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My assignment was to make a critical analysis of the materials and methods used in the Colorado Bar examinations, and to make suggestions, if any seem to be in order, for the improvement of either materials or methods. Any such analysis presupposes an understanding of the objectives of the examiners, and I am not entirely sure that I know what these objectives are, or what they should be. Obviously, therefore, the consideration of the objectives to be sought in bar examinations should come before any criticism of the methods or materials used in such examinations.

Everyone would agree, I think, that any bar examination should constitute a fair and comprehensive test of the applicant's knowledge of so much of State and Federal law as he is likely to encounter or require in the general practice of the law in the United States. Everyone also will agree, I think, that he should also have such specialized knowledge of the laws of the State of Colorado as he is likely to encounter or require in general practice in this State. It is when we leave the field of knowledge and approach the question of ability and skills that question is likely to arise.

There is a general agreement that the examination should be of such nature as will reveal to the examiner whether or not the applicant has, in addition to the requisite knowledge, the mental aptitude, or legal aptitude, or ability to think like a lawyer, which distinguishes the really good lawyer or judge from those who know the rules of law but have little understanding of their meaning or the manner in which they should be applied. It would seem, therefore, that every bar examination should test not only the knowledge of the applicant as to the rules of law but also should determine whether or not he has the analytical ability which will enable him to make efficient use of that knowledge. The new Manual for Bar Examiners, revised and reprinted in 1951 by The National Conference of Bar Examiners, confirms this view, saying that a bar examination should test both knowledge and mental aptitude. Stated in a different way, any bar examination should contain questions designed to test an applicant's ability to draw accurate conclusions as to the legal consequences of acts, conduct, and events. Professor Lon L. Fuller of the Harvard Law School calls questions of this type "what-result" questions. They put a litigational problem to the applicant, he says, and ask for an opinion as to the likely outcome of a lawsuit predicated on the facts stated. This is the conventional question of the law school and bar examinations. It tests, primarily, powers of legal diagnosis, case analysis, and logical discrimination.

Contrasted with these questions of the conventional "what-result" type, are questions designed to test the skills of the applicant, which Professor Fuller calls the "What-do-you-do" type of questions. Should a bar examination test for the skills of the applicant? Should the examination include questions which ask, not what do you know, or what would the Court decide, but rather, what would you do or what program you would suggest, or what you would write, under the circumstances described? This latter type of question would, as Professor Fuller suggests, put a practical situation before the applicant, and then ask him to work out a program for handling that situation. It might involve telling the client, "here is what you ought to do," or it may involve drafting a simple document or drafting a letter, even a very short letter. Professor Fuller believes that questions of this kind test two qualities: imagination and judgment. There is a good discussion of this type of question in The Bar Examiner for May, 1951, beginning on page 111. I think, however, that we must assume that it is not now, and that it never has been, an objective of our Colorado Board of Bar Examiners to ask questions designed to test the skills of the applicant.

ABILITY TO DRAFT AN INSTRUMENT

Should the "skills" type of questions, be included in the Colorado examination? In my opinion, one or two such questions should be included. The following is an example:

> "Assume that you are practicing law. An important client comes to your office and says that he is leaving in twenty minutes to go to the hospital for a serious operation. He wants to sign a will before he leaves. He tells you that he wants his personal effects to go to his wife, and that as soon as his will is admitted to probate he wants the residue of his estate to go to his brother, John Black, in trust for the client's wife for life, and after her death to be held in trust for the client's two minor sons, William and Carl. Twenty minutes has been allowed for answering this question. Draw the will as you would for your client."

A question like this would test the judgment and foresight of the writer. It would demonstrate his ability, or lack of ability, to handle an emergency situation. But the examiner himself would need to be well versed in the art of drafting testamentary trusts.

The question of bar examination objectives must be approached from one other angle. Is it the purpose, or objective, of the bar examiners to determine whether or not the applicant possesses the requisite knowledge of the law from the point of view of *law school standards* or from the point of view of the

standards of the practicing lawyer? And is there any difference between these two standards? Apparently there is a difference and apparently it is a policy of the examiners to test the applicant's knowledge in the light of the standards of the practicing attorney. Mr. Fred Farrar, the chairman of the Board of Bar Examiners, has stated (at least in substance) that it is the purpose of the examiners to determine whether the applicant possesses the knowledge considered requisite by practicing Colorado lawyers and not to determine whether he has the knowledge considered requisite by the law schools.

It would appear, therefore, that the present purpose and objective of the Colorado Bar examination is to determine whether or not the applicant has such knowledge, and legal aptitude, as is deemed by practicing lawyers to be needed in the practice of the law in Colorado.

RECENT BAR QUESTIONS ANALYZED

With the foregoing points in mind we can proceed to an examination of the questions themselves. Apparently it would serve no purpose to consider the quality or adequacy of examinations given at any time in the remote past. The question for determination is the quality and adequacy of the recent examinations, because it is reasonable to assume that they represent the present standard. Accordingly, this study and criticism is confined to the examinations given in June, 1947, in June, 1948, in January and in June, 1949, and in January, June, and December, 1950. The study of these seven bar examinations discloses the following:

1. That of the 451 separately numbered questions contained in these seven examinations, all are of the "what result," or "what decision," or "what advice" essay type except seven.

2. That of the seven questions which are not of the essay type, five call for definitions and the other two ask what procedural steps should be taken under certain circumstances.

3. None of the questions purport to test the skill of the applicant in drafting legal instruments, or matters of that kind, and none, I think, were concerned with ethical considerations.

4. Most of the questions are well drawn, and are so designed as to test adequately the applicant's knowledge, his analytical ability, and his judgment as to what courts will decide under the given circumstances. There is, however, a great lack of uniformity and a considerable variation in the skill displayed in drafting the questions. Moreover, it should be borne in mind that we do not know what answers the examiners expect or consider adequate, and without this knowledge no amount of question analysis can be at all conclusive. Unless the answers desired are carefully worked out and agreed upon by experts in the respective fields, the grade

received by the applicant will not necessarily depend upon the correctness of his answer, or his knowledge, but upon the examiner's own knowledge and analytical ability. To illustrate this point, let us take an examination question (not one of the better questions) given in a bar examination a few years ago. It read as follows:

QUESTION

A house and land were devised to the deacons of a church, "upon express condition and limitation," that is, that the respective ministers of the church should continuously live there during their incumbency in office; and in case this should not be done then by will the land was devised over to Z, a nephew of the testator.

(a) Was this a conditional limitation, or an estate upon a condition?

(b) Does the statute of perpetuities apply?

(c) What estate do the deacons take?

What would be the best answer to this question? I have no doubt it would depend upon the knowledge of the examiner. Here are three possible answers:

FIRST ANSWER

(a) This was a conditional limitation.

(b) The statute of perpetuities does apply.

(c) The deacons take a fee simple absolute.

SECOND ANSWER

(a) This seems to be the case of Moore vs. Second Congregational Church, decided by the Supreme Court of Colorado in 1946, although the facts are not exactly the same. In that case the Court said that the condition and reservation set forth in the deed constituted a limitation, therefore I would think that this is a conditional limitation.

(b) This is obviously a trap because there is no statute against perpetuities in Colorado. If, however, the rule against perpetuities is meant, the interest of the nephew, Z, is void as being in violation of the rule.

(c) According to the Colorado case mentioned above, the deacons take a fee simple determinable.

THIRD ANSWER

(a) It is difficult to answer this question because two estates are involved, the estate of the deacons and the estate of the nephew, Z. When it is asked, 'Was this an estate upon condi-

tion?' I am not sure what is meant. Certainly the estate of Z is an estate subject to a condition precedent, namely, that the ministers cease to reside in the house. The facts, however, are in all material respects the same as those in a leading Massachusetts case. It was there held that the devise did not create an estate upon condition, because the entire fee passed out of the devisor by the will. Therefore I will answer that the devise created a conditional limitation, although according to the terminology used in the Restatement and by modern text writers it should be called a shifting executory devise. I should add that the case of Moore vs. Second Congregational Church (Colorado) is not in point, because in the Colorado case the Court construed the limitation as relating only to the minister who was then residing in the house.

(b) It is not stated where the property in question is located, but presumably it is in New York, California, Pennsylvania, or one of the other states having a statute against perpetuities. The limitation to the nephew would violate any of these statutes with the possible exception of that in Pennsylvania, with which I am not famliar. It would certainly violate the common law rule against perpetuities which is in effect in Colorado.

(c) The will gave the deacons a fee simple subject to an executory limitation. After application of the rule against perpetuities, the deacons had a fee simple absolute.

Which answer would receive the better grade? It would depend upon the background and experience of the examiner, unless the answer had been carefully worked out by a group. To the practicing lawyer who graduated from a Colorado law school twenty-five years ago and has not specialized in future interests, the first answer probably would be best. To an examiner who based his question on Moore vs. Second Congregational Church, the second answer might be best. To an examiner recently graduated from any good law school, and who was an A or B student, the third answer almost certainly would be best, and the second answer only fair.

5. There has been a decided improvement in the quality of the examination questions during the last few years. In the most recent examinations there were no definition questions, the questions were more comprehensive than was generally the case in former years, and fewer questions called for a knowledge of a particular Colorado case or some peculiar rule of law.

6. Among the questions which were studied are some that are not sufficiently comprehensive. Some are merely substantially

copied from law quizzers or law school examinations.[1] A few cover only a single point of law, with little opportunity for a demonstration of analytical ability. A few cover very obscure points of law. Some questions are too easy and some are extremely difficult. A few questions employ terminology which might be considered obsolete. For example, the term "Conditional Limitation", used in the question in section "4", above, does not appear in the index to Symes' new Handbook on Future Interests, and it is very difficult to find the term in the Restatement of Property.

7. The plan of using alternative questions, recommended by some examiners in other states, has not often been employed. It was used in one division in 1948 where the applicant was instructed to answer any three of questions 1 to 4, inclusive. It was used again in the Conflict of Laws section in June, 1950, but apparently has not met with much approval. Certainly the use of alternative questions presents difficulties. It is not easy to draft alternative questions of the same difficulty and which will be entitled to the same weight in grading.

8. It is very difficult to say whether or not the time allotted for the various divisions is sufficiently long to permit the average applicant to write a proper answer. There is, however, considerable variation in the length and difficulty of the answers required in a three-hour period, or in one of the afternoon two-hour periods. For example, the December, 1950, examination, Division 1, which was given in a three-hour period on the first morning, included two questions in contracts, two in agency, and two in partnership.

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[1] It conclusively appears that all of the five questions on one subject in the June 1951 examinations were taken, practically verbatim, from Ballantine's "Problems in Law," second edition, 1937, where they appeared as questions 7, 10, 11, 13, and 14 at Pages 107-112. The questions on the bar examination are slightly re-worded, but for the most part are directly quoted from the copyrighted book. Moreover, it is the opinion of experts in the subject, who have read the questions, that the five questions cover only two general problems. In other words, they are not comprehensive and not a good test of the applicant's general knowledge of the subject.

There are additional objections to this method of obtaining bar examination questions. One is that when questions are taken from an old edition of a quizzer, the law may have changed in some respects since the question and the answer were prepared, and we cannot refrain from assuming that the examiner thought that the answers were in all respects satisfactory. Moreover, the applicant may have a later edition of the same quizzer and we understand that there is a new edition of Ballantine. Further, while Ballantine gives the solutions, he does not adequately discuss the theories upon which they are based. There is the additional objection that the student who was lucky enough to study Ballantine's 1937 edition would certainly have a definite advantage over the student who had recourse to more usual sources of knowledge.

One of the questions in another subject was taken almost directly from the October 1950 California Bar Examination, and was the same question, in all material respects, that was given in a spring term examination in one of the Colorado law schools. It seems quite apparent that here, too, the chances of certain applicants having a definite and undesirable advantage were quite real.

Presumably these six questions could be answered adequately within the three hours allotted. But on the second day Division 4, in a similar three-hour period, had five rather difficult questions on Constitutional Law and five questions on Taxation. It would appear difficult to answer the latter ten questions in three hours, particularly under bar examination conditions. Applicants have complained of lack of time on numerous occasions and of the physical hardships of the long examinations; but there is a difference of opinion on both scores.

Quite apart from the bar examination questions, and apart from the answers, several other matters require comment. They are as follows:

1. For many years there has been objection to the long and costly delay between the examination and the announcement of the results. The excuse for the delay is that the examiners work on a voluntary basis and without pay, and that they should not be asked to hurry with the correction of the examination papers. Now, however, each examiner has an assistant, and it does seem that the results could be announced earlier than at present. Let us assume that an examiner has a division with a total of eight questions. Assume also that there are 150 applicants. That means 1,200 separate questions to analyze and grade. If we further assume that a question can be graded in ten minutes, which is fairly fast grading, it would take 200 hours to complete the work. That would mean 25 working days, which is far too much time to expect any lawyer to put on voluntary work of this kind. It is too long both from the point of view of the examiner and from the point of view of the applicant for admission. What is the solution? One solution which suggests itself is to ask fewer and more comprehensive questions, and to provide more examiners, or assistants. In the October, 1950, California Bar examination 24 different subjects were covered and 24 questions were asked. This is in marked contrast to the Colorado examinations which average about 64 questions per examination. If Colorado should examine in 20 subjects or fields of law, and had ten examiners, each with one assistant, the examination could be divided into ten divisions. Each examiner, with his assistant, would then be responsible for only two questions per applicant. With 150 applicants taking an examination this would mean 300 questions per examiner and assistant. It is not difficult for an examiner, who is thoroughly familiar with his subject, to grade 50 questions a day. Thus an examiner, with one good assistant, should be able to dispose of 300 questions within a week, even if both worked only in their spare time. This may not be the solution, but certainly some plan should be worked out which would eliminate the long delay which has become standard procedure in Colorado.

2. It is a well-known fact that former bar examination questions are available to some persons preparing for the bar, and

not to others. How they obtain the questions is less certain. It is said that some applicants, after taking the bar, dictate the questions from memory so that they will be available to future generations. Within a week before the June examination which has just been completed, I asked two students who were preparing for the examination if they had questions from previous examinations. "Sure," they answered, "of course we do." There is nothing dishonest about this. It is simply the fault of a system which assumes that the questions are not available, when in fact they are available to some persons and not to others.

3. The order in which the different subjects are to be given on a bar examination is not made public. Some of the applicants, however, know what subjects to expect and are able to bone up at the last minute, while others have no idea what subjects will be covered. This unfair situation probably results from the fact that some of the applicants know what attorney is giving a certain subject and see him around before the examination is to commence, or they learn from the attorney himself that he will be in Denver on a certain day to participate in the bar examination. It would be much more fair if all applicants knew exactly what to expect on any given morning or afternoon.

4. Some of the applicants, during the course of the examination, ask the examiner leading questions about the examination and receive helpful replies. It would seem that if questions are to be permitted by applicants during the course of an examination, both the question and the answer should be heard by all the applicants, so that none will have an advantage over the others.

5. The present practice of permitting students to take the bar examination before they finish their law school work is destructive of law school morale and detrimental to the teaching process. Some of the worst work done in Colorado law schools has been by students who have taken and passed the bar, and feel under no compulsion to do any more than the barest minimum of work. Undoubtedly there are hardship cases in which the applicant should be permitted to take the bar before finishing law school, but it is respectfully suggested that the practice of permitting any applicant who files a petition to take the bar before finishing law school is wrong in principle and bad in effect. In some instances students have been permitted to take the bar examination a full year before completing their work in law school. Petitions for early examinations are permitted whether or not the Supreme Court is advised that the petitioner is likely to graduate at the end of the next ensuing term.

RECOMMENDATIONS

1. In conclusion, I recommend that all bar examination questions, and answers to all bar examination questions, be carefully worked out and submitted for approval to (1) the entire Board

of Bar Examiners and (2) an expert in the particular field from the faculty of a law school outside the State of Colorado.

2. That it be stated with respect to all questions whether they are to be answered according to general law, or according to the law of Colorado. This could be accomplished by stating at the beginning that the jurisdiction is Colorado unless otherwise expressly stated.

3. Each complete bar examination should contain at least one question designed to test the skill of the applicant in drafting a short will, or trust agreement, or legislative bill, or letter, or other instrument involving performance at some future time.

4. All applicants should be informed of the order in which the different divisions will be given.

5. No questions should be permitted by applicants during the course of an examination unless the questions and answers are made available to all.

6. An extra supply of the examination questions should be printed and made available to anyone wishing to buy them.

7. Some plan should be worked out which would enable the Board of Bar Examiners, and the Supreme Court, to make public the results of each examination within a period of not more than one month after the examination is completed.

8. Each complete bar examination should contain at least one question based on ethical considerations.

9. A student should not be permitted to take the bar examination in advance of graduation from law school unless (1) he shows to the satisfaction of the Supreme Court that any delay in taking the examination will result in great hardship and (2) that he will complete his work in law school not later than the end of the next ensuing term, and (3) that he intends to work to the best of his ability during the balance of his time in law school.

10. The Committee recommends that all questions given on the bar examination should be so far original that they could not be identified as being taken from any law quizzer or previous examination, whether given in a school, a bar examination or elsewhere.

It is further recommended, as an alternative to all of the above recommendations, that if and when a national bar examination is made available, Colorado evince its willingness to participate to the fullest possible extent, reserving, however, the privilege of giving a one-day, or half-day, examination on Colorado law.

PERSONALS

Robert S. Zimmerman, formerly of Denver and Walden, has recently joined George J. Petre in Glenwood Springs. The firm will be known as Petre and Zimmerman.