

Working Group Drafting Proposals for Discussion
Phase I
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Introduction

“In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them.” Felix Frankfurter¹

The Board of Trustees of the State Bar of California charged the Task Force on Admissions Regulation Reform (the “Task Force”) with “[e]xamin[ing] whether the State Bar of California (the “State Bar” or the “Bar”) should develop a regulatory requirement for a pre-admission practical skills training program, and if so, proposing such a program” for submission to the Supreme Court.

Most American law schools today follow the traditional Langdellian model of legal education, emphasizing doctrinal study as the basis for teaching students the art of “thinking like a lawyer.” Over the course of more than a century since this model of legal education took root around the country, law schools have gradually incorporated clinical experience and practical skills training into their core curriculum. The importance of providing new lawyers with opportunities to develop practical skills has been driven, in large part, by the rapidly changing landscape of the legal profession, where, due to the economic climate and client demands for trained and sophisticated practitioners fresh out of law school, fewer and fewer opportunities are available for new lawyers to gain structured practical skills training early in their careers. Many new lawyers, in fact, are now entering the profession as solo practitioners, without the solid practical skills foundation necessary to represent clients in a competent manner and with nowhere to turn to build that foundation.

From the standpoint of regulatory policy, this situation presents serious issues of public protection that cannot be ignored. The record that we have compiled and examined confirms the importance and urgency of a thoughtful policy response. Following a series of hearings during which the Task Force took testimony from many practitioners, legal academics, judges, clients, and members of the public at large; and based on a thorough review by the Task Force of the literature on the topic of practical skills training for new lawyers – an extensive body of work going back decades that has repeatedly addressed the same set of questions considered here, and that has time and again confirmed the need for reform -- we now answer the charge given to us in the affirmative: In our view, a new set of practical skills requirements focusing on competency and professionalism should be adopted in California in order to better prepare new lawyers for successful transition into law practice, and many of these new requirements ought to take effect pre-admission, prior to the granting of a law license.

Our findings confirm what many studies have already shown. Most new lawyers face a gap in practice-readiness between completion of law school and the beginning of law practice. To maintain and elevate standards of competence, we believe that, as a profession, we must act to close this gap and that we must join with the legal academy to do so. Some stakeholders who appeared before us urged that the Bar should stay its hand, and some warned against any regulatory action that might place the entire burden of practical skills training on law schools. We do not accept the advice that the Bar should stand pat, but we do agree that the burden of practical skills training must be shared. The profession not

¹ Letter from Felix Frankfurter, Professor, Harvard Law School, to Mr. Rosenwald (May 13, 1927) (Felix Frankfurter papers, Harvard Law School library), *quoted in Rand Jack & Dana C. Jack, Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers*, at p. 156 (1989), *quoted in* Harry T. Edwards, “The Growing Disjunction Between Legal Education And The Legal Profession”, 91 Mich. L. Rev. 34, 34 (1992).

only has a stake in improved skills training, but has an obligation to help to bring it about. Thus, we envision a skills training regimen that begins in law school and continues through the transition into practice, with greater levels of participation by practicing lawyers in the process of law school teaching, enhanced practice-based continuing legal education in the early years of practice, and expanded mentoring opportunities for young lawyers.

We have no illusions that the State Bar can bring this new, more practice-oriented training regimen about overnight or prescribe exactly what it must look like in every detail, but we are confident that the Bar can establish a regulatory framework that will provide a structure for the organic evolution and growth of such a system. We intend the recommendations we make in this Report to provide the foundation for that framework. Because any change of the magnitude we have in mind must be introduced gradually, we anticipate the need for the development of specific rules for the implementation of these recommendations over a number of years. In general, however, we are recommending an approach that maximizes freedom of choice from a menu of options, so that law students and new admittees to the Bar are presented with a variety of ways to fulfill their practical skills training requirements, at different times and in different ways, during law school and in the early years of practice. Flexibility is of paramount importance in addressing an issue of this complexity and potential cost. The adage that “no one size fits all” is certainly apt.

Before turning to specifics, we note and applaud the fact that a significant number of law schools are already offering the kind of practical skills training that we have in mind. Based on the testimony given by virtually every law school dean who appeared before us – testimony which, on the whole, was very encouraging and portrayed an environment in which the clinical element of law school education has grown dramatically in recent decades -- we suspect that in a growing number of law school settings, meeting the pre-admission practical skills requirements that we outline here may be a simple matter of law students certifying that they took existing clinical courses or existing courses with a clinical component in them.

But we cannot say that there is a universally strong movement toward greater clinical education among law schools, or that every law student is being taught to value practice-based experiential learning on par with traditional doctrinal course offerings. Indeed, there remains a persistent, unresolved debate in the legal academy about whether clinical legal education ought to be a mandatory part of the standard legal education curriculum. In our view, because this issue has public protection implications beyond the academy, there is great urgency to its resolution. We believe it must be resolved now, definitively, in favor of requiring that some substantial portion of legal education be clinical in nature. We do not propose to place this mandate on law schools directly, for we have no regulatory authority over many of the law schools whose graduates sit for the Bar Examination in this state. Rather, we propose to do it by creating some new requirements that new admittees would have to fulfill, and certify to having done so, as a condition of licensure.

With this general background in mind, we first set forth below our detailed findings and the basis for our call for reform. We conclude by outlining a recommended program of reform. Our proposed recommendations, in brief overview, are as follows:

- **Pre-admission:** A practical skills training requirement fulfilled while in law school where 250 classroom hours during the second and third law school years would be dedicated to developing practical skills and the servicing of clients. Credit towards those hours would be

available for “in-the-field” experience under the supervision and guidance of a licensed practitioner or a judicial officer;

- **Pre-admission or post-admission:** An additional practical skills training requirement, fulfilled either at the pre- or post-admission stage, where 50 hours of legal services are specifically devoted to pro bono or low bono service. Credit towards those hours would be available for “in-the-field” experience under the supervision and guidance of a licensed practitioner or a judicial officer; and,
- **Post-admission:** 10 additional hours of Mandatory Continuing Legal Education (“MCLE”) courses for new lawyers, over and above the required MCLE hours for all active members of the Bar, specifically focused on practical skills training. Credit towards these hours would be available for participation in mentoring programs.

I. Background and Findings

A. Past Studies

The Task Force reviewed and considered several past studies dealing with a perceived gap between law school education and preparation to practice law. All echoed a common theme: While law schools are able to impart “a distinctive habit of thinking that forms the basis for their student’s development as legal professionals ...” they are less successful in the “task of connecting these conclusions with the rich complexity of actual situations that involve full-dimensional people, let alone the job of thinking through the social consequences or ethical aspects of the conclusions...”² These studies are summarized below.

1. The MacCrate Report (1992)

In 1992, the American Bar Association (“ABA”) Section of Legal Education and Admissions to the Bar published its 400-plus page *Report of the Task Force on Law Schools and the Profession*.³ Known as the “MacCrate Report,” this influential study documented the findings of a task force commissioned to examine the connection between legal education and the profession.⁴ The MacCrate task force found that “[t]he skills and values of the competent lawyer are developed along a continuum that starts before law throughout a lawyer’s professional career.”⁵ After extensively reviewing the state of the profession

² Sullivan et al, *Educating Lawyers, Preparation for the Profession of Law*, The Carnegie Foundation for the Advancement of Teaching 2007, pp. 5-6.

³ American Bar Association, *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (1992). See also Robert MacCrate, *The Lost Lawyer Regained: The Abiding Values of the Legal Profession*, 100 Dick L. Rev. 587 (1996); Robert MacCrate ed., *Legal Education and Professional Development* (1992).

⁴ The task force report took its name from the chair, Robert MacCrate, a well known and successful lawyer from New York. (Shultz, RT 8-1-12 p. 104).

⁵ Patterson and Arons, *Joint NOBC/APRL Committee on Competency* 2010 pp. 1, 3.

and of legal education, the MacCrate Report issued a “Statement of Fundamental Lawyering Skills and Professional Values” that, in concluding summary, made some simple findings: a lawyer should (1) attain a level of competence in one’s own field of practice, (2) maintain a level of competence in one’s own field of practice, and (3) represent clients in a competent manner.

The MacCrate Report emphasized the value to law students of practice-oriented instruction that includes clinics, externships and simulations. It also recognized the value of part-time employment during the academic year as a complement to classroom instruction. It noted that apprenticeships have fallen into disfavor in the United States, but are generally required in English commonwealth jurisdictions. The MacCrate Report avoided acknowledging any “gap between law school and law practice,” but recognized the existence of “bridge the gap programs” in most states. The MacCrate Report did not address when, in the educational continuum, the level of competence to represent a client must be achieved, but did note the importance of continuing legal education.

There is little question that the MacCrate Report was a landmark. Commenting in retrospect on the continuing importance of the MacCrate Report today, former Chief Justice Randall Shephard of the Indiana Supreme Court recently said:

[T]he central contribution of the MacCrate Report has been to help all of us view ‘legal education’ as something that does not conclude with law school graduation but rather continues well thereafter. Whether we do it through the law-school admissions process, through law instruction in school, through the bar admissions process, or through continuing legal education, we should view lawyer education as a lifelong continuum in which various players take principal roles at different moments but which, in fact, ought to be one long and useful venture.⁶

2. State Bar of California, Committee of Bar Examiners, Special Committee Report on Courtroom Skills (1987)

In 1986 the California Legislature ordered the Committee of Bar Examiners (“CBE”) to report on the “necessity and practicability of requiring applicants for admission to practice law to be certified as possessing minimum courtroom or trial capabilities.”⁷ Accordingly, the CBE formed a Special Committee to study these issues and issued its report in 1987.⁸

The Special Committee first summarized the history of the California Bar Examination, tracing its evolution from a purely essay format to the inclusion of a Multistate Bar Exam of a type used in other jurisdictions. Among California lawyers, that history is well-known. In 1980, the CBE undertook two studies in conjunction with the regular bar exam to assess the degree to which examinees have some of

⁶ Randall T. Shephard, “*From Students to Lawyers: Joint Ventures in Legal Learning for the Academy, Bench, and Bar*”, 31 Ind. L. Rev. 445 (2011).

⁷ Assembly Bill 3072 (1986 Legislative Session).

⁸ The Committee of Bar Examiners of the State Bar of California, *Special Committee report on “Requiring Attorney Applicants to Possess Minimum Courtroom Or Trial Skills* (1987) pp. 2-7, 12, 22-29.

the important skills and knowledge that are necessary for legal practice.” After concluding that it is feasible to construct, administer and reliably score certain types of clinical skills tests, the CBE adopted a “Performance Test” designed to test “practice skills.” What resulted is the form of Bar Examination that is familiar to California lawyers today.

Toward the end of increasing practical skill testing on the Bar Examination, the Special Committee studied various interactive test taking models designed to test courtroom or trial capabilities and predicted that such testing might be feasible once such modes were perfected. The Special Committee also studied whether, if a sufficient mechanism could be found to provide “minimum trial or courtroom capabilities” to the new admittee who planned to appear in court, there might be some advantage to the profession and to the public to test for courtroom skill as a “necessity” for every licensee. The Special Committee concluded that there would indeed be an advantage in such a requirement and proceeded to study means to satisfy it.

First, the Special Committee considered studies growing out of a concurrent movement to enact Mandatory Continuing Legal Education requirements in California. The Special Committee urged that the adoption of such requirements include Trial Practice Skills training as part of the program.

Next, the Special Committee examined the work of the Consortium on Lawyer Performance and Education, a State Bar committee convened by the then State Bar Board of Governors⁹. This group studied “Bridging the Gap” programs that provided post-admission instruction on practical skills. Although the Consortium asked the Board of Governors to adopt a requirement that new admittees complete such a program, it does not appear that this was enacted. The Special Committee also studied smaller scale “Bridging the Gap” programs utilized by local bar associations. However, it opined that in their current class size and format such programs could not provide the individual training and experience opportunities for developing Trial Practice Skills as deemed necessary by the Special Committee.

- a) The Special Committee investigated practicable training alternatives. It considered studies of ABA-Federal Court Special Admissions Programs, Post Admission Clinical Training Programs and Trial Skills Training in law school. It looked at experiences in other states that in the past required participation in “Preceptor” programs. Of particular interest was a requirement in South Carolina that new admittees not only take specified law school classes related to the practice of law, but that they also participate in at least eleven “trial experiences”, defined broadly as actual participation in a full trial under supervision of a member of the bar, or observation of various contested testimonial-type hearings. Ultimately, the Special Committee issued four recommendations and conclusions: Trial testing of actual trial skills as part of the Bar examination was impractical at that time;
- b) The CBE should adopt testing of California Civil and Criminal Procedure and the California statewide Rules of Court in addition to the Federal Rules and Procedures than being tested;

⁹ Senate Bill 163 (2011 Legislative Session) renamed the State Bar of California’s governing board, the Board of Governors, as the Board of Trustees, effective January 1, 2012.

- c) All applicants for admission after January 1, 1990 be required to complete an approved Trial Skills Training course to be entitled to practice in California; and
- d) The “Experience Quotient” requirement adopted in other jurisdictions, while useful, was deferred.

3. The Carnegie Report (2007)

In 2007, the Carnegie Foundation for the Advancement of Teaching published a report of its study of the state of contemporary legal education.¹⁰ The study spread over two academic semesters and encompassed 16 law schools in the United States in Canada. Broadly, the authors advocated expanding traditional legal education in a way that integrates the teaching of practice and professionalism skills in actual practice settings, something which it referred to as “context legal education.” The study made five key observations:

First, law schools, in a relatively short time, train students to “think like a lawyer.” Students demonstrate new capacities to understand the legal process, see both sides of legal arguments, sift through facts and precedents in search of a more plausible account, for using precise language, and for understanding the applications and conflicts of legal rules.”

Second, the process of enabling students to “think like lawyers” comes through the single teaching medium of the case dialogue method. While effective, the consequence of using this single method is a “striking conformity in outlook and habits of thought among legal graduates.”

Third, while students discover that to “think like a lawyer” means redefining messy situations into neat legal arguments, they are not prepared to connect these conclusions with the “rich complexity of actual situations that involve full-dimensional people, let alone the job of thinking through the social consequences or ethical aspects of the conclusions.”

Fourth, law students’ learning in the current law school regime is assessed using “summative forms” i.e. measuring learning through traditional testing such as Law School Admission tests, final examinations and Bar Admission Examinations. While these are valuable devices to protect the public because they can ensure basic levels of competence, another form of assessment, “formative assessment,” which focuses on supporting students in learning rather than ranking, sorting, or filtering them, is available. The study points out that law schools make little use of “formative assessment,” despite its value.

Fifth, the study found, compared to 50 years ago, law schools now provide students with more experience, more contextual experience, more choice and more connection with the larger university world and other disciplines. However, efforts to improve legal education have been more piecemeal than comprehensive. Thus, both supporters and detractors of increased attention to teaching “lawyering” treat this major component in an “additive, not integrative way.”

¹⁰ Sullivan et al, *Educating Lawyers-Preparation for the Profession of Law*, The Carnegie Foundation for the Advancement of Teaching (2007) pp. 5-10.

After extensive discussion of these five observations, the study took the view that law schools should seek to unite the two sides of legal knowledge -- formal knowledge and experience of practice. The authors concluded that legal education should use more “effectively the second two years of law school to more fully complement the teaching and learning of legal doctrine with the teaching and learning of practice.” The study offered five recommendations toward implementing changes to the traditional legal education:

- a) Offer an Integrated Curriculum;
- b) Join “Lawyering”, Professionalism and Legal Analysis From the Start;
- c) Make Better Use of the Second and Third Years of Law School;
- d) Support Faculty to Work Across the Curriculum;
- e) Design the Program so that Students and Faculty Weave together Disparate Kinds of Knowledge and Skill;
- f) Recognize a Common Purpose; and
- g) Work Together, Within and Across Institutions.¹¹

4. Best Practices for Legal Education (2007)

Another important 2007 report, *Best Practices for Legal Education* (the “Best Practices Report”),¹² published by the Clinical Legal Education Association (“CLEA”), picked up the Carnegie Report’s call for “contextual” legal education and took it further. The Best Practices Report called attention to a “concern about the potential harm to consumers of legal services when new lawyers are not adequately prepared for practice” and to “provide a vision of what legal education might become if legal educators step back and consider how they can most effectively prepare students for practice.”

According to the Best Practices Report, American legal education has been criticized “[s]ince its inception ... as serving only some of the educational needs of lawyers” and, as currently established, it is “a system of education which ... is simply indefensible.” The Best Practices Report, therefore, began

¹¹ The critiques in the MacCrate Report, the Best Practices Report, and the Carnegie Report have a long lineage. Jerome Frank said many of the same things in the 1930s. See Jerome Frank, “*Why Not a Clinical Lawyer-School?*”, 81 U. Pa. L. Rev. 907, 916 (1933) (emphasis omitted) (“Law students should be given the opportunity to see legal operations.”). A fellow member of the Legal Realist school of thought, Karl Llewellyn, echoed Frank’s critique of the law school method of instruction. See Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study*, at p. 101(1930) (“[The first year] aims, in the old phrase, to get you to ‘thinking like a lawyer.’”). The themes laid down by these scholars continued to be heard decades later. See Anthony G. Amsterdam, “*Clinical Education – A 21st Century Perspective*”, 34 J. Legal Educ. 612 (1984).

¹² Roy Stuckey et al., Clinical Legal Education Association, *Best Practices for Legal Education* (2007).

with the conclusion that “[t]here is a compelling need to change legal education in the United States in significant ways.”

The Best Practices Report went on to describe the programs of instruction in American law schools in the late 1990s as “little more than a series of unconnected courses on legal doctrine ... [whose] educational goals are ... unclear.” The result is that the second and third years of law school are not useful to students, with “a surprising percentage of third year students [being] profoundly disengaged from the educational experience.”

Consequently, the Best Practices Report argued that “[a] serious, thoughtful consideration of legal education in the United States is long overdue.” As did the Carnegie Report, the Best Practices report advanced the view that law schools should “broaden the range of lessons they teach, reducing doctrinal instruction that uses the Socratic dialogue and the case method[;] integrate the teaching of knowledge, skills and values, and not treat them as separate subjects addressed in separate courses[;] and give much greater attention to instruction in professionalism.”

The Best Practices Report found that “most law school graduates lack the minimum competencies required to provide effective and responsible legal services” and “are not sufficiently competent to provide legal services to clients or even to perform the work expected of them at large firms.” The authors pin this deficit on their perception that “most law schools are not committed to preparing students for law practice,” despite “general agreement ... that one of the basic obligations of a law school is to prepare its students for the practice of law.”

The Best Practices Report further pointed out that law schools can “help students acquire the attributes of effective, responsible lawyers including self-reflection and lifelong learning skills, intellectual and analytical skills, core knowledge and understanding of law, professional skills, and professionalism,” by adopting the primary goal of “develop[ing] [student] competence, that is, the ability to resolve legal problems effectively and responsibly.

Clinical legal education was, naturally, central to the vision for legal education advocated by CLEA in the Best Practices Report. As part of a program designed to promote student competence, the Best Practices Report endorsed universal clinical education, arguing that all students should be required, during their third year of law school, “to participate in externship courses or in-house clinics in which students represent clients or participate in the work of lawyers and judges, not just observe it.”¹³

¹³ For another useful summary of how clinical education fits in to the traditional legal education curriculum -- and can be fitted in better -- including a survey of the historical development of the clinical education movement, see Marc Feldman, “*On The Margins of Legal Education*,” 13 N.Y.U. Rev. L. & Soc. Change 607 (1985).

5. The New York Experience

Stephen P. Younger,¹⁴ Past-President of the New York State Bar Association addressed the Task Force regarding a comprehensive report on lawyers and legal education (the “NYSBA Report”) that was conducted during his Presidential term.¹⁵ Motivating the NYSBA Report was one fundamental question: Why should students go to law school today, given the cost of legal education, layoffs in the profession, and the need for attorneys with over 25 years of experience to “retool their practice”?¹⁶ In his appearance before our Task Force, Mr. Younger discussed the specific concerns addressed in New York (law firm structure, billing arrangement, including discounts, and alternative fee arrangements) and those things will impact the practice of law in the future.¹⁷

The NYSBA Report found that law firm structure is changing dramatically due to advances in technology. Video-conferencing (by which Mr. Younger gave his statement from a remote location) reduces the need for a physical space for law firms. Law firms that were surveyed about the issue predicted two models of futuristic “virtual law firms.” The first encompassed a group of lawyers that associates around particular assignments and would not be a law firm in the conventional sense. The attorneys would bid for assignments. After the client finds the right number of attorneys for the assignment, the lawyers would complete the task. The second model predicted that groups of very senior lawyers nearing retirement would practice from their “beach houses”, providing clients with high-level counseling. Needing no physical office space they would provide their services remotely, with only a conference room required for the occasional client meeting.

Assuming changes in the need for physical space for law firms, the NYSBA Report examined other areas of the practice of law such as alternative fee arrangements. Noting that the predominant models of fee arrangements today are hourly billing contingency fees, and that these arrangements are often met with dissatisfaction, the NYSBA Report opined that alternative fee arrangements are something to be embraced. However, their study showed that most of those arrangements are discounting arrangement as opposed to true alternative fee structures. In the future, alternative fee arrangements should be created that will benefit both the client and the lawyer.

Regarding work/lifestyle issues, a major change resulting from modern technology is that attorneys are now accessible at all times, whether it be in the office or on weekends at a child’s soccer game. This creates a concomitant pressure to reply instantaneously. Their studies show that law firm partners expect their associates to respond to non-emergency e-mails over the weekend, inasmuch as the competition would be doing so. The NYSBA Report looked at the business case for providing better

¹⁴ Mr. Younger is a partner with the New York law firm of Patterson, Belknap, Webb & Taylor. He is a leading commercial litigator who is also well known for his alternative resolution work. He is a past president of the New York Bar Association.

¹⁵ *NYSBA Report of the Task Force on the Future of the Legal Profession* (April 2, 2011).

¹⁶ Testimony of Stephen Younger, Past-President, New York State Bar Association, RT 8-1-12 pp. 72-78, 80.

¹⁷ (RT 8-1-12 pp. 75-76, 80-81).

ways for people to bring up families, concluding that, in the long-term, such incentives benefited the law firm in terms of less turnover, talent development and workforce training.

The NYSBA Report found many advantages to the employment of advanced technology in the legal profession. Among other things, use of modern technology makes it possible for small law firms to compete with bigger firms. However, over 60 percent of New York lawyers are solo practitioners and lack access to in-house technology personnel. The NYSBA Report therefore made a series of recommendations that law firms have more training of their lawyers in technology and that Bar Associations and law schools join in this effort.

In terms of education and training, the NYSBA Report found that many clients cannot afford and do not wish to pay to have a law firm educate young associates. This raised the issue of where such training could then occur. Toward this end, NYSBA Report Task Force members met with all 15 law school deans. The deans pointed out the economic trade-off to having one professor teach a contracts class with 100 students versus a clinic utilizing a five to one or eight to one teaching ratios.

The NYSBA Report made it clear, Mr. Younger said, that while knowledge of technology is an essential part of legal practice nowadays, the key issue ensuring that lawyers keep up with the constant changes that technology brings and offers, and that appropriate training is always available. One recommendation of the NYSBA Report, highly pertinent here, was to have an educational process that trains young lawyers so that they are more practice-ready right out of law school. The NYSBA Report recommended that law schools provide more capstone classes, and more access to clinics. It is not just knowledge of the doctrinal law that new lawyers must have, but they must also possess the competencies, judgment and fundamental values necessary to prepare them for a life in the law.¹⁸

Finally, Mr. Younger reported that New York State's Chief Justice has issued a 50 hour pro bono requirement, which is discussed in detail below in Section IIB.

B. Changes in the Profession and in Legal Education

1. The Profession

As Bob Dylan sang, "you don't need a weatherman to know which way the wind blows."

Testimony before the Task Force on changes in the legal profession confirmed that the winds of change in the law are not only blowing, but blowing hard.

William Henderson, professor of law and director of the Center on the Global Legal Profession at the Maurer School of Law at Indiana University, told the Task Force emphatically that the profession needs to understand the fundamental shifts that are occurring.

Hastened by the economic realities of the last few years, lawyers must learn to be more efficient, more cost effective, and more attuned to both client desires and expectations.¹⁹ Today's law schools do not turn out sophisticated practitioners; law firms had in the past done the training to

¹⁸ NYSBA Report, pp. 39-42.

¹⁹ Testimony of William D. Henderson, (RT 8-1-12 pp. 130-148).

provide that sophisticated knowledge. Now, clients no longer want to pay for that training and are refusing to do so.

Just as many other industries have had to restructure over the past five years, restructuring is at hand for the legal profession as well. The boom market for legal services, evident in the 1980s to early 2000s is over. Moreover, Professor Henderson pointed out, as the number of lawyers increases, there is more competition and less money to be made.

On top of the debt burden averaging well over \$100,000, little more than half of the 2011 law school graduates found full time legal employment one year after graduation.²⁰ Professor Henderson commented that the changes in the profession are profoundly economic, and cautioned that practical skills are not going to change the outcomes of too few law school graduates landing too few fulltime long-term legal jobs. He pointed out that there is not enough high end legal work to support the supply of lawyers, nor will there be in the future, as outsourcing of legal process work continues to grow offshore, offering lower rates. The marketplace will demand that new lawyers come equipped with the skills that prospective employers want. As a result, the old model of legal education must radically change to meet the new demands.

Innovations in the provision of legal services are either here or on the way, and the profession ignores them at their peril. Thus, any changes to admission requirements, in terms of a new practical skills requirement, either pre or post admission, must take these new realities into account:

- a) Internet search engines, such as Google and FindLaw now make it possible to use machine algorithms to replace people, particularly in finding information. No longer is legal research the exclusive preserve of lawyers.
- b) The emergence of a global supply chain that allows for off shoring of routine legal work to locations where lawyers work for much lower wages.
- c) Although always an essential part of lawyering, the value and importance of developing a deep trusting relationship with the client is even more critical.²¹

Ways of practicing are also changing. Due to technology, there is a diminishing need for secretarial assistance. Location is less of an issue, since lawyers can now work from home, share space, or have a virtual office wherever necessary. The expense of maintaining a hard copy law library is also a relic of the past, as online resources replace the books and mortar.²²

Intertwined with those changes are changes in client expectations, primarily based on economics. It takes no citation to authority to see how those expectations and demands have changed since the recession. Corporate clients are no longer willing to pay high hourly rates for associate

²⁰ Testimony of Stephen Younger, past president New York State Bar Association, RT 8-1-12 pp. 73, 82.

²¹ The Legal Whiteboard Blog, *Why Are We Afraid of the Future of Law?*, September 6, 2012.

²² Kendall Coffey, *Underserved middle class could sustain underemployed law school graduates*, National Law Journal, August 15, 2012.

training. These clients, in fact all clients, want quality work at lower costs. They now seek alternative billing methods, reduced rates for routine work, and other ways to lower the costs of the provision of legal services.

Technology is also changing the ways lawyers practice. Not only does technology empower clients, it levels the playing field so that solo and small firms can compete with Big Law. Virtual offices, e-lawyering, cloud computing and social media were concepts unimaginable less than a decade ago, but now they represent different ways of providing cost efficient legal services. Lawyers entering the profession need to understand technology, not only for their own practices, but also for the representation of clients, especially in e-discovery matters. Having project management skills may also make sense for those entering the profession now and in the years to come.

Change will continue to come to the profession, redefining how lawyers practice, how they use technology in practice, and how they interact with clients and manage their expectations. The world is no longer lawyer-centric, and new lawyers must acknowledge that and be prepared for how legal services will be provided going forward.

In his book *The End of Lawyers?*,²³ Richard Susskind explains that there is a new normal for the legal profession. That “new normal,” according to Mr. Susskind, is that lawyers no longer have the all-pervasive control and influence they have had in the legal marketplace.²⁴ Clients are much more informed and self-educated on many issues before even seeking legal assistance. The Internet has stripped away much, if not all, of the mystique of the law. The test is now what value and efficiency the lawyer brings to the situation.

In addition to better educated and more sophisticated clients, the legal marketplace itself is also changing. Legal services can now be unbundled, limited scope representation is permissible, and the means and pricing of legal services is no longer left to the lawyers. Clients can shop, both on line and in person, for lawyers. Pricing no longer remains a mystery.

What is happening, as outlined by Mr. Susskind, is a revolution for lawyers and clients. Mr. Susskind devotes much of his book to the various kinds of legal practice that will evolve in the future. He notes that while there will always be a high-end market for what he terms “bespoke legal services,” e.g. the highly sophisticated and complex transactional and regulatory work, and the “bet the company litigation,” the legal world is becoming divided into a number of other categories, which he characterizes as standardization, systematization, packaging, and commoditization.

Standardization is what all lawyers know as “not reinventing the wheel.” It is the standardization of process, such as checklists or procedure manuals, and substance, such as templates, form documents and the like. Systemization is the creation of systems, such as automated document assembly. Packaging can include a client’s access to a law firm’s systems and knowledge through the Internet. Finally, commoditization is a legal service or offering that is readily available in the legal marketplace, “often from a variety of sources, and certainly at highly competitive prices.” Examples of commoditization include Legal Zoom and Rocket Lawyer. Additionally, various companies now provide

²³ The question mark is in the title of Mr. Susskind’s book; it is not an editorial comment.

²⁴ Susskind, *The End of Lawyers?* pp. 22-23, 28-33, 148.

experienced lawyers at reduced rates on project bases, thereby diminishing or even obviating the need for full-time, long-term, legal employment.

The State Bar of California is not the only agency grappling with changes in the profession and how to respond to them, especially when it comes to the new lawyer population. The State Bar of Wisconsin's Board of Governors' Challenges to the Profession Committee issued a report in July 2011 on "The New Normal: The Challenges Facing the Legal Profession." The Committee identified four top challenges: economic pressures on the practice, technology and the practice of law, regulation of the legal profession, and new lawyer training/development. Those four challenges are inextricably connected.

With respect to new lawyer training and development, the State Bar of Wisconsin's Committee made it clear that the new economic realities mean fewer opportunities for new lawyers. Burdened by staggering levels of debt and the need to repay that debt, new lawyers are deciding either by choice or lack of employment opportunities, to hang out their own shingles, often without having even basic knowledge of trust account accounting.²⁵ The report emphasized that both the State Bar and Wisconsin's law schools are "necessary partners in properly educating new attorneys in the rigors of the practice of law."

The Committee also recommended that the State Bar of Wisconsin should "further support the development of mentoring opportunities between experienced and new lawyers as a means of developing new lawyers." The State Bar of Wisconsin's report noted that one of the biggest differences in how lawyers will practice in the future is how "lawyers value and price what they sell. The first step is to understand that lawyers are selling knowledge, not legal services or time."²⁶ One of the recommendations is that the bar must take steps to help its members understand the move away from the traditional hourly billing.

2. Legal Education

It is not just the profession that must change. Washington University law professor, Brian Tamanaha, in his book *Failing Law Schools*, argues that the present system of legal education is broken. He posits that the economics of legal education must change.²⁷

Due to the staggering cost of the education, Professor Tamanaha fears that future generations of law students will come only from the ranks of the wealthy, who, unburdened by debt, will have the freedom to pursue whatever interests them in the practice. Contrast that, he says, with those burdened

²⁵ State Bar of Wisconsin, Board of Governors' Challenges to the Profession Committee, *The New Normal: The Challenges Facing the Legal Profession*, July 2011, pp. 2-4.

²⁶ Management professor and guru Peter Drucker coined the term "knowledge worker" in the 1960s. In his book, *The Effective Executive* (1966), Drucker said that the future belonged to those who materially affect the ability of companies to perform and prosper. Their capital is their knowledge.

²⁷ Brian Tamanaha, *Failing Law Schools* (2012). See also William D. Henderson & Rachel M. Zahorsky, "The Law School Bubble: How Long Will It Last if Law Grads Can't Pay Bills?," A.B.A. J. (Jan. 1 2012), available at www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills/.

by debt, will compete for a declining number of Big Firm and/or corporate jobs, the former available only with the requisite law school pedigree. The profession talks about access to justice, but Professor Tamanaha's premise is that the profession must also address access to legal education.

Professor Tamanaha notes that a century ago, members of the bar argued for a differentiated system of legal education: research-oriented law schools coexisting alongside law schools that focus on training the students to be good lawyers. That battle was lost.

However, Professor Tamanaha notes that no amount of practical skills training can substitute for the real thing: learning by doing. No amount of classroom learning, skills training and simulations will suffice. Professor Tamanaha's thesis is that law schools are doomed to fall short because students can only learn to practice in practice.

The test, he says, is whether today any lawyer would recommend that anyone apply to law school, especially those of modest economic means. In other words, is the debt worth the degree? In the face of sharply declining enrollments, the question is not whether law schools will respond to this issue, but how they will do so.

3. The urgency of action on practical skills

Professor Tamahana's critique has been widely discussed, in the academy and in the profession, and there are certainly many respected commentators who take exception to it, or at least to some of the more trenchant aspects of it. But without getting into the nuances of the debate about *Failing Law Schools*, we find Professor Tamahana's views and the vigorous controversy they have generated to be significant less for the specifics than as confirmation of the inexorable change in legal education that is currently taking place.

When we looked at some broader trends affecting the legal academy going back long before *Failing Law Schools* was published, we took note of three things. First, the academy's governing body, the Association of American Law Schools ("AALS"), has historically placed an emphasis on doctrinal teaching over clinical experience or practical skills based training. While AALS has been a great champion of clinical education and has done much to strengthen the status of clinical faculty within law schools, AALS has, so far, not embraced the view that clinical education should be a mandatory component of law school curriculum.

Second, we are struck by the powerful influence of the *US News and World Report* rankings. These rankings have nothing to do with what clients need and they make no effort to measure the effectiveness of law schools in teaching the core competencies that are associated with good lawyering. They tend to reinforce an emphasis on doctrinal teaching and away from clinical, practice-based modes of learning. Third, the ever-spiraling costs of law school in recent decades -- no matter how one diagnoses the phenomenon -- have, if anything, widened the disjunction between the legal academy and the world of practice that astute commentators began commenting on decades ago.²⁸ And little

²⁸ Harry T. Edwards, "The Growing Disjunction Between Legal Education And The Legal Profession", 91 Mich. L. Rev. 34, *supra* note 1; Harry T. Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript", 91 Mich. L. Rev. 2191 (1993). See Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993); Sol M. Linowitz, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (1994); Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society* (1994).

progress has been made to close that disjunction.²⁹

We conclude that, while the legal academy has made great strides toward improving the availability of practical skills training in law schools, there are forces of institutional inertia within academe that continue to resist the kind of change that must take place.³⁰ If we in the legal profession are going to address the rapidly changing landscape before us, we must break through that inertia. Voices outside the academy must not only weigh in, but must act. Accordingly, we believe that it is time for the Bar to take a proactive stance on the issue of practical skills training and to establish a new set of requirements that not only endorses the trend toward practice-based teaching, but sets the bar even higher.

Changes in economic circumstances and technology are here to stay, and other changes, impossible to predict now, will continue to impact the legal profession in ways big and small. One of the Bar's greatest responsibilities is to ensure that future generations of lawyers are not only practice-ready for newly evolving ways of providing legal services, but are well prepared to provide those services both to corporate clients and all other clients across the economic spectrum. As the profession faces its own transition, law schools are in the midst of their own epochal changes, driven by the stress of skyrocketing costs on their traditional model of delivering legal education. Now, while new priorities within law schools are being set and new models of teaching are being established, it is more important than ever for the Bar to weigh in on what should be expected of the law graduate who wishes to practice in California.

C. Forms of Practical Skills Training

1. The Law School Programs and Perspectives

²⁹ Charles E. Rounds, Jr., "The Sorry State of American Legal Education", 24:2 Acad. Quest. (2011):

In 1992, Judge Edwards wrote the aforementioned "The Growing Disjunction Between Legal Education and the Legal Profession," which essentially urged the legal academy to be mindful that most law students would eventually be called upon to serve real human beings. He was inundated with responses, some friendly, many hostile. In 1993, he wrote a postscript law review article that reprinted an excerpt from a letter Edwards had received from a law school dean, dated 1992, explaining how American legal education had come to be in such a sorry state. The letter could have been written in 2011. Nothing has changed.

³⁰ We do not endorse or adopt the view of some commentators that the inertia we perceive is due to narrow self-interest among academics. It is not necessary to go that far. See Randall T. Shephard, "From Students to Lawyers: Joint Ventures in Legal Learning for the Academy, Bench, and Bar", 31 Ind. L. Rev. at ____ (pointing out that in their zeal to see change lawyers often overlook the powerful institutional pressures that many law schools face, such as raiding of tuition revenues to cross-subsidize undergraduate education, and intense competition to hire top quality faculty). Whatever the diagnosis, the symptom -- law graduates who are not as practice-ready as they should be -- seems to be generally agreed upon.

The Task Force received testimony from various professors, deans, and other law school personnel at its meetings on June 11, August 1, September 25, and November 7, 2012. Following is a brief overview of that testimony, as well as additional information from related handouts and materials.³¹

a) Loyola Law School (Jean Boylan, Associate Dean for Clinical Programs and Experiential Learning and Clinical Professor of Law)

Loyola is committed to practical skills training in part to give its students an edge in the job market. Students desire this type of training. It features three practicums in civil litigation, transactional law, and criminal law. The latter is the most expensive because it is a heavily supervised experience at an actual clinic. In general, the supervision aspect of any practicum is the most expensive. Students make different choices in their third year (such as focusing on bar study), so Dean Boylan would not advocate to turning the third year into pure “field placement.” She suggested that any law school practicum requirement should be framed in terms of hours.

b) Loyola Law School (Victor J. Gold, Fritz B. Burns Dean and Professor of Law)

Most legal educators have the goals of producing ethical lawyers; enhancing respect for the rule of law and the profession; and increasing access to legal services. Dean Gold suggested that any practical skills requirement should not add to the cost of legal education.

c) California Western School of Law (Steven Smith, Professor of Law, Dean Emeritus)

There have been dramatic curricular changes in law schools in recent years to add clinics, internships, simulations, etc. California Western offers a second year, two semester program law firm simulation. 75% of its students also do carefully supervised internships of some nature.

The ABA accreditation standards already impose requirements for instruction and internships. The standards require significant supervision for internships. The economics of law schools will likely require that any new programs be created at the expense of existing ones. It is already a challenge to fit everything that needs to be taught into three years, including the core doctrinal tutelage.

³¹ See Erwin Chemerinsky, “You Get What You Pay For In Legal Education,” *National Law Journal* (July 23, 2012); Martha Neil, “Law Dean at Arizona State Unveils Plan to Create Law Grad ‘Residency’ Program at Nonprofit Law Firm,” *New York Law Journal* (June 5, 2012); Karen Sloan, “Think Of It As A Residency For Lawyers,” *National Law Journal* (June 5, 2012); Jordan Weissman, “Why Law Schools Are So Bad At Creating Lawyers (And How To Fix It),” *Atlantic Monthly* (November 2011); US General Accounting Office, “Higher Education: Issues Related To Law School Cost And Access” (2009); Malcolm Gladwell, “The Order of Things,” *The New Yorker* (February 14, 2011); Marylyn Cavicchia, “The Elephant In The Parlor: The NABE Takes On Legal Education,” *ABA Bar Leader*, Vol. 36, No. 3 (Spring 2012); Lily McCoy, Memorandum To Task Force On Admissions Regulations Reform re Law School Incubator Programs (September 25, 2015) (and sources cited therein).

- d) Stanford Law School (Lawrence C. Marshall, Professor of Law, Associate Dean for Clinical Education and David & Stephanie Mills Director of the Mills Legal Clinic)

Law schools are finally beginning to recognize that they need to integrate skills and experiences into the core curriculum. Two thirds of the students at Stanford Law School are doing a full time clinical program under faculty supervision. Professor Marshall cautioned against action that would deter or push away the legal academy.

- e) Southwestern Law School (Catherine Carpenter, Irving D. and Florence Rosenberg Professor of Law)

The goal of the ABA standards is the same as the goal of the Task Force—wrestling with what should be expected of law schools. Professor Carpenter specifically discussed Standards 302 (Curriculum) and 305 (Study Outside the Classroom). There is a proposal to strengthen the professional skills requirement by making it a three-unit experiential course.

An ABA survey she participated in conducting showed there was a huge increase in professional skills offerings from 1992 to 2002 and 2010. On average, schools are offering ten professional skills course titles, with increased transactional drafting courses, clinical opportunities, and externship opportunities.

- f) Santa Barbara & Ventura College of Law (Heather Georgakis, President and Dean)

Santa Barbara & Ventura College of Law offers a part time evening program to approximately 225 students. Classes are taught by two full time faculty members, judges, and practicing attorneys. Tuition is kept low in keeping with a commitment of affordability. The school has a 65 hour pro bono requirement and allows students the option of five units of credit in an externship situation.

Dean Georgakis advocated for a post-admission requirement so as to not burden students with additional expense, and because there is already too much to fit into only three years, among other reasons.

- g) Concord Law School (Greg Brandes, Dean of Faculty and Professor of Law)

Concord is an unaccredited law school with 300 graduates who are members of the California Bar. The average age of its students is 42. Many come to the school with practical work experience. Dean Brandes addressed the idea of a different MCLE requirement in the early years of practice. He also addressed the concept of credential evaluation to assess students for existing skills.

Practical skills training is a costly endeavor and the cost would need to be passed onto the students. Dean Brandes discussed the possibility of different requirements for different types of schools.

- h) Thomas Jefferson School of Law (Lilys D. McCoy, Director of Solo Practice Concentration & Lawyer Incubator Program)

Thomas Jefferson has developed a new postgraduate program designed to help alumni start their own firms. It has two prongs, the first of which is a solo practice concentration in the third year of school, and the second of which is a lawyer incubator program (borrowing heavily from business incubators).

The lawyer incubator idea originated at The City University of New York (CUNY). CUNY raises money through grants and other sources to pay its graduates to provide pro bono or low bono services.

2. Post-Law School Models

a) Overview

The Task Force considered a chart that summarized the pre and post admission requirements in 23 states. In comments to the Task Force, which were accompanied by a PowerPoint presentation, Chairman Streeter noted that there are 10 states that have selected a pre-admission regulatory approach. The majority of the states on the chart, however, have adopted a post-admission requirement of some nature. Most commonly, these are mentoring programs or CLE requirements. Chairman Streeter highlighted the discussions on this topic in New York and the Massachusetts.

The New York model was proposed in September 2012 by the Advisory Committee on New York State Pro Bono Bar Admission Requirements, and is discussed in detail below. The general proposal is that each new lawyer be required to perform 50 hours of pro bono legal services pre-admission. In Massachusetts, a Task Force on the Law, the Economy and Underemployment released a report in May 2012 exploring the causes of and solutions for underemployment of law school graduates. The Task Force recommended that the Massachusetts Bar Association encourage the law schools to re-tool the third year to provide greater opportunities for practical experience and to provide additional training in legal writing. The report additionally recommended the creation of a legal residency program.

What we are recommending here is not novel or wholly out of step with what other states are doing. Overall, there is a trend among the states toward adopting some form of practical skills training, at least post-admission. The idea of requiring some form of pre-admission practice-based training, such as articleship, clerkship or apprenticeship – something that has traditionally been a part of the legal culture in many other countries, including England and Canada – has been adopted by two states,³² and has been discussed as a possibility for years in many others.

³² Vermont and Delaware follow the English model and require full pre-admission practice training periods under the supervision of licensed practitioners. We concluded that adopting that approach at the scale that would be required in California, where we have 230,000 Bar members, is not practically feasible, however much it may have to recommend it.

b) Apprenticeship-Style Programs

The Task Force received testimony regarding other apprenticeship-style programs in the law at its meeting on June 11, 2012. The following is a brief overview of that testimony:

i. Joe Dunn, Executive Director, State Bar of California, Canadian Articles of Clerkship

Canada has a 10-month articling program. There are five goals of the articling program, which are application of combined practice and problem solving skills through a contextual or experimental learning; consideration of practice management issues, including the business of law; application of ethical and professional principals in professional, practical, and transactional context; socialization from student to practitioner; and introduction to systemic mentoring.

The Articling Task Force for the Canadian Law Society of Upper Canada, which covers the Ontario area, was established in May 2011 to take a critical look at the articling program. It ultimately released a report on October 25, 2012. The Canadian Law Society of Upper Canada initiated this Task Force because the students who wanted to go into the articling program far exceeded the number of lawyers who were willing to take on the students. This created a placement issue.

The majority of the Canadian Task Force recommended the approval of a pilot project that will allow articling and a new Law Practice Program (LPP) to operate side by side for five years. While articling would continue to be the route through which most candidates become licensed, the LPP, which would include both a skills-training program and a co-operative work placement, would provide an alternative path to licensing.

As described in the report: “[t]he LPP would be delivered through a third-party provider or providers. It is an innovative step, best undertaken by those whose primary expertise is in the development and delivery of professional experiential programs, adult learning and use of technology in advanced education. A Request for Proposals would be issued by the Law Society, which would mandate the practice skills, professionalism and other competencies to be mastered in the LPP.

Although the pilot project incorporates flexibility to refine the precise structure of the LPP as the pilot unfolds, it is currently expected that the LPP would be about eight months long, divided between course work and a co-op work placement.” The current 10-month articling program would continue, with additional measures designed to enhance regulatory oversight and provide a more systematic evaluation of articling as transitional training.

ii. Malcolm Sher, Member of the State Bar of California, English Articles of Clerkship

When Mr. Sher graduated from London University in 1969, it was required to do two years of Articles of Clerkship. The student would have to pay in order to be accepted into the program. Now, the mentors or firms must pay their trainees somewhere between 18,000 and 20,000 pounds per year. Students now have the option of entering into a full two year clerkship or a part time clerkship two and a half days a week. Mentors (called solicitors) must be in practice for at least five years with no disciplinary history. There are eight areas of training, including advocacy and oral presentation, case and transaction management, client care and practice support, dispute resolution, and legal research. Using

his own personal experience as an example, Mr. Sher made a compelling case for the value of supervised, practice-based training.

c) Mentorship Programs

The Task Force received testimony regarding mentoring programs in the law at its meetings on June 11 and August 1, 2012. The following is a brief overview of that testimony:

i. Gregg Kamer, Chair, State Bar of Nevada's Standing Committee on Mentoring and Transitioning into Practice

In Nevada there is a 10,000 attorney bar. In 1983, there were less than 1,000 lawyers, so the growth has been enormous. For 20 years, Nevada had a program called Bridge the Gap. Nevada became concerned that it was not effectively teaching civility, and that the bar was losing the sense of what it means to be a lawyer. It examined other jurisdictions with internship programs, and recently implemented a Transitioning into Practice Program.

The Transitioning into Practice Program is a six month program required of all admittees who have not practiced for more than five years in another jurisdiction. It matches an experienced practitioner with a new admittee. The mentors have at least seven years of practice, and cannot have had any active discipline in the last ten years. The mentors receive three CLE credits for participating in the mentor program. The program is new, so Nevada does not have any results to share yet.

The new admittees must finish the mentor program within sixth months of their admission to the bar. There are exceptions made for law clerks and judicial clerks.

ii. Elizabeth Wright, Coordinator, New Lawyer Training Program, Utah State Bar

Utah's mentoring program is called the New Lawyer Training Program. It is a mandatory program that began in 2009 for all new admittees to the Utah State Bar, with some exceptions. It runs on two terms per year that coincide with the bar examination. Utah implemented the program based on three problems it perceived. The first was the lack of crucial practical lawyering skills. The second was decreasing professionalism. The third was lawyers leaving the profession.

All mentors must have practiced for at least seven years, and cannot have any public or private discipline from the bar. They must carry malpractice insurance. 600 mentors initially signed up. A subcommittee of the Supreme Court, called the Professionalism Committee, reviews the mentor applications to determine whether or not they are appropriate mentors. Mentors earn 12 CLE credits for mentoring. The cost to the new lawyers is \$300, payable in two installments. New lawyers have the option of asking people they know to be mentors.

The program requires that the mentors and mentees meet every month. Mid-term reports are also required. The overall cost of the program is \$90,000 per year, which includes three full time employees and other costs associated with the program. The drawback is the inconsistency of experience with mentors. New admittees can switch mentors. New admittees can also defer the program two times until they find a job. Utah's mentoring plan has a primary focus on professionalism and the rules of ethics, including the handling of client funds.

d) Continuing Legal Education

- i. Presentation by Paula Littlewood, Executive Director, Washington State Bar Association (June 11, 2012)

The State Bar of Washington's Professional Development Committee made certain recommendations in May 2003. When the Committee finished its work, another committee called the Trust Professional Development Implementation Committee, was formed. It ultimately made three recommendations: a four hour preadmission orientation focused on civility and professionalism, orientation of local practice issues, basic law, approved practice management tips, balance issues, and networking; skills training for new admittees through requiring a certain number of credits; and mentored client representation, including 100 hours of supervised direct client representation in the first year of practice. The only one that was actually implemented was the four hour pre-admission orientation requirement.

Washington pays for staffing at each of the law schools through its state wide moderate means program, to give law students real skills training opportunities with real clients while they are still in law school. Washington also did a huge reorganization of its bar, enhancing its new lawyer education program. At the same time, it launched an initiative about enhancing the culture of service. The training provided by the Washington State Bar is free or low cost. While it did not implement a mentoring program, it works closely with minority bars, specialty bars, and county bars on their mentoring programs.

e) Other Professional Models

The Task Force received testimony regarding the requirements in other professions at its meeting on June 11, 2012. The following is a brief overview of that testimony:

- i. Ken Macias, CPA, Founder & Board Chair, Macias Gina & O'Connell LLP (accountancy)

CPAs are in the midst of changing the pathway to licensure in California, largely because 48 other states have already implemented changes, and California wants to stay consistent with those states with regard to the Uniform Accountancy Act. The first pathway is a bachelor's degree, 24 semester hours in accounting, and 24 semester hours in business related subjects, as well as the CPA exam. In addition, there is an experience requirement, which is two years with a licensed CPA and 500 hours of assurance work.

Pathway Two—passed into law in 2009—will require applicants to meet additional educational requirements beginning January 1, 2014. Pathway One will phase out. Pathway Two requires 30 more

semester hours of education, which is the equivalent of a master's degree.³³

- ii. Brennan Cassidy, MD, Hoag Memorial Hospital Presbyterian, Newport Beach (medicine)

For most medical students, four years of college with a degree is required to be admitted into medical school. A very few number of schools offer six year programs with combined degrees. Physicians who graduate from medical school and receive their doctor of medicine degree are required to do additional training, which is generally referred to as residency.

In California, in order to be licensed, postgraduate training is required. After licensure, there is a requirement of 25 hours a year of continuing medical education.

- iii. Joe Dunn, Executive Director, State Bar of California (June 11, 2012) (architecture)

There is a movement to standardize admission for architects across the country. The National Council of Architects Registration Board reports that all of its 54 U.S. jurisdictions have an experience requirement that must be documented and completed before one becomes licensed. This time between fulfilling the education requirement and getting licensed is referred to as an architectural internship.

³³ Department of Consumer Affairs, California Board of Accountancy, <http://www.dca.ca.gov/cba/applicants/pathway.shtml>

Specifically, Pathway 1 requires the following:

- Passed the Uniform CPA Examination
- Baccalaureate degree
- 24-semester units in accounting subjects
- 24-semester units in business-related subjects
- Completion of the PETH Exam (ethics exam offered by CalCPA)
- Fingerprinted
- Completion of two years of general accounting experience

Pathway 2 requires the following:

- Passed the Uniform CPA Examination
- Baccalaureate degree
- 150-semester units
- 24-semester units in accounting subjects
- 24-semester units in business-related subjects
- Completion of the PETH Exam (ethics exam offered by CalCPA)
- Fingerprinted
- Completion of one year of general accounting experience

If a prospective licensee completes his or her education after January 2013 and has no prior work experience, and thus cannot complete the minimum one year general accounting work experience by January 1, 2014, he or she will need to meet the new education requirements for licensure.

II. Beyond the “nuts-and-bolts” of law practice: Inculcating the values of professionalism

A. The Inns of Court Model

The American Inns of Court Foundation is the parent organization for local Inns of Court. Both the Foundation and its chapters exist to foster excellence in professionalism, ethics, civility, and legal skills. While the Inns originally started as a way to prove trial advocacy skills, the mission is now much broader. There are in fact now special Inns for transactional law made up attorneys engaged in the practice of various types of transactional law.

The Foundation³⁴ and the chapters have a Professional Creed that recognizes the importance of the Rule of Law, and the preservation and promulgation of the highest standards of excellence in professionalism, ethics, civility, and legal skills in order to achieve justice under the Rule of Law. All members adopt the Creed with a pledge to honor its principals and practices.

Today, there are more than 28,000 judges and lawyers across the country who participate in an Inn of Court chapter. There are also more than 80,000 judges and lawyer who are alumni of an Inn. Many accredited law schools participate in one or more Inns in some way. Inn activities are structured to encourage the most experienced legal practitioners, known as Masters, to pass down their knowledge and expertise – with an emphasis on ethics and professionalism – to younger members of their Inn chapters, known as Barristers and Associates. The Inns of Court model is built for mentoring, and its widespread growth and popularity within the profession nationwide is evidence of proven success in the more than three decades since Chief Justice Warren Burger founded the American Inns of Court in 1980.³⁵

The Inns of Court have long been recognized as the preeminent organizations in the practice of law in the United States for the promotion and fostering of civility, ethics, and professionalism. Many young lawyers join and enjoy the benefit of the experience of the senior attorneys and judges. As stated on the Foundation website, “By participation at regular Inn meetings, you will be an active part of the exchange of practical lessons, methods, and ideas focused on the highest standards of the legal profession. Inn meetings provide a relaxed, informal environment for informative discussions among all levels of the bench and bar.”

³⁴ The Foundation is governed by a board of trustees currently chaired by the honorable Donald W. Lemons of the Supreme Court of Virginia. There is a professional staff located in Alexandria, Virginia. The Foundation encourages the formation of local chapters. The organizing committee must be comprised of at least one judge and two to five leading members of the bar. Once sufficient interest has been determined at the local level, the organizing committee can apply for a charter with the American Inns of Court Foundation.

³⁵ Chief Justice Warren drew inspiration for The American Inns from the English Inns of Court, and as a result, the American Inns and the English Inns share a collegial relationship. Members of the American Inns of Court enjoy visitation privileges established by a declaration of friendship signed by the English and American Inns of Court.

The American Inns of Court have been specifically endorsed by the Conference of Chief Justices, the Judicial Administration Division of the American Bar Association, and the 7th Circuit Committee on Professionalism. They enjoy wide recognition in legal communities across the Country.

B. New York's Proposed 50-Hour Pro Bono Requirement

As discussed above in Sections I.A.4 and I.C.2.a, the Advisory Committee on New York State Pro Bono Bar Admission Requirements prepared a report to the Chief Judge of the State of New York and the Presiding Justices of the Fourth Appellate Division Departments, dated September 2012. The Advisory Committee's recommendations resulted in the honorable Jonathan Lippman, Chief Judge of the State of New York, announcing on May 1, 2012 that, beginning in 2013 prospective attorneys will be required to spend 50 hours performing pro bono work before admission to the bar of State of New York.

As the Advisory Committee's report explains, the requirement arose primarily to respond to the access to justice crisis. The report explains that by requiring 50 hours of highly supervised pro bono work, the State of New York is not only improving access to justice, but is helping prospective attorneys build valuable skills. It additionally imbues in them the ideal of working toward the greater good.

The report explains that New York tests of a vast number of candidates each year – more than 15,000 in 2011. This is approximately 20% of all candidates taking a bar examination in the United States each year. The pool of candidates taking the bar exam is extremely diverse.

As stated in the report, the pro bono hours must be law related. In other words, building a home for Habitat for Humanity or working in a soup kitchen would not qualify. The law related work can be performed in a law school or in an employment setting so long as it is completed before application to the bar. For example, the law related work can be performed as part of a law school clinical program, as part of summer or part time employment, during the course of law school an internship or externship, during the course of law school in a qualified setting not associated with the law school, or during the course of full or part time employment after graduation if that employment otherwise qualifies as pro bono, work or public service. The qualifying law related work can take place anywhere in the United States.

The Advisory Committee focused heavily on the issue of supervision. It was mindful that the individuals complying with the proposed rule will most likely be law students, not admitted practicing lawyers, and that in New York State, as with most jurisdictions, the unauthorized practice of law is forbidden. In order to ensure a high level of supervision, the Advisory Committee recommended an affidavit of compliance form. The Advisory Committee urged the organized bar, through its young lawyer and pro bono sections, to create programs that assist legal services providers and law schools in implementing the program. The Advisory Committee specifically found that the qualifying work is an essential part of education and therefore should not be deferred under after admission. It rejected the adoption of a deferral option because it would result in administrative problems and inequities.

C. A Low Bono Model

At the November 7, 2012 Task Force Meeting, Assistant Dean Shauna Marshall suggested consideration for a program that includes a “low bono” component.³⁶ Low bono practice involves the handling legal matters at greatly reduced rates for clients who cannot qualify for pro bono legal assistance but who also cannot afford traditionally priced legal services.

Low bono services are provided and contemplated in a variety of areas, including, but not limited to, family law, bankruptcy, unlawful detainer, and breach of contract matters.

In her law review article, *Rethinking Private Attorney Involvement through a Low Bono Lens*,³⁷ Professor Luz Herrera of the Thomas Jefferson School of Law argues that access to justice would be better served by not just focusing on free legal services, but on providing legal services to low and moderate income clients. She defines low bono as discounted fee arrangements between attorneys and clients, particularly those clients who are underrepresented. Professor Herrera says that CUNY School of Law, the University of Maryland School of Law, and others initiated low bono programs (also known as lawyer incubator programs) some years ago under the Law School Consortium Project. Since then, a number of other law schools have joined in the project, including several law schools in California.³⁸

In 2011, the University of Utah School of Law announced a program called the University Law Group that provides low cost legal services to Utah residents. The program focuses on representation of traditionally underserved communities, while giving new admittees with real life exposure to legal practice. It is an attempt to diversify and provide more clinical opportunities to low and moderate income clients as well as small businesses.³⁹ Wake Forest University School of Law started a similar program in 2009.⁴⁰

Professor Herrera’s law school itself also just recently initiated a program involving low bono services, as presented to the Task Force by her colleague Lilys D. McCoy, Director of Solo Practice

³⁶ (RT 11-7-12 p 82).

³⁷ Loyola of Los Angeles Law Review, Vol. 43, No. 1, p. 1 (December 19, 2009) Thomas Jefferson School of Law Research Paper No. 1524433. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1524433

³⁸ See www.lowbono.org, an Internet forum for those attorneys providing discounted legal services to underrepresented communities. The forum is also accessible to law students, new admittees, experienced practitioners, and those law schools involved in the Project.

³⁹ ULaw Today, *College of Law Announces University Law Group to Provide Low Bono Services to Underserved Populations*, November 17, 2011. <http://today.law.utah.edu/2011/11/college-of-law-announces-university-law-group-to-provide-low-bono-services-to-underserved-populations/>

⁴⁰ John Trump, *Alumni provide low-income legal assistance with support of the Community Law and Business Clinic*, Wake Forest University School of Law, February 22, 2010. <http://news.law.wfu.edu/2010/02/alumni-provide-low-income-legal-assistance-with-support-of-the-community-law-and-business-clinic/>

Concentration & Lawyer Incubator Program at the Thomas Jefferson School of Law.⁴¹ Most programs of this nature involve a level of supervision and/or training by more experienced practitioners.

Low bono services are additionally already being provided in the formal context of some lawyer referral services. Many have special panels of attorneys willing to take on cases in certain designated area for qualifying “modest means” clients.

According to Professor Herrera, the most common legal needs for middle class people revolve around personal finances, housing, consumer issues and real property. She asks, in her article, how many people could have avoided foreclosure during the financial crisis if they had had counsel to represent them? How many people, she asks, are only a paycheck away, a divorce away, or an eviction away from needing legal help that is unaffordable for them? These are critical issues that the provision of low bono services could address.

Professor Herrera further opines that the volume of unmet legal needs is reflected in the proliferation of self-help legal clinics and non-attorney resources now available on the Internet.⁴² The profession is driving the costs of legal services out of reach of the average American. Both Professor Herrera and the various low bono/incubator programs believe it to be critical to teach both law students and new lawyers the importance of their participation in addressing the justice gap. “Low Bono” offers the dual advantage of providing needed legal services while also providing law students with practical skills training and the realities of modern legal practice.

⁴¹ The incubator/low bono project at Thomas Jefferson School of Law (See Sections I.C.1.a and IIC of this report) has taken the name of the “Center for Solo Practitioners at Thomas Jefferson School of Law.” It is a post-graduate program through which alumni offer low-cost legal representation to people who are traditionally cut off from legal services and denied access to justice. The new lawyers in residence at the Center for Solo Practitioners address unmet legal needs in the following areas:

- Consumer law, including debt collection issues, credit report errors, credit card law, automobile fraud
- Wills and trusts, including simple wills and education on trust administration, probate, guardianships, and conservatorships
- Small-business advising, including city permit requirements and business formation
- Family law, including child support, spousal support, child custody, dissolution
- Immigration law, including visas, residency, naturalization, and asylum
- Landlord/tenant, including advice on unlawful detainer laws and procedure
- Real property law, including advice on foreclosure law and procedure
- Criminal law, including misdemeanors and felonies in both state and federal court
- Personal injury, including automobile accidents, insurance disputes, products liability, and premises liability

⁴² This dovetails with one of Richard Susskind’s premises that the delivery of legal services is changing and that lawyers must adapt to those changes.

In summary, limiting the focus of serving those without the ability to pay or with limited ability to pay to a strictly pro bono model may ignore the needs of many people who require legal services for issues that have a heavy impact on their lives but who do not qualify for legal aid. Expanding the opportunities to include a low bono model serves several purposes. Not only does it give law students and new admittees valuable experience in the practice of law and the business of running a practice, it provides access to justice to an underserved population sorely in need of legal help.

D. Closing the Justice Gap: Pro Bono and Low Bono Service Should be Part of any Practical Skills Training Program

Proposed California Rule of Professional Conduct 6.1 provides that “[e]very lawyer, as a matter of professional responsibility, should provide legal services to those unable to pay. A lawyer should aspire to provide or enable the direct delivery of at least 50 hours of pro bono publico legal services per year.”

This proposed rule, passed by the State Bar Board of Trustees in 2010, is only the latest step by the State Bar to address the importance of providing legal services to the poor and underserved. The commitment to pro bono service that we have made in California is also in line with longstanding national trends. For more than 50 years, since the founding of the Legal Services Corporation and the beginning of the legal aid movement in America,⁴³ lawyers in the United States have been seeking to address what has come to be known as the justice gap – the shortfall between those who need legal help to address crises in their lives, but cannot afford to pay for it, and the availability of lawyers to meet that need.⁴⁴

Due to the recent economic downturn, the number of people who qualify for civil legal aid has risen by 10 million nationwide since 2007. At the same time, there has been an explosion in demand for legal services in specific areas, such as bankruptcy, child dependency, foreclosure, and also in the number of first-time applicants for free legal services. A large number of returning veterans from Iraq and Afghanistan have been forced to turn to legal services agencies for help upon returning home to face new economic and family challenges. Across the country, the need for legal services among those who cannot pay or have limited ability to pay has never been higher. And although the United States has one of the best justice systems in the world, millions of Americans cannot access this system because they cannot afford a lawyer.⁴⁵ We have seen the same disturbing trends in California, especially in recent years as chronic underfunding of the courts has exposed the problem more than ever.⁴⁶

⁴³ Earl Johnson Jr., *Justice and Reform: The Formative Years of the American Legal Services Program* (1974).

⁴⁴ California Commission on Access to Justice, *Action Plan for Justice* (2011); California Commission on Access to Justice, *And Justice for All: Fulfilling the Promise of Access to Civil Justice for All in California* (1996).

⁴⁵ Legal Services Corporation, *Report of the Pro Bono Task Force* (2012).

⁴⁶ OneJustice, *Hearings on California’s Civil Justice Crisis* (2012).

In the face of these challenges, and given the recognition by the State Bar Board of Trustees in passing proposed Rule of Professional Responsibility 6.1 -- which would elevate pro bono service to the status of an ethical duty on the part of every member of the Bar -- we agree with the remarks of New York's Chief Justice Lippman, when he announcement of the formation of the Advisory Committee on New York State Pro Bono Bar Admission Requirements:

[I]f pro bono is a core value of our profession, and it is — and if we aspire for all practicing attorneys to devote a meaningful portion of their time to public service, and they should — these ideals ought to be instilled from the start, when one first aspires to be a member of the profession. The hands-on experience of helping others by using our skills as lawyers could not be more of a pre-requisite to meaningful membership in the bar of our state.⁴⁷

But we propose to go further. Because low bono service – as an optional way of fulfilling part of the new requirements we propose -- may help to introduce many young lawyers to an area of private, for-pay law practice focused on a middle class segment of California's population that has long been underserved, often in rural areas or in specialty areas such as consumer law or elder law that are too often overlooked by young lawyers in search of “glamorous,” high-paying career paths.⁴⁸ In short, we believe that what has come to be known as low bono legal service is, in reality, a vastly underdeveloped part the legal economy. To the extent possible, and the practical skills training regimen that we propose here is an opportunity to do so, the profession should embrace that sector and encourage young lawyers to train for it.

III. Cautionary comments on any new practical skills requirement

While there has been agreement for many years among lawyers and many commentators that new and better practical skills training makes sense, opinions diverge widely on what that requirement should look like, who should be responsible for the requirement, whether it should be pre or post admission, whether it should involve mentoring, whether there should be a mandatory pro bono component, and how any such requirement should be implemented.

On the Task Force, members are in agreement that any new practical skills requirements should not be “one size fits all”, and that there should be a variety of ways to fulfill the requirement, once it is

⁴⁷ Advisory Committee on New York State Pro Bono Bar Admission Requirements: Report to the Chief Judge of the State of New York and the Presiding Justices of the Four Appellate Division Departments (September 2012), p. 1.

⁴⁸ See E. Thomas Sullivan, *“The Transformation of the Legal Profession and Legal Education”*, 46 Ind. L. Rev. 145, 153 (2013) (“We have a maldistribution of lawyers, ...the result of which is we have many sectors of society that are not being serviced optimally or at all. There continue to be real ‘access’ and justice issues because of this maldistribution.”) (footnote omitted); see also Coffey, note ___ *supra*, *“Underserved middle class could sustain underemployed law school graduates”*.

decided what that requirement should be. However, one Task Force member cautioned that the more variety there is, the higher the administrative costs to the Bar of implementing it.⁴⁹

We are confident that the Bar is well-equipped to handle and accommodate the new administrative costs that would be entailed in implementing new practical skills training requirements. The Bar already has capacity to perform large-scale application processing, testing, verification, monitoring, and enforcement. In many ways, these kinds of administrative oversight tasks are already core functions of the Bar.

In this Report, we have refrained from attempting to sketch out the precise implementing rules that would be necessary to put our recommendations into effect. But because in general we are talking about, at the pre-admission stage, certification by Bar applicants of the nature and quality of their law school credit hours, and, at the post-admission stage, verification and monitoring that is very similar to what is already done for MCLE, we have no doubt that the Bar can handle the task.⁵⁰

A. Potential adverse impact on diversity

More than one Task Force member as well as those testifying voiced concern that law students from so-called elite law schools would have easier times fulfilling whatever the requirement might be, since employers (whether for profit or non-profit or government) tend to offer available positions to those graduates, especially if in the top percentages of their graduating classes.

The concern is that any requirement might have a disparate impact on those students graduating from non-elite law schools who need to fulfill that same requirement. We cannot at this point predict with certainty how our recommendations may affect the diversity of new admittees. Arguably, creating a greater emphasis on practical skills and aptitude for the competencies that the best and most successful lawyers must develop in practice, as opposed to standardized test-taking skills and rote use of legal doctrine, will, in the end, spur greater diversity in the profession rather than obstruct it. We also find it noteworthy that some of the most innovative and advanced practice-based law school curricula are in law schools of lesser status in the hierarchy of *US News & World Report* rankings, so students who attend those schools might well find themselves in a position of relative advantage after the change in emphasis in legal education that we have in mind.

But whether it is viewed as an aid to diversity in the legal profession or as a potential obstacle, we take the impact of adding new practical skills requirements on diversity in the Bar with utmost seriousness, since rooting out bias in the profession -- and promoting equal access to justice, which goes hand-in-hand with diversity -- is part of the Bar's broader regulatory mission, along with public protection. After weighing the competing views about this, we are prepared to say only that the impact on diversity too uncertain for it to stand in the way of recommending action on new skills requirements. All that can be said at this point is that, if our recommendations are adopted and implemented, the issue should be monitored very carefully.

⁴⁹ (RT 9-25-12, Brick, p 33).

⁵⁰ (RT _____) (Remarks of State Bar Executive Director Dunn).

B. Potential cost burden on law students and new lawyers

An important issue raised by many witnesses who appeared before the Task Force as well as by many Task Force Members is the financial impact of any new practical skills requirement on law school students, law school graduates and new lawyers. Many recent law graduates face staggering levels of debt (not only from law school, but from undergraduate studies as well) and, as a result, mandating that these graduates bear the burden of paying additional monies to fulfill a new practice skills requirement was, to say the least, a matter of great concern.

The cost of applying for and taking the California Bar Examination, plus any law review courses, can add significantly to the financial burden that graduates face. The question is whether it is fair to impose an additional financial burden on those most unable to pay it, to face yet another financial hurdle in order to be a California lawyer.

Of all the concerns expressed about whether to add new practical skills training requirements, we find this one to be the weightiest, given the exploding debt burden that law students have had to undertake in recent years and the challenges that so many new admittees face today in finding employment. But in the end, we have concluded that, while the root economic conditions that drive this concern are real and of great moment to the profession, the idea that new practical skills requirements will materially add to the cost burden for new lawyers can easily be overstated, since, as many of the law school deans pointed out, most law schools are already moving in the direction we wish to see.

We emphasize that we do not have in mind suddenly foisting upon law students a new and wholly unexpected set of requirements. We accept the advice we heard from a number of the law school deans that we should proceed gradually. We expect that any change that takes place following our recommendations would take place over a number of years. We envision a staged implementation, beginning with a further period of study to develop specific implementation rules, and then a multi-period in which the implementation is executed.

By the time any new requirements for practical skills training fully take effect, everyone who is affected, teachers and administrators in law faculties, law students, the Bar itself -- which will need to build new administrative capacity for implementation -- and, of course, practicing lawyers, many more of whom who will need to do far more mentoring and teaching than they have done in the past, will have had plenty of time to anticipate and adjust to the new environment. Because we recommend a gradualist approach, we simply do not accept the "sky is falling" warnings about increased costs.

We emphasize, above all, that we expect improvement in practice-readiness will prepare new lawyers better for the changing legal job market than they are today, which will help them become productive lawyers with the capacity to begin repaying educational debt at the earliest opportunity, and ultimately will lower costs to clients, who, in today's legal market, are too often forced to bear the costs of training young lawyers, either in the form of increased fees or ineffective lawyering.

C. Concerns expressed by academics

1. If it ain't broke, don't fix it

Some law schools took the position that they already have clinics and other means to incorporate practical skills training in their curricula for purposes of a pre-admission requirement. The

concern of Stanford Law Professor Larry Marshall is that the Task Force may recommend something that would thwart the progress that is ongoing in legal education.⁵¹

Professor Marshall offered as an example of that the requirement of training in professional responsibility, and that law schools do not offer courses beyond the one needed in order to take and pass the professional responsibility exam. His concern is that law schools would view any new practical skills requirement “as a ceiling, not a floor.”

Professor Marshall urged the Task Force not to dampen the feeling of the responsibility for practical skills education that is surging in law schools, and that the law schools should own the education of lawyering, including practical skills. “If any new practical skills requirement is pre-admission,” he says, “then law schools will have a reputational stake in that new requirement.”

To impose a new practical skills requirement post-admission would, according to Professor Marshall, disincentivize law schools not only in terms of expanding the law school clinical opportunities, but might well result in contraction of those that presently exist.

Taking a different viewpoint, academics on the Task Force felt that law schools can and should be pushed to do more practical skills training. While law schools appreciate the need for such training and are moving to implement it, a push forward would not hurt.⁵²

2. Everything has a price

Finances also play an issue as to whether a new practical skills requirement should be part of the law school curricula. Clinics and other methods of providing practical skills training in law school are expensive, especially given the necessary supervision ratio of faculty to student. Both Jean Boylan, Associate Dean at Loyola Law School and Steve Smith, Dean at Cal Western law school pointed out that the cost of a legal education would escalate if a mandatory new practical skills requirement took hold.⁵³ More clinical faculty would need to be hired and so law school tuition would rise concomitantly. Smith cautioned the Task Force about how any new practical skills requirement should be implemented. Dean Greg Brandes of Concord Law School echoed the concern about the increased cost burden, as did Dean Victor Gold of Loyola University.⁵⁴

3. Leave us alone -- Don't try to impose a new form of law school regulation

Dean Smith cautioned that to add a new practical skills requirement to the law school education would be a form of regulation of the law schools.⁵⁵ He advised the Task Force that it should educate

⁵¹ (RT 6-11-12, pp. 60, 63, 68-69).

⁵² (RT 6-11-12 pp. 155-156).

⁵³ (RT 6-11-12 pp. 122, 131, 133).

⁵⁴ (RT 8-1-12 pp. 40, 153).

⁵⁵ (RT 6-11-12 pp. 126, 128, 131-133).

itself on what law schools are doing now and how any new practical skills requirement would affect ABA accreditation standards. He also warned that the three years of law school are already pretty “full up” in terms of the curriculum and what the schools can expect the students to do during those three years.

Dean Smith said that the Task Force needs to be clear about the goal of a new practical skills requirement and what that goal is expected to accomplish, whether the benefits of such a requirement will outweigh the inevitable cost burden, and whether the additional regulatory burden will create resistance from legal educators. Dean Gold echoed those sentiments, adding that if the requirement is pre-admission, the law schools must be an equal partner with the State Bar of California in determining how that requirement would be implemented.⁵⁶

4. A post admission requirement would be better.

Dean Heather Georgakis of Santa Barbara Ventura Colleges of Law took the opposite view and suggested that any new practical skills requirement should be post-admission, as she does not want to prejudice students who do not have financial resources as they enter law practice.⁵⁷ She thinks that law schools are responding well to the increased need for clinical education and should do more, as did Dean Greg Brandes of Concord Law School. Echoing Dean Smith’s comment, she cautioned the Task Force that there is simply too much doctrinal material that the California Bar Examination requires to expand the curriculum further with a new practical skills requirement. As Dean Brandes suggested, one way to proceed is that MCLE requirements for new lawyers could be more extensive and provide programming that meets practical skills needs.

5. How to do it

Concerns about implementation also arose. If the State Bar of California adds a new pre-admission practical skills requirement, the Bar is urged to proceed slowly with implementation for economic reasons, that there should be a phased in approach, especially given declining law school enrollments.⁵⁸ Additionally, there should be other ways that new lawyers can fulfill any new practical skills requirement other than by increasing legal education.

6. Observations on the concerns expressed by academics

Because we believe that closing the gap in practice-readiness must involve a collaborative effort in which the law school community, practicing lawyers, and the Bar each have a role – it must be a shared endeavor in which burdens are shared and responsibility is shared as well – we view the academy as a partner, and we are disposed to give great weight to the views we hear from the legal academy. Much of the advice given by academics we accept. In particular, the suggestions that any new requirement be implemented gradually and that there should be a focus on the immediate post-admission period when new lawyers are just entering the profession are well-taken. We adopt those points in our recommendations.

⁵⁶ (RT 8-1-12 pp. 154-155).

⁵⁷ (RT 8-1-12 pp 18-19, 27-28, 32, 35).

⁵⁸ (RT 8-1-12 p. 43-44).

From a regulatory standpoint, however, we have a fundamentally different perspective than do many legal academicians. We reject the suggestions from those who urged that the Bar steer clear of anything having to do with legal education, for as guardian of the profession to which the law schools send their students, the Bar has at least as great a stake in what students are taught as does the academy. Indeed, in many ways, because practicing lawyers are, by definition, much closer to the day-to-day experience of law practice, the Bar not only should take a stand on what ought to be included in law school curricula, it *must* do so.

IV. What such a requirement should look like and how to implement it

A. What competencies are most critical?

Building on the work reported in the MacCrate Report, the Carnegie Report, and the Best Practices Report, the ABA published a 2010 study (the “ABA Core Competencies Study”) showing that any new practical skills requirement must involve the various competencies that it takes to be a good lawyer -- competencies not covered by doctrinal learning -- including problem solving, exercising good judgment client relations, time management, communication, ability to see and understand opposing points of view.⁵⁹ An extensive empirical study by two leading scholars in the field, Professors Marjorie Shultz and Sheldon Zeneck, followed in 2001 (the “Shultz and Zeneck Study”).⁶⁰

We view this recent work on core competencies to be foundational for purposes of setting expectations about what a new more practice-oriented training regimen for new lawyers ought to include. The specific areas of pre-admission practical skills training that we recommend are intended to be a distillation of concepts found in these studies. If our recommendations are adopted, we do not see them as fixed or set in stone. We anticipate that, in the implementation phase, further study will be given to ensuring that the areas of practical training that we specify fit sensibly with law schools and continuing education courses can deliver.

B. Are law schools equipped with the knowledge and expertise to train for practical skills?

Law school is and will always be the starting point for learning the core competencies that it takes to be a good lawyer, but we do not think law school should be viewed as the only place to handle any new practical skills requirements, given that most of the faculty has had little or no practice experience.⁶¹ Over time, perhaps that may change. We think it should, and that more practicing lawyers ought to be integrated into law school faculties, perhaps by expanding the use of adjunct teaching roles. But we also see practical skills training in the core competencies of lawyering as something that happens

⁵⁹ Edwin W. Patterson III and Jonathan I. Arons, *Joint NOBC/ARL Committee on Competency: Final Report* (2010).

⁶⁰ Marjorie M. Shultz and Sheldon Zedeck, Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admissions Decisions, *Law & Social Inquiry*, Journal of the American Bar Foundation, Volume 36,, Issue 3, 620, 661 (2011). See also Susan Swain Daicoff, “*Expanding the Lawyer’s Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law*”, 52 Santa Clara L. Rev. 752 (2012).

⁶¹ (RT 9-25-12 p 32).

on a continuum, beginning in law school and continuing after the transition into law practice. Thus, mentoring and continuing education must be included in any new practice-based training regimen for new lawyers.

C. How are mentors determined?

If mentoring is to be a component, then how are good mentors determined? Is it simply a matter of volunteering or should something more be required to make sure that the mentors are competent themselves, can communicate those competencies, and do an effective job of mentoring. Who makes the mentor matches? Is there to be quality control of mentors? If so, whose task will it be?

These are challenging questions, but they are questions for we there have proven examples of success. The Inns of Court model is one important and powerful example. The recently adopted mentoring programs in Nevada and Utah are two others. A state-wide organizational infrastructure to deliver new mentoring opportunities already exists as well. In addition to all of the voluntary membership Sections of the State Bar, there are dozens of bar associations in California, in all of the major metropolitan areas, at county level, and organized by specialties and affinities. To provide support for any new program of required practical skills training, we believe that an effort to provide mentoring opportunities for new lawyers, scaled up to handle the needs of new lawyers all around the state, can be developed in California.

D. Should law practice management be included in a practical skills training regimen?

The Task Force heard testimony to the effect that discipline issues do not tend to arise with new admittees, but rather are typically seen among lawyers who have been in practice for some years. Moreover, many discipline issues are traceable directly to problems with law practice management.

To the extent that there is a discernible pattern here, it is that a new attorney who is forced to “figure things out for on his or her own” can often pick up bad habits early, and those habits may remain latent as a discipline risk for some number of years, manifesting themselves only later, in the attorney’s middle to late years in practice, when common financial pressures of adult life – such as, for example, divorce or home foreclosure – combine with the increased scale and responsibility of a mature law practice to result in disciplinable misconduct. Thus, we do not find it especially noteworthy that we are not seeing many young lawyers in the discipline system. More than likely, what that means instead is that the true magnitude of the problem with poor practical skills training among young lawyers is being masked and may not show up for a number of years. It also means that, if we do not act now to try to correct the problem, the profession -- and the public – could be at greater risk than we may realize in the future.

Because law practice management problems do tend to be closely associated with discipline patterns, we are convinced that any new practical skills requirement should include a significant law practice management component.⁶² Running a law practice competently requires business skill, and as a result, we believe that the nuts-and-bolts of operating a business should be part and parcel of good practical skills training for young lawyers. The fiduciary responsibilities of lawyers provide a special overlay to the kind of business training that lawyers need, but at bottom law practice management is

⁶² (RT 9-25-12 p 67).

about understanding the financial aspects – and risks – of operating an enterprise. The subject can should be taught, and taught early.

E. Should California be a leader or a follower?

The Task Force considered various other concerns and issues, including whether the Bar has the clout to go to the ABA and advocate for standards that require law schools to provide practical skills training,⁶³ and what exemptions from any new practical skills requirement are appropriate. There was very little appetite for exemptions among members of the Task Force. While it may be that, in the implementation phase, rules exempting Bar applicants who are eligible for membership after passing the Attorneys' Bar Examination might be worth considering, at least with respect to the new pre-admission requirements -- since that route to membership, by definition requires four years of practice experience elsewhere – we leave that specific issue to further study in the implementation phase.

We do not view the issue of ABA accreditation standards as problematic. Nothing that we recommend would require changes in law school accreditation standards, at the ABA level or in California. We contemplate, instead, focusing on what is going to be expected of new admittees to the Bar. We certainly expect, and we intend, that that will place pressure on law schools to deliver what their students will need in order to become lawyers in California, and it may be that, eventually, changed accreditation standards may follow at some point, but we do not foresee the need for any such changes in order to establish the new admission standards that we have in mind.

Which, naturally, raises this important question: Might the imposition of practical skills training requirements through regulation of Bar admission in California create an undue burden on multistate law practice or deter law students who might otherwise be interested in moving to California from coming here? This is certainly a question that, like the potential impact on diversity in the profession, must be taken with utmost seriousness, given the increasing interconnectedness of our national and global economies.

After due consideration, we conclude that this multistate practice issue should not be an impediment to action, particularly if, as we have suggested, we give careful consideration to applicants taking the Attorney's Bar Examination in developing rules of implementation. The issue of practical skills training has been a subject of intensive study nationally for decades, at the ABA level, and in many states, including California. A national consensus is beginning to emerge.

When we examined what other state bars are doing in this area, we found that most states have already begin implementing new requirements to enhance practical skills training for new lawyers, and a clear trend toward enhanced practical skills training for new lawyers is evident. That trend points toward taking action, not shirking away from it. Our State Bar, with 230,000 licenses, is the largest organized bar in the country, by far. If we take a leading position on this issue – as New York has already done – we suspect that what we do may point the way towards ultimate national uniformity, not disrupt the existence of it.

⁶³ (RT 11-7-12 pp. 60-61).

V. Recommendations for a Set of Proposed Practical Skills Training Requirements

A. Pre-Admission: Practical Skills Training Requirement in Law School

The Task Force recommends that the State Bar establish a new set of requirements mandating that admittees certify prior to their admission that their law school course work has included a substantial amount of practice-based, experiential training during the second and third year of law school. This training may take the form of stand-alone courses; it may be integrated into the core curriculum in such a way that it is part of and complements existing doctrinal classes; or it may take the form of earned credit hours in clerkships, externships or other supervised work – for courts, governmental agencies, law firms or legal service providers. We do not here seek to prescribe with any exactness what such practice-based, experiential learning must look like, for that is a task best left to law schools, where a great deal of innovation in designing clinical and other experiential learning opportunities has been taking place for decades, and will continue.

Specifically, during the second and third year of law school, a total of 250 semester hours would be required in the following subject areas:

- Training in negotiation skills
- Training in speaking
- Alternative dispute resolution (mediation, arbitration)
- Problem solving and application of practical judgment
- Interviewing and counseling skills
- Project management
- Practical writing, such as contract drafting, motion drafting, advanced legal research and writing
- Pre-trial training, including e-discovery
- Oral advocacy skills
- Law practice management and technology
- Professional responsibility, ethics and civility⁶⁴

Law schools already offer many courses that teach these skills, such as classes in Pretrial Practice, Trial Advocacy, Problem Solving, Contract Drafting, Negotiations, Settlement and Mediations. Courses in Law Firm Management and Financial Basics for Lawyers need to become a part of the law school curriculum. And, courses in professionalism need to be added and offered throughout the curriculum. Presently too many law students graduate having only taken a 2-unit Professional Responsibility course designed to prepare them for the Bar exam.

Credit toward the 250 hour requirement, to the extent it falls within the parameters of one of the designated categories, may also be received for in-the-field experience such as hours devoted to legal clinic work or in judicial or other governmental externships. These hours may also overlap with the hours required in Section B below.

⁶⁴ See notes 59-60 supra and accompanying text.

B. Pre- or Post-Admission: Pro Bono or Low Bono Requirement

The Task Force recommends requiring 50 hours of legal services in the pro bono or low bono areas, under the supervision of licensed practitioners. In addition to addressing the justice gap and increasing core competencies, the breadth of this requirement – by including low bono as well as pro bono -- is designed to expose more new lawyers to the possibilities for developing law practices geared to clients who are not indigent but are of limited means. The 50 hour requirement may be satisfied in the second or third year of law school, post-graduation, and during the first year of licensure. It must be completed no later than the end of the first year of practice.

This requirement, spanning the transition years from law school into practice, would be enforced by mandating a certification from the Bar applicant or new admittee. For those who fulfill all or some of the requirement post-admission, failure to provide satisfactory certification, as with the Bar's existing MCLE regime, would result in license suspension.

C. Post-Admission: MCLE Practical Skills Training Requirement

The Task Force recommends that new admittees be required to complete 10 hours of certified MCLE courses by the deadline for the first compliance period following the completion of the first year of practice. This MCLE requirement is *in addition to* the regular 3-year, 25-hour requirement for licensees. These 10 hours should relate solely to practical skills training in the same areas described in Section A above:

- Training in negotiation skills
- Training in speaking
- Alternative dispute resolution (mediation, arbitration)
- Problem solving and application of practical judgment
- Interviewing and counseling skills
- Project management
- Practical writing, such as contract drafting, motion drafting, advanced legal research and writing re-trial training, including e-discovery
- Oral advocacy skills
- Law practice management and technology
- Professional responsibility, ethics and civility⁶⁵

⁶⁵ See notes 59-60 supra and accompanying text.

Conclusion

Whatever any new practical skills requirement might be, it must be forward-thinking, ready to prepare lawyers for practice in the 21st century, and cognizant of the changes in how legal services will be delivered and the marketplace pressures that are expected to continue now and in the future. 20th century skills will not be sufficient for the new legal world.

We do not delude ourselves that it is possible to bring about a system of training in which new lawyers would somehow emerge from law school fully formed and in possession of all the judgment and maturity that we know comes only from experience.⁶⁶ What we do expect, however, is that new lawyers enter the profession oriented to the actual experience of practice and the values of ethics and professionalism, so that when they begin to absorb that experience as practicing lawyers, they all have a proper foundation for growth. If we throw new members of the profession into the experience of practice on a “sink or swim” basis, as we do now, some will find their way and prosper, and some will not – but those who stand the most to lose are clients and the public at large.

We are the only learned profession that sends our newest members out into the world of practice without a period of intensive, supervised training. We also stand alone among English common law countries in not universally requiring that new lawyers undergo some type of apprenticeship training period prior to licensing. Long ago, when American lawyers entered the legal profession by reading law in the office of a practicing lawyer, as Abraham Lincoln did, the training regimen for new lawyers was integral to law practice. That venerable tradition has long since disappeared, never to return, and we do not propose to try to bring it back. Our proposal here is simply that some elements of it -- namely, a serious focus on practice-based, experiential learning, and early inculcation of the values of ethics and professionalism -- be revived.

⁶⁶ Sullivan, *supra* note 48 at ___ (suggesting that while better practical skills training may improve the depth of technical knowledge that young lawyers bring to their early years of law practice, it is no substitute for “the requisite judgment and wisdom that come from a more generalist-centered legal education experience”); Rounds, *supra* note 34 at ___ (Law graduates should not “be expected to spring from the academic womb armed with a full complement of lawyering skills. Seasoned practitioners, of all people, should know that practice proficiency comes only after years of, well, practice.”).