

**AMERICAN LAW REPORTS**

# ALR4th

*Cases and Annotations*

**VOLUME 57**

1987



LCP BW

**THE LAWYERS CO-OPERATIVE PUBLISHING CO.**

Rochester, New York 14694

**BANCROFT-WHITNEY CO.**

San Francisco, California 94107

**(800) 527-0430**

## **What is an ALR Annotation?**

Briefly, an ALR annotation is a complete statement of all the case law on a given point. A precise, current and authoritative treatise that is the quickest way to all the law within the scope of the subject matter.

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Every annotation is based on exhaustive research. Just one annotation may reflect months of work by the editor; hours upon hours spent reading and analyzing innumerable decisions of the courts.

## **SUBJECT OF ANNOTATION**

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Failed applicant's right of access to bar examination  
questions and answers

In the Matter of the Application of Thomas S. **OBERMEYER**

Supreme Court of Alaska  
April 18, 1986  
717 P2d 382, 57ALR4th 1195

### **SUMMARY OF DECISION**

An individual who took and failed the Alaska bar examination appealed the denial of certification to the Board of Governors of the Alaska Bar Association and requested a regrade of his examination and a hearing before the Board. The Board determined that the applicant had failed to allege facts which, if true, would establish an abuse of discretion or improper conduct by the Bar Association and denied him a hearing

The Supreme Court of Alaska, Compton, J., affirmed in part and remanded in part. The court held, *inter alia*, that the applicant was entitled to be given a sampling of overall passing and failing exams, not merely benchmark answers to examination questions, since a state bar rule provided that one challenging the denial of certification for admission to the bar had the right to inspect,

among other things, a representative sampling of passing and failing answers to the bar examination, and this rule had been interpreted to require that a failing applicant should have access to a representative sampling of the examination papers of other applicants who received overall passing and overall failing grades. To release only benchmark answers for each individual question, the court held, did not comply with this mandate. The court also held that a failing applicant should have access to the Multistate Bar Examination (MBE) questions and answers and to the applicant's own answers. Noting that one Alaska bar rule provided for release of examination materials, answers, grader's guides, and a representative sampling of passing and failing answers to failing

applicants, while another bar rule prohibited access to MBE materials. If the material is unavailable under the rules or policies of the National Conference of Bar Examiners (NCBE) - the strong policy of which was to prohibit inspection of the MBE unless required by a statute or court rule - the court held that absent a blanket prohibition of the NCBE, the policies upon which the Alaska bar rule restricting access to the MBE rested should be balanced to accommodate a failing applicant's interests both in learning why he failed the exam and in discovering any errors in grading or scoring.

### HEADNOTES

Classified to ALR Digests

#### **Attorneys §6 — unsuccessful applicant to bar — hearing on applicant's charges of abuse of discretion or improper conduct**

1. An unsuccessful applicant to the state's bar who alleges facts which, if true, would establish an abuse of discretion or improper conduct on the part of the board of governors of the state bar association, the executive director of the law examiners committee, or the state bar association itself, is entitled to a hearing; a hearing is required in response to sufficient allegations of either procedural improprieties or substantive deficiencies, but conclusory statements which fail to allege specific factual inadequacies with either the grading system on the state's bar examination or its application to the applicant's exam are insufficient.

#### **Constitutional Law § 369 - equal protection - unsuccessful bar applicant's challenge to bar examination procedure**

2. In an unsuccessful bar applicant's challenge to the state bar association's administration and grading procedures with respect to

the state bar examination, alleging violation of constitutional principles of equal protection, the question is whether the examination procedures bear a fair and substantial relation to the purpose of assuring minimal competence of lawyers when the means used and the reasons advanced therefore are closely scrutinized.

#### **Constitutional Law § 526 — due process-unsuccessful bar applicant's challenge to examination process**

3. In order to establish a violation of constitutional principles of due process by a state bar association in its administration and grading procedures with respect to the state bar examination, an unsuccessful applicant would have to establish that the challenged procedures were so irrational or arbitrary, or so lacking in fairness, as to shock the universal sense of justice.

#### **Attorneys §6; Constitutional Law § 369, 526 — validity of state bar association's procedure for grading bar examinations**

4. There is no violation of con-

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stitutional principles of equal protection and due process nor any abuse of discretion in a state bar association's procedure for grading bar examinations which uses "representative answers" called "benchmark" answers. Instead of using a "grader's guide" in assigning scores, since the procedures used are reasonable and within the bar association's discretion where the bar association has explained that, In grading the essay portion of the exam, graders (1) meet to calibrate a particular essay question by having at least five graders read and individually score five randomly selected answers on a scale of one to five; (2) repeat this process several times, with each grader reading at least 20 exams, until the graders agree on a set of answers that are representative of each of the five possible levels; (3) use these benchmark answers as guides in assigning scores to the remaining papers; and (4) have each essay read and scored by two graders, with scores that differ by more than one point resolved by reference to the benchmarks and different scores within one point resolved by simple averaging.

**Attorneys § 6; Constitutional Law §§369, 526 — unsuccessful bar applicant's challenge to bar examination grading procedures — credit for discussion of extraneous issues**

5. There was no violation of constitutional principles of equal protection and due process nor any abuse of discretion by graders of a bar examination in not giving an applicant extra credit when he discussed criminal law issues on a torts question, where a comparison

of the applicant's answer and the grader's guide showed that the applicant missed several of the torts issue while spending considerable time discussing criminal law; the state bar association's policy of not giving extra credit for such digressions is not an abuse of discretion.

**Attorneys § 6 — bar examination — unsuccessful applicant's right to see representative examinations**

6. One who failed a state bar examination and appealed to the board of governors of the state bar association as permitted under a state bar rule was entitled to a sampling of overall passing and failing exams pursuant to a provision of the state bar rule that an unsuccessful applicant be furnished, among other things, a "representative sampling of passing and failing answers to the bar examination," and it was not sufficient to furnish the unsuccessful applicant with "benchmark" answers, which were used in grading the examination, since a representative sampling of the examination papers of other applicants who received overall passing and overall failing grades is necessary to ensure an intelligent review by the board.

**Attorneys § 6 — bar examination — weight and correlation of different portions of exam — discretion of board of governors**

7. One who failed a state bar examination does not demonstrate that the state bar association abused its discretion in weighing essay scores and averaging essay scores with multistate bar examina-

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tions course where (1) the applicant contends that the statistical correlation of essay scores to multistate bar examination scores is invalid since fewer people were required to take the multistate examination than took the essay portion of the exam, but he does not explain under what theory these calculations are invalid nor discuss how this type of scoring had a negative impact on his, or anyone else's, score; (2) he questions why these correlations should be done at all but does not elaborate how the practice constitutes an abuse of discretion; and (3) he criticizes the weights given each portion of the essay exam in calculating the overall score, but the bar association has explained that the weights are a reflection of the importance attached to the skills required for each type of question, and the weight given to each section are reasonable and within the association's discretion.

**Attorneys § 6; Constitutional Law § 369, 526 — unsuccessful bar applicant's challenge to bar association's reread policy"**

8. A bar applicant who did not pass his bar examination does not demonstrate a violation of constitutional principles of equal protection or due process or an abuse of discretion by the state bar association in the bar association's policy of rereading falling examination papers only if the examination is within .99 of a point below the lowest passing score, where the thrust of his argument is that the statistical variance between the highest score which will warrant rereading and the score at which

one becomes ineligible for rereading was much smaller than the margin of error permitted by the bar association's practice of averaging scores assigned by different graders to Individual answers when they differed by only one point, since the more appropriate comparison would be to the statistical variance resulting when the answers on each section of the essay portion of the exam were combined and properly weighted and correlated with the multistate portion of the exam which would be much lower, but the applicant had offered no analysis on this point and, in any event, the applicant's score was 24 points below passing and he had made no argument that he would have gained sufficient benefit from a rereading to put him in the passing range.

**Attorneys § 6; Constitutional Law § 526 — unsuccessful bar applicant's challenge to bar examination procedure — use of local attorneys as examiners and proctors**

9. One who did not pass a state bar examination does not demonstrate an abuse of discretion or a violation of due process by the state bar association on the basis of the association's use of local attorneys as proctors and examiners - notwithstanding that proctors and examiners can be employed by the same law firm, that the applicant's wife was engaged in litigation against a partner in a firm employing a proctor and an examiner, and that another examiner represented a credit union against which the applicant himself had engaged in litigation-where the applicant does not accuse any of these lawyers or engaging in improper con-

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duct and where the bar association takes precautions against any conflict of interest with regard to the relation between proctors and examiners by using a different Identification number during the grading of examinations from that given applicants during the taking of the examination, so that a breach of security such as the one the applicant hypothesizes is only a remote possibility.

**Attorneys § 6; Constitutional Law  
§ 369, 526- unsuccessful applicant to bar — challenges to examination based on alleged breaches of security and confidentiality relating to prior exam**

10. An applicant to the bar who did not pass his bar examination could not demonstrate violations of constitutional principles of due process or equal protection, nor demonstrate his entitlement to a hearing before the board of governors of the bar association on his challenge to the examination, based on complaints as to breaches of security and confidentiality which related to a prior examination taken by the applicant, which was not the subject of the instant appeal.

**Attorneys §6; Constitutional Law  
§§369, 526 — unsuccessful applicant to bar — challenge to bar examination — breach of security and confidentiality — technical violation of rules**

11. An applicant to the bar who did not pass his bar examination did not demonstrate violation of constitutional principles of due process or equal protection or demonstrate his entitlement to a hearing before the board of gover-

nors of the bar association on his challenges to the bar examination based on his allegation that a typewritten response by another applicant, which was single spaced in violation of the rules, could have served as a “flag” to a friendly examiner, since he offered no argument that this actually happened or that his score was negatively affected by this incident.

**Attorneys § 6; Constitutional Law  
§ 369, 526- unsuccessful applicant to bar — challenge to bar examination — procedure as to multistate**

12. A bar applicant who did not pass his bar examination does not demonstrate violations of constitutional principles of equal protection or due process, or a right to a hearing before the board of governors of the bar association on his challenges to the bar examination, on the basis of his hypothesis of security breaches in the handling of the multi-state bar examination (MBE) where (1) he objects to the reporting of the MBE scores to the examination committee for computation of final scores without mailing the MBE results directly to the applicant’s home, but does not explain why direct mail is preferable, and (2) he claims that the availability of a regrade of the MBE to verify results (as the applicant did) is inadequate because he has no way of being certain that a proctor did not simply erase some of the pencil dots on the scoresheet before sending it to be graded; the various strands of the applicant’s conjecture on this subject in no way merged into a demonstrating of due process or equal protection violations, nor were they suffi-

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ciently specific to warrant a hearing.

**Attorneys § 6; Constitutional Law**

13. An applicant to the bar who did not pass his bar examination does not demonstrate violation of constitutional principles of equal protection or due process nor does he demonstrate his right to a hearing on his challenges to the bar examination before the board of governors of the bar association on the basis of his criticism of the alleged “appalling lack of supervision over examiners,” where the applicant objects to the examinations being taken from the bar association’s office to the grader’s home for grading, and suggests that the state Supreme Court check the security procedures used in other states, but offers no information about security procedures used in other states which would have supported his position.

**Attorneys §6; Constitutional Law**

**§369, 526 — unsuccessful applicant to bar — challenge to bar examination — conscientiousness of examiners**

14. An applicant to the bar who did not pass his bar examination does not demonstrate any violation of constitutional principles of due process or equal protection, nor does he demonstrate an entitlement to a hearing before the board of governors of the bar association, on the basis of his expressed concern that since examiners are allowed to grade examinations in their spare time there is no guaran-

tee that the papers are read at all, and on the basis of the fact, cited as evidence of such a possibility, that no marks were made on the examination papers, since the reason that no marks are made on the examination papers is that two graders independently graded each examination, and the first grader’s placing marks on the examination might affect the second grader’s assessment of the examination; the applicant’s skepticism about whether the examinations were even read had no factual basis, and his suggestion that each examiner receive a photocopy of the exam did not amount to a demonstration of abuse of discretion.

**Attorneys § 6; Constitutional Law**

**§369, 526 — unsuccessful applicant to bar — challenge to bar examination based on length of time in grading examinations**

15. An applicant to the bar who did not pass his bar examination does not demonstrate any violation of the constitutional principles of due process or equal protection, nor does he demonstrate entitlement to a hearing on his challenges to the examination before the board of governors of the bar association, based on his objection as to the length of time taken to grade the examinations and return the scores, where he makes no argument that this is an abuse of discretion or that it affected his score in any way.

**Attorneys § 6- unsuccessful applicant to bar — right to see questions and answers to multistate bar examination**

16. An applicant to the bar who

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did not pass his bar examination should be granted an opportunity to review the multistate bar examination (MBE) questions and answers and his own answers where a state bar rule provides for the release of examination materials, answers, grader's guides, and a representative sampling of passing and failing answers to failing applicants -notwithstanding that another bar rule prohibits access to MBE materials if the material is unavailable under the rules of policies of the National Conference of Bar Examiners (NCBE) and that it is the NCBE's strong policy to prohibit inspection of the MBE unless required by a statute or court rule since, absent a blanket prohibition by the NCBE, the policies upon which the bar rule restricting access to the MBE rests should be balanced to accommodate a failing applicant's interests both in learning why he failed the examination and in discovering any errors in grading or scoring.

[Annotated]

**Constitutional Law § 369, 526 —**

**unsuccessful applicant to bar - challenge to bar examination - lack of reliability of essay portion of exam**

17. An applicant to the bar who did not pass the bar examination does not demonstrate violations of the constitutional principles of equal protection or due process based on his argument that the essay portion of the exam is inherently unreliable, invalid, and unjustifiable, which arguments are supported by articles discussing the reliability of bar examinations. In general, where the state bar association's elaborate process of establishing consensus on benchmark answers to examination questions, its requirement that two graders grade each exam and agree within one point on the appropriate score, and its reread policy for papers that come within one point of passing sufficiently established the fairness of exam grading procedures, and essay examinations generally cannot be said to be an unacceptable way to evaluate applicants for admittance to the bar.

**APPEARANCES OF COUNSEL**

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**Before RABINOWITZ, CJ., and BURKE MATTHEWS.**  
**COMPTON and MOORE, J.J.**

**Failed applicant's right of access to bar examination questions and answers**

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