March 1987

Can Ethics Be Taught by Law Schools?

Daniel R. Coquillette
Boston College Law School, daniel.coquillette@bc.edu

SYLLABUS

American Bar Association Section of Legal Education and Admissions to the Bar
Volume XVIII, Number 1

March, 1987

International Law in American Law Schools Reviewed

William W. Bishop, Jr.

By William W. Bishop, Jr.

I first taught international law at University of Michigan Law School in 1933, and have been familiar with this field of legal education ever since. At that time international law courses were found in about one-fourth of the law schools in the United States and usually had small enrollments. I had only six students the first time I taught the course.

Those taking international law 50 years ago were particularly interested in government service and in the prevention of war. Many more were enrolled in political science courses in international law; indeed some law schools let their students take such courses rather than offering international law in the law school itself.

The combination of World War II, the creation of the United Nations, interest in war crimes trials, enthusiasm over the U.N. Human Rights Program in its early years, more widespread journalistic attention to international affairs from 1940 onward, the growth of foreign trade and international business—these were among the factors which contributed to a growing interest in international affairs after 1940. In the years since, more and more law schools in the United States teach international law, and enrollment in such courses has greatly increased.

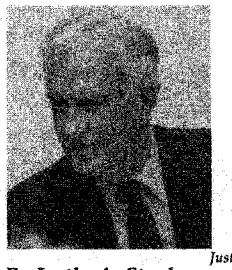
As early as 1955 about 70 percent of those graduating from University of Michigan Law School had taken at least the introductory international law course, and there were substantial enrollments in such courses in other law schools, a few of which required the subject. Practical opportunities for law practice on the private and business side of international law steadily increased.

At the same time, there has been growth in courses, seminars, and research in comparative law, furthered in part by the availability of scholars who had left Europe just before and after World War II. Student and faculty interest in both international and comparative law

Continued on page 7

A LOOK at Professional Responsibility

Comments on Report on Professionalism



Justin Stanley

By Justin A. Stanley

The Report of the ABA Commission on Professionalism considered the question of whether or not there was a decline in professionalism and, if so, what should be done about it. The initial question was easy to answer; the second far more difficult.

While recognizing that most lawyers do good work for their clients, are fair and maintain an interest in their profession and in the system of justice, we found that many lawyers disregard these matters and operate solely to make money.

Believing that the profession is facing a need for some basic changes, at the risk of having those changes imposed by governments, we decided that although a general overhaul was needed, we could only recommend some specifics. We thought they might be achievable and that, once achieved, they could lead to others and to a change in the attitude of the bar generally.

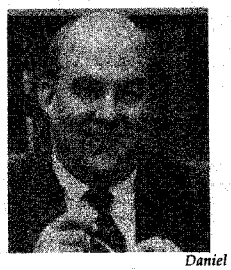
What follows is a brief summary of some of the things the Commission considered.

We addressed all segments of the bar: (1) the law schools, (2) the practicing bar and bar associations, and (3) the judiciary.

We urged the judiciary to take a much stronger role in the conduct of litigation, to adopt, in the states, the sanction rules already in effect in the federal system, and to employ sanctions. We advocated, once more,

Continued on page 7

Can Ethics Be Taught in Law Schools?



Daniel R. Coquillette

By Daniel R. Coquillette

Let us imagine that Peter T. is a lawyer in a small town. He specializes in handling accident cases for workers in certain large industries near the town. He takes their cases on a "contingency" basis of up to 30 percent. It is a tough practice. Peter's big problem is getting information out of the corporations involved in the accidents. They are represented by a big law firm in the city that knows every device to block discovery of evidence. But he has hired an expert investigator named Martin M., an industry safety inspector during the day who "moonlights" for Peter at night. After Peter hired Martin, his success increased. He now asks the industries the right questions about accidents, and has a much better idea about what records to demand. Martin has also told injured workers about Peter, and they often come to him.

Last week, Peter was served with a complaint by the bar overseers in his state. It accuses him of offenses contrary to the professional rules, including: bribing an employee to act against the interests of his employer, using a "runner" to solicit business, and requiring excessive contingency fees. The complainant is a partner of the large firm that serves the local industries. Now Peter is facing the professional crisis of his life.

Peter T.'s case, a real one, would today turn on whether his employment of Martin is a "deceit" or "prejudicial to the administration

Continued on page 8

Section Proposes Institutional Faculty Membership

An Institutional Dues for Fulltime Law Faculty proposal has been proposed by the Section's membership committee, supported by the Section's Council, unanimously endorsed by the ABA Board of Governors, and has the strong support of the president and president-elect of the ABA.

Under this proposal, an ABA-approved law school could pay the ABA an institutional membership fee, which would entitle any of its fulltime faculty members to join the ABA and the Section at no cost to the faculty member. The recommendation was approved by the ABA House of Delegates at the 1987 Midyear Meeting.

STUDENT INTEREST IN INTERNATIONAL LAW COURSES GROWS

By William B. Powers

The Office of the Consultant on Legal Education to the American Bar Association has recently completed an in-depth study of contemporary law school curricula. In this study, elective course offerings were put into 33 substantive categories. Data on these electives were collected, and the results were compared with the results obtained by E. Gordon Gee and Donald W. Jackson some ten years ago.

One elective category which showed a significant amount of change in the past decade is the international and comparative law category. The number of elective courses dealing with international and comparative law listed in law school catalogs has increased nearly 23 percent since 1975. The international and comparative law category ranks third in the number of courses listed in law school catalogs.

More significantly, the number of international and comparative law courses actually offered by law schools during 1984–86 has increased by 55.5 percent since 1975. The total number of electives offered in all categories increased by 18 percent during the past decade, so the number of international and comparative law courses offered by law schools has increased at over triple the average rate!

Our study also examined the number of students taking these courses. Ten years ago, the international and comparative law category ranked only 16th out of the 33 elective categories in the total

Continued on page 5

Coordinate Bar Review into Law School Curriculum?

After a program of the ABA Section of Legal Education and Admissions to the Bar, in which Sumner T. Bernstein participated, it was suggested that he adapt his remarks into a specific proposal based upon the positions he had presented. The result, which follows, originally appeared in The Bar Examiner *for August, 1986.*

By Sumner T. Bernstein

The time has come for the organized bar to propose a new relationship between legal education and the bar examination and admission process in the United States. Even a casual observer is aware of the problems inherent in having 51 different jurisdictions, each with separate admission standards; inherent in the reality that there is a growing practice of law on a national scale by large, private law firms, by government agencies, by in-house corporate counsel, and by public and quasi-public organizations; and inherent in the mobility of lawyers and the possible conflicts between restrictive local admissions concepts and the United States Constitution. The fact that bar review courses exist and thrive, relying on the commitment of time and money which almost every law graduate decides is necessary, points out another aspect of the need.

The common objective should be to find the most reasonable and effective way to prepare for, and to test, the transition from being a law student to being ready to practice law anywhere in the United States, whether in a 200-person office or as a sole practitioner.

The logical sources of leadership are the Conference of Chief Justices, the Association of American Law Schools, the National Conference of Bar Examiners and the American Bar Association; in particular, the ABA Section of Legal Education and Admissions to the Bar. Strong support of each organization and its individual members will be needed if the effort to reshape the bar examination and admission process, in coordination with legal education, is to be effective. A reasonable starting point would be a 12-member steering committee consisting of two representatives from each of the four organizations and their respective executives.

Briefly put, the proposal is that the bar examination process should become the final step within the basic three-year curriculum of each ABA-approved law school. What has been left to the bar review courses should be retrieved by the law schools and coordinated within the programs for the third year of law school, using nationally written, administered, and graded examinations that would serve as part of the law school final examinations and, also, for admission purposes.

This would not twist the law school curriculum into "teaching the bar exam." If there is a risk that some law schools might be tempted, the ABA accreditation and inspection processes would be a very reasonable safeguard.

A one-semester comprehensive review course would not impinge on the academic freedom of the American law school, and it might be welcomed by third-year law students.

Each state could supplement this process as it reasonably and constitutionally deemed appropriate.

This proposal is not an attack on law schools, on bar examiners, or on states' rights. Rather, it recognizes that we can develop an alternative framework which would hold the promise of greater effectiveness and at least equal, if not greater, fairness, and, of no little importance, greater economy of time, effort and money. (This proposal focuses on the knowledge and analysis of the law and legal issues, on legal skills, and on their testing. Character and fitness evaluation will await a different effort.)

We have the testing tools available to implement this proposal. The Multistate Bar Examination (MBE) is a proven testing effort in terms of knowledge of the law and in terms of psychometric standards. The MBE may not be a popular test with law students who have developed the techniques of explaining their answers and have come to expect credit for those explanations even when their answers are not as good as other available answers. The MBE may not be a popular test with some members of law school faculties who are unfamiliar with effective multiple choice questions, but the evidence is available to convince those concerned about the use of objective tests. The MBE works. It accomplishes its limited purposes of assisting in the identification of those who are not minimally competent.

The National Conference of Bar Examiners is now developing a Multistate Essay Examination, using a test drafting committee made up of members of law school faculties and practicing lawyers who have had experience as state bar examiners. This methodology has worked for the MBE and for the Multistate Professional Responsibility Examination. Within a few years, the Multistate Essay Examination, with model answers and suggested grading guides, will be another available tool. It will also respond to any argument that objective examinations do not test such matters as organization of ideas, articulation, and persuasiveness.

The issues which this proposal addresses may not be the highest on the agendas of the courts, or of the organized bar, but there is no reason to wait for some outside pressure to force change when these issues can be addressed effectively with a modest amount of attention and resources.

Sumner T. Bernstein is chairman of the Multistate Bar Examination Committee and former chairman of the National Conference of Bar Examiners. He is a partner in the firm of Bernstein, Shur, Sawyer & Nelson in Portland, Maine.

Contents

CAN ETHICS BE TAUGHT IN LAW SCHOOLS?: Coquillette

Continued from page 1

of justice" under the rules, whether 30 percent contingency fees for poor workers is "fair," and whether lawyers should be able to solicit business.

In addition, Peter's lawyer peers will worry that his methods lack "professionalism." Most significantly, Peter will probably ask himself if he really is guilty of a moral wrong in employing Martin, or whether he can be proud of doing all he can for his clients.

These issues arise every day, and are increasingly difficult to resolve as the American bar becomes larger, more diverse, and more specialized. Recently, I was asked to address the National Conference of Bar Presidents on a perceived "professionalism crisis," a deterioration of trust and mutual respect among lawyers themselves, as well as the poor image that the profession has with the general public.

What did these professional leaders have to ask a law school dean? It was simple. Can legal ethics be taught, or is this area so complex and subjective that young lawyers must learn by the trial and error of actual experience?

Boston College has tried to answer this question in the affirmative. Last year, we established a most innovative first-year course, "Introduction to Lawyering and Professional Responsibility." Instead of large class lectures focusing solely on isolated doctrinal issues of "contract" or "torts," classes of 35 students examine legal problems as they would appear to a Peter T. in his actual practice, full of conflicting demands—procedural, doctrinal, economic, ethical, and practical. Each section has a tenure track faculty teacher and a research and writing instructor to assist as students actually draft the necessary papers, deal with client needs, and resolve the most difficult professional issues.

On an advanced level, second- and third-year students have a selection of full courses in legal ethics dealing with the economic, historical, and institutional problems of professional discipline. I also will be teaching a special course that attempts to link the study of classical ethical philosophy and theology to the study of professional responsibility.

But it is clear we must do more. One badly neglected area is the responsibility of in-house counsel. In this day of environmental risk, genetic engineering, and complex technology, the ethical duties of such lawyers are of the utmost importance to the profession, to their clients, and to the public. How can the profession itself define its goals and standards of conduct, without valid accusations of elitism and self-interest? As part of a long-term planning study now taking place at Boston College Law School, students, faculty, and staff are discussing the possibility of a professional institute that could create a vehicle to learn from our powerful and far-flung alumni, and to be of greater assistance to them and to the public in resolving these growing problems of professional conduct and moral identity.

In addressing heated issues such as the litigation crisis, the crisis of confidence in the legal profession, and burgeoning legal costs, it is easy to forget that, in the end, it comes down to thousands of individual lawyers, like Peter T., and the way they perceive themselves, both as professionals and as human beings—including their religious and moral beliefs, their fundamental hopes and fears. Technical reforms and new rules can never really assist with such issues, but true, reflective education can.

Daniel R. Coquillette is dean and professor of law at Boston College Law School.

Nominating Committee Seeks Names

Your suggestions for nominees are solicited by the committee to nominate persons for offices to be elected at the 1987 Annual Meeting in San Francisco. Nominating chairman is:

Professor Steven R. Smith
University of Louisville
School of Law
Belknap Campus
Louisville, Kentucky 40292

To be elected are a chairman-elect, a vice-chairman, a secretary, a delegate to the House of Delegates, and Council members.

Please accompany your nomination with a brief biographical statement of the person or persons whose names you submit and send to Professor Smith by May 1, 1987. The committee requests that a copy of each nomination be sent to the Section's Staff Director at the American Bar Association, 750 N. Lake Shore Drive, Chicago, Illinois 60611, and the Consultant on Legal Education to the ABA, Indiana University School of Law, 735 West New York Street, Indianapolis, Indiana 46202.

SYLLABUS

Section of Legal Education and Admissions to the Bar
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Nonprofit Org.
U.S. Postage
PAID
American Bar
Association

TO: