IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE MATTER OF THE JULY 2020 NEVADA STATE BAR EXAMINATION

ADKT 0558

FILED

MAY 20 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER APPROVING MODIFIED JULY 2020 NEVADA BAR EXAMINATION

This matter comes before the Court on the petition to approve the proposal submitted by the Nevada Board of Bar Examiners to proceed with the July 2020 Nevada Bar Examination as scheduled, but with modifications to its format. The Board's proposal eliminates the Multistate Bar Examination (MBE) from the July 2020 examination, since the Board has concluded that it cannot administer the bar exam in person consistent with COVID-19 social distancing requirements and the National Conference of Bar Examiners has not approved the administration of the MBE remotely. The proposal maintains the essay portion of the examination, including eight Nevada essay questions and a performance test. The Board proposes to conduct the examination online using ILG Exam 360, except for applicants who require accommodation or who choose to handwrite the examination. In consultation with a psychometrician, the Board has developed and included in its proposal specific procedures designed to ensure reliable grading of an essay-based exam.

The Court considered alternatives to the Board's proposal, including canceling the examination and affording a diploma privilege to all American Bar Association law school graduates, or postponing the examination until September, by which time in-person testing consistent with COVID-19 protocols or the ability to administer the MBE other than

in an in-person environment might be possible. The Court solicited and received extensive public comment on these and other potential options and independently researched how courts elsewhere have responded to this dilemma. *See* https://news.bloomberglaw.com/us-law-week/more-states-move-upcoming-bar-exams-online-in-response-to-virus (last visited May 19, 2020); https://www.jdadvising.com/which-states-are-delaying-the-july-2020-bar-exam/ (last visited May 19, 2020) (tabulating state responses). After careful deliberation, we have reached the following conclusions.

We reject the option of canceling the examination and affording a diploma privilege. In our view, this alternative fails to adequately protect the public against practitioners who have not established minimal competence. We further reject the option of delaying the examination until September. There do not appear sufficient assurances the MBE will be available other than in an in-person environment by September, or that a two month postponement will allow the Board to arrange and safely administer the exam in an in-person format consistent with the COVID-19 protocols.

We agree with the Board that proceeding with a modified bar examination in July 2020 is in the best interest of the State of Nevada and the applicants. The Board's proposal adequately balances a number of important interests. First, proceeding with a modified examination in July 2020 provides stability to applicants during uncertain times. Second, the proposal protects applicants and examination administrators by following COVID-19 social distancing requirements. Finally, SCR 66 provides that the essays may test the same subjects the MBE tests, among others, and the Board's grading protocols and retention of Dr. Roger Bolus to ensure

reliable grading of the essays protects the public against practitioners who have not established minimal competence.

Therefore, we approve the proposal submitted by the Board modifying the format of the July 2020 Nevada Bar Examination, with one exception. An applicant who withdraws his or her application more than 5 days before the first day of the July 2020 examination shall receive a full refund of the application fee or, if requested, defer taking the examination until February or July of 2021. The Nevada Bar Examination shall take place on July 28, and 29, 2020, with its format modified as set forth in Exhibit A and shall include the aforementioned refund/deferral provision. Further, Supreme Court Rules 54(4), 65, and 69(1), as well as paragraphs 14, 32, 33, and 36 of Addendum 1 to those Rules, shall be suspended for the July 2020 Nevada Bar Examination.

Dated this 20th day of May, 2020.

Pickering, C.J.
Pickering

Gibbons, J.

Hardesty, J.

Parraguirre, J.

Cadish, J.

SILVER, J., with whom STIGLICH, J. agrees, dissenting:

I dissent. I would postpone the bar examination until September when the National Conference of Bar Examiners offers the Multistate Bar

Examination. The postponement of a mere two months to take a traditional bar examination is a more reasonable alternative in my view.

_____, J.
Silver

I concur.

_____, J.
Stiglich

cc: Paul Matteoni, President, State Bar of Nevada
Kimberly Farmer, Executive Director, State Bar of Nevada
Richard M. Trachok II, Chair, Board of Bar Examiners
Brian Kunzi, Admissions Director, State Bar of Nevada
Clark County Bar Association
Washoe County Bar Association
First Judicial District Bar Association
Douglas County Bar Association
Elko County Bar Association
Administrative Office of the Courts

EXHIBIT A

STATE BAR OF NEVADA

BOARD OF BAR EXAMINERS

MEMO

Jurisdictions across the United States are confronting the question of whether or not to hold the July 2020 bar exam given the restraints created by the corona virus pandemic. Some have cancelled the July exam and are planning to hold the exam in September or October. Most jurisdictions are still trying to administer the bar exam in July but recognize the uncertainty due to state social distancing orders. The National Conference of Bar Examiners (NCBE) has agreed to schedule the UBE and for non-UBE states, the MBE, on September 9th and another unannounced date in October.

Primary considerations for holding the exam include space concerns, social distancing requirements and testing limitations mandated by the National Conference of Bar Examiners (NCBE). There is no question that safety of test takers and exam administrators is paramount. A majority of jurisdictions administer the Uniform Bar Exam, which limits their options based on the NCBE testing requirements.

Nevada's options are: 1) cancelling the exam and affording a diploma privilege to all ABA law school graduates; 2) postponing the July exam and rescheduling to match the dates offered by the NCBE; or 3) holding an online Nevada Bar Exam in July online as proposed by the Board.

We would propose that Nevada offer the exam in July in the following format:

1. The exam be comprised of 8 Nevada essay questions and a Nevada MPT question drafted by the Board.

2. The exam would be offered online, save and except for those requiring special accommodations or for those who handwrite the exam. These accommodations would be held under strict health guidelines so no examinee or proctor would be exposed to the virus.

3. The two-day exam would be administered online using ILG Exam 360 testing program on the following schedule:

- 1st Session: 3-hour session for 3 essays
- 2nd Session: 3-hour session for 3 essays
- 3rd Session: 2-hour session for 2 essays
- 4th Session: 2-hour session for Nevada MPT

The MBE will not be administered for the July 2020 bar exam.

Since there is no way to prevent a test taker from accessing outside materials during each session, the exam would be open book. As a practical matter this would be relatively meaningless since an applicant who does not know the material would not have the time to search for answers to the question in the hour allocated.

The Board has consulted with our psychometrician, Dr. Roger Bolus, to address concerns regarding the reliability of the Nevada exam in the absence of the MBE. The Board will continue its consultation with Dr. Bolus and will take all reasonable measures to address the reliability of an essay only exam.

As we have discussed in the past with the Court, the essay portion is the more valid measure of minimum competence, something the MBE lacks. More important, under the proposed format Nevada will be testing knowledge, analytical ability, and writing skills, all which are accepted measures of attorney competence. In addition, the open-book component also incorporates what we as lawyers do every day: look up the applicable law. If a test taker has not studied and/or does not know the law the open book format provides little comfort with the strict time limitations of 60 minutes per question. The following are the proposals we are discussing for grading the exam to address reliability concerns:

1. Adopt a uniform grading scale and determine scoring criteria for each grade.
2. Use compensatory grading system – cumulative total of all scores.
3. Require a passing score on a determined number of exam questions at or above the basic competence level.
4. Each exam to be graded by two independent graders with review by a third grader if scores of main graders are divergent by a predetermined amount.
5. Establish process for arbitration of divergent scores.
6. Monitor grading as it progresses, which would allow for corrective action if divergence of scores is excessive.
7. Establish a band for answers warranting reappraisal/regrade.

For security reasons, applicants will be required to check in with a proctor before the start of each session so the identification of each applicant can be verified and receive instructions for the next session. The Board is continuing to work on the security aspect of the exam and will keep the Court apprised of our progress in real time. Accommodations in small group settings will be provided for applicants that lack the technology to take the exam under the security guidelines.

Graduating law school students understandably are experiencing psychological and emotional stress with preparing for and taking a bar exam. Requiring any applicant to take an exam under these circumstances or else forfeit the amount paid to apply for the exam would be unfair. We propose allowing applicants for the July 2020 bar exam not desiring to take the exam to defer their payments to one of the next two bar examinations.

The proposed bar exam format would require relief from the following Supreme Court Rules:

- Rule 54(4) – Refunds
- Rule 65 – Exam Requirements
- Rule 69(1) – Passing Grade
- Addendum, Para. 14 – Fees
- Addendum, Para. 32 – Dates and Location of Exam
- Addendum, Para. 33 – Composition of Exam
- Addendum, Para. 36 – Grading

The Board is convinced that this proposal is the best way to move forward in these uncertain times. We will continue to fine tune the security measures and the reliability issues. It is quite possible that the data generated from the results of this new format will be useful for the Court and the Board as we continue to find a more meaningful way to measure minimum competence to practice law in Nevada.

Richard M. Trachok, Esq.
Chair- Board of Bar Examiners