

PANEL NO. 1

MODERATOR: SAMUEL L. WILLIAMS, ESQ.
Los Angeles County Bar Association

1. Model Committee of Bar Examiners:
CLYDE O. BOWLES, ESQ.
Member, Board of Managers
National Conference of Bar Examiners
KENNETH D. MC CLOSKEY, ESQ.
Administrator, California Committee of Bar Examiners
2. BAR EXAMINATION
CLYDE O. BOWLES, ESQ.
ROBERT O'BRIEN, ESQ.
Member, California Committee of Bar Examiners

PROCEEDINGS

My name is Samuel Williams; I am a member of the Bar in the State of California; was formerly a member of the California Committee of Bar Examiners.

I was Chairman about two years ago. I was also formerly a member of the National Conference of Bar Examiners.

The subject of this panel, essentially, is the Bar Examination process; what the examination is all about; the kinds of people and organizations that administer the examination; how it is conducted; how it is graded.

We are fortunate to have three people on the panel today who probably know more about the Bar exam process in California than almost anyone. We have Mr. Robert H. O'Brien, who is with the Attorney General's office; has practiced law in California for about 15 years; who is presently a member of the California Committee of Bar Examiners. We have Mr. Kenneth McCloskey, who is the administrator of the California Committee of Bar Examiners. He is the chief staff person for the Committee and has been performing that function for a number of years. I am not sure how many, but I think it is close to ten.

Isn't it, Ken?

MR. MC CLOSKEY: Yes.

MR. WILLIAMS: And we have Mr. Clyde Bowles, who is a member of the Bar Examination Committee of the National Conference of Bar Examiners. Mr. Bowles also serves as counsel for the National Conference of Bar Examiners, and for those of you who aren't familiar with the involvement of the National Conference of Bar Examiners in the State of California, they are essentially responsible for constructing the Multistate Examination, which is a part of the California Exam.

What we will try to do during this panel is to give each of the three individuals whom I have just identified an opportunity to speak to you for

ten, fifteen minutes, then we will have a period in which they will respond to your questions.

The first panel member to speak will be Mr. Clyde Bowles. Mr. Bowles.

MR. BOWLES: Thank you. First, let me express my pleasure at being here and my appreciation for the opportunity to speak in some way to this subject.

As a member of the Illinois State Board of Law Examiners, located in Chicago, I have occasion year after year to interview many, many unsuccessful Bar applicants, many of whom are minority applicants. And through that particular procedure, especially, I have come to appreciate the seriousness of the problem to which today's symposium is addressed.

I will speak briefly to the subject of the nature and functioning of the National Conference of Bar Examiners and speak more at length to its preacher, the Multistate Bar Examination, which I think has more significance in the context of this particular meeting.

The National Conference of Bar Examiners, or the N.C.B.E., is a non-profit corporation. Its membership consists generally of present and past members of State Boards of Bar Examiners and state Character and Fitness Committees; administrators of Bar Examination systems, and supervisory judges involved in supervising the Bar Examination systems in various jurisdictions. The Board of Directors, so to speak, of the National Conference is a board of managers, elected annually at the annual meeting of the National Conference, which is held in conjunction with the American Bar Association annual meeting. There are officers who have a more direct responsibility and an executive director. Headquarter offices are in Chicago.

The general purposes and goals of the Conference are to aid and promote the work and the objectives of the Bar Examiners and the character and fitness committees throughout the country, and in that connection to formulate and distribute to its members Bar Examination materials to aid in character investigations and, in general, to participate with other branches of the legal profession in studies and the like relating to legal education and admission to the Bar. One of the principal functions in practice of the National Conference has been to prepare and submit to State Boards and character committees investigations on and reports on character and fitness. This usually involves lawyers who are transferring from one state to the other and who happen to have been admitted in the second state. This year 4,000 such reports will be made.

Another major function, of course, of the Multistate Bar Examination, which I will speak to briefly in a moment, the "Bar Examiners Handbook" has been published as a guide to Bar Examiners on standards and other background materials. The Bar Examination service, conducted by the National Conference, brings together a pool of Bar Examination questions from all over the country, which are made available to Bar Examiners in an effort to upgrade the quality of essay Bar Examination questions. In addition, the Conference currently seeks to survey and monitor the considerable litigation that is going forward on questions of constitutionality of State

Bar Examination systems with respect particularly to questions of possible racial discrimination. And, finally, I should mention that recently a committee has been appointed to look into the whole subject of the possible preparation and dissemination to the states of a Multistate ethics examination, partly, I think, in response to the increased pressure and interest in this subject arising out of the Watergate background and the like, in which the ethics examination—and California, as you probably know, is somewhat in the forefront.

Turning, if I may, to the Multistate Bar Examination, many of you know something about it already and forgive me if some of this is repetitious from your own point of view. The MBE Multistate Bar Examination is a 200-item multiple-choice examination. It is given in the course of one day in two three-hour segments. It is given twice a year at the same time throughout the country, late in February; late in July. It covers six basic subjects: Contracts; Torts; Real Property; Evidence; Criminal Law; and a new subject just added this past February, Constitutional Law. The day-to-day administration is in the hands of Professor Joe E. Covington, the Director of Testing, formerly Dean of the University of Missouri Law School; now a professor of law at Columbia, Missouri. Educational Testing Service in Princeton, New Jersey, ETS, has an important role in providing consultation in testing from the point of view of testing experts.

MBE was first put into use in February of 1972 when 19 jurisdictions saw fit to administer it as a part of the overall examination involving both the MBE and the traditional essay examination. Since then, in a very short time, the MBE has grown in popularity to the point that at this time 42 states use the MBE, in addition to the District of Columbia and Virgin Islands.

The hold-out states include, among others, New York; Minnesota; Indiana, and Iowa.

The subjects are not divided evenly among the 200 items. Contracts and Torts each have 40 items, whereas the remaining four subjects have 30. The character of the questions basically involve the setting out of a fact situation, which resembles very much the kind of fact situation that you may encounter on a typical essay question. This usually gives rise to somewhere between two and four items which consist of four choices, from which four the applicant is asked to pick out the best answer or response of the four.

The procedure for preparation of these questions is probably the most careful, I believe, of any procedure followed in preparation of Bar Examinations. There are six drafting committees, one for each separate subject. Typically, the drafting committees are five in number, usually with three law professors, who specialize in teaching the particular subject, and two Bar Examiners who have a substantial working knowledge of the subject. These committees meet at least twice a year for meetings that will last, oftentimes throughout an evening and into the next day, to review and process and tone down and select some questions that have been prepared in the intervening periods by all of the committee members, and submitted and reviewed in the meanwhile by those committee members.

Each committee has assigned to it a particular staff member from ETS and that staff member meets with the committee, not to contribute to the

substantive content of the questions, but to provide testing expertise in terms of the proper formulation of multiple-choice questions. After the questions have been largely arrived at by the particular drafting committee, through a further toning process with ETS, various boards of Bar Examiners themselves have the opportunity to review the questions and in addition, as of recent date, each MBE Bar Examination Committee member joins up with a professor or person quite knowledgeable in the particular subject and reviews the questions before they are finally selected. The scoring process, of course, is an objective process, done by machine at ETS in Princeton.

It usually takes three weeks from the time that the materials are received until the results are disseminated.

One interesting feature is the so-called early item analysis. This involves the securing of maybe a thousand to two thousand answers books from states near Princeton, New Jersey, immediately, and processing those with the keys that the drafting committees have come up with as to answers. If it is found that among the higher-scoring applicants a large number are giving the wrong answer or the wrong answers in terms of what the committee picked out, then these questions are flagged and reviewed further by the Drafting Committee. This often leads to identifying another answer, or other answers, apart from the key answer, as being correct, so as to improve somewhat the process. You may have, in any particular administration, anywhere from two to six questions, I would say, where perhaps two answers are identified as correct, or three, or sometimes possibly four.

Another particular feature of the scoring which deserves special attention is the process called equating or scaling scores, and this practice arises from this background, since each examination is substantially different from any other examination because of new and different questions, it is impossible each time to prepare an examination which is equally difficult or easy in comparison to other examinations.

This is reflected, I think, rather graphically by the fact that if one had used a raw score of 140 out of 200 items on the MBE as passing in July of 1972, for that examination and in July of 1973 for that particular examination, the differences in passing results would have been very marked. By which I mean that in July of 1972 48.4 percent of those taking that exam would have passed at 140 raw score, whereas, in July of 1973 only 26 percent would have passed at 140 raw score, a difference of 22½ percent. I think one can say with almost certainty that there wasn't that kind of variation in ability between those two groups. Basically it would be fair to say that I believe that they were probably very much equal in ability and yet you had this vast variation. So, people taking the July '73, compared to those taking July '72, would have had a much poorer chance of passing the MBE at that level merely because of the difference in the difficulty. This is a very undesirable thing without any need to elaborate.

This has led to a process through ETS whereby the raw scores of the MBE are adjusted to so-called equated or scale scores, upward or downward in the given case, so that the scale score numbers mean the same level of ability from exam to exam. So, maybe somebody makes a raw score of 120;

maybe changed to 125 on a scale score, and that 125 scale score measures the same level of competence or level of ability in terms of the MBE from exam to exam. The recommendation, of course, on the part of the committee and ETS is that you use the scale score and not the raw scores.

Now, the technique for doing this requires that certain carefully selected questions from past examinations be repeated in each examination, so that with that same sample, the same identical question, you can compare the performance of the current group with the performance of the standard or earlier group. You know, you have got a better group, and yet, if on the current level of achievement on the earlier standard total examination, you know you have a tougher examination and that, therefore, your raw scores should be upgraded. This is a critically important feature of the MBE, for it enables Bar Examination Boards, if they see fit to do so by using MBE score tables, to be consistent in a way that has never been before possible as far as essays are concerned, and, therefore, to take out to a large extent the element of chance, that otherwise any Bar applicant may have to contend with in that.

As to the use of that Bar Exam test score information on the particular state, they get both the raw scores and the scale scores; they themselves strictly determine where the pass-fail line is set. The MBE makes no recommendation as to that. Some of them have a separate pass-fail score for the essay and a separate pass-fail score for the MBE. Others, including Illinois, combine the essay and the MBE and have one pass-fail in terms of the combined score. So, you could do rather poorly in the essay and very well on the MBE and pass the exam, and vice-versa, and pass it in some states. In a few states, if a certain high score on the MBE is made, the Examiners do not grade the essay at all, on the theory that anybody who made that high score on the MBE would undoubtedly have made a passing score on the essay. For example, I believe in New Jersey for anybody who makes 145, they don't grade the essay; in Pennsylvania, a lower score, I believe.

In New Jersey, alone among the states so far as I know, a person who has made 145 on the MBE, and I think this is scale score, and passed the Bar in another state, is automatically eligible for admission to the Bar in New Jersey, without taking the Bar Examination. And in some states, including Illinois, at present, a person who has taken and passed the Bar in another state can transfer his MBE score to the new state and not have to take the MBE again in taking the new state's Bar Examination.

The materials for the Bar Examination applicants include the publication of February 1972, MBE in its entirety, but without the key or the answers. It also includes a release about two years ago of 50 representative questions from past MBE's with the answers. Another 50 or so will be released this fall and that practice will be followed every two years under current policy.

I will not say much about validation and correlation, since there are experts here, except to say that I am not familiar with any extensive studies on validity as such. I would, in just the space of a half minute, like to read you, however, this comment from Professor Covington, the Director of Test-

ing, on the basic question, is the MBE a good predictor of who will and who will not be a competent lawyer. Will the high scores be the best lawyers?

The answer is as follows:

"Prediction of which persons will become competent lawyers is largely a matter of judgment and judgments are fallible. One difficulty is in defining competent or the best lawyers.

"The MBE tests objectively, some of the skills required for a competent lawyer. A high score on the MBE indicates good comprehension and reading ability.

"The MBE is a test of reasoning ability, as well as a test of knowledge. Proficiency in these skills does not mean that one will be a competent lawyer, but lack of proficiency in these skills would likely mean that one would not become a highly competent lawyer.

"One could safely say that there is a positive correlation, if an applicant has a high score on the MBE, he is capable of becoming a competent lawyer, and if his MBE score is low, he is not likely to be a very competent lawyer."

I think my time has about expired. There are other things I would like to say about the MBE, but I will defer until the question period on that.

MR. WILLIAMS: Thank you very much, Mr. Bowles. The next member of the panel to speak will be Mr. Robert O'Brien.

MR. O'BRIEN: Thank you, Sam.

I am one of the members of the Committee of Bar Examiners that would like to put Mr. Bowles out of business, because I don't believe in the MBE, but . . . my remarks will be confined to attempting to describe to you the process in which the essay question portion of the California Bar Exam is arrived at. Mr. McCloskey and I, I think, will share in that description, because we both work very intimately with that process.

First of all, the questions that are put forward to applicants on the Bar Exam are solicited from out-of-state law professors, generally. Some of the questions are drafted in-state, but primarily, they are solicited from professors and legal scholars outside of California. The initial screening of those are, within the guidelines of the committee, acceptable to California testing. After the initial screening takes place, those questions are presented to the committee members and to the Board of Re-appraisers, and there is usually a three-day meeting that takes place where those questions are gone over in great detail. Prior to that meeting each committee person ballots and votes on the questions that they would like to see on a particular subject presented to the applicants at the next Bar Exam.

The meeting at which the questions are actually picked is a meeting that is a very intensive meeting, that takes place with the committee persons, the re-appraisers, and the staff of the committee. We first vote on which questions will be asked in the area of Contracts; in the area of Torts; in the area of Constitutional Law, and then we then cross the t's and dot the i's, and put in the commas, and try to rewrite the question so that it is an unambiguous question. So, a great deal of effort goes into drafting those questions. We don't accept the initial draft from the initial author. We try to refine it and make it as unambiguous as we possibly can.

After the questions are selected they then go back; the staff of the committee, working with committee persons and also the re-appraisers, then prepare them once again with all the comments and the analysis that went on at this first meeting. At a subsequent meeting, just prior to the examination, there is further editing and changes made to the questions before they are finally drafted.

At that time, of course, people that are working on particular questions are sick and tired of the questions. They could probably answer them themselves in their sleep, and we are fairly confident that we have a good, solid question to be asked of the applicants that are signing up to take the Bar Exam.

Mr. Bowles explained the MBE part of the examination. Presently in California we give 30-percent weight to that part of the exam and 70-percent weight to the essay part.

I might add, as I indicated at the outset, that the MBE has always been a subject of controversy in California, and in all fairness, however, even with my own personal predilections with regard to the MBE, the correlation between those people who do well on the essay and those people who do well on the MBE is surprising, with the short time that we have had in experiencing the combination of that type of exam.

The grading process I think I will leave to you, Ken, if I might, because I think you are more familiar with that and I will be happy to answer any questions with regard to picking of the questions during the question-and-answer period.

MR. WILLIAMS: Thank you very much, Mr. O'Brien. The third member of the panel, Mr. Kenneth McCloskey.

MR. MC CLOSKEY: Thank you. Mr. O'Brien mentioned two kinds of people, committee persons and re-appraisers. I think I will start out a little bit about the structure of the Committee of Bar Examiners in California and how both of those types of people got to be in the positions they occupy.

In California the Committee of Bar Examiners is appointed by the Board of Governors of the State Bar. The Board of Governors, in turn, is elected on a proportional representation basis by the attorneys of the State. This factor of the authority has led to some suppositions which should be put to rest. I think it is often—it has often been suggested that the Bar Examination is used as a device to limit competition in the profession; that is not true. The Committee, I think, is dedicated to the proposition that anybody who can demonstrate their qualifications should be permitted to practice law and it doesn't make any difference if that means we have got too many lawyers or it doesn't.

The Committee members are appointed for terms of four years. They are appointed on a staggered basis. There are two appointed one year, two another; two another, and three the third year. So, we do have continuity.

The Board, I believe, makes a concerted effort to be sure that the members of the Committee represent a variety of backgrounds, both in terms of cultural background, schools at which they acquired their legal education,

the age and experience, the type of law practice in which the Committee members have been involved. So, we have some people from large firms; we have at this time Mr. O'Brien, who is in a large public office, the Attorney General. We have an individual who is from a public interest law firm. We have a couple of people who have small law firms where there are one or two members. So that I think that the membership on the Committee is fairly representative of the profession.

MR. O'BRIEN: Except they never vote the way I want them to vote.

MR. MC CLOSKEY: We will have two nonlawyer members appointed to our Committee, and this is the result of legislation which was adopted last year. I can't say that I agree with that, that being a nonlawyer is a particularly valid way of determining that somebody should be a member of the Committee of our Examiners. I could see where our Committee could use some nonlawyers in certain areas, but that is because they possess certain qualifications, maybe testing experts or something like that. But that is not the qualification that the legislature set up. So, we will have two members who will be nonlawyers and that is the only thing we know about them to date. They will be appointed by six nonlawyer members of the Board of Governors, who are to be appointed by the Governor, I believe, starting this coming September.

We have also had a recent experience, and I think it is a good one, of having a judge on the Committee. I think probably some of our trial court judges may be given more opportunity to see newly admitted attorneys in action and get some idea about what it is, and if there is any weakness in the system of education and admission to the Bar that needs to be corrected. Anyway, now we have got people on the Committee, and I think Bob pretty well went through how they chose the questions.

There are two other important tasks that our California Committee has to perform: One is the accreditation of law schools. It makes a difference as far as qualifying for the Bar Examination whether you would graduate from an accredited law school or an unaccredited law school. Right now in California we have 25 accredited law schools and something like 33 non-accredited law schools. So that, in itself, can be a rather formidable task of inspecting the law schools.

The other function which the Committee must perform before certifying someone for admission to practice law is to investigate their moral character and determine whether or not the applicant possesses good moral character. That is one of the conditions to which he must certify when we move someone's admission before the California Supreme Court. Now, our Committee has recently taken the position that this should be something done by a separate body. I think the Committee's primary concern in doing that was that its own involvement in that activity could lead to suggestions and criticisms that maybe the examination was used to keep out people whose character the Committee questioned; it isn't. All grading is done on an anonymous basis. After the questions that Bob talked about are selected and given on an examination, we have to grade the answers. To do so we employ a staff of readers. The readers are mostly young attorneys; they must have practiced for a year before they start reading, and they are

selected on the basis of their educational qualifications. We seek recommendation from the law school deans; we check their examination results, and we try to get a good mix of backgrounds, educational, cultural, et cetera, the same as is done with the Committee. Recently we have started grading some of the questions in the Los Angeles area. Previously they were all graded in the San Francisco Bay area.

Our number of applicants has grown so much that we have to now use four readers per questions and we will shortly have to use five. Last July we had over 5,800 people taking the Bar Exam and we anticipate that we will have over 6,000 this July, and in order to get the results out in any reasonable period of time, we have to use the additional readers.

Anyway, as soon as the question is given on the examination, the questions are sent to the readers, without the draftsman's analysis, and the team of readers for that particular question gets together and makes up its own analysis of the question and sends it back to the Committee's office. At the same time we send the questions out to all of the law schools in the State and we ask the deans to distribute the questions to the appropriate faculty members and have them make comments about the question.

Was the question ambiguous? Did it cover material which the faculty member would not expect his students to know? Any other problems with the question? And do they have any suggestions as to its grading? We also asked whether there was any cultural bias that they perceived in the question. These comments are then sent back to the Committee's office and distributed, both to the Committee member who has charge of that particular question, and to the people who will be grading them.

In the meantime, we have taken a sample of the answers for a question from 75 applicants and distributed those answers to the appropriate readers for a sample grading or a tentative grading, and each of the members of the team of readers reads those 75 answers, and they turn in their tentative grades for those answers. We then compare them to see whether or not they seem to be applying the same standards. They also send in about ten books to which they have assigned a variety of grades to the Committee member who has charge of the question and those books are then forwarded to the Committee member, who reviews the grading of the questions to see whether or not he or she agrees with the reader's evaluation of the answer.

In the meantime, we get the comments back from the law schools; and about a month after the examination is given we have a meeting which is attended by the members of our Committee; the members of our Board of Re-appraisers and usually the deans of four to five law schools. At this meeting we call in each team of readers and they discuss with us the grading of their question, and usually they are asked to read a couple of answers, and we go around the table to see whether or not those present agree with the standards that the readers are applying. And if we don't, they are changed. The problems that the readers have with the questions are discussed and the deans are encouraged to participate in this process.

Now, we can get to the re-appraisers. After that the readers start grading the questions. We end up with a final grade on an applicant that either passes the applicant or fails the applicant, or puts him in a category that we

call re-appraisal, which is a grade which is a marginal grade. Anybody who, had he/she achieved five points or more on each of the essay questions, would have passed, goes into the re-appraisal system. There we employ our re-appraisers, who are people who read for the Committee for periods of years. I think some of them have been with the Committee, either as a reader or re-appraiser—one, I think, for approaching 15 years now. They are well experienced in the work of the Committee; they have sat with us in the process of selecting questions; they are, most of them, familiar with the readers and know the tendencies that they might expect to find from particular readers. Anyway, if the applicant falls into this category all of his essay answers are collected in a batch and sent to the re-appraiser, and the re-appraiser then makes a recommendation as to whether the applicant should pass or fail the examination.

They are sent back to the office and sent to a second re-appraiser to make the same kind of recommendation. If the two of them agree, that is the end of the grading for that applicant. If they don't agree, it goes to a third re-appraiser to break the tie.

I think it is a fairly thorough system and probably as fair as we can design. I think there is one thing I probably should emphasize, that is that all of this is done on a completely anonymous basis; that after the examination is given the books are sent in and the identification placed there by the applicant is removed, and there is a code number put on each book, which is not known to the applicant, and the readers have no way of associating a particular code number with any particular applicant. So, and the code chart is then maintained confidential until the results of the examination, the grading of the examination is complete. None of the readers have any way of identifying the background of the applicant as to race, sex, education, except for what the applicant writes in his answers, and that way I suppose maybe we hope the readers might be able to ascertain whether the applicant's legal education has been adequate or not, but not by trying to associate it with any law school.

I think that probably the title of this panel, I think, was to be a model committee of Bar Examiners and I pretty much concentrated on what's done in California.

MR. WILLIAMS: Are you denying, Mr. McCloskey, that California is the model Committee of Bar Examiners?

MR. MC CLOSKEY: I couldn't very well do that, Sam, with a former chairman and a present member of our Committee here, since I work for the Committee. No, I think actually that the National Standards for Bar Examination Committees are fairly consistent with what was done in California at the time they were written and I can't imagine why. Some of our practices now don't conform precisely to those standards, primarily the one about one reader per question, but that is just an impossibility in California at present.

MR. WILLIAMS: Thank you very much, Mr. McCloskey. I think before we proceed to the questions Mr. O'Brien indicated that he had one thing that he wanted to add very briefly.

MR. O'BRIEN: I just wanted to emphasize that with regard to the readers, the standards for grading each question is the subject of a very intense meeting and analysis by the Committee persons, the re-appraisers, and the readers. The readers are brought into a room, and they are faced with the Committee persons, the re-appraisers, and the deans that have been invited to the particular session in setting the standards for grading a particular question. So that what weight should be given to a particular issue, how much should this issue count, those things are gone over in very careful detail prior to the readers going out, picking up the books, and actually grading the papers.

One other point that I would also like to make is that up until this year we had two optional questions on the essay portion of the Exam. The Commission that studied the Bar Exam practice, particularly with regard to whether it was discriminatory against minority applicants, made a recommendation that that procedure be done away with and that it is going to be done away with, because it was found during that study that apparently nonminority people picked the optional questions, and this worked to the detriment of minority candidates for some reason. The Commission study didn't go into any great detail, but nevertheless, that was a recommendation that was adopted. Thank you.

MS. TIGGS: Good morning, ladies and gentlemen. I am Linda Tiggs, Executive Director of the Black Law Journal, and on behalf of the Black Law Journal, I welcome you to our program today on the minority candidate and the Bar Examination.

What we are going to do now is to entertain questions for our panelists, and I want to explain the procedure for that. Marilyn Ainsworth will be standing over there at the mike. If you have any questions you are to direct them to her; she will restate the question to the panelist, and then we will go from there. I just want to ask that you make your questions as concise as possible and please stay away from making statements, if you can.

QUESTION: Mr. McCloskey, at one point I spoke to someone who had been a past Bar grader and they indicated that approximately one-third of the people passed the Bar outright and about one-third flunked outright, if you will. And they felt that about one-third of the people fell into the re-appraisal category and they were uncertain as to what happened. And I would like to know if that is true, according to what you understand about the procedure. And still nobody seems to understand what happens if someone gets into the re-appraisal, those people who get passed on if they fall into that re-appraisal category.

MR. MC CLOSKEY: The statistics that you quoted were true until we started using the MBE. I think now that we have been using the MBE there is a slightly higher percentage as pass on first reading and a slightly higher percentage as failed, without re-appraisal. But it has decreased the number of people in the re-appraisal group. When you ask what happens in re-appraisal, the re-appraiser gets all of the essay answers of the applicant—and maybe I can give you an example.

We have—at present our passing score is 1200 and the fact of the passing level of 70 percent. In effect, the total number of points you can

get on the examination is 1700. But this can be composed either of 400 points on the multiple-choice, and 800 on the essay, or 900 on the essay, and 300 on the multiple-choice. We don't care how you got the 1200 points, as long as you got them. Anybody who gets between 1,140 and 1,200 is in the re-appraisal group. That is, there are 12 essay questions that they answered, and had they gotten an average of five points more on the essay questions they would have passed, because they have 1,140; if they had 60 or more they would have passed. So, the re-appraiser gets the essay answers of that applicant, and reads the essay answers, and tries to determine whether or not he can find sufficient additional credit within the total group of answers that the applicant should be passed, rather than failed, and if the re-appraiser can find that credit, then he recommends that the applicant pass.

Then it goes to a second re-appraiser, who goes through the same process, and if he comes out with the same conclusion, that is the end of it. And if he doesn't, then it goes to a third re-appraiser, who resolves the conflict.

QUESTION: Is the inverse also true?

MR. MC CLOSKEY: It takes two re-appraisers to either pass or fail the applicant. In other words, if the first one says, "He fails," and the second one says, "He passes," and it goes to a third one, who either says, "He passes," or "Fail." The first two are done independently. The third one has the comments of the first two, if it gets to a third re-appraiser. I hope that answered your question.

QUESTION: Mr. Bowles, I don't know how long you have been with—maybe since the beginning, MBE, I am sorry, missed that, but since you have had an opportunity to look at the Multistate on a national level, have you been able to determine what minorities, in particular blacks, do better or worse, when MBE is introduced into the Bar process? Some states, for example, use your examination exclusively and some use it in combination with other things, like California.

Have you been able to determine the relationship of it and the number of minority admittees?

MR. BOWLES: I don't know of any reliable statistics on that. There may be some that I am not familiar with. Let me say I believe your factual premise, that some states use the MBE exclusively, is not correct, to the best of my knowledge. To the best of my knowledge, they all combine it with an essay, although occasionally if you make a high score on the MBE they don't grade your essay in a given state. As I rack my mind, I cannot recall of hearing of any statistics in general. So far as I know, the states do not keep records of which applicants are minority and which are nonminority applicants. And, therefore, those statistics, generally, would not be available. The exception would be a study here or there, if there were one, where after an exam had been given they went back and found, by various ways, who were minority applicants and who were not, and then saw how they did on the MBE, compared with how they did on the essay.

I do recall that Professor Bernreuter, who is a testing expert, I believe, from Pennsylvania, made on the Pennsylvania Bar Exam, including the MBE,

an essay, and indicated that somewhat surprisingly that among about six Pennsylvania law schools from which applicants came who took the MBE and the essay exam, although the L.S.A.T. score averages were very different among those law schools, some of them were much lower than others, that there was not the same pattern on the passing of the MBE. That the applicants in the law school tended to do about the same: there wasn't too much difference between the averages among all the law schools. But that doesn't speak to the minority feature, as such. Maybe it does, to a tangential consideration. It might be looked into.

QUESTION: Mr. O'Brien?

MR. O'BRIEN: Well, I agree with Mr. Bowles. I don't think there are any reliable studies that would indicate or answer that question. However, I might point out that a recent meeting of law school educators in California, just this past weekend, there was one dean of a large law school in California who indicated that the MBE worked to the detriment of minority candidates. And, of course, he was just one person out of several law schools, but I don't know of any reliable studies that would indicate, one way or the other, whether the MBE would be beneficial to or help minority students one way or the other.

QUESTION: Mr. O'Brien. For the last couple of years every time there has been a Bar Examination in California, there has been a different Bar Examination, if you will. For example, you suggested that it is going to be a different one this summer, and it was something else, either that they added Ethics to it, or that they deleted some subjects, or there has been a change. Do you see a time when, at least for a couple of years, they are going to kind of standardize the Bar Exam?

MR. O'BRIEN: No, I don't.

First of all, the Committee changes each year and you get different philosophies. You get different viewpoints on what the Bar Exam should be. I don't think that we will ever get into the position of having an almost stable position where you can count five years from now that the Exam will be thus and thus and thus.

I think that you are going to get variations as we go along every couple of years.

QUESTION: In the appraisal process, is it true that applicants who initially have a lower score will sometimes do better than applicants who have a higher score?

MR. MC CLOSKEY: Yes, it is possible.

The re-appraisers, in essence, are looking at the grading that was done by the original readers, and they may find questions where some reader graded an applicant's paper way too high, so that although his original grade was 1,175, he didn't really deserve 1,175. And he may find another applicant whose papers were generally graded too low, and in essence, that is the purpose of the re-appraisal process.

QUESTION: Are there any figures showing how many minority candidates are successful in that re-appraisal process, as opposed to nonminority candidates?

MR. MC CLOSKEY: I have none. I think it is possible that we might be able to develop some for one examination from statistics that were developed by the Commission that was appointed by our Board of Governors in 1973, and made a report, but it would cover only one examination. And I am not even sure that they are there, but I think it probably could be found. They didn't look for them.

MR. BOWLES: May I go back to the question this gentleman asked, on a related question, on how the minority applicants might deal with the MBE, as compared with the essay? Professor Bernreuter, in his study, stated: In July of 1972, there were 43 black candidates, of whom 34 or 79 percent were admitted to the Bar. The lack of success of the nine who failed was due more to failure on the essay than on the MBE. Now, that is all I see in this article, but I wasn't aware of that until I looked it up.

QUESTION: Mr. McCloskey, you stated that you didn't feel that the Bar Exam was a way to limit competition. Yet, after World War II, and after the Korean War, 367 veterans were admitted to the Bar without having to take the Bar Exam. And that was Business and Professions Code 6,060.5, which has been repealed. How can you explain that activity that occurred at that time when the profession didn't have as many attorneys in it and the present need to have a Bar Exam?

MR. MC CLOSKEY: First I would like to point out, my understanding is that those provisions that were adopted by the legislature were opposed by the State Bar. They were opposed generally in a number of states by the organized Bar, because they felt that the fact that one was or was not a veteran shouldn't have anything to do with whether or not you are admitted to practice law. Secondly, I believed they applied only to people who had been in an accredited law school, and had their education interrupted by mandatory service in the Armed Services. So they are people that—and I think in the Korean one, it involved veterans who had served in the Second World War; had come back, gone to law school, and had their law school interrupted. If you want a political explanation of the second provision, I think it has a great deal to do with the fact that it was introduced by a Senator from Sacramento whose son was one of the beneficiaries of that provision.

But it was something that was opposed by the State Bar. I don't think the State Bar thought it was a good idea then; I am sure it didn't, and I don't think it believes now that it was a good idea. But it really didn't have anything to do with competition. It had to do with the legislature's ideas of fairness to people whose legal education was interrupted by service for the country.

QUESTION: Mr. McCloskey, in your opinion, how much time does a reader give to each paper?

MR. MC CLOSKEY: I think probably four to five minutes.

QUESTION: Do you think it's fair to have an applicant write for 52.5 minutes, of course which his whole livelihood will depend on—[and then have a reader] just take four or five minutes in his kitchen in reading a paper?

MR. MC CLOSKEY:

After the reader has gone through this intensive grading process and

discussed with the other readers and with members of the Committee, and with the law school deans, what you can normally expect, in a way what is there, what should be discussed. Most of the answers probably don't exceed eight, nine pages of handwritten material, and although some of them may take longer because someone has poor handwriting, it doesn't really take very long to read that much material and to evaluate it.

You know what you are looking for; usually you find it. There are certain papers where you don't find it, because the applicant gets off on a tangent, which may be valid, and those papers take longer. But on the average, I think probably four to five minutes is adequate to grade a paper.

The re-appraisers—that is one of the things about the re-appraisal system, if an applicant is in a marginal category—the re-appraisers do take longer, and they have all of his work.

QUESTION: I want some clarification as to whether California reads the Multistate first and if it is high, not reads the essay, and vice versa?

What are the chances of their separating the Multistate from the essay section as the professional responsibility section has been separated?

MR. BOWLES: I think California will have to answer that. You are looking at me; I think I can answer it, but I would rather defer to the experts.

MR. MC CLOSKEY: I was going to defer to our member.

MR. O'BRIEN: The answer to your first question is, no, they don't. We do not read the MBE and if a person gets a particular score not read the essay, if I understand your question correctly, or vice-versa.

QUESTION: You are going to read both sections?

MR. O'BRIEN: They are combined.

MS. AINSWORTH: There was a question of the possibility of having the test separately scored or—

MR. O'BRIEN: That is a possibility. The Committee and the State Bar has not decided to do that yet. But that is always a possibility. There are all sorts of alternatives that are being proposed with regard to the Bar examination process that are constantly being studied, and that is one of them. But at present it is not a current proposal.

QUESTION: This is addressed to both Mr. Bowles and Mr. O'Brien. The question is, Mr. Bowles commented that he was reading a quotation from someone that dealt with whether or not the MBE measures competence, and I think the conclusion of that statement was that if you fail the MBE you will not be a highly competent lawyer, as opposed to just a competent lawyer.

My question is—and then Mr. O'Brien then may give an answer for the subjective exam, does the subjective exam purport to measure competence, or high competence, or what standard is used as a goal?

MR. O'BRIEN: I will answer with regard to the essay part. The essay part is geared to measure knowledge and analysis at a level. It is not geared to a particular high standard or low standard. It is geared to an adequate

standard that the Committee, the readers, and the professors feel is necessary for a person to be a lawyer.

QUESTION: The adequacy is measured by what standard, just the individual members of the Bar; what they feel? Is that it?

MR. O'BRIEN: The process, the questions are drawn by people who also offer an analysis of the question, of what issues are involved in the question and what it would take to completely answer all of the issues in the question.

MR. WILLIAMS: Excuse me, Mr. O'Brien, I think the question, as I interpret it, really is: Does the Committee look for a standard that measures the minimum qualifications necessary to practice law? Or are they looking for a standard that would say the cutoff level at 70 percent, is that a standard that says these are—anybody who can pass will be outstanding lawyers? Is that the question?

QUESTIONER: Yes.

MR. O'BRIEN: I think the 70 passing mark is the bare minimum for an adequate lawyer, and that is the standard that is used for passing the Bar Exam.

QUESTION: What does that mean in relationship to the re-appraisal process, if you are passing maybe a third of the people who are below that line?

MR. O'BRIEN: Well, in the re-appraisal process, what you have got is a group of readers that reads one question of all of the applicants. If the total score of that is below 70, the minimum adequate, then the re-appraisers read all of the questions of the applicant to try and get a general profile of the applicant, to see whether or not he or she, in reading all of the questions, the Constitutional Law question; the Tort question; the Contracts question, altogether might indicate that that person would be an adequate lawyer.

A VOICE: That leads to my second question, which is that if that is the case, I think Mr. McCloskey mentioned the standards for the re-appraisers—is there a sufficient additional credit within the answer itself to pass or not pass a person? That to me is not really a standard for measuring, other than a subjective standard of the appraiser himself.

Is that what we are talking about for the re-appraisers or are they measuring against competence or incompetence?

MR. O'BRIEN: I will give that to Ken.

MR. MC CLOSKEY: Put it this way, each of the readers is supposed to be measuring on a standard set by the Committee after discussion with the deans and comments from law schools as to what is the minimum that we should require on this question to say that this individual, if admitted, could properly do an adequate job for his client. Now then, you give it to a reader and it is quite possible the reader may make an error. Maybe he grades somebody too low and the re-appraisers, being more experienced readers, may disagree with him and they may say, "If you are satisfied that this is a passing answer, not a particularly good one, but you are satisfied it is a clearly passing answer, you should give it at least a 75." If the re-

appraiser comes to a paper where the applicant got a 65 on that answer and the re-appraiser disagrees. He says, "To me, this is clearly an adequate job on this question. It is clearly a passing answer. I am going to give him ten points more." So, therefore, his score goes from 1,180 to 1,190. And then he finds another question where it goes up another five points. Then he finds a question where the grader, using that same kind of reevaluation on the grades, on the question made it too high. He may say, "Well, he lost five points there." But he may, in totality, find enough points to bring it up to the total level. And there is also the bit, I think, of judgment, that the re-appraiser will see in re-appraising a whole set of books where an applicant got a very poor grade on one question which pulled him out of the passing level and by reading all of his work you know that was just an anomaly.

MR. WILLIAMS: Mr. McCloskey, I think in terms of the grading, what 65 on a particular book, or a 70 on a particular book, or a 75 means would be helpful in understanding this process.

I know that instructions are given to readers on when they should assign a grade of 70; when they should assign a grade of 75. And if you could just take a couple of seconds and explain that, I think it might be helpful.

MR. MC CLOSKEY: We tell the reader that the first decision you should make is whether or not the applicant has written a passing paper or not. If you can't decide whether it is a passing paper or it is not a passing paper, you give the applicant a 70. And 70 happens to be the passing mark, but then if you decide that it is a pass and you are positive, it is 75 or above. You decide it is a fail, then it is 65 or below.

QUESTION: Doesn't that make the question we are trying to determine, what is a passing paper? And you are saying it is a passing paper.

MR. MC CLOSKEY: I don't think so. I think you can say this meets the standard that he should pass this question. That is the first decision you are going to make. If you say that, it doesn't make any difference what numbers you use. You could say, "We are going to say 50 is passing." So, if you decide it is passing, you give it a 50.

QUESTION: How do you decide the discretion in terms of what is a passing paper?

MR. MC CLOSKEY: I think Mr. O'Brien pointed out that we go over with the readers the issues that are involved in the question, what kind of treatment is adequate and what kind of treatment of those issues is inadequate to achieve a passing grade.

QUESTION: Are your meetings transcribed or reported?

MR. MC CLOSKEY: No, no.

QUESTION: I have a question for the representatives of the California Bar. To what extent do the procedures of the California Bar Examination, both in its development and use, conform to the standards for educational and psychological tests of the American Psychological Association or the E.E.O.C. guidelines for employee selection procedures?

MR. O'BRIEN: I don't know the answer to that question. I don't know if you do, Ken.

MR. MC CLOSKEY: No. If you are talking about E.E.O.C., if you are talking about validation, we don't know. There is quite a problem in trying to quantify some measure of competence and there is presently a study being conducted under the joint auspices of the American Bar Association, Association of American Law Schools, and the National Conference of Bar Examiners, trying to reach some way of quantifying or comparing effectiveness as an attorney or competency as an attorney, which can then be used for validation studies for the Bar Exam.

QUESTION: Does the Bar Examination group consult with the standard of the A.B.A. in making this examination? Did you consult last time you made an examination of the standard of the American Psychological Association?

MR. MC CLOSKEY: No.

QUESTION: I have to ask this first in order to kind of give you the question I am interested in.

Am I correct in understanding that you developed questions, and then you circulate them among the deans, the law professors, and so forth, to see whether or not they think there is any bias involved, any cultural bias, or anything that is unfair in the question, and you give it to different people; everybody looks at it, but in the meantime you say, "Well, all right, we are going to see what they say, but we are still going to give this exam?" At what point do you determine? If somebody does say, "This is an unfair question," what happens? Does that question just get kicked out after everybody has written on it or is it taken off the exam before the exam is given?

MR. MC CLOSKEY: At present, the questions are not circulated outside the examination or the re-appraisers until after the examination is given, and at that time we ask, "Do you perceive any cultural bias?" To date, we haven't found any questions as to which anybody perceived any cultural bias. Now, if it turned out that we were getting responses that indicated that we were using biased questions, then I think the Committee would reverse this procedure and do this kind of thing before we use the questions. But at present, it appears that we could—we are doing an adequate job of eliminating that without—

A VOICE: I am sure if you gave the same kind of people the questions that came from the same group that developed the questions, they would say, "No, we don't think this is culturally biased." I mean, how are you sure that the group that you are giving these questions to know how to judge what cultural bias looks like? Because they gave the Multistate portion, those kind of exams have been shown in L.S.A.T. and S.A.T. and so forth that there is some kind of bias, just by virtue of the pass and failure rate of minority students on it. In other words, how could somebody recognize it if they weren't familiar with it? I'm not sure that the people you are asking to evaluate that are really qualified to.

MR. MC CLOSKEY: I can't say that we are either. We have looked; we have tried to find law professors in California. In fact, one was recommended to us as an expert, and I asked him if he could come in and discuss

this question with the Committee, and he couldn't. We haven't found anybody yet who can identify the kinds of problems in Bar Examinations, really, that we should look for. I mean, they are different than just general educational development kinds of tests, because we are trying to test people who supposedly all have had at least equivalent education.