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Yale Law Journal  
May, 1907**\*514 ADMISSION TO THE BAR IN NEW YORK**

Frank Sullivan Smith [FN1]

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The standard of **admission** to the **Bar** is a matter of paramount interest, not only to students of law and to the Bench and **Bar**, but to the public, which, in the last analysis, must receive the maximum of benefit or injury therefrom. More lawyers are made annually in the State of **New York** than in any other state of the Union because it exceeds all other states in population and has the greatest number of students of law. For this reason a brief review of the history and present condition of the system which obtains in New York may be of interest.

## HISTORY.

In Colonial New York, prior to the establishment of "the Supreme Court of the Colony of New York" in 1691, which is the court referred to in our Code of Civil Procedure in fixing the jurisdiction of our Supreme Court, there was no distinct class of professional lawyers. The old records made mention of "attorneys" who appeared before the Assize Court, but they were not bred to the law, nor did they devote themselves to its practice exclusive of their occupations as merchants, mechanics, factors or dealers in real estate. In some of the colonies, notably in Massachusetts Bay, there was an intense prejudice against those who practiced law, and in the Nicholls Code of Massachusetts punishment by fine and imprisonment was provided against lawyers as "common barrators vexing others with unjust, frequent and endless law-suits." Neither the first Chief Justice nor any of the first Associate Judges of the Supreme Court of the Colony of New York was educated as a lawyer. James Wilson, one of the Justices who constituted the Supreme Court of the United States upon its creation, in a lecture upon Law delivered before the College of Philadelphia in 1790, at which President Washington and other distinguished personages were present, said: "In many courts-in many respectable courts within the United States-the judges are not, and, for a long time cannot be, gentlemen of professional acquirements. They may, however, fill their offices usefully and honorably, the want of professional acquirement notwithstanding."

## THE AMERICAN REVOLUTION.

And yet the irrepressible conflict over the rights of man between the colonies and Great Britain, without the influence of legal regulation or **\*515** authority, at the outbreak of the Revolution had raised up a race of giants in the Law and gave to our State and Nation such masterful lawyers as John Jay, George Clinton, Gouverneur Morris and the Livingstons.

In the New York Assembly of 1734 the power of the Crown to create courts without legislative sanction was denied after a debate in which clearly were enunciated the principles which found crystallized expression forty-two years later in the Declaration of Independence. In the year 1765 Lieutenant Governor Colden, writing to the

Earl of Halifax, deplored the dangerous influence which the profession of the Law had obtained in the Province of New York. Edmund Burke in speaking of the American Colonies said: "In no country perhaps in the world is the Law so generally a study." To the American lawyer is due not only the promulgation, but the defense of the principles that made America a nation and thereby also preserved the rights of Englishmen in the Mother Country from invasion.

#### REGULATED ADMISSION TO THE BAR.

The creation of a body of lawyers up to this time had been spontaneous and in response to the demand of the hour to prepare for the great awakening of man to Freedom. With the adoption of the Constitution in 1777, however, the admission of members of the Bar was regulated by the provision that all attorneys, solicitors and counselors should be appointed and licensed by the court in which they were to practice, and should be governed by its rules and orders. In 1779 the Legislature suspended all licenses to plead or practice law granted before April 21, 1777, because of the Toryism of some members of the Bar, subject to restoration upon giving before a sheriff's jury satisfactory proof that the lawyer under suspension had been true to the American cause.

Although the Constitution of 1777 provided for rules to be adopted by the Supreme Court for admission of attorneys, it cannot be determined that such rules were adopted until the year 1797. It was then provided that candidates for admission as attorneys must have served a regular clerkship of seven years with a practicing attorney of the court, time not exceeding four years devoted to classical studies after the age of fourteen years, being accepted as a part of the required period of clerkship. Four years' practice as an attorney, subsequently modified to three, gave the right, *ipso facto*, to admission as "counsel," but a person admitted as counsel was not permitted to practice as an attorney. Similar rules governed the admission of solicitors in Chancery with the addition of a provision\*516 in the line of modern requirements that the candidate should pass a satisfactory examination before the Chancellor, Vice Chancellor or other officer of the court as ordered by the Chancellor. In 1829 the rules were amended so as to require that an attorney should be admitted as counsel, not as "of course," but "if he be found to be duly qualified," thus extending the principle of examination as a test of fitness. In 1837 any portion of time, not exceeding two years, spent in regular attendance upon the law lectures in the University of New York was allowed to a law student in place of an equal amount of time in a clerkship. In 1845 this provision was extended to time passed in attendance upon law lectures at "Cambridge University or the law school connected with Yale College." Prior to the Constitution of 1846 the Legislature had passed an Act permitting **admission** to the **Bar** upon a diploma of the Albany Law School without examination.

Under the provisions of section 470 of the Code of 1852 the Supreme Court in the year 1858 made a rule requiring all applicants for **admission** to the **Bar** to be examined before the Court in General Term on certain specified days, "and at no other time or place," upon subjects designated by the court in its rule.

#### THE COURT OF APPEALS.

In 1871 the Legislature made the most drastic change in provisions for admission to the Bar which up to that time the history of the Bar in New York affords, in transferring the same to the jurisdiction of the Court of Appeals. Eleven years later the Court of Appeals fixed requirements for preliminary education and proof of character.

### THE STATE BOARD OF LAW EXAMINERS.

By Chapter 946 of the laws of 1895, Section 56 of the Code of Civil Procedure, the Legislature authorized the appointment by the Court of Appeals of a State Board of Law Examiners for the purpose of inaugurating a system of thorough and uniform examination for the ascertainment of the qualifications of candidates for admission to the Bar. This Act marked the opening of a new era in legal education in the State. In the methods that now obtain "all things have become new," although far short of the end desired by all those who foster for the profession of the Law a high ideal. By the strict letter of the statute even the much desired uniformity of examination was made impossible for the reason that two examinations in each year are required in each of the four Judicial Departments, and there are but three examiners. It resulted that until theyear\*517 1903 examinations were held in the Fourth Department on one day, and in the Third, Second and First Departments on the day following, requiring two sets of examination papers, each entirely different from the other, thus destroying all uniformity, because it is impossible to prepare two sets of different questions upon the same topics which shall be exactly equal in effect in ascertaining the degree of knowledge of the Law possessed by applicants for admission to the Bar.' With the consent of the Court of Appeals and the concurrence of the Appellate Division of the First and Second Departments, the examinations for those Departments were consolidated in that year enabling the examiners to hold all examinations contemporaneously and upon the same papers, securing absolutely uniform examinations throughout the State.

Other defects in the system of admission have been partially remedied by the action of the Court of Appeals in formulating new rules which will become effective July 1, 1907. These rules make a slight change in requirements for obtaining a law student's certificate so far as the study of English and English composition are concerned, but require four years of high school work instead of three for an equivalent certificate as at present. A most important change in the rules is that scholarship and a successful completion of a law school course, and not mere attendance, and that not less than twelve hours a week of actual class work for thirty-two school weeks, are made conditions precedent to the completion of law school time as part of the student's course. A law student's clerkship has been made definite by requiring proof of attendance in a law office during business hours for a fixed period while doing law office work under the direction of an attorney.

The Court of Appeals has failed to do that which it will do eventually in deference to the demands of public opinion. The time will come when it will require that the period of study for college graduates be three years in common with other students, and if the Bench and Bar aided by the great body of students of law will unite in arousing public opinion the requisite preliminary educational qualification will be a college degree or its equivalent in the attainment of knowledge, and as a condition precedent to admission to the Bar, the character of each applicant will be subjected to a scrutiny which will be genuine and not perfunctory.

If a choice of qualification for admission to the Bar were to be made between higher preliminary education and more knowledge of Law arid Practice, all members of the profession who have at heart its advancement would prefer the former to the latter, for the chief reason that it is not to be doubted that the higher education-alrequirement\*518 will carry with it a higher standard of personal character.

But every one who as a lawyer or law student has at heart high ideals for the profession of the Law will be grateful that the Court of Appeals has applied a remedy to the abuse of the name of law school in that no longer a night or day school, with inadequate facilities and unheard of instructors, requiring but one and one-half hours of work per day for five days in the week during eight months, aggregating a little more than 200 hours, will be as effective in counting a law student's time as our schools of law which are worthy of the name, and the fre-

quent evasions of the rule as to law clerkships approaching closely to the commission of fraud, will, at least, become more difficult. It is a subject for congratulation that it will no longer be less difficult to become a lawyer than to become a dentist or horse-doctor.

Close observation by the State Board of Law Examiners during the twelve years of its existence convinces that the new rules of the Court of Appeals will have a beneficent effect because of late the Law has lost rather than gained ground as a learned profession; weaklings try to enter the Law because entrance to that profession is less difficult than entrance into other professions. Higher preliminary requirements will elevate the moral tone of the profession by excluding the uneducated who can compete only by resort to questionable methods, and a higher standard of legal attainment for **admission** to the **Bar** will tend to limit the number of lawyers, fix a fairer competition and inspire the public with confidence in the profession.

#### LAXITY OF REQUIREMENT.

It is believed that the influence of **New York** in raising the standard of the legal profession will be felt throughout the Union and will correct the laxity that obtains in other states, in the matter of **admission** to the **Bar**.

This laxity is notorious in Indiana and is deplorable elsewhere. In Kentucky a candidate came up for **admission** before several judges, each of whom tried in vain to put some question which the applicant could answer. An attorney was finally authorized to conduct the examination but was unable to obtain any correct answer. The applicant was admitted on the ground stated by the court, that no one would employ him "anyhow." Not long ago the entire law class of the University of Louisville was presented to the court for admission to the Bar, and the question of qualification was covered by the announcement that they had all passed examinations satisfactorily\*519 their instructors, and the consideration of character was duly met by. the statement that none of the class "had ever fought a duel with deadly weapons either in the state or without the state *with a citizen of the state.*" Among the candidates for **admission** to the **New York Bar** in a recent examination was one who applied upon the ground of former **admission** and one year's practice in Kentucky. His papers showed that he had been admitted by the court in Kentucky before reaching the age of twenty-one years.

At a dinner given in honor of the late Hon. Thomas B. Reed upon his taking up the practice of law in **New York**, Mr. Reed gave his experience in gaining **admission** to the **Bar** of California when a law student in San Francisco. He and a fellow student in an office across the hall were applicants for **admission** to the **Bar**. One day a member of the Supreme Court called upon him and announced that he had come to ascertain his qualifications as a lawyer. The examination began at once with the question: "Is the Legal Tender Act constitutional?" Mr. Reed replied: "It is!" Said the justice: "I have just examined your friend in the other office and he says the Act is unconstitutional, but we need lawyers who are able to answer great constitutional questions so quickly, right or wrong. You are both admitted."

#### THE RESULTS OBTAINED BY THE BOARD.

Between January 1, 1895, when the State Board of Law Examiners began its work, and January 1, 1906, the total number of applications for examination received was 9,356, an average of 850 annually. The number examined in each year from 1900 to 1905, both inclusive, averaged 1113. The diversity in the number of applications from the number examined is due to the fact that many applicants have been examined and have failed

from two to seven and even more times. During the period last mentioned the average number of applicants rejected each year was about twenty-five per cent of the number examined.

During the years 1903, 1904 and 1905 the Board examined 2,768 applicants. Of this number 852, or thirty per cent, failed. Those who had an exclusive law school preparation were 1024, or thirty-seven per cent. The number who had only law office preparation was 329, or eleven per cent. Those who had both law school and law office experience were 1084, or thirty-nine per cent, and 2369, or eighty-five per cent, did some law school work. Of the failures 260, or twenty per cent, were among those who had law school preparation only, and 157, or thirty-nine per cent, were of those whose legal education was obtained in law offices exclusively. This demonstrates that the student who has a law school training has adouble\*520 advantage over the student whose knowledge of the law is obtained in a law office: The number of those who had both law school and law office training and who failed was 269, or twenty-five per cent. The effect of desultory work in preparation for examination is thus shown, as the percentage of failures among this class of students is identical with the percentage of failures among all students, including those who had no law school training. Of the applicants examined 846, or thirty per cent, were college graduates and 1917, or sixty-nine per cent, were not. The failures among college graduates were about twenty per cent, and among applicants who were not college graduates, about thirty-four per cent, being a difference in favor of those who have proper educational preparation, of fourteen per cent. It is probable that a college education should be credited with a portion of the advantage already shown to exist in favor of a law school training because eighty per cent of college graduates who enter the Law obtain their legal education at law schools.

#### THE METHOD OF EXAMINATION PURSUED BY THE BOARD.

The method of examination which the State Board of Law Examiners pursues was adopted after a careful study of the methods obtainable not only in the more progressive states of the Union, but particularly in England and France. The object of the Board is to ascertain the fitness of the applicant to practice Law in the State of New York. No attempt is made to learn the student's knowledge of the Law in other jurisdictions or his ability to state rules of law which have become obsolete. No effort is made to obtain definitions or statements of abstract principles of law. It is assumed that ability to do this has been acquired by the student in the course of his preparation. The Board prefers to test the ability of the would-be-lawyer rightly to apply the principles of law to a supposed case and correctly and safely to advise a client upon certain stated facts. The questions, fifty in number, six upon Pleading and Practice, five upon Evidence and thirty-nine upon Substantive Law, twenty-five for each of the two sessions of four hours in length, are therefore put in the form of problems which are carefully prepared by one or another number of the Board and are reviewed and criticised by the other members of the Board, each being assigned a certain number of questions upon stated subjects, the subjects being changed in rotation from one examination to another. Every fact necessary to the solution of the problem is stated in the question; nothing is left to assumption or imagination.

\*521 In marking the papers only errors are noted and equal effect is given to all questions except three upon Pleading and Practice and the Constitution of the State of New York, which, when missed, are marked as half errors. In all questions where it is practicable, a reason for the answer must be stated. If a question is answered correctly and a wrong reason is given, the mark imposed is half an error. Every paper is carefully read by a member of the Board. No part of their work ever is deputised or delegated. No commission of which the writer has knowledge performs its duty more conscientiously or devotedly. To have seventeen errors results in rejection. This involves the necessity of correctly answering sixty-six and two-third per cent of the questions upon

the basis of value heretofore stated.

If a reading results in rejection of an applicant his papers must be re-read by another member of the Board for the correction of any mistake which may have occurred in the first reading and marking, and mistakes are, not impossible in view of the magnitude of the labor involved.

A large percentage of the failures of applicants for admission to the Bar is due to insufficient preparation upon these subjects, viz: Pleading and Practice and Evidence. In June of the year 1903, the Board examined 482 applicants. Care was taken to ascertain the exact percentage of failures in these subjects. The percentage of those who failed to answer correctly sixty-six and two-thirds per cent of the questions on Pleading and Practice was eighty-six per cent, leaving the percentage of those who correctly answered that proportion of the questions on that subject but fourteen per cent.

No more than forty per cent of the applicants correctly answered sixty-six and two-thirds per cent of the questions on Evidence leaving sixty per cent to swell the percentage of failures. If the percentage of errors in these subjects can be brought down to the average of other subjects, the percentage of rejections will be materially lowered. This matter has been called to the attention of instructors in our principal law schools to the end that they devise a method of correcting the defect, and whenever opportunity has offered law students have been urged by members of the Board to put forth earnest effort to overcome this obstacle to their admission to the Bar. But there has been little or no improvement. As a means to the desired end the State Board of Law Examiners have formulated, effective July 1st next, the following:

#### RULE VII.

The Board will divide the subjects of examination into two groups, as follows: Group 1, Pleading and Practice and Evidence; Group 2, Substantive Law.\*522 Each applicant will be required to obtain not only the requisite standard on his entire paper, but also in Group 1 to entitle him to a certificate from the Board. If he obtains the required standard on his entire paper, but fails to obtain the same in Group 1, he will receive a pass card for Group 2 and will not be required to be re-examined therein. He will be re-examined in Group I at any subsequent examination for which he gives notice as required by these rules.

The present system is far from perfect. Its limitations are patent. But it has accomplished something in the cause of legal education. Its effect upon those who have failed to meet its requirements in one, two, three, four or even five or six attempts, is its most potent commendation. After grievous failures, denoting entire inadequacy of preparation, a large majority of those who thus have been forced to realize the causes of their failure and some of whom had never taken the study of law seriously, by dint of hard work and perseverance finally have acquired a knowledge of law which is creditable to them and will be of value to their clients.

After all, whatever the means of education vouchsafed to anyone seeking entrance to the legal profession, the ultimate question of success or failure in the acquisition of knowledge, rests upon individual effort. So, too, and even in a more marked degree, depends upon the individual, more than upon the teaching of any school, the attainment of character, that other requisite which in the making of a lawyer, must ever go hand in hand with knowledge, and without which the lawyer who possesses the highest learning will be poor indeed.

Our profession will be ennobled or debased in accordance with the standard created by the individuals who compose it.

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