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# Getting Serious About Legal Ethics

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# **76 The Bar Examiner**

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**Getting Serious About Legal Ethics**



# National Conference of Bar Examiners

An Affiliated Organization of American Bar Association

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# The Chairmen's Letter

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## To the Members of the Conference:

This Chairman's letter is our joint effort, as the outgoing and incoming Chairmen of the Conference. It reflects the reality that the Conference is constantly undergoing change, transition and challenge.

In the 1983-1984 year, both William Morris and Len Young Smith retired after long and productive service to the Conference. During this year, we have honored Joe E. Covington on his retirement as the Conference's Director of Testing, and we have welcomed Joseph R. Julin as the new Director of Testing, Research and Development. The office of the Director has moved from Columbia, Missouri to Gainesville, Florida.

The Conference is in the process of conducting a self-study. (If you have not responded to the Chairman's letter in the May 1985 issue of *The Bar Examiner*, please do so.) The Conference and all Boards of Bar Examiners are considering the impact of *Hoover v. Ronwin* and *Piper v. The Supreme Court of New Hampshire*. Character and fit-

ness programs are being evaluated. In California, and various other states, new testing programs and new procedures are being designed to assure the competence of applicants to the Bar.

This summer marks a number of other transitions for the Conference. First, John Germany has retired as Chairman of the Multistate Bar Examination Committee. John, a former Chairman of the Conference, has served the Conference and the Multistate Bar Examination with unflagging dedication. In his work with Joe Covington and the members of the MBE Committee, John has played a key role in moving the MBE program forward; in improving the quality of the MBE and assuring its validity and reliability; and in addressing the complex and demanding problems that the Conference and the jurisdictions continually face. John's commitment has set a high standard of responsibility to our profession. We take this opportunity to thank John for many tasks well done and his exemplary leadership.

Stuart Lampe, who has served the Con-

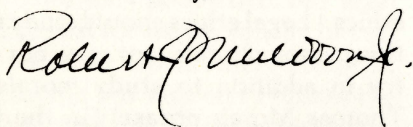


ference so ably as its Secretary for many years, this year asked not to be renominated for that position. If the Board of Managers has an "institutional memory," then Stuart has been it. The Board will miss Stuart, and his successors will have a very lofty standard to meet.

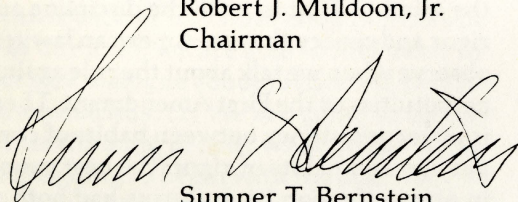
Another transition comes with Wayne Denton's election to the Board of Managers *ex officio* as the Chairman of the Conference's Committee of Bar Admission Administrators. Wayne succeeds the indefatigable Marlyce Gholston in that position. The Conference can never sufficiently acknowledge the contributions to the admissions process by people such as Marlyce and Wayne and the Administrators whom they represent.

In addition to Wayne Denton, the Conference welcomes three new members of the Board: Beverly Tarpley of Texas, Marvin Barkin of Florida and Stuart Duhl of Illinois. The Board continues to draw its members from the ranks of people who are, or have been, bar examiners around the country. The Conference will offer them opportunities for service, interesting occupation and association with a fine group of women and men dedicated to maintaining the highest standards so that people can continue, in Holmes' words, "to live greatly in the law."

Sincerely,



Robert J. Muldoon, Jr.  
Chairman



Sumner T. Bernstein  
Immediate Past Chairman



*This essay is a slightly reworked version of the introduction to the author's book American Legal Ethics (1985). Copyright 1985 by Matthew Bender & Co., Inc.; reprinted with permission. Portions of this essay originally appeared as an article in The University of Baltimore Law Forum, Fall, 1983, p. 6, and are used here with the permission of that journal.*

## Getting Serious About Legal Ethics

by Thomas L. Shaffer

There seems to be a difference between saying to a naughty child, "A good girl does not turn the garden hose on her grandmother," and, "If you turn the garden hose on your grandmother, you're going to be in trouble."

American legal ethics deserves to call itself *ethics* to the extent that it focuses on the first kind of statement. Ethics is not a matter of staying out of trouble. It is a matter of being good. The ultimate ethical question for American lawyers is whether it is possible, in America, to be a lawyer and a good person—and, if so, how. Law is relevant to this question, but it will never be enough; and it will not be relevant in the same way that law is relevant to the study of contracts or of federal income taxation.

This approach to legal ethics—to see legal ethics *as* ethics—will preserve or revive in the university and in the profession an ancient discipline: the study of morals as that subject has been of interest in philosophy, theology, literature, and history. It aims to locate and clean up and weigh the roots of behavior and of admonition.

This is a far more *personal* venture than study of codes of professional ethics—which are not ethics, but administrative regulation. A person accounts for himself and examines himself when she or he studies morals. This personal (or, as ethics scholars sometimes call it, pre-rational) concern is a necessary part of the agenda in ethics.<sup>1</sup> Legal ethics should study morals in this personally relevant way, but it should try in addition to study morals (to use Thomas More's phrase) "in the tangle of the mind."<sup>2</sup> That is, with the discipline and rigor and civility that we American lawyers observe when we talk about the rule against perpetuities or the First Amendment. There is no inconsistency between habits of compassion and habits of rigor; the best people in our profession have always had both.

If lawyers really studied ethics they would also study their culture. Those who have preserved the study of ethics in the West have been at home in every corner of our civilization, among Greek philosophers, among biblical Hebrews, in the church. Legal ethics should be comfortable



with thinkers from Augustine to Maimonides, Aquinas to Karl Barth, John Calvin and Martin Luther to the Niebuhrs and Martin Buber—all of these as well as the great American teachers of legal ethics, David Hoffman, George Sharswood, Thomas Goode Jones, Henry Drinker, and all the rest.<sup>3</sup>

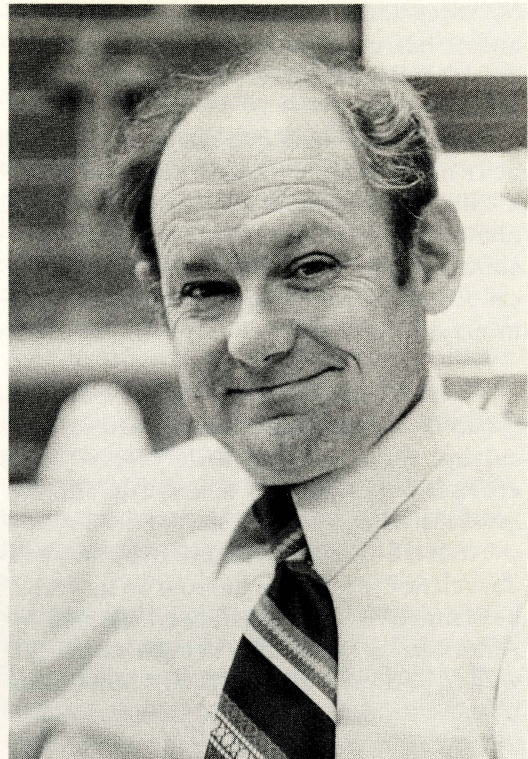
In these two ways (the personal and the cultural) legal ethics is in part a consideration of Plato's *Republic*—of the conversation between Socrates and Thrasymachus, in which Socrates decided that the two of them would discover justice in the way they treated one another.<sup>4</sup> And it is in part a consideration of everything that went into making each of us who she or he is, and that went into making our communities what they are.

I got a lasting lesson in legal ethics in the faculty lounge one day, when I came upon a colleague who was reading the latest issue of *Sports Illustrated*. "You know," he said, "they give Earl Campbell the highest praise you can give a Texan." (My colleague is a Texan.)

"Oh," I said. "What is that?"

"They say he had a good mama."

Earl Campbell's mother is personal to him, of course, but my colleague claimed also a cultural importance, for all Texans, in the fact that this prominent Texan has a good mother. The ethical lesson was personal and cultural: I doubt that our legal ethics will be real for us, personally or culturally, if we leave our mothers out of it, even if including our mothers reduces the time we have available for codes and cases. Because each of us values good mothers in all of our lives, we are able to find value in Socrates' dialogue about justice. He says to Thrasymachus: (1) We are going to figure out, as thinking people, what justice is. (2) We are going to begin with the discovery—a discovery I just noticed, or remembered—that justice is a virtue;<sup>5</sup> justice is something people give to one another. (3) And therefore, as we proceed, let's try to notice and learn from one another what justice is—from the way we treat one another. Justice is a moral subject, and an interesting subject, and is therefore an ethical subject; eth-



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ics can be defined as the discussion of (a) what is interesting (b) in morals. Justice as ethics—that is, as a virtue—has an agenda that is personal and an agenda that is cultural.<sup>6</sup>

Socrates had learned somewhere (maybe from his parents) (probably from his parents) that a good person treats other persons as creatures like himself. In a discursive, virtually academic setting, he put the label "justice" on what he already knew. That procedure will also be important in modern professional discourse, where lawyers, old and young, learn how to treat their clients. A human person, especially one up close, is what Justice James Wilson called the noblest work of God; much more important, he said, than the government.<sup>7</sup> It is wrong to use a person as the occasion of another person's profit or learning or entertainment. This point has personal significance; it has professional significance—it was the turning point in the



Socrates-Thrasymachus conversation—and it has cultural significance: Socrates did not call his discovery good manners; he called it *justice*.

Both stories—the one about Mr. Campbell's mother and Socrates's discovery that a conversation about justice shows what justice is—are interesting and they are about morals. Those facts make them ethical. Ethics is the consideration of what is interesting in morals.

**Vicarious Morals.** Universities and professions deal with interesting subjects by cutting them up into little pieces; legal ethics is only a piece of ethics. Our subject involves what a lawyer should do *as a lawyer*; that is a specific jurisdiction, but we will do well not to let it get narrow on us. It can be claimed—it *has*, often, been claimed by American lawyers—that being a lawyer is a way to become a good person.<sup>8</sup> Most of us lawyers think, at least, that being a lawyer is compatible with being a good person. We hope that the lawyer part of us does not *destroy* goodness. It is still possible, in living as a lawyer, to ask ourselves broad moral questions—such as:

- What am I up to in my client's life?
- How is my client changing because of me?
- How am I changing because of him—because of what I think he wants me to do?

Those are broad questions. They are also vicarious. That latter fact narrows inquiry, *but*, maybe, those questions are more interesting *because* they are vicarious. For example, if I ask you whether I should lie to the judge, you will likely tell me that I should not. If I ask you if I should endeavor to help the poor and the ignorant, you will likely tell me that I should. Professional ethics takes its special jurisdiction, not from those questions, but from the fact that professional life includes being of assistance to people who have *good reasons* for lying to judges and spurning the poor.

Professor Harry W. Jones said in a lecture at Villanova,<sup>9</sup> "One of the best men I have ever known, my Sunday School

teacher... was... a vastly successful practicing lawyer and a person of stiffly uncompromising rectitude... How could he have accommodated his keen sense of justice to the partisan ethics of the profession he thought of as his life's vocation?" Professor Jones found it interesting to ask whether his teacher would have helped a person who had been indicted for a violent crime; whether the teacher would be willing to conceal incriminating evidence, or to cast guilt on an innocent person. Such questions became interesting *because* they involved a client. They would have been less interesting if they had involved concealment or false accusation by the Sunday-school teacher in his own behalf. If that had been the case, Professor Jones would have gone to a different class, or maybe to a different church.

This vicarious focus gives legal ethics two kinds of tension: (a) between a lawyer's morals and the morals of his client, and (b) between a lawyer's morals and his sense of public and professional duty. Those tensions are topical in legal ethics. We who work together in the law are aware of these two tensions; we *feel* them. These two tensions are evident also in the history of American legal ethics. Chief Justice Roger Brooke Taney was attorney general of Maryland before he became a judge. As a lawyer he argued a case involving importers in interstate commerce. As a judge, years later, he decided the same question. When he was an advocate, he argued for a result that favored Maryland; when he was a judge he decided the other way. The inconsistency was, to his 19th-century gentleman's conscience, a bother—a moral bother. He felt he had to explain himself. "I argued the case... and... at that time persuaded myself that I was right.... But further and more mature reflection convinced me that the rule [finally] laid down by the Supreme Court is a just and safe one," he said. "The question was a very difficult one."<sup>10</sup> Why difficult? *Why is the inconsistent behavior even noticed?* Because Taney felt so tender about not following as judge a position he had urged as a legal rule when he was employed to be an advocate for a

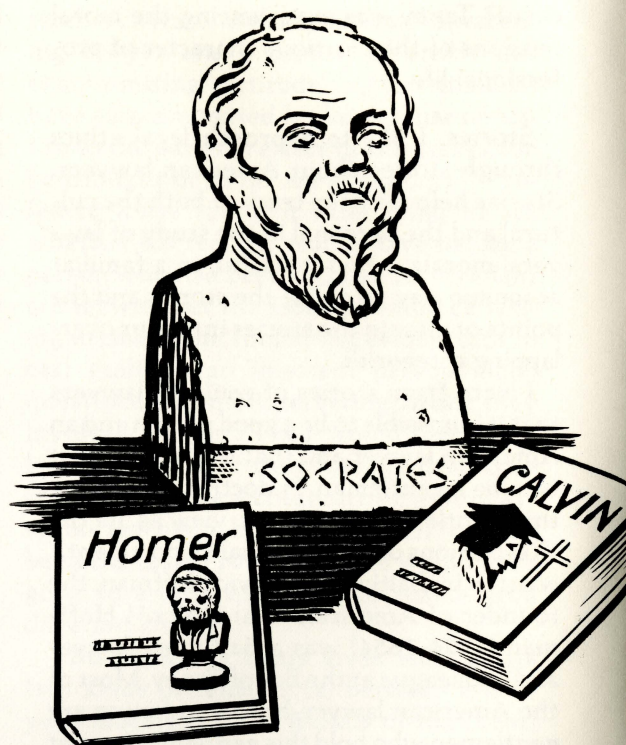


was a man of principle. He gained renown as a modern American lawyer-hero when Robert Bolt's play "A Man for All Seasons" became popular in this country in the 1960s.<sup>13</sup> More did not go to his death saying that martyrdom is a gentleman's lot; he died announcing three principles: the legal principle that silence is not treason, the moral principle that one should not take an oath falsely, and the religious principle that the King of England could not exercise ultimate spiritual authority. He also went to his death with significant self-deception about what was going on in England. Part of his self-deception was the notion that principles were an adequate way to describe his moral life.

David Hoffman's Resolutions are almost moral principles (he was fond of maxims), and so are the greater parts of the earliest codes of legal ethics, such as Judge Jones's 1887 Alabama Code, and the 1908 American Bar Association Canons. They all contain deceptions analogous to Thomas More's.

The claim that American legal ethics rests on principles suggests an ancient contrast between virtues and principles as being fundamentally significant in morals, a contrast between being *good* and being *right*, a contrast between Aristotle, who did not announce principles, and most of modern philosophical ethics and jurisprudence, which rarely announces anything else. The difference is between accounting for morals with the *Scout Handbook*, which talks about qualities, or dispositions, or habits such as bravery, cheerfulness, honesty, and loyalty, instead of the Code of Professional Responsibility, which is a set of principles.<sup>14</sup>

This difference is subtle at first, but it is real and it is important. When you get going on it, you are doing nothing less than invoking Earl Campbell's mother in legal ethics. You are discovering the fact that there is in our lives moral material that is deeper and more explanatory than principles: Maybe we come to see something as a moral problem *because* of this deeper material. The most interesting moments in ethics deal not with right versus wrong, but with right versus right; not with which



moral rules you follow, but with how you *live with* all the moral rules you are supposed to follow. Aristotle understood that; so did Atticus Finch.

*The legal ethics of the two kingdoms*<sup>15</sup> say that it is possible to be a good person and an American lawyer and that the way to do it is to separate one's personal morals from one's professional morals. This point of view says that it is possible to be a good lawyer and a good person too, but rarely the twain shall meet. The purest doctrinal expression of the two kingdoms in American legal ethics is the development of the adversary ethic in the late nineteenth century.<sup>16</sup> The adversary ethic says that it is selfish and immoral to refuse to do for clients what clients want done. Modern lawyer-heroes often announce this point of view (for example George V. Higgins's Boston criminal defense lawyer Jerry Kennedy<sup>17</sup>), but the moral argument has ancient roots. My way of naming it is borrowed from Martin Luther; much of his thinking on the point came from St. Augustine—and from the New Testament. There



are personal tensions here, too: It is difficult for many of us to figure out a way to live bifurcated moral lives, and it is almost always unsatisfactory to answer that bifurcation is what the legal system requires of us.

*Professional legal ethics* finds moral authority in the profession itself. Judge (Dean) Sharswood's 1854 essay on legal ethics invoked the morals of the fraternity.<sup>18</sup> Sharswood, who was a magnificently *clubbable* man, told his students that they would not go wrong if they sought in everything the approval of their professional elders. This point of view is prominent in the modern lawyer stories of Louis Auchincloss and James Gould Cozzens. The notion that the profession had or could have moral authority led to the founding of the first American bar associations in the 1870s, but the notion has ancient roots. The earliest hero stories in the West are stories of warriors and adventurers who did what they were given to do, and who learned from their colleagues how to do what they were given to do. This point of view preserves the tensions of modern professional life: Law students are familiar with the morality that calls on them to imitate their elders, but they are also familiar with Watergate, security frauds, and murky characters who hand around police courts and hospital emergency rooms looking for legal business.

**The legal ethics of dissent.** Rebellion is a persistent strain in the American legal profession; the American Revolution was, uniquely, a *lawyer's* revolution, as all of our subsequent national revolutions have been. Rebellion is noticeable in the "vulgar bar" of urban stories, in the frontier profession in America, and among modern lawyers who find unbearable elitism in bar associations and among gentlemen. Ephraim Tutt, lawyer-hero of more than a hundred short stories in the old *Saturday Evening Post*, is a 20th-century example of this point of view, as are Higgins's Jerry Kennedy and the wonderful, real-life Fanny Hotlzmänn.<sup>19</sup> These lawyers seem to believe, and sometimes say, that the way to be a good person

and a lawyer is to ignore what prosperous, elder lawyers say to do. In a more positive analysis, the morals of those who dissent are likely to be more personal and cultural than professional. They refuse to make a morality out of procedures such as the adversary ethic. They make the useful point that a client is a person before he is a moral problem. Some of them see the law as a means to social change. These last talk, as the civil-liberties lawyer Charles Morgan does,<sup>20</sup> not of law *and* order, but of law *against* order.

• • •

How does one talk in the profession about such moral point of view? The how-do-we-talk question, to Socrates, was substantive; the answer to it contains the answer to what justice is. The most common method for talking about moral questions in law school, and especially in the study of professional responsibility, has been to talk in quandaries. Our penchant for the study of cases in law carries over into a preference for cases in morals, and so we present a dilemma and say, "What would you do?" This method is attractive, unavoidable, and limited.

For one thing, the case method in morals overlooks the fact that a quandary *becomes* a quandary *because* of morals. Morals may solve quandaries but, before that, they *create* quandaries. Jean-Paul Sartre presents the case of the World War II French patriot who is the sole support of his mother: Should he leave home and join the Free French Army, or stay at home and care for his mother? There would be no quandary if the man in the story had not learned, somewhere, to love his country—and not only his country but a particular view of what his country is. There would be no quandary if he had not learned, somewhere, to love his mother, and not only to love her, but to express his love in a particular way. Sartre uses the story to make the existentialist claim that our morals are the product of our choices; they are morals only because we choose to make them so. I think he came up with a good quandary, but, in



figuring it out, he ignored culture; he did not take account in a truthful way of Earl Campbell's mother. The mother in the Sartre example is not a mystery and a source of value, as real mothers are; she is only a difficulty. Sartre might have done better if he had been a Texan.

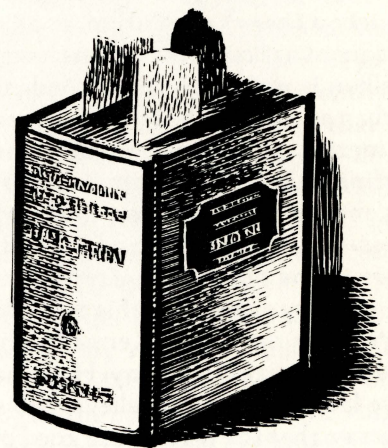
The maternalistic lawyer who has as a client a teenager in trouble in juvenile court may be in a quandary when she compares doing for her client what her client wants done: She wants her client to grow up. Her client wants to be restored to his colleagues in the alley. The state boys' school would dry him out and teach him a trade, but he is not anxious to be enrolled there. Procedural notions point in one direction; the wisdom—such as it is—of a culture that imposes values on children, as any culture inevitably does, points in another direction. But the quandary will not be there if mama-knows-best lawyer morality is strong enough to overcome her law school acculturation to free choice and due process. (Atticus Finch, was a remarkably paternalistic lawyer, but Atticus never went to law school.) The quandary would not be there if moral, not legal, notions of civil liberty were strong and the determination to protect the weak were not as strong as our American-lawyer-gentleman stories make it. One who discusses morals in the context of a quandary needs to know what he is doing, and what he is not doing.

For another thing, quandary ethics has Sartre's existentialist bias. It tends to equate one's morals with one's taste in beer. It tends to make a fetish (rather than a virtue)<sup>21</sup> of tolerance and to avoid intellectual rigor. In a characteristic display of this, one of us presents the case of the maternalistic lawyer and the teenager, and then directs argument over it for a while, and then moves on to the next quandary. We do not *evaluate* the moral arguments we make to one another. It is not true that every point of view in ethics is as valuable as every other point of view. A good deal of moral argument is fatuous, and can be shown to be fatuous. Part of our professional calling is to *think* about our professional morals. If the topic of discussion

were covenants-running-with-the-land, we would see that in a moment. The *First Resolution in Spencer's Case*, that a tenant's covenant to build a bridge cannot benefit a successor owner of the land, is a silly rule, and the discussion in property class will not go on long before someone notices and describes the silliness. The general attitude among property teachers is that such judgment and analysis *must* occur or students will not learn to think like lawyers. Quandary ethics is weak because it does not call upon the intellectual rigor we demand in our property courses.

For some reason, possibly because values are often religious and Americans have the anti-intellectual notion that it is not civil to talk about religion, we have not analyzed and debated moral notions with the openness and discipline we bring to legal notions. Quandaries keep us in the intellectual shallows; they make it comfortable for us to go on a little hike through a field of moral brambles and then come home thinking we have learned something.

Finally, quandaries hide people, as Sartre's example hid the mother of the French patriot. Quandaries are abstract. It is probably the case that no one would retain his clarity on the answer to a moral quandary, such as Sartre's example or the juvenile court case, after he gets to know the people involved. For this reason, I find it useful to read and think and talk about stories. Stories *display* morals more than announce them. They involve quandary and princi-





ples, but they put quandary in a narrative, human context; and they show that principles are something we live with more than live by. The context cuts the quandary and the principle down to size. A story helps give the quandary and the principle appropriate amounts of weight, that is, the weight they have in life. Stories are in fact the way we know what to do about the pain and the tragedy of those who come into our professional lives.

1. John Hill, "Christian Moral Education," 9 *Journal of Religious Ethics* 103 (1981).
2. Robert Bolt, *A Man for All Seasons* 73 (Vintage ed. 1962).
3. See Armstrong, "A Century of Legal Ethics," 64 *A.B.A.J.* 1063 (1978).
4. I Plato, *The Republic* 613 (Random House ed., Jowett trans. 1937).
5. See Thomas L. Shaffer, *On Being a Christian and a Lawyer* 135-142 (1981).
6. Aristotle and Thomas Aquinas are common sources, in the Western ethical tradition, for the ethics of virtue; see Gilbert Meilaender, *The Theory and Practice of Virtue* (1984); and "Joseph Pieper: Explorations in the Thought of a Philosopher of Virtue," 11 *Journal of Religious Ethics* 114 (1983); Stanley Hauerwas, *Character and the Christian Life* (1975).
7. *Chisholm, Executor, v. Georgia*, 2 *Dallas* 419, 462-463 (1792).
8. See Thomas L. Shaffer, "Brother Justinian Goes to Law School," 34 *Journal of Legal Education* 190 (1984); Harry W. Jones, note 9 *infra*.
9. Harry W. Jones, "Lawyers and Justice: The Uneasy Ethics of Partisanship," 23 *Villanova Law Review* 957 (1978).
10. Bernard C. Steiner, *Life of Roger Brooke Taney* 268 (1922).
11. "Fifty Resolutions on Professional Deportment," in II David Hoffman, *A Course of Legal Study* (2nd ed. 1836); in Thomas L. Shaffer, *American Legal Ethics*, ch. 3 (1985).
12. Alexis deToqueville, *Democracy in America* (1835).
13. Note 2 *supra*.
14. Edmund Pincoffs, "Quandary Ethics," *Mind*, Oct. 1971, pp. 552-571; James William McClendon, Jr., *Biography as Theology* 13-38 (1974).
15. Thomas L. Shaffer, "The Legal Ethics of the Two Kingdoms," 17 *Valparaiso University Law Review* 1 (1983); in *American Legal Ethics* (note 11 *supra*), Part Two.
16. Michael Schudson, "Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles," 21 *American Journal of Legal History* 191 (1977); in *American Legal Ethics* (note 11 *supra*) Part Two.

17. Kennedy for the Defense (1980); *Penance for Jerry Kennedy* (1985).
18. "An Essay on Professional Ethics," in 32 *Reports of the American Bar Association* (1907); this version is the fifth revision of the 1854 essay.
19. Mary Case Harriman, "Miss Fixit," *The New Yorker*, Jan. 30, 1937, pp. 21-25, Feb. 6, 1937, pp. 22-25; Ted Berkman, *The Lady and the Law* (1976).
20. Frederick Powledge, "Something for a Lawyer to Do," *The New Yorker*, Oct. 25, 1969, p. 63.
21. Grant Tinker, *Tolerance: Toward a New Civility* (1975): Tolerance is not a way to avoid delicate subjects, but a way to discuss them with compassion—a matter of "waiting for the other."



## Readmission and Reinstatement, a Role for Bar Examiners: A Florida Experience

by Stanley A. Spring

**M**odel Rules for Lawyer Discipline and Disability Proceedings (Model Rules) have been developed by the ABA Standing Committee on Professional Discipline to assist jurisdictions in implementation of Lawyer Standards and are published in *Professional Discipline for Lawyers and Judges*, a publication of the National Center for Professional Responsibility of the ABA.

The Model Rules and all jurisdictions regard disbarment as the most severe of all lawyer disciplines. The sanction of disbarment results in removal of the license to practice law. A substantial period of time, usually three to five years, is required by most jurisdictions before application for readmission is even permitted. As indication of the finality of disbarment is the use of the term *readmission* in the Model Rules and most jurisdictions when identifying the process and procedures required of the disbarred lawyer to again secure a license and resume practice of the law.

Reinstatement is used in the Model Rules and most jurisdictions to identify the process and procedures required of the lawyer

after the sanction of suspension, disability, resignation in some cases, and in other situations where fitness to resume practice must be shown after a period of interrupted practice not involving disbarment.

The Model Rules, as well as Florida rules, provide that a judgment of disbarment, as well as resignation, terminates a person's status as a lawyer by removal of the license to practice law. In resignation, as well as disbarment, readmission is and should be used rather than reinstatement when describing those procedures required to again secure a license to practice law.

Suspension, by definition, connotes temporary disqualification, and *reinstatement* is used when describing the procedures necessary in removing temporary disqualification to practice where neither the license nor the court's jurisdiction over the lawyer has been removed or terminated during the period of suspension.

### Readmission

The Model Rules recommend that after disbarment, the lawyer ought not be able



to apply for readmission until at least five years after the effective date of disbarment and all petitions for readmission should be filed with and considered by the disciplinary agency. The disciplinary agency has no independent mission or original jurisdiction in determining fitness for admission and licensure to practice law.

In contrast, procedures contained and provided for in The Florida Bar Integration Rule, Article XI and its Bylaws, (Rules of The Supreme Court of Florida regulating lawyers admitted to practice in Florida), provide that no application for readmission may be tendered within three years after the date of disbarment, or such longer period as the court might determine in the disbarment order. Further, and significantly different than the Model Rules, a disbarred Florida lawyer may be readmitted only upon full compliance with the rules and regulations set forth for those governing admission to the Florida Bar. Effective since December 1, 1972, this rule regulating lawyers in Florida requires a disbarred lawyer to make application for readmission to the Florida Board of Bar Examiners, rather than the disciplinary agency, as recommended in the Model Rules and as followed in most jurisdictions.

The Florida Board of Bar Examiners have established and developed over the years successful and tested procedures to determine the character, fitness, and general qualifications of persons applying for a license to practice law. These procedures include the successful taking of the Florida Bar Examination to insure competency in the law. A disbarred Florida lawyer to again resume practice of the law must, as any other applicant, satisfy the Florida Board of Bar Examiners of these same qualifications including the successful retaking of the Florida Bar Examination.

The Florida Board of Bar Examiners has by its very mission developed the necessary expertise to satisfy itself that each applicant recommended to the court for licensure is not only of good character but also has adequate knowledge of the law, including the Code of Professional Responsibility, the standards and ideals of the pro-



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fession, and is in all ways a fit person to take the oath and perform the obligations and responsibilities of an attorney.

It is not unusual for the Supreme Court of Florida in disbarment orders to impose periods ranging from four to twenty years, rather than the minimum three years, after which the disbarred lawyer may then make application for readmission.

Presently pending before the Supreme Court of Florida is a proposed rule change submitted by the Board of Governors of the Florida Bar providing that no application for readmission may be tendered within five years after the date of disbarment or such longer period as the court may order. Raising the minimum period before readmission after disbarment to five years, Florida would then conform to the time

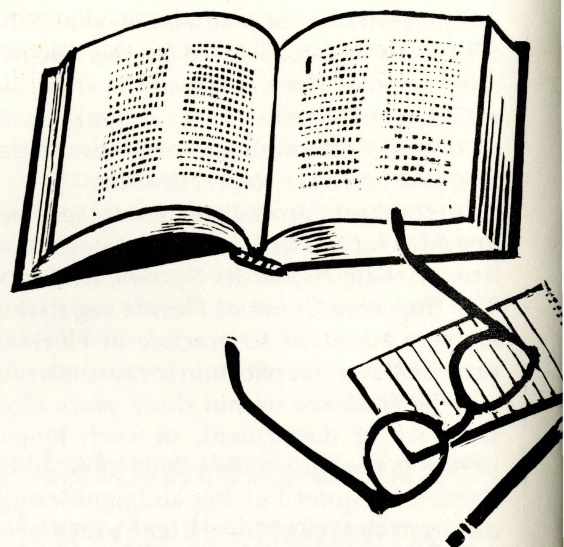


standard set forth in the Model Rules for readmission application after disbarment.

In the many meetings of the Florida Bar Board of Governors and its committees over the past several years during which changes to the rules regulating the Florida Bar were considered, no suggestion was received from any source that consideration be given to returning readmission procedures after disbarment from the Florida Board of Bar Examiners to the disciplinary agency. To the contrary, the Florida Board of Bar Examiners, who as a separate arm of the Supreme Court of Florida are independent of any disciplinary agency, have discharged their assigned responsibilities in readmission after disbarment so satisfactorily that the ABA Standing Committee on Professional Discipline and other jurisdictions would be well served to give serious consideration to adopting a rule similar to Florida having the bar admission agency, rather than the disciplinary agency, determining fitness for readmission after disbarment.

Florida rules, along with the majority of jurisdictions and the Model Rules, do not authorize permanent disbarment. However, Florida rules do provide for a lawyer to resign with disciplinary proceedings pending, and if the petition to resign states that it is without leave to apply for readmission permanently, such condition precludes any readmission. All other petitions for readmission after resignation with discipline pending may be filed within three years or such additional time as may be stated in the petition to resign and as reflected in the court order accepting and approving the resignation.

The Supreme Court of Florida has not hesitated to bind resigned members to their petition of permanent resignation, the court distinguishing that a judgment of disbarment does not authorize permanent disbarment in the sense that a disbarred lawyer may never petition for readmission. In effect, permanent disbarment does live in Florida but in a different form. Notwithstanding that a permanent resignation has the same effect and goes beyond the disbarment rules, the readmission procedures after resignation with discipline pending



have not been assigned to the Florida Board of Bar Examiners as in disbarment. Rather, readmission after resignation with discipline pending, which as in disbarment requires a minimum of three years before readmission, has remained within and the responsibility of the disciplinary agency to determine those qualifications that are the business of the bar examiners.

The Model Rules, in dealing with resignation while discipline is pending, treats the situation as a disbarment by consent rather than a special type resignation with its own set of special rules to cover the situation as Florida does. Florida would be well advised to treat resignation with discipline pending as a disbarment by consent, as recommended in the Model Rules. Readmission after resignation with discipline pending would then remain with the Board of Bar Examiners, as it does after disbarment.

Readmission procedures after a resignation, whether or not triggered by pending discipline, should be assigned to and the responsibility of the bar admission agency rather than the disciplinary agency. Readmission procedures after disbarment being assigned to the Florida Board of Bar Examiners, as noted before, has worked well and with uniformity. The assignment of readmission procedures after resignation



to bar examiners would be logical and consistent with their mission. Readmission in Florida was routine after disbarment while administered by the disciplinary agency. Since 1972, when readmission after disbarment was assigned by the court to the Florida Board of Bar Examiners of seventy-three lawyers subsequently disbarred, one has been found fully qualified and readmitted to practice.

The Model Rules, in providing standards for readmission after disbarment, given general and broad direction to the disciplinary agency in determining fitness for readmittance.

Model Rule Standard 6.2 provides that the lawyer should not be able to apply for readmission until at least five years after the effective date of disbarment and should not be readmitted unless he or she can show by clear and convincing evidence: rehabilitation, fitness to practice, competence, and compliance with all applicable discipline or disability orders and rules.

The standard does not provide uniform procedures or examinations within the jurisdictions for use in determining with consistency and accuracy fitness to practice, the very mission of bar examiners who have long since developed valid examinations and procedures to determine with uniformity fitness to practice.

In order to bring about uniformity, fairness to lawyers and the public in determining fitness to once again practice law, Florida has accomplished this, in the case of disbarred lawyers, by using the already existing machinery and experience of the Board of Bar Examiners. Attempting to develop a parallel body of rules, procedures, and examinations within the disciplinary system that would accomplish the same task in Florida had not been successful in the past. Although the rules in Florida still provide that readmission after resignation remains within the disciplinary agency, a case can be made for also assigning to the bar examiners this responsibility, particularly in those cases involving pending discipline, which require a minimum three-year separation from practice before any application for readmission may be

made, and those resignations of any type involving a substantial period of separation from the practice of law.

### Reinstatement

In treating reinstatement after suspension, neither Florida, the Model Rules, nor any other jurisdictions I'm aware of, have assigned this responsibility to bar examiners. It remains for the disciplinary system to determine fitness for reinstatement after suspension.

The Model Rules recommend that suspension be for a specified period of time not to exceed three years. Pointing out in those cases where the misconduct has been so severe that even a three year suspension would not be adequate, the lawyer should be disbarred. A specified period of suspension further provides in each case the basis for a time certain in which the reinstatement process may be commenced after suspension.

Reinstatement proceedings after suspension most often require at least ninety days to complete, and in some instances, a much longer period of time is required.

Requiring reinstatement in all cases of suspension regardless of the duration of the suspension would serve as an additional sanction where the suspension has been ordered for a short period of time. The Model Rules recommend reinstatement from a suspension of six months or less be automatic upon the expiration of the period of suspension along with the filing of necessary affidavits of compliance with the orders and conditions applicable in the particular case.

Florida rules provide for automatic reinstatement in suspensions of three months or less as no proof of rehabilitation or further hearings are required. For greater clarity, a rule change has been proposed providing the suspension be for ninety days or less, rather than three months or less. The three month or ninety day rule in Florida authorizing automatic reinstatement rather than six months, as recommended in the Model Rules, has created no real problems in Florida, nor given rise to



any efforts to provide a longer period of suspension before rehabilitation or reinstatement hearings would be required.

The reinstatement procedures after suspension recommended in the Model Rules follow those recommended for readmission after disbarment. The Model Rules recommend reinstatement should require the lawyer who has been suspended to show by clear and convincing evidence rehabilitation, compliance with all applicable discipline or disability orders, and a fitness to practice with current competence. Factual issues involved are assigned to a disciplinary hearing committee for recommendations to a disciplinary board and to the court, following the same procedures for readmission after disbarment.

Florida rules for reinstatement proceedings after a suspension of over three months require of the lawyer a showing by clear and convincing evidence of rehabilitation and are set forth in greater detail in the rules. The petition for reinstatement after suspension is referred to a referee, a trial judge, who conducts the hearing in the same manner as a disciplinary trial, but pleadings other than the reinstatement petition are not required. The matter to be decided by the referee is the fitness of the suspended lawyer to resume the practice of law. The rules place emphasis upon the protection of the public. The petitioner must establish that his or her conduct will justify the restored confidence of the public, professional contemporaries, and of the Supreme Court of Florida. The petitioner must sustain the burden of proving fitness to resume practice in terms of integrity as well as professional competency.

Some of the elements that have been used by the petitioner to sustain this burden in Florida are:

1. Strict compliance with the original disciplinary order of suspension.
2. Evidence of unimpeachable character and moral standing in the community.
3. Evidence of good reputation for professional ability and competence.
4. Evidence of lack of malice and ill feeling

toward those who were compelled to bring about the original disciplinary proceedings.

5. Personal assurances, supported by corroborating evidence, revealing a sense of repentance as well as a desire and intention to conduct himself or herself in an exemplary fashion in the future.
6. In cases involving misappropriation, a showing of restitution.
7. A showing by petitioner of conduct in the life of the community to justify a conclusion that petitioner has been impressed with the importance of ethical conduct and is morally equipped to resume a position of honor and trust among peers at the bar.

Florida Rules further require the following items to be furnished by the petitioner:

1. Authorization to the District Director of Internal Revenue for release of petitioner's federal income tax returns since original admission to the bar. (Florida has no state income tax.)
2. A copy of all disciplinary judgments previously entered against the petitioner.
3. All specifics in the disciplinary proceedings that resulted in the suspension or resignation from which reinstatement is being sought.
4. Personal data since suspension, including occupation, income, residence, creditors, landlords, obligations, arrests, any civil or criminal proceedings.
5. Applications made for licenses requiring proof of good character.
6. Proceedings involving his or her standing as a member of any organization or as a license holder subsequent to the suspension.

The items and examples above are not all inclusive and individual petitions may require more or varied information depending upon the original disciplinary order.

A copy of the petition is filed with the Supreme Court of Florida and is served



upon the disciplinary agency for investigation. The disciplinary agency assumes the role of adversary in reinstatement proceedings as it does in all disciplinary matters.

The investigation of reinstatements, as conducted by the disciplinary agency in Florida, has been criticized in the past on several occasions by members of the Board of Governors who supervise the disciplinary system for the court in Florida. Criticism was prompted by reinstatement of lawyers with whom board members were familiar and believed were not worthy of reinstatement.

In Florida where rehabilitation and fitness to resume practice must be shown by the petitioner, little variation exists in the outcome of the proceedings as conducted by the disciplinary system. During the 1983-84 bar year, five reinstatement hearings were held and all five petitioners were recommended for reinstatement. The Supreme Court, by its own review, denied three. During the first nine-month period of the 1984-85 bar year, eight reinstatement hearings were held and all eight petitioners were recommended for reinstatement as well. The Supreme Court, by its own review, denied one. Since July 1, 1983, every petitioner for reinstatement requiring a hearing showing rehabilitation has been recommended to the court for reinstatement. Referees in some cases have required little demonstration of the lofty goals of rehabilitation. There is little to

contest in a reinstatement proceeding if the disciplinary agency has not changed hats as bar examiners and conducted a thorough and complete investigation to determine the petitioner's fitness to resume the practice of law. This is a most difficult assignment without a system of uniform testing and examinations to insure competency.

The disciplinary agency in Florida, in conducting a reinstatement investigation, does some or all of the following: furnish copies of the petition for reinstatement to concerned Board of Governor members, local bar associations, and to discipline committees which brought the original charges. An attempt is made to locate and interview those involved in the original disciplinary case, including complainants, referee, any other counsel involved, as well as witnesses, prosecutors, probation officers, and judge, where a criminal case gave rise to the suspension, or similarly if civil litigation was involved. Consideration was given, but not authorized by the Board of Governors, to obtain any pertinent comments regarding the lawyer seeking reinstatement by publication of the pending proceedings in the *Florida Bar News*, which publication reaches all members of the Florida Bar.

In reinstatement hearings, as now conducted, few witnesses ever come forward to give negative or derogatory information concerning the petitioner. Under current rules, without a most detailed, intensive, and penetrating investigation by the disciplinary agency, reinstatement of the petitioner is assured.

Depending upon the referee conducting the reinstatement proceedings and the investigation conducted by the disciplinary agency, the burden upon the petitioner most often results in completing the petition, payment of necessary deposits and costs, and producing some lawyers or judges who will speak well of the petitioner. Rarely does a referee require the petitioner to submit to any type of testing or examination to insure competency in current law, ethics, or the rules, regardless of the duration of the suspension or separation from practice.





The Model Rules recommend that the disciplinary agency, as in readmission after disbarment proceedings, conduct reinstatement hearings and make final recommendations to the court.

The Board of Governors, in accepting their responsibilities as the governing body of the disciplinary system of the Florida Bar, have attempted through several proposed rule changes to bring about additional improvement and uniformity in reinstatement proceedings.

One proposed change would provide that a suspension of more than ninety days *may* require passage of the Florida Bar examination. Another change would provide that suspensions which continue more than three years *shall* require passage of the Florida Bar examination within one year prior to reinstatement.

Proof of competency required in reinstatement proceedings where discipline had been involved would then include a certification by the Florida Board of Bar Examiners of the successful passage of the bar examination subsequent to the date of suspension. The successful passage of the Florida Bar examination by being available to referees in suspensions of over ninety days and being required in suspensions of over three years will, no doubt, be used frequently in suspensions of less than three years to satisfy the requirement of competency.

A further change proposed in the rules would provide that lawyers who retire, resign without discipline, or have been separated from the bar for non-payment of dues for a period of three to five years *may* be required to successfully complete all or a portion of the Florida Bar examination before reinstatement. Those who have been separated for a period of five years or more would not be reinstated except upon certification by the Florida Board of Bar Examiners, as currently required by the rules in readmission after disbarment proceedings. The disciplinary agency would not have to determine, in these cases, as it currently does, fitness without a valid test or examination for competency.

The Model Rules offer no specific recommendations for determining proof of com-

petency in reinstatement or readmission proceedings regardless of the reason or period of separation or suspension.

Readmission and reinstatement proceedings are necessary to prove rehabilitation of the lawyer. Rehabilitation should reflect a fitness to resume the practice of law and requires a showing of the restoration of integrity, good character, and competence, the same qualities which were required of the lawyer for licensure.

Disciplinary agencies are not and should not be charged with establishing procedures and expertise to determine of a person those qualities required for licensure. The disciplinary system is the structure established to direct its talents and resources in developing procedures and expertise to ferret out of the law those who have demonstrated by their conduct they are for some reason unable or unwilling to properly discharge their professional duties.

Florida has been a leader in giving the Board of Bar Examiners as in readmission proceedings after disbarment the continuing responsibility in determining those qualities required for licensure, where those same qualities are necessary to be demonstrated for readmission and reinstatement as well.

There continues in Florida a forward looking move toward greater involvement of the Board of Bar Examiners by recognizing and using their expertise and experience in all types of reinstatement proceedings where fitness to practice and proof of competency are required to be shown.



# South Carolina's Rule 5 Works Well

by Bruce Littlejohn

**T**he Constitution of South Carolina imposes on the supreme court the sole responsibility of determining those persons entitled to practice law and those persons who should be disbarred or otherwise sanctioned. In 1979, I chaired a committee appointed to study admissions to our Bar. Our study necessarily came to involve legal education and, in turn, lawyer competency in general.

In February 1982, I prepared, by request, an article for publication in the *Bar Examiner* entitled "Lawyer (in)Competency: Who is Responsible?" I have now been requested to comment upon how our Rule 5, which was adopted in 1979 as an outgrowth of our committee study, has worked.

Rule 5 of the Rules for Admission to the Bar for South Carolina is directed to the applicant. It has nothing to do with the operation of any law school and we recognize their academic freedom to structure legal education. At the same time, I am sure the law schools recognize our constitutional duty to see that those persons admitted to the Bar are competent and worthy of hire.

Competency is not easy to define, evaluate or accomplish. Our committee study was inspired by observations of members of the supreme court that many young lawyers, and sometimes older ones too, were less than capable of representing their clients skillfully in the trial of a case. Rule 5 provides five basic approaches which are aimed at improving lawyer competency:

(1) A requirement that the clerk of the supreme court communicate every summer with the pre-law advisors in South Carolina undergraduate schools and urge them to encourage students who expect to pursue a career at law to study English composition, English public speaking, United States history, accounting, economics, literature, political science, logic and philosophy.

(2) We require that law students applying to stand for the bar exam in South Carolina must have taken courses in the areas of contracts, property, constitutional law, business law, civil procedure, commercial law, equity, evidence, legal writing and research, professional responsibility, taxation, torts, trial advocacy and domestic relations.

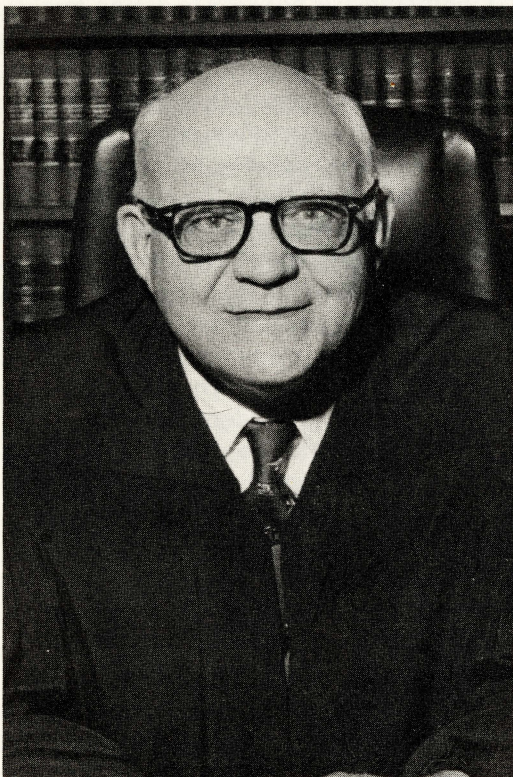


(3) We require every admittee to the Bar to have had eleven trial experiences before he or she may try a case *alone*: three in Criminal Court, three in Civil Court, three in Family Court, one in an administrative law hearing and one in an equity hearing. These experiences may be acquired by assisting an attorney or by observation of an entire trial.

(4) A student practice rule has been promulgated.

(5) Commencing in the fall of 1984, a thirty-hour "Bridge the Gap" Program is required of all applicants before admission.

The impact of all of these is difficult to prove. Fortunately, we do not have to prove with mathematical certainty the benefits which admittees receive from these requirements. It is sufficient that we have a conviction that students who have complied with these rules are better prepared to serve clients than students who have not had the benefit of these programs.



Bruce Littlejohn is Chief Justice of South Carolina.

I will now proceed to briefly discuss each. In the pre-law handbook of the Association of American Law Schools will be found the following: "The Association's responsibility in matters of legal education cannot be met by prescribing certain courses and extra-curricular activities for students planning later to study law." Such a statement is coming to be recognized as a disservice to the student, the lawyer and his client. The medical profession requires study of certain subjects prior to admission to medical school. The law schools might well emulate the formula. Two important committees agree with us.

In recent years, the American Bar Association has appointed two committees: one chaired by Attorney Ronald J. Foulis of California to study legal education<sup>1</sup> and one chaired by Attorney Herschel H. Friday of Arkansas to study professional competency.<sup>2</sup>

The Foulis committee had this to say:

...In our view, the time may be ripe for the reformulation of advisory statements on prelegal education. Certain perceived deficiencies may be more suitably remedied by prelegal than by legal education. The possibilities for action include the recommendation of a particularized prelaw curriculum or of certain prelaw majors, limited but specific course recommendation, or at a minimum the dissemination of information about legal education and the legal profession that takes into account relevant, recent research findings...

The Friday committee agreed with the Foulis committee and said:

...Prelegal education is an important beginning in the eventual mastery of the knowledge and skills of the lawyer. The *Foulis Report* recommended that the Section of Legal Education and Admissions to the Bar and the Association of American Law Schools (AALS) confer for the purpose of reexamining and rewriting the 1953 AALS Statement of Prelegal Education to provide clearer and more concise guidelines for prelaw students. While the principal concern expressed in the *Foulis Report* relative to prelegal education was the need to master advanced writing skills and effective oral communication, the report went on to support the view that undergraduate education should include 'courses that provide a basic understanding of accounting, economics, psychology, and of his-



torical and contemporary social and political processes.'... The Task Force concurs with the recommendation and urges, with the *Foulis Report*, that prelaw students should receive clear and concise information expressing that preference. In the broadest sense, we take the *Foulis Report* to support undergraduate liberal education as highly desirable preparation for law school (as does the 1953 AALS Statement), and the Task Force joins in that position.

I have little sympathy for the student who takes "crip" courses unrelated to skills desirable at the law in order to build up a good GPR and enhance the possibility of getting a law school entrance application approved. Lawyers are in the word business; they have nothing to offer their clients except written and spoken words. Skills in the field of communication should be developed at the undergraduate level. Law schools offer no courses in public speaking, but the faculty is unable to explain why.

The University of South Carolina Law School, which supplies about ninety per cent of our applicants, lists more than one hundred courses in the catalog. Many of them are totally unrelated to the problems which the South Carolina lawyer will most likely be solving. It would be well, if one had the luxury of time, to study all of these courses, but inasmuch as time is limited, we reached the conclusion that students should be studying the subjects concerning

those areas of the law into which they will most likely be thrown. Every law school has what they refer to as a core curriculum, required subjects, which are so important every student should study them. Our Rule 5 includes the subjects named in most core curriculums: contracts, property, constitutional law, legal research, civil and criminal procedure. The Rule merely adds a few more which we think equally important. Students should not be allowed to waste their time on Roman law, with which they will never be concerned, when in truth they will be concerned with such things as torts, taxation, insurance and domestic relations.

Our Rule requires that each admittee to the Bar have eleven trial experiences in various courts as named above. This will not assure a good trial lawyer, but inescapably, the admittee will know more about how to act than if he or she had never seen a case tried. Prior to the adoption of our Rule, it was not unusual to find young lawyers admitted to practice who had never even seen a case tried before a judge or jury.

Our student practice rule permits selected students to participate, along with a lawyer, in the trial of cases. Similar rules have been promulgated in many other states.

Our "Bridge the Gap" Program follows the pattern of several other states which now require that students take a course in office and courtroom procedures. Ours is more comprehensive than most. It is directed by Chief Justice Elect J. B. Ness. It is a thirty-hour course, and the faculty is composed of some of the state's most outstanding lawyers and judges. We undertake to teach the young lawyer how to act and what to do when the client comes to the office and how to act and what to do when he goes to court for the first time. The students were unhappy with this course when it began. On the last day, students were delighted with what they had learned.

At first the demands of Rule 5 were attacked by the academic world, but the Rule has now come to be accepted and the benefits appreciated. In order to improve the administration of justice, we need to insure





the competency of the judges and the lawyers. This can be done by improving the law student and his education. The law student can be improved by having him begin his training for a career at the law at the undergraduate level. All of this we undertake.

Legal education and lawyer competency will not be greatly improved until the House of Delegates of the American Bar Association come to grips with the accreditation of law schools. Routinely, the House rubber stamps the recommendations of the Section on Legal Education and Admission to the Bar. The section is dominated by professors and law school deans. Few members of the Bar have read the requirements for the accreditation of a law school. A detailed study of these recommendations will reveal that there is substantially nothing therein which requires good training for the student. Much is included to assure favorable working conditions for the faculty.

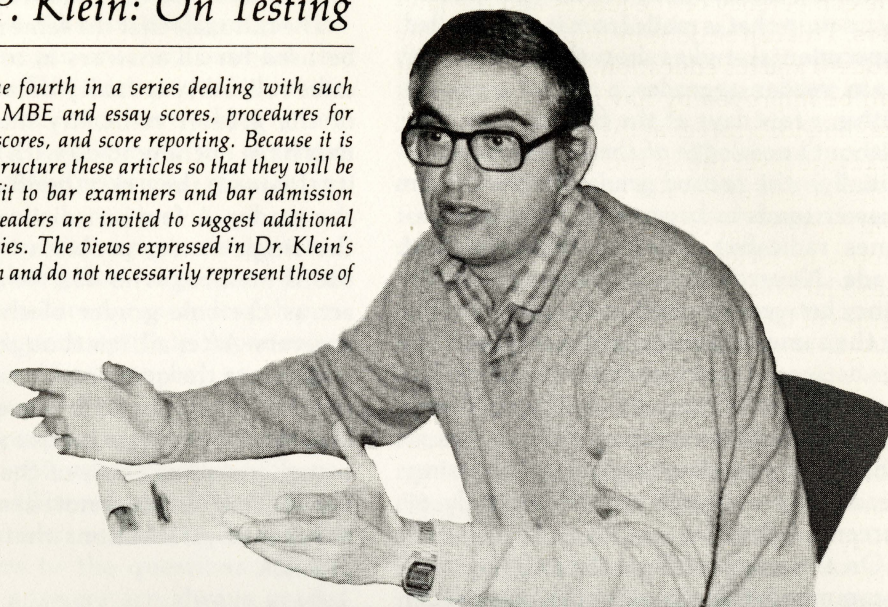
Mr. Allan Ashman has requested me to report on the workings of our Rule 5 which has now been in effect for five years. The answer, Mr. Ashman, is that it is working well. The bench and bar in South Carolina are happy with the program. The students are benefitting from it, and in turn, the lawyer and his client are assured of better representation.

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1. Law School and Professional Education Report and Recommendations of the Special Committee for a study of Legal Education of the American Bar Association.
  2. Report of Task Force on Professional Competency — American Bar Association.



## Stephen P. Klein: On Testing

*This article is the fourth in a series dealing with such topics as scaling MBE and essay scores, procedures for setting pass/fail scores, and score reporting. Because it is our intention to structure these articles so that they will be of optimum benefit to bar examiners and bar admission administrators, readers are invited to suggest additional topics for this series. The views expressed in Dr. Klein's article are his own and do not necessarily represent those of NCBE.*



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## IV. Essay Grading: Fictions, Facts and Forecasts

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**T**he first portion of this article discusses four common myths about grading essay answers. These misconceptions often lead to grading practices that do not conform to official board of bar examiner policies or satisfy basic professional standards for score reliability and fairness to applicants. The four myths are:

- It is best to have one and only one reader per question.
- Extraneous characteristics of an answer, such as length and penmanship, do not affect grades if readers agree to ignore these factors.
- All essay questions have the same influence on whether an applicant passes if all the questions have the same maximum score; i.e., the number of points assigned to a question determines how much weight it carries.
- Two essay tests are equally difficult to pass if the score required for passing them is the same; i.e., even though these tests had different questions and readers.

The second portion of this article provides suggestions for avoiding the problems that are often created by these myths. Finally, it discusses how many states are now implementing these suggestions.

### **Myth #1: Only One Reader Is Better**

*The Bar Examiners' Handbook* recommends that "all of the answers to a particular question should be graded by the same reader." (page 283) The assumption underlying this recommendation is that if the same reader grades all answers, then there is a greater likelihood that the same grading standards will be applied to these answers.

Empirical evidence usually supports the



foregoing assumption, but not the recommendation that is made from it. Controlled experimental studies show that when a bar exam reader regrades a set of answers within a few days of the first reading (but without knowledge of the grades assigned initially), the second grade assigned to an answer tends to be somewhat (and sometimes radically) different than the first grade. Nevertheless, the average discrepancy between the first and second reading by the same reader is slightly smaller than it is between two independent readers. For instance, in one study<sup>1</sup> readers agreed with themselves 75 percent of the time as to whether or not an answer was passing. Readers agreed with each other only 67 percent of the time.

On the surface, these data support the recommendation to use only one reader per question. However, I suspect that bar examiners will be less likely to embrace this recommendation when they discover some of the potential sources of the greater between than within reader inconsistencies. These sources range from preferences for certain handwriting and penmanship styles to fundamental differences in the criteria that should be applied in the grading process.

For example, suppose that one, but not both, of the readers assigned to a question believes that it is appropriate to deduct points from an answer that discusses (perhaps incorrectly) an issue that is irrelevant to the question. Unless a protocol is developed for handling answers that discuss such issues before the grading process begins, there is a greater likelihood that the readers will agree more with themselves than they will with each other in the grades they assign.

Another important source of differences between readers is how much emphasis each reader places on the different parts of a question, their preferences for which precedents should be discussed, and the order in which issues are considered. If two qualified readers do not agree on a question's scoring guide and the relative importance of different aspects of an answer, how can applicants be expected to know

how to compose their answers?

The rationale that the same reader should be used for all answers in order to maximize reliability is faulty because the *source* of the greater reliability may be factors that have nothing to do with answer quality. Instead, they may be idiosyncratic to the reader. A few jurisdictions compound the single reader problem by having the board member who drafted the question act as the sole grader of that question's answers. After all, it is thought, the person who wrote the question knows what he or she is trying to test with that question. The fact that no one else knows what is being tested, including some of the board member's colleagues, does not seem to deter the handful of jurisdictions that still use this practice.

## **Myth #2: Grades Are Not Affected by Extraneous Factors**

A second myth about grading bar exam essay answers is that readers base their grades solely on answer quality and that instructions to readers to ignore extraneous factors eliminate the influence of these factors. The fact that this does not happen was demonstrated clearly in an experiment that John Gorfinkle and I conducted with the participants at the NCBE's seminar for new bar examiners in April 1980.

John Gorfinkle developed two answers, A and B, to the same essay question. Both answers were of about equal quality. He then prepared two versions of each answer (A-1, A-2, B-1, and B-2). Versions A-1 and B-1 discussed the issues in the question in a clear and concise manner. Versions A-2 and B-2 contained the same content, but used about fifty percent more words to present it. In other words, the second version was merely longer than the first one.

The bar examiners were assigned randomly to two groups. One group graded answers A-1 and B-2 while a second group graded A-2 and B-1. Both groups were instructed to grade the answers in terms of their quality and to ignore such things as grammar, spelling, and length. On the average, the examiners in the first group graded answer B-2 higher than A-1. The examiners



ers in the second group graded answer A-2 higher than B-1. Thus, in both groups, version 2, the longer answer, received the higher grade. This occurred despite the fact that bar examiners were told to ignore answer length and almost all of them claimed that they preferred shorter answers.

The knowledge that longer answers tend to receive higher grades regardless of instructions to readers to ignore length probably comes as no surprise to experienced bar examiners. However, bar examiners may not be aware of the many other factors that inappropriately influence grades. For instance, applicant C's chances of passing the exam will be reduced if (1) applicant A's and B's answers tend to be among the better answers to the questions and (2) applicant C's answers are always graded after A's and B's answers. Similarly, handwriting quality has often been shown to affect essay grades.<sup>2</sup>

### Myth #3: Number of Points Assigned to a Question Determines Its Weight

Another common myth about grading essay answers is that if the theoretical maximum score on two questions is the same, such as 100 points, then both questions carry the same weight in determining the relative standings of the applicants on the essay portion of the exam.

The fallacy of this belief is demonstrated in the table below with hypothetical data for five examinees (A through E).

Examinee	Question 1	Question 2	Total
A	10	100	110
B	20	99	119
C	30	98	128
D	40	97	137
E	50	96	146
Average	30	98	128

Note that the maximum scores on Questions 1 and 2 were 50 and 100, respectively, and that the rank ordering of examinees on Question 1 was directly opposite to the rank ordering on Question 2. Nevertheless, the final rank ordering was perfectly consis-

tent with Question 1; i.e., the question that had the lowest possible maximum score. Question 1 carried far more weight because the scores on this question spread out more from the average score on this question than did the scores on Question 2 spread out from their average score. In statistical terms, Question 1 had a much larger "standard deviation" than Question 2.

Unless a jurisdiction takes specific steps to prevent questions from having markedly different standard deviations, it is not uncommon to find that one question will have a standard deviation which is twice that of another question. It therefore carries twice the weight in determining total essay scores. It also refutes a state board's claim that all questions are of equal importance in determining who passes. An extreme example of this situation is the question on which all applicants receive the same grade. This question would have a standard deviation of 0 (zero) and it would have no impact on who passed or failed.

### Myth #4: Essay Grading Standards Can Be Maintained Across Exams

A fourth myth is that a state is able to maintain the same essay grading standards across exams even though (1) the questions on these exams change each time the test is administered and (2) there are often changes in who grades the answers. The belief that grading standards can be maintained across administrations is often referred to as the "seventy percent myth" or "I can recognize a passing answer when I see one."

While many bar examiners believe they can recognize a passing answer when they see one, there is strong empirical evidence to the contrary. This evidence comes from several sources. For instance, two independent readers often disagree on whether a given answer is passing and on the percentage of answers in a group that are passing. As noted above, readers are not substantially more consistent with themselves than they are with each other. Thus, not only can one reader's perception of a passing answer differ from another reader's assessment, but even over a few days, the



same reader will change his or her mind regarding the relative and absolute quality of an answer.

Studies also show that it is possible to affect the score assigned to an answer by embedding it in a set of relatively high versus low quality answers.<sup>3</sup> Statistical analyses further reveal that when applicant ability is held constant (through the MBE), bar exam readers tend to be more lenient in grading answers written on February exams than in grading answers on July exams.<sup>4</sup>

Two questions can have very different average scores even though in advance of the exam they were believed to be of equal difficulty. If this can happen (and we know it does), then it is apparent that two tests (made up of such questions) can also vary in difficulty even though a thorough but subjective appraisal of them suggested they were comparable.

The problem here is that if a state's exam unintentionally varies in difficulty from one administration to the next, then that exam is not fair to applicants who happen to take an unusually hard version of it. We know this sometimes occurs and there is no way of determining in advance of giving a test how difficult its questions will be or how leniently the answers to them will be graded. Attempts to subjectively adjust for perceived differences in essay test difficulty across administrations are notoriously unsuccessful.

### Recommendations

The bleak picture painted here can be brightened considerably by adopting a few simple procedures:

1. Assign at least two readers to each question.

Some jurisdictions have every answer independently graded by two readers. Other states, divide the answers up among the set of readers assigned to the question.

Most states with multiple readers per question also employ some form of reread procedure. For example, one state has a second reading of all the essay answers of applicants who came close to either side of



the pass/fail line on the total exam after the initial reading of their essay answers. If the score on the second reading differs substantially from the score on the first reading, then the two readers meet and resolve what score should be assigned to the answer. Otherwise, the average of the two scores is used because the average is usually the best estimate of answer quality.

2. Have the readers assigned to a question agree on a scoring guide for that question.

A preliminary scoring guide for a question should be developed before the test is given. This helps to assure the question really measures what it is supposed to measure. For instance, do the persons who review the question agree with the guide?

After the test is administered, the readers assigned to the question should also review the guide for appropriateness. This activity includes reading several answers to determine whether the question elicited the responses that were anticipated. If not, the scoring guide should be revised in a way that indicates how to handle common responses.

3. Calibrate the readers in the use of the scoring guide through the use of benchmark answers.

The first step in this process involves each reader independently evaluating a set of



two to four answers and deciding upon the relative quality of the answers in this set. All the readers assigned to a question evaluate the same common set of answers. This process is called "round robin" grading. For instance, if there are three readers assigned to a question, each reader would read one answer, pass this answer clockwise to the next reader, who would evaluate it, and then pass it on to the third reader. In this way, all three readers can evaluate a common set of three or four answers.

In the second step, the readers compare notes on their independent evaluations of the relative standings of the answers in the common set. This activity often leads to modifying the scoring guide in order to handle typical (albeit unanticipated) responses to the question. The calibration process involves one additional step in those jurisdictions that do not scale their essay scores to the MBE. This step consists of the readers deciding which answers should or should not be considered as "passing".

An important feature of this process is that all the readers make their initial evaluations of answer quality *independently*. In other words, one reader does not know the grade assigned to an answer by another reader until they meet to discuss the answers. This approach helps to avoid one reader dominating another and simulates more closely the actual grading process.

The process of independent "round robin" readings and achieving consensus on relative quality is repeated until there is an adequately high level of agreement among readers on the relative quality of the answers used for reader calibration. It usually requires four or five "round robin" grading sessions (with four or five answers per session) to achieve this degree of consistency.

After the readers achieve an adequately high agreement level, they identify the one or two answers at each score level that best illustrate the quality of the answers at that level. For instance, one state grades each answer on a five-point scale. As part of the

calibration process, that state's readers identify five "benchmark" answers, one answer for each of the five points on the scale. These answers serve as guides in the grading of other answers. For example, a grader might read an answer and then ask a series of questions, such as: "Is this answer better, worse, or about the same quality as the benchmark 3?" "If it is better, is it as good as the benchmark 4?"

Once the benchmarks are agreed upon, each reader assigned to a question reads a common set of about five answers to their question. This "round-robin" reading of answers is done independently. Any disagreements in the grades assigned are discussed, the scoring guide modified as needed, and another set of five answers are subjected to "round robin" grading. This sequence of activities is repeated until all the readers for a given question independently agree on the scores that should be assigned. They cannot agree to disagree.

Taken together, recommendations one through three will help to eliminate the problem of essay scores being affected by the conscious and unconscious idiosyncratic preferences of a single reader. However, when multiple readers are used, they should be monitored to insure that their grading standards do not drift apart.

#### 4. Use a realistic score range.

Many states still say they grade answers on a 100-point scale. However, an analysis of their data suggests otherwise. The grades tend to be assigned in 5-point intervals and almost all of them fall between 50 and 90. Thus, only nine score levels are being used. Moreover, only one especially low score on such a 100-point scale, such as a 30, may effectively preclude the examinee from passing the entire exam.

The foregoing situation has led several states to give up the old 100-point scale and grade answers along a 5, 7, or 10-point continuum. This practice generally leads to more reliable scoring because readers are not asked to make distinctions where there are no real differences in answer quality. In general, the longer the question and the



more applicants answering it, the greater the need to have more points along the score continuum.

5. Control for differences in standard deviations (score spread) among questions so that the questions carry equal (or prespecified) weight in determining total essay scores.

This recommendation applies only to those jurisdictions that scale their essay scores to the MBE. In these jurisdictions, readers have merely to determine the quality of the answers relative to each other whereas in jurisdictions that do not scale, readers also have to decide which answers are passing. States that do not scale their essay scores to the MBE but statistically control for differences in standard deviations among essay questions are likely to violate the principles underlying grading on an absolute (as distinct from a relative) scale.

The states that do scale their essay scores to the MBE can use indirect and/or direct controls on the standard deviations.

Indirect control involves readers being instructed about the percentage of answers that should be placed in each of the possible score categories for a question (i.e., grading on a predetermined curve) and requiring that the same set of score categories be used on all questions.

Direct controls are somewhat more complicated. They involve converting the scores on each question to a prespecified mean and standard deviation. For example, several states convert the scores on each question to a distribution of scores that has a mean of 50 and a standard deviation of 10. This conversion procedure does not change the examinees' relative standings, but it does result in the questions carrying equal weight.

Direct controls have several advantages. They insure that each question has the same weight. They also permit using one grading scale for one question and a different grading scale for another question without affecting how much weight each question carries. For instance, the readers can use a 5-point scale for Question 1 and a 10-point scale for Question 2. And, this will have no impact on the weight each question carries.

The third advantage of direct controls is that they permit more weight to be assigned to some questions than to others (e.g., those that are more complicated and for which applicants are given more time to answer). Some jurisdictions use this technique of planned differential weighting in conjunction with the direct controls they place on standard deviations.

Finally, by converting the scores on each question to a truly common scale (as distinct from one that just appears to be the same), it is easier to appropriately compare a given applicant's scores among questions. The only major disadvantage to direct controls is that they are somewhat more difficult to explain.

6. Scale the essay scores to MBE scale scores.

Scaling the essay scores to the MBE scale scores puts both the MBE and the essay on the same scale of measurement. Moreover, because the MBE scale scores have been equated across the years, a given MBE scale score represents the same level of proficiency regardless of the exam on which it was earned. This same important characteristic also applies to essay scale scores. Thus, setting the pass/fail line on the total exam in terms of a combination of MBE and essay scale scores eliminates the problem of some essay tests being more difficult than others because of the questions asked and/or the leniency with which the answers to them are graded.

There are just as many myths about scaling essay scores to the MBE as there are about essay grading. For instance, contrary to the popular misconceptions regarding





this topic, scaling essay scores to the MBE does not give any more weight to the MBE than to the essay, it does not set the percent passing at a given level, and it does not change a given applicant's essay score in terms of that applicant's MBE score.

### Forecasts

Most of the applicants who took the July 1985 bar exam will be affected by one or more of the procedures described above. For instance, all of the following jurisdictions scale their essay scores to the MBE (or to their own equated multiple choice exam):

Alaska	Montana
Colorado	Nebraska
Connecticut	New Hampshire
District of Columbia	Nevada
Florida	New Mexico
Georgia	New York
Maine	North Dakota
Massachusetts	Pennsylvania
Michigan	Puerto Rico
Minnesota	Texas
Missouri	Wisconsin

In the years to come, I expect more jurisdictions will scale their essay scores to the MBE, employ multiple readers per question, have automatic and independent re-read procedures for applicants who were close to the pass/fail line after the first reading, and control for differences in standard deviations among questions. These technical changes will be adopted as bar examiners continue to question the myths surrounding essay grading and as they have to cope with the petitions filed by failing applicants who feel they were unfairly treated.

1. Stephen P. Klein, *An Analysis of Grading Practices on the California Bar Examination*. Report prepared for the Committee of Bar Examiners of the State Bar of California, December 1977.
2. David Hughes, Brian Keeling and Bryan Tuck, *Affects of Achievement Expectations and Handwriting Quality on Scoring Essays*. *Journal of Educational Measurement*, Vol. 20, No. 1, Spring 1983 pp 65-70
3. David Hughes and Brian Keeling, *The Use of Model Essays to Reduce Context Affects in Essay Scoring*. *Journal of Educational Measurement* Vol. 21 No 3, Fall 1984 pp 277-281.
4. Stephen P. Klein, *Sources of Variations in Passing Rates on California Bar Examinations*. Report prepared for the Committee of Bar Examiners, State of California. July 1983 (Rep No. PR 83-2).



# A National Law Practice Will *Piper* Lead the Way?

by Allan Ashman

**A**fter following a rather serpentine route through federal trial and appellate courts, New Hampshire's residency requirement finally was struck down by the U.S. Supreme Court in *Supreme Court of New Hampshire v. Piper*.<sup>1</sup> New Hampshire had required that applicants for admission to the bar become residents of the state before they actually could be sworn into the bar.

Both durational and simple residency requirements have been subject to intense scrutiny in recent years. Some states voluntarily abandoned their residency requirements while other federal and several state courts held existing rules unconstitutional.

Still, before *Piper*, many states had some form of residency requirement either as a prerequisite for taking the bar examination, or for admission on motion, or, like New Hampshire, as a prerequisite for

simply being sworn in. Now, the constitutionality of all such requirements is suspect following the *Piper* decision.

## The Basic Question

But what does *Piper* really portend? For example, is it simply the logical denouement of one unreasonable and impractical restriction facing bar applicants, or does it mark the beginning of the removal of all barriers to the interstate practice of law? What follows are some random observations and a bit of idle speculation on this provocative question.

## Are the Rules Too Restrictive?

During the past decade, there have been increasing protestations from many quarters that the current rules requiring the passing of a bar examination and admission to the bar in each state in which lawyers wish to practice regularly constitute intolerable and impractical restrictions on the present-day practice of law, on the development of a needed national law practice, and on the legal needs of national,

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commercial, financial and industrial business entities. The residency restriction, in particular, had become increasingly vexatious with the growth of law firms that maintain branch offices in many states and with the increased use of in-house counsel by multistate corporations.

In 1978, Chesterfield Smith, a past president of the American Bar Association, stated that it would be in the "national interest and the interest of nationwide consumers of legal services that restrictive practices and state barriers be eliminated and interstate reciprocity broadened...."<sup>2</sup> Smith believed that the "chilling" of interstate bar admissions was in conflict with the long-range economic interests of the legal profession and the nation.<sup>3</sup> He also thought that many of the states that had erected fences against out-of-state lawyers had done so primarily to protect their own lawyers from professional competition.

### No Fear of 'Carpetbagging'

The court in *Piper* made it quite clear that this reason was "insubstantial" to justify such barriers, noting that the privileges and immunities clause of the Constitution was designed primarily to prevent such economic protectionism.<sup>4</sup> The court emphasized that the privileges and immunities clause was intended to create a national economic union. The court did not share the concern of Chief Judge Levin Campbell and Judge Stephen Breyer of the U.S. Court of Appeals for the First Circuit who, in the First Circuit's *en banc* reconsideration of the *Piper* decision, expressed the view that New Hampshire could reasonably fear that complete abolition of residency requirements would mean large law firms in distant states would exert significant influence upon the decisions, practices, and makeup of the New Hampshire bar.<sup>5</sup> Law practice in certain fields, the judges stated, could come to be dominated by out-of-state lawyers whose only connection with the state would be their desire to earn money there.

But the court did not seem concerned, stating that barring nonresidents was an overbroad means of assuring that attor-

neys would be available for court or amenable to disciplinary proceedings. A review of nonresident attorneys appearing in New Hampshire courts, either as members of the bar or *pro hac vice*, indicated, according to the court, that residence was not substantially related to in-court conduct or availability. The court also believed that New Hampshire's "simple residency" requirement was "underinclusive" as well, because it permitted lawyers who moved away from the state to retain membership in the bar. The court concluded that there was no reason to believe that a former resident would maintain a more active practice in the New Hampshire courts than would a nonresident lawyer who had never lived in the state. Nor did the court believe that a nonresident lawyer would conduct his practice in a dishonest manner.

A nonresident lawyer's professional duty and interest in his reputation should, the court observed, provide the same incentive to maintain high ethical standards as they do for resident lawyers. A lawyer will be concerned with his reputation in any community where he practices, regardless of where he may live, the court stated. Furthermore, a non-resident lawyer can be disciplined for unethical conduct. The court emphasized that the Supreme Court of New Hampshire has the authority to discipline all members of the bar regardless of where they reside. New Hampshire could, the court pointed out, discipline nonresident lawyers in the same manner in which it disciplines resident members.

### What the Court Didn't Hold

Justice William Rehnquist, the lone dissenter in *Piper*, suggested that the residency requirement promoted New Hampshire's "interest in maximizing the number of resident lawyers, so as to increase the quality of the pool from which its lawmakers can be drawn." But this notion was rejected by the court's majority, which pointed out that only a few of New Hampshire's legislators were lawyers and that, besides, non-lawyers could serve on the state's courts. Having said this, the court emphasized that its holding in no way interfered with



the ability of the states to regulate their bars. Unlike *pro hac vice* applicants, nonresidents who seek to join a state bar must have the same professional qualifications required of resident lawyers.

### **Residency Rules in Question**

What then are we to make of this decision? Clearly one important barrier for out-of-state lawyers to be admitted to the practice of law has, for all apparent purposes, been removed. While the precise effect of the decision is still unknown, it would seem logical to conclude that all residency rules for purposes of admission to the bar must now be called into serious question. But the Supreme Court in *Piper* has not gone so far as to declare that under existing economic conditions the interstate practice of law is constitutionally mandated. It seems equally clear after *Piper* that each state still has a legitimate interest in regulating the admission and practice of lawyers to ensure that lawyers are professionally competent, are familiar with local laws and procedures, and abide by the rule governing professional responsibility. But to effectuate these purposes and to avoid needless litigation, I submit that in the wake of the *Piper* decision, states should begin a systematic review of their admission standards with an eye toward retaining only those standards that are deemed to be reasonably related to the state's legitimate interests.

### **Piper Leads the Way**

This, it is entirely plausible that *Piper* will serve as a catalyst for the removal of other barriers, reasonable or otherwise, that frustrate or inhibit the interstate practice of law. In the past decade, we have witnessed a rather dramatic change in the practice of law characterized in large part by the soaring numbers of multistate practitioners. This phenomenon probably can be attributed to a variety of factors including increased lawyer specialization, the greater mobility of lawyers and clients, and increased uniformity of state laws as a consequence of more and more states adopting model and uniform laws and federal practice and procedures.

Consequently, *Piper* could spur a relaxation of *pro hac vice* admission and related requirements of association with local counsel for attorneys already admitted to practice. *Pro hac vice* status does not allow the nonresident to practice in a state on the same terms as a resident member of the bar. The lawyer appearing *pro hac vice* must be associated with a local lawyer who is present for trial or argument. Furthermore, a decision on whether to grant *pro hac vice* status to an out-of-state lawyer is purely discretionary. Also, states which currently require nonresident attorneys to maintain an in-state office may wish to rethink the purpose of this policy in light of the *Piper* decision.

*Piper* could also have an indirect impact upon full admission to the bar in a sister state by motion upon proof of professional competence and personal integrity. On the one hand, states which currently permit reciprocity might seek to ease such admission by relaxing the prescribed years of practice from the customary five-out-of-the-preceding-seven-years in the jurisdiction of original admission to three-of-the-past-five-years. Those states which do not permit admission on motion and require the seasoned practitioner to pass another full bar examination might explore the possibility of substituting a more limited attorneys' examination in local law and practice. This could be complemented by a rule requiring mandatory attendance of nonresident attorneys at periodic seminars on state practice, a step the court in *Piper* viewed as a less restrictive alternative to the existing residency requirement.

### **Rethinking the Multistate**

To the degree that *Piper* does provide a spur toward more liberal rules and procedures with regard to the interstate practice of law, it might also prompt states to rethink some basic assumptions about the nature and uses of the Multistate Bar Examination. In recent years, there has been an increasing sentiment for "national acceptance of a multistate bar examination."<sup>6</sup> Such sentiment generally has embraced the twin concepts of greater uniformity



and the transferability of MBE scores. For example, the Chief Justice of Nebraska, Norman Krivosha, thinks it "totally counter-productive to design a national examination to be given all over the country on the same day and then to redefine what 'passing' the examination means from state to state. If the function of the MBE is to determine whether an applicant, given the right answer, still cannot recognize it, it seems to follow," the chief justice noted, "that the inability to recognize the right answer is the same throughout the country and should [be] treated the same everywhere."<sup>7</sup>

Chief Justice Krivosha also has been a leading advocate of liberalizing existing rules with regard to the transfer of MBE scores from one state to another. He finds little sense in the current practice which exists in several jurisdictions requiring an applicant to take another MBE examination even though the individual may have successfully completed the same exam just six months earlier.<sup>8</sup>

### Impact on Discipline

Finally, *Piper* should prompt all jurisdictions to re-examine their own professional disciplinary standards and procedures. Until now, companies and law firms that regularly have business in states with residency requirements have had to retain a local law firm to act as "local counsel." The immediate impact of *Piper* should be to make it markedly easier for big law firms in major cities, and for corporations with large legal departments to handle lawsuits wherever they are filed. Therefore, it is far more likely that weak or ineffectual state moral character certification and lackadaisical enforcement of existing rules of professional responsibility could become the burden of sister states. Upholding the standards of professional responsibility must now be approached with less diffidence and indifference. Rather, states should now become acutely sensitive to the fact that one state's disinterest in matters of moral character and fitness could become another state's embarrassment.

### In Conclusion

Perhaps it is premature to characterize the *Piper* decision as a watershed in the evolution of bar admissions and the interstate practice of law. The more appropriate consideration seems to be whether the states are going to allow the freedom of movement that the decision implies or whether they are going to respond by imposing other restrictions. The next few months should provide a clue as to the direction in which we are headed.

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1. 53 L.W. 4238, March 4, 1985.
  2. Chesterfield Smith, "Time for a National Practice of Law Act." April 1978, *ABA Journal*, pp. 557, 559.
  3. *Id.*, at 560.
  4. 53 L.W. at 4241 (footnote #18).
  5. 723 F.2d 110 (1983).
  6. Krivosha, "Planning for the 21st Century," 54 *The Bar Examiner* 23, February 1985.
  7. *Id.*
  8. *Id.* at 23, 24.



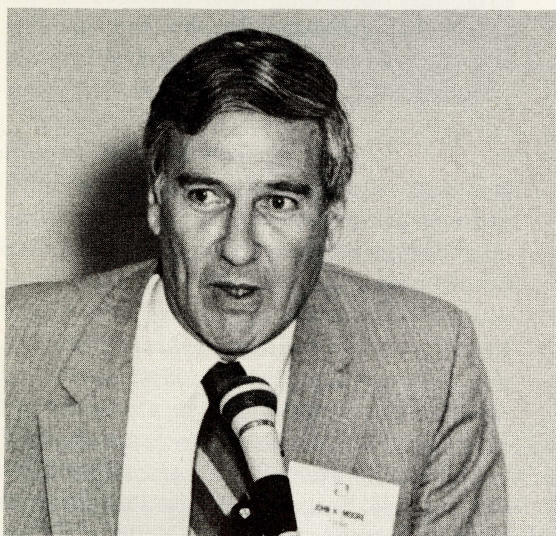
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*Hiram A. Sanchez-Martinez, Executive Director, Puerto Rico Board of Bar Examiners asks a question from the floor*



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