"Trade Barriers" to Bar Admissions

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IN RECENT YEARS much attention has been directed to trade barriers which have been erected to protect local business activities from outside competition. The profit motive has generally been the underlying cause of such restrictions in order to give advantage to local business. Lawyers and physicians have always insisted that theirs was a profession and not a trade or business and should be conducted on a different basis. Yet, an examination of requirements for admission to the bar shows a distinct leaning toward the protection of the local student and the local lawyer with much the same effect as is created by ordinary trade barriers.

These restrictions do not state this as their purpose and it is probably true that in many and perhaps most cases objectives of a much higher nature were originally responsible for the restrictions which are found in a majority of the states. However, they should be viewed as to their actual present-day effect rather than the motive which first suggested their adoption. Is their tendency to improve the profession, or to secure special privileges to a local group? It should be borne in mind that "the licensed monopolies which professions enjoy constitute, in themselves, severe restraints upon competition. But they are restraints which depend upon capacity and training, not special privilege." *United States v. American Medical Association,* 130 Fed. 2d. 233 at p. 246. In so far as the restraints imposed do not depend on capacity and training nor insure proper character investigation, they serve to protect local interests from competition, rather than to secure a better quality of legal service. As such they are not justified from a public and professional standpoint and for the good of the profession should be done away with as "trade barriers" which tend to protect and keep in "business" those who cannot stand professional competition. These barriers affect two groups, lawyers who wish to move to another state, and law students seeking admission to practice.

Many of the provisions are of long standing but have recently been more rigidly enforced since many members of the bar have felt the effects of economic pressure, due in part to the depression of the early thirties, but probably more because of the diminution of business resulting from the failure of many lawyers to keep abreast of the more recent developments in the law, particularly in such fields as taxation, labor law and various branches of administrative law.

EXCLUDING THE CROOKED LAWYER

The migrant attorney, shifting from one state to another, has no doubt brought about many of the restrictive provisions originally intended for the protection of the bar. In earlier years it was not unusual for grievance committees to give to an attorney, accused of unethical conduct, a choice of leaving the state or being subject to a full investigation with a possible recommendation for disbarment proceedings. Such an attorney, whose misdeeds had caught up with him, was likely to go to a state where he was not known to begin his unethical career all over again. Lax provisions as to admission on comity made this easy and in some states the problems thus brought about were acute. I remember hearing, some years ago, the chairman of a grievance committee reply, when asked what action had been taken with reference to an attorney against whom complaints had been made, "We gave him a trip to California." California, however, instead of making exclusionary rules for admission of attorneys from other states, met this situation by provisions for careful examinations of all such applicants combined with full inquiry as to the lawyer's antecedents and reputation. It has been the administration of their rule rather than the rule itself that has resulted in a great decrease in the number of

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comity applicants and the admission only of those who will raise, rather than lower, the quality of the bar.

Most states have some comity provisions permitting an attorney who has practiced a number of years in another state to be admitted on motion, but provisions as to residence or citizenship prior to admission usually operate to exclude the good lawyer, leaving the door wide open for the down-and-out practitioner of another state. If a lawyer must be a resident for one year or more prior to applying for comity admission, it is quite clear that unless he has a substantial income outside of his practice, he cannot abandon his office and settle down for a year in idleness in order to establish such a residence. On the other hand, the attorney who does not have a sufficient practice on which to live can come into the state, get a job of a non-legal nature and thus fulfill the residence requirement for comity admission. For him the requirements are not exclusionary and there is nothing to prevent the bar of the state from being filled up with lawyers whose abilities have not assured them a living elsewhere from their profession. In other words, the residence restriction has worked only to exclude the lawyers of better quality while in itself it is in no way a barrier to the one who has already proven himself professionally incompetent and a failure in another state.

Of course the reason given for a period of residence prior to admission is that it will thus prevent an unknown lawyer of bad moral or professional character from gaining admission, because during this period he will have an opportunity to establish his good moral character where he will be under the observation of local people. Practically this is of little or no protection to the state and the bar. A mere year of residence does not go far to establish a man's character and only careful investigation at the applicant's former place of residence is apt to disclose those habits or qualities which would make him an undesirable member of the local bar.

RECIPROCAL COMITY PROVISIONS

Another peculiar but frequently found comity provision—a very human one but one which does not tend to assure quality—is the provision that a lawyer from state A will not be admitted on comity in state B unless state A would extend like courtesies to the lawyers of state B. Such a provision has no doubt satisfied local pride but does not tend to secure professional competence. Thus, if state B only requires a high school education and two years of night law school for admission to the bar, the effect of the provision is to prevent comity admission to any lawyer who comes from a state insisting on higher educational qualifications. A lawyer from a state that has fixed high standards to insure competence is in effect barred by that fact.

The difficulty of securing adequate information concerning the migrant attorney has induced the American Bar to establish a service for the investigation of comity applicants. After such an inquiry and examination of his record there is apt to be little of a lawyer's shady past history that is not brought to light. This investigation is not limited to the immediate place of the applicant's residence, but his previous activities are traced, wherever they may have taken him. With such opportunity for securing information, it would work for a better quality of the bar if, instead of requiring residence with attendant idleness or separation from practice, it were only required that sufficient notice be given of the desire to become a member of a certain bar and pay such fee as is required to permit a thorough investigation. An organization such as the American Bar Association, with its personnel and its broad contacts, is in position to make an investigation such as few, if any, local bar associations could attempt, leaving it to them to require such further examination as they may think necessary or desirable. The Federal Bureau of Investigation could hardly do a better job than is now done in the reports made by this organization when called on for information on lawyers seeking to become members of the bar of another state.

PROBLEMS OF THE LAW SCHOOL GRADUATE

As to students, the main hurdles to admission which are exclusionary in effect are provisions for residence as a prerequisite to taking the bar examinations and unnecessarily severe requirements as to registration. It is strange to find states requiring an applicant to be a resident and a citizen for a substantial length of time but allowing graduates of local schools to be admitted "on diploma" on the assumption

that they are of good character unless the contrary is definitely shown. No state that is interested in the quality of its bar should grant admission to one who does not have the courage to submit himself to a sound bar examination test. It is characteristic of a school having the "diploma privilege" that its curriculum and methods of teaching have seen little if any change during the past quarter of a century, although during that time the members of the profession have been required to adjust themselves to radically changed conditions of practice if they were to survive.

The theoretical justification for rules as to residence or citizenship is that it gives the examiners and the public of the state in which admission is sought an opportunity to become familiar with the candidate and informed as to his moral character. Such restrictions are subject to less criticism where a real attempt is made to secure information which such residence in the state may afford, but the states following this practice are few indeed. True, if a student should be convicted of a serious crime during his period of residence it is likely that this fact might come to the attention of the examiners but it is not likely that they will have any information bearing on his conduct before coming into the state. As a protection to the profession, it seems to contemplate a state composed of small communities in which each individual's personal affairs are known and talked about by the rest of the community. If a real knowledge of the candidate is desired, mere residence does not provide it, and unless the student has been engaged in some disgraceful affair that has given him great notoriety, it is not apt to be brought to the knowledge of the bar examiners. Usually a statement as to "good moral character" given by two or three local residents is all that is required, and these are often furnished without any feeling of responsibility to the profession.

A provision for the registration of law students has been adopted in a number of states with the time set for such registration varying from some months before the beginning of law study to within a few weeks of the bar examination. In theory, this calls to the attention of the examiners those who intend to apply for admission and gives them opportunity to observe them during the full period of such registration. But is this in fact being done? It takes a well organized and efficient board of bar examiners, with a permanent office force and considerable funds at its disposal, (as in New York and Pennsylvania) to operate such a plan so as to make it even fairly effective in the elimination of unworthy candidates.

MUST HE GO THROUGH LAW SCHOOL AGAIN?

What then is the effect of the restrictions as to residence or registration? In many cases the registration provisions are almost an absolute barrier to a young man who seeks admission unless he has decided long before he is ready to practice that he desires to make his professional career in a particular state. Add to this the requirements of residence,—as much as 18 months in one jurisdiction,—and the difficulties of making a free choice of school and location are almost insuperable. The solution suggested by one bar examiner shows the extent to which such restrictions may be, from a practical standpoint, an absolute barrier. In this case the young man, a resident of state A, after securing his legal education at a nationally known law school in state B, was offered a desirable opportunity to become connected with a good law firm in state C. He was willing to abide by the results of a bar examination or any character examination given by the state but he found that he was not eligible to take them, both because he had not registered at the beginning of his period of law study and because he had not been a resident of the state for the required period. The happy solution suggested by an official of the board of bar examiners was that he should now register, establish a residence, and begin the study of law all over again! The fact that he only had one life to live and already had a good legal education did not enter into the solution of his problem.

Is it short-sighted or unreasonable or undesirable for a young man to attend that law school where he believes he can secure the best possible legal education? Over one hundred approved law schools grant to their graduates the privilege of putting after their names certain letters to signify they have completed the course of study which the school offers. Yet, the difference in the quality of these schools and the type of education which they offer may be the difference between a knife made of cast

iron and one made of the finest steel. Some schools offer no courses in taxation, labor law, or other administrative law subjects although a large proportion of present day practice deals with such matters. In others, though courses are offered under these titles, they are given by instructors having no adequate background for their presentation. The fact that the young man asserts such discrimination at the beginning of his law study as to pick a school which applies high standards of admission and performance to its students and that offers instruction in the subjects of present day importance by men who are experts in their fields would point to his becoming a desirable member of the bar of any state. This seems of more vital interest to the profession than the mere fact that the student had filled in a blank at or before the time he decided to study law, or has resided in the state for a given length of time without being convicted of a crime or being proved to have engaged in immoral conduct. Particularly is this so if there are convenient methods provided by which the bar examiners may ascertain and have available for consideration all pertinent facts concerning him.

Will it raise the standards of the bar if the young man, a resident of another state and a graduate of an out-of-state law school, is required to wait for a year or perhaps almost two years, if he happens to come into the state just subsequent to the first available examination, and live by his wits or work in a filling station until he has fulfilled this time requirement? If he has no independent means, such a retriction may, as a practical matter, be an absolute barrier to his ever becoming a member of the bar in that state. If he should work in a filling station for a year or more while forgetting a great deal that he has learned in law school, will he be a better potential member of the profession? Will they be more certain at the end of this time that he is of the quality which they desire than if he had been allowed to take the examinations immediately upon graduation from his law school and at once begin his professional career?

BETTER METHODS OF INVESTIGATION

If the protection of the profession requires knowledge of the man in his local setting, would it not be better to admit him provisionally and make an investigation after he has been connected with the profession for a reasonable length of time and there has been an opportunity for members of the bar to become acquainted with and observe him? Or, if that is undesirable, to allow him to take the examination and withhold his license for such time as is necessary to investigate him.

But there is another way in which the bar can more adequately protect itself. Here, as in the case of the migrant attorney, the bar can be much more adequately protected by asking the American Bar Association to make an investigation of the student not only at his school but at his home, or if the local bar has its own machinery for such investigation to apply it to the student as well as to the migrant attorney. It is likely that the American Bar would undertake this service at a much lower charge for students than for lawyers. But whether it would or not, it would still be worth while for the student to pay the fee whatever it might be rather than to have denied to him the opportunity to start at once in the place where he wishes to establish himself professionally.

Provisions for registration of law students have been found to be of some value to prevent applications being made for the bar examinations by persons who have not spent the required length of time in law study or whose period of study might be certified to by some irresponsible lawyer or law school. But registration should be more than a matter of form and the payment of a fee. To be effective it should be combined with some check of the student's conduct, his course of study and his diligence in pursuing it. With the aid of such an organization as the American Bar Association, a reasonable comity provision applicable to student registration would not only accomplish the purposes for which local registration is required but would prevent the hardship upon an applicant for the bar examinations who is now often prevented from taking the examinations because at the time of or before the beginning of law study he had not decided upon the state in which at the time of graduation he desires to locate. The investigations might be limited only to those attending schools

approved by the American Bar Association, for here the opportunity for careful check of the student would be quite complete since such a school is under the supervision of the American Bar Association, responsible to it, and subject to its inspection as to its standards and quality of work.

Though each state determines who should become members of its bar, such barriers as are set up for admission should be those attempting to secure competency, rather than exclusionary with the purpose or effect of reducing competition for the local lawyer. He needs to be stimulated by higher professional standards and a higher quality of membership rather than to be protected by rules which in effect hold for those of poor ability or inadequate training, already members of the fraternity, such business as they are in position to handle. That the public has an interest surely does not need to be argued.

It cannot be said that the bar in general has deliberately sought to establish trade barriers for the profession yet they are present in many states while the bar looks on,—or fails to look,—with the result that low standards of professional competence are tolerated to the very great detriment of the lawyer in public estimation.

That a great advancement has been made in the last twenty-five years, no one can question. Nor can anyone doubt that there is still left a great field for improvement. No longer can any state afford to seek to protect the present members of the profession by barriers which are not based on professional competence or to bar men from entering the practice merely because it is too much trouble to investigate them. The barriers such as residence and registration have grown up gradually and though perhaps at the beginning had no deliberate intention to place a bar to competency or freedom of choice of location, now, because of changes in viewpoint and conditions, are being used in some states with the deliberate intention of preventing entrance into the profession with the resultant protection of the lower portion of the bar that has not kept up with the changes and advancements which produce the type of lawyer that the public has reason to demand,—a bar prepared to handle the many new types of legal business with which the present-day public is concerned.

Lay Notaries Should Be Abolished

The Lawyers Club of Los Angeles, according to a note in the North Dakota State Bar Association's *Bar Briefs*, is advocating the abolition of the office of notary public and the use of acknowledgments, and is proposing instead that documents now notarized be witnessed by two witnesses. *Bar Briefs* finds merit in the proposal, provided there is an adequate penalty for false witnessing. "North Dakota is blessed with notaries on every corner who will stamp that official seal on anything presented, fill out any sort of blank in any sort of way, to the detriment of the unsuspecting public. Why not have legislation making every lawyer, by virtue of his license, an officer authorized to do the job of a notary?"

27 Cents a Year for Courts

The average per capita cost of the American courts in 1939 was 27.042 cents, of which 4.816 cents was for supreme courts and 22.226 cents for other courts. Per capita cost of supreme courts went as high as 40.585 cents in Nevada and as low as 1.516 in Texas, while for the other courts the extremes were $1.01649 in Vermont and 4.785 cents in Delaware.

The 309 supreme court judges in the United States drew an average salary of $9,280.93. The highest were—and still are—$22,000 in New York, while the highest judges of South Dakota receive only $4,800 a year. Four states, Idaho, Kentucky, North Dakota and Utah, pay only $5,000 a year. Salaries of trial judges ranged from as low as $3,000 a year in Arizona to as high as $25,000 for New York City judges of the Supreme Court of New York, a trial court.

Salaries of federal judges range from $7,500 in certain territorial courts to $20,000 for the justices of the Supreme Court. The more than 150 federal district judges are paid $10,000 a year.

From three- to four-fifths of all Texas cases are now settled or simplified through pre-trial procedure.—*Texas Bar Journal.*