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THE FUNCTION OF BAR EXAMINERS

*By Stanley T. Wallbank of the Denver Bar**

IF we as bar examiners start with the premise that our function is to admit to the legal profession only those candidates qualified to practice, those of adequate legal training and satisfactory moral qualifications, we commence our consideration of this subject with a truism—one which probably defies successful contradiction, but which in reality is but a high-sounding platitude, neither self-explanatory nor enlightening.

What are proper legal training and satisfactory moral qualifications? In the light of what conditions, by what criteria and how are they to be determined? These and countless related questions involve a vast process beset with many complexities and obstacles. Let us then before attempting to adopt a comprehensive meaning of our premise, take a bird's-eye-view of our field of action, do the necessary reconnoitering, and lastly draw such conclusions as seem warranted.

To obtain a perspective of our task, let us draw back a moment to visualize a numerical picture of the National Bar. It will readily be conceded that our problem is national in character and scope, although the incidence of the remedies to be applied is probably local. The 1930 U. S. census figures are not yet fully available, but in the light of the best estimates obtainable, the National Bar probably numbered about 160,000 in 1930. This compares with about 122,000 lawyers in 1920, and with 114,000 lawyers in 1910, making an increase since 1910 of over 40%. In the same period the nation's population has increased about 33%, and her per capita wealth probably twice that rapidly. The greatest increase in the bar is taking place now, however, in spite of the current failure yearly of over 50% of all applicants who present themselves for admission.

There is herewith presented a chart showing graphically for the period from 1900 to 1930 the nation's population, lawyers, attendance of students at law schools and admissions to the bar.

*Mr. Wallbank is a member of the Executive Committee of The National Conference of Bar Examiners. This address was delivered at the first annual meeting at Atlantic City, September 16, 1931.

In 1930 about 20,000 applicants were examined, of which number about 10,000 were admitted, the percentage passing being 46.4%. It is readily seen that for the past few years we have been experiencing a crescendo of newly admitted lawyers and are now near the peak of this movement—whether destined to continue that crescendo or to fall back to more normal admissions being for the moment undetermined. Some conservative authorities have estimated that, based upon our present rate of increase, the American Bar in 1940 will aggregate over 250,000 with an estimated total population at the present rate of increase of 137,000,000, or one lawyer for every 548 persons, compared with one lawyer to every 801 persons in 1910. Since 1920 it is estimated about 79,000 new lawyers have been admitted to practice. Incomplete figures now compiled indicate that to keep the profession at its present number, about 4,800 admissions annually are required. To fill this requirement there are about 20,000 applicants annually of which about 10,000 are being admitted. Assuming our present numerical strength sufficient—many assert it is now far more than sufficient—what of the unneeded 5,200 new lawyers being admitted annually? The examiner with his hand on the pulse of the profession is thus faced first with a numerical problem.

You may at once propound these questions: Is it within the province of bar examiners to take cognizance of the comparative rates of increase of the bar? Are we not officers of the court sworn to examine into and pass upon the legal training and moral qualifications of candidates and to admit those suitably qualified regardless of how many or how few are admitted, and regardless of whether the bar is overcrowded or underpopulated?

If our examinations resulted in an underpopulated bar it would undoubtedly be urged that bar examiners should take cognizance of that fact. Perhaps intelligent reasoning may be applied upon both sides of the question, but for the present it will be conceded that bar examiners are entitled to be bar-conscious, are entitled to relate their work as examiners to the entire legal profession and that in any event it is fitting that they should accord due attention to the numbers and percentages of admissions and failures upon examination, so that they

might from such a perspective examine introspectively into the character and processes of the examinations given. This will determine wherein those examinations may be deficient or subject to more rational standardization in the various states, or may be unscientific, unfair or unsound, and in general how the degree of perfection in the conducting of those examinations may be constantly increased.

Recently a distinguished dean of a law school writing in the American Bar Association Journal stated that it was not the direct concern of the law school how overcrowded the bar became. It is respectfully submitted that the converse is true. This is a problem that requires the best thought of all lawyers, law educators, judges, examiners and all law schools, and should receive prime consideration at the hands of all bar associations and of our citizenry.

COLORADO EXAMINATIONS

It may be of interest to select one of the average states where less than 200 applicants are examined a year and inquire briefly into the method of examination employed. Not that the state selected may be a model, but it affords a starting point of consideration. Colorado is such a state. During the year ending July 1st, 1930, that state had 110 candidates who took the examinations, of whom 48% passed.

The Board has 9 members, none of whom receive any compensation. They are appointed by the Supreme Court to serve for a period of five years. They have a paid secretary, a member of the bar, who receives \$1,200.00 per year. The average aggregate time given by each examiner annually for the two examinations each year in the preparation of questions, the attendance upon four meetings of the Board each year, the correction of the examination books and in general examination duties, is probably 15 working days each year.

The written examinations cover a period of 3 days. They consist of 80 questions covering 24 principal subjects, but there is no classification or designation of subjects on the examination questions.

The examination is wholly anonymous, each candidate being assigned a number at the beginning of the examination. The candidate's name appears nowhere upon the examination

books. The books when completed are returned to the secretary of the Board who alone and secretly reassigns a new number to each candidate. It is this reassigned number that appears upon the examination books when they are delivered to the examiners for grading, the former number which appeared in the upper right hand corner of the cover of each book having been clipped off by the secretary and the reassigned number appearing on the back of the triangle so clipped off as well as upon the face of the book. Thus, if an overanxious friend of any candidate should by oversight suggest the number of any candidate to an examiner, it would convey no information to the examiner whatever, in that no one but the secretary of the committee has knowledge of the reassigned numbers. Accidents of this character have happened.

24 SUBJECTS EXAMINED UPON

The examiners individually correct the books in the examinations they have given, each examiner covering 3 subjects. The entire 24 subjects included are contained in a schedule hereto appended. The passing grade is 75. The graded books are returned within 60 days from the taking of the examination at which time the secretary compiles the averages.

The examination into the moral and character qualifications is conducted by a separate committee appointed also by the Supreme Court, known as the Bar Committee. Excellent results have been accomplished by this committee which examines each candidate personally but its work begins after the candidate applies for admission and in that respect perhaps the Pennsylvania plan of character approval is much more satisfactory. A committee theretofore unadvised of a candidate's background, interrogates the applicant about the Canons of Ethics being "conscious that the greatest rogue may give the most pious answers."

The preparation of the questions by each examiner has proven to be an extensive matter. From time to time notes are made upon proper subject matter for the examination and thus over a period of months a set of questions is gradually evolved by each examiner. About 15 questions are submitted by each examiner out of which 10 are finally selected by the

Board as the most desirable. This selection is made at a meeting of the Board which is held about four weeks prior to the giving of each examination. The questions are read aloud before the Board, criticized and discussed, in many cases corrected, and thus put through a refining process.

TYPES OF QUESTIONS

The questions have included some of the Yes-No type, although at the last June examination they were entirely of the essay type.

Our Board has definitely discarded the definition type of question, feeling it is too well adapted to the unintelligent memorizer or crammer. Memory is not the ultimate test. The essay type calls not for memorizing but for analysis, the separation of the material from the immaterial, and the ability to apply legal doctrine to the case in hand, displaying powers of reasoning, independent judgment, incidentally the applicant's use of the English language, and other fundamentals that the definition question excludes. Of course, catch questions are sought to be avoided as also are questions of too great or not sufficient length.

It is readily seen that improvement could be made in this set up. An insight into the conditions in other state boards might perhaps be more enlightening, but we now have the chief characteristics of the Colorado Board's procedure which may enable us to prospect for improved methods and plans generally.

A NEW ERA

It is refreshing to realize that today marks the dawn of a new era in the field of bar examinations. The organization today of this Conference of Bar Examiners should signify the beginning of a far-reaching, practical, efficient movement respecting bar examinations. Without doubt the bar examiners of the nation can act effectively if they speak with an organized voice. This Conference can well serve as a clearing house on examination matters. The machinery that we create, though not highly perfected at the start, can be made so effective as to bring incalculable good to the profession and to the public. Among the things that may well engage our attention and be in keeping with our proper functions are the following:

I.

PAID EXECUTIVE AND STAFF-DUTIES

The creation of efficient working machinery in the Conference whereby a paid officer would be the executive in charge, suitable compensation and necessary clerical assistance to be allowed him.

(a) This executive might conduct a clearing house for all examination matters, affording examiners in the various states the opportunity to submit their various problems, including the submission of individual examination questions if desired.

(b) Questions could be interchanged among the various boards.

(c) It is not inconceivable that a plan may be devised similar in operation to the American Law Institute in which the best legal minds of the country closely affiliated with law schools might be enlisted in the solution of our problem, the framing and criticism of the examination questions, the standard of grading of those questions and all related matters.

(d) This plan would have the beneficial tendency of standardization among the various states and while this cannot be made absolute because admiralty law would be as useful in Colorado as mining law perhaps in Florida, nevertheless many state boards would welcome a decided approach towards standardization in questions propounded. In this respect it is certain that many states would regard themselves as having made definite improvements if their questions were more similar to those given by the efficient boards in New York and Pennsylvania.

(e) Types of questions could be carefully analyzed and studied.

(f) A free interchange of ideas and plans regarding the mechanics of giving the examinations could be carried on.

II.

COMMITTEE WITHIN EACH STATE BOARD

A committee within each state board might be designated to study conditions, to devise ways and means of improving

those conditions and to report its findings and conclusions to the board. The state board could in turn recommend desirable improvements to the proper authorities, whether they be legislative or judicial, and exert their utmost influence in the accomplishment of such improvements. It is believed that in the vast majority of the states where the appellate courts have jurisdiction over admissions and examinations, those bodies welcome and encourage improvements in methods of examination recommended by the examiners and that in most jurisdictions a very fine cooperation will prevail between the courts having jurisdiction over these matters and the examining boards. It thus probably rests with the examining boards in most jurisdictions to take the initiative, to examine their own problems, and after wise consideration to recommend desirable changes. The committee thus constituted within each state board, working in close cooperation with the executives of this Conference, could probably accomplish great improvements within surprisingly short periods of time.

III.

CLASSIFICATION OF SCHOOLS

This Conference could adopt a classification of all pre-legal schools and all law schools so that there might be an accepted national standard that would be some guide to the individual boards in the various states. For instance, in those jurisdictions where two or three years of successful college work in an approved college or university is required as a prerequisite to law school study, there is apparently no uniform standardization whatever. One widely-used list of institutions is promulgated by the New York University, one list is set up by each of the regional educational associations of which there are five in the United States and one list is often fixed by the state institutions of learning within the particular jurisdiction. The same confusion exists with respect to law schools, they being classified by the American Bar Association, the Association of American Law Schools, The Law School Blue Book and other organizations. A suitable standardization would be very desirable, for if a board could point to a national standard it would be relieved of much unjust criticism and embarrassment resulting from an application from one who

did his work in a local unrecognized school. Such a classification would also produce splendid results in the publishing of the results of each individual institution respecting numbers and percentages of their graduates who passed or failed the bar examinations. The percentage of Harvard graduates for instance, who passed the Massachusetts state bar from 1920 to 1929 was 98%, while the percentage of Suffolk Law School graduates who were admitted in Massachusetts in the same period was 65%. Likewise the "course mortality" at Harvard Law School for the above ten year period was 39% while that of Suffolk Law School was 73%. If each law school in the nation were thus rated the inevitable result would be in the direction of improved conditions within the law schools and the gradual and desirable elimination of those schools that are ill-fitted to prepare students for admission.

IV.

COOPERATION WITH LAW SCHOOLS

This Conference has an unusual opportunity for cooperation with the law schools of the country. It sees first hand the product of those schools as no others do. It sees that product collectively. Its composite views might be of interest and value to law schools and law teachers. A closer cooperation and means of communication between this Conference and the various law schools would unquestionably be invaluable to both the law schools and this Conference. We would better understand their problems and they would more fully appreciate ours. There are now 180 degree-conferring law schools in the country. It would seem that the executive of this Conference could use that mailing and visitation list to excellent advantage and thus coordinate our work with that of the Section of Legal Education, and with that of the law schools.

V.

WORKING LIBRARY IN HANDS OF EACH EXAMINER

This Conference could with little expenditure create a comprehensive working library of all material and data bearing upon legal education and admissions and have such data and information available to all examiners, law schools and others interested. Thus, it would serve to collect and dis-

seminate information useful to examiners. It might also be advisable that the executive of this Conference construct a suitable volume of such data and send it presently to each examiner and from time to time also send to each examiner in the country, being about 250 in number, such new data and material as might be collected, sending the same upon uniform sheets or booklets punched suitably for loose leaf binding. The Adviser to the Section of Legal Education has from time to time forwarded very valuable information to the various board members, but little of this is in uniform design, or suitable for satisfactory preservation. Perhaps each state board, and if not, then this Conference would gladly furnish each of the examiners with a standard loose leaf binder in which could be filed this valuable data and information and thus provide a volume or two of most useful information that would be the examiner's handbook and that would be transmitted from retiring board members to new members. As it is, an incoming member of any board, and the membership is constantly changing, has little to go upon except by hearsay and general information, and perhaps it is often two or three years after an appointment before such a new board member comprehends the gist or scope or importance of his appointment and trust. There are appended hereto various charts and a suggested preliminary list of some articles that might be included in such a loose leaf volume, including outstanding papers by such authorities as Philip J. Wickser of the New York Board, Dean Goodrich of the University of Pennsylvania, Rollin B. Sanford of the New York Board and Will Shafroth of the Section of Legal Education.

In this connection it is also suggested that all the examination questions of all the states be furnished to each of the other states for surely we have now evolved to such a point where with our contemplated machinery there need be no further secrecy about examination questions.

VI.

FINANCING OUR UNDERTAKING

This Conference can devise a means of properly financing its undertakings. There would appear to be no duty higher than that of perpetuating the American Bar by first selecting

suitable persons for law training, sponsoring them under the Pennsylvania plan during their law study, requiring a suitable clerkship before admission and then admitting such of those students as appear properly qualified. Surely the American Bar, now numbering at least 160,000, and the American Bar Association now numbering 28,000, and the various state boards with an annual aggregate income of \$250,000.00 to \$300,000.00 from examination fees, can insure the allowance annually of the nominal amount that will be required to carry on the proper functions of this Conference. If 50 cents were collected from each candidate it would provide an annual budget of about \$10,000.00 which would be adequate for the present. It would seem desirable that at least one member from each state board should attend each annual meeting of this Conference. Inquiry would determine promptly whether or not each state board would pay one-half the railroad and Pullman fares of at least one such delegate to this Conference, and unless they all agree to do so it would seem clear that our general budget should allow for such amount. Ways and means can and must be found. A suitable committee can do the task.

Thus, this partial survey of a few of the high peaks in the rugged territory of bar examinations, and these prospectings as to our work, our duties, and our function bring us to "sign off." Nothing new may have been here presented, but if these recitals have produced such mental attitudes or differences as are conducive to constructive reasoning and action, then all that is hoped for from these suggestions will have been accomplished.

SCHEDULE I.

SUBJECTS COVERED BY COLORADO EXAMINATION QUESTIONS UPON EACH EXAMINATION

Agency	Contracts	Personal Property
Bailments	Damages	Pleading
Bankruptcy	Domestic Relations	Partnership
Corporations	Equity	Public Utilities
Carriers	Evidence	Real Property
Constitutional Law	Insurance	Sales
Conflict of Laws	Irrigation	Torts
Criminal Law	Negotiable Instruments	Wills and Administrations

The examinations are not given by subjects, the six half-day sessions of each examination being designated as divisions numbered I to VI.

SCHEDULE II.

SUGGESTED LIST OF INCLUSIONS
IN EXAMINERS' HANDBOOK

- Reports of the Judicial Council of Massachusetts.*
- Notes on Legal Education, March 16, 1931*.....WILL SHAFROTH
Published by Section of Legal Education.
- Bar Examinations*.....PHILIP J. WICKSER
American Law School Review,
Dec., 1930, pp. 7-17.
- The Threatened Inundation of the Bar*.....CHAS. H. KINNANE
American Bar Association Journal,
July, 1931, pp. 475-479.
- Bar Examiners and Examinees*.....WILL SHAFROTH
Published by Section of Legal Education.
- Bar Examiners and Legal Education*.....HERBERT F. GOODRICH
- The New Pennsylvania Requirements for Admission to
the Bar*.....WALTER C. DOUGLAS, JR.
Thirty-fourth Annual Report of the Pennsylvania Bar Association,
Vol. XXIV, pp. 385-402.
- Admissions to the Bar*.....WILLIAM D. GUTHRIE
Year Book, 1930, New York State Bar Association,
pp. 231-251.
- The Law Schools and the Law*.....PHILIP J. WICKSER
American Law School Review,
April, 1931, pp. 121-132.
- The Yes-No Type of Bar Examination Question*.....ROLLIN B. SANFORD
"Types of Bar Examination Questions,"
published by Section of Legal Education.
- Bar Examinations of the Essay Type*.....STUART B. CAMPBELL
"Types of Bar Examination Questions,"
published by Section of Legal Education.
- The Research Type of Examination*.....ALBERT D. AYRES
"Types of Bar Examination Questions,"
published by Section of Legal Education.
- Supply and Demand in the Legal Profession*.....H. C. HORACK
American Bar Association Journal, Nov., 1928.
- The Rising Tide of Advocates*.....WILL SHAFROTH
American Bar Association Journal, July, 1930.
- Fewer Lawyers and Better Ones*.....I. MAURICE WORMSER
Year Book, 1929, New York State Bar Association.

SCHEDULE III.

NUMBER OF LAWYERS IN EACH STATE, 1850-1920,
FROM U. S. CENSUS

	1850	1860	1870	1880	1890	1900	1910	1920
Alabama	570	763	758	798	1,313	1,596	1,488	1,416
Arizona	---	---	21	118	159	267	366	443
Arkansas	224	467	413	745	1,082	1,381	1,350	1,338
California	191	894	1,115	1,899	3,228	4,278	4,908	6,745
Colorado	---	89	99	807	1,266	1,633	1,645	1,539
Connecticut	289	468	391	796	833	1,080	1,120	1,339
Delaware	46	87	84	127	176	215	180	171
District of Columbia	99	189	411	918	1,408	1,468	1,542	2,415
Florida	131	173	149	306	574	615	713	1,137
Georgia	711	1,168	851	1,432	1,731	2,391	2,235	2,531
Idaho	---	---	42	61	176	348	563	652
Illinois	817	1,602	2,683	4,025	5,789	9,030	8,054	8,843
Indiana	924	1,211	1,685	2,904	3,208	4,285	3,611	3,307
Iowa	272	1,161	1,456	2,610	2,800	3,436	2,579	2,494
Kansas	---	361	682	1,492	2,964	2,383	1,782	1,676
Kentucky	995	1,190	1,552	1,981	2,356	3,147	2,672	2,382
Louisiana	622	698	663	828	1,071	1,316	1,235	1,206
Maine	560	646	558	725	751	895	860	801
Maryland	535	599	772	1,087	1,464	2,035	1,998	2,118
Massachusetts	1,111	1,186	1,270	1,984	2,589	3,459	4,417	4,954
Michigan	560	791	1,167	2,097	2,648	3,070	2,834	3,037
Minnesota	23	407	449	906	2,142	2,518	2,404	2,613
Mississippi	590	620	632	820	898	1,027	1,218	1,518
Missouri	687	1,187	3,452	2,907	3,954	5,285	4,556	4,506
Montana	---	---	67	77	343	543	625	875
Nebraska	---	130	204	840	2,453	1,930	1,456	1,528
Nevada	---	18	116	119	100	105	294	230
New Hampshire	326	375	349	382	417	468	407	379
New Jersey	412	537	888	1,557	2,159	2,865	3,236	3,918
New Mexico	11	23	48	128	239	274	386	342
New York	4,263	5,592	5,913	9,459	11,194	14,759	17,271	18,473
North Carolina	399	500	574	772	992	1,263	1,313	1,585
North Dakota	---	---	---	---	337	457	669	629
Ohio	2,028	2,537	2,563	4,489	5,336	6,655	6,152	6,485
Oklahoma	---	---	---	---	264	670	2,738	2,818
Oregon	22	104	194	311	662	1,035	1,312	1,424
Pennsylvania	2,503	2,414	3,253	4,992	6,735	8,330	7,206	6,784
Rhode Island	114	96	163	237	283	369	465	515
South Carolina	397	457	387	614	772	854	908	989
South Dakota	---	8	23	300	740	693	690	700
Tennessee	725	1,037	1,126	1,506	2,064	2,730	2,099	2,040
Texas	428	904	1,027	2,109	3,555	4,617	4,557	5,323
Utah	5	8	23	119	315	434	446	527
Vermont	494	not stated	72	424	457	424	381	344
Virginia	1,384	1,341	1,075	1,355	1,650	2,032	1,812	1,981
Washington	---	22	56	113	1,204	1,540	2,495	2,237
West Virginia	---	---	400	629	937	1,338	1,407	1,326
Wisconsin	471	1,133	785	1,198	1,691	2,249	1,876	1,978
Wyoming	---	---	25	34	131	142	205	268
United States	23,939	33,193	40,736	64,137	89,630	114,703	114,704	122,519

SCHEDULE IV.

POPULATION PER LAWYER

	1850	1860	1870	1880	1890	1900	1910	1920
Alabama	1,353	1,263	1,183	1,582	1,152	1,145	1,436	1,658
Arizona .....	.....	.....	459	333	555	460	608	754
Arkansas	937	932	1,170	1,077	1,042	949	1,166	1,309
California	484	425	502	455	375	347	484	507
Colorado .....	.....	385	402	240	326	330	485	610
Connecticut	1,283	983	1,374	782	895	841	1,232	1,031
Delaware	1,989	1,289	1,488	1,154	957	859	1,124	1,304
District of Columbia.....	522	397	320	193	163	189	214	181
Florida	667	811	1,260	880	681	859	1,055	850
Georgia	1,274	905	1,391	1,076	1,061	926	1,162	1,144
Idaho .....	.....	.....	357	534	503	464	578	662
Illinois	1,042	1,067	946	764	660	533	700	733
Indiana	1,069	1,115	997	681	683	587	747	886
Iowa	706	581	820	622	632	650	862	963
Kansas .....	.....	296	534	667	481	617	948	1,055
Kentucky	987	971	851	832	780	682	856	1,015
Louisiana	832	1,014	1,096	1,135	1,044	1,049	1,341	1,491
Maine	1,041	972	1,141	895	880	775	863	958
Maryland	1,089	1,146	1,011	860	702	583	648	684
Massachusetts	894	1,037	1,140	898	864	811	762	777
Michigan	710	902	1,014	780	790	783	991	1,207
Minnesota	264	422	979	861	611	695	863	913
Mississippi	1,028	1,276	1,310	1,379	1,436	1,510	1,475	1,546
Missouri	992	995	498	745	677	587	722	755
Montana .....	.....	.....	307	508	416	448	601	627
Nebraska .....	.....	221	602	532	433	532	818	848
Nevada .....	.....	380	255	523	473	403	278	336
New Hampshire	975	869	912	908	902	879	1,057	1,169
New Jersey	1,188	1,251	1,020	729	668	657	784	805
New Mexico .....	.....	4,065	1,914	934	670	712	847	1,053
New York	726	694	741	537	536	496	527	562
North Carolina	2,178	1,985	1,866	1,813	1,641	1,499	1,680	1,615
North Dakota	a	806a	616a	450	566	698	862	1,019
Ohio	976	922	1,039	712	688	624	758	888
Oklahoma .....	.....	.....	.....	.....	979	1,179	605	719
Oregon	604	504	467	561	479	399	512	550
Pennsylvania	923	1,203	1,082	857	780	756	1,063	1,285
Rhode Island	1,294	1,818	1,333	1,166	1,220	1,161	1,166	1,175
South Carolina	1,683	1,539	1,823	1,621	1,491	1,569	1,668	1,702
South Dakota	a	806a	616a	450	471	579	846	909
Tennessee	1,383	1,070	1,117	1,024	856	740	1,040	1,146
Texas	496	668	797	754	628	660	855	876
Utah	2,276	5,034	3,773	1,209	669	637	837	852
Vermont	635	.....	.....	783	727	810	934	1,023
Virginia	1,027	1,190	1,139	1,116	1,003	912	1,137	1,166
Washington .....	.....	527	427	664	296	336	457	606
West Virginia .....	.....	.....	1,105	983	814	716	867	1,104
Wisconsin	627	684	1,344	1,098	1,001	920	1,228	1,330
Wyoming .....	.....	.....	274	611	477	651	712	725
United States	968	947	946	782	632	662	801	862

a—Dakota Territory embraced present states of North Dakota and South Dakota.