

AGENDA ITEM

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DATE: October 12, 2013

TO: Members, Board Committee on Operations
Members, Board of Trustees

FROM: Jon Streeter, Chair, Task Force on Admissions Regulation Reform

SUBJECT: Task Force on Admissions Regulation Reform: Phase I Proposals for a Competency Training Requirement – Request for Adoption Following Public Comment

EXECUTIVE SUMMARY

In February, 2012, the Board of Trustees approved the appointment of the Task Force on Admissions Regulation Reform (“Task Force”). (**Attachment 1**) The Phase I charge of the Task Force was to examine whether the State Bar should develop a regulatory requirement for a pre-admission competency training program and if so, propose such a program to the Supreme Court. (**Attachment 2**)

On June 11, 2013 the Task Force received and referred the Phase I Final Report with 3 competency training recommendations to the Board Committee on Regulation, Admissions and Discipline Oversight with a recommendation to send the final report out for public comment.

In July, the Regulation, Admissions and Discipline Oversight Committee authorized 45 days of public comment. (**Attachment 3**) 30 public comments were received. (**Attachment 4**)

It is recommended that the Board of Trustees approve the Task Force Phase I final proposals.

BACKGROUND

Since June, 2012, the Task Force has held 8 public hearings in the State Bar’s Los Angeles and San Francisco offices where it heard testimony from practitioners, legal academics, judges, clients, other state bar associations and members of the public. The Task Force also considered an extensive body of research and literature on the topic of law practice competency skills training for new lawyers.

In its Phase I Final Report, the Task Force concluded that:

“...In our view, a new set of training 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.

The 3 proposed recommendations are as follows:

Pre-admission: A competency training requirement fulfilled prior to admission to practice. There would be two routes for fulfillment of this pre-admission competency training requirement: (a) at any time in law school, a candidate for admission must have taken at least 15 units of practice-based, experiential course work that is designed to develop law practice competencies, and (b) in lieu of some or all of the 15 units of practice-based, experiential course work, a candidate for admission may opt to participate in a Bar-approved externship, clerkship or apprenticeship at any time during or following completion of law school;

Pre-admission or post-admission: An additional competency training requirement, fulfilled either at the pre- or post- admission stage, where 50 hours of legal services is specifically devoted to pro bono or modest means 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; 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 law practice competency training. Alternatively, credit towards these hours would be available for participation in mentoring programs.”¹

On September 5, 2013, the 45-day public comment period closed. 30 substantive comments were received, many of which focused on the implementation phase.

ISSUE

Whether to approve the Task Force Phase I proposals for a competency training requirement.

¹ [Task Force Report at 1-2.](#)

DISCUSSION AND PUBLIC COMMENT

Following a 45-day period of public comment, the recommendations presented by the Final Report are now before you for adoption. As set forth in great detail in the Report, the proposed new licensing conditions that the Task Force has proposed are designed to improve the practice-readiness of new lawyers in California. This is an issue of growing concern, as more and more new lawyers graduate from law school and transition into the practice of law without access to mentoring and other modes of informal practice-based training that, in previous eras, were more readily available. If this Board decides to pass a resolution adopting the recommendations presented by the Final Report -- as I will urge it to do on the 12th -- we will move into a further phase designed to generate specific implementing rules and guidelines. Before any of the recommendations or the implementing rules and guidelines actually goes into effect, this entire new regime would be subject to additional public comment requirements and have to be presented for approval to the California Supreme Court, as the final authority on admissions in California. Unquestionably, however, the adoption by this Board of the Final Report would represent a major step toward actual realization of the Task Force's proposals.

The purpose of this section is to comment briefly on the submissions that have been received during the recent public comment period. The close of the comment period was September 5, 2013, although we stood ready to receive and consider submissions in the days and weeks after the deadline. In total, 30 submissions have been received and considered, including one that arrived just this morning. These comments are attached to your agenda materials and a bookmarked PDF is available on the State Bar's website.

My initial observation about the comments is that relatively few were submitted, given the magnitude of the proposals that the Task Force has presented. The reason for that, in my view, is quite clear. By now, nearly eight months after the Task Force released its first exposure draft, the work of the Task Force and the nature of these proposals is well known publicly, not just in California but across the country. There have been many articles and reports in the legal press and in the mainstream press about the Task Force's work. Starting in February of this year, we released three drafts, each time giving plenty of opportunity for interested stakeholders to comment and provide input at hearings; and following each hearing, we made revisions to the draft that were directly in response to comments and concerns that we received. Without in any way diminishing the value and importance of the comments that we received in the recent public comment period, I view the relative dearth of comments at this stage to be reflective of the care the Task Force took to invite and respond to input from all affected stakeholders during the drafting stage. Anyone who wanted to be heard was heard at that stage, and while many serious and thoughtful reservations were stated, ultimately the Task Force made a series of policy judgments after weighing competing considerations that are reflected and explained in the Final Report. The Report openly acknowledges all of the major points of concern that surfaced in the input we received during the drafting process, some of which appear again in the recent public comments,

but in the end it struck a balance that we believe best addresses the challenge of closing the practice-readiness gap in the Twenty-First Century.

Having carefully read all of the submissions received in this recent round of public comment, it is my view that virtually everything in the comments has either been (i) said before by witnesses or interested parties who appeared before or made submissions to the Task Force prior to the completion of the Final Report, or (ii) is a matter of execution that can and should be addressed in the implementation process. From the release of the first exposure draft, the Report went through a continual process of refinement and improvement. Should this Board adopt the recommendations of the Final Report, the mission of the implementation committee will be, above all to write a set of rules designed to turn the broad proposals made in the Report into a concrete, specific and workable reality, but also to continue the process of listening to stakeholders with legitimate execution concerns, while standing ready to accommodate those concerns where feasible, thereby, in the end, producing something that is all that much better for having been tested.

For purposes of setting the agenda in the implementation phase I found many suggestions in the public comments to be noteworthy. By way of example -- and without diminishing the significance of other points of view -- I would highlight four submissions.

First, some commenters focus their attention specifically on helping to frame the issues that we should examine in the implementation phase. For instance, a group of 18 Law School Pro Bono Administrators submitted a letter dated August 26, 2013 that poses 14 questions suggested by them for consideration in the implementation phase. These questions are all directed toward the 50-hour pro bono/modest means requirement and run the gamut from very specific matters of administration (“Who will determine if a program is ‘Bar-certified’?”) to fundamental definitional questions (“How will ‘modest means’ be defined?”). Many of the questions arose in the deliberations of the Task Force, but were deferred as matters of detail that ought to be addressed later in formulating rules and guidelines for putting our proposals into effect. The thoughtful way in which the Law School Pro Bono Administrators crafted and presented their questions is not only of great value, but, I think, reflects the fact that many people around the state who would be affected by our proposals have been closely following what we have done to date and have already invested a great deal of time and effort into the task of making our proposals a reality.

Second, some commenters added new information that could have an important bearing on such critical issues as how many law school units of practice-based experiential work we will require prior to admission. Here, I draw your attention to a letter dated September 5, 2013 from Professor Robert Kuehn, a clinician at Washington University School of Law. Professor Kuehn discusses a recently completed study that he authored, as follows:

“I recently completed an empirical study showing that the overwhelming majority of ... law schools, both in California and throughout the country, could implement today a ...clinical education requirement for a law clinic or externship experience without any curricular change in their curriculum or faculty. [This] ...reviews data submitted annually by all ABA accredited law schools to determine the current availability of clinical education courses. According to the data, 158 law schools (79%) already have the law clinic and externship course capacity to provide each of their J.D. students with a clinical experience prior to graduation. Another eleven law schools already offer sufficient law clinic or externship positions for over 90% of its students. [¶] Looking just in California, ABA data shows that 19 of the 21 ABA-accredited California law schools (90%) already have the capacity in the law clinic course positions they offer and field placement/externship positions they have filled to ensure that each of their J.D. students has a clinical education experience prior to graduation. [¶] Thus, although only 15% of law schools presently require or guarantee a clinical experience, 84% of law schools either already have or are easily capable of providing the course capacity to comply with a requirement that each bar applicant have a clinical experience. This demonstrates that the California Bar could implement a clinical experience requirement effective today without those schools having to add any new or expanded clinical courses, any new positions in existing clinical courses, or any additional faculty in order for their students to qualify for admission.”

Many of the concerns that we received in the drafting process, and again in the public comments, are rooted in the idea that for law schools to offer more practice-based experiential education will be enormously costly, that law schools will inevitably pass those increased costs along to their students by increasing tuition, and that this will only add to the challenges that recent law school graduates face. It is not an overstatement to say that this raises a “hot button” issue that many opponents of our proposals have seized upon as a justification for doing nothing or for putting our proposals into an indefinite state of “more study.” See, e.g., Letter from Diane Karpman, President of the Beverly Hills Bar Association, to Teri Greenman (October 9, 2013).² The importance here of Professor Kuehn’s work is that he demonstrates empirically that the vast majority of ABA-accredited law schools already have the capacity to offer their students something very similar to what we are proposing. Professor Kuehn would go further than we do, to be sure, and would make clinical education in law school mandatory -- we provide the option of satisfying the need for practice-based training outside of law school -- but the point he makes is still highly relevant, since it appears to answer directly, and answer with data, those who object on cost grounds to the proposals we make. His work also suggests that data is readily available to measure whether the number of law school units in practice-based experiential education that we chose --15 -

² Ms. Karpman suggests that our proposals are inconsistent in some unspecified way with the recently released draft Report and Recommendations of the ABA Task Force on the Future of Legal Education (September 20, 2013). She does not cite that report, but it may be found at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/task_force_on_legal_education_draft_report_september2013.authcheckdam.pdf. Her assertion that what our Task Force proposes is inconsistent with the ABA Task Force’s draft recommendations is incorrect.

- is supported by what law schools are already doing. If that number is too high or too low, we will take that into account in implementation.

Third, several of the commenters criticize the idea of allowing an alternative track to satisfy the pre-admission competency training requirement by earning credit equivalent hours outside of law school (i.e. apprenticeships, externships, clerkships). A vocal minority in the law school community holds strong reservations about this aspect of our proposals. For example, Dean Niels Schaumann of California Western School of Law, in a letter dated, August 23, 2013, says:

“We differ with the Task Force’s suggested alternative...that some or all of the 15 units could be satisfied by a “Bar-approved externship, clerkship, or apprenticeship at any time during or following law school.” Allowance of work outside of academic programs defeats the purpose of the “structured competency training” requirement to create “a shifting of priorities within law schools in a way that encourages the existing trend toward incorporating more clinically-based experiential education.” There is no incentive for law schools to consider their curricula, if this requirement can be entirely met after law school. We agree with those commentators who cautioned that allowing students to go outside a law school’s academic programs for compliance in fact undermines the school’s curricular efforts.”

Dean Schaumann raises an issue that arose initially in input we received during the drafting process. It surfaced again in the public comment period. Some law school deans are, understandably and justifiably, rather proprietary about their curricular programs and view the creation of any incentive for their students to seek educational opportunities outside the four walls of law school as unwelcome. A cynical reading of these concerns as self-interested is certainly possible, but my view is that legitimate concerns are driving it, not least of which is the danger that some apprenticeships, externships and clerkships are pedagogically unstructured, can be difficult to manage from a quality control standpoint, and are occasionally exploitative. Dean Schaumann appears to be unaware, however, that the Task Force addressed this issue head on in the Final Report by proposing to give any law school that wishes to do so the ability to opt out of this alternative for its graduates. Now, to be sure, the Task Force expressed the hope that few law schools would exercise that option, and during the implementation phase our intention is to write stringent certification guidelines that alleviate these concerns by tying our certification of such programs strictly to objective criteria in proposed ABA Accreditation Standard 302.³ It may even be the case that, at least at the outset, our guidelines must set standards so high and difficult meet that, in practice, few apprenticeship, externship or clerkship programs will qualify at first, making this option effectively a pilot program, an approach that a number of commenters suggest

³ These proposed amendments to the ABA Standard 302 “would clarify the characteristics involved in educationally sound skills instruction.” See Letter from Katherine Kruse, President, Clinical Education Association, to Teri Greenman (September 4, 2013). The amendments would, for the first time, establish a set of specific criteria that must be met by experiential courses and field placements to meet the requirements for ABA accreditation.

anyway for some or all of our proposals. See, e.g. Letter from Christopher Kearney, President of the Bar Association of San Francisco, to Teri Greenman, dated September 5, 2013.

Fourth, Acting Dean Gillian Lester of Berkeley Law, in a letter dated September 5, 2013, raised the issue of whether our proposals cover foreign students, and if it does, she expressed concern about the potential deleterious effect on Berkeley Law's LLM programs. This is an excellent example of an implementation issue that must be addressed in an effort to clarify, further refine, and improve our proposals to ensure that they are workable in practice. My own view, as Chair of the Task Force, is that an express exemption is warranted. Our proposals are designed to apply only to new lawyers in California who intend to practice in California. I would offer the same response to those who are concerned about burdening multijurisdictional practice. See, e.g., Email from Hon. Andrew Guilford, United States District Judge for the Central District of California, to Teri Greenman, dated September 5, 2013. The discussion of admissions reforms on this Board more than a decade ago that led to the adoption of the Bar's current multijurisdictional practice program focused on lowering barriers to practice in California for lawyers who are already licensed in other states. See California Supreme Court Advisory Task Force on Multijurisdictional Practice (January 7, 2002).⁴ Under our proposals, out-of-state lawyers who come into California would be eligible to join the Bar on the same basis that they are currently eligible – i.e. by taking the practitioners' bar examination and passing the moral fitness test – without more. We propose nothing that would erect a barrier to cross-border mobility among practicing lawyers. Rather, we propose some new licensing requirements for applicants who are not yet in practice, anywhere. In doing so we have been mindful of the regulatory needs of our state. Obviously, every state has its own set of licensing requirements, and even those people who call for a uniform set of bar examination standards nationwide would allow for state-by-state licensing variations. When considering the issue of potential barriers to multijurisdictional practice, it is important to be clear about what is at stake. At most, we are talking about adding some requirements that law students who come from out of state may need to think carefully about before they decide to settle in California. But rather than create a degree of balkanization in the practice of law in the United States that, theoretically, could be harmful to California citizens in the mind of some economist, frankly, given the early indications of nationwide attention that our proposals have received so far, it appears to be more likely that we are, in effect,

⁴ The California Supreme Court has never endorsed the free-market idea of allowing unlimited licensing reciprocity with other states in order to promote maximum multijurisdictional practice nationwide. In 2002, the Court's Multijurisdictional Advisory Task Force endorsed a few limited reforms that were designed to enhance multijurisdictional practice for certain specific categories of lawyers. Subsequently, the Bar adopted its current Multijurisdictional Practice Program, which, in line with the Supreme Court Multijurisdictional Advisory Task Force's recommendations, applies only to registered corporate in-house attorneys and registered legal services attorneys. See Rules of the State Bar, Title 3, Division 3, Chapter 1, Articles 1 and 2. Those who were part of the study and deliberation about the issue of multijurisdictional practice when it came before this Board will also recall that there was opposition from some members of the Board at the time, particularly from public members, to permitting out-of-state lawyers who have not met California's admissions requirements to practice in California on the ground that it presents serious public protection risks.

proposing to set a new competence training benchmark that will be embraced by many law schools outside of California, not to isolate ourselves from the rest of the country.

I look forward to answering any questions the Board may have about the Final Report or the comments that have been received.

FISCAL / PERSONNEL IMPACT:

Staff time and costs for the implementation phase would result in some fiscal impact, the amount of which is unknown at this time.

RULE AMENDMENTS:

Unknown at this time.

BOARD BOOK IMPACT:

No Board Book impact is anticipated.

RECOMMENDATION

It is recommended that the Task Force Phase I proposals for a competency training requirement be adopted and that the public comment recommendations received be fully vetted during the implementation phase.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Board Committee on Operations agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that following a period of public comment and consideration of the public comment received, the Board Committee on Operations recommends that the Board adopt the Task Force Phase I proposals for a competency training requirement; and it is

FURTHER RESOLVED, that the public comment received be forwarded to the Implementation Committee, when it is appointed, to be fully vetted during the implementation phase.

PROPOSED BOARD OF TRUSTEES RESOLUTION:

Should the Board concur with the Board Committee on Operations recommendation, the following resolution would be in order:

RESOLVED, that following a period of public comment and consideration of the public comment received, and upon the recommendation of the Board

Committee on Operations, the board hereby adopts the Task Force Phase I proposals for a competency training requirement; and it is

FURTHER RESOLVED, that the Board hereby directs that the public comment received be forwarded to the Implementation Committee, when it is appointed, to be fully vetted during the implementation phase.

ATTACHMENTS

1. Board Operations/Board of Trustees Agenda Item, February 10, 2012
2. Task Force Mission Statement and Workplan, approved by the Board of Trustees April 9, 2012
3. Regulation, Admissions & Discipline Oversight Agenda Item, July 18, 2013
4. Public Comment Received on the Task Force Phase I Final Report, October 1, 2013