NEW JERSEY'S BIFURCATED BAR

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A divided legal profession is an inveterate feature of English law. In English courts, legal practitioners are distinguished as barristers or solicitors. Barristers, which comprise the senior branch of the profession, are primarily engaged as advocates and enjoy the exclusive right of audience before the higher courts. In contrast, the role of solicitors is generally confined to dealing with clients and arranging details incidental to a case.[1]

The receipt of English jurisprudence in America influenced some states, like New Jersey, to institute similar classifications for their legal practitioners.[2] Such distinctions have now disappeared in America, and a general designation applies to all who practice law.[3] Nevertheless, the concept of a bifurcated bar figured prominently in the development of the profession. In 1958 New Jersey became the last state to abolish attorney distinctions, but by that time the bifurcated bar had lingered for nearly two hundred years.[4]

The first legislation pertaining to lawyers in the Province of East New Jersey was passed in October of 1676.[5] The Act provided that no justice of the peace could be "imployed [sic] in the practice or exercise of an attorney" while holding office.[6] A person could have another assist him in court, but the other person was not permitted to receive a fee for his work.[7] During this early period of colonization,

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[1] *See* Tempany, *The Legal Profession in England—Its History, Its Members, and Their Status*, 19 AM. L. REV. 677 (1885). The classification of lawyers was present in England since the Middle Ages and did not always consist of only two categories. In fact, during the seventeenth century, there were at least five classes: pleaders, conveyancers, attorneys, solicitors, and barristers. *See* 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 431-57 (3d Ed. 1926); LEGAL INSTITUTIONS TODAY: ENGLISH AND AMERICAN APPROACHES COMPARED 109-10 (H. Jones ed. 1977).

[2] *See* Q. JOHNSTONE & D. HOPSON, JR., LAWYERS AND THEIR WORK 357-58 (1967).

[3] *See id.* Besides England and Wales, few countries have retained a system for classifying lawyers. Distinctions exist in the Australian states of Victoria, as well as in British Guiana, Ceylon, Hong Kong, Ireland, New South Wales, Queensland, South Africa, and the Caribbean islands of Barbados, Granada, Jamaica, Tobago, and Trinidad. *Id.* at 357.

[4] *See* notes 58-66 *infra* and accompanying text.

[5] *See* THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 120 (A. Learning & J. Spicer eds., reprint ed. 1881) (1st ed. Philadelphia 1751) [hereinafter cited as Learning & Spicer].

[6] Acts of the General Assembly at Woodbridge, 5th, 6th, 7th, and 8th of October, 1676, *reprinted in* Learning & Spicer, *supra* note 5, at 120.

[7] *See id.*

lawyers were commonly regarded as unscrupulous pettifoggers, and at one time or another were banned from court or forbidden to receive fees in most colonies.[8] Because legal matters were uncomplicated, involving wills, deeds, trespass, ejectment, and slander, there was little need for lawyers. Settlers relied on their own familiarity with English law, or, when this knowledge was lacking, on common sense and the Bible.[9] Even so, the 1676 legislation soon crimped burgeoning transatlantic mercantile interests, and the law was changed to permit justices of the peace to have power of attorney in business matters.[10]

The notion that every citizen had an absolute right to be his or her own lawyer was carried into the 1683 constitution for the Province of East New Jersey. Article XIX granted every citizen the right to pro se representation, and the payment of legal fees was expressly forbidden.[11] It was in 1692, with the passage of an act making legal all land conveyances executed by attorneys, that the first step in the public licensing of attorneys occurred.[12] In 1694, however, another

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[8] *See* C. WARREN, A HISTORY OF THE AMERICAN BAR 111 (1911). At one time or another lawyers were banned from court or forbidden to receive fees in most colonies. *Id.*

[9] *See* E. Q. KEASBEY, COURTS AND LAWYERS OF NEW JERSEY 1661-1912, at 228 (1912). Dean Pound has said that "[e]very Utopia that has been pictured has been designed to dispense with lawyers." R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES xxv (1953). In describing the development of the legal profession in America, he pointed to four periods: the effort to work without lawyers; the era of irresponsible writ filings; the organization of practitioners into judicial associations; and, by the time of the American Revolution, the advent of trained lawyers. *Id.* at 129-73.

[10] *See* Acts Made by the General Assembly, begun at Woodbridge the tenth day of October 1677, and ended at Elizabeth Town the Nineteenth of the said Month, *reprinted* in Leaming & Spicer, *supra* note 5, at 127. The Act read:

> Whereas there is an act made October the 5th, 1676 prohibiting all justices of the peace within this Province, for appearing in any cases as attorneys or advocates, except for the King, the Lord Proprietor, or his or their cases, or in cases already commenced, be it enacted by the present General Assembly, that in cases of foreign negotiations, it is allowed for any justice of the peace within this Province to appear as an attorney or advocate.

Id.

[11] The Fundamental Constitution for the Province of East New Jersey in America, Anno Domini 1683, art. XIX, *reprinted* in Leaming & Spicer, *supra* note 5, at 163. Article XIX, which deals with jury trials, states in part: "in all courts persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cases themselves, or if unable, by their friends, no person being allowed to take money for pleading or advice in such cases." *Id.*

[12] *See* An Act declaring all Conveyances of land made by Attorneys, shall be good and effectual in Law, *reprinted* in Leaming & Spicer, *supra* note 5, at 315.
The Act, which liberalized the 1676 and 1677 legislation, read:

> Whereas the Proprietors of this Province, and other persons residing in England, Scotland and other places, who have interest and estates of land within this Province, have a letter of attorney constituted, appointed and impowered [sic] their

act was passed which further extended the list of those forbidden to practice law.[13]

Despite the circumscribing of practice, there were those who desired to be lawyers. The title and right to practice law was never there just for the taking. The right came only as a result of a formal process of call, appointment, or admission.[14] The King of England delegated authority to appoint to the provincial Governors. The first recorded delegation in East New Jersey may be found in the 1698 instruction to Governor Jeremiah Basse.[15]

Eventually, the responsibility for testing qualifications of candidates and making recommendations to the Governor was delegated to the supreme court, and in 1752 the supreme court promulgated its first rule, creating the clerkship and examination.[16] No person would

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respective agents and attorneys, for selling, exchanging, and otherwise conveying or disposing of their respective lands within the said Province, and that the intentions of those who have granted such letters of attorneys may not be frustrated or disappointed, and the purchasers secured in their purchase, be it therefore enacted by the Governor, Council and Deputies now met and assembled in General Assembly, and the authority of the same, that all deeds and conveyances made by attorneys, constituted, appointed and empowered by the Proprietors, or any other persons owners of any land in this Province, for selling, exchanging, or otherwise disposing and conveying of their land here, whose letter of authority be entered on the public [sic] records of this Province, shall be good and effectual in law, to all interests and purposes, and hereby declared good, firm and effectual in law as aforesaid.

Id.

[13] *See* An Act for regulating Attorneys at Law within this Province, *reprinted* in Leaming & Spicer, *supra* note 5, at 343. The pertinent provision of this act read:

> [N]o justice of the peace, sheriff, sub-sheriff, no clerk of any court within this Province, directly or indirectly, no commissioners or messenger of the court of small causes, shall be admitted or suffer'd to plead as an attorney, in any court within this Province, excepting in such cases as any of said persons are either plaintiffs or defendants themselves, under the penalty of the forfeiture of twenty pounds, whereof one-third part to the informer who shall prosecute the same as an action of debt in any court of record within this Province, one-third to the Governor, and one third to the county.

Id.

[14] *See* A. REED, PRESENT DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA 3 (1928).

[15] *See* Further Orders and Instructions to Jeremiah Basse, Esquire, Governor of the Province of East New Jersey, by the Committee of the Proprietors here to be observed by the said Governor, *viz.*, London, 14th April, 1698, *reprinted in* Leaming & Spicer, *supra* note 5, at 223.

[16] *See* RULES OF THE NEW JERSEY COURTS 39 (C. Corbin ed. 1898) [hereinafter cited as Corbin]. In part, the rule read:

> No person shall be admitted to examination for license as an attorney unless he shall have served a regular clerkship with some practicing attorney of this court, for a term of three years at least, if he shall have been previous to the commencement of such service, admitted to the degree of bachelor of arts or bachelor of science in any college or university . . . and four years at least, if he shall not have been so admitted.

Id.

be licensed as an attorney unless he first served a clerkship for at least three years with a practicing attorney.[17]

In 1755 the rank of sergeant-at-law[18] was created, thereby instituting a second classification for New Jersey lawyers.[19] Admission, limited to twelve men, was codified in 1763. Four years later, a third rank, counsellor-at-law, was created.[20] Thus, from 1767 until 1839, when the rank of sergeant was abolished, New Jersey had three classes of lawyers. A lawyer could be recommended for a license as a counsellor only after having practiced for at least three years.[21]

Also in 1767, new rules were promulgated expanding the examination to be taken before the assembled supreme court[22] and increasing the clerkship period to five years.[23] Law clerks could work only for counsellors, and only counsellors could conduct the attorney bar exam. Most importantly, only counsellors could appear before the supreme court.[24]

Not only was the aristocratic notion inherent in a graded bar alien to the new American ethic,[25] but the economy was too primitive to produce the legal business necessary to support more than one level of attorneys. Additionally, the population was sparse, and the seats of appellate jurisdiction were not yet centralized. An anachronism at its creation, the graded bar was doomed to extinction.

Economic dislocations during the period of the Articles of Confederation and a severe depression in 1785 exacerbated the lawyer's

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[17] *Id.*

[18] Sergeants were the most ancient order of the profession, having become in England by 1290 the only class which was permitted to plead in the highest courts. Judges were always chosen from their ranks. *See* C. WARREN, *supra* note 8, at 23.

[19] *See* 1 A. CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 200 (1965).

[20] *See* RULES OF THE NEW JERSEY COURTS 55 (C. Corbin & G. Hobart eds. 1906) [hereinafter cited as Corbin & Hobart]. The rule provided:

> No person shall be recommended for license to practice as a counsellor-at-law in this state unless he shall first submit himself to examination, and give satisfactory evidence of his knowledge of the principles and doctrines of the law, and of his abilities as a pleader; nor shall any be admitted to such an examination until he shall have practiced in this court as an attorney for the space of three years at least.

Id.

[21] *Id.*

[22] *See id.* at 53. According to Alfred Zantzinger Reed and Anton-Herman Chroust, an examination was an alternative to the clerkship between 1752 and 1767. *See* A. CHROUST, *supra* note 19, at 169; A. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 99 (1921). A study of the rules and the entire history of the clerkship in New Jersey does not substantiate such a conclusion.

[23] *See* A. REED, *supra* note 22, at 83.

[24] *See id.* at 39.

[25] Nevertheless, a bifurcated bar was also established in Pennsylvania, Virginia, and Georgia as well as New Jersey. *See id.*

predicament. Ironically, many lawyers waxed prosperous, but this was achieved mainly through the collection of bad debts, often causing the debtors imprisonment.[26] As a consequence, the press condemned legal practitioners as oppressors and tyrants who comported like aristocracy.[27] Abuses, real and imagined, plus a sense of egalitarianism and individualism buttressed the support for the every-man-his-own lawyer concept throughout the states.

One effect of the assault on the profession was, except in New Jersey, the creation of the general practitioner. Elsewhere, the bifurcated bar was destroyed. The general practitioner emerged from the paucity of well-educated lawyers and from the absence of native institutions which could provide the bases for dividing the profession into exclusive branches.[28]

In 1780, and again in 1817, the New Jersey Supreme Court remained resolute in the face of egalitarian onslaughts and reiterated its clerkship and examination requirements.[29] It did, however, reduce the clerkship period for attorneys to three years.[30] Until 1805 the examinations for attorneys were conducted orally before the supreme court,[31] but in that year the supreme court created a continuous Board of Bar Examiners to prepare and administer examinations to aspiring attorneys and counsellors.[32] The Board of Bar Examiners became responsible for making recommendations to the court, which in turn would make recommendations to the governor.[33]

In 1881 the supreme court amended its rules so that candidates for admission as either attorneys or counsellors were required to pass a written examination before taking the oral examination.[34] The written exam was not intended to enlarge the scope of the test nor require more than knowledge of fundamental principles, definitions, and state practice. Questions for attorneys were on the first and third books of Blackstone, and so much of the second as pertained to

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[26] *See* 2 A. CHROUST, *supra* note 19, at 12-28.

[27] *See id.*

[28] *See* A. REED, *supra* note 22, at 79.

[29] *See* Corbin & Hobart, *supra* note 20, at 53, 55.

[30] *See id.* at 53. If a clerkship and a bar examination represent a measure of competence and educational accomplishment, New Jersey defied widespread disintegration of standards. In 1800 a period of learning was required in fourteen of nineteen states and territories, but by 1840 this ratio had decreased to eleven out of thirty. By 1860 a clerkship was required in only nine of thirty-nine. *See* A. REED, *supra* note 22, at 86-87.

[31] *See* Corbin & Hobart, *supra* note 20, at 55.

[32] *See id.* at 55-56.

[33] *See id.*

[34] *See id.*

personal property, ordinary law and equity practice, and state and federal constitutions.[35] The attorney's exam would also include some questions on pleading from Chitty.[36] The counsellor's exam would focus on the areas of real estate, equity, the constitutions, and statutes.[37] Finally, in 1902 the oral examination became an optional supplement, to be utilized at the discretion of the examiners.[38]

Between 1882 and 1903 the supreme court faced several legislative challenges to its control over entry to the profession.[39] As interesting as these challenges were, this study is limited to examining the unsuccessful legislative assault on the bifurcated bar. The first such attempt took place in 1890 when Assembly Bill Number 65, entitled "An Act conferring the degree of counsellor-at-law upon certain attorneys-at-law," was introduced. By a unanimous vote the bill was rejected.[40] In 1893, another attempt was made to have counsellors admitted easily.[41] This time the bill was passed by both the Assembly[42] and the Senate.[43] No such law, however, can be found in the compiled laws for 1893. It was probably vetoed by the Governor.

In 1896 the legislative effort continued with considerable activity in the Assembly, but not the Senate. A bill,[44] designated as "An Act to

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[35] *See* 4 N.J.L.J. 253 (1881).

[36] *See id.*

[37] *See id.*

[38] *See* Corbin & Hobart, *supra* note 20, at 55. Additionally, in 1889, at the urging of the New Jersey State Bar Association and the Special Committee of the Board of Bar Examiners, the Supreme Court promulgated rule 3(d):

> [T]hat at least three years before taking this bar examination, he had graduated or had duly passed his final examination for graduation in a college or university, or in a public high school of this state, or in a public high school of another state, or a private school or academy approved by the board of bar examiners, or he had passed an examination equivalent to that for graduation in a public high school of this state, to be held by officers of the public schools, the times, places, and character of which examinations shall be determined by the state board of education, with the concurrence of the board of bar examiners.

Corbin & Hobart, *supra* note 20, at 54.

[39] For example, it required legislation to grant women admittance to the attorney examination. *See* N.J. Pub. L. No. 1895, 366. On the other hand, despite legislation the court refused to abrogate its general education standards. *See In re* Branch, 70 N.J.L. 537, 57 A. 431 (1904).

[40] *See* Minutes of Votes and Proceedings of the One Hundred and Fourteenth General Assembly of the State of New Jersey 77, 182, 231, 246, 273, 286, 385 (1890).

[41] Assembly Bill Number 35, One Hundred and Seventeenth General Assembly of the State of New Jersey (1893).

[42] *See* Minutes of Votes and Proceedings of the One Hundred and Seventeenth General Assembly of the State of New Jersey 395, 529, 549, 603 (1893).

[43] *See* Journal of the Forty-Ninth Senate of the State of New Jersey being the One Hundred and Seventeenth Session of the Legislature 533 (1893).

[44] Assembly Bill Number 75, One Hundred and Twentieth General Assembly of the State of New Jersey (1896).

provide for the admission as counsellor-at-law, without written or oral examination, any attorney admitted to practice in the courts of this state who has been in active practice for ten years," was referred to the Committee on the Judiciary, where it was buried.[45] Similarly defeated was a later bill[46] entitled "An act regulating the admission of attorneys and counsellors-at-law of this state and allowing them to practice before the courts of the same, and providing for the admission of attorneys to the degree of counsellors in certain cases."[47] After six years, legislative attempts to abolish or weaken the bifurcated bar were abandoned.[48]

The main factor that ultimately led to abolition of the bifurcated bar was the great increase in the number of lawyers employed by the federal government during and after World War II. Because New Jersey attorneys could not practice before their state's highest court, they were not permitted to practice in the federal courts. As a result, federal hiring was prejudiced against attorneys. In 1946 the New Jersey State bar association Committee on Legal Education urged an end to the unwarranted discrimination against New Jersey attorneys,[48] and in May of that year the supreme court heard arguments.

The Attorney General brought the matter before the court on the basis of a resolution by the legislature. It was contended that the two examinations were little different, that attorneys and counsellors were virtually identical, and that the federal government discriminated in hiring and practice.[49] A Special Committee on the Abolition of Examinations for Counsellor-at-Law was appointed after the bar association overwhelmingly voted to recommend to the supreme court that the distinction be abolished.[50]

Two years passed, during which time a new state constitution was passed and the court system reorganized. The new constitution, which replaced the constitution of 1844, took control over bar admissions from the Governor and granted it to the supreme court.[51] Then, in 1950, the Committee on the Abolition of Examinations for Counsellor-at-Law recommended abolishing the distinction.[52] Over the

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[45] *See* Minutes of Votes and Proceedings of the One Hundred and Twentieth General Assembly of the State of New Jersey 80 (1896).

[46] Assembly Bill Number 273, One Hundred and Twentieth General Assembly of the State of New Jersey (1896).

[47] *See* Minutes of Votes and Proceedings of the One Hundred and Twentieth General Assembly of the State of New Jersey 297 (1896).

[48] New Jersey State Bar Association, [1946] YEARBOOK 45-47.

[49] *See id.* at 101. *See also* 69 N.J.L.J. 3 (1946).

[50] *See* New Jersey State Bar Association, [1946] YEARBOOK 101.

[51] *See* N.J. CONST. art. VI, § II.

[52] *See* 73 N.J.L.J. 1 (1950).

following years, an increasing number of criticisms and justifications were offered for the bifurcated bar. The Committee had already termed the system archaic and noted that it prevailed in no other state.[53] Nevertheless, counsellor standards were strengthened and more carefully defined. Maintenance of the graded bar and the required clerkship, also an increasing anachronism, became intertwined.[54]

In 1951 the New Jersey Institute for Practicing Lawyers offered a practice course for clerks.[55] This course could be considered the ancestor of the later course for attorneys preparing to take the counsellors examination and for the skills and methods course which was years later to become first an option and then a replacement for the clerkship.

In was in November 1952 that the supreme court began chipping away at the ancient attorney-counsellor distinction. With the institution of rule 1:8-9,[56] attorneys had to successfully complete a thirty-week course covering the new subjects of appellate procedure, brief writing, and oral advocacy that would be added to the counsellor's examination. Additionally, the three-year wait as an attorney was abolished and recent law school graduates were permitted to take the course while clerking.[57] Some welcomed the change because it restricted the scope of the examination to subjects germane to the exclusive prerogatives of counsellors, *viz.*, representation and appearance in appellate courts.[58] Not aware that this was the beginning of the end for the bifurcated bar, some believed that "[a] distinct appellate

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[53] *Id.*

[54] *Id.*

[55] *See* 74 N.J.L.J. 8 (1951).

[56] *See* 75 N.J.L.J. 4 (1952).

[57] The rule read:

> (a) No person shall be recommended for a license to practice as a counsellor unless he shall have taken and passed the examination given by the Board of Bar Examiners in Appellate Procedure, Brief Writing and Oral Advocacy. (b) No person shall be admitted to the bar examination for counsellors unless he first produces to the Board of Bar Examiners in the manner prescribed by its rules satisfactory evidence that: (1) He is a licensed attorney of this State in good standing; (2) He is a resident of this State; (3) He has met the requirements of paragraph (c) hereof. (c) At any time after having successfully completed all of the courses required of a candidate for a bachelor's degree pursuant to Rule 1:8-2(f), or after admission as a licensed attorney of this State, a candidate for the counsellor's examination shall begin and successfully complete at an accredited law school a course in Appellate Procedure, Brief Writing, and Oral Advocacy. Such course shall be given in a 2 hour session, once each week and shall run for a full school year (30 weeks).

Id.

[58] *See* 75 N.J.L.J. 4 (1952).

bar may ultimately eventuate."[59] After the program was established, a special committee of the state bar association interviewed participants.[60] It found that nearly everyone considered the course "unsuccessful and many viewed it as an insult to their education, intelligence and experience."[61] The Committee commented that the program's fault did not lie so much in its administration, but rather in "its very existence."[62]

In its third year of existence, the appellate practice course concentrated on procedure, research, and written briefs. Oral argument was added[63] and in March 1957 the Supreme Court Committee on Training for the Practice of Law issued a report on improving the clerkship required to become an attorney.[64] Recommendations were: (a) a summer training program in practical skills would be required of candidates for the Bar; (b) a continuous six-month clerkship should be required after passing the bar examination; (c) preceptors should have at least three years experience; (d) preceptors should see that clerks do specified work; (e) the concept of a "well-rounded" clerkship should be abandoned to permit specialization; (f) each County Committee on Character and Fitness should set minimum fee scales; (g) every preceptor should have discretion to permit the clerk to appear in lower courts; and (h) a manual of all requirements should be prepared for clerks.[65] Most importantly, as far as the bifurcated bar was concerned, the Committee recommended that the counsellor's training course be dropped and counsellor status be obtained by actual demonstration of appellate advocacy. Course contents would then be included in the summer training program, and attorneys would be permitted to take the counsellor's exam after one year of practice.[66]

In July 1958 the supreme court, refusing to tinker further, abolished the bifurcated bar which had been in effect since 1767.[67] The court concluded that the course which had existed for four years had been less than successful. After 191 years the court modified rule 1:12-1 to abolish the bifurcated bar, observing:

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[59] *See id.*

[60] *See* 77 N.J.L.J. 5 (1954). The committee was designated as the Special Committee on the Counsellorship Requirement of the Junior Section of the New Jersey State Bar Association. *Id.*

[61] *Id.*

[62] *Id.*

[63] *See* 79 N.J.L.J. 4 (1956).

[64] *See* 80 N.J.L.J. 1 (1957).

[65] *See id.* at 5-6.

[66] *See id.* at 6.

[67] *See* 81 N.J.L.J. 345 (1958).

> The fact that the attorney-counsellor distinction is unique to New Jersey—it exists in no other state—is a strong indication that its existence is not essential either for the maintenance of a competent bar, for the development of the state's jurisprudence, or for the protection of the public.[68]

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[68] *See id.* at 341, 345.