ON LICENSING LAWYERS: WHY UNIFORMITY IS GOOD AND NATIONALIZATION IS BAD

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With the world evolving towards a more global system of commerce, trade, and life in general, multi-jurisdictional practice and "nationalizing" law licenses have become regular topics of lawyer conversation. The California Supreme Court fueled the current debate when it decided that lawyers in the Birbrower firm who moved to California, opened an office, and worked on litigation, all without a California license, were acting unlawfully and need not be paid.[1] As a result of *Birbrower* and similar cases, scholars and transactional and international lawyers have been discussing a possible transition from the current, state-based bar to a more standard, nationalized structure administered by a single entity with uniform standards.

Such a regime would ultimately disrupt the reasonably harmonious arrangements that the profession has developed. This article examines the history of bar admissions and contemplates the beneficial and detrimental effects of a unified national authority for licensing and discipline. Although a federalized testing system presents the impression of a more ideal system, readily identifiable problems arise that make its implementation less attractive. It makes for a lawyer corps less capable in fields of law especially important to clients in the state of practice and less accountable to the bench and to each other.

THE GENESIS OF BAR ADMISSIONS

The process of American bar admission began with local courts. During the colonial period, some colonies admitted attorneys to individual bars that were not recognized in any other court in that colony or others. Other colonies applied a comity principle, under which those admitted in one court in a colony were accepted

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1. In *Birbrower v. Superior Court of Santa Clara County*, 949 P.2d 1 (Cal. 1998), the California Supreme Court ruled that a New York law firm could not collect attorneys fees for services that resulted in the practice of law in California without a license, despite the signed fee agreement.

in other courts of that colony. In yet other colonies, applicants applied to the highest court in the colony for admission to practice in any of that colony's courts as a matter of right.[2] Several colonies had a graded bar in which permission from individual courts was still a requirement, but increased training was necessary to gain permission for appearance before the higher courts.[3] Apprenticeships were also a prominent feature of law training; some of those lasted as long as eleven years.[4]

After the American Revolution, bar admission requirements evolved into state governed entities. The entry requirements states used varied greatly in length, and standards included educational and apprenticeship elements. Some states required passage of written or oral tests, although no standard requirements were established.[5] States that required examinations often waived that requirement if the applicant could prove an alternate form of legal study such as a clerkship.[6] Despite the differentiation, each colony enforced obligatory individual standards to practice law in that area.

During the Jacksonian era and through the Civil War, a growing distrust of the bar developed. Many Americans perceived admissions practices as elitist and contradictory to democratic sentiment.[7] These attitudes prompted a lowering of the study requirement for becoming a lawyer such that by 1860, only one-third

2. *See* THE NATIONAL CONFERENCE OF BAR EXAMINERS, THE BAR EXAMINERS' HANDBOOK 15 (Stuart Duhl ed., 2nd ed. 1980).

3. *Id.*

4. *Id.* at 15. For example, to enjoy the full privileges of attorney in Massachusetts required an eleven-year apprenticeship, which included a college education, or nine years if no college education was included.

5. Michael Bard & Barbara A. Bamford, *The Bar: Professional Association or Medieval Guild?*, 19 CATH. U. L. REV., 393, 406 n.57 (1970); George N. Stevens, *Diplomas Privilege, Bar Examination or Open Admission*, 46 THE BAR EXAMINER 15, 25 n.23 (1977) ("The bar examination, although required in all states [by 1860] but Indiana and New Hampshire, was everywhere oral and normally casual."); *Id.* at 17 (supporting the finding that oral examinations were often short and incompetent because if an applicant failed, he typically shopped for a more lenient judge or court-appointed examiner in hopes of a less stringent examination).

6. Courts commonly adopted loose interpretations of compliance with "apprenticeships," "clerkships," and "legal study" in efforts to admit additional applicants. *See* ANTWON-HERMAN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 167–68 (1965).

7. *Id.* at 165–66, 171. Some Americans revolted against the notion of a professional privileged class, and many sought ways to deprofessionalize the bar. *See also* Bard & Bamford, *supra* note 5, at 395 (noting revolts against the bar as a professional organization); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 6–7 (1983).

of the jurisdictions mandated a specific period of law study.[8] Some states did not require legal education at all. Indiana's Constitution of 1851 provided that "[e]very person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice."[9] In a similar vein, Ohio simply required applicants to present a certificate signed by a practicing attorney to the effect that the "applicant had regularly and attentively studied law."[10] Likewise, New Hampshire merely "provided that any citizen over twenty one was entitled to be admitted to practice."[11]

Despite the lowered standards during the Jacksonian era, most states administered some type of bar examination. The quality and reliability of these procedures reflected the fact that courts generally did not have the time or the resources to administer rigorous tests.[12]

Written examinations eventually replaced the earlier, less formal processes and provided a foundation for development of national standardized bar examinations. Massachusetts gave the first written exam in 1855.[13] New Hampshire became the first state to establish a board of bar examiners possessing statewide jurisdiction

8. Bard & Bamford, *supra* note 5, at 395 n.7.

9. IND. CONST. art. VII § 21 (repealed Nov. 8, 1932).

10. CHROUST, *supra* note 6, at 168 (citing ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 229 (1953)).

11. Stevens, *supra* note 5, at 9 (finding that despite New Hampshire's moderate requirements, members of the profession tried to uphold standards through "snubbing untrained interlopers"). Stevens further notes that the nominal standards were easily met in states that did not eliminate legal education requirements.

12. As a result of such examinations, it was common to hear anecdotes such as the following:

> In Abraham Lincoln's day, the state bar examination was a most casual affair. This may, in part, have been because Lincoln himself served on a board of bar examiners. One Illinois applicant recalled being examined by Lincoln while Abe took a bath: 'He asked me in a desultory way the definition of a contract, and two or three fundamental questions, all of which I answered readily, and I thought, correctly. Beyond these meager inquiries . . . he asked nothing more. As he continued his toilet, he entertained me with recollections—many of them characteristically vivid and racy—of his early practice and the various incidents and adventures that attended his start in the profession. The whole proceeding was so unusual and queer, if not grotesque, that I was at a loss to determine whether I was really being examined at all.

Joel Seligman, *Why the Bar Exam Should be Abolished*, JURIS DR., Aug—Sept. 1978, at 48.

13. Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 374 (1996).

in 1880.[14] Between 1890 and 1914, most states adopted some form of written examination.[15] By the second half of the twentieth century, state bar authorities acting collectively as the National Conference of Bar Examiners devised a series of popular testing instruments, most prominently the multistate bar examination (MBE), and the multistate professional responsibility exam (MPRE). The success of this bar examination evolution has been central to the discussion about multi-jurisdictional practice.

UTOPIA REVEALED: A UNIFORM SYSTEM OF TESTING

The notion that standardized tests create a more valid and reliable system of assessing applicant performance enjoys deep support. Subjectivity is a standing problem with essay examinations regardless of the quantity to be graded. In response, testing experts have argued for decades that concerns about subjectivity can be addressed by using multiple-choice questions.[16] They say that using such a test format—and achieving greater uniformity in the process—confers benefits on admission authorities and applicants alike. Well-developed and expertly drafted objective inquires are fully capable of testing high-level mental processes, they say, despite the misconception to the contrary.[17] Such inquiries prevent "the reshaping [of] the question to [an examinee's] own purpose."[18] Standardized multiple choice exams allow for coverage of a broader base of subject area with minimal manpower if graded electronically.

Many scholars marshal what they regard as potent statistics in support of the proposition that objective multiple-choice tests obtain accurate and objective scores.[19] For the most commonly used of these tests, the National Board of Bar Examiners engages academics and other contract experts to prepare questions and an-

14. Arthur Karger, *The Role of the NCBE in the Bar Admission Process: Its First Fifty Years*, 50 THE BAR EXAMINER 7, 8–9 (1981); Stevens, *supra* note 5, at 17.

15. Elizabeth Chambliss, *Professional Responsibility: Lawyers, A Case Study*, 69 FORDHAM L. REV. 817, 833 (2000).

16. *See* Stephen P. Klein, *Are Your Test Scores Only Half Safe?*, 48 THE BAR EXAMINER 137, 137 (1979) (supporting the multiple choice portion of bar exams but criticizing the essay portion, believing that it poses "special problems", mainly that once the applicant submits his written answer, "there is a rogue's gallery of biases and artifacts that are likely to influence the score assigned to that answer.")

17. *Contra* THE NATIONAL CONFERENCE OF BAR EXAMINERS, *supra* note 2, at 225–26, 228 (claiming the best exam reflects a combination of essays and objective questions to "take advantage of the strengths of both types of examinations.")

18. *Id.* at 226.

19. *See* Klein, *supra* note 16, at 137.

swers for a test that is no more or less difficult than the tests in its sister states. Proponents agree that such standardization will assist states in assessing the efficacy of law school instruction and curricula. The National Conference of Bar Examiners Deputy Director Mary Sandifer observes, "[n]ot even the most skilled test developers and item writers are able to consistently prepare items or tests having exactly the same difficulty."[20]

The popularity of the MBE and the MPRE has made it feasible to contemplate a complete form of standardized exam. Since its inception in 1972, the MBE has been adopted and is currently administered as part of bar examinations in all but two states and in other American flag territories.[21] Most states currently require the MPRE, a standardized ethics exam, which has proven to be a sufficient use of time. Some states even require a standard essay instrument called the Multistate Essay Examination (MEE).[22] Support for a nationalized system is sustained by the realization that most states are already transitioning towards this concept through their adoption of NCBE instruments. The search continues for ways to reduce the probability for error and eliminate subjectivity.[23]

20. Mary Sandifer, *Testing, Testing*, 69 THE BAR EXAMINER 35, 35–38 (2000).

21. The Multistate Bar Examination was developed in response to the growing number of applicants to law schools and the bar examination in the late 1960s. Today, every state uses the Multistate Bar Examination except Louisiana and Washington State. Wisconsin requires that applicants who did not attend a Wisconsin law school to take the MBE. The District of Columbia, Guam, Northern Mariana Islands, and the U.S. Virgin Islands also require the MBE as part of their examinations; Puerto Rico does not. The MBE is also used in the Republic of Palau. Statistics on bar examinations are available from the National Conference of Bar Examiners website, http://www.ncbex.org/tests (last visited Dec. 6, 2004).

22. Although several states administer the Multistate Essay Examination (MEE), this component allows for subjectivity. This is the very premise upon which proponents of the federalized multiple-choice-only examination wanted to eliminate it. The Mulistate Performance Test (MPT), on the other hand, is an essay examination, but because the examination is in a "closed universe," and applicants are not allowed to use law other than what is provided to them, subjectivity is severely limited.

23. *See* Mary Sandifer, *Testing, Testing*, 68 THE BAR EXAMINER 1, 17 (1999). Computer Based Testing (CBT) is a new movement in the bar examination realm. Arguable advantages of this system of testing are that test schedules may be flexible, instant scoring is possible, questions may be presented in random order, security problems with printed materials are reduced, and the potential to present stimulus in new ways. The disadvantages include the need for a larger test bank of questions which experts recommend be retired after 15,000 examinees have taken that particular question, items must be pre-tested on a large scale, fact scenarios typically cannot be displayed on a single screen, security problems arise with electronic hardware, and high administration costs will likely arise.

Notwithstanding this search, the perception persists that some minorities historically score lower than majorities on standardized exams. The leading study of bar passage rates reveals disparities in the passage rate of first time bar examination takers between certain minority groups on standardized exams.[24] This disparity, however, diminishes substantially as applicants sit for subsequent tests, and most candidates eventually pass. Similarly, there is a definite need for accurate gender representation in the legal profession. A complete exam format under which certain minority groups do not initially succeed can only be a barrier to those groups and the profession as numbers of unsuccessful first time takers do not attempt to retake the exam. Such testing may disparately impact the entry of minorities into the legal profession and further decrease the numbers in practice which, in turn, reduces the representation representative of America.

CONS OF A NATIONAL BAR EXAM AND LAWYER LICENSING

The progression of uniform testing has run in tandem with greater interest in permitting lawyers to practice in multiple jurisdictions. Part of the pressure for such a change is the fact that businesses now have multiple locations throughout the nation. Other sources include the revolutions in communications and travel. The profession has been much affected by the technological revolution in laptops, PDAs, e-mail, and wireless communication. The legal profession's increased dependency on these devices which actually simplify communication has promoted a blurring of border lines which once required physical contact to conduct business. Likewise, advances in travel have also greatly increased the effortless mobility and afforded uncomplicated opportunities to conduct trans-border business between states. While liberal licensing and portability will benefit attorneys who reside and practice in border states as well as corporate and other transactional attorneys, there are real drawbacks to such changes.

Although a national examination of multiple-choice questions would produce demonstrable efficiencies for test-givers, it would do little to account for the needs of the legal system and consumers in locales where they need legal services. The present pattern of examinations requires that applicants exhibit a general understand-

24. *See* Stephen Klein, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, 66 THE BAR EXAMINER 8, 8–10 (1997) (stating that although the passage rate for first time takers of certain minority groups is lower than for majority examinees, the passage rate is virtually equal after multiple attempts).

ing in areas where special industry, culture, or environmental concerns are prevalent.

In Texas, for example, the real property component of the bar examination tests oil and gas law, obviously pertinent to the Texas energy industry.[25] Similarly, Wyoming tests not only oil and gas law, but water law as well.[26] Likewise, New Mexico tests its applicants on federal Indian law.[27] One could only assume that an applicant has some interest in practicing in that state if the applicant takes its exam; therefore, basic knowledge of important legal material is highly valuable to say the least if a lawyer is to render minimally competent legal assistance in that state. A single national examination in multiple-choice form graded by computer could hardly tolerate any state-specific assessments on special subjects.

Likewise, establishing national lawyer licensing would reduce the profession's ability to police and discipline its members. This pendulum, however, swings in both directions as lawyers may find it difficult to remember and observe the various individual regulations of the numerous state jurisdictions in which they wish to practice. Communication and enforcement of professional norms would prove difficult as attorneys roam from state to state with no knowledge and little recourse by the local governing bar. Such serious surgery on the present system is hardly necessary. Virtually every state provides that an active attorney in the forum state may sponsor a visiting attorney to litigate a case *pro hac vice*. Other rules permit lawyers to work in other states where they are not licensed for specific tasks.[28] Thus, despite the roars of some,[29] various court rules presently accommodate the needs of lawyers to "practice" specialized tasks in states outside of their licensed home. The prevailing rules of our profession continue to expand the accommodation of multi-jurisdictional practice. The American Bar Association has adopted a new version of Rule 5.5 of the Model Rules of Profes-

25. *See* Texas Board of Law Examiners, *available at* http://www.ble.state.tx.us/Rules/NewRules/appendixB.htm.

26. *See* Wyoming State Bar *available at* http://www.wyomingbar.org/admissions.asp (last visited Dec. 6, 2004).

27. *See* New Mexico Board of Bar Examiners *available at* http://www.nmexam.org/rules/rules203.htm (last visited Dec. 6, 2004).

28. In Indiana, for example, foreign state licensed attorneys may practice law under the Admission for Business Counsel License on the foreign license provision governed by Indiana Admission and Discipline Rule 6.

29. *See* Anthony Davis, *Multijurisdictional Practice by Transactional Lawyers—Why the Sky Really* is *Falling*, 70 THE BAR EXAMINER 15 (2001) (arguing that disallowance of multi-jurisdictional practice is ubiquitous, robs the public of trained and specialized services, and disrupts the legal profession).

sional Conduct, designed to acknowledge temporary practice by a lawyer in places outside the lawyer's home state.[30]

Some who chafe under the present licensing system support a "one license for life" concept whereby attorneys who are licensed and in good standing in one state have the option to practice in any jurisdiction as long as they do not relocate.[31] Although such a pro-

30. The most recent version of ABA Model Rule 5.5, adopted in August 2002, addresses the unauthorized practice of law and multi-jurisdictional practice. It states:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or another in doing so.
(b) A lawyer who is not admitted to practice in this jurisdiction shall not:
  (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
  (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
  (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
  (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
  (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or
  (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
  (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission; or
  (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Model Rule of Prof'l Conduct R. 5.5, *available at* http://www.abanet.org/cpr/mjp/201b.doc (last visited Dec. 6, 2004).

31. See Ronald Minkoff, *One License for Life: A Paradigm for Multijurisdictional Practice*, THE PROF. LAW. 3–4, Spring 2000 (comparing granting bar licenses to granting drivers licenses). Whereas people with valid licenses can travel from state to state with their drivers' license, so should attorneys be able to practice inciden-

posal appears to produce the perfect compromise for multi-jurisdictional practice, such a concept might in fact produce the perfect storm. What state's ethical rules apply when Lawyer A from State A spends months tending to a matter in State B? Which disciplinary authority has the power to act against lawyer A's license?[32] It is hardly heartening to envision such a Pandora's box of confusion, increased disciplinary actions, and reduced accuracy of records.

With so many suggestions and strong opinions on multi-jurisdictional practice and its role in the legal profession's future, the current path of progressive liberalization of the system that incorporates both multi-state and state-specific components presents the best option for establishing legal competence and state specific adeptness. Nationalized licensing is sometimes painted as the magic bunny pulled out of the hat or the dove that appears from a cloth, but in reality, much like magic, it is still smoke and mirrors. Such a system would result in a more expensive, less productive system of administering bar examinations and governing bar admittees.

CONCLUSION

The concerns raised by proponents for one generic bar examination and uniform national licensing program are typically stated in the negative. In one symposium on the topic, participants criticized local admission procedures:

> [B]ecause it is inconvenient, expensive, and cumbersome. They claimed that bar exams do not test for knowledge of local law and therefore should not be required as a basis for local state licensure. They also alleged that limited or non-existent reciprocal motion admission is protectionist and anticompetitive. Some symposium attendees asked why state licensure should not be eliminated altogether.[33]

While the world transitions towards a global approach to business and procedure, local licensing should follow suit but maintain its institutional integrity. The profession should work to expand

tally in other jurisdictions. When people move to another state, they are required to obtain new licenses. The author proposes the same logic applies to attorneys—they should not have to obtain new licenses unless they move to a different jurisdiction.

32. *See In re* Murgatrovd, 741 N.E.2d 719 (Ind. 2001) (holding that attorneys who were not licensed to practice in Indiana but who solicited potential clients are bound to the Rules of Professional conduct and subject to the Supreme Court's authority to regulate practice of law).

33. Margaret Fuller Cornelle, *Multijurisdictional Practice: A Challenge for Bar Examiners*, 69 THE BAR EXAMINER 18 (2000).

the number of jurisdictions that allow attorneys to practice in more than one state—either through new Model Rule 5.5 or on licenses for specific purposes. States should examine the new ABA model proposals to modernize *pro hac vice* procedures. These latest proposals might be supplemented by standard guidelines to assist transactional attorneys who visit other states on specific matters.

A general opening of borders on the model of the driver's license would be a race to the bottom of the sort that characterized the Jacksonian era. The clients deserve better.