973). States have a strong interest in assuring that those licensed as attorneys are competent and have determined that one of the most reasonable, albeit not perfect measures of competency are test scores. Id. The Court has previously recognized that the Bar examination is a proper test of fitness and qualification for the practice of law. In re Randolph-Seng, 669 P.2d 400 (Utah 1983).

## **I. APPLICABLE LAW.**

### **A. Legal Framework**

The power to admit persons to the practice of law in Utah is vested by the Utah Constitution in article VIII, section 1 to the Utah Supreme Court. The Utah State Bar admits no one to the practice of law, but assists the Court in the exercise of its constitutional authority by processing applications and administering the Bar examination twice a year. The Court has observed that the Bar, when determining the qualifications of applicants and administering the examination, acts as an “arm of the Court”. In re Thorne, 635 at 23. While acting for the Court, the Bar is not a state agency nor is it subject to record disclosure requirements generally applicable to government entities. See Barnard v. Utah State Bar, 804 P.2d 526 (Utah 1991). The Court’s review of a Bar examination petition is not on the same footing as the review of a judgment of a trial court, nor of an administrative agency. In re Thorne, 635 at 23. In exercising its ultimate authority, the Court generally, “deems it appropriate to repose some confidence and trust in the [Bar Commission’s] actions by indulging some deference to its findings and judgments . . . the Court should not disturb what the Commission has done unless a petitioner clearly demonstrates he has been treated in an unfair, unreasonable or arbitrary manner.” Id. at 23.

The Utah State Bar has adopted Utah Supreme Court approved rules applicable to the admission of the practice of law. Of significance here are the Rules Governing Admission (“Admission Rules”) [Addendum 1] and the Bar Examination Review and Appeal Procedure (the “Appeal Procedure”) [Addendum 6]. The latter, although not formally incorporated into the Admission Rules, has also been approved by the Court.<sup>1</sup> The drafting, review and grading of essay questions are conducted in accordance with the Grading Handbook [R. at & Addendum 6].

## **B. Constitutional Considerations**

Petitioners raise questions concerning the legal sufficiency of the content, administration and grading of the July Exam. In assembling a panoply of alleged deficiencies, they assert that they were denied due process and equal protection under the United States Constitution. The Court has recognized that the admission and testing process involves a liberty or property interest protected by the due process and equal protection clauses of the Fourteenth Amendment. In re Randolph-Seng, 669 at 402.

### **1. Due Process**

The Court has also recognized that it is not the role of a court to re-read essay answers for the purpose of re-grading in order to satisfy due process

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<sup>1</sup> The Court recently requested the Bar to physically insert a slightly modified version of the Appeal Procedure into the Admission Rules. The Bar filed a petition pursuant to these directions and the

requirements. In re Thorne, 635 P.2d 22 (Utah 1981). Rather, the Court looks for arbitrary or capricious conduct leading to manifest injustice in the examination result. Id. This view has been adopted by a number of jurisdictions. For example, the Alaska Supreme Court has concluded that in order to establish due process violation, “the challenged procedures must be so irrational or arbitrary as to shock the universal sense of justice.” See In the Matter of the Application of Obermeyer, 717 P.2d 382, 386 (Alaska 1986). The Ninth Circuit has also weighed in on this issue: “Inability to pass the examinations, which are successfully passed by other applicants, will, of course, not be inquired into by the Court. If any dissatisfied applicant can show that he was denied passage . . . through fraud, imposition or coercion [or treated unjustly or unfairly] . . . this Court will be willing to listen to his complaint.” See Chaney v. State Bar of California, 386 F.2d 962, 967 (9<sup>th</sup> Cir. 1967) (quoting Staley v. State Bar, 109 P.2d 667, 670-1 (1941)). See also Hooban v. Board of Governors of Washington State Bar, 539 P.2d 686, 688 (Wash. 1975) (“general rule is that courts will not set aside the determination of bar examiners as to an applicant’s legal proficiency unless there is a showing of fraud, coercion, arbitrariness or manifest unfairness.”) (citations omitted); Scinto v. Stamm, 620 A.2d 99, 106 (Conn. 1993) (“courts have consistently refused to embark on any inquiry into the integrity of examination results in the absence of clear and unequivocal allegations of

probative facts that would establish fraud, imposition, discrimination or manifest unfairness on the part of bar examiners.”).

Moreover, the Tenth Circuit has explained that although due process principles would not necessarily prevent the subjective grading of examinations, an unqualified right to re-take the examination satisfies due process requirements. See Lucero v. Ogden, 718 F.2d 355, 359 (10<sup>th</sup> Cir. 1983) *cert. denied*, 465 U.S. 1035 (1984). A review of the In re Thorne, In re Randolph-Seng, and Lucero cases reflects a logical, practical approach in that bar examinations are not required to be perfect in every respect, but rather, should be rationally related to the ability and fitness to practice law while being administered in an essentially fair manner.<sup>2</sup>

The Seventh Circuit has even gone so far as to hold that although a bar examination applicant is entitled to some procedural protections, due process did not require that an applicant even be permitted to see his test answers and compare his essay answers with model answers. Whitfield v. Illinois Board of Law Examiners, 504 F.2d 474, 478 (7<sup>th</sup> Cir. 1974).

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<sup>2</sup> Interestingly, both the Randolph-Seng and Thorne cases involved “defects” in the examination process. In Randolph-Seng, apparently a flawed essay question had been eliminated from consideration. In re Randolph-Seng, 669 P.2d 400, 402 (Utah 1983). In Thorne the applicant discovered on the first morning of the test that no examination packet had been prepared for him. On the second day, the applicant discovered that one of the essay questions in his packet was missing. This Court held that such irregularities did not invalidate the examination or the applicant’s scores. In re Thorne, 635 P.2d 22 (Utah 1981).

A right to re-take the examination, and in some jurisdictions, a form of review, then satisfies due process requirements. See, e.g., Jones v. Board of Commissioners, 737 F.2d 996, 1103 (11<sup>th</sup> Cir. 1984) (right to retake exam up to five times sufficient to meet due process concerns); Poats v. Givan, 651 F.2d 495, 497 (7<sup>th</sup> Cir. 1981) (right to retake exam four times suffices to overcome due process challenge); Tyler v. Vickery, 517 F. 2d 1089, 1104 (5<sup>th</sup> Cir. 1975), cert. Denied, 426 U.S. 940 (1976) (no hearing and unlimited right to retake exam meets due process requirements); In re Mead, 361 N.E. 2d 403 (Mass. 1977), *cert. denied*, 434 U.S. 858 (1977) (unqualified right to retake exam satisfies due process); Scinto v. Stamm, 620 A.2d 99 (1993) (unlimited right to retake exam).

There is no limit to the number of times an applicant for admission to the Utah State Bar may take the examination.

## **2. Equal Protection**

The equal protection clause of the Fourteenth Amendment requires that when government acts, those affected must be treated in an equal and equitable manner. Schwartz v. Board of Bar Examiners of N. M., 353 U.S. 232 (1957). Courts have created fundamental doctrines specifying that the level of scrutiny in an equal protection analysis depends on the class of persons affected. That is, persons within a protected class invoke strict scrutiny of the action while others are subject to either intermediate scrutiny or a rational basis test. Equal

protection principles in the context of a bar examination are demonstrated by the case of Jones v. Board of Commissioners of the Alabama State Bar, 737 F.2d 996 (11<sup>th</sup> Cir. 1984). There, applicants challenged that admission rules governing the examination violated due process and equal protection. The Eleventh Circuit explained that while the taking of a bar examination may invoke constitutional protections, there are no fundamental rights at issue and a traditional rational basis review is appropriate.

Despite the fact that the equal protection cases Petitioners raise in support of their equal protection claims largely deal with alleged racial discrimination in a bar examination context,<sup>3</sup> Petitioners have not asserted that they fall within a protected class of persons. Their burden, therefore, is to show that they were denied equal protection because there was no rational basis underlying the Bar's conduct in the examination process.

## **II. THE JULY 2000 BAR EXAMINATION WAS LEGALLY SUFFICIENTLY UNDER THE CONSTITUTION AND SUFFICIENTLY VALID UNDER APPLICABLE STANDARDS**

Petitioners assert that the July Exam as constructed, administered, and graded, failed to provide a reliable, valid and fair assessment of their competency to practice law. Therefore, they argue, they must be deemed to have passed, or



those who passed must be deemed to have failed. Absent from the creative shotgun spread of allegations is the fact that the overall pass rate for the July Exam was 87.9%. [R. at TAB E & Addendum 4] This pass rate is well within the range of rates over the past 10 years which has been as low as 79.4% in February of 1999 and as high as 94.1% in July 1998. [R. at TAB E & Addendum 4] The July Exam pass rate of 87.9% is nearly identical to the average pass rate for the previous 20 examinations: 87.85%. [R. at TAB E & Addendum 4] Petitioners do not dispute these statistics. The fact that the July Exam average passing rate was well within the expected range is indicative that any alleged irregularities related to the examination did not result in manifest unfairness.

Petitioners' arguments assume that they would have passed the July Exam if the test complied with all the additional and different standards and practices they want to impose on the Bar. This assumption lies at the heart of many bar examination grievances and accounts for courts' reluctance to exhaustively examine every alleged defect of an examination. Even if a "perfect" examination process existed, there are always alternative, albeit equally "perfect" methods of testing, and the potential for challenge becomes endless. The question should be not whether the Bar has alternative or even improved means

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<sup>3</sup> Those cases include: Avery v. Georgia, 345 U.S. 559 (1963); Palmer v. Thompson, 403 U.S. 217(1971); Parrish v. Board of Commissioners of the Alabama State Bar, 533 F.2d 942 (5<sup>th</sup> Cir. 1976); and Tyler v. Vickery, 517 F.2d 1089 (5<sup>th</sup> Cir. 1975).

available in its testing procedures, but whether the current methods it has chosen are essentially fair and rational.

**A. Administration Issues: Assignment of “Identifiable” Test Numbers**

The Bar provided Petitioners with a reasonable explanation of the test numbering system it uses. [R. at TAB Q & Addendum 8] Part of the explanation included the fact that student and attorney applicants are given a different series of numbers because of test seating arrangements, e.g., attorney applicants only sit for one day of the two-day examination. [R. at TAB Q & Addendum 8]

Petitioners allege that the anonymity of applicants was adversely impacted under the system the Bar uses because, “...if graders were to have even limited and cursory access to a list of applicants . . . anonymity would be immediately and fatally compromised.” [Petitioners’ Opening Brief at 13]

It is axiomatic that anonymity is important in the examination process. It is the very reason why applicants are assigned test ID numbers rather than being identified by name. Admittedly, some test ID systems may be better than others and there is always room for improved procedures. But the Bar is unaware of any foolproof system that will guarantee an examinee’s anonymity if a grader gains access to a source containing the key coding information. There was no breach of security during the July Exam where applicant anonymity was

compromised. [R. at TAB 11] Petitioners fail to raise a single fact or the slightest evidence that such occurred.

The mere potential for wrongdoing should not invalidate an entire Bar examination nor should it turn a failing grade into a passing one. See e.g., Scinto v. Stamm, 620 A.2d 99, 106-7 (Conn. 1993) wherein the court commented: “Courts have consistently refused to embark on any inquiry into the integrity of examination results in the absence of clear and unequivocal allegations of probative facts that would establish fraud, imposition, discrimination or manifest unfairness on the part of bar examiners.” (citing, *inter alia*, In re Thorne, 635 P.2d 22 (Utah 1981). See also Hooban v. Board of Governors of Washington State Bar, 539 P.2d 686, 689 (Wash. 1975) (“A simple allegation with nothing more...is insufficient to establish arbitrariness in the conduct of the examination...and there is nothing in the record indicative of fraud or dishonesty by the examiners....”); Mississippi Board of Bar Admissions v. Applicant F, 582 So.2d 377, 379-80 (Miss. 1991) (“In the present context...a complaining examinee must offer more than bald conclusory language in support of his claim”) (quoting In re Mead at 405). See also In the Matter of the Application of Obermeyer, 717 P.2d 382 (Alaska 1986).

## **B. Construction and Time Issues**

Petitioners contend that deletion of the torts question - and the composition of the remaining 11 essay questions - are flaws so fatal that they invalidated the entire July Exam. The elimination of the torts question was clearly an irregularity on the July Exam. It, in fact, may even have been a substantial irregularity. The issues then become: (1) did the Bar have a reasonable basis for its decision to delete the question from consideration; and (2) were Petitioners (and other applicants) treated so unfairly such that they were subject to manifest injustice?

It was during the initial calibration grading process after the examination that the graders discovered that the torts question was not fairly assessing the knowledge of the applicants. [R. at TABS 9, 10, 11 & Addendum 3] Therefore, at the point the torts question was determined to be defective, the examination was over. As a practical matter, the Bar had three choices: (a) declare the examination invalid and require applicants to re-take the test, most likely at the next regularly scheduled examination period seven months later; (b) admit everyone who took the examination regardless of their performance, or (c) eliminate the statistically invalid question and score the remainder of the examination. [R. at TABS 9, 10, 11 & Addendum 3]

The Bar's Executive Committee found that declaring the examination invalid and requiring all applicants to re-take the two-day examination at a later

time would have been unduly burdensome and manifestly unfair to all the applicants. [R. at TABS 9, 10, 11 & Addendum 3] They also concluded that invalidating an entire examination would have been relinquishing the Bar's responsibility to administer the examination. [R. at TABS 9, 10, 11 & Addendum 3] Admitting everyone who took the examination regardless of their performance would have been an abdication of the Bar's fundamental obligation to ensure competency and abdication of the public trust. [R. at TABS 9, 10, 11 & Addendum 3] The Grading Committee, the Admission Administrator and the Bar's General Counsel, in conjunction with the National Conference of Bar Examiners, determined that discarding the defective question was the most acceptable and least problematic resolution to the real world problems recognized by the Executive Committee. Under the circumstances, there was no manifest unfairness. [R. at TABS 9, 10, 11 & Addendum 3]

Petitioners argue, on the basis of the report of David J. Gustafson, that the decision to delete the torts question reduced the validity of the examination, and that therefore, it is impossible to use the July Exam as the basis for an accurate determination regarding the applicants' competency.<sup>4</sup> [Petitioners' Brief at 9].

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<sup>4</sup> Petitioners also observe that the issue of the dropped question could have been avoided if the Bar had originally constructed a proper question in accordance with rules and guidelines, which of course, begs the question. The Bar administers two examinations a year and makes every attempt to ensure the test's quality. As far as records show, the last time an essay question had to be eliminated was in 1983. See In re Randolph Seng, 669 P.2d 400 (Utah 1983). The Bar continues to make improvements, has hired a new Admissions Administrator and has just concluded a two year review of the admissions process but as yet has not implemented the recommended changes.

While the Bar was unable to submit a psychometric report of its own in this particular case to refute these findings, the undisputed fact remains that the Bar made the decision to eliminate the faulty question in conjunction with the National Conference of Bar Examiners, an organization which oversees and sets national standards for the process of admissions, including bar examinations, throughout the United States. (R. at TABS 9, 10, 11 & Addendum 3] The fact also remains that the Bar chose a practical, rational response to a problem which treated everyone equally and left 11 essay questions on the examination to test competency in addition to the 200 questions on the MBE.

Petitioners assert that they were deprived of an opportunity to accrue as many as five points upon the deleted torts questions – points that other applicants may not have accrued. They also assert that by answering the dropped torts question, they were deprived of time in which they might have accrued additional points on the test which others may not have accrued. In fact, Petitioners were in the same shoes as everyone else who took the July Exam. Each of the essay questions is designed to take approximately 30 minutes to answer and if an applicant chooses to spend undue time on one question to the detriment of available time to answer others, an applicant exercises that judgment at his or her own peril. [R. at TAB G & Addendum 5] Furthermore, even assuming Petitioners had less time to spend on answering the five

remaining questions in that particular session, that may - or may not have - resulted in their earning a lower score on those questions relative to what they would have earned had they devoted about the same amount of time to all six of them.

Petitioners next contend that contrary to the Grading Handbook, some of the essay questions required too many issues be identified and discussed within the recommended thirty (30) minute time period. Without going into exhaustive detail about exactly how many issues each of the eleven essay questions contained, and whether the graders classified these issues as “primary” issues or “sub-issues”, and how much weight the graders accorded to identification versus the quality of discussion of each issue, it should be kept in mind that the calibration process is designed to assure fairness and puts all the examinees on an equal footing. Petitioners were not asked to perform a task that was more or less burdensome with respect to any other applicant who answered the questions. Their answers were compared to the calibrated “benchmark” answers and graded accordingly. Moreover, the two questions that Petitioners cite as containing too many issues were ethics and criminal law. Those two questions received the highest average grades (“3”) of any question on the July Exam. Again, the average pass rate on the July Exam was well within expected range. [R. at TABS 9, 10, 11 & TAB E] and indicative of a normal examination. If, in

fact, there were “too many issues” in the essay questions to answer in the allotted 30 minutes, the passage rate should reflect the “manifest unfairness” that ensued.

### **C. Grading Issues**

Petitioners take another shot in their scattergun approach by attacking how the examination was graded.<sup>5</sup> One of the claims is that elimination of the defective torts question gave additional weight to the remaining eleven essay questions. That may or may not have been the result but even if it were, the issue is whether the practical solution to delete one question was arbitrary, capricious and resulted in manifest unfairness. The Bar was unable to submit an expert’s assessment of the psychometrics of testing but the national organization which oversees bar examinations was consulted before the question was eliminated. Petitioners also complain that the graders’ qualifications may not have been up to “standard,” but that they were unable to explore this avenue more fully because the Bar refused to provide information relating to the graders’ expertise. This argument is discussed more fully below in the discovery context, but suffice it to say that at a minimum, there is a potential nightmare relating to the recruitment of necessary volunteers if they are sucked into disputes about

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<sup>5</sup> It is interesting to compare Petitioners’ claims with those put forth in the Tyler case. In that matter, applicants argued that examiners merely should use model answers and predetermined standards in grading. The court held, however, that these claims were “merely suggestions for improvement and did



their professional qualifications. Bar examiners are selected and appointed by the Commission. This is a reasonable explanation in response to the demand that every failed applicant is entitled to information about 75 bar examiners in order to determine if they are suitably qualified to draft questions and grade an examination.

The next grading complaint is that the calibration and grading process was unsatisfactory, e.g., insufficient time to calibrate and then grade the examinations the way Petitioners think that they should be graded. Petitioners also assert that the five-point grading scale may not have been carefully followed and that this resulted in their failure to pass. The record is clear that calibration and grading took place. [R. at TABS 9, 10, 11] Simply answered, whatever time was expended by each of the 12 grading committees, the calibration and grading process resulted in the normally expected range of passing and failing scores on the July Exam

Petitioners argue that unacceptable grade compression which invalidates the test resulted from a “bell curve” process employed on the July Exam. This argument unfortunately arises out of misunderstanding based on the Bar’s poor choice of language in supplying some of the requested information. Even assuming that there is something suspect about employing a “curve” in the

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not raise a fact issue as to whether the examination itself is rational.” Tyler v Vickery, 517 F.2d 1089, 1102-3 (5<sup>th</sup> Cir. 1975), cert. denied, 426 U.S. 940 (1976).

system, there was no actual “bell-curve” grading of essay questions. [R. at TAB Q at paragraph 3 & Addendum 8] In the information the Bar supplied to Petitioners, the Ethics Grading Committee's tally of how many applicants had “5's”, how many applicants had “4's”, etc. was characterized as a “bell curve” because the majority of applicants had grades of “3's” on that question. [R. at TAB Q & Addendum 8] As explained in a letter dated January 29, 2001, the grading chair merely performed the exercise AFTER the grading was finished out of curiosity. [R. at TAB Q & Addendum 8] The “bell curve” document was not in fact, used in the actual grading process. [R. at TAB Q & Addendum 8]

The final complaint in this section is that the Bar has failed to adopt and apply procedures for review of the grading process. Petitioners comment the Bar should have a “dispassionate and qualified committee to review and remedy inaccuracies and irregularities in the grading protocol”. This observation does not form part of the alleged basis for their failure to pass the examination but rather is indicative of Petitioners' overall approach to discredit the examination process.

**III. THE BAR'S REAPPRAISAL POLICY RESULTING IN THE ADMISSION OF FIVE OTHER APPLICANTS IS NEITHER ARBITRARY, CAPRICIOUS NOR DISCRIMINATORY.**

Petitioners argue that because five other applicants were subsequently deemed to have passed the July Exam after initially failing it, that the Petitioners were denied due process and equal protection. The required score for passing the Bar examination is 130. [R. at 9, 10, 11 & Addendum 1 & 2] There were five applicants on the July Exam who scored between 129.00 and 130.00. [R. at Tab Q & Addendum 8] The Utah Bar Examiner's Committee Grading Handbook at Part V-H provides for reappraisal grading where a final score falls between 129 and 130. [R. at Tab G & Addendum 5] The five applicants' essay answers were re-graded and resulted in scores of 130 or more. [R. at O & Addendum 7] The practice of reappraisal is neither arbitrary, capricious nor discriminatory under equal protection principles. It recognizes the inherent subjectivity of grading essay questions even with a calibration process and helps insure that every applicant who comes within one point or less or less of passing has the fairest treatment possible. This Court in Randolph-Seng has explained that a rational selection process fairly based on objective criteria is required to distinguish among those who initially failed but are subsequently admitted to the practice of law. In re Randolph-Seng, 669 P.2d 400 at 402. That is precisely the case at hand.

A number of jurisdictions have adopted automatic re-grading or reappraisal procedures when applicants' grades within a point or two of passing. In a case where the petitioner challenged the policy of rereading exam scores which fell within one point of passing as arbitrary and violative of due process and equal protection, the court held that the bar did not abuse its discretion. Tyler v. Vickery, 517 F.2d 1089, 1103 (5<sup>th</sup> Cir. 1975), *cert. denied*, 426 U.S. 940 (1976). That court also observed, "[I]t is curious logic to condemn the examiners for utilizing practices designed to recognize the inherent limitations of testing and for attempting to give the benefit of the doubt to applicants who may have been adversely affected by those limitations." Id. See also In re Mead, 361 N.E. 2d 403 (Mass. 1977) (board provides for rereading for any failing applicant who scored within two points below the passing grade); Mississippi Board of Bar Admissions v. Applicant F, 582 S.2d 377, 380 (Miss. 1991) (automatic regrading process for marginal failures).

#### **IV. THE BAR HAS ADOPTED AND FOLLOWS A VALID APPEAL PROCEDURE.**

Petitioners claim that the Bar's current appeal procedures for those who do not pass the examination constitutes a denial of due process. They argue that, "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."

Petitioners' Brief at 30-31. The primary objection appears to be that the Bar did not satisfactorily respond to their voluminous "discovery" requests. For example, the Bar did not provide the names, addresses, registered agents and qualifications of approximately 75 examination graders.<sup>6</sup>

Petitioners' objections fail to acknowledge Admission Rule 11 which reads: Examinations shall be retained for not less than six (6) months after the date that examination results have been announced. An unsuccessful applicant shall be entitled to reasonable inspection of: (1) the essay questions; (2) the applicant's answers; (3) sample answers for each question.<sup>7</sup> [Addendum 1]

Bar examination grievants are not entitled to every piece of information generated in the admissions process in order to satisfy their notions of fairness. In a classic case of no good deed goes unpunished, the Bar attempted to accommodate most of Petitioner's requests despite the fact that it had no legal obligation to do so. The Bar was unable or unwilling to comply with all the

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<sup>6</sup> See Record of Proceedings, Tab B – Grievants' Initial Set of Requests for Information: "Please provide year 2000 Martindale-Hubble Law Directory competency and ethics ratings and years of Utah Bar licensure for each individual responsible for the composition of and for each individual responsible for the grading of those questions appearing on the July 2000 Bar Examination." See Record of Proceedings, Tab I for Bar's response which reads in part: "You've also asked for names, addresses, registered agents, etc. for those individuals grading the July 2000 Bar Examination. I am unable to provide you with this information for confidentiality and practical reasons. If our Bar exam volunteers were subject to this kind of disclosure, the Bar would soon find itself without these volunteers' valuable assistance."

<sup>7</sup> In one of the Bar's letters to Petitioners' attorney, its General Counsel wrote in part: "Again, although we are willing to work with you, please bear in mind that the grievance procedures are not intended to mirror proceedings in a litigation context and we are only obligated to provide grievants with the limited information specified . . . courts have typically found that Bar Examiners are not obligated to produce exhaustive documentation in order to meet due process concerns in this particular area of the law. Nevertheless, I will try to respond to your inquiries the best that I can." [R. at TAB O & Addendum 7]

“discovery” because of confidentiality concerns or because the requests were unduly burdensome. [R. at TAB Q & Addendum 8] As previously noted, the Utah Rules of Civil Procedure providing for discovery procedures do not apply in bar examination appeals. Also previously noted, the Bar is not considered to be an administrative agency where the same rules and regulations for purposes of disclosing information apply. See Barnard v. Utah State Bar, 804 P.2d 526 (Utah 1991).

The cases of Parrish v. Board of Commissioners of the Alabama State Bar and Mathews are invoked as examples of what Petitioners might deem to be acceptable bar examination review procedures. Parrish v. Board of Commissioners of the Alabama State Bar, 523 F.2d 942 (5<sup>th</sup> Cir. 1976) and Mathews v. Eldridge, 424 U.S. 319 (1976). The Mathews case, however, addressed whether the due process clause of the Fifth Amendment required that prior to the termination of Social Security disability benefits, a recipient be afforded an opportunity for an evidentiary hearing. Again, the Bar is not a government entity which should be subject to the same administrative agency rules, regulations and laws. Moreover, as the Tenth Circuit has observed, “the interest of the unsuccessful bar examinee pales by comparison with the interest of the welfare recipient, or even the disability benefits recipient who was found

not to deserve a pre-termination hearing in Mathews.” Lucero v. Ogden, 718 F.2d 355, 358 (10<sup>th</sup> Cir. 1983), cert. denied, 465 U.S. 1035 (1984).

For comparison purposes, a number of jurisdictions either have no review appeal procedures for examination failures or have an extremely limited review process along with restricted policies relating to the release of information. These procedures have passed judicial scrutiny. See, for example, Tyler v. Vickery, 517 F.2d 1089 (5<sup>th</sup> Cir. 1975), cert. denied, 426 U.S. 940 (1976) where the court found that a procedure for review of a failing grade was not constitutionally required because there was an unqualified right to retake the examination. See also In re Mead, 361 N.E.2d 403, cert. denied, 434 U.S. 858 (1977) (Mass. 1977) an applicant’s discovery motion for a sampling of both passing and failing examination papers was denied because the Bar provided an unqualified right of reexamination. Other cases reflect similar holdings: Carroll White Puckett v. Alabama State Bar, 603 So.2d 908 (Ala. 1992) (holding that the rules applicable to the Alabama bar examination paper affords applicants adequate due process protections against the possibility that their interests in practicing law will be limited or denied improperly.); In re Bar Exam Class Action, 752 So.2d 159 (La. 2000) (no post exam review process held constitutional); and Bowles v. Askew, 448 S.E.2d 191 (Ga. 1994) (where lack of a post exam review process was held not to violate due process.)

Petitioners here have the remedy of an unqualified right to retake the examination and indeed, one who has elected to do so has already has been admitted to the practice of law. The contention that failed applicants are entitled to a virtually unending stream of discovery constitutes an unreasonable burden on the Bar's admission system.

## CONCLUSION

While the U.S. Supreme Court has held that bar examination procedures are always reviewable to determine if there has been any contravention of the due process or equal protection clause, the constitutional inquiry here is whether there is some reasonable basis for the challenged conduct, or some rational connection between it and a legitimate state interest. Schwartz v. Board of Bar Examiners of N.M., 353 U.S. 232 (1957). The Constitution does not require a perfect test nor does it require perfect examiners; it requires only a rule of rationality. See, e.g., In re Reardon, 378 A.2d 614, 618-9 (Del. 1977).

The July Exam had 204 successful applicants out of a total of 232 individuals who took it, culminating in nearly a 90% pass rate. Two of the Petitioners who were not among the 204 now seek to blame their failure not on their poor performance and undisputedly low test scores, but on the examination itself, the computer-generated test ID numbering, the review process of the

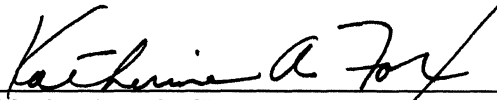


essay questions, the dropped torts question, the number of issues in each question, the identity and qualifications of the graders, the length of time the graders spent grading, the calibration process, the length of time the graders spent calibrating, the grading scale, the application of the grading scale, the Bar staff's poor choice of the phrase "bell curve," the reappraisal policy, the current appeals procedure, and finally, the Bar's alleged lack of responsiveness to all their discovery requests.

The Utah State Bar did not engage in arbitrary or capricious conduct in administering its policies, procedures and the July Exam. No one's due process rights were violated in administering the July Exam. No one's equal protection rights were violated in administering the July Exam. The relief Petitioners specify – that all 204 individuals who took and passed the July Exam now should be required to re-take it or in the alternative, Petitioners should be deemed to have passed it - should only be granted upon a showing that they failed the examination *because of a substantial irregularity in the administration of the examination which resulted in manifest unfairness or because of mathematical inaccuracy in the scoring process*. The Bar respectfully submits that they have not met their burden.

Dated this 15<sup>th</sup> day of August, 2001.

UTAH STATE BAR



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Katherine A. Fox  
General Counsel

Fox/Adm/briefmontgomery

## **ADDENDUM**


Rules Governing Admission to the Utah State Bar .....	1
Bar's Failed Examination Letters to Cox, Arnovick And Wansker .....	2
Final Determinations for Cox, Arnovick And Wansker .....	3
Bar's Pass/Fail Rate Historical Information .....	4
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## CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed in the U.S. mail, first class and postage prepaid, **two** true and correct copies of the foregoing **Brief of Respondent Utah State Bar and Addendum** on the 15<sup>th</sup> day of August, 2001, to the following:

Carolyn Montgomery  
1904 Longview Drive  
Salt Lake City, Utah 84124

Attorney for Petitioners

  
\_\_\_\_\_  
Katherine A. Fox, General Counsel

Tab 1

# **RULES GOVERNING ADMISSION TO THE BAR**

## **RULE ONE Definitions**

Section 1-1. Definitions. As used in the rules relating to admission, the following terms shall be given the following meanings, except as otherwise provided or may result from necessary implication from the rule.

Approved Law School. An "approved law school" is one which is fully or provisionally approved by the American Bar Association pursuant to its Standards and Rules of Procedure for Approval of Law Schools.

Attorney Applicant. An "attorney applicant" is any person who satisfies the requirements of Rule 4.

Student Applicant. A "student applicant" is any applicant for admission to the Bar who does not qualify as an "attorney applicant" under Rule 4.

## **RULE TWO Board of Commissioners - General Powers**

Except as otherwise indicated the word "Board" as used in these rules refers to the Board of Commissioners of the Utah State Bar. For the purposes of these rules, applicants are classified as either "student applicants" or "attorney applicants."

Section 2-1. Admission to the Bar. The Board shall recommend and certify to the Supreme Court for admission to the Bar such persons, and only such persons, who possess the necessary qualifications of learning, ability and character which are a prerequisite to the privilege of engaging in the practice of law, and who fulfill the requirements for admission to the Bar, as provided by these rules.

Section 2-2. Subpoena Power. Any member of the Board, or the Executive Director or the Secretary or an Assistant Secretary thereof, shall have power to issue subpoenas for the attendance of witnesses or for the production of documentary evidence before the Board or before anyone authorized to act in its behalf.

Section 2-3. Administration of Oaths. Any member of the Board or the Executive Director shall have power to administer oaths in relation to any matter within the functions of the Board.

Section 2-4. Taking of Testimony. Any member of the Board, and any other person who has power to administer oaths, shall have power, upon order of the Board, to take testimony in reference to any matter within the function of the Board.

Section 2-5. Regulations. The Board is empowered to adopt and enforce such reasonable regulations and to appoint such committees in furtherance of the purpose of these rules and to facilitate their administration as may be necessary or advisable.

**RULE THREE**  
**Qualifications for Admission of Student Applicants**

Section 3-1. Requirements of Student Applicants. To be recommended as a student applicant for admission to the Bar, a person must:

1. Have filed an application for Bar Examination and Admission to the Bar as a student applicant in accordance with Rule 5;
2. Be at least twenty-one years old;
3. Have graduated with an LL.B, J.D., or equivalent degree from an approved law school.
4. Be of good moral character and have satisfied the requirements of Rule 6;
5. Have successfully passed the Bar Examination as prescribed in Rule 7;
6. Have complied with the provisions of Rule 12 concerning enrollment fees;
7. Have successfully passed the Multistate Professional Responsibility Examination (MPRE) as prescribed in Rule 7-8.

Section 3-2. Foreign Law School Applicants. Applicants who have not graduated from an ABA accredited law school, but who have graduated from a foreign law school in a country where principles of English common law form the basis for the country's jurisprudence, may be recommended for admission to the Bar under the following conditions:

1. Have filed an application for Bar Examination and Admission to the Bar as a foreign law school applicant in accordance with Rule 5;
2. Be at least twenty-one years old;
3. Have (a) been admitted to practice in the jurisdiction where the applicant attended law school, and (b) successfully completed, within twenty-four (24) consecutive months, not less than twenty-four (24) semester hours, or their equivalent in quarter hours, at an ABA-approved law school, including no less than one course each in constitutional law, civil procedure, legal ethics and evidence.
4. Be of good moral character and have satisfied the requirements of Rule 6;
5. Have successfully passed the Bar Examination as prescribed in Rule 7;
6. Have complied with the provisions of Rule 12 concerning enrollment fees;
7. Have successfully passed the Multistate Professional Responsibility Examination (MPRE) as prescribed in Rule 7-8.

Section 3-3. Other Foreign Law School Graduates. All other students and graduates from foreign law schools not meeting the requirements of Section 3-2 may be recommended only if they have been admitted to an ABA approved law school, consistent with Standard 303 of the American Bar Association Standards for Approval of Law Schools, and

school.

Section 3-4. Foreign Law Schools. A foreign law school, for purposes of these rules, is any school located outside of the U.S. and its protectorates, and accredited by that jurisdiction's legal accreditation body, if one exists, or who's graduates are otherwise permitted by that jurisdiction's highest court to practice law.

## **RULE FOUR**

### **Qualifications for Admission of Attorney Applicants**

Section 4-1. Requirements of Attorney Applicants. To be recommended as an attorney applicant for admission to the Bar, a person must:

1. Have filed an application for the Utah Bar Examination and Admission to the Bar as an attorney applicant in accordance with Rule 5;
2. Be at least twenty-one years old;
3. Have been admitted to the practice of law before the highest court of a sister state or the District of Columbia for no less than five years, and have been substantially and lawfully engaged in the practice of law in such jurisdiction for any four of the five years immediately preceding the filing of the application. For purposes of this rule, the practice of law includes the following activities or the equivalent thereof:
  - (a) sole practitioner in a private law firm;
  - (b) partner, shareholder, associate, or one of counsel in a private or public law firm;
  - (c) officer of a corporation or other business organization whose principal responsibilities include rendition of legal advice and/or assistance;
  - (d) government employee whose principal duties are providing legal advice to the governmental agency by which he or she is employed or representing such agency before the courts;
  - (e) service in the armed forces in the Judge Advocate department in a legal capacity in any state;
  - (f) judge of a court of general or appellate jurisdiction requiring admission to the Bar as a qualification for admission thereof;
  - (g) law clerk to a judge of a court of general or appellate jurisdiction;
  - (h) teaching full-time in an approved law school.
4. Be of good moral character and have satisfied the requirements of Rule 6;
5. Have successfully passed the Bar Examination as prescribed in Rule 10-1;
6. Have complied with the provisions of Rule 12 concerning enrollment fees;
7. Have successfully passed the Multistate Professional Responsibility Examination (MPRE) as prescribed in Rule 7-8.



## **RULE FIVE**

### **Application Forms and Fees**

Each applicant of admission must file an application for examination and admission to the Utah State Bar on a form prescribed by the Board, which shall include an authorization and release to enable the Board to obtain information concerning the applicant.

Section 5-1. Applications. All applicants shall file completed applications for permission to take the Bar Examination and for Admission to the practice of law in this state with the Utah State Bar office by October 1 preceding the February Bar Examination and by March 1 preceding the July Bar Examination.

Section 5-2. Applicant Filing Fees. Filing fees shall be established by the Board and shall be submitted with the application according to the deadlines in Section 5-1.

Permission to sit for the Utah Bar Examination may be withheld for any applicant who does not satisfy the documentation requirements ten days before the examination is to be administered.

Section 5-3. Withdrawal of Applications. If the application is withdrawn in writing prior to 30 days before the examination date for which the applicant has filed to sit, one-half of the filing fee shall be refunded.

## **RULE SIX**

### **Moral Character & Fitness**

Section 6-1. Standard of Character and Fitness. An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for denial of admission.

Section 6-2. The Investigative Process. Investigations into the moral character and fitness of applicants may be informal, but shall be thorough, with the object of ascertaining the truth. The Board or a committee appointed by the Board may act with or without requiring a personal appearance by an applicant. If an applicant is required to appear, the Board or committee may require the applicant to appear under oath. After investigation is complete, if the Board or committee is not prepared to certify the applicant, it shall promptly notify the applicant by certified mail that the applicant has not been approved to sit for the Bar Examination and for Admission to the Bar.

Section 6-3. Confidentiality and Due Process. Records and sources shall be kept confidential in order to protect the applicant and the sources. Applicants shall be provided with notice and an opportunity to appear, with right to counsel, before the Board before a final adverse determination is made. Following denial of admission on character and fitness grounds, re-application may be made after one year unless otherwise set forth at the time of denial.

Section 6-4. Release of Information. Except as otherwise authorized by order of the Supreme Court, the Board or committee appointed by the Board shall deny requests for confidential information but may grant the request if made by:

- a. An agency authorized to investigate the qualifications of persons for admission to practice law;

- ... agency, authorized to investigate and qualify persons for government employment;
- c. A lawyer discipline enforcement agency; or
- d. An agency authorized to investigate the qualifications of judicial candidates.

If the request is granted, information shall be released only upon certification by the requesting agency that the confidential information shall be used for authorized purposes only. If one of the above enumerated agencies requests confidential information, the Board or committee shall give written notice to the applicant that the confidential information will be disclosed within ten days unless the applicant obtains an order from the Supreme Court restraining such disclosure.

Section 6-5 Evidence. In addition to the standard set forth in 6-1 above, the revelation of discovery of any of the following should be treated as cause for further inquiry before the Board decides whether an applicant possesses the requisite character and fitness to practice law:

- a. the applicant's lack of candor
- b. unlawful conduct
- c. academic misconduct
- d. making of false statements, including omissions
- e. misconduct in employment
- f. acts involving dishonesty, fraud, deceit or misrepresentation
- g. abuse of legal process
- h. neglect of financial responsibilities
- i. neglect of professional obligations
- j. violation of an order of a court
- k. evidence of mental or emotional instability
- l. evidence of drug or alcohol dependency
- m. denial of admission to the bar in another jurisdiction on character and fitness grounds
- n. past or pending disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction
- o. other conduct bearing upon moral character or fitness to practice law

In making this determination through the processes described above, the following factors should be considered in assigning weight and significance to prior conduct:

- a. the applicant's age at the time of conduct
- b. the recency of the conduct
- c. the reliability of the information concerning the conduct
- d. the seriousness of the conduct
- e. the factors underlying the conduct
- f. the cumulative effect of conduct or information
- g. the evidence of rehabilitation
- h. the applicant's positive social contributions since the conduct
- i. the applicant's candor in the admissions process
- j. the materiality of any omission or misrepresentations

Conduct that is merely socially unacceptable or the physical disability of the applicant is not relevant to character and fitness for law practice and should not be considered.

Section 6-6. Review after Denial. If an applicant is not certified by the Board or committee, and after notice is sent as required in Section 6-2, the applicant shall have the right to file a written request for hearing within ten days after such notice, and a hearing shall be granted by the Board under the following rules of procedure:

- a. The Secretary of the Board shall notify the applicant of:
  - 1) the date, time and place of such hearing;
  - 2) the matters adverse to applicant which were disclosed in the preliminary hearing or hearings;
  - 3) if such matters were based in whole or in part upon adverse statement from other persons, the names of such persons; and
  - 4) the applicant's right to be represented by counsel at the hearing to examine and cross-examine witnesses, to adduce evidence bearing on the aforesaid adverse matters and upon the applicant's moral character and general fitness to practice law, and for such purpose to make reasonable use of the Board's subpoena powers.
- b. The hearings before the Board shall be private unless the applicant shall request that they be public. The hearings shall be conducted in a formal manner, with the applicant having the rights set forth in this rule. The burden of proof shall be on the applicant to establish that he or she is possessed of good moral character and entitled to the high regard and confidence of the public, and removing any and all reasonable suspicions of moral unfitness. The Board shall not be bound by the formal rules of evidence; it may in its discretion take evidence in other than testimonial form, having the right to rely upon records and other assistance in its inquiries; and may in its further discretion determine whether evidence to be taken in testimonial form shall be taken in person at the hearing or upon deposition, but all testimonial evidence shall be in either event be taken under oath. A complete stenographic record of the hearing shall be kept, and a transcript may be ordered by the applicant at his or her own expense.
- c. If after such hearing the Board does not certify the applicant, it shall make written findings and conclusions and it shall deliver a copy thereof to the applicant.

**With respect to Rule 6, the Utah Supreme Court has ruled:**

Character reference letters submitted with application in which the writer requests confidentiality are to be held confidential and not placed in evidence or otherwise made available to decision-making body or anyone else involved in a decision-making capacity with respect to the admission of the applicant. Any such body or person having knowledge of the content of the information, including members of the Bar Commission shall withdraw from participation in the matter, and if necessary, the Bar Commission shall appoint persons necessary to replace those required to withdraw from the decision-making process.

## RULE SEVEN Student Bar Examination

Section 7-1. Content. The Student Bar Examination shall consist of such questions as the Board shall select relating to the practice of law. The essay portion of the examination shall consist of twelve questions, some of which may be taken from the Multistate Essay Examination (MEE). One essay question shall deal with Legal Ethics.

Section 7-2. Composition. The Student Bar Examination shall include an essay component and the Multistate Bar Examination (MBE). The MBE and essay portions ordinarily will be given over a two-day period, with one day allocated to the MBE and one day to essay questions.

Section 7-3. Preparation of the Essay Examination. Essay questions may be:

- 1) taken from the Multistate Essay Examination;
- 2) prepared by practitioners and/or professors of law;
- 3) or both.

Model answers or outlines analyzing the issues presented shall be prepared by the author of the question. The answer or outline shall be submitted with the question to the Bar Examiner Review Committee.

The test questions and model answers shall be reviewed by the Bar Examiner Review Committee. The Bar Examiner Review Committee shall be independent of the Bar Examiners and shall determine the adequacy and appropriateness of all questions and model answers. The Bar Examiner Review Committee may require the questions and model answers to be rewritten or modified.

Section 7-4 Grading the Essay Examination. Essay answers shall be graded on a five-point scale. Each answer shall be graded on the following basis:

- (A) No credit shall be given to an unanswered question or to a nonresponsive answer;
- (B) A grade of 1 shall be given to an answer that is well below average;
- (C) A grade of 2 shall be given to an answer that is below average;
- (D) A grade of 3 shall be given to an answer that is average;
- (E) A grade of 4 shall be given to an answer that is above average;
- (F) A grade of 5 shall be given to an answer that is well above average.

Section 7-5. Uniformity of Grading. In order to assure maximum fairness and uniformity in grading, the Board shall prescribe procedures and standards for grading to be used by all graders.

Section 7-6. Method for Combining Scores. After all essay questions are graded, the grades received shall be added together for each applicant and scaled to the MBE portion of the examination. MBE scaled scores and essay scaled scores shall be combined accord-

ing to the standard deviation method. An applicant who receives a combined score of 130 or above by this method passes the Bar Examination.

Section 7-7. Administration of Essay Examinations Under Special Circumstances. Applicants who have medical, physical, or cognitive disabilities may request examinations be administered under special circumstances to accommodate their disability. Cognitive disabilities do not include "English as a second language." Such requests shall be made in writing at the date of application. Each request shall be reviewed and any special accommodation shall be made on an individual basis.

Section 7-8. Multistate Professional Responsibility Examination (MPRE). Each applicant must achieve an MPRE scaled score of 80 within two years before or following the date of the examination and provide proof thereof.

The MPRE is administered by the National Conference of Bar Examiners. Any person seeking to take the MPRE shall file an application with and pay the fee specified by the National Conference of Bar Examiners.

To be eligible to have his or her score on the MPRE accepted by the Board as satisfying the requirements of this rule, a student applicant must have completed one year of law school.

## **RULE EIGHT**

### **Retaking of Examination**

Section 8-1. Students Failing Bar Examination. All applicants failing will be required to retake the complete Bar Examination. Scores on the essay or MBE portions of the examination will not be carried over.

## **RULE NINE**

### **Transferability of Scores**

Section 9-1. Scores achieved on the Multistate Bar Examination (MBE) administered in a jurisdiction other than Utah will not be accepted unless the examination is taken concurrently with the Utah examination.

## **RULE TEN**

### **Attorney Examination**

Section 10-1. Content. The Attorney Examination consists of the essay portion of the Student Bar Examination and will administered the same date and time as the Student Bar Examination. The Attorney Examination will be graded and scaled to the MBE according to the procedures set forth in Rule 7-6. The passing applicant must achieve a score of 130 on the examination.

Section 10-3. Failing Applicant. An applicant who fails the Attorney Examination may sit for subsequent examinations, including successive examinations, upon payment of any required fees.

## **RULE ELEVEN**

### **Unsuccessful Applicants; Right of Inspection**

Section 11-1. Test Inspection. Examinations shall be retained for not less than six (6) months after the date that examination results have been announced. An unsuccessful

applicant shall be entitled to a reasonable inspection of:

- (1) the essay questions;
- (2) the applicant's answers to the essay portion of the examination;
- (3) sample answers for each question.

This rule does not permit applicants to inspect the Multi-State Bar Examination.

Section 11-2. Bar Examination Grading. The Board shall only review petitions of failing applicants who claim that this failure was because of a substantial irregularity in the administration of the examination which resulted in manifest unfairness or because of mathematical inaccuracy in the scoring process. The petition must be filed in writing by the applicant within thirty (30) days after notice to the applicant of examination results.

## **RULE TWELVE**

### **Certificate of Admission, Membership and Fees**

Section 12-1. Fees. Upon notification that the Board has approved the applicant for admission and before an motion is made to the Supreme Court for admission, the applicant shall pay to the Utah State Bar the fee for an active or inactive member as appropriate, and also the admission fee of fifty dollars (\$50.00) to be transmitted by the Utah State Bar to the Clerk of the Supreme Court upon the issuance of the applicant's Certificate of Admission.

Section 12-2. Non-compliance. If the applicant fails to comply with the preceding section and does not appear for admission within six (6) months after being called to appear before the Supreme Court for admission, the approve of his or her application for admission to the Bar shall be deemed to be withdrawn. The Board may reapprove such application upon a satisfactory showing of the qualifications of the applicant at the time he appears for admission to the Bar, or may grant an extension of the time for making appearance upon petition.

Section 12-3. There are two admission ceremonies each calendar year. To be admitted to the Utah State Bar you must participate in an Admissions Ceremony and pay the proper fees so that you name can be put on the motion submitted to the court the day of the ceremony. No other motions for admission to the Bar will be submitted to the court until the next scheduled Admissions Ceremony. NO EXCEPTIONS.

## **RULE THIRTEEN**

### **Practice of Law in Utah**

Section 13-1. Practice of Law. To practice law in Utah, an attorney must be an active member of and in good standing with the Utah State Bar.

Section 13-2. Admissions Pro Hac Vice. For the purpose of an individual case, no member of the bar of any jurisdiction may appear in the courts of this state without associating a licensed active attorney upon whom pleading and other papers may be served and who shall be responsible for the ethical conduct of such attorney under the provisions of the Rules of Conduct of the Utah State Bar.

**RULE FOURTEEN**  
**Readmission after Resignation or Disbarment**

Section 14-1. Readmission after Resignation. Readmission subsequent to the resignation of a member of the Bar shall be by petition in writing verified by the petitioner, addressed to the Board and filed with the Executive Director. The petition shall set forth the name, age, residence and address of the petitioner, his residence and occupation during the period subsequent to his resignation, the reasons for this resignation and a copy of the Order of the Supreme Court, if any, with respect to the resignation. The petition must be accompanied by a filing fee of \$200.00.

Section 14-2. Readmission after Disbarment. An applicant for readmission to the Bar after disbarment shall satisfy all requirements of Rule 3 as stated above, and shall satisfy all other requirements imposed by the Supreme Court.

**RULE FIFTEEN**  
**New Lawyer Continuing Legal Education**  
**Effective July 1991**

Section 15-1. The New Lawyer Continuing Legal Education program is divided into three parts, and is designed to ease the transition into practice. All Utah Attorneys who have an active license are required to comply with Mandatory Continuing Legal Education "MCLE". As stated in Rule 3 of the MCLE Rules, new admittees will meet their first two-year requirement through the New Lawyer Continuing Legal Education "NLCLE" program. The program is as follows:

- a. A one day "NLCLE" program which is given annually.
- b. Four monthly "NLCLE" workshops (three hours each) that will be sponsored by the Utah State Bar.
- c. Twelve hours of approved live continuing legal education.

If you serve as a judicial law clerk, practice law out-of-state, have an inactive licenses, or have a hardship you may apply for an extension or a waiver. For further information, please contact Sydnie W. Kuhre at 531-9095.

**RULE SIXTEEN**  
**Licensing of Foreign Legal Consultants**

Section 16-1. General Regulation as to Licensing. IN ITS DISCRETION, the Utah Supreme Court may license to practice in this State as a Foreign Legal Consultant, without examination, an applicant who:

- (a) is a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;
- (b) possesses the good moral character and general fitness requisite for a member of the Utah State Bar; and
- (c) intends to practice as a legal consultant in this State and to maintain an office in this State for that purpose.

- (d) has passed the Multistate Professional Responsibility Examination.

Section 16-2. Proof Required. An applicant under this Rule shall file with the Utah State Bar:

- (a) a certificate from the professional body or public authority in such foreign country having final jurisdiction over professional discipline, certifying as to the applicant's admission to practice and the date thereof, and as to her or his good standing as such attorney or counselor at law or the equivalent;
- (b) a duly authenticated English translation of such certificate, if it is not in English; and
- (c) such other evidence as to the applicant's educational and professional qualifications, good moral character and general fitness, and compliance with the requirements of Sections 1 and 6 of this Rules as the Utah Supreme Court may require.

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### **BAR EXAM REVIEW COURSES**

The Utah State Bar does not endorse any provider of bar review courses. The following information is provided for reference only.

Multistate Review Course, contact Debra Roberson-Ochoa, Preliminary Multistate Bar Review, 1247 Sixth Street, Santa Monica, CA 90401 1-800-523-0777.

BARBRI Bar Review, 1-800-729-0190

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### **MPRE SCORE**

Verification of passage of the Multistate Professional Responsibility Examination (MPRE) with a scaled score of 80 or better within two years before or following the date of examination is required of all applicants before admission to the Bar.



## **GENERAL BAR EXAMINATION INFORMATION FOR STUDENT APPLICANTS**

### **STUDENT BAR EXAMINATION:**

The Utah Student Bar Examination is a two-day examination, consisting of a one-day essay examination component and a one-day Multistate Bar Examination (MBE) component. The total time allotted for each component is six hours.

#### **The Essay Examination.**

The examination is given the first day. It consists of 12 essay questions: six questions in the morning session and six in the afternoon. The six morning essay questions could be taken from the Multistate Essay Examination (MEE) questions. The MEE questions are taken from the following ten subject areas:

Agency and Partnership	Family Law
Commercial Paper	Federal Civil Procedure
(Negotiable Instruments)	Sales
Conflict of Laws	Secured Transactions
Corporations	Trusts and Future Interests
Decedent's Estates	

The remaining essay questions are state prepared and will be from the following 15 subject areas:

Administrative Law	Ethics
Business Entities (including corporations)	Evidence
Civil Procedure	Family Law
Utah Constitutional Law	Real Property
Federal Constitutional Law	Torts
Contracts	Uniform Commercial Code
Creditor/Debtor	(Articles II, III, IV, IX)
Criminal Law and Procedure	Wills/Estate Planning/Trusts
	(including tax aspects)

Applicants are expected to answer using the Utah Rules of Civil Procedure, the Federal Rules of Civil Procedure, the Utah Rules of Professional Conduct, the Utah Rules of Evidence and the Federal Rules of Evidence as applicable.

#### **The Multistate Bar Examination.**

The Multistate Bar Examination (MBE) is given the second day. It consists of 200 multiple choice questions.

## ADDENDUM/ERRATUM TO ADMISSION RULES

**RULE 3-2.(3) Foreign Law School Applicants** should read: Have (a) been admitted to practice in the jurisdiction where the applicant attended law school, and (b) successfully completed, within twenty-four (24) consecutive months, not less than twenty-four (24) semester hours, or their equivalent in quarter hours, at an ABA-approved law school, including no less than one course each in constitutional law, civil procedure, criminal procedure, legal ethics and evidence.

### **RULE SIX Character & Fitness**

**Section 6-1. Standard of Character and Fitness.** An attorney's conduct should conform to the requirements of the law, both in professional service to clients and in the attorney's business and personal affairs. An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. An applicant whose record manifests a significant deficiency in honesty, trustworthiness, diligence, or reliability shall be denied admission. Applicants must be approved by the Character and Fitness Committee and then approved by the Board prior to sitting for the Bar Examination.

**Section 6-2. The Investigative Process; Investigation Panel Interviews.** Investigations into the character and fitness of applicants may be informal, but shall be thorough, with the object of ascertaining the truth.

- (a). The Character and Fitness Committee may conduct an investigation and may act with or without requiring a personal appearance by an applicant.
- (b). At the discretion of the Character and Fitness Committee, an applicant may be required to attend an investigation panel interview conducted, by no fewer than three (3) members of the Committee. The investigation panel interview shall be informal but the applicant shall have the right to counsel and shall be notified by mail of the general factual areas of inquiry. Documentary evidence may be provided to the Character and Fitness panel but no witnesses will be permitted to appear during the interview. The interview shall be a closed proceeding.
- (c). After an investigation panel interview has been conducted the Character and Fitness Committee shall promptly notify the applicant that he or she has been approved to sit for the Bar Examination or notify the applicant by mail that the applicant has been denied and set forth generally the reasons for denial.

Section 6-3. **Formal Hearing; Applicant's Request.** In matters where the Character and Fitness Committee determines that an investigation panel interview is unnecessary, or in cases where an applicant has been denied admission by an investigation panel as outlined in this Rule, the Character and Fitness Committee shall hold a formal hearing pursuant to an applicant's request as set forth below. The formal hearing shall be a closed proceeding and may be scheduled whether or not preceded by a panel interview. A decision after a formal hearing is a prerequisite to appeal under the provisions below.

- (a). If an applicant has been denied admission as outlined above, an applicant may within twenty (20) days of notice of the decision by the investigation panel request a formal hearing. The request must be made in writing and provided to the Bar's Admission Administrator.
- (b). Notice of the formal hearing shall be given at least ten (10) days before the hearing via mail and shall include a statement of the preliminary factual matters of concern constituting the grounds for denial. The names of persons who provide information adverse to the applicant which was in whole or in part a basis for the denial shall be disclosed in the notice.
- (c). A formal hearing shall be a *de novo* proceeding attended by no fewer than five (5) but no more than thirteen (13) Character and Fitness Committee members. The applicant has the burden of proof to establish his or her requisite character and fitness to practice law by clear and convincing evidence.
- (d). The formal hearing will have a complete stenographic record made by a certified court reporter or an electronic record made by means acceptable in the courts of the State of Utah. All testimony shall be taken under oath. Although no formal rules of evidence or civil procedure will apply, an applicant has the right to counsel, the right to cross-examine witnesses, examine all evidence and the right to present witnesses and documentary evidence. An applicant is entitled to make reasonable use of the Board's subpoena powers to compel attendance of witnesses and to adduce relevant evidence relating to matters adverse to the applicant.
- (e). Written Findings of Fact and Conclusions of Law should be issued no later than forty-five (45) days after the formal hearing and subsequent briefings, if any.

Section 6-4 **Factors Related to Character and Fitness.** In addition to the standards set forth in Rules 6-1 and 6-5 the Character and Fitness Committee may use the following factors to decide whether an applicant possesses the requisite character and fitness to practice law:

- (a). the applicant's lack of candor
- (b). unlawful conduct
- (c). academic misconduct
- (d). making of false or misleading statements, including omissions
- (e). misconduct in employment

- (f). acts involving dishonesty, fraud, deceit or misrepresentation
- (g). abuse of legal process
- (h). neglect of financial responsibilities
- (i). neglect of professional obligations
- (j). violation of an order of a court
- (k). evidence of mental or emotional instability
- (l). evidence of drug or alcohol dependency
- (m). denial of admission to the bar in another jurisdiction on character and fitness grounds
- (n). past or pending disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction
- (o). other conduct bearing upon character or fitness to practice law

In making this determination through the processes described above, the following factors should be considered in assigning weight and significance to prior conduct:

- (p). the applicant's age at the time of conduct
- (q). the recency of the conduct
- (r). the reliability of the information concerning the conduct
- (s). the seriousness of the conduct
- (t). the factors underlying the conduct
- (u). the cumulative effect of conduct or information
- (v). the evidence of rehabilitation
- (w). the applicant's positive social contributions since the conduct
- (x). the applicant's candor in the admissions process
- (y). the materiality of any omission or misrepresentations

#### **Section 6-5. Criminal Conduct; Parole, Probation and Supervised Release.**

1. An applicant convicted of a misdemeanor offense or who has entered a plea in abeyance to any criminal offense may be asked to appear before members of the Character and Fitness Committee for an investigation panel interview or a formal hearing. In determining whether the applicant is of good character, the Committee will consider the nature and seriousness of the criminal conduct resulting in the conviction(s), mitigating and aggravating factors including completion of terms and conditions of any sentence imposed and demonstration of clearly proven rehabilitation.
2. A rebuttable presumption exists against admission of an applicant convicted of a felony offense. For purposes of this rule, a conviction includes entry of a *nolo contendere* (no contest) plea. An applicant who has been convicted of a felony offense is not eligible to apply for admission until after the date of completion of any sentence, term of probation or term of parole or supervised release whichever occurred last. Upon an applicant's eligibility, a formal hearing as set forth in these Rules before members of the Character and Fitness Committee will be held. Factors to be considered by the Committee include, but are not limited to, the

nature and seriousness of the criminal conduct resulting in the conviction(s), mitigating and aggravating factors including completion of terms and conditions of a sentence imposed and demonstration of clearly proven rehabilitation.

**Section 6-6. Appeals from Final Denial; Applicant's Request.** Applicants have the right to appeal a final decision made after a formal hearing as set forth in these Rules. An applicant must file a written request to the Board of Bar Commissioners with the Bar's Admissions Administrator within twenty (20) days of the date of notice of denial. A pre-determined panel of three (3) Board of Bar Commissioners will conduct a formal review of the final decision. The appeal hearing shall be a closed proceeding and will be limited to consideration of the record produced in the formal hearing. Oral argument will be held at the discretion of the appeal panel and only if such is deemed necessary.

- (a). The decision after the formal hearing shall be affirmed if there is substantial and credible evidence to support it.
- (b). Applicants will be responsible for payment and obtaining a duly certified copy of the transcript of the formal hearing proceedings or other electronic record copy as described in Rule 6-3(c).
- (c). The appeal hearing panel shall within thirty (30) days after the complete formal review issue a written decision.

**Section 6-7. Reapplication After Denial.** Following the final decision, which includes the appellate decision if one was issued, re-application may be made after one year from the date of the decision unless a different time period was specified in writing.

**Section 6-8. Confidentiality; Exceptions.** All records, documents, and sources relating to the admissions process shall not be disclosed other than to the applicant and the applicant's attorney and to Committee members, admissions staff, the Bar's General Counsel, members of the Bar Commission who serve on appeals panels and in appropriate cases, the Bar's Office of Professional Conduct as contemplated by these Rules. Confidential information includes, but is not limited to the application and supporting documents including letters of recommendation, reports and documents from other associations, agencies, employers, and courts of law. Confidential information in some instances may be disclosed under Rule 6-10.

**Section 6-9. Communications Relating to Applications.**

Letters or information relating to an applicant in which the writer requests confidentiality are to be held confidential and not placed in evidence or otherwise made available to the decision-making body or anyone else involved in a decision-making capacity with respect to the admission of the applicant. Any such body or person having knowledge of the content of the information, including members of the Board, shall withdraw from participation in the matter, and if necessary, the Board shall appoint persons necessary to replace those required to withdraw from the decision-making process.

Section 6-10. **Release of Information.** Except as otherwise authorized by order of the Utah Supreme Court, the Bar or the Character and Fitness Committee shall deny requests for confidential information but may grant the request only if made by:

- (a). An entity authorized to investigate the qualifications of persons for admission to practice law; or
- (b). An agency or entity authorized to investigate the qualifications of persons for government employment; or
- (c). A lawyer discipline enforcement agency; or
- (d). An agency or entity authorized to investigate the qualifications of judicial candidates.

If the request is granted, information shall be released only upon certification by the requesting agency or entity that the confidential information shall be used for authorized purposes only. If one of the above-enumerated entities requests confidential information, the Character and Fitness Committee or the Bar shall give written notice to the applicant that the confidential information will be disclosed within ten (10) days unless the applicant obtains an order from the Supreme Court restraining such disclosure.

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Tab 2



ohn C. Baldwin  
xecutive Director

# Utah State Bar

645 South 200 East • Suite 310  
Salt Lake City Utah 84111 3834  
Telephone 801-531-9077 • 1-800-698-9077  
FAX 801-531-0660  
www.utahbar.org

September 27, 2000

Ms. Valerie L. Cox  
3129 North 1050 East  
North Ogden, UT. 84414-

Dear Ms. Cox:

I regret to inform you that you were unsuccessful on the July 2000 Utah State Bar Examination because you did not achieve a combined score of 130 or greater as required by the Rules Governing Admission to the Utah State Bar. A breakdown of your results are enclosed for your review.

You may request a copy of the essay questions, model answer outlines and your essay answers. I have enclosed a copy of the Bar Examination Review and Appeal Procedures and recommend that you refer to Rule Eleven, 'Unsuccessful Applicants, Right of Inspection' in the Rules Governing Admission to the Utah State Bar which you received with your application.

The next Bar exam will be given February 27th & 28th. You do not need to file a new application, although you must notify me at the Bar offices in writing on or before February 1, 2001 if you want to take the February exam. Please include in your letter any address, employment, or other changes, together with the examination retake fee of \$250.00.

Please don't hesitate to contact me if you have any questions regarding the Bar examination or your results.

Sincerely,

Darla C. Murphy  
Admissions Administrator

Enclosures

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# Utah State Bar

645 South 200 East • Suite 310  
Salt Lake City, Utah 84111-3834  
Telephone 801-531-9077 • 1-800-696-9077  
FAX 801-531-0660  
www.utahbar.org

September 27, 2000

Ms. Kathleen G. Arnovick  
6344 Meadowcrest Road  
Salt Lake City, UT. 84121 -

Dear Ms. Arnovick:

I regret to inform you that you were unsuccessful on the July 2000 Utah State Bar Examination because you did not achieve a combined score of 130 or greater as required by the Rules Governing Admission to the Utah State Bar. A breakdown of your results are enclosed for your review.

You may request a copy of the essay questions, model answer outlines and your essay answers. I have enclosed a copy of the Bar Examination Review and Appeal Procedures and recommend that you refer to Rule Eleven, 'Unsuccessful Applicants; Right of Inspection' in the Rules Governing Admission to the Utah State Bar which you received with your application.

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Sincerely,

Darla C. Murphy  
Admissions Administrator

Enclosures



ohn C. Baldwin  
xecutive Director

# Utah State Bar

645 South 200 East • Suite 310  
Salt Lake City, Utah 84111-3834  
Telephone 801-531-9077 • 1-800-698-9077  
FAX 801-531-0660  
www.utahbar.org

September 27, 2000

Mr. Henry B. Wansker  
8333 Supernal Way  
Salt Lake City, UT. 84121-

Dear Mr. Wansker:

I regret to inform you that you were unsuccessful on the July 2000 Utah State Bar Examination because you did not achieve a combined score of 130 or greater as required by the Rules Governing Admission to the Utah State Bar. A breakdown of your results are enclosed for your review.

You may request a copy of the essay questions, model answer outlines and your essay answers. I have enclosed a copy of the Bar Examination Review and Appeal Procedures and recommend that you refer to Rule Eleven, 'Unsuccessful Applicants; Right of Inspection' in the Rules Governing Admission to the Utah State Bar which you received with your application.

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Please don't hesitate to contact me if you have any questions regarding the Bar examination or your results.

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Sincerely,

Darla C. Murphy  
Admissions Administrator

Enclosures

Tab 3

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BEFORE THE EXECUTIVE COMMITTEE  
OF THE UTAH STATE BAR

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In Re:

Valerie L. Cox,  
  
Applicant.

FINDING OF FACT AND FINAL  
DETERMINATION

---

The grievance petition of Valerie L. Cox came before the Bar's Board of Bar Commissioners Executive Committee (the "Committee") on January 8, 2001. The Committee considered the materials submitted by the applicant, the Findings of Fact and Recommendation submitted by the Admissions Committee Panel, the Rules Governing Admission to the Utah State Bar including grievance procedures and the Utah Bar Examiner Committee Grading Handbook.

**Background**

Petitioner, Valerie L. Cox, sat for the July 2000 Utah State Bar examination (the "July Exam") as a Student Applicant. She received a scaled (equated) score on the Multistate Bar Examination ("MBE") of 123 and a raw essay score of 25. After scaling and averaging, her final combined (weighted) score was 127.81. A total combined (weighted) score of 130.0 is required for Student Applicants to pass the examination.

The bar examination is designed to be reliable, valid, fair and efficient. The July Exam consisted of 12 essay questions, but one of the questions, the Torts question, was not considered in the final examination scores.

**Petitioner's Claims**

Ms. Cox asserts that the scoring of the examination was not conducted properly because the Torts question, which was one of the 12 essay questions,

was improperly excluded from the calculation of her score. She also asserts that the preparation of the essays, grading of the essay answers, and uniformity of grading, was generally improper which constituted a substantial irregularity in the administration of the exam. Finally, she asserts that the grading of one of her 12 essay answers (the Ethics question) was incorrect which constituted mathematical inaccuracy in the scoring process.

### **Context of Rules and Findings of Fact**

1. Rule 11-2 of the Rules Governing Admission and the duly authorized Bar Examination Review and Appeal Procedure governing appeals from failures to pass the Utah State Bar examination allow for grievances to be reviewed only on the basis of a substantial irregularity in the administration of the examination which resulted in manifest unfairness or because of mathematical inaccuracy in the scoring process.

2. The Rules Governing Admission and the grievance procedures do not provide for the *re-reading* of individual essay answers of an applicant. Ms. Cox's answer to the Ethics question was not re-read.

3. The duly authorized Utah Bar Examiners Committee Grading Handbook provides for automatic *reappraisal* grading in certain instances as follows: Reappraisal grading is used to confirm the essay scores of those applicants who fail in a range just below the passing score. The passing score for the bar examination is a weighted average score of 130. Applicants whose weighted average score on the full bar examination is between 130 and 129 (below the passing level) shall have all their essay answers re-graded. The papers of these applicants will be submitted to another member of the grading team for reappraisal. If the second reader assigns the same raw score as the first reader, that is the score for the answer. If the raw score assigned by the second reader differs from that assigned by the first reader, the two scores will be averaged together and the averaged score will be the final raw essay score. This score is the raw score assigned to the applicant.

4. The average passing combined (weighted) score for all applicants taking the July Exam was 147.69. Ms. Cox's final combined (weighted) score was 127.81. By virtue of this score the applicant's answers do not qualify for reappraisal.

5. The average scaled (equated) MBE score of all the applicants taking the July Exam was 144.17. Ms. Cox's scaled (equated) MBE score was 123.

6. The average raw score of all applicant answers to the essay portion of the July Exam was 28.96. Ms. Cox's raw essay score was 25.

7. After all essay questions are graded, the applicants' raw scores are scaled to the MBE portion of the examination. Scaling creates comparable numeric scores on the essay and MBE portions of the standard examination. MBE equated scores and essay scaled scores are combined for Student Applicants according to the standard deviation method and compared to the passing benchmark of 130. Student Applicants who achieve a 130 combined score or above pass the examination.

8. The procedure followed by the Bar staff in transferring scores from the scoring sheets to the records of each applicant involves no fewer than three separate operations performed by two different individuals in order to check for accuracy. In Ms. Cox's case, the records reflect that her scores were accurately transferred from the scoring sheets to her test record.

9. The prior bar examination format that was amended in 1991, required that applicants pass at least 12 of 18 essays. The bar examination was three days in duration, rather than the two-day format that exists today. One of the primary reasons for specifying that numerous essay questions be included in the examination is to define a basis for the examination's statistical reliability. That is, in order to assure that qualified candidates receive the opportunity to demonstrate their abilities, the examination must cover a sufficiently broad spectrum of subjects. An examination consisting of 11 graded essay questions out of 12 essay questions is not a substantial irregularity in the administration of the examination which resulted in manifest unfairness and does not create mathematical inaccuracy in the scoring process nor is it fatal to the examination's statistical reliability.

10. According to the scoring information provided to Ms. Cox, the Torts question was excluded from the calculation of the score for the examination. The Grading Committee assigned to grade the Torts question conducted the scoring calibration process to assure the statistical validity of the question. In

this process, each member of the Grading Committee reads five of the same answers to the question being graded and then discusses the answers and grading of each, as a group. After completing that process and while reviewing several other answers, the Grading Committee concluded that the Torts question was not fairly assessing the knowledge of the applicants. As a result, the decision was made to not grade the question because it lacked statistical validity.

11. The Bar's Rules Governing Admission provide that 12 essay questions shall be included in the examination. Twelve questions were included in the examination but as discussed above, the Torts question was eliminated from scoring because it was deemed to lack statistical validity. At the point the Torts question was determined to be defective, the examination was over. As a practical matter, the Bar had three choices: (a) declare the examination invalid and require applicants to re-take the test, most likely at the next regularly scheduled examination seven months later; (b) admit everyone who took the examination regardless of their performance; or (c) eliminate the statistically invalid question and score the remainder of the examination.

12. Declaring the examination invalid and requiring all applicants to re-take the two-day examination at a later time would have been unduly burdensome and manifestly unfair to the applicants. Also invalidating an entire examination would have been relinquishing the Bar's responsibility to administer the examination. Admitting everyone who took the examination regardless of their performance would have been an abdication of the Bar's fundamental obligation to ensure competency and abdication of the public trust. The Torts Grading Subcommittee, the Admission Administrator, and the Bar's General Counsel, in conjunction with the National Conference of Bar Examiners, determined that discarding the defective question was the most acceptable and least problematic resolution.

13. The Utah Bar Examination Committee Grading Handbook in conjunction with the Rules Governing Admission provide guidelines for the preparation of the essays, grading of the essay answers and uniformity of grading. No departure from these guidelines alleged by Ms. Cox, would, if proven, constitute a substantial irregularity in the administration of the examination which resulted in manifest unfairness or mathematical inaccuracy in the scoring process.

14. The overall pass rate for the July Exam was 87.9%. This pass rate is well within the range of pass rates over the past ten years, which has been as low as 79.4% in February 1999 and as high as 94.1% in July 1998. The average pass rate for the 20 examinations given over the past ten years is 87.85%. The fact that the overall pass rate on the July Exam did not significantly deviate from prior examination pass rates demonstrates that there was no substantial irregularity in the administration of the examination which resulted in manifest unfairness nor mathematical inaccuracy in the scoring process.

15. Ms. Cox's relatively low score on the MBE portion of the examination was a determining factor in her overall failing score.

16. Ms. Cox failed to sufficiently demonstrate by her performance on the July Exam that she has the ability to identify legal issues, to engage in a reasoned analysis of those issues and to arrive at a logical solution by application of fundamental legal principles which demonstrate her thorough understanding of these legal principles.

### **Conclusions and Final Determination**

1. There is no evidence of mathematical inaccuracy in the scoring process or that the written procedures governing the grading process were not substantially followed.

2. At the point the Torts question was determined to be statistically invalid, the examination was over. The Bar chose the most acceptable and least problematic but practical solution. Elimination of the Torts question did not constitute a substantial irregularity in the administration of the examination resulting in manifest unfairness.

3. The Rules Governing Admission and the grievance procedures do not provide for re-reading of essay answers. Furthermore, the Committee finds that if answers to particular questions were re-read upon an applicant's mere request and not based on the grounds set forth in the rules and appeal procedures, failing applicants would be able to endlessly request re-reading of their answers.



4. Uniformity in grading by the same grading panels is essential to the statistical integrity of the exam. Uniformity in grading is destroyed if answers are re-read. The reappraisal process provides an adequate safeguard for re-consideration of applicant essay answers.

5. Ms. Cox's final score of 127.81 does not qualify for reappraisal grounds set forth in the Utah State Bar Examiners Committee Grading Handbook.

6. There is no basis for re-reading or reappraisal of the applicant's answer to the Ethics question.

7. Ms. Cox did not pass the July Exam.

For the foregoing reasons, the Committee denies Ms. Cox's petition.

DATED this 19 day of January, 2001.



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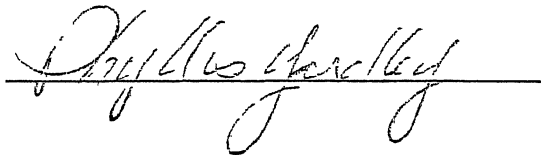
David Nuffer on behalf of the Executive Committee

## CERTIFICATE OF SERVICE

On the 19<sup>th</sup> day of January, 2001, the undersigned hereby certifies that a true and correct copy of the foregoing Findings of Fact and Final Determination for Valerie L. Cox was hand delivered to the following:

Carolyn Montgomery  
Attorney at Law  
1904 Longview Drive  
Salt Lake City, Utah 84124

DATED this 19<sup>th</sup> day of January, 2001.

A handwritten signature in cursive script, reading "Doreen J. Gentry", is written over a horizontal line.

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BEFORE THE EXECUTIVE COMMITTEE  
OF THE UTAH STATE BAR

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In Re:

Kathleen G. Arnovick,  
  
Applicant.

FINDINGS OF FACT AND FINAL  
DETERMINATION

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The grievance petition of Kathleen G. Arnovick came before the Bar's Board of Bar Commissioners Executive Committee (the "Committee") on January 8, 2001. The Committee considered the materials submitted by the applicant, The Findings of Fact and Recommendation submitted by the Admissions Committee Panel, the Rules Governing Admission to the Utah State Bar including grievance procedures and the Utah Bar Examiner Committee Grading Handbook.

**Background**

Petitioner, Kathleen G. Arnovick, sat for the July 2000 Utah State Bar examination (the "July Exam") as a Student Applicant. She received a scaled (equated) score on the Multistate Bar Examination ("MBE") of 126 and a raw essay score of 23. After scaling and averaging, her final combined (weighted) score was 126.39. A total combined (weighted) score of 130.0 is required for Student Applicants to pass the examination.

The bar examination is designed to be reliable, valid, fair and efficient. The July Exam consisted of 12 essay questions, but one of the questions, the Torts question, was not considered in the final examination scores.

**Petitioner's Claims**

Ms. Arnovick asserts that the scoring of the examination was not conducted properly because the Torts question, which was one of the 12 essay questions, was improperly excluded from the calculation of her score. She also

asserts that the preparation of the essays, grading of the essay answers, and uniformity of grading, was generally improper which constituted a substantial irregularity in the administration of the exam. Finally, she asserts that the grading of one of her 12 essay answers (the Ethics question) was incorrect which constituted mathematical inaccuracy in the scoring process.

### **Context of Rules and Findings of Fact**

1. Rule 11-2 of the Rules Governing Admission and the duly authorized Bar Examination Review and Appeal Procedure governing appeals from failures to pass the Utah State Bar examination allow for grievances to be reviewed only on the basis of a substantial irregularity in the administration of the examination which resulted in manifest unfairness or because of mathematical inaccuracy in the scoring process.

2. The Rules Governing Admission and the grievance procedures do not provide for the *re-reading* of individual essay answers of an applicant. Ms. Arnovick's answer to the Ethics questions was not re-read.

3. The duly authorized Utah Bar Examiners Committee Grading Handbook, however, provides for automatic *reappraisal* grading in certain instances as follows: Reappraisal grading is used to confirm the essay scores of those applicants who fail in a range just below the passing score. The passing score for the bar examination is a weighted average score of 130. Applicants whose weighted average score on the full bar examination is between 130 and 129 (below the passing level) shall have all their essay answers re-graded. The papers of these applicants will be submitted to another member of the grading team for reappraisal. If the second reader assigns the same raw score as the first reader, that is the score for the answer. If the raw score assigned by the second reader differs from that assigned by the first reader, the two scores will be averaged together and the averaged score will be the final raw essay score. This score is the raw score assigned to the applicant.

4. The average passing combined (weighted) score for all applicants taking the July Exam was 147.69. Ms. Arnovick's final combined (weighted) score was 126.39. By virtue of this score the applicant's answers do not qualify for reappraisal.

5. The average scaled (equated) MBE score of all the applicants taking the July Exam was 144.17. Ms. Arnovick's scaled (equated) MBE score was 126.

6. The average raw score of all applicant answers to the essay portion of the July Exam was 28.96. Ms. Arnovick's raw essay score was 23.

7. After all essay questions are graded, the applicants' raw scores are scaled to the MBE portion of the examination. Scaling creates comparable numeric scores on the essay and MBE portions of the standard examination. MBE equated scores and essay scaled scores are combined for Student Applicants according to the standard deviation method and compared to the passing benchmark of 130. Applicants who receive a combined score of 130 or above pass the bar examination.

8. The procedure followed by the Bar staff in transferring scores from the scoring sheets to the records of each applicant involves no fewer than three separate operations performed by two different individuals in order to check for accuracy. In Ms. Arnovick's case, the records reflect that her scores were accurately transferred from the scoring sheets to her test record.

9. The prior bar examination format that was amended in 1991, required that applicants pass at least 12 of 18 essays. The bar examination was three days in duration, rather than the two-day format that exists today. One of the primary reasons for specifying that numerous essay questions be included in the examination is to define a basis for the examination's statistical reliability. That is, in order to assure that qualified candidates receive the opportunity to demonstrate their abilities, the examination must cover a sufficiently broad spectrum of subjects. An examination consisting of 11 graded essay questions out of 12 essay questions is not a substantial irregularity in the administration of the examination which resulted in manifest unfairness and does not create mathematical inaccuracy in the scoring process nor is it fatal to the examination's statistical reliability.

10. According to the scoring information provided to Ms. Arnovick, the Torts question was excluded from the calculation of the score for the examination. The Grading Committee assigned to grade the Torts question conducted the scoring calibration process to assure the statistical validity of the question. In this process, each member of the Grading Committee reads

five of the same answers to the question being graded and then discusses the answers and grading of each, as a group. After completing that process and while reviewing several other answers, the Committee concluded that the Torts question was not fairly assessing the knowledge of the applicants. As a result, the decision was made to not grade the question because it lacked statistical validity.

11. The Bar's Rules Governing Admission provide that 12 essay questions shall be included in the examination. Twelve questions were included in the examination but as discussed above, the Torts question was eliminated from scoring because it was deemed to lack statistical validity. At the point the Torts question was determined to be defective, the examination was over. As a practical matter, the Bar had three choices: (a) declare the examination invalid and require applicants to re-take the test, most likely at the next regularly scheduled examination seven months later; (b) admit everyone who took the examination regardless of their performance; or (c) eliminate the statistically invalid question and score the remainder of the examination.

12. Declaring the examination invalid and requiring all applicants to re-take the two-day examination at a later time would have been unduly burdensome and manifestly unfair to the applicants. Also, invalidating an entire examination would have been relinquishing the Bar's responsibility to administer the examination. Admitting everyone who took the examination regardless of their performance would have been an abdication of the Bar's fundamental obligation to ensure competency and abdication of the public trust. The Torts Grading Subcommittee, the Admission Administrator, and the Bar's General Counsel, in conjunction with the National Conference of Bar Examiners, determined that discarding the defective question was the most acceptable and least problematic resolution.

13. The Utah Bar Examination Committee Grading Handbook in conjunction with the Rules Governing Admission provide guidelines for the preparation of the essays, grading of the essay answers and uniformity of grading. No departure from these guidelines alleged by Ms. Arnovick, would, if proven, constitute a substantial irregularity in the administration of the examination which resulted in manifest unfairness or mathematical inaccuracy in the scoring process.

14. The overall pass rate for the July Exam was 87.9%. This pass rate is well within the range of pass rates over the past ten years, which has been as low as 79.4% in February 1999 and as high as 94.1% in July 1998. The average pass rate for the 20 examinations given over the past ten years is 87.85%. The fact that the overall pass rate on the July Exam did not significantly deviate from prior examination pass rates demonstrates that there was no substantial irregularity in the administration of the examination which resulted in manifest unfairness nor mathematical inaccuracy in the scoring process.

15. Ms. Arnovick's relatively low score on the MBE portion of the examination was a determining factor in her overall failing score.

16. Ms. Arnovick has failed to sufficiently demonstrate by her performance on the July Exam that she has the ability to identify legal issues, to engage in a reasoned analysis of those issues and to arrive at a logical solution by application of fundamental legal principles which demonstrate her thorough understanding of these legal principles.

### **Conclusions and Final Determination**

1. There is no evidence of mathematical inaccuracy in the scoring process or that the written procedures governing the grading process were not substantially followed.

2. At the point the Torts question was determined to be statistically invalid, the examination was over. The Bar chose the most acceptable and least problematic but practical solution. Elimination of the Torts question did not constitute a substantial irregularity in the administration of the examination resulting in manifest unfairness.

3. The Rules Governing Admission and the grievance procedures do not provide for re-reading of essay answers. Furthermore, the Committee finds that if answers to particular questions were re-read upon an applicant's mere request and not based on the grounds set forth in the appeal procedures, failing applicants would be able to endlessly request re-reading of their answers.

4. Uniformity in grading by the same grading panels is essential to the statistical integrity of the exam. Uniformity in grading is destroyed if answers are re-read. The reappraisal process provides an adequate safeguard for re-consideration of applicant essay answers.

5. Ms. Arnovick's final score of 126.39 does not qualify for reappraisal grounds set forth in the Utah State Bar Examiners Committee Grading Handbook. There is no basis for re-reading or reappraisal of the applicant's answer to the Ethics question.

6. Ms. Arnovick did not pass the July Exam.

For the foregoing reasons, the Committee denies Ms. Arnovick's petition.

DATED this 19 day of January, 2001.



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David Nuffer on behalf of the Executive Committee



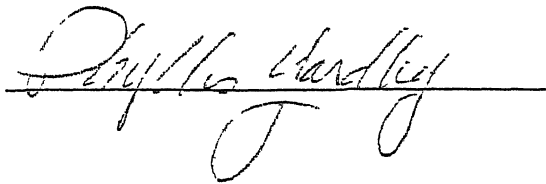
# CERTIFICATE OF SERVICE

On the 19<sup>th</sup> day of January, 2001, the undersigned hereby certifies that a true and correct copy of the foregoing Findings of Fact and Final Determination for Kathleen G.

Arnovick was hand delivered to the following:

Carolyn Montgomery  
Attorney at Law  
1904 Longview Drive  
Salt Lake City, Utah 84124

DATED this 19<sup>th</sup> day of January, 2001.

A handwritten signature in cursive script, reading "Doreen Harding", is written over a horizontal line.

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BEFORE THE EXECUTIVE COMMITTEE  
OF THE UTAH STATE BAR

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In Re:

Henry B. Wansker,  
  
Applicant.

FINDINGS OF FACT AND FINAL  
DETERMINATION

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The grievance petition of Henry B. Wansker came before the Bar's Board of Bar Commissioner's Executive Committee (the "Committee") on January 8, 2001. The Committee considered the materials submitted by the applicant, the Findings of Fact and Recommendation submitted by the Admissions Committee Panel, the Rules Governing Admission to the Utah State Bar including grievance procedures and the Utah Bar Examiner Committee Grading Handbook.

**Background**

Petitioner, Henry B. Wansker, sat for the July 2000 Utah State Bar examination (the "July Exam") as an Attorney Applicant. He received a raw essay score of 21. His scaled (converted) essay score was 120.94. A total scaled essay score of 130.0 is required for Attorney Applicants to pass the examination.

The bar examination is designed to be reliable, valid, fair and efficient. The July Exam consisted of 12 essay questions, but one of the questions, the Torts question, was not considered in the final examination scores.

**Petitioner's Claims**

Mr. Wansker asserts that the scoring of the examination was not conducted properly because the Torts question, which was one of the 12 essay questions, was improperly excluded from the calculation of his score. He also

asserts that the preparation of the essays, the grading of the essay answers, and the uniformity of grading, was generally improper which constituted a substantial irregularity in the administration of the exam and mathematical inaccuracy. He also asserts that the anonymity of one's attorney status is adversely impacted by the Bar's test identification numbering system that assigns Attorney Applicants a different series of numbers from the Student Applicants. Finally, he asserts that by "arbitrarily" assigning Attorney Applicants a Multistate Bar Examination ("MBE") score of 130 in the process to arrive at the final score, Attorney Applicants are prejudiced. That is, he claims that if 144.17, the average of all applicants' MBE scores on the July Exam, was arbitrarily assigned to all Attorney Applicants instead of the 130 MBE score, and if the resulting combined score was used to evaluate Attorney Applicants, he would have passed the July Exam.

### **Context of Rules and Findings of Fact**

1. Rule 11-2 of the Rules Governing Admission and the duly authorized Bar Examination Review and Appeal Procedure governing the Utah State Bar examination allow for grievances to be reviewed only on the basis of a substantial irregularity in the administration of the examination which resulted in manifest unfairness or because of mathematical inaccuracy in the scoring process.

2. The Rules Governing Admission and the grievance procedures do not provide for the *re-reading* of individual essay answers of an applicant. Mr. Wansker's essay answers were not re-read.

3. The duly authorized Utah Bar Examiners Committee Grading Handbook, however, provides for automatic *reappraisal* grading in certain instances as follows: Reappraisal grading is used to confirm the essay scores of those applicants who fail in a range just below the passing score. The passing score for the bar examination is a weighted average score of 130. Applicants whose weighted average score on the full bar examination is between 130 and 129 (below the passing level) shall have all their essay answers re-graded. The papers of these applicants will be submitted to another member of the grading team for reappraisal. If the second reader assigns the same raw score as the first reader, that is the score for the answer. If the raw score assigned by the second reader differs from that assigned by the first reader, the two scores will

be averaged together and the averaged score will be the final raw essay score. This score is the raw score assigned to the applicant.

4. The average passing combined (weighted) score for all applicants taking the July Exam was 147.69. Mr. Wansker's final scaled essay score was 120.94. By virtue of this score the applicant's answers do not qualify for reappraisal.

5. The average raw score of all the applicant answers to the essay portion of the July Exam was 28.96. Mr. Wansker's raw essay score was 21.

6. After all essay questions are graded, the applicants' raw essay scores are scaled to the MBE portion of the examination. Scaling creates comparable numeric scores on the essay and MBE portions of the standard examination. MBE equated scores and essay scaled scores are combined for Student Applicants according to the standard deviation method, and compared to the passing benchmark of 130. Student Applicants who receive a combined weighted score of 130 or above pass the bar examination. Attorney Applicants, however, do not take the MBE portion of the examination. Attorney Applicants are only required to achieve a scaled essay score of 130 to pass the bar examination. While combined scores are printed on the form letters sent both to the Attorney and Student Applicants and on internal bar forms, these combined scores are inapplicable to Attorney Applicants.

7. The procedure followed by the Bar staff in transferring scores from the scoring sheets to the records of each applicant involves three separate operations performed by two different individuals in order to check for accuracy. In Mr. Wansker's case, the records reflect that his scores were accurately transferred from the scoring sheets to his test record.

8. The prior bar examination format, that was amended in 1991, required that applicants pass at least 12 of 18 essays, and was three days in duration, rather than the two-day format that exists today. One of the primary reasons for specifying that numerous essay questions be included in the examination is to define a basis for the examination's statistical reliability. That is, in order to assure that qualified candidates receive the opportunity to demonstrate their abilities, the examination must cover a sufficiently broad spectrum of subjects. An examination consisting of 11 graded essay questions out of 12 essay questions is not a substantial irregularity in the administration

of the examination which resulted in manifest unfairness and does not create mathematical inaccuracy in the scoring process nor is it fatal to the examination's statistical reliability.

9. According to the scoring information provided to Mr. Wansker, the Torts question was excluded from the calculation of the score for the examination. The Grading Committee assigned to grade the Torts question conducted the scoring calibration process to assure the statistical validity of the question. In this process, each member of the Grading Committee reads five of the same answers to the question being graded and then discusses the answers and grading of each, as a group. After completing that process and while reviewing several other answers, the Committee concluded that the Torts question was not fairly assessing the knowledge of the applicants. As a result, the decision was made to not grade the question because it lacked statistical validity.

10. The Bar's Rules Governing Admission provide that 12 essay questions shall be included in the examination. Twelve questions were included in the examination but as discussed above, the Torts question was eliminated from scoring because it was deemed to lack statistical validity. At the point the Torts question was determined to be defective, the examination was over. As a practical matter, the Bar had three choices: (a) declare the examination invalid and require applicants to re-take the test, most likely at the next regularly scheduled examination seven months later; (b) admit everyone who took the examination regardless of their performance; or (c) eliminate the statistically invalid question and score the remainder of the examination.

11. Declaring the examination invalid and requiring all applicants to re-take the two-day examination at a later time would have been unduly burdensome and manifestly unfair to the applicants. Also, invalidating an entire examination would have been relinquishing the Bar's responsibility to administer the examination. Admitting everyone who took the examination regardless of their performance would have been an abdication of the Bar's fundamental obligation to ensure competency and abdication of the public trust. The Torts Grading Subcommittee, the Admission Administrator, and the Bar's General Counsel, in conjunction with the National Conference of Bar Examiners, determined that discarding the defective question was the most acceptable and least problematic resolution.

12. The Utah Bar Examination Committee Grading Handbook in conjunction with the Rules Governing Admission provide guidelines for the preparation of the essays, grading of the essay answers and uniformity of grading. No departure from these guidelines alleged by Mr. Wansker, would, if proven, constitute a substantial irregularity in the administration of the examination which resulted in manifest unfairness or mathematical inaccuracy in the scoring process.

13. The overall pass rate for the July Exam was 87.9%. This pass rate is well within the range of pass rates over the past ten years, which has been as low as 79.4% in February 1999 and as high as 94.1% in July 1998. The average pass rate for the 20 examinations given over the past ten years is 87.85%. The fact that the overall pass rate on the July Exam did not significantly deviate from prior examination pass rates demonstrates that there was no substantial irregularity in the administration of the examination which resulted in manifest unfairness nor mathematical inaccuracy in the scoring process.

14. All applicants are assigned numbers that are used to track them throughout the application and examination process that provides anonymity that would not be possible if their names were used. Student Applicants are assigned numbers beginning with 1000 and Attorney Applicants are assigned numbers beginning with 3000. The number series bifurcation is done for internal administrative reasons unrelated to grading, e.g., charges and fees.

15. The graders of the bar examination are not provided with any information to indicate that the 1000 series of applicants are Student Applicants and that the 3000 series of applicants are Attorney Applicants. The Bar's practice for assigning a different series of numbers to the Student and Attorney Applicants has been in place for approximately ten years. During that period of time, in most instances, the Attorney Applicants have performed better and had a higher pass rate than the Student Applicants.

16. Attorney Applicants are not required to take the MBE portion of the examination. In the past, if an attorney (an applicant licensed to practice in a sister jurisdiction) has wanted to take the two-day student examination, which includes the MBE, the applicant has applied as a Student Applicant. There are no rules that would prohibit an out-of-state licensed attorney from

applying as a Student Applicant unless they do not meet the required qualifications. Most out-of-state licensed attorneys, however, prefer taking the abbreviated one-day examination which does not include the MBE.

17. Because of computer limitations requiring a number to be filled into the MBE field on the record of each applicant, the admissions staff has filled in that field on the record of Attorney Applicants with a 130, the score required to pass the bar examination. The National Conference of Bar Examiners which scales essay scores for the Bar also requires that the "dummy" score be filled into each Attorney Applicant's record. An individual Attorney Applicant's scaled essay score, however, is not combined with the "dummy" 130 MBE score for any evaluative purpose. Specifically, it is not relevant or used in determining if the Attorney Applicant has achieved a passing score. Attorney Applicants are only required to achieve a scaled essay score of 130 to pass the bar examination. There is, in fact, no negative or positive effect from recording a dummy 130 MBE score in the record of Attorney Applicants.

18. Mr. Wansker has failed to sufficiently demonstrate by his performance on the July Exam that he has the ability to identify legal issues, to engage in a reasoned analysis of those issues and to arrive at a logical solution by application of fundamental legal principles which demonstrate his thorough understanding of these legal principles.

### **Conclusions and Final Determination**

1. There is no evidence of mathematical inaccuracy in the scoring process or that the written procedures governing the grading process were not substantially followed.

2. At the point the Torts question was determined to be statistically invalid, the examination was over. The Bar chose the most acceptable and least problematic but practical solution. The elimination of the Torts question was not a substantial irregularity in the administration of the examination resulting in manifest unfairness.

3. The Rules Governing Admission and the grievance procedures do not provide for re-reading of essay answers. Furthermore, the Committee finds that if answers to particular questions were re-read upon an applicant's mere request and not based on the grounds set forth in the rules and appeal procedures, failing applicants would be able to endlessly request re-reading of their answers.

4. Uniformity in grading by the same grading panels is essential to the statistical integrity of the examination. Uniformity in grading is destroyed if answers are re-read. The reappraisal process provides an adequate safeguard for re-consideration of applicant essay answers.

5. Mr. Wansker's scaled essay score of 120.94 does not qualify for reappraisal grounds set forth in the Utah State Bar Examiners Committee Grading Handbook.

6. There is no basis for re-reading or reappraisal of the applicant's essays answers.

7. There is no evidence that the assignment of a different series of test identification numbers to Attorney Applicants adversely affects the Attorney Applicants. The practice has been in place for approximately ten years and Attorney Applicants more often than not have a higher pass rate than Student Applicants. Furthermore, the grading of essays is governed by guidelines that are designed to eliminate subjectivity on behalf of any individual grader.

8. Assigning Attorney Applicants an imputed MBE score of 130 for purposes of scaling the essay answers of the examination to the MBE does not disadvantage Attorney Applicants. There is, in fact, no negative or positive effect from recording a dummy 130 MBE score in the record of Attorney Applicants.

9. Mr. Wansker did not pass the July Exam.



For the foregoing reasons, the Committee denies Mr. Wansker's petition.

DATED this 19 day of January, 2001.



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David Nuffer on behalf of the Executive Committee

Fox/Adm/GrievanceWanskerrev

CERTIFICATE OF SERVICE

On the 19<sup>th</sup> day of January, 2001, the undersigned hereby certifies that a true and correct copy of the foregoing Findings of Fact and Final Determination for Henry B. Wankser was hand delivered to the following:

Carolyn Montgomery  
Attorney at Law  
1904 Longview Drive  
Salt Lake City, Utah 84124

DATED this 19<sup>th</sup> day of January, 2001.

Phyllis J. Clark

Tab 4

# UTAH STATE BAR EXAMINATION

## Statistics

<u>Year</u>	<u>Exam</u>	<u>Total Sitting</u>	<u>Total Admitted</u>	<u>Pass Rate</u>	<u>B.V.U. Passing</u>	<u>U. of U. Passing</u>
1990	July	189	163	86.2%	56	72
	Feb.	76	50	65.8%	15	21
1989	July	177	134	75.7%	49	59
	Feb.	72	50	69	21	16
1988	July	163	120	73.6	27	61
	Feb.	70	49	70	22	18
1987	July	171	134	78.4	43	61
	Feb.	72	57	79.2	16	23
1986	July	195	162	83.1	45	80
	Feb.	66	49	74.2	14	15
1985	July	193*	166*	85.7	44*	70*
	Feb.	57	51	89.5	14	8
1984	July	208	186	89.4	44	52
	Feb.	78	67	85.9	12	23

\*estimated

The total number of attorney applicants admitted from 1984 to 1989 is 123. Approximately 20 attorney applicants are admitted each year. Typically, the pass rate is around 95%.



10 YEAR STATISTICAL REVIEW  
UTAH STATE BAR EXAMINATION RESULTS

Test Date	# Examinees Taking Exam	# Examinees Passing Exam	Pass Rate %	# Fail Essay	# Fail MBE	# Fail Both	Total Fail
7-88	163	120	73.6	25	5	13	43
2-88	70	49	70.0	16	3	2	21
7-87	171	134	78.4	25	7	5	37
2-87	72	57	79.2	10	1	4	15
7-86	195	162	83.1	23	4	6	33
2-86	66	49	74.2	11	3	3	17
7-85	n/a	n/a	85.7	n/a	n/a	n/a	n/a
2-85	57	51	89.5	5	1		6
7-84	208	186	89.4	13	9		22
2-84	78	67	85.9	7	4		11
7-83	n/a	n/a	93.8	n/a	n/a		n/a
2-83	65	57	87.6	6	2		8
7-82	n/a	n/a	n/a	n/a	n/a		n/a
2-82	61	54	88.5	6	1		7
7-81	179	167	93.3	8	4		12
2-81	61	53	86.9	3	5		8
7-80	202	185	91.6	6	1	10	17
2-80	69	50	72.5	n/a	n/a	9	19
7-79	n/a	n/a	n/a	n/a	n/a	n/a	n/a
2-79	83	64	77.1	6	12	1	19

Memorandum - October 3, 1988  
Mr. George Haley  
Page -2-

The criteria effective 1981 through February 1985 is based on the expectation that a correlation existed between scores achieved on the MBE and number of essay questions passed. As such, rules were adopted that allowed applicants achieving a raw score on the MBE equal to or exceeding the upper 20 percentile of all persons taking the MBE nationally would be admitted. Those who achieved less than 15 percent on this exam were considered failing the MBE and were not admitted. Those applicants in between were graded on their essay questions and required to pass 12 of the 18 questions. Those who failed to pass 12 of the 18 were considered failing applicants.

Effective July 1985 it was determined that a correlation did not always exist between the MBE and essay scores. Therefore rules were adopted setting as minimum competency the requirement that an applicant receive a scaled score of 125 on the MBE and pass 12 of 18 essay exam questions. Those applicants failing one portion of the exam are allowed to retake that portion.

I did not have time to compile MBE averages nationally and for Utah. These are probably available with more extensive research. The July 1988 exam showed a national average of 139 and a Utah average of 141.

I hope this information is helpful. If I can be of further assistance, please contact me at 531-9077.

cc: Stephen Hutchinson, Executive Director



# Utah State Bar

645 South 200 East • Salt Lake City, Utah 84111-3834  
Telephone: (801) 531-9077 • (WATS) 1-800-862-9054  
ABA/Net: ABA 1152

Stephen F. Hutchinson  
Executive Director  
Barbara R. Bassett  
Associate Director

## MEMORANDUM

TO: Mr. George Haley, Attorney at Law

FROM: Michele Roberts, Admissions Administrator

DATE: October 3, 1988

RE: Your request for a 10-year Statistical Review  
of the Utah State Bar Examination Results

Upon receiving your request for a 10-year statistical review identifying,

Number of people taking the exam,  
Number of people passing the exam,  
Number of people failing the exam,  
Number of people failing the essay portion only,  
Number of people failing the MBE portion only,  
Number of people failing both portions of the exam,  
Utah's average on the MBE,  
National average on the MBE,

I researched our records to compile this information. The attached table indicates those statistics. In some cases results were not available and I designated this with n/a.

You should be aware that criteria for determining a passing applicant on the bar exam has changed over the years. As such, comparisons should not be made between groups identified by the solid line between the tests 7-80 and 2-81 and between the tests 2-85 and 7-85.

It was not clear from the records what exact criteria was in effect 1979-1980. It appears to be a weighted average based on a conversion ratio in which the essay and MBE scores are converted to the same scale. Passing applicants were those who scored above a certain cut-off point.

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FEBRUARY 1991 BAR EXAMINATION  
RESULTS STATISTICS

Pass Rate Percentage

July 1990	86.2%		
February 1990	65.8%	February 1991	86.1%
July 1989	75.7%	July 1988	73.6%
February 1989	69.0%	February 1988	70.0%

PASS RATE BY LAW SCHOOL

Law School	Number		Passage Rate
	Sat	Pass	
Brigham Young University	20	16	80.0%
University of Utah	18	16	88.9%
Out of State Law Schools	27	23	85.2%
Attorney Applicants	14	13	92.9%

Statistics of Passing  
Student and Attorney Applicants

Total Number Passing Exam	68
Men	42
Women	26
Total Number Sat for Examination	79
Men	51
Women	28

## JULY 1991 BAR EXAMINATION RESULTS

Results of the July 1991 Bar Examination are as follows:

	Students	Attorneys
Total number:	169	12
Total passes:	152	10
Total Fails:	17	2
PASS RATE	89.9%	83.3%
PASS RATE ON TOTAL EXAMINEES.....	89.5%	

### RESULTS STATISTICS

#### Pass Rate Percentage

February 1991	86.1%	July 1991	89.5%
February 1990	65.8%	July 1990	86.2%
February 1989	69.0%	July 1989	75.7%
February 1988	70.0%	July 1988	73.6%

### PASS RATE BY LAW SCHOOL

Law School	Number		Pass Rate
	Sat	Pass	
BYU	56	52	92.9%
UofU	70	63	90.0%
Out of State	43	37	89.0%

## FEBRUARY 1992 BAR EXAMINATION RESULTS

Results of the February 1992 Bar Examination are as follows:

	Students	Attorneys	Total
Total number:	78	16	94
Total passes:	68	15	83
Total fails:	10	1	11
PASS RATE:	87.1%	93.7%	88.2%

PASS RATE ON TOTAL EXAMINEES.....88.2%

### RESULTS STATISTICS

#### Pass Rate Percentage

February 1992	88.2%		
February 1991	86.1%	July 1991	89.5%
February 1990	65.8%	July 1990	86.2%
February 1989	69.0%	July 1989	75.7%
February 1988	70.0%	July 1988	73.6%

#### PASS RATE BY LAW SCHOOL

Law School	Number		Pass Rate
	Sat	Pass	
BYU	27	26	96.2%
UofU	29	22	75.8%
Out of State	38	35	92.1%

## JULY 1992 BAR EXAMINATION RESULTS

Results of July 1992 Bar Examination are as follows:

	Students	Attorneys	Total
Total number:	207	18	225
Total passes:	187	17	204
Total fails:	20	1	21
PASS RATE:	90.3%	94.4%	90.7%

PASS RATE ON TOTAL EXAMINEES.....90.7%

### RESULTS STATISTICS

#### Pass Rate Percentage

February 1992	88.2%	July 1992	90.7%
February 1991	86.1%	July 1991	89.5%
February 1990	65.8%	July 1990	86.2%
February 1989	69.0%	July 1989	75.7%
February 1988	70.0%	July 1988	73.6%

### PASS RATE BY LAW SCHOOL

Law School	Number		Pass Rate
	Sat	Pass	
BYU	69	60	87.0%
UofU	92	83	90.2%
Out of State	64	61	95.3%

## FEBRUARY 1993 BAR EXAMINATION RESULTS

Results of February 1993 Bar Examination are as follows:

	Students	Attorneys	Total
Total number:	84	28	112
Total passes:	73	23	96
Total fails:	11	5	16
PASS RATE:	86.9%	82.1%	85.7%

PASS RATE OF TOTAL EXAMINEES.....85.7%

### RESULTS STATISTICS

#### Pass Rate Percentage

February 1993	85.7%		
February 1992	88.2%	July 1992	90.7%
February 1991	86.1%	July 1991	89.5%
February 1990	65.8%	July 1990	86.2%
February 1989	69.0%	July 1989	75.7%

### PASS RATE BY LAW SCHOOL

Law School	Number		Pass Rate
	Sat	Pass	
BYU	37	30	81.1%
UofU	14	12	85.7%
Out of State	61	54	88.5%

Applicants signed up for July 1993 Examination

Students	270
Attorneys	31
Total	301

Possible retakes 16

## JULY 1993 BAR EXAMINATION RESULTS

Results of July 1993 Bar Examination are as follows:

	Students	Attorneys	Total
Total number:	248	21	269
Total passes:	218	15	233
Total fails:	30	6	36
PASS RATE:	87.9%	71.4%	86.6%

PASS RATE OF TOTAL EXAMINEES.....86.6%

### RESULTS STATISTICS

#### Pass Rate Percentage

February 1993	85.7%	July 1993	86.6%
February 1992	88.2%	July 1992	90.7%
February 1991	86.1%	July 1991	89.5%
February 1990	65.8%	July 1990	86.2%
February 1989	69.0%	July 1989	75.7%

### PASS RATE BY LAW SCHOOL

Law School	Number		Pass Rate
	Sat	Pass	
BYU	80	75	92.5%
UofU	99	89	89.9%
Out of State	90	69	76.7%

Retakes..... 14 ..... 7 passed 50%

## FEBRUARY 1994 BAR EXAMINATION RESULTS

Results of February 1994 Bar Examination are as follows:

	Students	Attorneys	Total
Total number:	103	33	136
Total passes:	91	31	122
Total fails:	12	2	14
PASS RATE:	88.4 %	93.9%	89.7%

PASS RATE OF TOTAL EXAMINEES.....89.7%

### RESULTS STATISTICS

#### Pass Rate Percentage

February 1994	89.7%		
February 1993	85.7%	July 1993	86.6%
February 1992	88.2%	July 1992	90.7%
February 1991	86.1%	July 1991	89.5%
February 1990	65.8%	July 1990	86.2%
February 1989	69.0%	July 1989	75.7%

### PASS RATE BY LAW SCHOOL

Law School	Number		Pass Rate
	Sat	Pass	
BYU	25	24	96.0%
UofU	31	28	90.3%
Out of State	80	70	87.5%

Retakes.....20 ..... 15 passed

## JULY 1994 BAR EXAMINATION RESULTS

Results of July 1994 Bar Examination are as follows:

	Students	Attorneys	Total
Total number:	217	25	242
Total passes:	187	24	211
Total fails:	30	1	31
PASS RATE:	86.2%	96.0%	87.2%

PASS RATE OF TOTAL EXAMINEES.....87.2%

### RESULTS STATISTICS

#### Pass Rate Percentage

February 1994	89.9%	July 1994	87.2%
February 1993	85.7%	July 1993	86.6%
February 1992	88.2%	July 1992	90.7%
February 1991	86.1%	July 1991	89.5%
February 1990	65.8%	July 1990	86.2%
February 1989	69.0%	July 1989	75.7%

### PASS RATE BY LAW SCHOOL

Law School	Number		Pass Rate
	Sat	Pass	
BYU	73	60	82.2%
UofU	84	80	95.2%
Out of State	85	71	83.5%



## FEBRUARY 1995 BAR EXAMINATION RESULTS

Results of February 1995 Bar Examination are as follows:

	Students	Attorneys	Total
Total number:	86	31	117
Total passes:	68	25	93
Total fails:	18	6	24
PASS RATE:	79.1%	80.6%	79.5%

PASS RATE OF TOTAL EXAMINEES.....79.5%

### RESULTS STATISTICS

#### Pass Rate Percentage

February 1995	79.5%		
February 1994	89.9%	July 1994	87.2%
February 1993	85.7%	July 1993	86.6%
February 1992	88.2%	July 1992	90.7%
February 1991	86.1%	July 1991	89.5%
February 1990	65.8%	July 1990	86.2%
February 1989	69.0%	July 1989	75.7%

### PASS RATE BY LAW SCHOOL

Law School	Number		Pass Rate
	Sat	Pass	
BYU	31	24	77.4%
UofU	20	16	80.0%
Out of State	66	53	80.3%

Retakes. .23.....14 passed      60.9%

## JULY 1995 BAR EXAMINATION RESULTS

Results of July 1995 Bar Examination are as follows:

	<i>Students</i>	<i>Attorneys</i>	<i>Total</i>
Total number:	225	34	259
Total passes:	203	31	234
Total fails:	22	3	25
PASS RATE:	90.2%	91.2%	90.4%

PASS RATE OF TOTAL EXAMINEES.....90.4%

### RESULTS STATISTICS

#### Pass Rate Percentage

February 1995	79.5%	July 1995	90.4%
February 1994	89.9%	July 1994	87.2%
February 1993	85.7%	July 1993	86.6%
February 1992	88.2%	July 1992	90.7%
February 1991	86.1%	July 1991	89.5%
February 1990	65.8%	July 1990	86.2%

### PASS RATE BY LAW SCHOOL

Law School	Number		Pass Rate
	Sat	Pass	
BYU	78	70	89.7%
UofU	83	76	91.6%
Out of State	98	89	90.8%
Female	91	84	92.3%
Male	168	150	89.3%

Retakes.....13.....7 passed    53.8%

## FEBRUARY 1996 BAR EXAMINATION RESULTS

Results of February 1996 Bar Examination are as follows:

	<i>Students</i>	<i>Attorneys</i>	<i>Total</i>
Total number:	94	24	118
Total passes:	76	22	98
Total fails:	18	2	20
PASS RATE:	80.9%	91.7%	83.1%

PASS RATE OF TOTAL EXAMINEES.....83.1%

### RESULTS STATISTICS

#### Pass Rate Percentage

February 1996	83.1%		
February 1995	79.5%	July 1995	90.4%
February 1994	89.9%	July 1994	87.2%
February 1993	85.7%	July 1993	86.6%
February 1992	88.2%	July 1992	90.7%
February 1991	86.1%	July 1991	89.5%
February 1990	65.8%	July 1990	86.2%

### PASS RATE BY LAW SCHOOL

Law School	Number		Pass Rate
	Sat	Pass	
BYU	30	26	86.7%
UofU	22	18	81.8%
Out of State	66	54	81.8%

Retakes.....20.....8 passed      40.0%

## JULY 1996 BAR EXAMINATION RESULTS

Results of July 1996 Bar Examination are as follows:

	Students	Attorneys	Total
Total number:	228	28	256
Total passes:	201	27	228
Total fails:	27	1	28
PASS RATE:	88.1%	96.4%	89.0%

PASS RATE OF TOTAL EXAMINEES.....89.0%

### RESULTS STATISTICS

#### Pass Rate Percentage

February 1996	83.1%	July 1996	89.0%
February 1995	79.5%	July 1995	90.4%
February 1994	89.9%	July 1994	87.2%
February 1993	85.7%	July 1993	86.6%
February 1992	88.2%	July 1992	90.7%
February 1991	86.1%	July 1991	89.5%
February 1990	65.8%	July 1990	86.2%
February 1989	69.0%	July 1989	75.7%

### PASS RATE BY LAW SCHOOL

Law School	Number		Pass Rate
	Sat	Pass	
BYU	82	75	91.4%
UofU	83	73	87.9%
Out of State	91	80	87.9%

Retakes.....15.....5 passed.....33.3%

## FEBRUARY 1997 BAR EXAMINATION RESULTS

*Results of February 1997 Bar Examination are as follows:*

	Students	Attorneys	Total
Total number:	95	27	122
Total pass:	86	27	113
Total fail:	9	0	9
PASS RATE:	90.5%	100%	92.6%

PASS RATE OF TOTAL EXAMINEES.....92.6%

### RESULTS STATISTIC

February 1997	92.6%		
February 1996	83.1%	July 1996	89.0%
February 1995	79.5%	July 1995	90.4%
February 1994	89.9%	July 1994	87.2%
February 1993	85.7%	July 1993	86.6%
February 1992	88.2%	July 1992	90.7%
February 1991	86.1%	July 1991	89.5%
February 1990	65.8%	July 1990	86.2%
February 1989	69.0%	July 1989	75.7%

### PASS RATE BY LAW SCHOOL

Law School	Number		Pass Rate
	Sat	Pass	
BYU	35	32	91.4%
UofU	24	20	83.3%
Out of State	63	61	96.8%

Retakes.....20.....16 passed.....80.0%

Essay scores varied from 19 to 45/Total possible score 60

Average essay score 32.74

MBE scores varied from 105 to 174

Utah's average MBE score 143.41

National MBE average 139.45 for February 1997. (18,468 applicants tested)

Highest combined score 167.30....lowest combined score 104.64

## JULY 1997 BAR EXAMINATION RESULTS

*Results of July 1997 Bar Examination are as follows:*

	Students	Attorneys	Total
Total number:	222	29	251
Total pass:	206	27	233
Total fail:	16	<b>2</b>	18
PASS RATE:	92.8%	93.1%	92.8%

PASS RATE OF TOTAL EXAMINEES.....92.8%

### RESULTS STATISTIC

February 1997	92.6%	July 1997	<b>92.8%</b>
February 1996	83.1%	July 1996	89.0%
February 1995	79.5%	July 1995	90.4%
February 1994	89.9%	July 1994	87.2%
February 1993	85.7%	July 1993	86.6%
February 1992	88.2%	July 1992	90.7%
February 1991	86.1%	July 1991	89.5%
February 1990	65.8%	July 1990	86.2%
February 1989	69.0%	July 1989	75.7%

### PASS RATE BY LAW SCHOOL

Law School	Number		Pass Rate
	Sat	Pass	
BYU	74	72	97.3%
UofU	76	67	88.2%
Out of State	101	94	93.0%

Retakes.....11.....9 passed.....81.8%

Essay scores varied from 18 to 46/Total possible score 60

Average essay score 33.34

MBE scores varied from 96 to 176

Utah's average MBE score 144.88

National MBE average 143.92 for July 1997. (44,128 applicants tested)

Highest combined score 175.26....lowest combined score 103.49

## FEBRUARY 1998 BAR EXAMINATION RESULTS

*Results of February 1998 Bar Examination are as follows:*

	Students	Attorneys	Total
Total number:	<b>81</b>	22	103
Total pass:	<b>66</b>	20	86
Total fail:	15	2	17
PASS RATE:	81.5%	90.9%	83.5%

PASS RATE OF TOTAL EXAMINEES.....83.5%

### RESULTS STATISTIC

February 1998	83.5%		
February 1997	92.6%	July 1997	92.8%
February 1996	83.1%	July 1996	89.0%
February 1995	79.5%	July 1995	90.4%
February 1994	89.9%	July 1994	87.2%
February 1993	85.7%	July 1993	86.6%
February 1992	88.2%	July 1992	90.7%
February 1991	86.1%	July 1991	89.5%
February 1990	65.8%	July 1990	86.2%
February 1989	69.0%	July 1989	75.7%

### PASS RATE BY LAW SCHOOL

Law School	Number		Pass Rate
	Sat	Pass	
BYU	19	17	89.5%
UofU	24	21	87.5%
Out of State	60	48	80.0%

Retakes.....12.....7 passed.....58.3%

Essay scores varied from 12 to 42/Total possible score 60

Average essay score 31.90

MBE scores varied from 107 to 167

Utah's average MBE score 140.88

National MBE average 137.74 for February 1998. (18,470 applicants tested)

Highest combined score 166.24....lowest combined score 99.70

## JULY 1998 BAR EXAMINATION RESULTS

*Results of July 1998 Bar Examination are as follows:*

	Students	Attorneys	Total
Total number:	219	19	238
Total pass:	205	19	224
Total fail:	14	0	14
PASS RATE:	93.6%	100%	94.1%

PASS RATE OF TOTAL EXAMINEES.....94.1%

### RESULTS STATISTIC

February 1998	83.5%	July 1998	94.1%
February 1997	92.6%	July 1997	92.8%
February 1996	83.1%	July 1996	89.0%
February 1995	79.5%	July 1995	90.4%
February 1994	89.9%	July 1994	87.2%
February 1993	85.7%	July 1993	86.6%
February 1992	88.2%	July 1992	90.7%
February 1991	86.1%	July 1991	89.5%
February 1990	65.8%	July 1990	86.2%
February 1989	69.0%	July 1989	75.7%

### PASS RATE BY LAW SCHOOL

Law School	Number		Pass Rate
	Sat	Pass	
BYU	71	67	94.3%
UofU	87	82	94.2%
Out of State	80	75	93.7%

Retakes.....7.....5 passed.....71.4%

Essay scores varied from 15 to 43/Total possible score 60

Average essay score 29.72

MBE scores varied from 108.00 to 176.00

Utah's average MBE score 146.07

National MBE average 142.11 for July 1998. (43,541 applicants tested)

Highest combined score 180.41.....lowest combined score 111.28



## FEBRUARY 1999 BAR EXAMINATION RESULTS

*Results of February 1999 Bar Examination are as follows*

	Students	Attorneys	Total
Total number.	75	22	97
Total pass:	<b>56</b>	<b>21</b>	77
Total fail:	19	1	20
PASS RATE:	74.7%	95.5%	79.4%

PASS RATE OF TOTAL EXAMINEES.....79.4%

### RESULTS STATISTIC

February 1999	79.4%		
February 1998	83.5%	July 1998	94.1%
February 1997	92.6%	July 1997	92.8%
February 1996	83.1%	July 1996	89.0%
February 1995	79.5%	July 1995	90.4%
February 1994	89.9%	July 1994	87.2%
February 1993	85.7%	July 1993	86.6%
February 1992	88.2%	July 1992	90.7%
February 1991	86.1%	July 1991	89.5%
February 1990	65.8%	July 1990	86.2%
February 1989	69.0%	July 1989	75.7%

### PASS RATE BY LAW SCHOOL

Law School	Number		Pass Rate
	Sat	Pass	
BYU	20	17	85.0%
UofU	15	13	86.7%
Out of State	62	47	75.8%

Retakes.....13....7 passed.....53.8%

Essay scores varied from 12 to 43/Total possible score 60

Average essay score 31.45

MBE scores varied from 111.00 to 181.00

Utah's average MBE score 138.88

Highest combined score 167.12.....lowest combined score 100.18

PASS RATE BY LAW SCHOOL

Law School	Number		Pass Rate
	Sat	Pass	
BYU	80	72	90%
UofU	82	71	86.6%
Out of State	99	90	90.9%

## JULY 1999 BAR EXAMINATION RESULTS

	<u>Students</u>	<u>Attorneys</u>	<u>Total</u>
Total number:	242	19	261
Total pass:	214	19	233
Total fail:	28	0	28
Pass Rate:	88.4%	100%	89.3%

### Pass Rate History

February 1999	79.4%	July 1999	89.3%
February 1998	83.5%	July 1998	94.1%
February 1997	92.6%	July 1997	92.8%
February 1996	83.1%	July 1996	89.0%
February 1995	79.5%	July 1995	90.4%
February 1994	89.9%	July 1994	87.2%
February 1993	85.7%	July 1993	86.6%
February 1992	88.2%	July 1992	90.7%
February 1991	86.1%	July 1991	89.5%
February 1990	65.8%	July 1990	86.2%

Essay Scores  
 60 Points Possible  
 Varied from 48 High to 18 Low  
 Average Score: 31.92

Retakes  
 Total Retakes 14  
 Total Passed 7  
 Rate 50%

Multistate Scores (MBE)  
 200 Possible  
 Varied from 101.00 to 176.00  
 Utah's Average Score: 144.54  
 National Average Score: 142.25 (43,417 applicants)

Combined Scores  
 Highest Exam Score: 177.20  
 Lowest Exam Score: 107.88  
 Average Exam Score: 145.31

# PASS RATE BY LAW SCHOOL

Law School	Number		Pass Rate
	Sat	Pass	
BYU	24	23	95.8%
UofU	21	20	95.2%
Out of State	61	54	88.5%

## FEBRUARY 2000 BAR EXAMINATION RESULTS

	<u>Students</u>	<u>Attorneys</u>	<u>Total</u>
Total number:	91	15	106
Total pass:	85	12	97
Total fail:	6	3	9
Pass Rate:	93.4%	80.0%	91.5%

### Pass Rate History

February 2000	91.5%		
February 1999	79.4%	July 1999	89.3%
February 1998	83.5%	July 1998	94.1%
February 1997	92.6%	July 1997	92.8%
February 1996	83.1%	July 1996	89.0%
February 1995	79.5%	July 1995	90.4%
February 1994	89.9%	July 1994	87.2%
February 1993	85.7%	July 1993	86.6%
February 1992	88.2%	July 1992	90.7%
February 1991	86.1%	July 1991	89.5%

**Essay Scores**  
 60 Points Possible  
 Varied from 49 High to 13 Low  
 Average Score: 32.96

**Retakes**  
 Total Retakes 22  
 Total Passed 18  
 Rate 81.8%

**Multistate Scores (MBE)**  
 200 Possible  
 Varied from 115.00 to 179.00  
 Utah's Average Score: 144.02  
 National Average Score: 136.86

**Combined Scores**  
 Highest Exam Score: 173.20  
 Lowest Exam Score: 107.59  
 Average Exam Score: 140.92  
 Passing Score: 130.00

# PASS RATE BY LAW SCHOOL

Law School	Number		Pass Rate
	Sat	Pass	
BYU	72	67	93.1%
UofU	76	70	92.1%
Out of State	84	67	79.8%

## JULY 2000 BAR EXAMINATION RESULTS

	<u>Students</u>	<u>Attorneys</u>	<u>Total</u>
Total number:	211	21	232
Total pass:	190	14	204
Total fail:	21	7	28
Pass Rate:	90.0%	66.7%	87.9%

### Pass Rate History

February 2000	91.5%	July 2000	87.9%
February 1999	79.4%	July 1999	89.3%
February 1998	83.5%	July 1998	94.1%
February 1997	92.6%	July 1997	92.8%
February 1996	83.1%	July 1996	89.0%
February 1995	79.5%	July 1995	90.4%
February 1994	89.9%	July 1994	87.2%
February 1993	85.7%	July 1993	86.6%
February 1992	88.2%	July 1992	90.7%
February 1991	86.1%	July 1991	89.5%

Essay Scores  
 55 Points Possible  
 Varied from 40 High to 15 Low  
 Average Score: 28.96

Retakes  
 Total Retakes 8  
 Total Passed 5  
 Rate 62.5%

Multistate Scores (MBE)  
 200 Possible  
 Varied from 108.00 to 181.00  
 Utah's Average Score: 145.57  
 National Average Score: 141.95  
 (43,791 nationally tested)

Combined Scores  
 Highest Exam Score: 175.70  
 Lowest Exam Score: 102.63  
 Average Exam Score: 147.69  
 Passing Score: 130.00

Tab 5



# UTAH BAR EXAMINERS COMMITTEE GRADING HANDBOOK

## ACKNOWLEDGEMENT

The Utah State Bar Admissions Committee and Bar Examiners Committee wish to thank the Connecticut, California, Florida and Idaho Bar Examining Committees for their willingness to share their expertise and experience with us as we restructured our examination procedures. The Utah Bar Examiners Committee Grading Handbook has been modeled after similar *grading* handbooks used by these jurisdictions.

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## I. INTRODUCTION

The admissions process is conducted under the Rules Governing Admission to the Utah State Bar, which have been adopted by the Utah Supreme Court.

The Utah Bar Examination is administered twice a year in February and July. The examination is a two-day examination consisting of a one-day essay examination and a one-day Multistate Bar Examination (MBE). Each portion of the examination is six hours. The MBE is a multiple choice examination graded by the National Conference of Bar Examiners (NCBE). The essay portion of the examination is divided into two parts; in the morning, the applicants take the Multistate Essay Examination (MEE) which consists of six questions; in the afternoon the state-prepared portion consists of six questions. Both parts of the essay examination are graded by the Utah Bar Examiners.

The Bar utilizes the services of expert graders to grade the essay answers. The graders are qualified Utah attorneys or law professors who have expressed interest and are invited to serve as members of the Bar Examiners Committee as graders.

All members of the Bar Examiners Committee must treat in absolute confidence all information regarding the nature and content of their work for the Bar Examiners Committee, including the contents of the booklet. The Board of Bar Commissioners and the Supreme Court expect that each committee member will undertake the task of grading with the utmost seriousness. Committee members cannot be associated with bar review courses. Committee members who may be involved in teaching law students must avoid offering "helpful hints" which could unfairly give advantage to these students.

The grading process requires strict adherence to the enclosed schedule to insure that scores are reported as soon as practicable. Your cooperation is essential to meeting this goal. The sacrifices made by the graders in order to assure timely and accurate grading are greatly appreciated.

## II. GENERAL BAR EXAMINATION INFORMATION

### Subject Matter Identification

#### The Essay Examination

The essay examination is given the first day. It consists of 12 essay questions: six questions in the morning session and six in the afternoon. The morning session is the Multistate Essay Examination (MEE) developed by the National Conference of Bar Examiners. The MEE questions are taken from the following ten subject areas:

Agency and Partnership	Family Law
Commercial Paper	Federal Civil Procedure
(Negotiable Instruments)	Sales
Conflict of Laws	Secured Transactions
Corporations	Trusts and Future Interests
Decedent's Estates	

The six afternoon essay questions are taken from the following 15 subject areas:

Administrative Law	Ethics
Business Entities (including corporations)	Evidence
Civil Procedure	Family Law
Utah Constitutional Law	Real Property
Federal Constitutional Law	Torts
Contracts	Uniform Commercial Code
Creditor/Debtor	(Articles II, III, IV, IX)
Criminal Law and Procedure	Wills/Estate Planning/Trusts
	(including tax aspects)

Applicants are expected to answer using the Utah Rules of Civil Procedure, the Federal Rules of Civil Procedure, the Utah Rules of Professional Conduct, the Utah Rules of Evidence and the Federal Rules of Evidence as applicable.

State-prepared essay questions are confined to a single subject area while the MEE may include "cross-over" questions in which more than one subject area is tested. Both portions of the essay examination are graded by the Utah Bar Examiners Committee.

#### The Multistate Bar Examination

The Multistate Bar Examination (MBE) is given the second day and consists of 200 multiple choice questions. The MBE is graded nationally.

### III. BAR EXAMINERS COMMITTEE COMPOSITION AND QUESTION PREPARATION

The Bar Examiners Committee is comprised of active members of the Utah State Bar in good standing and professors of law who have been selected by the Board of Bar Commissioners on the basis of demonstrated professional expertise. Members of the Bar Examiners Committee are appointed to serve a three (3) year term and may be reappointed to serve additional terms.

Bar examiners shall be arranged into subcommittees, called question committees, consisting of four members for each subject area. These subcommittees shall be responsible for drafting questions and grading answers in the assigned subject area. One member of each subcommittee is appointed as chairperson and will serve for a three (3) year term. The chairperson will be the liaison for the question committee with the Admissions Administrator. The chairperson is responsible for the timely submission of the completed questions and model answer to the Review Committee. Prior to the examination, the question committee chairperson shall designate one member of the committee as the "drafter" and one member as the "supervising grader". The supervising grader will moderate the calibration session as outlined in section V-E. The supervising grader will oversee the grading process, including reappraisal grading, and will prepare the final issue outline and revised model answer.

The drafter will prepare a question and model answer according to the guidelines in section III-

The remaining committee members will review, critique and suggest revisions for the question and model answer prior to submission to the Bar Examiners Review Committee and participate in grading the examination.

The question committee chairperson will submit the question and model answer to the Bar Examiner Review Committee. The Review Committee will analyze the question and model answer and may require the drafter to make revisions. Finally, the Review Committee will approve the questions for inclusion in the Utah portion of the examination. Additionally, the Review Committee will review the Multistate Essay Examination before administration of the examination to determine the appropriateness of the questions and to determine the composition of the Utah portion of the examination.

#### A. Questions/Model Answer Drafting Guidelines

- 1) The examination questions should be designed to be analyzed and answered in approximately 30 minutes. A rule of thumb for question length is that the question should be no more than 200 to 300 words in length or approximately one page double-

spaced. Otherwise the applicant will spend a disproportionate amount of time reading and analyzing the questions as opposed to preparing his or her response.

- 2) The "call" of the question should draw the applicant's attention to the specific task assigned. The call of the questions should be appropriate for a time restricted question.
- 3) Facts such as names, dates, and relationships must be described with absolute clarity. Idiomatic phraseology should be avoided. Parties should be identified in a manner that will help the applicant to distinguish one party from another.
- 4) The question should not be so broad as to invite a general or non-responsive discussion of a wide field of law, nor be so specific as to dictate the answer. Generally questions should test for basic legal principles which would be within the common knowledge of recent law school graduates. Emphasis on fundamental legal principles should not preclude testing on issues of substantial local importance.
- 5) The question should include no more than 3 or 4 issues which the applicant can identify and analyze fully.

### III. MULTISTATE ESSAY EXAMINATION GRADING PROCEDURE

The Multistate Essay Examination (MEE) is developed by the National Conference of Bar Examiners and is graded by the Utah Bar Examiner Committee according to the scale outlined in section V - F of this handbook. The 1-6 grading scale included in section IV - A is used only as a guide by the National Conference of Bar Examiners during the MEE grading workshop.

#### A. MEE Grading Workshop

The MEE questions and analyses are sent to all workshop participants by overnight courier immediately following the administration of the exam. Each participant is encouraged to conduct an independent analyses of the question he or she will be grading, identifying, where appropriate, citation to local law. Participants are instructed to be thoroughly familiar with the questions(s) they are going to grade and the analyses provided by the Conference in order to take full advantage of the workshop activities.

At the workshop, a session is conducted for each question. A typical schedule is as follows:

#### Saturday

Overview	12:30 - 1:00
Questions 1 - 3:	
1 (30 min)	1:00 - 3:00
2 (30 min)	1:00 - 5:00
3 (30 min)	3:00 - 5:00

#### Sunday

Questions 4 - 6:	
4 (30 min)	8:00 - noon
5 (30 min)	8:00 - 10:00
6 (30 min)	10:00 - noon

Facilitators lead discussions regarding each question and proposed analysis, and then each group reviews and assigns grades to a set of answers written to the question by applicants in the jurisdictions administering the MEE. The goals of the workshop are to identify problems with the analyses, refine the weights to be assigned to issues, and/or to uncover unanticipated grading problems.

Each of the jurisdictions administering the MEE uses a different scoring method (e.g, 100-point scale, 10-point scale); the following system has been selected for use at the MEE grading workshops:

<u>Score</u>	<u>Description</u>
6	A 6 answer demonstrates a <u>high degree of competence</u> in response to the question. While not reserved for a perfect answer, a 6 answer demonstrates a full understanding of the facts, a complete recognition of the issues presented and the applicable principles of law, and a good ability to reason to a conclusion. A 6 answer is clear, concise and complete.
5	A 5 answer demonstrates <u>clear competence</u> in response to the question. A 5 answer demonstrates a fairly complete understanding of the facts, recognizes most of the issues and applicable law, and reasons fairly well to a conclusion.
4	A 4 answer demonstrates <u>competence</u> in response to the question. A 4 answer demonstrates an adequate understanding of the facts, and adequate recognition of most of the issues and law, and adequate ability to reason to a conclusion.
3	A 3 answer demonstrates <u>some competence</u> in response to the question but is <u>inadequate</u> . A 3 answer demonstrates a weak understanding of the facts, misses significant issues, fails to recognize applicable law, and demonstrates inadequate reasoning ability.
2	A 2 answer demonstrates only <u>limited competence</u> in response to the question and is <u>seriously flawed</u> . A 2 answer demonstrates little understanding of the facts or law and little ability to reason to a conclusion.
1	A 1 answer demonstrates <u>fundamental deficiencies</u> in understanding facts and law. A 1 answer show virtually no ability to reason or analyze.

Following the workshop, revisions to the analyses and/or grading guidelines suggested by workshop participants are sent by Federal Express to all persons grading the MEE.

### B. Local Grading of MEE

The MEE is not graded at the MEE Grading Workshop. The workshop is a pre-calibration session for the MEE and provides local graders with a starting point in conducting the calibration session (section V - D). The MEE and the state-prepared essay will both be graded using the procedures described in section V - A thru I. At the discretion of the question committee chairperson, all four members of the question committee may participate as graders when grading the MEE because one member did not draft the question.



## V. STATE-PREPARED ESSAY EXAMINATION GRADING PROCEDURE

### A. Definition of Terms

**BENCHMARK PAPERS:** Essay answers selected by the readers during the calibration session and used to represent the various score categories used during grading and reappraisal. Graders are to refer to the benchmark answers to refresh their memories regarding the standards set in the calibration session. The benchmark answers will also be published as sample answers after the results of the examination are announced.

**CALIBRATION:** The method of establishing a single scoring system among several graders on one question.

**CORRELATION:** A measure of the extent to which a measure on one criterion predicts a measure on another criterion.

**GRADING TEAM:** Members of each question committee who actually grade examinee responses.

**MEAN:** Arithmetic average.

**STANDARD DEVIATION:** A measure of the spread of scores in a distribution.

### B. Analysis of the Question

Immediately following the date on which the examination is administered, the examination questions shall be sent to the graders on each question committee. Your first assignment as a grader is to research all significant legal issues raised by the question you will be grading to verify the issues addressed by the question drafter's model answer. As part of your preliminary research you must prepare a written outline analysis of the issues. Each grader's outline will be distributed to all graders at or prior to the calibration session to facilitate discussion at the session.

### C. Grading Overview

The grading process is designed to accomplish three principal objectives:

1. To arrive at a consensus analysis of the question.
2. To calibrate to consistent grading standards.
3. To grade the examination books.

#### D. Calibration and Grading Sessions

At the calibration session, the members of the grading team compare the outlines of issues that each has prepared and the model answer. The grading team should discuss the issues raised by the examination question and formulate a consensus model answer and consensus issue outline. Graders are reminded that the analysis prepared by the question drafter is intended for guidance only. A grader must not give undue emphasis to the analysis during the calibration session. After the consensus issue outline and model answer have been prepared, the grading team will read five randomly selected applicant answers to the question without assigning grades. After all members have read these answers, the team will then discuss any additional issues or problems which have been raised by the review of these answers.

The grading team must agree on the main issues and the resolutions to those issues which are worthy of credit; the graders should agree on how to treat lesser issues which only the most enlightened applicants may recognize. The graders should resolve ambiguities and other problems which arise in the grading process.

After completing the pre-grading procedure, the graders shall individually assign grades to the five answers. The graders should reread the entire answer before forming any opinions as to the grade to be assigned. After reading each individual answer, the grader will 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 procedures depends on uniformity. The graders may not agree to disagree. After the first round of answers have been thoroughly discussed, the graders will grade another five examination papers in the same manner, again followed by a discussion of the grades assigned. This will continue until the graders have reached uniformity on the grades which are assigned. The graders are to put no marks on the papers. Papers scored during the calibration session which illustrate the range of score (benchmark papers) shall be selected. The benchmark papers are to be used by the graders during the remainder of the grading session to help the graders maintain grading consistency. This completes the calibration session.

Immediately following the calibration session, graders will continue grading equal portion of the remaining papers during the grading session in accordance with the guidelines that follow in section V - E.

The supervising grader will be responsible for revising the model answer and issue outline in accordance with the consensus of the grading team. The final revised model answer and issue outline, complete with score breakdown will be submitted to the Admissions Administrator no later than the Monday morning following the calibration and grading sessions.

### E. Grading Guidelines

1. Refer to benchmark papers often during grading.
2. No marks are to be made anywhere on the answer book. Marking the answer book will compromise reappraisal grading which must be done without prejudice.
3. Do not exchange any answer booklets with another reader without the consent of the Admissions Administrator.
4. If you find an answer booklet for a question other than the one you are grading, please contact the Admissions Administrator immediately who will instruct you on what steps to take. If you find that you are missing a booklet that you expected to be included, contact the Admissions Administrator.
5. Record all grades on the grading sheets and complete the grader certification form.
6. Return all answer booklets in numerical order after randomly grading the answers.
7. Return all benchmark papers to the Admissions Administrator. These are necessary as samples of scored answers for distribution to applicants.

### F. Grading Scale

The following grading scale will be used to grade answers on both the MEE and the state-prepared sections of the essay examination:

<u>Score</u>	<u>Description</u>
5	Well Above Average  While not reserved for a perfect answer, a 5 answer demonstrates a full understanding of the facts, a complete recognition of the issues presented and the applicable principles of law, and a good ability to reason to a conclusion. A 5 answer is clear, concise, and complete.
4	Above Average  A 4 answer demonstrates a fairly complete understanding of the facts, recognizes most of the issues and applicable law, and reasons fairly well to a conclusion.

3 Average

A 3 answer demonstrates an adequate understanding of the facts, an adequate recognition of most of the issues and law, and adequate ability to reason to a conclusion.

2 Below Average

A 2 answer demonstrates a weak understanding of the facts, misses significant issues, fails to recognize applicable law, and demonstrates inadequate reasoning ability.

1 Well Below Average

A 1 answer demonstrates little understanding of the facts or law and little ability to reason to a conclusion.

0 Unanswered questions or an unresponsive answer

A 0 answer demonstrates fundamental deficiencies in understanding facts and law. A 0 answer shows virtually no ability to reason or analyze.

No determination of "passing" or "failing" or "minimal competence" should be made while grading the essay examination. Answers are to be scored according to the grading scale. The determination of pass and fail will be made by combining the MBE scaled score and the essay scaled score together as described in section VI.

A score of "5" is not reserved for a perfect answer or for the single best answer which a grader may encounter. A grade of "5" should be assigned when the grader believes the examinee has done as well as can be expected of any applicant on that question.

If the examinee has shown any understanding of the question and has made a serious attempt to at least try to answer it, that examinee should not receive a grade of "0". However, if the examinee has written an answer that almost completely, or completely, unresponsive, a grade of "0" is appropriate.

All papers shall be graded using the whole number "0 - 5" on the grading scale. No paper should receive a fraction of a point, i.e. "3.5", "4.25", "2.75".

### G. Failure to Follow the Grading Scale

Unless bar examination graders adhere to the established grading system, a fair and accurate evaluation of applicant performance on the examination is impossible.

## H. Reappraisal Grading

Reappraisal grading is used to confirm the essay scores of those applicants who fall in a range just below the passing score. The passing score for the bar examination is a combined scaled score of 130. Applicants whose combined score on the full bar examination is between 130 and 129 (below the passing level) shall have all their essay answers regraded.

The papers of these applicants will be submitted to another member of the grading team for reappraisal. If the second reader assigns the same score as the first reader, that is the score for the answer. If the score assigned by the second reader differs from that assigned by the first reader, the two scores will be averaged together and the averaged score will be the final raw essay score. This score is the score assigned to the applicant.

## I. Grader Certification

The grader must sign and date a grader certification sheet and submit it with a copy of the completed grading sheet(s). Copies may be taken from the sample sheets in this handbook or will be distributed by the Admissions Administrator at sequestration.

## VI. DESCRIPTION OF SCALING

The Committee of the Bar Examiners has adopted a grading procedure, approved by the Board of Bar Commissioners of the Utah State Bar, designed to assure that the difficulty of passing the bar examination remains unchanged from test to test.

The statistical technique, called scaling, converts scores on the essay section to the same scale of measurement as the MBE. Since the MBE is an "equated" exam (whose scores are adjusted to control exam-to-exam variation in test difficulty), converting the essay section to the MBE scale results in an overall exam which remains at a constant difficulty level, regardless of differences in the leniency of the grading from one exam to the next.

The conversion process involves comparing the distribution of raw scores on the essay exam to the distribution of MBE scores on that same exam. An applicant's written score is converted in terms of that applicant's MBE score. In technical terms, the written scores are converted to a score distribution that has the same mean and standard deviation as does the MBE score distribution. For instance, a raw essay score that is two standard deviations below the essay mean is placed on a continuum that shows an MBE-Equated score that is two standard deviations below the MBE mean.

Attorney applicants who elect to take the Attorney's Examination (those applicants from out of state who have been admitted five years and have practiced for four of the last five years) also have their essay scores placed on the same scale as general applicants, but as they are excused from the MBE, their pass/fail status is based solely on the essay section.

The level of performance required for passing the Utah State Bar Examination is set at a combined scaled score of 130. The combined scaled score for each applicant is determined by scaling the total raw essay score to the MBE scale and then adding the essay scaled score and the MBE scaled score together for each applicant and dividing by two resulting in the total combined scaled score. This scoring procedure will assure that the same standard for passing is maintained over time. Passing rates will, of course, continue to vary depending upon the ability of the applicants taking the examination.

## VII. EXPENSE REIMBURSEMENT

Expense reimbursement is approved for examiners who must travel to Salt Lake City for the calibration session and who live beyond the area typically designated as the Wasatch Front. Please contact the Admissions Administrator for information regarding the pre-approved hotel accommodations.

Upon receipt of a letter requesting reimbursement, mileage is reimbursed in the amount of **twenty-five** cents for each mile. Please submit your request to the Admissions Administrator.

## VIII. EVALUATION

After grading the answers to your question, please complete the following evaluation.

1. What question did you grade?

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2. Did you consider this a fair question? An easy question, a difficult questions, or about right?

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3. Were there any ambiguities in the wording of the question which misled the applicants? What percentage would you estimate were misled and how?

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4. Of the basic issues covered in your issue outline, were any overlooked or inadequately treated by a substantial percentage of applicants? Which issues? By how many applicants?

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5. Were there any issues not included in your issue outline that were raised by a significant number of applicants? How did you treat them in your grading?

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6. Did the question present any unusual grading problems? What were the problems?

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7. Do you have any comments or recommendations regarding the grading process?

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Tab 6

## BAR EXAMINATION REVIEW AND APPEAL PROCEDURE

Revised March, 1991

Any person who has failed to pass the Utah State Bar Examination may, within 30 days after service of written notice thereof, file a petition with the Executive Director of the Utah State Bar directed to the Board of Commissioners, requesting a review of the determination that petitioner has failed the Bar Examination. The petition shall contain a short and plain statement of the claim showing that the petitioner is entitled to relief based on Rule 11-2 of the Rules Governing Admission to the Utah State Bar. Relief shall be granted only upon showing that the petitioner failed the examination because of a substantial irregularity in the administration of the examination which resulted in manifest unfairness or because of mathematical inaccuracy in the scoring process. The Board of Bar Commissioners and/or any review committee designated by it shall not reread examination answers or substitute their judgement for that of the Committee of Bar Examiners.

Unless the President of the Utah State Bar appoints a special review committee, the review committee shall consist of no more than three (3) members of the Admissions Standing Committee.

The review committee shall review all relevant evidence and may conduct a hearing if necessary. The chairperson of the review committee shall notify the petitioner and the Admissions Administrator in writing of the time and place set for the hearing, if one is required. Petitions setting forth common issues may be consolidated in whole or in part as determined by the chairperson of the review committee. After completing its review, the review committee shall file with the Board of Commissioners its written findings of fact and recommendations on all petitions. The Board of Commissioners shall make its decision on each petition and shall notify each petitioner in writing of its decision and of the findings of fact upon which its decision is based.

Within thirty (30) days after service of the findings and decision upon the petitioner, or counsel for the petitioner, the petitioner may appeal to the Supreme Court of the State of Utah by filing a written notice of appeal with the Clerk of the Supreme Court. The notice of appeal shall contain those items listed in Rule 3(d) of the Utah Rules of Appellate Procedure and a statement of the basis for the appeal. A copy of the notice of appeal shall be served on the Executive Director of the Utah State Bar. The record of the proceedings shall be prepared by the Executive Director and shall be filed with the Clerk of the Supreme Court within fifteen (15) days following the filing of the notice of appeal. The Supreme Court shall treat the appeal according to the Utah Rules of Appellate Procedure.

The procedure set forth in this rule shall be the exclusive remedy for review of or appeal from the refusal of the Board of Commissioners of the Utah State Bar to certify any applicant for admission to the Utah State Bar for failure to pass the Utah State Bar Examination. No appeal or original petition will be accepted by the Clerk of the Utah Supreme Court unless the requirements of this rule have been met.

All notices and service shall be sufficient if mailed by regular mail, postage prepaid, to the person designated, at his or her address as shown by the records of the Utah State Bar. Notice shall be deemed given on the date of mailing.

Tab 7

figure represents applicants who initially achieved a passing total combined score of 130. Five applicants, however, received grades of between 129-130 and those tests were reappraised at the Bar as required by the Bar's rules and policies. These reappraisals subsequently resulted in passing scores of 130 or above which raised the pass rate number from 199 to 204. Please note that the document designates the total number of applicants taking the exam as 232.

204 Findings of Fact and Recommendation

**Bar's Response . . . . . Accurate figure.**

204 Pass list for the 2000 examination posted on the Utah State Bar web site, dated October 13, 2000

**Bar's Response . . . . . Accurate figure.**

203 Pass list for the 2000 examination posted on the Utah State Bar web site, amended October 17, 2000

**Bar's Response . . . . . This also is an accurate figure. The web site list was amended to reflect that one examinee who passed the exam was later de-certified for character and fitness purposes and thus became ineligible for admission. Accordingly, the de-certification reduced the pass rate by one.**

204 2000 Bar Examination Results; Exhibit 5

**Bar's Response . . . . . Accurate figure.**

## SUMMARY OF MATHEMATICAL AND STATISTICAL DISCREPANCIES

### Number of Applicants Taking 2000 Bar Examination

- 232 2000 Bar Examination Results; Exhibit 5
- Bar's Response . . . . . This is the accurate number of total applicants taking the exam.**
- 235 Letter from General Counsel dated 12-1-00, attachment on Ethics bell curve; Exhibit 3.
- Bar's Response. . . . . This is an accurate number in the context in which it was created. It was not intended to reflect the total number of applicants actually taking the exam.<sup>1</sup>**

### Number of Applicants Passing the 2000 Bar Examination

- 199 Standard Division Formula; included as an attachment to Exhibit 3
- Bar's Response . . . . . NOTE: this document is actually attached as Exhibit 6, not Exhibit 3. This figure is accurate for purposes of the standard deviation formula on this document created by National Conference of Bar Examiners. The**

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<sup>1</sup> The document was created by the chair of the ethics grading committee (although the handwritten portions are identifying remarks by the Bar's General Counsel). It was supplied to the grievants' attorney in conjunction with the attorney's request for grading information. While grading the 232 copies of all the applicants' answers, there were 3 answers that were copied and distributed among the graders for additional discussion and grading confirmation purposes. When grading was completed, the chair of the ethics grading panel counted the answers for tallying purposes and the 3 extra copies were counted as well. Thus, the 235 figure includes the 3 extra copies. The admissions department did not refer to the grade tally sheet (the ethics bell curve sheet) in transferring individual grades as it merely was created by the ethics grading chair for his own curiosity to ascertain where the grades fell when the grading was completed.

**MBE score for attorney applicants was used to equate raw essay answer scores.**

144.17

Standard Deviation Formula; included as an Attachment to Exhibit 3

**Bar's Response . . . . . NOTE: this document is actually attached as Exhibit 6, not Exhibit 3. Accurate figure. Same explanation as above**

144.17

Letter from General Counsel dated 11-22-00 Exhibit 6

**Bar's Response . . . . . Accurate figure. Same explanation as above.**

145.57

Letter from Admissions Administrator dated 10-4-00; Exhibit 7

**Bar's Response . . . . . Accurate figure. This number reflects the average MBE score of the total number of applicants who actually took the MBE (211). Thus, it does not include attorney applicant imputed 130 MBE scores.**

145.57

2000 Bar Examination Results; Exhibit 5

**Bar's Response . . . . . Accurate figure. Same explanation as above.**

#### **Range of Scaled MBE Scores**

108.63 to 175.70

Letter from Admissions Administrator dated 10-4-00; Exhibit 7

## Percentage of Passing Applicants

85.78% (199 out of 232)

Standard Deviation Formula; included as an attachment to Exhibit 3

**Bar's Response . . . . .** **NOTE: this document is actually attached as Exhibit 6, not Exhibit 3. This figure is accurate for the purposes for which it was created. Again, five applicants who had scores between 129-130 had their answers reappraised at the Bar after National Conference sent the exam results. The final percentage of passing applicants was then adjusted accordingly.**

87.9% (204 out of 232)

2000 Bar Examination Results; Exhibit 5

**Bar's Response . . . . .** **Accurate figure. This figure represents the final, adjusted passing rate after reappraisals were conducted as described above.**

87.9%

Findings of Fact and Recommendation

**Bar's Response . . . . .** **Accurate figure. This number represents the final adjusted passing rate after reappraisals were conducted as described above.**

## Average MBE Score for All applicants

144.17

Findings of Fact and Recommendation

**Bar's Response . . . . .** **Accurate figure. This number reflects the average MBE score for all applicants after the imputed 130**



C. Baldwin  
Executive Director

# Utah State Bar

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January 17, 2001

Carolyn Montgomery  
Attorney at Law  
1904 Longview Drive  
Salt Lake City, Utah 84124

Re: Bar's Response to Summary of Mathematical  
and Statistical Discrepancies

Dear Carolyn:

I am responding to the "Summary of Mathematical and Statistical Discrepancies" that was attached to your supplemental materials for the Executive Committee's meeting on January 8, 2001. I took the liberty of re-typing your list and have provided explanations below each of your entries. If you have additional concerns after reviewing the explanations, please let me know.

I have yet to review the additional discovery requests you had delivered to me at the meeting because I am working on the Executive Committee's Findings of Fact and Final Determination. As soon as those are finalized, I will review your requests and ascertain what we can release. Again, although we are willing to work with you, please bear in mind that the grievance procedures are not intended to mirror proceedings in a litigation context and we are only obligated to provide grievants with the limited information specified, such as copies of applicants' answers, model answers, etc. Courts have typically found that bar examiners are not obligated to produce exhaustive documentation in order to meet due process concerns in this particular area of the law. Nevertheless, I will try to respond to your inquiries as best I can.

Very truly yours,

Katherine A. Fox  
General Counsel

Board of Commissioners

David O. Nuffer  
President  
Scott Daniels  
President-Elect  
Ronald A. Adams  
David Snow Bockelie  
Theresa M. Cook  
George Daines  
Baron A. Donovan  
Christine A. Drago  
Alvin Gould  
Andy S. Kester  
Robert K. Merrell, CPA  
Debra J. Moore  
Dane Nolan  
Lowry Snow

KAF/py  
Enclosure  
Fox/Adm/montgomery5ltr



**Bar's Response . . . . . Contains typographical error. The range of scaled MBE scores on the letter should have read: 108.00 to 181.00. This error did not affect the scoring of the exam.**

108.00 to 181.00

2000 Bar Examination Results; Exhibit 5

**Bar's Response . . . . . Accurate figure.**

108.00 to 175.00

Letter from General Counsel dated 11-22-00  
Exhibit 6

**Bar's Response . . . . . NOTE: this document is actually attached as Exhibit 7, not Exhibit 6. Contains typographical error; it should have read 108.00 to 181.00. This error did not affect scoring of exam.**

Tab 8



1 C. Baldwin  
utive Director

# Utah State Bar

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January 29, 2001

Carolyn Montgomery  
Attorney at Law  
1904 Longview Drive  
Salt Lake City, Utah 84124

Re: Bar Exam Grievances

Dear Carolyn:

I apologize for the relative tardiness of my response but I finally just had the opportunity to consider your supplemental requests for additional information. First, I want to address your letter dated January 24<sup>th</sup>. As we agreed, all materials related to the July 2000 exam will be preserved. Second, while we recognize your intent to submit an expert report from a psychometrician, it isn't clear to me what role this evidence will play in the future; I guess we will deal with that issue at a later time if it becomes necessary.

I hope that some of your questions already have been answered by the response I sent you on the "statistical discrepancies" exhibit provided during the Executive Committee meeting on January 8<sup>th</sup> or even at the meeting itself. For instance, there was apparently some miscommunication and confusion between us relating to the "bell curve" reference on the ethics question. To reiterate what was discussed at the meeting, the handwritten notations on the ethics grading sheet which I provided you earlier are mine, not the grader's. I merely added the terminology for your convenience and identification purposes since the grader did not label the columns. The bell curve reference was an unfortunate choice of words in retrospect.

Graders in fact do not compress the grades or force them to fit within a bell curve after grading. In the ethics question example, only after the grading was completed did the "bell curve exercise" occur. The chair of the ethics grading committee performed the exercise merely out of curiosity to see where the grades on this particular question fell. The "bell curve document" I provided to you was not used in any fashion to affect the grading process nor was it used by the Admission Administrator in any way affecting the grades.

rd of Commissioners

id O. Nuffer  
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tt Daniels  
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1 A. Adams  
ci Snow Bockelle  
resa M. Cook  
George Daines  
ron A. Donovan  
ise A. Dragoo  
vin Gould  
idy S. Kester  
bert K. Merrell, CPA  
ra J. Moore  
Jane Nolan  
owry Snow

You've asked for more information about the examination identifying numbers (Wansker Supplemental Interrogatory No. 3). Every applicant is assigned a four digit identification number approximately one week before the test. The admission's computer database automatically assigns these numbers. As you know, student applicants are assigned a "1,000" series identification number and attorney applicants are assigned a "3,000" series number.<sup>1</sup> The different series numbers are used for several purposes. First, attorney applicants are charged a higher fee and the identification numbers aid in accounting purposes. Second, and perhaps more importantly, all applicants whether student or attorney, are assigned seats during the examination. Attorney and student applicants are mixed together for seating purposes. However, attorney applicants only sit for one day of the two day examination and therefore, seat assignments must be revised for the second day. The different series of numbers make these changes much easier and more efficient than would otherwise be possible.<sup>2</sup>

As far as I can tell, the only grading material out of our possession after sequestration was the ethics question grading chair's handwritten notes of the question's issue subcategories and his copy of the subcategory breakdown of scores for the applicant answers he graded. However, the Admission Administrator does not use either of these documents to transfer the applicant's final grades to the computer for National Conference of Bar Examiner grading purposes. All grades are transferred by the graders to a "Grading Sheet" and these sheets are accompanied by a "Grader Certification". (Please find attached blank copies of each.) It is these sheets which are retained after sequestration and used by the Admission Administrator to post the applicants' grades. These sheets, for all the essay questions, were provided to the Bar by every grader before they left after sequestration. In other words, any material retained by the graders did not affect the integrity of the grades.

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<sup>1</sup> In the past when the admission rules permitted MBE test results to be transferred from other jurisdictions to the Utah examination, those applicants were automatically assigned a "2,000" series identification number. When the rule was changed to eliminate MBE transfers, the "2,000" series numbers were no longer useful.

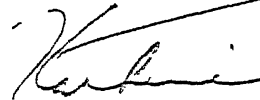
<sup>2</sup> This is a more significant problem than one might guess as there are special seating arrangements made for typists as well as ADA special accommodations within both groups.

Carolyn Montgomery  
January 29, 2001  
Page 3

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In reviewing the remainder of your supplemental and renewal requests as well as the originals, I am respectfully declining to respond. Primarily I am declining because the requests are unduly burdensome in conjunction with the redaction that would be necessary for confidentiality reasons. Your requests for documents which are not amenable to redaction, however, are even more problematic because they simply cannot be produced without violating confidentiality. As you know, the approved appeals procedure states that the only documents to which grievants are entitled consist of copies of their essay answers and the model answers. As I may have mentioned before, there are other jurisdictions which have refused to provide any information relating to the examination and that they have withstood court challenges. The general and commonly acceptable remedy in the vast majority of post examination challenges is the availability to re-take the examination. Since we do not limit how many times an applicant can take our examination, that remedy is freely available.

Very truly yours,



Katherine A. Fox  
General Counsel

KAF/py  
Enclosures

Fox/Adm/montgomery7ltr

GRADING SHEET

Question #

Examination Date

Subject

Page No.

of

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