DOCUMENT RESUME

ED 126 805 HE 008 072

TITLE Report on the Clare Committee Proposal for Rules of Admission to the Federal District Courts in the Second Circuit. Report of Special Committee on Admissions to the Bar.

INSTITUTION Association of American Law Schools, Washington, D.C.

NOTE 21p.

EDRS PRICE MF-$0.83 HC-$1.67 Plus Postage.

DESCRIPTORS Admission Criteria; *Court Litigation; *Curriculum; Curriculum Development; Curriculum Evaluation; Higher Education; *Law Instruction; *Law Schools; *Lawyers; *Legal Responsibility; Professional Education

IDENTIFIERS Association of American Law Schools; *Clare Committee

ABSTRACT

The Clare Committee recommends that admission to practice in the federal district courts in the Second Circuit be limited to those who have studied five subjects, including trial advocacy, in law school or after graduation in approved continuing legal education programs. The practical effect of adoption of these recommendations would be to require the law schools to offer and the students to take the required subjects. The committee's recommendations reflect the opinion that there is a need for improvement in the level of performance of trial advocates. The Association of American Law Schools' report on the recommendations reviews the proposal and its factual premises, and summarizes and examines the alternative requirements for admission to practice in a federal district court. (JMF)

ASSOCIATION OF AMERICAN LAW SCHOOLS

REPORT ON THE CLARE COMMITTEE PROPOSAL FOR RULES OF ADMISSION TO THE FEDERAL DISTRICT COURTS IN THE SECOND CIRCUIT

Report of

Special Committee on Admissions to the Bar

ASSOCIATION OF AMERICAN LAW SCHOOLS

Suite 370, One Dupont Circle, N.W.
Washington, D.C. 20036
202/296-8851

FOREWORD

A significant development, and to many of us in legal education a disturbing one, in the last two years has been the emergence of proposals and efforts to control or influence law school curricula by court rule. I believe that these efforts are mistaken. They imperil a long-standing allocation of functions among the bar, the judiciary, and the schools, upon which much of the achievement of the schools and the profession rests.

These efforts are, in part, the product of a conviction very widely held, in the bar, bench and law schools, that legal education must provide more and better "lawyer skills" training. This is most commonly understood as training in the arts of litigation, instrument drafting, interviewing and negotiation. I am sympathetic to much that is said in support of these proposals. I would feel happier, I must admit, if some teachers and practitioners were quicker to recognize that the arts of reading, writing and reasoning are today, as in the past, basic lawyer skills.

These efforts are also a product of a sincere concern about the competency of lawyers in the courtroom, to which we all must attend. These proposals deserve, therefore, a thoughtful response. There must be a search for alternatives that will prove more effective and less destructive. I believe that the bench, bar, legal education and the public have been exeedingly well served in that search by the Association's Special Committee on Admissions to the Bar, chaired by Dean Harry H. Wellington of the Yale Law School. At its May 21 and 22, 1976 meeting, the Executive Committee received and unanimously approved the Special Committee's report. I commend the Committee's report to your consideration.

Francis A. Allen
President, Association of American Law Schools

REPORT ON THE CLARE COMMITTEE PROPOSAL FOR RULES OF ADMISSION TO THE FEDERAL DISTRICT COURTS IN THE SECOND CIRCUIT

Charge to the Committee and Interest of the Association

At its August 10 and 11, 1974 meeting, the Executive Committee established the Special Committee on Law School Course Requirements for Eligibility for Admission to the Bar, subsequently renamed the Special Committee on Admissions to the Bar. This committee was initially chaired by Thomas Ehrlich, then Dean of the Stanford Law School, and is now chaired by Dean Harry H. Wellington of the Yale Law School. The committee was charged with the responsibility, among other things, of exploring the implications for legal education and in particular the Association's member schools in the proposal then being examined by the Special Committee on Qualifications to Practice in the Federal District Courts of the Second Circuit, which was appointed by Chief Judge Irving R. Kaufman and chaired by Robert L. Clare, Jr., Esq. of New York City (hereinafter referred to as The Clare Committee).

"The purpose of the Association of American Law Schools is the improvement of the legal profession through legal education." AALS Bylaw Section 1-2. While as individual law teachers we shre the concerns of other lawyers with all questions bearing on the health of our profession and the quality of legal services provided to the public, as law teachers and members of this committee our primary concern is with the implications of the Clare Committee proposal for legal education.

The Clare proposal, which mandates certain course requirements for admission to the federal bar, raises concerns for the AALS both about the financial impact on the schools and about the resulting curricular inflexibility for dealing with changing conditions. We are aware that the Clare proposal does not require that the specified training and education be obtained in law school. Unlike Rule 13 of the Indiana Supreme Court, which mandates 13 specified law school subjects that must have been taken by candidates for admission to the bar of Indiana, the Clare Committee proposal would permit an applicant for admission to the District Courts of the Second Circuit to obtain the necessary training and education in law school or after graduation in an approved continuing legal education program. However, it is our judgment that informed and prudent law students will want to take the necessary courses in law school that will qulaify him or her to be admitted to the federal district courts. Adoption of the rule in the Second Circuit alone would have national effects. Given the special business, financial and governmental importance of the courts of the states in the Second Circuit and given the mobility of law students and lawyers, few law students would be confident that they would never want to be admitted to practice in the District Courts of the Second Circuit. Therefore, the great majority of, if not virtually all, law students in all of our member and American Bar Association approved law schools will want to take the course work specified in the Clare rule. See Ehrlich, A Critique of the Proposed New Admission Rule for District Courts in the Second Circuit, 51 A.B.A.J. 1385 (November, 1975).

The Clare Committee Proposal and its Factual Premises

The rules for admission in the nine districts in the Second Circuit have been substantially the same. The applicant must be a member in good standing of the bar of the state in which the district is situated. Upon filing written application, paying a $2 to $8 filing fee, and, in certain of the districts, furnishing additional information, the attorney is admitted to practice in the district. This past December the Northern and Western Districts of New York adopted the rules for admission proposed by the Clare Committee.

The final report of the Clare Committee carries forward the present professional and educational requirements that a person be a member of the bar of the state in which the Federal District Court is situated. In addition, the committee recommends that the "applicant either has successfully completed a course of study in an educational institution [defined as an ABA approved law school or any institution providing CLE that is approved by the Court's Committee on Admissions], before or after admission to the bar, covering the following subject matters or has met the standards or requirements prescribed or deemed equivalent by the Committee on Admissions in the following subject matters: (a) Evidence; (b) Civil Procedure, including Federal Jurisdiction, Practice and Procedures; (c) Criminal Law and Procedure; (d) Professional Responsibility; and (e) Trial Advocacy." "Trial Advocacy" is defined as a "course of study undertaken while attending, or after graduation from law school, in which the students, under supervision of a member of the bar in simulated or actual litigation, participate in various phases of trial work. Supervision must have been provided by lawyers who are familiar with litigation."

Public attention was called to the adequacy of trial advocacy by Mr. Chief Justice Warren E. Burger's Sonnett Lecture at Fordham University in November, 1973 and was reenforced by Chief Judge Irving R. Kaufman's address to the New York County Lawyers Association two weeks later. In January, 1974 Chief Judge Kaufman appointed the Clare Committee.

The Clare Committee's report reflects much of the public discussion of this question. The quality of performance of trial advocates is discussed in terms of competence and incompetence, inadequacy and need for improvement in the level of performance. The Clare Committee concludes that "all of the evidence demonstrates that incompetence exists, attributable to lack of proper training, and that the public is deceived when the court admits unqualified attorneys to practice."

To the extent that the Clare Committee is speaking of "incompetence," then with respect to criminal cases the question of the violation of an accused's rights under the Sixth Amendment immediately arises. Asserted incompetence in the representation of civil clients raises issues of discipline and malpractice liability for the incompetent lawyer and raises serious questions for the administration

of justice generally. Actual incompetence, where it exists, requires more immediate remedies than the long term solution of rules for the admission of new attorneys, as the Clare Committee recognized. It is possible, however, that the Committee used the term "incompetence" in the sense of "inadequacy," a level of performance that does not raise constitutional concerns but that is sufficiently below par to alarm serious observers.

Some published differences over the findings of fact and recommendations of the Clare Committee include vigorous disagreements with their basic findings as to the adequacy of representation in the Federal District Courts. See, for example, the statement of Federal District Judge Jack B. Weinstein to the Clare Committee. The Clare Committee based its findings upon interviews with forty judges in the Second Circuit. The summary of the results of those findings suggests that the interviews may not have been carefully structured so as to elicit from the interviewees in all cases careful distinctions between levels of incompetence or inadequacy in their observations about lawyers who appeared before them.

This Committee's Assumption. These questions aside, whatever may be a completely objective and accurate description of the quality of representation in the federal district courts, we assume for purposes of the rest of this memorandum that there is a sufficient inadequacy of representation to require action. The question that we address is what action should be taken; the answer to this question necessarily depends on the causes of the deficiency.

The inadequate performance of a trial advocate in the trial of a case or in the handling of another matter before a judge may be a product of one or more deficiencies on his part. The lawyer simply may have spent inadequate time in developing the facts involved or in planning the presentation of the evidence at the hearing. The lawyer may have an inadequate or incomplete understanding of the current substantive law applicable to the matter. The lawyer may have an inadequate or incomplete understanding of the principal procedural problems that will be encountered in the court's handling of the case. The lawyer may have an inadequate capacity to practice the skills and art of advocacy. The lawyer may lack the capacity to articulate clearly and concisely his theory of the client's cause of action or defense and may lack the capacity to relate the evidence to his theories. It is readily apparent that not all of these deficiencies are remediable by additional training and education in law school or in CLE programs.

With respect to existing members of the bar who perform in the federal district courts below the minimally acceptable level of adequacy, there are several apparent responses. The Clare Committee acknowledged that if the inadequacy is the result of failure to prepare the case in question or a failure to be informed about how to conduct a trial in the federal courts, disciplinary action by the trial judge or other appropriate body may be warranted.

Almost all observers of the process indicate that most complaints about attorneys from their clients involve lack of communication with the client; it is difficult to tell how many of these complaints raise legitimate concerns about the attorney's competence in fulfilling duties on behalf of the client. See Justice (British Sect. of Intl. Comm'n of Jurists), Complaints Against Lawyers 12 (1970); Association of the Bar of the City of New York, Annual Report of Committee on Grievances (1970). These reports, as well as the language of the Clare Committee itself, suggest that the most pervasive source of attorney deficiency may be lack of diligence rather than lack of educational preparation.

The critical conclusion of the Clare Committee is that deficiencies exist in the trial bar "attributable to lack of proper training." The Committee acknowledges that it "has no evidence that the direct cause of the criticism is lack of knowledge of the subject matters" required in the proposed rule. This absence of evidence may not be entirely the fault of the Committee since valid data on the sources of deficiencies will be difficult and costly to obtain, and the Committee did not have sufficient resources to undertake a major investigation of what makes a trial lawyer succeed or fail. To leap from a lack of evidence to a drastic imposition of requirements on law school curricula, however, is a serious step that should not be taken lightly, particularly when it is realized that this first step could have extraordinarily far-reaching implications for the entire legal profession. A reasonable operating principle in matters of this kind is that the proponents of change should bear the burden of proof that both their diagnosis of the deficiencies of the present system is accurate and complete and their remedy is aptly designed to remove effectively and economically the deficiencies.

As we will discuss below, significant well-funded investigations of the lawyering process are now being conducted and the Association of American Law Schools is cooperating in those studies with the bench and bar. It is hoped that these studies will produce the kinds of data that will allow us to make reasoned choices about the imposition of requirements either on law school curricula or on practicing lawyers. Temperance and patience in such an important undertaking are, we believe, virtues rather than delaying tactics.

Since we are concerned about the quality of advocacy in both state and federal courts, and since we agree with those judges who stated that there were no lawyers in whom there was no room for improvement, we assume, as did the Clare Committee, that deficiencies exist in the trial bar. We propose to continue working diligently with both bench and bar to identify sources of deficiencies and to assist in finding remedies as they are shown to be appropriate. Nevertheless, we do object to suggestions of a "cure" for a malady whose symptoms are only incompletely identified and whose causes are yet inadequately explored.

Summary of Alternative Requirements for Admission to Practice in a Federal District Court

Before an examination is made in detail of the several alternative rules for admission to practice in a federal district court, it may be useful to summarize these alternatives in general terms. The apparent alternatives are:

a) Admission Based on Prior Admission to a State Bar. The virtually unanimous rule of the federal district courts currently is that a person must have been admitted to practice before the courts of the state, territory or other jurisdiction in which the federal court is situated. If the applicant has been so admitted and is in good standing, he or she is admitted to the bar of the federal district court. This rule delegates to the state or other jurisdiction the responsibility for determining the prospective lawyer's competence. Except for the half-dozen states that extend the "diploma privilege" to graduates of accredited schools in their states, this means that admission to practice in the federal district court follows successful negotiation of the state-administered written bar examination.

b) Admission Based Upon Prior Admission to a State Bar and Study of Stated Subjects. In addition to requiring an applicant to have been admitted to practice before the courts of the state, territory or other jurisdiction in which the federal district court is situated, the court could require the applicant to have completed certain stated subjects. This is the Clare Committee rule. It is a modified form of the "diploma privilege."

c) Admission Based Upon Prior Admission to a State Bar and Apprenticeship in the Federal District Courts. In addition to requiring an applicant to have been admitted to practice before the courts of the state, territory or other jurisdiction in which the federal district court is situated, the court could require the applicant to have been a successful participant (with a temporary license for the purpose) in a specified number of proceedings in a federal district court in association with, or under the tutelage of, a lawyer admitted to practice in the court.

d) Conditional Admission Subject to Evaluation by the Judges. An applicant who has been admitted to practice before the courts of the state, territory or other jurisdiction in which the federal district court is situated could be granted a conditional or limited admission. This admission could be converted to an indefinite admission upon the lawyer's receiving an appropriate number of satisfactory ratings by the federal district judges before whom he or she has appeared.

e) Admission Based Upon Written Examination. Admission to practice in the federal district courts could be based upon admission to practice before the courts of the state, territory or other jurisdiction in which the federal district court is situated plus successful completion of a written bar examination. The examination for admission to practice before the federal district court could deal with a limited number of federal subjects.

Examination of the Alternative Requirements for Admission

To explain our concerns with the Clare Committee proposal and to identify areas for further study, we will examine each of the alternatives summarized above. We recognize that there could be various combinations of these alternatives. We do not describe and analyze each of these combinations; we hope that the discussion of the alternative plans will suggest the policy questions and operational problems involved not only in these plans but also in the various combinations and permutations thereof.

a) Admission by the state or territory in which the court is located. Since this is the prevailing rule in all the federal district courts and its operation is familiar to all concerned, we need not discuss it further. It suffices to note that the present rule does not draw any substantive distinction between practice in the federal courts and practice in the state courts. We do not speak to the merits of the disagreement between the Committee and Professor Charles Alan Wright over whether the Courts of Appeal have the power to impose additional requirements, such as the Clare recommendations. For purposes of exploring the various alternatives, we assume that power to impose some form of additional requirements exists.

b) Law School Course Requirements. The Clare Committee recommended requiring five courses that relate to practice and procedure in the federal courts. As an abstract proposition, there

can be little argument that students would be well advised to take these courses. As a condition for admission to the bar, however, the requirement is objectionable on several grounds.

First, any external mandating of law school courses presents real dangers to legal education. If the trial courts can insist on one package of courses, then probate courts can designate another package, and family courts another package. The Internal Revenue Service and Tax Court could then indicate courses to be taken by potential tax lawyers and each state's secretary of state could dictate the courses for corporate lawyers. Students would find that they could not take the courses required for all of these tribunals and would be forced to choose a specialty before finishing the basic law degree.

This "parade of horribles" perhaps overstates the case slightly by emphasizing long-term effects, but even in the short run some severe consequences can occur. Few students would wish to foreclose the possibility of appearing in federal court some day and would therefore take the courses required for admission to the federal bar. The cost implications to the law schools of every student's enrolling in trial advocacy courses are not easily specified but they would surely be sizable. Dean Sovern of Columbia reported that the day after Professor Rosenberg announced to his class the Second Circuit's endorsement of the Clare Report, the law school was forced by student demand to go from two sections of trial advocacy to five sections.

In addition to the cost implications, requiring a certain package of courses threatens the integrity of the educational process. If a court requires a course, then it must have some interest in the content of the course. To ensure that the Trial Advocacy course has the content that serves the objectives of the rule would seem to require the court to audit periodically the teaching materials and teaching. Official control over a professor's teaching is not only repugnant to the traditions of academic freedom but is also functionally impracticable with more than 160 approved law schools throughout the country.

Geographical distribution is relevant in another context. The districts embraced by the federal courts differ widely in the number and character of law schools as well as in the types of law practiced within them. If different districts were to establish different requirements, then schools would not be able to prepare their students for admission to different courts. Instead of recognizing the increasingly national character of our country, this approach would result in restricting the opportunities of attorneys to move to other districts. In addition, any rule of this type would probably require an exception for attorneys who represent the federal government since these attorneys are hired from all over the country and are often asked to appear in courts at opposite ends of the country. An exception for these attorneys, however, would raise serious questions of fairness and even-handedness.

A concrete example of the type of problem that course requirements can pose for the schools and their graduates is Rule 13 recently adopted by the Indiana Supreme Court. This rule specifies 50 semester hours of course work (over half of a student's courseload) in 13 different subject areas that must have been completed in law school by a candidate for the Indiana Bar. The law schools in Indiana can adjust their curricula so that their offerings will permit their graduates to meet the Court's requirements; the students enrolled in those schools are aware of the probabilities that they may seek admission to the Indiana bar and are able to make their course choices accordingly. However, a moment's reflection will make apparent the difficulties the Court's rule presents for schools and their students that are situated elsewhere. If additional states were to impose their own course requirements, it might quickly become impossible for the schools to prepare their students for the bar examination in any state other than the one in which the school is located. This potential balkanization of the legal profession and its effect on the mobility of lawyers runs counter to all trends of the last half century and poses an intolerable burden for the law schools. See Beytagh, Prescribed Courses as Prerequisites for Taking Bar Examinations: Indiana's Experiment in Controlling Legal Education, 26 J. Leg. Ed. 449 (1974). In addressing this concern, the Clare Committee was able to give only general assurances that the Judicial Conference of the United States should work with interested parties to retard proliferation of additional course requirements.

Both the Clare Committee Report and Indiana Rule 13 raise directly some of the fears that have underlain the longstanding insistence of legal education and the practicing bar on examination by an independent agency as the means of admission to the bar. The July 1971 statement of the American Bar Association's Council of the Section on Legal Education and Admissions to the Bar and the Board of Managers of the National Conference of Bar Examiners deserves quoting in full:

> "A half century ago the American Bar Association adopted standards for legal education, the second of which is as follows:
>
> 'The American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subject to an examination by public authority to determine his fitness.'
>
> The criticism of bar examinations, which is daily becoming more prevalent, makes it most appropriate for the Council of the Section of Legal Education and Admissions to the Bar and the Board of Managers of the National Conference of Bar Examiners to state their opinion on the matter of the so-called 'Diploma Privilege.'

It is the position of the Council and Board that the above quoted standard, adopted in 1921, is as valid today - perhaps more so with the mobility of law graduates - as it was at the time and that every applicant for admission to the Bar should be subjected to examination by public authority.

Very great progress has taken place in the caliber of legal education in the fifty years intervening since 1921. In part the improvement of legal education has been the result of experimentation in teaching techniques. Not all such experiments have proved successful. Public authority should not dictate teaching techniques but it should make sure that all applicants have the training necessary adequately to serve the public upon their admission.

Not only are law schools quite properly experimenting in teaching techniques but they are experimenting in curriculum content. Again, public authority should not dictate curriculum content but by examination should determine that the content of the applicant's education is such that upon admission he will be able adequately to serve the public. In one of the jurisdictions where graduates of certain law schools are admitted without examination, the Court found it necessary to a certain extent to dictate the curriculum content of those schools - an unfortunate limitation on the educational freedom of those schools.

Bar Examinations themselves serve additional functions. They encourage law graduates to study subjects not taken in law school. They require the applicant to review all he has learned in law school with a result that he is made to realize the interrelation of the various divisions of the law - to view the separate subject courses which he took in law school as a related whole. This the curriculum of most law schools does not achieve. Also it is the first time many of the applicants will have been examined by others than those who taught them, a valuable experience in preparation for appearing before a completely strange judge.

To reiterate, it is the position of the Council and the Board of Managers that there must be examination by public authority. This is not to say that public authority must not be very careful in its examination procedure to make sure that it is fulfilling its responsibilities. It should continually strive to make its methods of examination more effective so that the results will be the nondiscriminatory admission of none not qualified and the exclusion of none qualified, even though this requires the use of innovative examining techniques and constant consideration of the ever changing needs of our society. The necessity to train lawyers to represent all members of society is a continual challenge to teachers of law and legal education. To test this properly the examining authority can perform effectively and satisfactorily only if it makes responsive changes in its techniques.

In discussing law school imposition of procedure courses as a prerequisite to Trial Advocacy courses, the Clare Committee asserts that if these courses are preparations for moot court work then they should equally be required preparation for actual court work. Similarly, in discussing the alternative of a Federal Bar Examination, the Committee asserts that the schools should object to a bar examination just as to course requirements on the ground that, unless the courses in examination subjects are worthless, the students are forced to take these courses.

In these comments, the Committee's report seems to misperceive important aspects of the process of legal education and, perhaps even, of lawyering. Students and lawyers both learn a great deal about practice and procedure, as well as trial technique, while engaged in study of various other subjects. Students learn evidence rules and procedure in their torts courses; they learn trial techniques in every course that deals with subjects of litigation; they learn about federal jurisdiction in courses as different as taxation and constitutional law. In short, the legal process is not the neat compartmentalized set of rules that the Committee statement may suggest. The observation that the law is a seamless web makes our point.

It is precisely because we believe that we teach all necessary subjects in many different ways under various titles that the law schools embrace state bar examinations as an insulation from imposition of specific course requirements by public authorities. Fortunately, the American Bar Association has understood the dynamics of the legal process and education sufficiently to support this effort.

As a practical matter, the Clare rule will have a greater impact upon student choice of courses than the usual state bar admission rules specifying the subjects upon which the students will be examined.

In this connection it might be noted that the Jackson and Gee study, Bread and Butter?: Electives in American Legal Education (Council on Legal Education for Professional Responsibility, 1975) discloses that most students take almost all of the "bar subject" courses, whether they are elective or not. The impact of the Clare specification of subject matter will be even greater, since with respect to a given bar examination subject a student may choose not to take the course and instead learn enough to pass the examination through independent study or by taking a cram course.

While this influence upon course selection will have some general impact on course offerings and staffing of law schools, the principal impact is the result of the Clare rule requirement on training or education in trial advocacy. The original proposed rule would have required that training in trial advocacy take place in clinical programs dealing with live clients, a form of education that the law schools embrace, but which costs substantially more per student credit hour than conventional modes of teaching, some suggest 3 to 5 times more. The Clare Committee is to be applauded for recognizing the utility of classroom simulation techniques and changing the proposal to provide for classroom courses in trial advocacy. These are not as expensive.

Most law schools now provide an offering in trial advocacy but are not able to make it available to all students. The practical effect of adoption of the Clare Committee proposal would be to require the schools to reallocate their resources so as to make the described trial advocacy training available to all students. This reordering of educational priorities by direction of an external governmental body troubles the law schools. The Clare Committee addresses these concerns as follows:

> While the law schools complain of the costs involved in teaching Trial Advocacy, at the same time they apparently have no difficulty in funding courses in such subjects as "Urban Development," "Macro-economics and the Law," and "Psychoanalysis and the Law" (defined as a "study of the theory of psychoanalysis and its relevance (if any) to the law"). We do not argue that these courses lack value, but we do consider that if the courts and the public are to be adequately served, and if students are demanding training in the technique of litigation and not getting it, then the priorities demand that the necessary resources be diverted to and more emphasis be placed on trial advocacy rather than on more esoteric subjects.

A poet has wisely observed that beauty is in the eye of the beholder; perhaps there is substantial truth in observing that what is an esoteric law course may also be in the

eye of the beholder. Certainly there are law teachers who would agree that there are courses in their law school's curriculum (very unlikely is it one they offer) that may properly be labelled "esoteric." There may be substantial consensus that Torts, Property, Contracts, Constitutional Law, Criminal Law and Procedure are core courses, but beyond that one can find many reasonable legal educators and practitioners disagreeing over "what every law student should take". The above quoted observations in the Committee's report fail to recognize that debate over these curricular questions within the law schools and the profession is a healthy thing and that there should be no orthodoxy established by rule of court. Resolution of this debate by court rule will reduce the ability of law schools to respond to the changing needs of the profession and society. It should not be forgotten that the Trial Advocacy courses praised by the Committee are themselves a relatively recent innovation. If the Trial Advocacy course is set in concrete as a requirement for admission to the bar, what unknown innovations of the future may never come to pass because of the need to staff the required courses? The loss to the profession may be great and never known.

The Clare Committee report repeatedly emphasizes that the courses it recommends are desirable, as the law schools themselves recognize, and therefore should be taken by all students who wish to try cases. The difference between "should" and "must," however, is great. The federal courts are not like potential employers as the Committee report suggests (analogizing to the Justice Department's interviewing only students who have taken antitrust courses). Whether a student wishes to take the courses required to land a particular job is primarily the concern of the student, who has choices in the matter; but specifying a list of courses as a sine qua non of practicing law is a direct governmental imposition on the schools themselves. Our concern is not a simple claim of academic freedom as the Committee suggests. We do not profess to know more about the needs of the trial bar than the federal courts, but we do lay claim to the need for flexibility to deal with changing conditions and new technology more rapidly than would be possible if operating under the strictures of a court-imposed curricular rule.

c) Apprenticeship. Admission to the federal district courts could be conditioned on successful participation in a stated number of proceedings within a stated period of time (such as one year) in association with a lawyer admitted to practice before that court. The Chicago Bar Association has established a "buddy system" for lawyers appointed to represent indigents in criminal courts. The lawyer who has not handled a criminal matter previously is assigned to assist experienced criminal defense lawyers in the trial of cases until he or she is sufficiently experienced to go it alone. Apprenticeships exist in fact if not in name in the larger law firms. It is also common practice for a fledgling sole practitioner to seek the sustained guidance of an experienced attorney. None of these systems, however, is expected to be a condition of admission to the bar. Each is a method for insuring quality of representation by one who is already a member of the bar.

When apprenticeship has been attempted as a condition for admission to the bar, it has had unfortunate results. New Jersey and Pennsylvania until recently imposed apprenticeship requirements but abandoned them on finding that they did not work satisfactorily and tended to drive down the income of the young lawyer to such a point that the apprenticeship resulted in exploitation in many cases. If association of an experienced lawyer on cases handled by an inexperienced attorney could be imposed following the attorney's admission to the bar, the exploitation problem might be eased, but other problems remain. There are not likely to be enough highly skilled practitioners willing to serve as mentors in an apprenticeship system compared to the high number of persons seeking to qualify as apprentices; and these practitioners may not be able to give as much time to instructing the apprentices as they hoped. The bulk of the "supervising" is likely to be handled by less capable attorneys who need whatever income may be gained from sharing in the small fees earned by young attorneys, thus perpetuating the lower level of skills of these attorneys.

d) Evaluation by Judges. There are a variety of approaches that could be related to this technique, including conditional initial admission to the bar with full licensing dependent on satisfactory performance in a given number of proceedings. For example, a temporary 3-year license could be given, with permanent admission being dependent on obtaining passing marks from judges in at least five proceedings during the period. A substantial defect in this form of conditional admission is that it creates severe pressure on the attorney to solicit cases or take cases to court that should be settled, all for the purpose of handling the requisite number of proceedings within the established time limit. In addition, this type of rule would make it difficult for the judge to eliminate personality or attitude differences from the decision of who should practice before him or her, a problem that might be particularly acute in small districts.

Routine grading after admission of lawyers by judges is feasible if the consequences of the attorney's achieving a low grade are that he or she must enroll in some form of refresher course on trial techniques. Continuing legal education is now so widespread that no stigma need be attached to being told by a judge that one needs additional work. Objections to judicial evaluation of attorneys are that it could be largely perfunctory and tend to be pass-fail, that it makes possible retribution by the few judges who have personal animosities against certain lawyers (or, at least, that lawyers might perceive this possibility and therefore moderate the level of presentation of their clients' interests), that the process would be costly to all parties including the clients who must ultimately pay for the continuing legal education of their lawyers, that public disclosure of one bad rating could unfairly hurt a lawyer's reputation but that the public is entitled to this information, and finally that the general level of tension between bench and bar (particularly in the case of young and minority lawyers) could be unduly heightened.

Assuming that evaluations of lawyers could be made on a routine basis after resolving the above objections, then the sanction

for a low rating must be carefully considered. There are some poor performances that should result in disbarment, but should the judge be allowed to make this decision alone? As suggested above, the usual course would be to refer the matter to a bar association grievance committee. Due process requires at least notice and a hearing prior to disbarment, and a judicial evaluation system will not itself meet this requirement. It is adequate as a triggering device but not as a device for making major decisions about the property-like interest of an attorney in his license. On the other hand, the attorney who is not "incompetent" but who needs some additional work might be counseled by the judge to take whatever steps are appropriate. If the judge has discretion to recommend that the lawyer take a particular CLE course, read a certain book, or prepare better as the case may be, then the system may not be sufficiently formal to be of much efficacy. Without this flexibility, however, the system becomes punitive in character and the objections mentioned above take on more dimension.

e) Examination. The conventional basis for testing a candidate's competence for admission to the bar is his or her successful completion of a written examination. Historically, the bar examination has been quite similar to the conventional law school problem-solving discussion question. A relatively recent development is the adoption of a multiple-choice examination by over 40 states and other jurisdictions: The Multistate Bar Examination is prepared by the National Conference of Bar Examiners with technical assistance of the Educational Testing Service. Judge Malcolm D. Wilkey and Mr. John Germany of Florida (chairman of the National Conference of Bar Examiners) have proposed that a federal bar examination be instituted to serve as a basis for admission to all federal courts. See Wilkey, A Bar Examination for Federal Courts, 61 A.B.A.J. 1091 (1975). Mr. Germany proposes that the multiple-choice format developed for the Multistate Bar Examination be used, and that applicants be tested on three to five federal subjects.

It can be argued that a paper-and-pencil test, whether discussion type or multiple-choice, does not adequately test for advocacy skills, such as the use of evidence as opposed to the formal rules surrounding its introduction. The Clare Committee apparently judged that tests were unsuitable for this purpose, but it is possible that the Committee did not fully explore some recent developments in this field. Programmed instruction, such as Professor Robert E. Keeton's efforts for the National Institute of Trial Advocacy, could use a transcript or filmed courtroom proceeding and individual computer consoles through which a student can change the course of the proceedings by interposing objections or new evidence. Thus far, these techniques have been limited to instruction, but they may be adaptable for testing purposes.

Of the skills needed for trial advocacy, many seem easily testable. In this category are the application of procedural and evidentiary rules, opening and closing arguments and preparation of jury charges and court findings. The skills that might elude testing are examination and cross-examination of witnesses, which are often

said to be skills possessed in high degree by only a handful of lawyers. Further exploration should be made to determine whether some form of testing that can be administered objectively to large numbers of applicants could be developed to serve this purpose.

An examination might be particularly attractive if it were administered after the attorney has been admitted to the federal bar for a period of, for example, one year. This technique would separate the examination from the state bar examinations and would allow the young attorney to pursue either an apprenticeship arrangement or post-law-school education in preparing for the examination. Since the examination would be designed to test for skills of advocacy rather than formal learning, it could be administered to all members of the federal bar periodically (e.g. every five years), should that be found desirable. To avoid the due process problems mentioned above, it would probably be best for the consequences of the examination to be referral to continuing legal education rather than withdrawal of the previously acquired right to practice.

It is worth noting that an examination in trial advocacy techniques, if not administered as part of a general bar examination, is a clear step toward separation of the legal profession into compartmentalized specialties and may be objectionable from that standpoint alone.

Response of the Bar and Bench to Incompetence

Both the practicing bar and the judiciary have fashioned responses to the public's need for competent legal counsel, but there is reason to believe that these responses have not been adequately implemented. In criminal cases, the Sixth Amendment demands competent counsel; it is the judge's responsibility to discharge incompetent counsel from a case. In civil cases, the theoretical underpinnings are less clear but the judge's responsibility to prevent a client's interests from being completely subverted is similar. The courts were, at common law, entitled to determine who comes before them as an advocate. Much of the initial stages of this function has been delegated by rule or statute to the organized bar. When a judge is unable to secure adequate performance by cajoling or threatening an attorney, it becomes the responsibility of the bar to police itself and remove the incompetent attorney.

The most searching study to date of the problem of lawyer competence is contained in Marks & Cathcart, Discipline Within the Legal Profession: Is it Self-Regulation?, 1974 Ill. L. Forum 193. The authors interviewed the professional staff of most bar associations and studied the statistical data on lawyer discipline. They note that the "professionals in the disciplinary agencies insist that they are unable to deal with issues of competence." Id. at 226. The reasons most often cited are inadequate staff for investigation of these difficult cases and lack of well-defined criteria for competence.

Their observations are summed up as follows: "We have seen that clients complain chiefly about matters touching on performance, while the agencies to which they complain concern themselves almost exclusively with misconduct. Even when a disciplinary agency accepts jurisdiction over a complaint about performance, the investigation is more apt to result in a search for moral deviance or fault than for substandard practice of law." Id. at 225.

The Response of Legal Education

The law schools recognize that they have an obligation to cooperate with their colleagues on the bench and at the practicing bar in improving the quality of advocacy as well as the quality of all other facets of the provision of legal services. Toward that end we are engaged in active studies of the legal profession and legal education. As noted above, there may be several areas in which attorney skills could be improved; and there is little reason to pursue one without the others. Nevertheless, it would not be appropriate to impose requirements in any area without taking into account the results of these studies as they come available.

The American Bar Foundation has embarked on a major study of legal education and has over a dozen special projects underway. Of particular interest to the current topic is the project on Legal Education and Professional Development of Lawyers, which is working with 500 lawyers representative of the profession to produce articulated statements of the effects of legal education on the development of lawyers and how law schools can meet the requirements of contemporary law practice. A final report of the project is due in mid-1976. The Foundation has also funded several small projects by independent investigators that link with their general research effort.

At the initiative of the Law School Admission Council, the Competent Lawyer Study was launched in 1973. The National Conference of Bar Examiners, American Bar Foundation and the Association of American Law Schools have cooperated and contributed. Among other things, this project contemplates identifying the qualities that account for competent professional performance and eventually discovering the contribution that legal education may make to a lawyer's capacity to perform competently. The results of this study may be extremely important for legal education and the bar, and the initial reports are due to be completed this year.

The Association of American Law Schools is cooperating with these studies. The basic goal of all these studies is to identify the attributes of competent legal practice and relate those elements to the educational process. When these factors are identified, we will be in a better position to determine the precise response of legal education to the problems of trial advocacy. In the meantime, the law schools need the protection of their historical independence

and educational judgment that has been afforded by the absence of officially dictated course requirements. Therefore, we oppose adoption of the Clare Committee recommendations at this time. We lean toward exploring the possibilities of a federal bar examination and propose to study the feasibility of this device.

Summary

The general objectives of the Clare Committee are widely shared. This committee and virtually all other legal educators are seriously interested in the improvement of the quality of legal services, including provision of adequate representation of clients in the federal district courts. At the present time, however, we are not prepared to agree with the Clare Committee report's diagnosis of the causes of deficiencies in trial advocacy in the federal district courts or with its prescription for remedying the described deficiencies. Assuming that the courts should take additional steps now to insure more adequate representation by changing the rules for admission to practice in the federal district courts, we are persuaded that a federal bar examination is the more promising method.

The Clare Committee recommends that admission to practice in the federal district courts in the Second Circuit be limited to those who have studied five subjects, including trial advocacy, in law school or after graduation in approved continuing legal education programs. Practical considerations make it highly probable that almost every informed and prudent law student in the country would seek to complete these requirements while in law school. The practical effect, then, of adoption of these recommendations would be to require the law schools to offer and the students to take the required subjects. Before the courts by rules of admission interfere in this way with the freedom of choice by the students and their law schools, it should be demonstrated that this step is necessary and that no other method holds realistic promise for better attaining the objective. We do not believe that case has been made. Since 1921 the written bar examination plus graduation from an accredited law school has been endorsed by the American Bar Association as the preferred means for determining admission to the bar. We do not fully understand why this means was rejected in this case.

The Clare Committee has performed a service to the profession and to legal education in calling attention to the importance of improving the quality of representation in the courts and in suggesting the contribution that the teaching of trial advocacy in law schools can make. Law schools are interested not only in educating their students in the law but also to the extent feasible in training them in the lawyering skills. It may be hoped that the attention focused on this matter by the Clare Committee will help generate the additional resources needed.

There are several studies now underway and in the planning stages that promise to tell us in a systematic way more about the various lawyering tasks, including trial advocacy, and the contributions that legal education can make to the education and training of lawyers. The Competent Lawyer Study being undertaken by a consortium headed by the Law School Admission Council and including the National Conference of Bar Examiners and our Association and an American Bar Foundation study seem especially promising. Among other things, these studies may produce more complete and precise data on the sources of deficiencies of trial advocates and identify how the law schools can contribute more effectively to skillful representation in the courts. Armed with these data, some future committee of judges, practitioners and teachers may be able to fashion a more apt solution.

Special Committee on Admissions to the Bar:

Dean Harry H. Wellington, Yale Law School, Chairman
Dean Sanford H. Kadish, University of California at Berkeley
Dean Albert M. Sacks, Harvard Law School
Dean Theodore J. St. Antoine, University of Michigan
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