The Bar Exam and Law Schools

Michigan law and the essay questions

By Byron D. Cooper

In the last issue of the Journal, *this column explored the Michigan Bar Examination's effects on student course selection and on course coverage. But what about specific rules taught in substantive courses? Could a law school course be made into a "bar prep" course designed to cover the Michigan rules tested on the essay questions? If so, what difference would it make?*

A survey of the rules tested over the past decade in the essay questions on property—the only bar exam topic in which I am familiar with the content of current casebooks—indicates that the questions are fair and test rules that any student having studied almost any property casebook should be able to handle.[1]

The Model Answers publicly distributed may not reflect how the answers were in fact graded, but only the published Model Answers could influence course content in the law schools. The Model Answers to the real and personal property questions from the past decade suggest that a knowledge of Michigan law may be of limited value in answering the essay questions.

As for personal property, a question on the July 1995 exam required legal advice to a party whose property had been converted and then resold for more than the owner paid for it. According to the Model Answer, the question presented a choice between "an action—historically called trover—for the tort of conversion" and replevin. But in Michigan, trover was long ago abolished with the other common law forms of action, and replevin was declared unconstitutional in 1972 and replaced with claim and delivery (MCR 3.105). It doesn't really matter since the owner ought to sue neither in trover nor for replevin but waive the tort and sue for unjust enrichment.

The two lost property questions from the past decade raise a special conundrum. On both the July 1991 and July 1996 lost property questions, the examinee is told to disregard the Lost Goods and Stray Beasts Act (which had been repealed effective January 6, 1988). Does the instruction mean that the new Lost Property Act should be applied? Or does it mean to ignore whatever statute is in effect and apply the common law?

In *Willsmore v Township of Oceola*, 106 Mich App 671 (1981), the major case on lost property in Michigan, the Court of Appeals held that Michigan recognizes *none* of the common law of lost property (neither treasure trove doctrine nor the late nineteenth century developments favoring the owner of the locus in quo). The Model Answers for both questions, it turns out, apply the common law anyway. Concluding that the questions are close, the Model Answers favor the finder on the basis of *Willsmore*, which relied entirely on the Lost Goods and Stray Beasts Act that the examinee was told to ignore!

The questions concerning fixtures and the law of gifts have followed general American law, except perhaps for the rule that a gift causa mortis in contemplation of suicide is valid in Michigan (July 1993, February 1999).

As for real property, the Model Answer to the only question from the past decade involving the rule against perpetuities (July 1991) ignores both the Uniform Statutory Rule Against Perpetuities adopted in 1988 (MCL 554.71 et seq.) and the act limiting the duration of possibilities of reverter and rights of entry adopted in 1968 (MCL 554.61 et seq.).

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The questions relying on *Sanborn v McLean*, 233 Mich 227 (1925) (which is probably the Michigan courts' most notable contribution to the American law of property) presented not the use restrictions that arise by implication or the role of inquiry notice as in *Sanborn*, but rather the notice provided by deeds out from a common grantor who *expressly* restricts property retained. Although the Model Answers to these questions (July 1993, July 1997) cite *Sanborn*, the questions have nothing to do with implied restrictions or inquiry notice; the correct analysis should be based on cases such as *McQuade v Wilcox*, 215 Mich 302 (1921), part of a long line of cases in Michigan holding that deeds out from a common grantor provide notice of restrictions on property retained by the grantor.

The Model Answer to a question on the Statute of Frauds in conveyances (February 1990) specifies estoppel as a means of avoiding the statute, but an analysis of the state of

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Michigan law supports Judge Avern Cohn's conclusion in *Hazime v Martin Oil of Indiana*, 792 F Supp 1067 (ED Mich 1992), that "if the Michigan Supreme Court looked at the issue today, it would rule . . . that the doctrine of promissory estoppel may not be applied to a statute of frauds case involving the sale of real estate."

Inconsistencies in the rules applied by Model Answers are especially troubling. Michigan recognizes two forms of joint tenancy: A conveyance to two or more people "as joint tenants" creates a traditional joint tenancy with right of survivorship, but a conveyance to two or more people "as joint tenants with right of survivorship" creates a joint life estate with indestructible alternative contingent remainders. On the February 1994 exam, a conveyance by a father to his two sons "jointly, with full rights of survivorship" was correctly construed as a "cotenancy in a life estate only," with a contingent remainder in the survivor.

But on the July 2000 exam, the question involved a deed conveying property to two sisters "as joint tenants, with right of survivorship." Did a subsequent lease of the property by sister A sever the joint tenancy, so that on the death of sister B her will effectively gave her half interest to a church? Incredibly, the Model Answer concludes that there is a "split in authority" on this issue, and the "executor should be advised to secure a judicial determination of title"! In fact, the church can have absolutely no interest in the property under Michigan law. The joint life estate can be severed, but the ultimate ownership depends on which of the original grantees survives the other.

In real property, the only topic on which there is a substantial difference among states and on which Michigan law has been consistently and correctly applied in the Model Answers is the "race-notice" statute (July 1994, July 1995, February 1999).

The inescapable conclusion is that where Michigan law deviates from general American law, examinees are not really expected to have mastered state law so much as to understand the law as presented in the casebooks.

Even if a property instructor wanted to "teach to the bar" specifically in Michigan, the objective could be accomplished with perhaps five Michigan cases[2] and two statutes[3] along with a few comments about the Uniform Statutory Rule Against Perpetuities, the race-notice statute, and gifts by donors who commit suicide. Even then, the Model Answers may ignore the Michigan variations.

In short, the content of a "bar cram" course would probably differ little from the content of most casebooks currently available. Certainly such limited supplementation would not impede consideration of economic theory, historical context, social policy or any other perspectives the instructor wishes to bring to the course. If the property content is typical of the rest of the exam, relying on the commercial bar review courses to cover specifically Michigan content for the Michigan bar exam seems both legitimate and realistic.

The bar exam clearly influences a significant number of students in their choice of elective courses and consequently schools as well in their course offerings. It has some marginal effect on topics covered in some courses. But it is doubtful that it affects much of what is actually taught. ✦

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FOOTNOTES

1. Essay questions and model answers for the Michigan bar exam, along with those from other states, are available in *Compilation of Bar Examination Questions and Answers*, published twice a year by the Institute for Bar Review Study.
2. *Willsmore v Township of Oceola* (lost property), *Albro v Allen* (joint tenancy "with right of survivorship"), *Koenig v Van Reken* (equitable mortgages), Cameron v Oakland County Gas & Oil Co (trade fixtures), and one of the cases illustrating the three-prong test for fixtures in Michigan. This assumes that other courses are relied upon for mortgages (and water law for the Multistate questions).
3. The Lost Property Act, MCL 434.21–29, and the Act to Limit the Duration of Possibilities of Reverter and Rights of Entry, MCL 554.61–65.