

# ADMISSION TO THE BAR: MANY ARE CHOSEN (A SYMPOSIUM)

## SECURING PROPER BAR EXAMINATIONS

H. Claude Horack\*

A FEW years ago almost everyone interested in better legal education was demanding that bar examinations should be more severe in order to eliminate candidates of poor preparation. It was pointed out, with seeming logic, that with more difficult examinations the graduate of the better law school would pass with flying colors while the office-trained man and the graduate of poor quality or of a commercialized law school would fail.

The raising of the educational requirements in most of the states to comply with the standards set by the American Bar Association has undoubtedly brought a better quality of applicants to the bar examinations but that the bar examinations have done much to encourage a better type of legal education in the law schools is doubtful. Most bar examiners sincerely believe that they are weeding out those unfit or those unprepared to practice law, but the success of the "repeaters" in most states seems to show that persistence rather than legal talent is the basis upon which admission may be finally gained.

We may well ask whether the law student, graduating with a satisfactory record from a school of good standing and who has taken substantial courses such as the bar examinations should cover, finds himself prepared by his

law school training to stand the type of examination generally given. Unfortunately the answer for most states is most decidedly NO.

Wherever there has been a serious effort to stiffen up the bar examinations there will be found thriving coaching schools where men from the best as well as from the worst law schools go—not to increase their legal information but to learn how to get over this particular hurdle. Many of these cram schools are able to show such a high percentage of success for those who have registered with them as to convince the student that no matter how sound his legal education may have been he is taking a big chance to try the bar examinations without a special coaching course based, not on what a legal education should be, but on a careful study of what the examiners will ask.

Why should a well-trained applicant need a coaching course in order to pass such subjects as Contracts, Torts, Property, or any of those subjects which the bar examiners say are "fundamental"? Must the student find out what sort of answer the examiner wants rather than show his capacity in analyzing, discussing, and deciding the questions presented? Must he have experts take him through a special course to answer questions of a type for which a sound

\* Ph. B., 1899, LL.B., 1900, State University of Iowa; LL.B., 1904 Harvard University; LL.D.,

1937, Tulane University. Dean, Duke University School of Law.

education will not prepare him? Most of the difficulty lies in the type of men appointed to be bar examiners. They may be good lawyers but most of them are unfamiliar with present-day legal education with the result that the test is based upon what the examiners, rather than the law schools, consider to be an adequate legal education.

If the men chosen for the performance of this important function have not brought about the results desired, it is seldom due to any feeling of lack of responsibility on the part of the examiners or of those who have the duty of selecting them. It is rather that they are unconscious of the part the bar examinations should play in legal education. It is true that men are often chosen because of their political connections or affiliations, but even when this is not the prime motive in selection the results are much the same.

The qualifications which the bar and the public usually think are desirable for an examiner are about as follows: He must be a man well along in his profession, who through many years of practice has demonstrated that he is at least a moderately good lawyer. If, in addition, he has scholarly leanings, reads Shakespeare, teaches a Bible class, and gives an occasional talk on the ethics of the profession, he is considered an ideal appointment. That he has no familiarity with modern legal education is immaterial. The most essential thing is that he should have had a long experience at the bar!

Legal education has progressed a great deal during the last twenty or thirty years. The law has changed con-

siderably during this period and law schools have spent much time and thought in fitting the curriculum to present-day needs and in seeking to determine how to develop those qualities which are considered essential for the high-class lawyer of today. Until quite recent years many schools gave but slight emphasis to such matters and spent their entire time in seeking to get the student to commit to memory definitions and so-called "Rules of Law." The application of these rules and the method of approach to a legal problem were left to the future. "Law school law" was quite distinct from "lawyers' law" as the young man learned it through use after he was admitted to practice.

If one of the older examiners phrases his questions in terms of his own student days, perhaps he is told by some of his colleagues that definitions are no longer considered the test of legal ability nor should questions be asked which only call for a "Yes" or "No" answer, or for the mere naming of three of this or four of that. So he attempts to state "hypothetical" questions which usually are not hypothetical but merely a recital of the facts of some case with which he is familiar. It may cover a narrow point or it may make a good question, but this is largely a matter of chance. He is not practiced in framing questions either to make judgment of the ability of the student in analysis or reasoning nor does he consider whether the question is broad enough to test the student on his knowledge of the particular subject involved. Such a question may be no better than the

old "Yes" or "No" type and often may be answered about as well, from the standpoint of the examiner, by the poor student as by the one of real ability.

It is not at all surprising that the older lawyer is not informed on the subject of legal education in its modern developments. Why should he have kept up with it? From the day he entered an office or hung out his shingle, he has been concerned with clients and not with methods of instruction. Nor is it a matter merely of a few hours of study to catch up with the changes that have taken place between the day of the lawyer's admission and the assumption of his duties as a bar examiner.

It is hard to convince the public that every lawyer or judge would not be a good law teacher, and harder still to make them believe that he would not be a satisfactory bar examiner. The matter of working out questions proper in form and fairly covering the subjects involved, such as would permit fair judgment as to the knowledge reasonably to be expected from the student and be a test of the qualities which must be possessed by the good lawyer is a matter which requires both a background that the older practitioner does not have and much more time than he can ordinarily give to the task. I wonder how often it happens that the examiner assigned to the preparation of a certain number of questions puts off the unfamiliar and hence unpleasant task until the last possible minute, then after an all-night session or two gets something together which he thinks will get by. He probably says to him-

self, "Never again! Next year I am going to make out questions as matters are suggested in my practice and not be caught this way at the last minute." Perhaps next year he finds himself in the same position or if he actually carries out his resolution he comes forth with a group of questions which, after twenty years of experience, have come to his attention as new points—often matters of procedure about which he says to himself, "I have been practicing law for twenty years and I never knew that before. That's something the boys ought to know." He conceives his position as that of an instructor rather than an examiner, and his questions, if not of the vintage of his own student days, are based on isolated points about which he has recently become informed.

The lack of knowledge as to what to do makes him take a case from the last number of the Reporter System as containing a new point, or prompts him to ask for information contained in a particular statute even though he would know, if he stopped to consider the matter, that the person least fitted to be a lawyer might have the capacity to memorize the specific requirements which the statute has set forth. Is it fair to the student to train him in the manner which the law schools have developed and then to test him according to an entirely different or haphazard standard?

The bar examination is the last hurdle which stands between the student and his right to practice law. If the examination is a very different one than that for which the law school has

trained him, one of two results must follow: the student, finding himself entirely unprepared regardless of how sound his legal education may have been, must submit to a coaching or cram course to specially fit himself for it; or the law school, after repeatedly having its students failed, must change its course to fit them for the bar examination rather than for the practice of law. Unfortunately the public and the bar consider the bar examination as the final test of the student's legal ability and without a fair percentage of success the school cannot secure public approval, and thus great pressure is brought to bear to make the school turn itself into a three-year cram course for the passing of the bar examinations rather than to give a legal education. The choice open to the school is unfortunate. The better schools are choosing the lesser of the two evils, going ahead with sound legal education and sending their students to the coaching courses.

If the cram course were in the nature of a comprehensive review of three years of substantial work instead of an attempt to out-guess the examiners, something might be said for it. But if his legal education has accomplished its purpose, the student should be perfectly capable of making this review for himself and would profit much more by doing it independently than by being led through it day by day by an instructor. No comprehensive review, however, will prepare him to pass the bar examinations if they are constructed without reference

to the present-day law school curriculum.

Many a good student from a good law school has found himself in difficulties in taking the bar examinations because he rashly assumed that a comprehensive review after conscientious study under sound instruction for three years should adequately prepare him for admission to the bar. An official in a certain state, proud of what he thought were high standards for admission in his state, declared that seldom had graduates of any of the leading law schools been able to pass their examination on the first trial. He was satisfied that this proved that the standards of the schools of his state were much higher than those of other states, though a large proportion of those admitted by his state each year had studied law in offices or night schools for much less than the three years of full-time study required by the American Bar Association standards.

The bar examiner is almost always sure that his test definitely establishes which school is doing the better job of legal education based on the success of the graduates of the various schools in the bar examinations. No matter what the bar examinations may be, let a number of a school's graduates fail to pass and at once lawyers generally and the bar examiners in particular will ask, "What's wrong with the Law School?" This is, of course, a proper inquiry but along with it should go the question, "Is anything wrong with the bar examinations?"

The movement started during the last few years for joint conferences of

bar examiners and law school teachers has produced many desirable results. In a number of states the effect of these conferences has been to bring the bar examinations more in accord with the law school's curriculum. Yet such conferences, no matter how desirable they may be, are not apt to give an examiner of the old school a fundamentally different viewpoint about education than that which holds over from his own student days.

There is needed on every state board a fair proportion of young lawyers who held high rank as students and who are but a few years out of law school. They are the ones who are in touch with what the law schools are doing, they understand the problem of the applicant and would give more nearly adequate time to the framing of questions and the grading of answers. Yet it is extremely difficult to secure such young men as bar examiners. The bar and the public are shocked at the appointment of one who has not through long years of practice attained distinction at the bar or on the bench, for they feel that in some mysterious way he passes along to the candidate the benefit of the experience he has acquired. So the situation is not very hopeful for getting younger men appointed as examiners anywhere, and to have this influence brought upon the bar examinations in every state seems at present beyond the range of probability.

There is one plan, however, that does hold hope of producing a sound type of bar examination, with men who will make a study of legal education and

give to the task the full time that it deserves. This is to have a national board of bar examiners. Local pressure and politics would have but little opportunity to come into play and it is a fair expectation that the attitude of the best men in the profession would prevail. There is no valid reason why the bar examinations should be more difficult or more lenient for any one state or for any part of the United States. It is true that occasionally the law on a particular point may be different in one state from what it is in another, but there is no reason why the examiners cannot take this into consideration if the candidate knows the general rule but wishes to decide the question presented to him in accordance with the decisions of his own state. If legal education is not carried on in any one state in accordance with the standards of the better schools, good bar examinations should make this apparent, and until this is brought out there is but little hope for local improvement.

If a local board of examiners felt it desirable that some questions be asked on their own state procedure or statutory law, this could be provided for by a short examination given by the state board and graded by them, allowing such examination to be given as a certain portion, say 10% to 20%, of the whole. Whatever can be done in the matter of character examination should also be handled by a local board and would get much more attention than it now receives. Such a plan would result in better bar examinations generally. They would be more in accord with present law school methods and

could be so framed that a comprehensive review of his law school course by the good student would be sufficient instead of making him face the necessity of attending a cram course as a special preparation for an examination which does not examine the applicant on the matters which he is or should be prepared to discuss. There is a better chance that a national board would keep abreast of present-day curricula and methods in the better law schools and give to the preparation of questions and the grading of answers the time and the serious consideration which they deserve.

It is true that no one examination, no matter how carefully prepared, will fit the ideas of all law schools. If a school desires to fill its whole curriculum with freak courses or to spend the major portion of its time discussing theories of government, it might have to decide whether or not it was out of touch with the bar and change its courses accordingly or accept the consequences. I have confidence that the well-trained American lawyer of the type who might be secured as a national bar examiner wants in his office the young man of broad training and progressive outlook. I believe he will be quite willing to let each school go as far as it likes so long as that school does not obstinately take the attitude that it is always right and that all of the rest of the bar is wrong. If it gives a sound training in the essential things a lawyer needs to know, there should be nothing to prevent it from engaging in experimentation as to methods, or mate-

rials to be used, or subject matter to be covered.

We cannot dispense with the examination for a license as some have suggested; any scheme that does not provide for it is doomed to failure and, as with the "diploma privilege," will lead to interminable controversy and intrigue. The examination is one of the most important contacts between the teacher and the practitioner. A personal inspection of each school as an alternative merely substitutes national inspectors for national bar examiners with no accurate standard for comparison, while a proper bar examination would make manifest the enormous differences that now exist among the law schools that meet the standards of the American Bar Association or are members of the Association of American Law Schools. We need *good* bar examinations rather than *no* bar examinations.

Recently there has been considerable discussion of a "quota" system. To say that such a plan is inhuman and unAmerican would merely be calling names, but is such an extreme method of regulating admissions necessary? It should be adopted only as a last resort after other and less objectionable plans have failed. Through the present plan of local bar examinations, almost two hundred law schools are being supported in the United States, most of them being able to secure the licensing of a fair proportion of their students. The variations existing among these schools is almost unbelievable even by those who are engaged in legal education, while the bar in general is quite

unconcerned because it believes that the bar examinations as they are now given are making the proper differentiations.

Before trying a quota system, it would be well to attempt to work out a bar examination of a comprehensive type through a national board which would show up these enormous differences that exist among the various schools—an examination that would require more than mere persistence in order to pass. That such a plan would eventually eliminate some of the schools that are now on approved lists is quite probable. It would show whether the standardizing associations have stooped too low in giving their approval—whether some schools are approved because of compliance with objective requirements rather than because they are really giving a good legal education. The statement made at the time of the big fight over the adoption of the standards of the American Bar Association is well worth keeping in mind—that these standards are not standards of excellence but only minimum standards of decency.

After all, whatever may be said for a quota system, unless it is first based on bar examinations, it is not apt to satisfy the bar or the public and without their support it could not endure. It would be more necessary than ever under such a plan that everything possible should be done to insure that the examinations should test the real value of the applicant's legal training and his aptitude for the practice of law.

Let us hope for a plan which will tend toward better law schools and

toward a better profession, one that will eliminate the poor law school and tend to keep the erratic one on an even keel, one that will protect the well-trained applicant and eliminate the memorizer who must become an ambulance chaser because he does not have the ability to be a real lawyer. It would be wonderful if we could get forty-eight boards to bring this about in each of the forty-eight states, but it is more probable that it could be accomplished for all the states by one national board.

The bar examinations can be made a vital factor in legal education, but this cannot happen until we have proper examinations, and we cannot have proper examinations generally until we have taken much more seriously the function of the bar examination in the whole educational scheme. A few states have pointed the way and we do not need to start from scratch to work out a satisfactory national plan. We can learn much from the medical profession which has had a national board functioning for many years. The standing of the lawyer and the public respect for the profession are problems that are not strictly local. But whether the bar examinations should be given locally or nationally, they should promote rather than retard legal education. There should be a standard everywhere which would be fair to the young man who has ability, a good educational background, has chosen his law school wisely and has put in three years of conscientious study. Mere proportion of failures among applicants does not necessarily show high or proper standards for admission.