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[February 15, 1972]

ABOUT TIME --

THAT THIS NATION HAS A MULTI STATE BAR EXAMINATION

There is an advantage in the inimitable practice of this club in the persistent use of titles for papers which do not disclose the subject. A perfectly good title can be given to the secretary in time for printing the program whether or not the essayist has selected the subject of his paper. I am reminded of the practice of my father-in-law, who was often called upon to make speeches. Frequently, not knowing the subject he intended to address, he would give the program printers the title "The Scoreboard", which he said was sufficiently flexible to cover any subject he might later select.

Since I had been assigned the February date, it occurred to me that it was ABOUT TIME that we reexamined George Washington in order to reacquaint ourselves with his contributions in the 18th Century and determine what he might be saying to us now. The more I studied the more I realized that I did not have sufficient acquaintanceship with the life or contribution of George Washington to presume to address

this group. I concluded that before undertaking the burden of that assignment I should let my research become more extensive and perhaps season for a few years. Maybe in the next round of Kit Kat papers the seasoned process will be complete.

My research did go far enough, however, that I can report to this club a confirmation of the authenticity of the tree cutting incident. During the debunking era of the 1930s and 1940s, this story and others about George Washington were reported to have no basis in fact. My authority for the authenticity of the story is Senator Tower of Texas.

During a recent visit to Columbus he confirmed the story in the following report:

(Senator Tower's Washington story)

mesquite tree
bowie knife

Since my announced subject was ABOUT TIME which clearly has flexible aspects, I concluded that I might more profitably make a

narrative report on the subject of which I have close, intimate knowledge, and although not necessarily controversial, may be of interest to you.

There are numerous callings, generally professional in nature, for which the government, usually the State, through its executive department, has presumed to assume the right to control through the device of granting a license to those who would follow a particular calling. This is the situation with medical doctors, osteopaths, dentists, engineers, architects, cosmetologists, and a host of others. One profession, the practice of law, has valiantly, resolutely, and with a remarkable degree of success, resisted this practice. In most states the licensing of lawyers is the exclusive prerogative of the judiciary and usually, as in Ohio, under the direct control of the Supreme Court.

There are some states, even in relation to lawyers, where the legislatures have provided annual license fees and in some states have statutes regarding subjects to be included in bar examinations or procedures to be followed in the examining process. In most states, however, the Supreme Court has asserted and maintained exclusive control of the

admission to practice. This is on a sound theory that lawyers become officers of the court and the court (not the legislature or executive) should control the selection and determine the qualification of its officers.

In this regard we did not, along with the common law, inherit the English system. This past summer I had dinner at one of the Inns of Court, Inner Temple. This experience, incidentally, permitted me to see the residence occupied by Samuel Johnson while a member of the Inner Temple. You will recall that Dr. Johnson was a member of the original Kit Kat Club.

My host on this occasion explained that one acquired the right to practice before the courts of England by being "called up" by one of the Inns of Court. The Inns of Court are associations of private persons, albeit lawyers. So in England neither the executive, legislature nor judiciary determine qualified applicants of the bar, but rather private societies, the Inns of Court, perform that function.

In United States, as I have suggested, the Supreme Courts of the various states exercise the right to license attorneys. As you might imagine, each separate and sovereign state, now 50 of them, pursuing their own individual inclinations, have evolved numerous and varied procedures to determine who is and who is not qualified to become an officer of the court.

All states now give a bar examination but as you might also imagine the historical path followed to reach that result is characterized, as most professional or social institutions, with considerable and varied trial and error.

Even the objectives of the examining process have been variously stated, but perhaps there would not be general approval that the examining process is one testing essentially "the applicant's ability to analyze fact situations, his knowledge of legal principles and his ability to utilize legal principles and lawyerlike reasoning to reach a sound result."

Or stated differently by the National Conference of Bar Examiners

"The bar examination should test the applicant's ability to reason logically, to analyze accurately the problems presented to him, and to demonstrate a thorough knowledge of the fundamental principles of law and their application. The examination should not be designed primarily for the purpose of testing information, memory or experience."

The states as I have suggested, have employed various examination techniques in an effort to reach such a lofty result.

Over the years judges, both Supreme Court and trial court, have examined the applicants seeking admission to the bar. Practicing lawyers have been designated, with little or no direction or experience, and with the occasional, unfortunate result -- particularly in small communities -- that friendship and family relations were more often compelling criteria than the legal proficiency of the applicant.

Illinois may be a rather representative state in reflecting the evolving process of examinations. From statehood in 1818 to about 1850 one or more judges of the Supreme Court personally conducted the examination. Then from 1850 until 1897 the assignment was discharged by various appointed lawyers. The procedure was about as informal as the examining lawyer wanted to make it.

Abraham Lincoln was designated an examining attorney. One successful applicant reported regarding his experience with Mr. Lincoln:

> "Some of the things he asked, though calculated to test one's memory, it appeared to me bore but a faint relation to the practice of law. He fired his questions at me somewhat rapidly, scarcely giving me time to answer properly, and never indicated by look, word or gesture whether I was right or wrong. Presently, and even before I was prepared for the announcement, he stopped somewhat abruptly, saying,

'Well, I reckon I've asked you enough.' wheeled in his chair, and proceeded to write out a certificate recommending me for license, meanwhile giving me some kind advice as to my future course of study, which later, it occurred to me, was about the first thing that had been said to indicate that the entire proceeding was, after all, an examination to test the applicant's ability to practice law."

Another applicant, who was examined by Lincoln, noted -

"I well remember that after said examination, Lincoln, Herndon and myself went to Charles Chatterton's who kept a restaurant under the store now occupied by Myers Brothers on the west side of the square and partook of oysters and fried pickled pigs feet at my expense."

It occurred to me that to give proper historical setting for this paper

I should have suggested to Christopher Kat that we have for dinner tonight "oysters and fried pickled pigs feet." In 1897 Illinois Supreme Court appointed a Board of Bar Examiners which has assumed the responsibility of the bar examination ever since.

All states now have a Board of Bar Examiners and most have had such boards for 50 years or more. As I have suggested, each state implements its own ideas and solutions which are reflected in amazing variations of procedure and details. Perhaps it would be helpful and interesting if I reported on Ohio's procedure.

Ohio's program is a good one and, if there is a typical program, Ohio's is such. I shall refer to the procedures when I served as a member of the Ohio Board - nearly fifteen years ago, but they remain, with a few minor variations, the same today.

One day while I was in the office struggling with some client's contract or pleading, I received a call from Judge Stewart (not the son Potter now a Justice of the U. S. Supreme Court, but the father, James

Garfield, then a Justice of the Ohio Supreme Court.)

He advised me that by unanimous action of the Ohio Supreme Court I had been appointed a bar examiner. Now for the Court to act unanimously is significant; to be designated for such a heavy professional responsibility is also significant.

In spite of the personal satisfaction I experienced at the selection, I did not lose my sense of reason, and indeed, under the pressure of the moment thought I was fairly resourceful. While I never had been a Bar Examiner, I knew there was no assignment more reasonably calculated to put one in an early grave.

I had just recently bought my home, and was moon lighting to pay off the second mortgage by teaching constitutional law at Franklin University night law school. In the emotional crisis of the moment the fact flashed in my mind and I advised Judge Stewart that no lawyer could be other than highly honored at such an opportunity, but that I was teaching law school students and there would be a clear

incapability to both teach and examine candidates. The Judge readily agreed, but destroyed my resourceful gambit by suggesting, perhaps directing (a suggestion by a Supreme Court Judge to a practicing attorney is a direction!) that I resign my teaching assignment. That I did, and became a Bar Examiner!

At that time the Court maintained a board of ten examiners (now twelve) by appointing two each year to a five year term. They never reappointed an examiner to a second five year term. Because of that fact several lawyers are alive today who could not have survived a second term. Most of us found that if you were young, vigorous and in excellent health, you could survive five years as an examiner but ten would have been impossible.

In making its selections, the court followed a couple of interesting rules. It was not until my third year that I discovered the fact that of the two practicing lawyers appointed each year, one came

from a relatively small community and one from a relatively large community. The obvious and commendable purpose was so the examination would not be made up of all county ditch or farm line cases, or all questions involving large corporations or SEC matters. Equally significant was that one examiner so appointed was a registered Democrat and one a registered Republican. Again the Court wanted all suspicion removed that politics was or could be involved in the examining process.

The preparation of each examination was laboriously slow but commendably fair to the applicants.

Over the years the Court had identified fourteen subjects of the law which should be examined, and the Court even designated the weight to be given each subject. There were to be, for instance, two questions on evidence and five on contracts and the like.

Each of the fourteen so called bar subjects had been, over the years, the subject of a detailed outline, perhaps 4, 5 and 6 pages long with Roman numerals I, II, III and A, B, C and 1, 2, 3 and a, b, c.

It was the responsibility of the Chairman of the Board, one of the five year men, to make up and issue assignments for the examination preparation. Each examiner would give five questions in his session of the examination and with ten examiners there was a total of fifty questions. The assignment to each examiner required the preparation of six questions, so if one of his questions was withdrawn at any stage of preparation, there would be a substitute available.

One of the six assignments to an examiner might read Contracts III, B, 1 a, b, 2a, b, c. From the outline on the subject, the examiner could determine what subjects under III, B, 1a, b, 2a, b, c were covered. It was his assignment, then, to familiarize himself with that area of contract law, prepare an essay question which he believed properly examined that area and then prepare what he thought was the proper answer with citation of his authorities. This procedure was followed for all six of his questions.

This was all done by examiners who were attorneys engaged in the private practice of law. Most had never taught a law course, and most had never graded papers.

The Ohio practice is not to telegraph the subject of the examination by labeling it "contract", or "tort", etc. (Ohio once did and Florida still does). That meant that each examiner might be called on to prepare a question in five or six different subjects on each of his ten examinations. (In Ohio bar examinations are given twice a year, and during a five year appointment each examiner participates in ten examinations.)

An examiner might get an assignment in Trust, a subject he perhaps had not considered since he graduated from law school twenty years before. Under those circumstances he would be required to go to the books, study the area of his assignment and indeed both sides of it, and then draft his question. It is hard to indicate the tremendous amount of time and pressure of concern this drafting exercise imposes on each examiner.

Once the questions and answers had been drafted, there followed an exchange procedure. Each first year man exchanged his questions and answers with a five year man. Similarly the second and fourth year men exchanged and the two third year men exchanged.

Each "exchange party" undertook to examine the questions and answers sent to him using unmercifully in the process a very sharp blue pencil. The purpose was to catch errors in statement, misleading fact pattern and errors in law. For a good, thorough, straight forward examination, the "exchange parties" had to be tough and they were. The interest of a fair examination for the applicants was paramount to the feelings and pride in draftsmen of the exchange parties.

Ohio had certain rules that had to be studied and followed. "Cute" names were not used such as "Louise Lover met and married Handsome Harry". The applicants were to be examined on so called general law not local Ohio law. If Ohio law, as such were involved, the court decision in relevant

part or statute had to be quoted. Accordingly, an applicant who took his law at Harvard, Chicago or Stanford had an equal opportunity with a graduate of Ohio State or Case-Western Reserve.

When the exchange parties had finished their important but cruel work, the questions and answers were returned to the original examiner who then proceeded to work on his questions in the light of the blue penciling. When the redrafting was completed, all examiners sent their work to the two five year men who again did the same thing. That step completed, the Board met in Columbus, divided into groups and for a third time went over the examination.

You must appreciate the great and careful effort all of which was done to assure the best possible examination with the least possible amount of ambiguities, misleading statements or errors of law. Even in the last stages an error might be encountered and a question substituted. I was impressed when I first saw the procedure unfold and am, indeed, impressed

as I relate to you the measure of conscientious concern evidenced and acted upon by ten busy lawyers in an effort to be certain the examination they prepared was fair and did not trick the applicants.

Once prepared, the examination was assembled, printed and given to the applicants over a three day period of ten sessions of two hours each. In spite of an occasional comment to the contrary in the journals and public press in relation to racial issues, I can assure you the names of the applicants remained anonymous to the bar examiners. Each applicant had a number, and that is all the examiners ever knew.

Following the three day examination period the beleaguered examiners would go into the grading syndrome. Each page, each answer and each exam had to be read. 600 eager, informed and determined applicants can write, in all shades and permutation of handwriting, a stack of paper about five feet high. Dedicating every night and all day Saturday and Sunday would allow a determined examiner to discharge the task in about two months.

In California an examination is given in July and working their sixty-five graders as hard as they can, they try to get the results of the examination announced by Christmas.

Each question was graded between 0 and 10 and 75 for the total examination was passing. The few sharp articulate applicants who wrote answers which could be graded 9 and 10 made the job easy and pleasant. Those who wrote 0 to 5 answers made the job easy but not so pleasant. The real job of sorting were those who wrote 6 - 7 and 8 answers.

The physical task of reading was tiring, but I felt much more oppressed by the concern and responsibility involved. So often I would pause to reflect "Is this applicant really prepared to practice law or by passing him will I be putting on the unsuspecting public one who is not equipped to handle properly the assignment of his client. On the other hand, if I fail him I will have frustrated the goal of eight years in grade school, four in high school, four in college and three in law school." It was not a comfortable spot to be in.

After the grading was finally done and the results were in and assembled, the Board of ten met again in Columbus to review the results as a guard against any unexpected or surprise development and review marginal papers. Then the grades were announced - in Ohio around three months after the examination had been taken. And shortly thereafter, the whole process started all over again!

This is the Ohio procedure - fairly typical of many states, especially smaller states, but perhaps variation is more the rule than uniformity. In some states the Board of Examiners are policy makers and all the drafting and grading is done by hired employees. This is the New York practice. California buys all their questions from out of state law professors and then hires sixty-five readers to grade the questions. Florida writes many questions of their own and buys some. The practice among the states vary widely.

Consider for a moment the lack of uniformity where sixty-five different people are grading essay questions. Even in Ohio there is a

problem with the essay questions. I never knew when I was grading number 550 if I was easier or tougher than I had been when I graded number 25. To adjust for the fatigue factor, in Ohio examiners are assigned different starting numbers. One examiner may start with paper number 1, the next with number 50, a third with number 100 and so on. The purpose, so number 600 would not have ten exhausted examiners look at his work.

You can be sure that some states prepare and give a high grade examination and in others the quality is not the best. Some states pass about 33% (Georgia) of the applicants and others 95% to 100% (West Virginia).

In spite of these obvious variations, the general character and quality of bar examinations have materially improved over the past several decades. Some fifty years ago the National Conference of Bar Examiners was organized and has been an effective, active organization. The Conference, a related organization to the American Bar Association, meets once a year at the time of the annual meeting of the American Bar

Association. All bar examiners of the various states are automatically members of the Conference.

In addition to assuming a responsibility in the area of character investigation (a concern of all admitting authorities, but not a subject of this paper) the Conference has had programs, panel discussions and the like in the art of question drafting, grading, and related subjects. Our Ohio Supreme Court each year sends the two three-year examiners to the meetings of the National Conference. It was through the largess of our Court that I became involved in the National Conference.

At the meeting of the National Conference in August of 1967, the then Chairman, Robert Seiler, who has since become a Justice of the Missouri Supreme Court, announced to the Conference that he was going to appoint a committee to make an in depth study of the bar examining process and announced without consultation with me that he was appointing me Chairman. His procedure had about the same finality to it as did Judge Stewart's a decade earlier.

The Committee which was thereafter assembled was composed of bar examiners from both large and small states. Several were former chairmen of the National Conference. One was a Judge and recently one of the members of the Committee has been appointed a Judge in the United States 6th Circuit Court of Appeals and another appointed to an appellate court in Pennsylvania. The Dean of the University of Chicago Law School and a law teacher from Yale, and several professional examiners made up the committee.

The Committee was directed to make an "in depth study" of the bar examination process and that it did. Every avenue was studied and investigated. During its study, the Committee observed that each Board of Bar Examiners was doing about the same thing as boards in other states were doing. There was an obvious duplication of effort and inefficiency in the husbanding of available skill and talent.

The Committee found that remarkable progress had been made in the past decade or two in the science of testing, perhaps similar to the

progress made in the nuclear sciences and in electronics. The Committee was impressed with the bar examination procedure used with remarkable success by the Florida Board of Bar Examiners. From 1965 the Florida bar examination has included objective questions, and since 1968 Florida has used a two-day bar examination with multiple-choice questions on five subjects for one day and essay questions on other subjects for one day. In recent years the law school admission test, using objective, machine-scored questions, has furnished valuable experience and has won broad acceptance by the legal profession as a valuable means of determining the capacity of a person to study law and, of course the capacity of that person, having studied law, to practice law.

The Committee's study revealed that there was a universal concern among bar examiners about the mounting burden of preparing and grading papers in the light of the anticipated (and now being realized) increase in law school enrollment. Its investigation showed that many

state procedures are not easily susceptible to expansion to handle an increased number of applicants. Many boards, courts and lawyers were alarmed at the time lag, even under the current examination load, between the time the examinations are given and the results announced. The Committee learned that there was a general receptivity among bar examiners for any suggestions and help that might be developed.

Within the last thirty years several efforts have been made to institute a "national bar examination", and there has been recurring discussion of the possibility of such a plan. Although endorsed by the National Conference of Bar Examiners, the Section of Legal Education and Admissions to the Bar of the American Bar Association and the Association of American Law Schools, the idea was not implemented. It was often said that a national examination would take away the control of admission to the Bar from the state boards of bar examiners, and financing for the plan has never been available.

State co-operation in testing for licensing by other professions was investigated. It was learned that more than a dozen professions, including medicine, nursing, engineering, veterinary medicine, pharmacy, accounting and architecture, use uniform tests. It was found that in every instance they are using multiple-choice tests with universally satisfactory results.

After all its studies and many foreboding warnings, the Committee concluded that it was

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that the best known of all licensing examination, the law bar examination, should employ modern testing procedure, and that a test of multiple-choice questions be made available to all states. This was the recommendation of the Committee to the Board of Managers of the National Conference of Bar Examiners. The recommendation was approved and the Committee directed to cause such an examination to be prepared and made available to the various states.

Gentlemen, I am proud to report that one week from tomorrow, on Wednesday, February 23, 1972, the applicants for admission to the practice of law in 19 states will be taking for the first time in history an identical bar examination. On July 23, 1972 the applicants from 26 states will take the Multistate Bar Examination. Among the 26 states will be Maine and California, Alaska and Florida and, personally exciting to me, Ohio!

To reach this result there have been thousands and thousands of hours of hard and inspired work by many people. There have been many problems considered and resolved. Two may have been of unusual significance.

As I have said for more than thirty years, there has been casual conversation of a "National bar examination". But to merely state the proposition and to name it "national" was to kill it. No one from North Dakota was ever going to tell anyone in Alabama what to put in their bar examination. The States have been fiercely proud and protective of their sovereignty and in no place is sovereignty more jealously guarded than

in admission to a state bar. So, we stopped calling our examination "national" and called it "multistate".

In a measure this is sheer semantics -- but, really, perhaps more. The Multistate Bar Examination is available to any state that wishes to use it. It does not require national participation nor national control for its success. Any state can use the multistate examination, interpret its grades any way it wishes, put its cut off of pass and fail wherever it will. Each state board is master of its own examination.

The second important decision was a recognition of the fact that no one examination could possibly accommodate the various rules and requirements that each of the fifty states have adopted for themselves over the past 100 years or so. Some give two day examinations, some three day. Some ten require questions on suretyship, eleven cover mortgages, eleven examine on insurance and fourteen consider administrative law. We found, indeed, only six subjects were examined by all

fifty states, contracts, criminal law, evidence, real property, torts and constitutional law.

Our Committee decided to give a one day examination twice a year on contracts, criminal law, evidence, real property and torts and to allow each state to use its second or second and third day to meet its other subject requirements. It is expected that this part of the examinations, locally prepared, will use essay questions which will allow each board a chance to study the performance of each type of examination.

We did, for security reasons, require that the examination be given on the same date. Adjustments by the court on this subject proved to be fairly easy. As experience is had with multistate bar examinations, courts will have time to change their various rules to accommodate an even more complete and total examination.

While states giving the examination will pay a modest fee per applicant (which will prove to be much less than costs now expended by the individual states) it was necessary to fund the start-up costs. The American Bar Endowment made the program possible with a grant of $125,000.

These funds made possible sessions we had in New York City, Chicago and San Francisco with bar examiners in those areas to explain the nature of the multistate bar examination. And those funds permitted us to assemble the five committees that have actually prepared the multiple-choice questions.

The Committee was, fortunately, successful in securing Dean Joe Covington, former Dean of Missouri Law School, to assume a position designated Director of Testing. Dean Covington with the Committee assistance assembled five committees, one each for the five subjects in the examination. On the committees were two bar examiners and three law professors who were outstanding scholars of the subject assigned to the committee. Herbert R. Brown, a Columbus lawyer and member of the Ohio Board of Bar Examiners is a member on the committee for evidence.

The Committee retained the Educational Testing Service of Princeton, New Jersey as our consultant. The Educational Testing Service has for years prepared and given the college boards examinations and more recently the law school aptitude tests.

Under the guidance and direction of Dean Covington and officials from the Educational Testing Service, the five committees met, were instructed in the modern skills of question writing and set to work. Elaborate procedures of checking, double checking, language analysis, grading as to difficulty and the like have been faithfully adhered to.

There will be forty questions on each of the five subjects. Each question consists of a statement of facts with four alternative answers--a "best answer" and three "distractors". The test of 200 questions will be administered on one day in six hours of testing and, it is believed, will be the most detailed and thorough coverage of each of the five subjects ever available on any bar examination.

To give you some idea of the coverage. The very thorough Ohio examination has two questions on evidence and, I believe, five on contracts. The multistate bar examination will have forty questions on each subject. The questions have been assembled in a random pattern and are not labeled by subject.

It just is fact that never in the history of time has there been

a law examination prepared by so many recognized scholars using test devices and techniques that have been developed in the last couple of decades. It should be the most thorough, clear cut, fairest law test ever assembled.

Each state will use a number assignment system so the identity of an applicant will be protected against disclosure.

Educational Testing Service will machine score the answer sheets and within fifteen days report the scores to each state board. Each board will receive the scores of its candidates, the number and percentage of right and wrong answers each candidate had on the total examination and on each subject, the distribution of total scores of the board's candidates and the median score of the group. A distribution of scores for all candidates taking the examination, but without individual or state identification, will be provided. The National Conference of Bar Examiners will not release the results from any state or the score of the applicants who graduate from one law school. The sovereignty of

the states and law schools will be preserved!

It is presumed this new plan will raise many questions. What about reciprocity? Will the score of an applicant be recognized in all participating states so that one need pass only the locally prepared test after making an "acceptable" score on the multistate bar examination? Will the multistate examination be expanded to two days and more subjects added with perhaps both objective and essay questions so that a participating state may wish to give this examination only, with no locally prepared examination? Will states set different cut-off scores? These are only a few of the obvious questions that cannot be answered in this paper, and, in fact, some of them have no answer at present.

For more than three years the committee has been working with constant and concentrated attention to its assignment and responsibility to study the bar examining process. It has been gratified by the wide acceptance of and participation in the multistate bar examination and by the indispensable financial support made available by the American

Bar Endowment. The Committee is certain that the multistate bar examination will improve materially the scope and quality of bar examinations, will solve the immense problems faced by many examining boards and will drastically reduce the time lag in many states between the giving of examinations and the announcement of results.

And if any of you have a brother, son or grandson who plan to take a bar examination -- or if any of the lawyers present plan to retire to Florida or California -- they or you can be sure if you study well and are prepared the multistate bar examination will give you a quick, fair, uniform and thorough means to demonstrate to the chosen state that they or you possess the "ability to analyze fact situations, have knowledge of legal principles and ability to utilize legal principles and lawyer-like reasoning to reach a sound result."

JOHN ECKLER