

## What Doth the Board Require of Thee?

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## WHAT DOTH THE BOARD REQUIRE OF THEE?

By WILLIAM H. ADKINS, II\*

### I. INTRODUCTION — HISTORICAL BACKGROUND OF BAR ADMISSIONS

Probably almost all of the readers of this journal have undergone or will undergo the trauma of taking a bar examination. For most of us who have taken a bar examination, this has been a unique experience, and happily so. Perhaps because of unpleasant associations, many lawyers give little thought to bar examinations or bar examiners once the joyful day of admission to the bar has passed. Yet the matter is one of general concern to the bar, for the quality of the bar depends, in many respects, upon the proper administration of bar examination procedures. Boards of law examiners today deal not only with administration of the physical and mental ordeal known as the bar examination, but also with character qualifications, standards of legal education, and the complex matter of admission on motion. Some insight into the procedures of the Maryland State Board of Law Examiners and some discussion of the problems facing the Board may, therefore, be not without interest.

Historically speaking, the concept of a bar examination, as it is now understood, is a rather recent one. Although examinations for admission to the bar existed in earlier times, they were conducted on an individual basis, and admission was granted individually to each successful applicant. Problems existed, even in the fifteenth century; in 1402, because of "Damages and Mischiefs" caused by "a great number of Attornies, ignorant and not learned in the Law, as they were wont to be before this time," the King's Justices were directed to examine all attorneys, "and they that be good and vertuous, and of good Fame, shall be received. . . ."<sup>1</sup> This particular enactment seems to put more

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1. 4 Hen. 4, c. 18 (1402), 1 J. ALEXANDER, BRITISH STATUTES 279-80 (Coe ed. 1912); see The Statute of Carlisle, 15 Edw. 2 (1322), 1 J. ALEXANDER, BRITISH STATUTES 217 (Coe ed. 1912).

emphasis on character than on legal learning, but it does demonstrate the early concept of individual examination by a court as a prerequisite to practice.

In Maryland, as early as 1708, there were disputes between the two houses of the provincial legislature respecting the power of the Lord Proprietor or Governor to appoint or remove attorneys.<sup>2</sup> These difficulties were resolved by a statute enacted in 1715,<sup>3</sup> which firmly established in the courts the right to admit and to suspend lawyers, "*salvo jure coronae.*" Since that date, the duty of handling admissions to the bar in Maryland has always been recognized as a judicial one, although the legislature has frequently laid down general rules as to qualifications for admission.<sup>4</sup>

Although later statutes required that a court, in passing upon an application for admission, should consider both character and legal learning, there was little uniformity in the standards actually applied, because the matter was left to the various county courts, as it had been under the act of 1715.<sup>5</sup> But through a statute passed in 1831 an effort was made to establish uniformity throughout the state.<sup>6</sup> The 1831 act is also noteworthy because it seems to contain the first formal requirement of legal education and the first provision for admission of attorneys without examination.<sup>7</sup> In brief, the act called for an application for admission to be made in open court, in any of the county courts, "courts of equity or courts of appeals. . . ."<sup>8</sup> The application could be made by a free white male citizen of Maryland, over twenty-one years of age, who had been a student of the law in any part of the United States for at least two years.<sup>9</sup> Upon application, the courts were required "to examine the applicant upon the same day during the regular session thereof, touching his qualifications for admission . . . and they shall also require and receive evidence of his probity and general character. . . ."<sup>10</sup> Foreign attorneys could be admitted without examination under a reciprocity arrangement. Although this statute provided general guidelines, admission remained with the several courts. However, admission entitled a lawyer to practice in all courts of the state.<sup>11</sup>

In 1872, a statute was passed in which University of Maryland law graduates were given diploma privileges, that is, the right to admission without examination.<sup>12</sup> The next step came in 1876, by which time the judges were apparently becoming dissatisfied with the

2. 1 J. ALEXANDER, BRITISH STATUTES 218 (Coe ed. 1912).

3. Act of April, 1715, ch. 48, § 12, [1692-1809] Md. Laws 128-32 (Maxey ed. 1811).

4. See *State v. Johnston*, 2 Harr. & McH. 160 (Md. 1786).

5. Act of April, 1783, ch. 17, [1692-1799] Md. Laws (Kilty ed. 1799). The contents of the statute are not available because it expired three years after its enactment, but the substance of the statute is provided in *State v. Johnson*, 2 Harr. & McH. 160, 163 (Md. 1786).

6. Ch. 268, [1831] Md. Laws.

7. *Id.*, § 5.

8. *Id.*, § 1.

9. *Id.*, § 2.

10. *Id.*, § 2.

11. *Id.*, § 3.

12. Ch. 91, [1872] Md. Laws 134.

chore of examining applicants. In that year, the General Assembly enacted a statute which authorized each court to appoint a board of at least three attorneys to examine the applicant in the presence of the court.<sup>13</sup> This procedure was, of course, the beginning of the Board of Law Examiners system in Maryland.<sup>14</sup>

In 1892, following *In re Taylor*,<sup>15</sup> in which the court of appeals denied admission to a Negro despite the fourteenth amendment, the word "white" was dropped from the statement of qualifications.<sup>16</sup> In addition, after the court had held that women could not be admitted in *In re Maddox*,<sup>17</sup> that inequity was likewise rectified by statute.<sup>18</sup> Between these two events, in 1898, a statute was enacted which established the system essentially as it is today.<sup>19</sup> This legislation created a state-wide board of three law examiners which would administer a uniform written examination to all applicants and make recommendations for admission to the bar to the court of appeals, which was the admitting authority. The diploma privilege was abolished, except as to University of Maryland and University of Baltimore graduates who had matriculated prior to January 1, 1898.

Except for changes in administrative provisions (and some important modifications as to pre-legal training, of which more will be said later), the system established by the act of 1898 was not materially different from the present system.<sup>20</sup> Then, as now, the statute and rules called for a three-man Board of Law Examiners required to investigate the legal learning and character qualifications of each applicant and to make recommendations to the court of appeals, the admitting authority for all courts of the state. Then, as now, requirements were established for a minimum level of legal education. Then, as now, there was provision for a written examination in specified subjects and for admission of certain foreign attorneys without examination.

Within this consistent framework, there have been considerable changes in detail, especially in the work-load of the Board. The first three examiners, Messrs. Arthur George Brown, Benjamin A. Richmond, and John S. Wirt, were required by the 1898 rules to meet at least twice a year to give a six-hour written examination in fifteen different subjects, including Elementary Law, International Law, and Legal Ethics.<sup>21</sup> In the first year in which this examination was given, seven candidates were recommended for admission, one of them being Arthur W. Machen, Jr., of Baltimore.<sup>22</sup>

13. Ch. 264, [1876] Md. Laws 469.

14. An interesting example of the type of examination administered under this statute in 1895 in Allegany County may be found in *The Daily Record*, July 31, 1947, at 3.

15. 48 Md. 28 (1877).

16. Ch. 37, [1892] Md. Laws 50.

17. 93 Md. 727, 50 A. 487 (1901).

18. Ch. 399, [1902] Md. Laws 566.

19. Ch. 139, [1898] Md. Laws 599. The first codification of rules implementing this new system appear at 88 Md. xxvii (1898).

20. The present system is that codified in MD. CODE ANN. art. 10, §§ 2-8 (1957).

21. RULES OF THE COURT OF APPEALS OF MARYLAND REGULATING ADMISSIONS TO THE BAR, RULES FOURTH & FIFTH, 88 Md. xxvii (1898).

22. MINUTES OF THE COURT OF APPEALS OF MARYLAND, November 18, 1898.

In 1967, the Board gave two twelve-hour examinations encompassing thirteen subjects (two of them electives), including Federal Income Taxation (required), Administrative Law, Federal Estate and Gift Taxation, and Federal Jurisdiction (all electives). Elementary Law and International Law have disappeared from the scene, although Legal Ethics has, happily, returned after an absence of some years.<sup>23</sup> In 1967, 682 people took the Maryland Bar Examination, and 286, or 41.9%, passed it.<sup>24</sup>

The increase in the number of applicants has indeed been spectacular. Even as recently as 1948, the annual number was less than 300. A decade ago the figure was 417. Beginning with 1963, the number has always exceeded 500; in 1966, a record 745 applications were received. The latter year also produced the greatest number of applicants at a single examination — 393 in July of 1966.

The increase in applicants has not, however, been accompanied by a proportionate increase in the number of successful applicants. For example, the 412 applicants in 1957 produced 214 passing examinations, while only 286 out of the 682 applicants in 1967 were successful. Similarly, only 306 of 745 applicants passed the two examinations in 1966. The low point in recent years was the Winter examination in 1967, which had a passing rate of only 34.5%.<sup>25</sup>

From the Board's point of view, however, the work-load is measured by the number of total applicants and not by the number of those passing. The figures just cited clearly show why, in 1966, it became necessary for the court of appeals to provide for special assistants to the Board who assist in the preparation and grading of examination questions. Three assistants have now been on the job for over a year and have significantly expedited this aspect of the Board's work.<sup>26</sup>

It should be recalled, however, that the Board has functions other than the administration of the semi-annual examinations. It hears appeals from character committees under Rule Fourth and frequently holds hearings in connection with applications for admission on motion under Rule Fourteenth.<sup>27</sup> In 1945 (the earliest year for which Board minutes are readily available), there were no character appeals and one Rule Fourteenth hearing. The Board held five meetings, including those

23. RULES GOVERNING REGISTRATION OF LAW STUDENTS AND ADMISSION TO THE BAR OF MARYLAND, RULE SEVENTH (1967).

24. MARYLAND STATE BOARD OF LAW EXAMINERS, REPORT TO THE COURT OF APPEALS OF MARYLAND (1967). The report consists of two parts, which contain the results of the Winter and Summer examinations, respectively. A breakdown of the results may be of interest: Of the 355 persons taking the Winter examination, just 113 passed, a percentage of only 34.5%. The 327 persons taking the Summer examination fared better; 173, or 49%, passed.

25. Although in 1954, the Board minutes indicate that it is "a rare happening [now] that less than 50% pass", the same minutes show that prior to 1939, when the pre-legal education requirements were substantially increased by ch. 410, § 3½, [1939] Md. Laws 874, passing rates of only 25 to 33¼% were common. MINUTES OF THE MARYLAND STATE BOARD OF LAW EXAMINERS 68-9 (July 6-7, 1954). Beginning with 1965, however, the passing rate has never been as high as 50%.

26. The special assistants are Norman E. Burke, Esquire, of the Baltimore Bar, Joseph A. Kenary, Esquire, of the Montgomery County Bar, and Raymond S. Smethurst, Esquire, of the Wicomico County Bar.

27. RULES GOVERNING REGISTRATION OF LAW STUDENTS AND ADMISSION TO THE BAR OF MARYLAND, RULES FOURTH & FOURTEENTH (1967).

connected with administration of the examination. With few exceptions, this general pattern continued through the early sixties. However, since 1962, there has been no year with less than six Board meetings (there were eleven in 1965, and at least eight were held in 1967); the character committee appeals have averaged three per year (1963-1966),<sup>28</sup> and there have been no less than four Rule Fourteenth hearings annually (ten in 1965). As a further indication of the extent of its current operations, the Board handled \$93,375.71 in funds during the fiscal year ending June 30, 1967.

This general background of the growth and development of the present system of bar examinations in Maryland helps place in proper perspective a few specific problems to which the Board had not as yet found entirely satisfactory solutions. These are all problems as to which suggestions and constructive criticism from the bar could be helpful. They lie in the areas of character determination, admission on motion, legal and pre-legal education, and the nature of the bar examination itself.

## II. CHARACTER DETERMINATION

Unquestionably, problems dealing with good (or more accurately, bad) moral character are the most unpleasant matters to come before the Board of Law Examiners. They arise under Rule Fourth, which permits an applicant, in effect, to have an adverse character committee determination reviewed de novo by the Board. The facts brought before the Board in such proceedings range from failure to disclose traffic convictions on an application form to alcoholism, adultery, and subornation of perjury. The Board's problems are often increased because, except in Baltimore City and a few other areas, character committees seldom make a systematic investigation of an applicant, fail to record the facts supporting their recommendations, and sometimes do not give the Board the benefit of the reasoning supporting their conclusions. Sometimes, too, one detects an inclination on the part of the committees to pass certain matters on to the Board, such as cases with possible local implications or cases of a border-line nature. Problems such as these are probably inevitable, in greater or lesser degree, as part of the system. The difficulty I should like to discuss goes somewhat deeper.

Generally, moral impediments to admission to the bar have been deemed equivalent to those moral defects which would justify disbarment: "professional misconduct, malpractice, fraud, deceit, crime involving moral turpitude or conduct prejudicial to the administration of justice."<sup>29</sup> The first two categories are obviously not applicable to

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28. The character committee system, in substantially its present form, has existed since about 1955. See ch. 586, § 3(d), [1955] Md. Laws 953, which requires "character examination of each applicant."

29. *In re Meyerson*, 190 Md. 671, 675, 59 A.2d 489, 490 (1948), quoting Md. CODE ANN. art. 10, §§ 16, 17 (1939). A number of Court of Appeals decisions have dealt with disbarment or readmission after disciplinary action. Apparently, only one reported case has dealt with the moral character requirement of admission, and this case throws little light on the present discussion. *Character Committee for Third Judicial Circuit v. Mandras*, 233 Md. 285, 196 A.2d 630 (1964).

admissions, since a layman would not normally be guilty of professional misconduct or malpractice. The other categories have been construed most frequently as involving offenses such as cheating, larceny, embezzlement, lying, lack of candor, and the like.<sup>30</sup> Interestingly enough, such activities as physical violence, drinking, and sexual misconduct, unless often repeated, are not usually considered to be conclusive evidence of bad moral character.<sup>31</sup> Perhaps some of these latter difficulties do not really reflect on an applicant's ability to be an attorney; in addition, it may be that some of them strike a little close to the bones of character committee members and law examiners.

Whether the decisions as to these activities are right or wrong, they are made in the context of a body of precedent, certain statutory provisions and community mores. There are, in short, guidelines for reaching a conclusion and fairly firm authority to support the conclusion reached. Completely beyond the scope of precedent, statute, and mores is the case of the applicant who gives indications of emotional instability or neurotic tendencies, short, of course, of legal insanity. The customary approach to moral character affords no basis for handling problems of this nature. It may be that the current state of the arts of psychiatry and psychology is such that areas of the personality must be left unconsidered when deciding fitness for admission to the bar. Yet these areas present a potentially serious problem, if not an actually acute one.

Situations occasionally arise in which the source of doubt on the part of the character committee is neither a specific history of misconduct, nor acts which could reasonably be characterized as involving fraud, deceit, or moral turpitude. In these situations, the committee is disturbed by perhaps less demonstrable indications that the candidate lacks the degree of emotional balance which one would hope to see in a lawyer. Such cases have been recounted both in reports of character committees and in private conversations with members of character committees.

The field is full of pitfalls. The legal genius who becomes a jurisprudential giant may have his eccentricities. Admission to the bar should not, of course, be limited to a group of mediocre minds whose only virtue is great stability. Nevertheless, the problem is real. Our profession is a demanding one, emotionally and psychologically, as well as intellectually and physically. Extraordinary pressures may often be brought to bear on a lawyer, and psychological weaknesses in his makeup may lead to precisely the sort of conduct which will adversely affect the interests of a client and ultimately result in disbarment.

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30. See, e.g., *Milio v. Bar Ass'n of Baltimore City*, 227 Md. 527, 177 A.2d 871 (1962) (mishandling of clients' funds); *Fellner v. Bar Ass'n of Baltimore City*, 213 Md. 243, 131 A.2d 729 (1957) (systematic use of slugs in parking meters). The goal is "to protect the public from imposition by the unfit or unscrupulous practitioner." *Rheb v. Bar Ass'n of Baltimore City*, 186 Md. 200, 205, 46 A.2d 289, 291 (1946) (evasion of income tax).

31. The files of the Board of Law Examiners contain a few instances of cases of the types cited in which admission to the bar has been recommended. Names are withheld to protect the guilty.

Under the present rules, there is probably no way in which persons of dubious emotional stability can be denied admission to the bar. The question, simply stated, is whether the standards for admission to the bar should be expanded to permit consideration of emotional imbalance. Other professions do this;<sup>32</sup> many businesses require psychological tests as a prerequisite to hiring. Should we not at least permit the consideration of psychological factors on the issue of admission to the bar? Although I have no strong bias as to the appropriate answer, I submit that this problem is a subject which might well be studied by the bar associations. It has troubled and frustrated many a character committee member and some law examiners.

### III. ADMISSIONS ON MOTION

One group, however, which impresses this bar examiner with its mental stability consists of those who apply for admission to the bar on motion. No one in his right mind wants to take a bar examination. The problems in this particular field deal more with matters of broad state policy than with the subjective reaches of the psyche. There are those, in fact, who assert that the contrasting viewpoints as to admission on motion under Rule Fourteenth are governed almost solely by such mundane factors as the economics of law practice.

Prior to mid-1962, Rule Fourteenth, dealing with admission on motion, without examination, was quite broad in its terms. General practitioners of five years standing in other jurisdictions were admitted along with government lawyers and house counsel. In 1961, sixty-two such attorneys were admitted, as compared with 237 admitted by examination. In the same year, California admitted 1,139 by examination and 60 on motion; New York, 1,944 and 26; and Virginia, 292 and 23.<sup>33</sup> As these figures clearly indicate, the proportion of admissions on motion in Maryland, relative to admissions by examination, was high as compared to the other states mentioned.

At about this time, members of the Maryland Bar, especially those in the Montgomery County area, began to express loud objections to admissions on motion, particularly of government lawyers. The geographical relationship of Montgomery County to the District of Columbia might help to explain their position. In any event, in 1962, Rule Fourteenth was amended to exclude, for all practical purposes, house counsel and government lawyers, civilian or military, from those eligible for admission on motion. This was accomplished by narrowing the definition of a "practitioner of the law" to include only those who "maintained a regular and established office for the general practice of law" or who were "employed by a member of the Bar . . . maintaining

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32. See, e.g., Canon 26 of the Protestant Episcopal Church of the United States of America which requires a thorough examination of a postulant for admission as a candidate for Holy Orders. This examination must cover "mental and nervous as well as . . . physical condition." 1 E. WHITE & J. DYKMAN, ANNOTATED CONSTITUTION AND CANONS FOR THE GOVERNMENT OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA 432 (1954).

33. *Admission to Bar by States — 1959-1962*, 32 BAR EXAMINER 98-99 (1963).



such office" and whose income "was principally derived from the general practice of law or from such employment by the general practitioner of the law."<sup>34</sup> The effect of the new provision is dramatically illustrated by the low admission on motion figures for 1962, 1963 and 1964: 32, 29 and 28 respectively.<sup>35</sup> For California, New York, and Virginia the figures were:

	<i>California</i>	<i>New York</i>	<i>Virginia</i>
1962	60	26	14
1963	53	39	18
1964	54	62	22

Obviously, the new Maryland provisions were having the effect, desired by some, of drastically reducing admissions on motion. However, other forces were also at work during this period. Among other things, the business community in Maryland was seriously concerned about the admission of house counsel.<sup>36</sup> There were also those who felt that the definition of a practitioner of the law contained in Rule Fourteenth was arbitrary. These people argued that the purpose of a rule pertaining to admissions on motion was to insure that the applicant had a background in practice indicating the sort of general familiarity with law that would be demonstrated by passing a written examination. They submitted that house counsel and government lawyers of broad experience could not reasonably be excluded merely because they had not been engaged in private practice, a practice which might, in fact, have been specialized and narrow. The matter came to a head when the petition of Robert B. Seeley, a member of the Baltimore and Ohio Railroad Company's law department, was rejected by a two-to-one Board decision. All members of the Board agreed that Mr. Seeley was qualified for admission on the basis of character and general experience. The Board majority recommended against his admission solely because he was the employee of a corporation and thus did not "maintain a[n] . . . office for the general practice of law" as required by the rule. Mr. Seeley appealed to the court of appeals.<sup>37</sup> Before the case was argued, Rule Fourteenth was amended (in 1965) to permit his admission. The definition of "general practice" was revised to include substantial trial practice. Mr. Seeley had done a great deal of trial work. Because the amendment was tailored to the specific facts of the *Seeley* case, the problem still was not solved. Other house counsel of broad

34. RULES GOVERNING REGISTRATION OF LAW STUDENTS AND ADMISSION TO THE BAR OF MARYLAND, RULE FOURTEENTH, MD. CODE ANN., vol. 9A, at 242 (1963 repl. vol.). The history of the rule is outlined in STANDING COMMITTEE ON RULES OF PRACTICE & PROCEDURE, REPORT TO THE COURT OF APPEALS (Dec. 14, 1966).

35. *Admission to the Bar by States — 1963-1966*, 36 BAR EXAMINER 98-99 (1967); *Admission to the Bar by States — 1959-1962*, 32 BAR EXAMINER 98-99 (1963).

36. Interestingly enough, between 1952 and 1964 the number of house counsel increased 145.5%, more than ten times the percentage increase of members of the bar in private practice. Note, *Corporate Counsel: Qualifications for Admission to the Bar on Motion Under Reciprocity Statutes*, 14 NOTRE DAME LAWYER 235 (1965).

37. See Mr. Seeley's brief in the Court of Appeals, which contains the record before the Board, and the majority and dissenting Board opinions. Brief for Appellant, *In re Seeley*, No. 1 (Misc.) Sept. Term, 1965.

experience had not necessarily been actively engaged in trial work during the seven year period which was crucial under the rule. Many government lawyers were still excluded, because trial participation was made the *sine qua non* of admission. Moreover, the rule could easily be viewed as arbitrary in that lawyers in private practice were not subjected to the trial participation test.

After additional agitation, including suggestions from the Maryland State and American Bar Associations, the rule was further liberalized, effective January 1, 1967. In many respects, this amendment returned the rule to where it had been before the 1962 revision.<sup>38</sup> Presently, one eligible for admission on motion must be a foreign lawyer who, throughout the critical period of time (five years within the seven years immediately preceding his application), "has regularly engaged in the practice of law as the principal means of earning his livelihood, and whose entire professional experience and responsibilities have been sufficient to satisfy the Board that the petitioner should be admitted without written examination."<sup>39</sup> In making this determination, the Board may consider, among others, the following factors:

- (1) Extent of experience in general practice;
- (2) Experience and reputation for competence in a specialty;
- (3) Nature and extent of professional duties and responsibilities as an employee of a law firm, corporation, or governmental agency, including the nature and extent of contacts with and responsibility to clients or other beneficiaries of his professional skills; and
- (4) Professional articles or treatises written by the applicant.

It is obvious that this latest amendment has vastly liberalized the rule as compared to its 1963-1964 version. However, the floodgates have not necessarily been opened. In 1965 and 1966, under the *Seeley* amendment, 43 and 25 persons, respectively, were admitted on motion.<sup>40</sup> In 1967, under the current scheme, some 32 persons were admitted; a number of these, however, were applicants whose applications had been filed in 1965 or 1966 but had been deliberately not acted upon pending a revision of the rule.

It should also be noted that under the present version of Rule Fourteenth, a petitioner meeting the requirements of the rule is conditionally admitted. At the expiration of eighteen months following the conditional admission, he must show that he has in fact been regularly engaged in practice at an office in Maryland, or that he has been teaching here full-time for at least the twelve preceding months. Upon such

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38. Under the 1967 amendment, practice outside the United States (as by a military lawyer) was excluded. This drawback was corrected by a further amendment of the rule in February, 1968. For a good treatment of the military lawyer problem, see Howell, *Does Judge Advocate Service Qualify for Admission on Motion?*, 53 A.B.A.J. 915 (1967).

39. RULES GOVERNING REGISTRATION OF LAW STUDENTS AND ADMISSION TO THE BAR OF MARYLAND, RULE FOURTEENTH (1967).

40. *Admission to the Bar by States — 1963-1966*, 36 BAR EXAMINER 98-99 (1967).

a showing, the conditional admission becomes permanent; if the requisite showing is not made, the admission is cancelled.

The crucial question, however, is not the number or proportion of persons admitted on motion, but whether or not the system of admissions on motion is a reasonable and equitable one. Arguments may be made against permitting any admissions on motion. Laws differ from state to state. Lawyers today tend to specialize, but admission to practice does not limit one to a specialty. If this is so, should not an examination testing basic knowledge in all fields of the law be a prerequisite to all admissions?

Whatever the theoretical merits of these arguments, the vast majority of states permit admission on motion under at least some circumstances.<sup>41</sup> As previously noted, Maryland has provided for special admission of foreign attorneys since 1831. It is submitted, moreover, that a system of admissions on motion is desirable from several points of view. To begin with, the similarities between the legal systems of the several states are generally more striking than the dissimilarities. With a few notable exceptions, English common law forms the basis of most of these systems. Differences in particular matters can frequently be readily discerned by reference to statute or rule book — a procedure resorted to by the careful attorney even in his own state. Then, too, the increase in federally-oriented litigation cuts across state lines. In short, one might well conclude that the emphasis should be on such basic matters as the ability to perceive the issues involved in a legal problem, to apply appropriate legal principles, and to reason to a logical result, rather than on the ability to recognize, or perhaps to recite by rote, certain peculiarities of a given state's law. Of course, the abilities just described can be measured by examination. But it is not unreasonable to assume that lawyers who have been able to sustain themselves by practicing for a number of years in one or more jurisdictions, whether as general practitioners, specialists, house counsel, or government employees, possess these skills in reasonable degree. If they do, they will find little difficulty in ascertaining the peculiarities of Maryland law and applying them to a given situation.

As a matter of general state policy, it would seem desirable to encourage the admission of competent people to our bar, including those who have developed, over years of practice, some degree of expertise in a particular field of law. While, as noted, such a man could not be limited to practice in his specialty after admission, the economic and professional probabilities are strong that he will continue to work in this specialty, which will produce the greatest economic advantage for him. Furthermore, if the state is to participate in healthy industrial growth, an atmosphere friendly to the immigration of corporations must be achieved. This means, *inter alia*, the elimination of undue burdens on the admission of house counsel.

The unstated premise of the argument against liberal admission on motion is an economic one. It involves the fear of lawyers, especially

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41. Thirty-nine states admitted foreign attorneys without examination in 1966. One of these, California, gives a special one-day attorney's examination. *Id.* at 98-99.

those in the Washington suburban areas, that they will be immersed in a tidal wave of retired JAG officers, Department of Justice employees, and the like. Standards for admission to the bar should not however, be based on a desire to suppress competition, a sort of protective tariff approach.<sup>42</sup> The only permissible consideration, if there is to be admission on motion at all, should be whether the applicant has sufficient professional experience to give a reasonable assurance of at least that degree of basic legal ability and perceptiveness measurable by a bar examination. A demonstration of mastery of nice and esoteric points of local law should not be essential.

It is submitted that the present version of Rule Fourteenth is consistent with this criterion. As the rule is administered by the Board, all doubtful applications are set for hearing, thus permitting a face-to-face evaluation of the applicant, a benefit not generally available in connection with admission by examination, except at the character committee level. On balance, it would seem that the standards now prevailing establish sufficient safeguards for the bar and the people of Maryland, while at the same time permitting healthy economic growth and reasonable professional competition. The writer, for one, would regret a return to narrower guidelines for admission without examination.

#### IV. PRE-LEGAL AND LEGAL EDUCATION

To accept all this, however, only opens the door to additional problems. When we admit a man on motion, we assume, among other things, that he has probably passed a bar examination in some jurisdiction and that he has fulfilled certain requirements of pre-legal and legal education. The former assumption is almost invariably correct. The latter is also usually correct, but there are great variations as to the amount of pre-legal and legal training required from jurisdiction to jurisdiction. Maryland has suggested that candidates for admission on motion demonstrate educational qualifications substantially equivalent to those required for admission by examination.<sup>43</sup> But such a proviso, even if rigorously enforced, will have little practical meaning, because of the inadequacy of Maryland's educational requirements. It should be noted at the outset, however, that substantial improvements in educational prerequisites have been achieved in Maryland in recent years. Nevertheless, a tremendous amount remains to be done, and I should now like to consider this facet of the subject of admissions to the bar.

As was noted earlier, the 1831 statute pertaining to admission to the bar required that every applicant must "have been a student of the law . . . for at least two years" prior to his application.<sup>44</sup> The nature of this study was not specified. No doubt, reading law in a lawyer's office

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42. Some legitimate criticism of liberal admission of "moonlighters" or "sundowners" may be made. The conditional admission feature of Rule Fourteenth is intended to guard against this. Compare Md. R. Civ. P. 301(g), 302(c).

43. MINUTES OF THE MARYLAND STATE BOARD OF LAW EXAMINERS 114 (July 9, 1958).

44. Ch. 268, [1831] Md. Laws.

for two years would have sufficed. There was no requirement of any pre-legal education; the same was true of both the statute and rules of 1898 and the statute of 1892 which, it will be recalled, continued the diploma privilege first established in 1872.<sup>45</sup> In 1918, however, the statute was amended to require high school graduation or its equivalent.<sup>46</sup> In 1939, a provision requiring two years of college or the equivalent after 1941 was added.<sup>47</sup> The Board minutes show that prior to the 1939 statute, the passing rate on bar examinations was sometimes as low as 25%. After the statute, the rate was commonly 50% or better, at least until 1954. However, as we have seen, the passing rate dipped to 47% in 1965, 41% in 1966, and was 41.9% in 1967. One reason for these rather low rates is, in the writer's opinion, the unfortunately low standard of pre-legal and legal education required for admission to the bar.

As to pre-legal education, anyone who has read a set of bar examination blue books must be impressed with the near illiteracy of a number of the applicants. Allowance must, of course, be made for answers written under the stress of a difficult and vitally important examination. Even so, many examinees demonstrate a quite astounding inability to spell or to construct a simple sentence, let alone a paragraph. In short, the ability to communicate in a lucid and precise manner — that ability which is perhaps the single most important aspect of the lawyer's art — is sadly lacking in all too many who aspire to admission to the bar.

The statistics tell their own story as to legal education. Does it not seem odd that less than half of the bachelors of law who take the bar examination pass it? Either something is radically wrong with the examination or something is drastically wrong with our system of legal education; perhaps there is something amiss in both respects. A little later we will consider in detail the examination itself; for the present, a closer look at the statistics may be useful.

Under Rule Fifth of the Rules Governing Registration of Law Students and Admission to the Bar of Maryland, every student who has studied law outside of Maryland must have graduated from an American Bar Association approved law school.<sup>48</sup> On the other hand, those who have studied law in Maryland need not have graduated from an approved law school. In Maryland, there is one A.B.A. approved school and two non-approved schools. In recent years, approximately 46% of those taking the Maryland Bar Examination for the first time have been graduates of the two non-approved schools.<sup>49</sup>

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45. See notes 12, 16 & 19 *supra*.

46. Ch. 426, § 3, [1918] Md. Laws 891.

47. Ch. 410, § 3½, [1939] Md. Laws 874. The statute imposed a one year college requirement effective from June 1, 1940, and a two year requirement after June 1, 1941. See also ch. 586, § 4, [1955] Md. Laws 953, in which it was provided that the two year requirement could be met by completion of 60 semester hours of work in prescribed subjects taken at a college approved by the Maryland State Department of Education.

48. This provision of Rule Fifth will not take effect until Sept. 1, 1968, as to persons beginning the study of law at that time. However, the Board's policy has been identical to the provision now embodied in the rule.

49. If first-timers and repeaters are included, the figure is over 50%.

With respect to the 1964, 1965, 1966 and 1967 examinations, the aggregate passing rate for first-timers was 49%, while the over-all rate was 43%. The passing rate for first-time takers from out-of-state law schools (all A.B.A. approved) was 68% while the passing rate for first-timers from Maryland law schools was 40%. The rate of success for first-timers from all A.B.A. approved schools, including the one Maryland school so approved, was 69%, while the passing rate for first-timers from A.B.A. unapproved schools was 24%. A passing rate of 69% is quite respectable. A passing rate of 24% is shocking. These figures would seem to demonstrate fairly conclusively that the examination itself is not the only problem. Some measure of the problem relates to the legal and pre-legal education of the applicants. Pre-legal education is involved because A.B.A. approved law schools have higher admission standards than non-approved schools. Most of the former require at least a bachelor's degree prior to admission.

In 1964, the State Bar Association Committee on Legal Education (the Bamberger Committee) called attention to these problems.<sup>50</sup> It pointed out that in 1963 20% of all law students in the United States attending unapproved law schools attended the two unapproved Maryland schools referred to above and that 32% of the "degrees conferred in 1963 in the United States by law schools not approved by the American Bar Association were granted by the two unapproved schools in Maryland."<sup>51</sup> The committee recommended substantial revision of Maryland's pre-legal and legal educational requirements.

Largely as a result of the valuable work done by this committee and its successor committees and with the enthusiastic support of the Board of Law Examiners, the legislature adopted a statute which requires three years of college (ninety semester hours) as a prerequisite to registration as a law student.<sup>52</sup> This legislation, however, will not become fully effective until 1970. In addition, the court of appeals, by amendments to Rule Fifth, increased the duration of the night school legal curriculum to not less than four academic years; this requirement is applicable to all students beginning the study of law on or after September 1, 1968 (the day school requirement is at least three academic years).<sup>53</sup>

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50. 69 TRANSACTIONS OF THE MARYLAND STATE BAR ASS'N 340 (1964).

51. *Id.* at 343. The report of the committee revealed that the percentages cited in the text had increased significantly over those of the previous year.

52. Ch. 268, § 4(b), [1965] Md. Laws 290.

53. At its 1968 winter meeting, the Maryland State Bar Association adopted a resolution supporting graduation from an A.B.A. approved school as "a minimum prerequisite for admission to the Bar" and urged its Committee on Legal Education to work towards implementation of this objective in cooperation with the schools concerned. 73 TRANSACTIONS OF THE MARYLAND STATE BAR ASS'N, No. 1, 60-61 (1968). A resolution looking to the same end has been introduced in the 1968 session of the General Assembly as H.J.R. No. 13. As to the present A.B.A. standards for certification, see 75 A.B.A. REP. 411-12 (1950); 63 A.B.A. REP. 161-62 (1938); 46 A.B.A. REP. 37-47, 656-78 (1921). Proposed new standards are contained in a 1968 publication: A.B.A. COUNCIL OF THE LEGAL EDUCATION AND ADMISSION TO THE BAR SECTION, STANDARDS FOR LEGAL EDUCATION AND FOR APPROVAL OF LAW SCHOOLS (1968).

These innovations undoubtedly represent a substantial improvement, though their effects will not be evident for several years.<sup>54</sup> However, further changes are necessary to complete the job, and I would hope that ultimately the statute and rules will require a bachelor's degree for admission to law school and that all examinees be graduates of A.B.A. approved law schools. The evidence suggests that imposition of these requirements would probably increase the passing rate to 70% or more. For example, the record of graduates of several law schools, which are A.B.A. approved and which generally require a bachelor's degree for admission, in the 1964, 1965, 1966, and 1967 examinations is as follows:<sup>55</sup>

	<i>First-Timers</i>	<i>Over-all</i>
Georgetown	73%	71%
Harvard	96%	93%
Maryland	71%	71%
Virginia	84%	79%
Yale	100%	100%

## V. THE BAR EXAMINATION

But no matter how fine one's legal and pre-legal education, no matter how outstanding his moral character, for most who look to admission to the bar comes the day or days of awful reckoning — the *dies irae* — known as the bar examination.

At one time, this examination consisted mainly of memory-type questions — What is a copyhold tenure? What is free and common socage? What is hearsay? Define murder in the second degree.<sup>56</sup> More recently, the trend has been toward essay-type questions, designed to test analytical and reasoning ability rather than memory. Prior to 1966, the examination consisted of sixty essay questions, each weighted five points and grouped in specified subject areas. At the present time, there is no set number of questions. Certain weight is given to each subject area, and within that area there may be one or more questions of varying length and difficulty. Under the older system, all questions had to be answered. Under the present system, there are certain mandatory subjects; in addition, the applicant must select two subjects from a list of six electives.

When this writer was appointed to the Board in 1962, applicants wrote their names and educational background in each blue book. They sometimes furnished other data as well, such as "My uncle is a State Senator," or "My cousin is a member of the Workmen's Compensation

54. For an interesting discussion of some other aspects of legal education, see Asper, *Some Old Fashioned Notions About Legal Education Accompanied by Some Ultra-Conservative Suggestions*, 25 MD. L. REV. 273 (1965).

55. It may be noted that during the period in question, only 11 Yale graduates have taken the examinations. The figures for the other schools are: Georgetown, 147; Harvard, 28; Maryland, 491; and Virginia, 33.

56. See note 14 *supra*; the 1895 Allegany County examination is probably quite typical.

Commission." All of this information was known to the examiner grading the book. In 1963, the present system, under which the books are identified only by number, was adopted.<sup>57</sup>

At all times, great care has been exercised in the preparation of the examination itself. Each examiner and special assistant is assigned certain subject areas. Questions and suggested answers are prepared and supported by appropriate citations, all of which are circulated among all Board members and assistants. Some weeks prior to the examination, the Board and its assistants meet. The questions and answers are considered in detail, frequently revised, and sometimes rejected. Every question ultimately used on the examination has been approved by all Board members and assistants, as has every suggested answer.

At one time, each examiner was responsible for the grading of one-third of the total number of examination books. At present, each examiner or assistant grades all answers on the subjects for which he has prepared the questions. However, all books with scores of 202-209 (210 or 70% is passing) are regraded jointly by the three examiners.

Prior to each examination every applicant is furnished detailed information as to how the examination is prepared, how it is graded, the extent of knowledge of specific statutes and rules which is required, and what the Board looks for in evaluating the answers. On this final point, it is fair to say that sound legal analysis and reasoning are the most essential elements of a passing examination, while knowledge of holdings of particular Maryland cases is not of special interest. The Board is not concerned with any one "right" answer; the primary concern is that the applicant demonstrates a working knowledge of legal principles as well as a reasonable degree of analytical and reasoning ability.

The preceding discussion indicates, I hope, that the Board has consistently attempted to develop a better and fairer bar examination, one which will measure in some degree the qualities required of a member of the bar. I hope, too, that my comments regarding legal and pre-legal education show that the rather low passing rate is more probably a result of deficiencies in education than defects in the examination.

Even so, the bar examination as now administered is far from the ideal tool for deciding bar admissions. What happens to the applicant who has extensive legal knowledge and a high degree of reasoning ability but who happens to be a slower thinker than others? What of the individual who becomes unduly tense under the pressure of the examination? What of the person of high intelligence and learning who is deficient in the ability to express himself clearly? Many of these individuals may unjustifiably fail under the present system. It is likely that applicants with such characteristics would be aided by a supplemental oral examination, and the Board, under Rule Seventh, has authority to employ such a procedure. Problems, of course, would attend the administration of a supplemental examination. For example,

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57. MINUTES OF THE MARYLAND STATE BOARD OF LAW EXAMINERS 167-68 (May 11, 1963).



what criteria should be used in the determination of whether a particular applicant should be given an oral examination? How extensive should such an examination be? Would not all who fail demand an oral examination? If this had occurred with respect to the July, 1967 examination, the Board would have been required to give 182 oral examinations, a prospect which staggers the imagination, since one can scarcely conceive of an effective oral examination lasting less than an hour.

Another facet of the present procedure subject to inquiry deals with the requirement that an applicant who falls short of a passing grade must take the entire examination again. Is it not unfair to require a person to be subjected to a re-examination in those subjects in which he has demonstrated passing proficiency? Would it not be reasonable to require him to retake only those subjects which he has failed? This procedure is followed in C.P.A. examinations and in the New York bar examination. The latter consists of two major divisions, substance and procedure. An applicant successful in one division is not re-examined in it. While the present Maryland examination is structured in such a way as to make such an approach something of an administrative nightmare, the difficulties in instituting this procedure are by no means insuperable.

Many law schools now give open book examinations and, in doing so, recognize that the ability to memorize legal principles should not be assigned the importance which it has heretofore been accorded. Indeed, it does seem somewhat unreasonable to require the aspiring lawyer to stand or fall on what he can carry in his mind. The practicing lawyer, when confronted with a problem, is usually not required to rely on memory and more often than not turns to the statutes, rules, and case books for his answer. Once again, however, administrative and cost problems would be considerable. What books would be permitted? How would they be supplied? Who would pay for them? Such questions would have to be satisfactorily answered before such a procedure could be put into effect.

Another matter frequently discussed involves the possibility of a national or standardized bar examination.<sup>58</sup> Such a procedure is currently employed in medicine and accounting. If the examination is designed to test knowledge of basic legal principles as well as the ability to rationally analyze, such an approach would not be unrealistic. It would be fairer to graduates of so-called national law schools. However, as the statistics cited above suggest, these graduates seem to be those having the least difficulty with the present examinations.

All of these problems are being continually reviewed and discussed by bar examiners and legal education committees throughout the country. While these problems can be attacked in any one or more of the ways discussed above, abolition of the bar examination and return to the diploma privilege system is a possible solution. There is something to be said for the argument that a law school, having had a student under close observation for three years or more, is better able

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58. See *A Standard Bar Examination, To Be or Not to Be*, 36 BAR EXAMINER 54 (1967).

to determine his qualifications for admission than a bar examiner reading the results of a two-day examination. With general upgrading of pre-legal and legal education, such an approach may become entirely feasible. On the other hand, it can be contended that a law school might be of the opinion that its quality will be measured by others by the percentage of its graduates admitted to the bar. A school might, for this reason, be reluctant to fail to graduate substantial numbers of its students. The independently administered bar examination constitutes a check on any school's tendency to be too lenient with its own students.

In any event, until we reach some such millenium, it appears that the written examination will be with us. And as long as it is, we can only say, in the manner of the prophet Micah: "What doth the Board require of thee, but to learn deeply and to think clearly, and to write plainly with thy pen?"<sup>59</sup>

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59. Cf. *Micah* 6:8 (King James). An applicant might wish the Board to follow the prophet's original injunction: "to do justly, and to love mercy and to walk humbly with thy God."