

## Working Group Drafting Proposals For Discussion

### Phase I

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## Introduction

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.

With this brief introductory background in mind, we set forth below our 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 prior to admission to practice. There would be two routes for fulfillment of this pre-admission practical skills requirement: either in law school, where 15 units of course work during the second and third law school years must be dedicated to developing practical skills and the servicing of clients, or, alternatively, following law school, in a Bar-approved clerkship or apprenticeship program of at least six months in duration;
- **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 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.

In general, we believe 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.

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. We call for no radical change in legal education as it exists today, indeed we see much that we seek to build upon. And by including in our pre-admission proposal an alternative that would permit law graduates to meet their requirement through a six-month clerkship or apprenticeship, wholly outside of law school, we hope to promote greater participation by practitioners themselves in the training of new lawyers.

We have no illusions that the State Bar can fashion a new, more practice-oriented training regimen 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. To put these requirements into effect, we recommend that the Bar develop a set of implementing rules, with full and extensive vetting in the rulemaking process, and that the final rules go into effect gradually, phasing in first the post-admission requirements in 2015, the pro bono/low bono requirement in 2016, and the classroom requirements in 2017.

## 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. . .”<sup>1</sup>

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<sup>1</sup> Sullivan et al, *Educating Lawyers, Preparation for the Profession of Law*, The Carnegie Foundation for the Advancement of Teaching 2007, pp. 5-6.

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*.<sup>2</sup> 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.<sup>3</sup> 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.”<sup>4</sup> After extensively reviewing the state of the profession and of legal education, the MacCrate Report issued a “Statement of Fundamental Lawyering Skills and Professional Values” that, in its 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.<sup>5</sup>

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<sup>2</sup> 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).

<sup>3</sup> 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).

<sup>4</sup> Patterson and Arons, *Joint NOBC/APRL Committee on Competency* 2010 pp. 1, 3.

<sup>5</sup> Randall T. Shephard, “From Students to Lawyers: Joint Ventures in Legal Learning for the Academy, Bench, and Bar”, 31 Ind. L. Rev. 445 (2011).

In the ensuing years since the MacCrate Report was published, several other major studies have appeared, each finding essentially the same thing.<sup>6</sup> Clinical legal education was, naturally, central to the vision for legal education advocated by these various studies. As part of a program designed to promote student competence, some commentators have 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.”<sup>7</sup>

## B. Changes in the Profession

We emphasize that the gap in practice-readiness among new lawyers is not due to some fundamental default on the part of legal educators. That is not what we see and it is not what we suggest in this report. Much has changed among law schools in the years since the MacCrate Report was issued. Clinical education is now widely available in most law schools and a great deal of experimentation is occurring, with many schools finding new and innovative ways to integrate it into their traditional curricula.

Coming out of law school, new lawyers today face a crushing debt burden -- the average is well over \$100,000 -- and many have great difficulty finding jobs. At the same time, 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.<sup>8</sup> Changes in the economics of the profession are making it more and more difficult for new lawyers to find the training, hands-on guidance and mentoring that is necessary for a successful transition into practice. Law firms had in the past done the

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<sup>6</sup> See also Sullivan et al, *Educating Lawyers-Preparation for the Profession of Law*, The Carnegie Foundation for the Advancement of Teaching (2007) (the “Carnegie Report”) pp. 5-10; Roy Stuckey et al., Clinical Legal Education Association, *Best Practices for Legal Education* (2007) (the “Best Practices Report”). The critiques in the MacCrate Report, the Best Practices Report, and the Carnegie Report, and the Best Practices 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 21<sup>st</sup> Century Perspective*”, 34 J. Legal Educ. 612 (1984).

<sup>7</sup> 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).

<sup>8</sup> Testimony of William D. Henderson, (RT 8-1-12 pp. 130-148). See Susskind, *The End of Lawyers?* pp. 22-23, 28-33, 148.

training to 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 skill set that new lawyers develop as they transition into the profession must be well-matched to the impact of technology on how the law is practiced these days. Thus, any changes to admission requirements, in terms of a new practical skills requirement, either pre or post admission, must take technology considerations into account. 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. 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 is becoming increasingly evident. And although always an essential part of lawyering, the value and importance of developing a deep trusting relationship with the client is even more critical, now that electronic communications is so prevalent.<sup>9</sup>

The day-to-day business of practice – and the challenges associated with law practice management – is 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.<sup>10</sup> Intertwined with those changes are changes in client expectations, primarily based on economics. Corporate clients are no longer willing to pay high hourly rates for associate 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.

Not only does technology empower clients, it levels the playing field so that solo and small firms can compete with bigger firms. 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, for their own practices, and also for the representation of clients, especially in ediscovery 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.

A number of state bars around the country have issued studies canvassing recent changes in the profession and commenting on challenges facing today's new lawyers as they begin the process of

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<sup>9</sup> The Legal Whiteboard Blog, *Why Are We Afraid of the Future of Law?*, September 6, 2012.

<sup>10</sup> Kendall Coffey, *Underserved middle class could sustain underemployed law school graduates*, National Law Journal, August 15, 2012.

transitioning into the profession. For example, Stephen P. Younger,<sup>11</sup> 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.<sup>12</sup> 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’ experience to “retool their practice?”<sup>13</sup> 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.<sup>14</sup>

### C. Changes in 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.<sup>15</sup> 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 they have in the practice. Contrast that, he says, with those burdened by debt, who 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 issue was decided long ago in favor of research oriented institutions. Given this reality, Professor Tamanaha notes that no amount of practical skills training can

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<sup>11</sup> 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.

<sup>12</sup> NYSBA Report of the Task Force on the Future of the Legal Profession (April 2, 2011).

<sup>13</sup> Testimony of Stephen Younger, Past-President, New York State Bar Association, RT 8-1-12 pp. 72-78, 80.

<sup>14</sup> NYSBA Report, pp. 39-42.

<sup>15</sup> 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/](http://www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills/).

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. The ABA's Task Force on the Future of Legal Education (the "ABA Legal Education Task Force"), a blue-ribbon group appointed in 2012 by Immediate-Past ABA President William T. Robinson III, is currently examining this question. From some quarters, fairly radical steps have been suggested. For example, what began years ago as an odd-sounding suggestion that the third year of law school be simply abandoned and that law students be permitted to sit for the bar examination after two years is now re-surfacing more and more frequently, and in one state, Arizona, the Supreme Court has recently changed the admission rules to allow that.<sup>16</sup> Others have suggested that ABA accreditation standards should be relaxed to allow for more experiential learning, since these standards limit the use of adjunct faculty, impose library requirements that are outmoded, and impede the use of on-line learning.<sup>17</sup>

We do not embrace or endorse the idea that law schools are somehow "broken." We take that thesis into account only as a marker of the vigorous debate about change that is now underway within the academy itself, as it is in the profession. We also choose not to enter into the debate about whether some forced restructuring of law school education is in order, through accreditation standards or otherwise.<sup>18</sup> That issue is better addressed at the ABA level, where national change may best be accomplished, if appropriate. Here in California, at the state level, 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.

During our Task Force proceedings, we heard helpful and illuminating testimony from a number of law school deans. Much of the advice given by the law school deans testified before us 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. We may differ in some respects, mostly because we look at these issues through a regulatory frame, always bearing our public protection charge

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<sup>16</sup> See Debra Cassens Weiss, "Two-year law school was a good idea in 1970, and it's a good idea now, prof tells ABA Task Force," ABA Journal (February 9, 2013) (citing the testimony of Professors Paul Carrington and Jim Chen before the ABA Task Force).

<sup>17</sup> *Id.* (citing the testimony of Professor Luke Bierman before the ABA Task Force).

<sup>18</sup> See Randall T. Shephard, "From Students to Lawyers: Joint Ventures in Legal Learning for the Academy, Bench, and Bar", 31 Ind. L. Rev. at \_\_\_\_ (urging the bar to exercise prudence and caution in calling for law school reform since 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).



in mind, but to the degree we part ways with some in the academic community, we believe we do so only by degrees.

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

Effective and meaningful orientation to the legal profession for new lawyers involves far more than simply teaching them such day-to-day details as how to find the courthouse, how to format pleadings properly, how to draft contracts and other legal instruments, how to conduct interviews of clients and third-party witnesses, how to negotiate, how to frame questions, how to find and examine documents, how to recognize and take precautions to ensure the protection of privileged and other confidential matters, how to set up and manage the business of a law practice, and any of the other myriad details that a young lawyer must learn. It also involves orientation in the values of professionalism and the identity of what it means to have the privilege of holding a law license. We believe that including some requirement that all new admittees spend some time in law school or in the first year of practice serving those who cannot afford a lawyer will help to inculcate the values of professionalism. As model for this, we look to the example of New York.

### **A. Pro Bono Service**

Recently, responding to the call of its Chief Justice, New York has found a path-breaking way to enhance the practical skills training of new lawyers *and* address the access to justice crisis. Following the issuance of the NYSBA Report, on May 1, 2012, the Chief Justice Jonathan Lippman announced that, beginning in 2013, prospective attorneys will be required to spend 50 hours performing pro bono work before admission to the bar of the State of New York. To set the guidelines for implementing this requirement, the Advisory Committee on New York State Pro Bono Bar Admission Requirements (the “Advisory Committee”) prepared a report (the “Advisory Committee Report”) to Chief Judge Lippman dated September 2012. The Advisory Committee Report explains that the pro bono admission requirement arose primarily to respond to the access to justice crisis. The Advisory Committee Report further 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 Advisory Committee Report focuses heavily on the issue of supervision. It is 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 recommends an affidavit of compliance form. The Advisory Committee urges 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 finds that the qualifying work is an essential part of education and therefore should not be deferred until admission. It rejects the adoption of a post-admission deferral option because it would result in administrative problems and inequities.

### **B. Low-Bono Service**

Low bono practice involves 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 a law review

article on the topic, *Rethinking Private Attorney Involvement through a Low Bono Lens*,<sup>19</sup> 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.

This area provides an excellent example of the ways in which law schools are developing innovative approaches to practice-based, experiential education. 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.<sup>20</sup> 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 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.<sup>21</sup> Wake Forest University School of Law started a similar program in 2009.<sup>22</sup>

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<sup>19</sup> 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](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1524433)

<sup>20</sup> See [www.lowbono.org](http://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.

<sup>21</sup> 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/>

<sup>22</sup> 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/>

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 Concentration & Lawyer Incubator Program at the Thomas Jefferson School of Law.<sup>23</sup> 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.

"Low Bono" service 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. 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.

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

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<sup>23</sup> The incubator/low bono project at Thomas Jefferson School of Law (See Section IIB 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

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,<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup> 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.<sup>27</sup>

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 announced 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

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<sup>24</sup> Earl Johnson Jr., *Justice and Reform: The Formative Years of the American Legal Services Program* (1974).

<sup>25</sup> 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).

<sup>26</sup> Legal Services Corporation, *Report of the Pro Bono Task Force* (2012).

<sup>27</sup> OneJustice, *Hearings on California’s Civil Justice Crisis* (2012).

using our skills as lawyers could not be more of a pre-requisite to meaningful membership in the bar of our state.<sup>28</sup>

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.”<sup>29</sup> In short, we believe that what has come to be known as low bono legal service is, in reality, a vastly underdeveloped part of 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. What a new practical skills 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.<sup>30</sup> 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”).<sup>31</sup>

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<sup>28</sup> 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.

<sup>29</sup> 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*”.

<sup>30</sup> Edwin W. Patterson III and Jonathan I. Arons, *Joint NOBC/ARL Committee on Competency: Final Report* (2010).

<sup>31</sup> 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).

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. For preadmission practical skills training in law school, how many credit hours should be required?

We approached this issue with three things in mind. First, the traditional focus on doctrinal curricula in the first year of law school is important and ought to remain a cornerstone of law students' introduction to the law. Second, the trend toward increasing clinically-based curricular options in the second and third year of law school ought to be reinforced and encouraged by building in incentives for students to choose these courses. Third, ideally, some substantial portion of the second and third law school year ought to be devoted to practice-based, experiential learning. We make no pretense to having drawn upon a rigorous formula for measuring what should count as substantial. We simply took as a rule of thumb that 25% of the final two years of school would be devoted to experiential learning in clinics, externships, and skills courses. We initially considered measuring that in the form of credit hours, but opted instead for the more precise measure of academic units – 15 units, or in ABA terms, 10,500 classroom or classroom-equivalent minutes -- to be taken as skills courses, clinics and/or field placements following the first year of law school.<sup>32</sup>

- C. How can we promote greater participation by practitioners and judges in the training of new lawyers?

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.<sup>33</sup> 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 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.

A key feature of our recommendations is the preadmission clerkship or apprenticeship alternative. This option adds flexibility in how Bar applicants may meet their preadmission training

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<sup>32</sup> We anticipate that these units would generally be taken in the second and third years of law school, but in the case of part-time law school programs, they could be taken in a later year. As we have emphasized, flexibility is important, and in any implementing rules we expect that the unique needs of night law schools or other part time programs would be kept in mind.

<sup>33</sup> (RT 9-25-12 p 32).

requirement, accommodates concerns on the part of law schools that we seek to force changes on them that are impractical and bound to increase costs, and most importantly, promotes a greater role by practitioners and judicial officers in preadmission practical training. In the long run, as a new system for clerkships and apprenticeships develops, it could also serve the function of helping new lawyers find jobs by providing them exposure as trainees to potential employers.

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 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 – combined 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.<sup>34</sup> 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 about understanding the financial aspects – and risks – of operating an enterprise. The subject can and should be taught, and taught early.

**IV. Cautionary comments on any new practical skills requirement**

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 an easier time 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.

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<sup>34</sup> (RT 9-25-12 p 67).

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.

#### 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 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. 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 concern 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 are not proposing the addition of a fundamentally different set of practical skills requirements in law school – necessitating the creation of a raft of new courses, adding to the existing cost structure, and driving tuition up – but rather that there would be a shifting of priorities within law schools in a way that enhances the already ongoing trend toward incorporating more clinically-based, experiential education. Nor do we 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. To put these requirements into effect, we recommend that the Bar develop a set of implementing rules, with full and extensive vetting in the rulemaking process, and that the final rules go into effect gradually, phasing in first the post-admission requirements in 2015, the pro bono/low bono requirement in 2016, and the classroom requirements in 2017.

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 future improvement in practice-readiness will better prepare new lawyers 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. Potential Impediment to national uniformity and multistate practice

When we examined what other state bars are doing in this area, we found that most states have already begun 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.<sup>35</sup> 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.

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,<sup>36</sup> 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.

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 hope that law schools continue the path that they have been on in recent decades, increasing the clinically-oriented content of their curricula, and perhaps what we

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<sup>35</sup> 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. 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.

<sup>36</sup> (RT 11-7-12 pp. 60-61).

recommend here will provide incentives for them to accelerate that trend. But would not recommend that the Bar purport to mandate that, even if it had power to do so. We wish to put in place a new training regime that will evolve organically, with multiple paths for law students – which will maximize their choices, and leave law schools free to address students’ needs as the schools deem fit – while encouraging more participation by judges and lawyers in the process of new training for new lawyers.

## **V. Recommendations**

### **A. Pre-Admission: Practical Skills Training Requirement**

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 prior to admission.

There would be two routes for fulfillment of this pre-admission practical skills requirement: either (1) in law school, where 15 units during the second and third law school years must be dedicated to developing practical skills and the servicing of clients, or (2) employment in a six-month clerkship or apprenticeship program approved by the Bar.

Credit for the law school training units would be given for stand-alone courses, or for clinical work 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 units in clerkships, externships or other supervised work – for courts, governmental agencies, law firms or legal service providers. Specifically, during the second and third year of law school, a total of 15 units 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 civility<sup>37</sup>

Credit toward the 15 unit 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 units may also overlap with the units required in Section B below.

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<sup>37</sup> See notes 30-31 supra and accompanying text.

As an alternative to law school credits, an alternative path to meeting the preadmission training requirement would be available through employment in a Bar-approved six-month clerkship or apprenticeship offered by a court, a government agency, a legal service provider, a private law firm, or a solo practitioner. This aspect of our proposed pre-admission practical skills requirement is key. It is intended to provide flexibility for law students, so that if any student feels that available curricular offerings in law school are unsuitable to meet the requisite number of in-class units, or if any student elects for whatever reason not to take courses that are available, an alternate path to fulfilling the pre-admission practical skills requirements could be taken. Most importantly, giving credit for approved internships or apprenticeships would promote greater participation in training and mentorship by experienced practitioners, potentially assist with permanent job placement, and avoid the appearance that the Bar seeks to foist the entire burden of better practical skills training on law schools.

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. 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. For anyone who chooses to fulfill the pre-admission practical skills requirement through a year's employment in a clerkship or apprenticeship program with a court, governmental agency or legal service provider, the 50 hour pro bono/low bono requirement would be deemed automatically satisfied.

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

- Pre-trial training, including e-discovery
- Oral advocacy skills
- Law practice management and technology
- Professional responsibility, ethics and civility<sup>38</sup>

### 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. Twentieth 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.<sup>39</sup> 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.

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<sup>38</sup> See notes 30-31 *supra* and accompanying text.

<sup>39</sup> Sullivan, *supra* note 29 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”); Charles E. Rounds, Jr., “The Sorry State of American Legal Education”, 24:2 Acad. Quest. 34 (2011) \_\_ (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.”).