1952

Dissent in Rockwell v. State Bar, Unpublished Opinion

1952 or 1953 ?

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

DICK ROCKWELL, EMILY JOHNSON and HOWARD GIBSON, Petitioners, vs. THE STATE BAR OF CALIFORNIA, Respondent.	S.F. 18567
ROBERT W. YANK, Petitioner, vs. THE STATE BAR OF CALIFORNIA, Respondent.	S.F. 18566
MAXIMILIAN KOESSLER, Petitioner, vs. THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA, Respondent.	S.F. 18562

MARVEL M. TAYLOR, Petitioner, vs. THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA, Respondents.	S.F. 18568
RUSSELL MILTON KOCH, Petitioner, vs. THE STATE BAR OF CALIFORNIA, Respondent.	S.F. 18564
DOUGLAS R. PAGE, Petitioner, vs. THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA, Respondents.	S.F. 18565

I dissent from the orders denying writs of review in the above entitled proceedings and desire to state my views in relation thereto.

The above named petitioners, having taken the Bar examination given by the Committee of Bar Examiners of the State Bar of California in October, 1951, seek to have this Court review the decision of said Committee. The decision which petitioners seek to have reviewed refused to recommend to this Court their admission to practice law in this state. As grounds for such review, petitioners urge that the

Committee of Bar Examiners acted arbitrarily, capriciously and unreasonably in conducting said bar examination and in the grading, and re-grading, of the examination papers of each of said petitioners.

From the record before us in these proceedings and published statements by members of the Committee of Bar Examiners in the January-February, 1952, Journal of the State Bar of California, it appears that 1041 applicants took the October, 1951, bar examination given by the Committee of Bar Examiners of the State Bar of California. Of this number, on the first reading of the examination papers, 15.4 per cent received an average grade of 70 per cent or better. This means that only 160 applicants out of the total number of 1041 taking the examination passed on the first reading. Thereafter, in accordance with past practice, papers which received grades ranging from 65 per cent to 69.9 per cent were reappraised. On November 23, the Committee of Bar Examiners directed the reappraisement of papers with scores below 65 per cent and papers with grades ranging downward to 63.75 per cent were reviewed. No paper with a score below 64.2 per cent was found to be of passing quality. Three hundred and twenty-six papers in all were reappraised by three members of The Board of Reappraisers, Miller, Jonas

and Aldwell. This resulted in 231 more applicants passing the examination. In other words, all but 94 of the papers reappraised were given passing grades. In the group at or above 65 per cent, 47 were refused passing grades while 13 of the group below 65 per cent (which are not normally in the reappraisal group) were passed. Every applicant who received an original grade above 67 per cent, with the exception of one who received a grade of 67.1 per cent, was passed on reappraisal. These figures show that before reappraisal, the passing percentage was 15.4 per cent; on reappraisal, 22.2 per cent more passed, making a total percentage passing the examination of 37.6 per cent. (Note that almost half again as many passed on reappraisal as on the first reading.)

After the result of the examination was announced, an Interim Committee of the State Senate conducted an investigation into the examination, and on February 2, 1952, said Committee adopted the following resolution which was submitted to this Court:

RESOLUTION

(Adopted by the Senate Interim Judiciary Committee, February 2, 1952.)

WHEREAS, 1041 law students took the California bar examination in October, 1951, and only 391 passed. This is 37.5%, the lowest since October, 1946 which was 37.1%. It is 13% below the 50.9% average for fall examinations in the five-year period, 1946-50.

WHEREAS, this Committee has carefully investigated the reason for this low percentage and has found the following facts and reached the following conclusions:

1. There is no suggestion of dishonest, favoritism, intentional severity or carelessness in the conduct of the examination.

2. The fact that only 160 or 15% of those taking the examination attained the passing grade of 70% on first reading was due to two major factors:

(a) Unusual difficulty in at least three of the questions.

(b) Strictness of grading.

3. After the original grading, three reappraisers reviewed 326 papers graded between 63.75 and 69.9%. They passed 231 students, 59% of all the successful candidates. This is a radical departure from the original purpose of reappraisement which was to remedy inequities in a relatively few borderline cases.

4. The process of reappraisement in this examination was criticized for these reasons.

(a) Reappraisement is not authorized, prescribed, or governed by the Business and Professions Code or the rules governing the State Bar. It is a procedure for which the Committee of Bar Examiners makes its own rules and standards from year to year.

(b) The standard used on reappraisement is not fixed, definite or certain. It is subject to the broad discretion of each reappraiser in individual cases.

(c) Each of the three reappraisers was competent and conscientious. However, each had his own temperament, viewpoint and subjective standards. One was relatively strict, one less strict, and one liberal in passing papers. Since in most cases the reappraisers acted independently, this lack of uniformity may have worked substantially to the advantage of certain students and the disadvantage of others. In addition, it appears that certain students whose original grades were between 1560 and 1610, or 65% and 67.1%, and whose papers were reviewed and failed on or before November 25, 1951, may have been reappraised more strictly than students whose papers were reviewed and passed on and after November 26, 1951, the date when a lower minimum review grade of 63.75% was established.

(d) Many of the persons adversely affected by the decision of the reappraisers are veterans of World War II who sacrificed several years of their normal scholastic life in the service of their country.

NOW THEREFORE BE IT RESOLVED that this Committee requests the Supreme Court of California to:

(a) Determine, after investigation and hearing, whether the 47 students whose original marks were between 65 and 67.1% and who were failed by the Board of Reappraisers should not be admitted to the bar without further examination.

(b) Review the papers of students receiving original marks between 63.75 and 65% to determine if the procedures which were followed with regard to this group resulted in substantial injustice to any of the 48 applicants who were failed.

(c) Make such further inquiry concerning the papers between 60 and 63.75% as will satisfy the Court that no students in that category should have been reappraised and passed. And be it

FURTHER RESOLVED that the Court and the Committee of Bar Examiners are requested to establish the following rules for future student bar examinations:

(a) Require submission of the authors' analyses of all questions used, after the bar examination but prior to the grading of the examination, to all of the law schools in California for evaluation and criticism.

(b) Require the giving of a reasonable number of alternative questions in each examination. And be it

FURTHER RESOLVED that the Court and the Committee of Bar Examiners are requested to give consideration and study to the following suggestions which have been made to this committee:

(a) Credit each applicant who has failed to obtain a passing average with each subject in which he has received a passing grade. Limit re-examinations to subjects in which an unsuccessful applicant has failed.

(b) Appoint a full-time Committee of Bar Examiners to serve under the direction of the Supreme Court of California, and to be responsible only to such Court.

(c) Establish a base, perhaps at a level 5% below the average percentage of success in the bar examinations of the preceding 5 years, above which there must be no failures.

(d) Whenever an average grade of all applicants who have answered a particular question is 10% or more below the average of the grades for all of the other questions, the percentage of difference between the two shall be credited to each answer to the question; i.e., if the average grade of all other questions is 50% and the average for a particular question is 40%, then 10% shall be added to each grade previously awarded for the particular question.

(e) Establish a policy, implemented by rules, which will make standards of questions, grading, and reappraisal more uniform from year to year.

(f) Encourage examinations which most of the qualified applicants can pass without selective reappraisement.

(g) Establish more uniform standards and better coordinated procedures on reappraisement. And be it

FURTHER RESOLVED that a copy of this resolution be sent to the Supreme Court of California, the State Bar of California, and the Committee of Bar Examiners.

At the hearings before the Senate Interim Judiciary Committee, the following matters were brought to light: That of the 24 questions submitted by the Committee of Bar Examiners, 16.6 per cent of the total number of examinees received passing grades (70 per cent) on question No. 5; 21.8 per cent received passing grades on question No. 10; 18.1 per cent received passing grades on question No. 12; 20.2 per cent received passing grades on question No. 20; 20.4 per cent received passing grades on question No. 24. In the entire examination, no applicant received a higher grade than 80.8 per cent. The average grades of all the answers to five of twenty-four questions were as low as 45.3 per cent on question No. 10; 46.5 per cent on question No. 24; 52.3 per cent on question No. 12; 54.8 per cent on question No. 20 and 55.2 per cent on question No. 5.

In the January-February, 1952, issue of the Journal of The State Bar of California (page 47), it appears that 488 graduates of American Bar Association approved California

law schools took the October, 1951, bar examination for the first time. Of the 488, 288 passed the examination. There were 64 graduates of out-of-state American Bar Association approved law schools who took the same examination and of these, 21 passed. This makes a total of 552 American Bar Association approved law school graduates who took the examination with 56 per cent, or 309, receiving a passing grade. So far as individual law schools are concerned, Harvard passed 50 per cent, Michigan passed 50 per cent, Hastings College of the Law passed 44.1 per cent, Yale passed 40 per cent, and the University of San Francisco passed 38 per cent.

"Noteworthy, by way of contrast, is the fact that six states in 1950 had passing percentages of 90 or better: Kansas, 99 per cent; Nebraska, 99 per cent; Iowa, 96 per cent; Oklahoma, 93 per cent; Wyoming, 92 per cent; Indiana, 90 per cent. Each of these states, however, has adopted the American Bar Association standards, or their substantial equivalent, which means that a more highly select group of applicantsis being examined than in California which has had practically no selective educational requirements. Thus, Kansas, which requires a four-year college degree plus graduation from an accredited law school, would be expected

to show, and does show, a very high percentage of success, namely 99 per cent." (See "The California Bar Examination: Its Comparative Standing" by Shelden D. Elliott, Dean of the School of law, University of Southern California, in the January-February, 1952 issue of The Journal of the State Bar of California). The figures just quoted by me belie the above quoted statement because Harvard, Michigan, Hastings, Yale and the University of San Francisco are all American Bar Association approved law schools. It is also a complete refutation of the argument that there is a drop in the quality of the applicants who took the October, 1951 bar examination (see "The October 1951 California Bar Examination" by Graham L. Sterling, Jr., of the Los Angeles Bar, Member of the Committee of Bar Examiners; Journal of the State Bar of California, January-February, 1952, issue).

Petitioners here contend that the reappraisement by a single reappraiser is a deviation from the customary practice when the reappraisers acted as a board; that one reappraiser, Miller, who graded approximately half the papers, had a more severe standard than either Aldwell or Jonas; that the re-appraisers applied their own individual standards in grading the papers which resulted in discrimination against those whose papers were reappraised by Miller and Jonas. The transcript of the Senate Interim Judiciary Committee shows that the reappraising

was done on a personal basis; that the reappraisers themselves admitted it would have been "better" had two or more reappraisers read each paper.

The Recorder (a newspaper published in San Francisco and accepted as the official organ of the courts) for Friday, May 2, 1952, quoted Goscoe Farley, Secretary of the Committee of State Bar Examiners, as follows: "The difficulty with the October 1951 bar examination arose from the fact that inadvertently three or four questions out of the twenty-four contained problems that had not been adequately covered at most law schools. The low grades on these three or four questions caused many otherwise fairly good papers to fall within the reappraisal group." (Emphasis added.) It seems obvious that if the examination contained four questions which had not been covered at "most" law schools, and which, consequently, the applicants could not answer, it would be necessary for them to receive not less than 85% on every other question. When one takes into consideration that in this examination no applicant received a higher grade than 80.8%, the examination was manifestly unfair. It also appears to me that when the future of more than a thousand applicants who have spent three years of time, money, and labor in the study of law is at stake, that there should be no room for such "inadvertence" on the part of the Committee of Bar Examiners.

Quoting again from Mr. Farley's statement as reported in The Recorder: "In order to help avoid such situations in the future, the Committee of Bar Examiners has reinstated the former practice of giving optional questions. At all but one of the six sessions of the April 1952 bar examination, for example, candidates were permitted to answer any four questions out of five. This use of optional questions will make it less likely that a student will perforce have to answer a question with unfamiliar subject content.

"Another important improvement in this aspect of the examination will take place as (a) result of a survey just completed by a committee of the State Bar. Each California law school plus three of the larger eastern schools was requested to furnish the name of the case and text book used for the course in each bar examination subject. A total of 129 books were reported used. The school was then further requested to state precisely what portions of the books used by it were not covered. A report was then prepared showing precisely which topics in the subject were covered and which were not covered at each school. This report will serve as a guide to the Committee of Bar Examiners in the future in deciding what topics should not be included in the examination. . . .

"Another recent change which will be put into effect with this April bar examination will be to have each paper in the reappraisal group reviewed by two appraisers. The second reappraiser will not know whether the first reappraiser passed or failed the paper. If the two reappraisers do not agree on the result, the paper will go to a third reappraiser who will cast the deciding vote. This will stop the complaint that the three reappraisers do not each apply the same standards to their review of the papers." (Emphasis added.)

It would appear from Mr. Farley's statement to the press that he has, by implication at least, admitted all of the charges raised by petitioners here. He has admitted the examination was unfair in that "three or four" questions unfamiliar to the applicants were "inadvertently" used; that there is a need to ascertain what subjects are being taught in California law schools and three of the larger Eastern schools; and that a "new" system of reappraisement of borderline papers is necessary.

This court, although it has not in the past chosen to exercise it, has plenary authority with respect to admissions to practice law in this state. Because of the constitutional provision providing for a tripartite form of government and the

separation of those three departments into the judiciary, legislative and executive branches, the Legislature may regulate and control the subject of admissions to practice law only so far as this court, by a vote of a majority of its members, chooses to permit it to do so. There can not be the slightest doubt that the State Bar of California is an arm of the judiciary, and that this court, if it chose to do so, as I believe it should, could take over the entire field of admissions to practice law and prescribe the rules and regulations therefor. (Preston v. State Bar, 28 Cal. 2d 643; Brydonjack v. State Bar, 208 Cal. 439; Vaughan v. State Bar, 208 Cal. 740; Fish v. State Bar, 214 Cal. 215; In re Lacey, 11 Cal. 2d 699.) In addition to the inherent power of this court over admissions to practice law, section 6066 of the Business and Professions Code provides: "Any person refused certification to the Supreme Court for admission to practice may have the action of the board, or of any committee authorized by the board to make a determination on its behalf, pursuant to the provisions of this chapter, reviewed by the Supreme Court, in accordance with the procedure prescribed by the court."

In view of the rules of law above stated and the foregoing facts, I am convinced that petitioners herein have made out a prima facie case for a review by this court of the

October, 1951 bar examination and that the petitions should be granted and a complete record of all proceedings before the State Bar relative to said examination certified to this court for such determination as may be warranted. While the granting of these petitions may place a heavy burden on this court because of the effort required for a full review of the proceedings involved in said examination, I am convinced that the matter is of such great importance to the public, the applicants and the law schools in this state and elsewhere as to justify the undertaking.

In refusing to take this action, I feel that this court is being remiss in the exercise of its power over admissions to practice law in this state and fails to respond to an opportunity to render an outstanding public service.

CARTER, J.

I CONCUR:

Schauer, J.