



Making the Bar Review Fun

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YOU WANT TO TAKE another bar exam? Ask that question of any attorney and watch their face blanch with fear. In fact, I have one friend who claims he could not sleep a wink for two nights during the exam, wondering if he had answered the procedure essay correctly. The bar exam is hard and dreary, but there's no reason why the bar review, at least, can't be a little bit fun.

The bar examination in most jurisdictions is given twice a year: the last week of February and the last week of July. The exam usually is either two or three days long. States vary but the usual pattern is one or two days of essay and short answer questions and/or performance tests and one day – the Wednesday – for the national Multistate Bar Exam, made up of 300 multiple choice questions in six subjects: torts, contracts, criminal law and procedure, property, evidence, and constitutional law.

It was the spread of the Multistate Bar Exam across the country that led to the

modern bar review course. Before the 1970s, each state tested on its own law exclusively and had its own set of bar examiners. The prevalent type of bar review course prior to the 1970s was therefore local in its focus and its ownership. Very often in these pre-Multistate review courses, all subjects were taught by a single person who specialized in knowing the foibles and preferences of local examiners. Substantive legal knowledge took a back seat to insider knowledge about the local examiners. So, for example, the instructor might advise the students in the course that, in commercial paper, the examiner always used fact situations derived from recent Court of Appeals cases. So the student could review the past year's five or six commercial paper cases in the Court of Appeals and feel sure they had seen the fact patterns they would be asked to discuss on the bar. Other typical observations might include whether the particular examiner appreciated outlines rather than full paragraphs of the answers and whether the ex-

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aminer expected case citations. Many of these courses, including the one I took, were deadily dull. As a result, I set out on a mission to make my bar lectures fun.

As more and more states adopted the national standardized test – the Multistate Bar Exam – these locally focused bar reviews were doomed. A new kind of bar course was needed – one that would actually teach students the substantive law of the six subjects tested on the Multistate exam.

The concept of the modern bar review is a combination of accumulating substantive knowledge and practicing test-taking technique. Usually the early part of these courses is largely devoted to our substantive lectures and the latter part to test-taking technique. No matter how much substantive law a student may learn from us, there is no substitute for writing sample essays for grading and constantly practicing with simulated multiple choice questions. In the end, what correlates with success on a test? Experience with that test.

In the substantive lectures, we summarize each three or four hour credit law school course in six or seven hours. The most difficult part is that there is a new subject to learn every two days while reviewing past subjects, doing a prescribed number of practice questions per night, and reading the outlines for upcoming subjects before class. Needless to say, this is a grueling two-month marathon that requires students to put in about eight hours of lecture, practice, and reading a day.

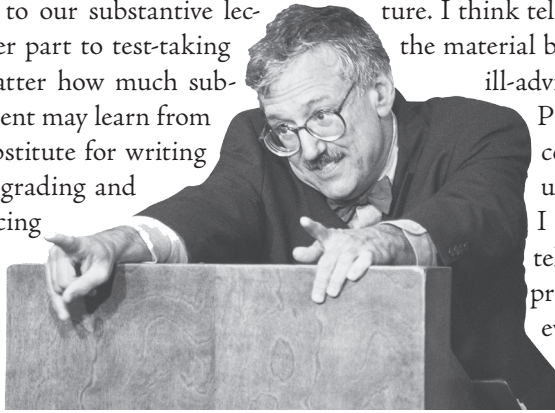
I have been lecturing in Criminal Law and Criminal Procedure for a national bar review course for over thirty years. In that time, I have come to rely on humor in my

presentations for several reasons. First, humor can lighten up the presentation so the substantive points I make will sink in. I hope students will associate a substantive issue with humor essentially as they might with some cleverly contrived mnemonic device. Second, I try to use humor to keep the students' attention, as long lectures can overwhelm. Third, and most important, humor can be invaluable in keeping students from panic, the bar applicant's worst enemy.

Before I present examples of humor I have used over the years, I want to be clear about what I view as legitimate and illegitimate ways of injecting humor into a bar lecture. I think telling jokes unrelated to the material being discussed is both ill-advised and inappropriate. Professors have no license to engage in stand-up comedy. For example, I once heard a lecturer tell a joke that began, "A priest, a rabbi, and a televangelist boarded an airplane" Such a joke would only be appropriate if he were teaching aviation law.

What I view as legitimate humor is making fun of the material we must cover anyway or telling relevant anecdotes from law practice that exemplify or elaborate on the point I am making in the lecture itself.

Perhaps some examples might clarify what I mean by having fun with the material we must cover anyway. I weave into my substantive lectures analysis of exemplary multiple choice questions. In many cases, there is something about the question itself which can provoke laughter. In one criminal law question, one of the responses was, "A revolver with only one of its six chambers loaded is not a deadly weapon." After read-



Whitebread at work, with bow tie.
Courtesy of BAR/BRI Bar Review.

ing that response, I pause and say, "Did you hear that? That is simply the silliest thing I have seen in a law exam in thirty-seven years of teaching! I really must pause to say if you would even toy with that response – yes, you are in trouble on the bar exam and, what's more, you're in trouble in life. If you choose that response, you will never own your own home."

In another question about defenses to homicide, one response suggests that the victim's failure to leave the house made him a trespasser, so it was O.K. to kill him. I note that, "Unlike the professors of torts or property, I have no idea where two people jointly own a home and one tells you to leave and the other says to stay whether that makes you a trespasser or not, but I am the professor of criminal law and you know what I know for sure – you can't kill trespassers. Who cares if he's a trespasser? You can't kill him."

Sometimes there is simply some amusing misunderstanding about a question. One question began, "An invalid grandmother ..." and I recall that several students e-mailed me in outrage asking what could make a grandmother "invalid" and what would be a "valid" grandmother and why hadn't I described this legal distinction.

Let me show how I use humor for each of the three purposes I have outlined above: to help students remember substantive points, to help student attention during long non-interactive lectures, and to avoid student panic. There is, of course, no clear delineation among these three goals and much of my use of humor is for multiple purposes, so some of the distinctions I make among these three goals will seem artificial and overlapping.

But, to demonstrate the concept, first take humor that reinforces the substantive point. When I am teaching about the

number and unanimity of jurors, I note the Supreme Court has finally stopped treating jurors like prunes. It turns out that, just like prunes, it takes a certain minimum number of them to work and the minimum number of jurors is six. Some students have said that, because of the analogy between jurors and prunes, they will never forget the minimum number of jurors required.

Another example of using humor to underscore a substantive point comes up when I discuss pre-trial identification and the fact that, if a defendant is identified at trial, he is overwhelmingly likely to be convicted. To bolster this point, I note that, in many places, jurors are given seats that both swivel and rock. I ask, "Do you believe anything about so-called body language? I can't tell you how often I have sat as an observer in a courtroom where the minute the witness or victim identifies the defendant those jurors begin to rock. You know what that rocking means – it means (here I point at a student as a proxy for the defendant) you're gone, that's what it means. And there is only one way it can be worse, and that is the defense attorney's clever cross-examination. In one case where the victim had identified the defendant and the jurors were peacefully rocking, the defense attorney got very close to the victim and asked, 'Isn't it true that at the preliminary hearing you said the perpetrator had on green pants, now you say he was wearing grey pants?' The victim's answer, 'It's really hard to remember in detail like that with that big sawed-off shotgun pointed right at you.' What did the jurors do? Two of them rocked so hard they broke their chairs."

The second purpose of injecting humor into bar review lectures is to break up the unrelenting parade of factual material so as to keep the students' attention. Two techniques I have used for this purpose are to

point out something humorous about a case I am discussing and to pause to tell an anecdote from my former practice or my life that is related to the substantive topic. It has always surprised me that my own practice, which no criminal law all-star would envy, generated so many funny incidents.

For instance, the case *United States v. Havens*, 446 U.S. 620 (1980), stands for the proposition that all illegally seized real or physical evidence may be admitted into evidence to impeach the credibility of the defendant's trial testimony. After setting out the rule of the case, I move to a discussion of the facts of the case by saying, "I want to tell you a little about the *Havens* case because I like this case not just for the rule of law it announces, but for the rule it teaches about how you ought to live your life. The *Havens* case stands for the proposition it never pays to be too stingy; it never pays to be too cheap. Havens and his friend and, by the way, both were lawyers, conspired to import cocaine into the United States. Now the conspiracy wasn't too clever. Havens cut big holes out of a t-shirt and they sewed the pieces of cloth on the inside of the friend's jacket, making false pockets, and put the drugs in those pockets. What do you think the Customs and Immigration authorities found in a lawful search of the friend? The drugs. What do you think the authorities found in an illegal search of Mr. Havens's suitcase? The t-shirt with all the big holes cut from it. What did he save that for? How cheap can you be? What was he going to do? Wear the t-shirt to a party? Whatever he saved the t-shirt for, it was a big mistake. Havens's friend – we can now call him Havens's former friend – made a deal with the government and agreed to testify against Havens. After his friend's testimony, Havens took that stand and on direct examination was asked, 'Did you have anything to do with smuggling the drugs?' Havens's

answer was no. On cross-examination, the U.S. Attorney asked, 'Well, did you have anything to do with sewing the false pockets in your friend's jacket?' Havens answered no. The U.S. Attorney continued, 'Was a t-shirt with big holes cut from it found among your luggage?' Havens replied, 'Not to my knowledge,' and, with that response, the U.S. Attorney produced the t-shirt and said, 'What about this?' and the Supreme Court held illegally seized real or physical evidence, in this case the t-shirt, inadmissible from the State's case in chief may be admitted to impeach the credibility of the defendant's trial testimony."

When I am teaching the law of search and seizure and the exception to the warrant requirement for hot pursuit, I pause to tell a story from my practice and make the point that if the police are truly in hot pursuit, they may enter anybody's home without a warrant. After stating that principle, I pause to tell the following story. "It was a dreary Saturday afternoon when one of my clients decided to bag up all of his marijuana for sale. Unfortunately for him, a fleeing felon came running through the wide open front screen door of his house with the police in hot pursuit. I have always thought this case of mine resembled a Roadrunner cartoon in that the fleeing felon ran down the hallway, out the back door, down the alley, over the fence, and was never found, but the police, on seeing the big pile of marijuana on the kitchen table, skidded to a halt and thought, why, there's a day's work right there! And do you see what my client and I learned the hard way? If the police are truly in hot pursuit, they may enter without a warrant anybody's home – it doesn't have to be the fleeing felon's home."

When I teach the material about police interrogation and confessions, I focus on the *Miranda* warnings because there is so

much emphasis on *Miranda*-based questions on both the Multistate and the essay parts of the bar exam. In introducing the *Miranda* warnings, I say, "I am reluctant to insult your intelligence by telling you what the *Miranda* warnings are. If you really don't know the *Miranda* warnings, you separate yourself from every person who watches television in America. If you don't know the *Miranda* warnings, you should study a little less tonight and watch a cop show on T.V. and you will learn them."

After reciting the warnings, I admonish students to look for two triggers for the need to give the warnings: custody and interrogation. The police must be engaging in interrogation to require them to give the *Miranda* warnings. As to interrogation, no warnings are required to admit what courts call spontaneous statements or threshold confessions. To exemplify this point, I once again resort to a case I had in my very limited criminal practice. One of my clients, on seeing two police officers coming up the walkway of his home, ran out the front door and blurted out, "You must be here about that Buick I stole." The police did not need any warnings to admit that spontaneous statement. I then pause to explain to the students what the two police officers were doing approaching my client's home – they were raising money for the Fraternal Order of Police. Who were many of my clients? Life's losers, that's who.

In addition to the use of humorous examples from my practice, I also break up the monotony of the substantive lecture by telling occasional brief anecdotes from my own life. Undoubtedly, the best-remembered of these concerns my mother. I assert that the United States Supreme Court will never overrule the *Miranda* decision and get rid of the *Miranda* warnings even though the votes might be there to do so. I state that most serious studies of the impact of the *Miranda*

warnings on suspect willingness to talk (including the study I helped conduct when I was a student at Yale – I participated in the very first study of the impact of the *Miranda* warnings on suspect willingness to cooperate) have reached the same conclusion: the *Miranda* warnings have no impact on suspect willingness to talk. What do people do when they hear their rights? Do they assert them? No – they waive them. But, the *Miranda* warnings have had a dramatic impact on America. The portrayal of *Miranda* on television has told everybody they have some rights. In my limited practice, I never met a juvenile client or criminal client who didn't say to me in one of his first sentences, "I didn't get my rights. I didn't hear my rights. He didn't read me my rights." Now they have no idea what the rights are or why they would be useful, but the portrayal of *Miranda* on television has informed everyone they have some rights and I will predict the Supreme Court will never overrule *Miranda* and become famous in the American popular imagination as the Court that took away all of America's rights.

Then I say, if you will allow me one anecdote from my own life, I think I will be able to convince you. My mother knew that I had been a law professor for over thirty years – at Virginia, Georgetown, and USC – but my mother never really quite understood what that meant I did. But, my mother did remember that when I was a student at Yale I had participated in their first study of the impact of the *Miranda* warnings on the New Haven, Connecticut police. So, in 1976, when Ernesto Miranda himself was killed in a bar room brawl in Phoenix, my mother, wanting to be relevant, cut out the clipping about Miranda's death and sent it to me. What amazed me wasn't that she did that, what amazed me was what she had written at the bottom in her own little handwriting.

And I do want you to know my mother, who lived in Bethesda, Maryland, was the perfect bellwether of American public opinion. So, imagine my surprise when I read, "Charles, isn't this a shame after all he did for all of us?" Do you think the *Miranda* warnings are here to stay? The *Miranda* warnings are part of our culture.

The third and most important use of humor in the bar review is to keep students from panicking in the face of all the material they must absorb. One office of our course admonishes the students at the beginning of the course as they are being presented with seventy-five pounds of books, most bearing a shocking resemblance to the phone book in a major metropolis, not to panic, with two pieces of advice. First, they say this is a minimum competency exam so all you A and B students don't have to do that well and all you C students just keep doing what you are doing. Second, they advise the students to think of a person from their school who has passed the bar who they never dreamed would do so. The students are urged to cut out a picture of that person from their school class picture book and keep it nearby while they study for the exam. Every time they think they just can't learn enough to pass or start to have self-doubt, they should take another look at the picture they have cut out and they will feel more confident.

I try to build student confidence by reference, once again, to a story from my own experience. I tell the students, "You can't learn all the stuff in these books and it is even dangerous to try. If you are taking our course, you have no reason to fear lack of knowledge on the bar. My golly, these books are so chock-full of knowledge they would choke a horse! Your only fear if you are taking our course is that, in the face of all this material, you will panic. To show you what you shouldn't do, let me tell you what I did

do. I graduated from Yale Law School in 1968. In those days, we went to school right up until the first of June. I sat for the D.C. bar exam which, in those days, was given the last week in June. I had three weeks to prepare for the exam. I rushed to D.C., where I took a review course in which a single guy drearily lectured on every topic eight hours a day. As I like to say, I wish you (pointing at the students) could have been with me for that. But I was just like bar review students everywhere. I didn't care what he said, I just took notes as fast as I could. We must have been two weeks into this course before I even looked up from my note-taking. As I recall, he was lecturing on Commercial Paper: Negotiable Instruments. I looked up and a little light bulb came on over my head and I thought to myself – do you think he means a check? I later found out that I answered all ten commercial paper questions on the D.C. bar correctly but, to this day, I have just one little problem about commercial paper: I don't know what it is.

"Well, I attended eight hours of lecture and then went home at night and studied some more. My mother threw food in at me like I was some kind of animal.

"Came the day of the D.C. bar exam. The exam was given at the old Georgetown University Law Center, which was then an un-air-conditioned, five-story, walk-up fire trap. Where do you think I was assigned? The fifth floor. I climbed up there to a room that was hot and airless. You can believe this or not – it really happened. I found I had been assigned to the smoking room, but I didn't smoke and, worse yet, it was a typing room and I didn't type. I am in this hot, nasty, smoking and typing room when I try to remember my outlines and mnemonics. I am starting to panic. I can't remember any of my material. The sweat beads are pouring off my head. I am having what I have al-

ways thought of as the Toilet Flush – I am in total panic. I can't recall any of my notes and it looks like I am doomed. Just as I was in that totally panicked state and they were getting ready to hand out the exam, the fellow sitting in front of me did one of the most charitable things anyone has ever done for me in my life. Just as they were about to hand us the exam and I am in total panic, this guy turned around to me for no reason I ever figured out and said, 'You know, I hear some people take a course before they take this test.' What did I think? I thought, 'O.K., that's one.' That's what I thought. And what is the moral of the story? The moral of the story is: Don't panic no matter how little you know! You can take it from me, there will be boatloads of folks sitting for the bar exam who know less than you."

Sometimes humor arises when the speaker least expects it. In other words, funny things happen off-script and the lecturer must adjust. One of my favorites was the time I was explaining what it meant for a person to be wearing a wire or to be wired. I said, "You know what I mean by wired? I do not mean an extra cup of coffee. I mean, won't you just speak a little more clearly into the bow tie, please." Here I pulled on my bow tie and, unexpectedly, it came apart in my hands. I then had to repair and retie it without missing a beat in the lecture. When I succeeded, the live audience gave me a thunderous ovation.

As a preface to my discussion of homicide I always begin with the point that the victim must be human. There have been several past Multistate questions in which people kill animals – dolphins, thoroughbred race horses, seeing eye dogs To make sure students are not distracted by their concern for these imaginary animals, I say, "Don't love them. Don't hate them. Don't be distracted

by these animals. They don't care about you." After spouting that mantra several times, I then ask the class, "O.K., folks, the opening bid in a homicide case – the victim must be what?" I expect the response "human." One time, someone yelled out "dead." I quickly had to recover and said, yes, we'll accept that: "Dead and human."

One surprising humorous incident had larger ramifications. I would tentatively assert that any speaker, no matter how self-important or prominent, would be frozen in his or her tracks by what was shouted at me once as I walked to the podium in Florida. Because Florida has no reciprocity with other states and has a large number of attorney retirees from other states who decide they would like to practice in Florida, the Florida bar review often contains a substantial number of seniors. As I approached the podium in Tampa, in a large dark hall with several hundred students, someone in the back hollered out, "I know your mother." If that doesn't freeze you like a deer in the headlights, nothing will.

Finally, those who live by the sword, die by the sword. If you believe it is important to use humor in the bar review to underline substantive material, keep student attention, and build confidence, you must be willing to concede you can't please all the people all the time. There will always be those students who will not enjoy your teaching. The best of the negative reviewers may give you a taste of your own medicine by throwing sarcastic humor back at you. My all-time favorite was the student who simply hated my lectures and, after panning my work in every other way, answered the one positive question on the critique, "What was the best thing about this lecturer?" by saying, "Looking at him for six hours made me feel thin." *JB*