

AGENDA ITEM

113 NOVEMBER 2014

DATE: November 6, 2014

TO: Craig Holden, Chair
Members, Board Executive Committee
Members, Board of Trustees

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

SUBJECT: Task Force on Admissions Regulation Reform: Final Phase II Implementing Recommendations For a Competency Training Requirement – Request for Adoption Following Public Comment

EXECUTIVE SUMMARY

In February 2012, the Board of Trustees appointed the Task Force on Admissions Regulation Reform (“Task Force” or “TFARR”). In Phase I, the Task Force held eight public hearings to examine whether the State Bar should develop a regulatory requirement for a pre-admission competency skills training program, and if so, propose such a program to the Supreme Court. The State Bar Board of Trustees unanimously adopted the TFARR Final Phase I Report on October 12, 2013 (**Attachment 1**).

Phase II of TFARR’s work began in December 2013. A series of eight public hearings focused on developing rules for the implementation of its Phase I recommendations. As in Phase I, TFARR publicly noticed each meeting, posted all agendas for discussion in advance of the meeting, and invited public comment.

Between August 14, 2014 and September 16, 2014, TFARR proactively sought informal public comment on the Phase II proposals from interested and potentially affected groups who have been monitoring TFARR’s work actively (e.g. California Law Schools, County and Specialty Bar Associations, Legal Aid Associations, Legal Services Providers, State Bar Sections, Standing Committee on the Delivery of Legal Services, Pro Bono Coordinating Committee, Access to Justice Commission, CYLA, MCLE Providers, Association of Pro Bono Counsel, Association of American Law Schools, American Bar Association Center for Pro Bono, and the Clinical Legal Education Association). TFARR received twenty three comments.

At its September 16, 2014 hearing, TFARR reviewed all feedback and made revisions where needed before sending to the Board Executive Committee with a request for a 35-day period of official public comment. On September 29, 2014, the Board Executive

Committee approved TFARR's request for public comment. The public comment period ended on November 3, 2014. TFARR received 42 comments.

With some minor adjustments to the Phase I recommendations, and upon review of informal public comment received as of September 16, 2014 (**Attachment 2**) and official public comment received as of November 3, 2014 (**Attachment 3**), TFARR submits its final implementing recommendations with a request for adoption:

- Pre-Admission: 15 Units of Practice-Based Experiential Training in Law School/Apprenticeship Option
- California's Proposed Recommendation for 50 Hours Pro Bono/Reduced-Fee Legal Services
- Post-Admission: California's Proposed Recommendation for 10 Hours Competency Training MCLE

A detailed description of the activities of the Task Force along with the Task Force's proposed amendments to the Business and Professions Code, California Rules of Court, and State Bar Rules is provided in 3 Attachments to the *Task Force on Admissions Regulation Reform Phase II Final Report* at **Attachment 4**.

While the California Supreme Court's reserved power over the regulation of the practice of law includes its plenary authority over the admission of attorneys, the legislature shares that authority by adopting measures regarding the practice of law. In order for all the proposed amendments to the Rules of the State Bar to take effect, the Supreme Court must adopt the proposed amendment to the Rule of Court and the legislature must adopt the proposed amendments to the Business and Professions Code.

DISCUSSION AND PUBLIC COMMENT

On September 29, 2014 the Board Executive Committee released the Phase II implementing recommendations for a 35 day official public comment period which ended on November 3, 2014. 42 comments were received (**Attachment 3**).

As Chair of TFARR, I have reviewed each and every one of the comments. No new issues have been raised warranting further consideration or re-opening of the TFARR process. Below, I summarize briefly what I view as the most significant aspects of these comments.

As has been the case from the beginning of TFARR's work, virtually all of the comments support the TFARR's twin goals of improving practice-readiness and fostering a commitment to serving the underserved. Many of the comments from law students and young lawyers -- including, notably, the California Young Lawyers Association --- gave full support to all of TFARR's recommendations. The high level of support for better practice-based training among those who have recently entered the practice and those

about to enter it has been consistent throughout our process. Indeed, it strongly suggests that those of us who have been in the profession for many years underestimate how difficult it is to make the transition into law practice today, and thus how important it is to take steps to assist with that transition. A number of commenters expressed disappointment that we have not pursued the idea of establishing or sponsoring mentoring programs. We continue to see a strong need for mentoring programs, and we hope that the Board will study that idea further, but we reluctantly concluded that attempting to establish and monitor quality mentoring programs for the large number of new admittees to the California Bar each year is unlikely to be feasible, without testing the feasibility of different mentoring models on a small-scale first, which is something that should probably occur initially at county and local levels.

Among the recent law graduates and law students who commented, and some experienced practitioners as well, a number disagreed with recommendation B, the 50-hour pro bono/modest means requirement. These concerns are not new and they do not address implementation, which was our charge in Phase II. Most of these concerns, moreover, seem to reflect a misunderstanding of why TFARR is recommending 50-hours of pro bono/modest means service (to help close the justice gap as a fundamental value of the legal profession). With recommendation B, we are not exclusively focused on practical skills. TFARR believes that recommendation B will promote *both* of its goals -- enhanced practical skills training, **and** greater commitment to serving the underserved. Admittedly, some young lawyers may find little value in performing 50 hours of service to the underserved, in either respect. But the policy choice we made is that, on the whole, more young lawyers will benefit, and the public will certainly benefit more, from having the requirement than not having it. That is the choice the state of New York made, and we agree with it.

A small number of comments about recommendation B expressed, frankly, ideological opposition. These commenters object on the ground that young lawyers should not be, in effect, placed into forced servitude. Not much need be said about this objection, except that it ignores the fact that holding a law license is a privilege, and in exchange for that privilege, certain obligations have always been expected. The most serious and substantive comments on recommendation B came from the California Commission on Access to Justice, the State Bar's Standing Committee on the Delivery of Legal Services, the Public Law Center, the Legal Aid Association of California, the Barristers Club of the Bar Association of San Francisco, the Bay Area and Southern California Pro Bono Managers, each of whom has tracked our work and consistently submitted valuable comments. Many of these commenters expressed concerns that increased demand for pro bono experience among law students and new lawyers may be too much for already overburdened legal services agencies to absorb. This is not a new line of critique. We have carefully weighed it, and we believe we have been sensitive to it. One specific concern -- that requiring qualifying work to be done under the supervision of a lawyer with at least two years' experience -- was the subject of extensive consideration and debate in our implementation phase. Suffice it to say that we thought that two years' experience seemed the minimum necessary to ensure oversight of reasonable quality.

We received a noteworthy comment letter dated November 3, 2014 from Professor Robert Kuehn, of the Washington University School of Law, who gave a presentation to TFARR at its February 2014 meeting, and who contributed particularly valuable comments in the implementation phase of TFARR's work based on his empirical work focusing on the effects and the costs of requiring greater clinical education in law school. In general, Professor Kuehn's submissions dispel common notions that increasing the experiential component of legal education will necessarily result in a sharp spike in costs, the burden of which must ultimately be borne by students in the form of higher tuition. Professor Kuehn has shown that, empirically, the available data simply do not show support for that idea. Professor Kuehn's most recent contribution to the TFARR record, his letter of November 3, 2014, is notable for its detailed presentation -- again, empirically based -- of the widespread perception among judges and lawyers nationwide that better practice-based training of lawyers is needed. His survey of 21 articles and studies on the topic indicates that "[j]udges, practicing lawyers, recent law graduates, current law students, prospective law students, and law school admissions officials overwhelmingly support the need for more practice-based coursework." He goes on to say that "[s]tudies of the effect of law student clinic courses on students also demonstrate the educational gains to students and enhanced readiness to practice from such courses."

The Committee of Bar Examiners ("CBE") submitted a comment letter from Ms. Patti White, in her capacity as Chair of the CBE. Ms. White also served as a member of TFARR in Phases I and II and has been a valuable contributor to TFARR's work. While lauding the goals and objectives of TFARR, Ms. White, on behalf of CBE, states a number of concerns: first, that TFARR's recommendations will add to the cost burden on law students, and that students at California Accredited Law Schools -- a demographic least able to absorb increased costs -- will bear the brunt of this increase; second, that recommendation B, requiring 50 hours of service to pro bono or modest means clients, will require a "kind of conditional admission" to practice because new lawyers who have not fulfilled it by the end of their first year in practice will be subject to inactive enrollment; third, that lawyers who are members of other states' bars but have practiced for less than a year, and foreign-licensed applicants who have practiced for less than a year, will be required to meet the practice-based requirements we are recommending, which will have the effect of, for the first time, creating unequal treatment between these "lateral" applicants for admission and other out-of-state applicants; and fourth, that because CBE has statutory authority to "examine" all applicants for admission to the Bar, to "administer" the Bar Examination, and to "certify" applicants for admission to the Supreme Court, the CBE, not the Board of Trustees, has approval authority over recommending any new admissions requirements to the Supreme Court.

Taking these concerns in order: (1) the issue of cost has been thoroughly and thoughtfully considered by TFARR, and, contrary to the suggestion of possible disparate cost-impact on students who attend California Accredited Law Schools, the evidence reviewed by TFARR in both Phases of its work shows that, on the whole, compared to

ABA-Accredited Schools, California Accredited Law Schools, because of their extensive use of adjunct faculty and closer ties to practicing lawyers, are probably **better** equipped than ABA-Accredited law schools to offer the amount of practice-based experiential education that our recommendations will require, meaning that the cost impact of adding new experiential education will be modest or non-existent among that segment of schools; (2) because there is clear administrative precedent for the enforcement mechanism we recommend for recommendation B – inactive enrollment for non-compliance with MCLE obligations – we do not believe it is fair or accurate to characterize anything in recommendation B as amounting to “conditional admission;” (3) any new difference in treatment between out-of-state and foreign lawyers who have practiced for less than a year and other out-of-state and foreign lawyers is rationally justified because, quite simply, they have less practice experience than those who have practiced for more than a year; and (4) CBE’s statutory charge to “examine,” applicants, “administer” the Bar Examination, and “certify” admissions does not implicitly carry with it exclusive, plenary approval authority over all policy-making recommendations from the State Bar to the Supreme Court that may touch on the subject of admissions.¹

Perhaps most notably, we received a thoughtful and important comment letter dated November 3, 2014 signed by the Deans (the “ABA Deans” or the “Deans”) of ten of the highest-ranked law schools in the United States in the US News & World Report rankings – Yale, Harvard, Stanford, Columbia, Chicago, Michigan, New York University, the University of Pennsylvania, Berkeley, and UCLA. The delivery to the Bar of a letter signed jointly by such an extraordinarily distinguished group of legal educators may be unprecedented, but the fact that the Deans took the time to coordinate their views and prepare this letter is, in itself, very significant. The ABA Deans have clearly taken note of our work and have been monitoring it closely. We are grateful for their input and are very pleased to have the views they have offered.

The ABA Deans open their letter by stating their support for the value of experiential legal education. They tell us: “We agree with the TFARR that experiential education is important and valuable. All of our institutions have long been committed to providing a range of experiential education of the highest quality.” In both Phases of its work, TFARR found that to be true. The trend toward increased experiential education in legal education in the last 30 years has been truly impressive in its breadth and variety, and that trend has been led by many of these leading law schools. TFARR’s recommendations simply seek to foster and encourage this trend. The ABA Deans next state that “exactly how much experiential education should be required, and precisely how it is delivered, are matters best left to the judgment of the individual schools.”

¹ TFARR has carefully and deliberately avoided considering or recommending any changes to the Bar Examination itself. Perhaps such recommendations are in order. And perhaps, if TFARR’s recommendations are ultimately adopted and they do lead to some changes in the way new lawyers are trained to enter the legal profession in California, at some point the CBE will itself begin to consider whether adjustments to the Bar Examination may be warranted in light of TFARR’s recommendations. But that is for another day.

Here, too, TFARR has been acutely sensitive to the importance of ensuring that law schools themselves remain ultimately in charge of their own curricular choices.

Finally, the ABA Deans report that “while some of [the Deans]...have substantial doubts about the wisdom of the decision to mandate experiential learning,” if TFARR’s recommendations are adopted by the Bar’s Board of Trustees, two “vital matters of implementation” should be given further consideration: (1) that “what constitutes experiential education be defined very broadly and flexibly, so that individual schools have the ability to develop course offerings in a manner that makes the most sense for students,” and (2) since it will take time for law schools to make the necessary changes needed -- with appropriate monitoring and interim evaluation for effectiveness -- “TFARR’s recommendations should be subject to the same process of phase-in, review and assessment by the law schools that will be implementing them.” Specifically, the ABA Deans suggest the following, gradual phase-in schedule: a) 10 units of experiential education would apply to students entering law school in 2017, 2018, 2019 and 2020, and b) the full 15-unit requirement would apply to students entering law school in 2021, with the entire rollout subject to a process of review and assessment based on “student feedback and other methods of assess[ment]...; the impact on students’ ability to pursue other curricular offerings....; [and] the impact on readiness for practice after graduation...”

We believe we have drafted rules that accommodate the ABA Deans’ concern that the definition of experiential education be broad enough in scope to allow ample latitude by law schools themselves in determining what meets it, in accord with whatever pedagogical model a particular school follows. Indeed, the ABA Deans do not point to anything specific in our proposed rules that they perceive as a weakness or oversight in this regard. Which is not surprising. There is no aspect in which our proposed rules seek to micro-manage or prescribe how experiential course offerings should be offered or how they should be designed. The system we propose is a “self-verifying” one for exactly this reason, and the list of practice-based courses that we have provided is illustrative for a reason as well. We *want* the law schools to continue their impressively vigorous efforts to experiment and innovate with practice-based course work, but we also want law students to understand that they have an obligation to take advantage of these courses so that the depth and level of practice-based experience among applicants to the California bar is uniformly greater than it is today. Every law student must know that the profession they seek to enter, if they come to California to practice, will ultimately hold them to a high standard of professional competence. We believe that it is not too much to expect that, *while still in law school*, students begin to understand that they have some level of actual professional accountability for their curricular choices.

The ABA Deans’ detailed and carefully-worked out phase-in plan, obviously, calls for a far longer rollout period than TFARR’s Phase I Report anticipated (we generally recommended that recommendation A, the new 15-unit requirement, would go into effect in 2017, three years after the projected effective date for recommendation C, and 2 years after the projected effective date of recommendation B). But the reality is that

TFARR has never been in a position to determine the exact phase-in schedule for its recommendations, since those recommendations, if adopted by the Board of Trustees, will require changes in law that the Supreme Court and the Legislature must address first, before **any** changes are introduced. Since the comments from the ABA Deans are so recent, I cannot say what the position of the full TFARR membership would be on the Deans' proposed two-step, 10-year phase-in plan. In general, I can report that the TFARR membership includes a range of viewpoints about how aggressive we should be in recommending change, both in terms of the amount of experiential education that we have recommended (some members believe 15 units is too modest) and the immediacy of the need for change (some members believe that the sooner these recommendations go into place the better). From my own point of view as Chair, I believe that the rollout period that the ABA Deans have proposed is broadly consistent with TFARR's recommendations; that accepting it would go a long way toward underscoring the point that, at the Bar, we see the larger project of improving the practice-readiness of new lawyers as one in which we are in partnership with law schools, not somehow set against them; and that, while a two-step, ten-year phase-in period may seem like an eternity, for those of us who have witnessed the extraordinary change in legal education that has already taken place in the last three decades – led by many of the same institutions that these distinguished Deans represent – that is not such a long time.

ISSUE

Should the board adopt the final implementing recommendations proposed by the Task Force on Admissions Regulation Reform which appear as Attachments A – C of the *Phase II Final Report* and direct staff to pursue adoption of the recommended Rule of Court, legislation, and State Bar Rules?

CONCLUSION

Yes.

FISCAL / PERSONNEL IMPACT:

To be determined, but it has been estimated that the cost will be approximately \$464,000/year.

RULE AMENDMENTS:

See Attachments A – C of **Attachment 4**.

BOARD BOOK IMPACT:

None.

RECOMMENDATIONS

It is recommended that the implementing recommendations proposed by the Task Force on Admissions Regulation Reform which appear as Attachments A – C of the *Phase II Final Report* at **Attachment 4** be adopted and that staff be instructed to pursue adoption of the proposed amendments to the Rule of Court and Business and Professions Code.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Board Executive Committee agree with the above recommendation, the following resolutions would be appropriate:

RESOLVED, that following a period of public comment and consideration of the public comment received, the Board Executive Committee recommends that the Board adopt the implementing recommendations proposed by the Task Force on Admissions Regulation Reform, which appear as Attachments A – C of the *Phase II Final Report* at **Attachment 4**; and it is

FURTHER RESOLVED, that the Board Executive Committee direct staff to pursue adoption of the proposed amendments to the Rule of Court and Business and Professions Code.

PROPOSED BOARD OF TRUSTEES RESOLUTION:

Should the Board concur with the Board Executive Committee recommendation, the following resolutions would be appropriate:

RESOLVED, that following a period of public comment and consideration of the public comment received, and upon the recommendation of the Board Executive Committee, the Board hereby adopts the implementing recommendations proposed by the Task Force on Admissions Regulation Reform, which appear as Attachments A – C of the *Phase II Final Report* at **Attachment 4**; and it is

FURTHER RESOLVED, that the Board direct staff to pursue adoption of the proposed amendments to the Rule of Court and Business and Professions Code.

Attachments:

1. TFARR Final Phase I Report (June 24, 2013)
2. Informal public comment received as of September 16, 2014 including Summary Chart
3. Official public comment received as of November 3, 2014 including Summary Chart
4. TFARR Final Phase II Final Report (September 25, 2014) with Implementing Rules at Attachments A, B and C