Overview of Proposed Mandated Experiential Requirements of the State Bar of California

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Memorandum

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To: Daniel Bogart, Associate Dean

From: David H. Gibbs

Re: Proposed Mandated Experiential Requirements of the State Bar of California

As you requested, I have prepared an overview of the proposals of the State Bar of California for changes to the requirements for admission to the bar and continuing legal education. The Trustees of the State Bar adopted the proposed requirements on November 7, 2014. The proposals have been submitted and are under consideration by the Supreme Court of California.

In February 2012, the Trustees of the State Bar of California established a Task Force on Admissions Regulation Reform (the “Task Force”) “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.” On July 18, 2013, the Task Force issued the Task Force Phase I Final Report and Recommendations (the “Report”). The Trustees adopted on October 13, 2013 Phase I Final Proposals for a Competency Training Requirement from the Report and established a special committee to devise a plan to implement the proposals.

The Requirements Adopted by the Board of Trustees on October 13, 2013

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.” Report at 1-2.
The Task Force concluded that the public interest required a shift in priorities by law schools to better prepare lawyers for practice:

“We are not proposing the addition of a fundamentally new set of competency training curricula in law schools – 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 encourages the existing trend toward incorporating more clinically-based, experiential education.” Report at 21-22.

The Task Force on Implementation

The Task Force established a working group for each of the three requirements, held meetings and on September 25, 2014, adopted the Phase II Final Report Recommendations and A Summary of Rules (“Final Report II” or “Proposed Rule”).

Proposed Timing of Implementation

The requirements would apply to the students entering law schools in each year as follows:

- Pre Admission Requirement of 15 Units of Experiential Education 2017
- Pre Admission Pro Bono Requirement of 50 hours 2016
- Post Admission Requirement of 10 hours of MCLE 2015

Working Group A-15 Credits of Experiential Education

The Task Force believes that, “today’s law graduates must not only understand legal doctrine but have the ability to apply that doctrine in practice settings,” and “that the distinction between doctrine and skills is often an artificial one and has designed this competency requirement to reflect the synthesis of doctrine and skills that lawyers find in practice.” Attachment A of Final Report II at 1.

The Task Force recommended and the Trustees voted to establish a new requirement that applicants for the bar demonstrate by a certificate from their law school, or other documentary evidence, the completion of 15 credits of “practice-based experiential competency training.” Proposed Rule 4.34(A).
Definition of Practice-Based Experiential Competency Training

“Competency training must develop the concepts underlying a particular subject matter, provide opportunities for student performance in addition to traditional classroom discussion, provide for regular individualized student feedback from a faculty member, and provide opportunities for student self-evaluation.” Proposed Rule 4.34 (C).

Subjects that Would Meet the Requirement

“Credit toward the fifteen unit requirement may be given upon successful completion of training that includes, but is not limited to, the following topics:

1. oral presentation and advocacy;
2. interviewing;
3. counseling;
4. client service and business development;
5. negotiation, mediation, arbitration, or other alternate dispute resolution methods;
6. advanced legal research and writing excluding
   (a) purely academic papers; and
   (b) the first four units earned in introductory first-year legal research and writing class, first-year Moot Court class, or any combination thereof.
7. applied legal writing such as drafting of contracts, pleadings, or other legal instruments;
8. law practice management or the use of technology in law practice;
9. cultural competency;
10. collaboration or project management;
11. financial analysis, such as accounting, budgeting, project management, and valuation;
12. cost benefit analysis in administrative agencies;
13. use of technology, data analyses, or predictive coding;
14. business strategy and behavior;
15. pre-trial preparation, fact investigation, such as discovery, e-discovery, motion practice, assessing evidence, or utilizing experts;
16. trial practice;
17. professional civility and applied ethics;
18. a law clinic that includes a classroom component; or
19. a legal externship that includes a classroom component.” Proposed Rule 4.34(C).

Types of Courses or Programs That Could Meet the Requirements

- Clinics
- Legal Externships
• Experiential/simulation courses
• Part of a doctrinal course
• A Lab in conjunction with a doctrinal course
• Clerkships
• Apprenticeships

Apprenticeships and Clerkships

• “An apprenticeship or clerkship approved by the Committee or by a law school must provide the opportunity to further develop knowledge of the law and any of the following:
  - effective research and organization of legally relevant information derived from non-legal sources, such as investigation records, economic research, and technical analysis
  - analysis, critical reasoning, and problem solving;
  - application of facts to law;
  - legal expression, such as persuasive and objective oral or written communication;
  - practice competencies, such as litigation or transactional projects;
  - professionalism;
  - client service;
  - leadership, such as communicating and effectively influencing others;
  - collaboration; or
  - management, such as giving feedback, planning and implementing tasks, organizing or managing workloads.” Proposed Rule 4.34H.

• Apprenticeships and clerkships may be approved by the Committee or a law school and must provide an orientation session, active supervision, a system for assignments, timely oral and written feedback, a diversity of tasks and an opportunity for reflection. Proposed Rule 4.36(A).
• The supervisor of an approved apprenticeship or clerkship must have practiced law for at least two years immediately preceding the time of supervision. Proposed Rule 4.36(B)(1).
• Law schools will be responsible for the operation of their programs and will not apply to the State Bar for approval like bar association programs.
• Apprenticeships are limited to a maximum of 6 units allowed to meet the 15 unit requirement.
• Summer employment that meets the other standards could be included.
• Fifty hours of work is the equivalent of one unit.
• Students may receive compensation but not academic credit for apprenticeships.
• Students may receive credit for judicial clerkships.
Additional Requirements and Considerations

- Law schools will be able to choose how to structure their programs to enable students to meet this requirement.
- The requirements will apply to students from other states.
- Lawyers who have practiced full time for at least one year or half time for two years will not be subject to the requirement.
- Applicants who have received a degree from a law school outside the United States and have received an LLM from a law school within the United States will not be subject to the requirement.
- Credit towards the requirement can be earned for a part of a course that meets the requirements in units of at least ½ unit per course.
- The first 4 credits of first-year legal writing and research course, as well as Moot Court, will not count towards the requirement.
- Clinics or externships may also satisfy the pro bono requirement.
- The Bar will review these requirements in three years and will consider whether to require participation in a clinic or externship.
- The Task Force did not implement mentoring as means of meeting the requirement, but has authorized pilot programs for further development.
- Courses satisfying the proposed ABA requirement for 6 units of experiential education will be acceptable for the California requirement.

Task Force B Mandatory 50 Hours of Pro Bono Work

The Task Force proposed that the applicants for admission or newly admitted members of the bar should be required to perform 50 hours of pro bono, or for a reduced fee for persons of modest means within 18 months of admission to the bar.

The Task Force wrote:

“While the proposed requirement, will increase practical competency skills in furtherance of the State Bar’s public protection mission, the pro bono aspect will also help inculcate pro bono as a core value of professionalism and help address California’s justice gap.”

Attachment B of Final Report II at 1.

- Members employed by a qualified legal services project or support center will be deemed to have satisfied the fifty hour pro bono or reduced-fee requirement
- Lawyers who have practiced full time for at least one year or half-time for two years will not be subject to the requirement.
- The Task Force expects that most new members will complete this requirement while in law school, but has provided in the proposed rule that new members have up to 12 months to meet the requirement, with extensions available to attorneys who establish a claim of hardship.
- Pro bono and reduced-fee are defined as:
“Pro bono” means providing or enabling direct delivery of supervised legal services without expectation of compensation from the client other than reimbursement of expenses to

- persons of limited means as defined by Business & Professions Code section 6213(d) in California, or by the interest on lawyers trust account program in another United States jurisdiction;

- charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; or

- individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate.

“Reduced-fee” means providing or enabling direct delivery of supervised legal services at a substantially reduced rate affordable to

- individuals qualified as “low-income,” “very low-income,” or “extremely low-income” under the current California Department of Housing and Community Development Official State Income Limits at the State of California Web site, or comparable income limits in another United States jurisdiction; or

- organizations identified in (A)(2) or (A)(3). (Proposed Rule 2.151(A), (B)).

- An attorney or law student must be supervised by an attorney who is a member in good standing of a jurisdiction in the United States, and who has practiced law for at least two years immediately prior to the time of supervision. Proposed Rule 2.155(A)

- The supervising attorney is responsible for providing or ensuring active and timely feedback, compliance with labor laws, verifying the number of hours and reporting to the State Bar.

Task Force C 10 Hours of Continuing Legal Education Within One Year of Admission

The Task Force proposed that newly admitted attorneys complete ten hours of basic skills training within one year of admission to the Bar, in addition to the required 15 credits of experiential courses.
The Task Force wrote that newly licensed attorneys need to

“quickly receive practical skills in core competencies that typically are not covered by doctrinal learning. …The proposed change will also ensure new attorneys gain access to legal ethics in the context of a specific practice area. Early development of these skills will not only be beneficial to new attorneys’ careers, but will also further the State Bar’s mission of public protection by ensuring that new attorneys learn how to adequately and ethically represent their clients.” Attachment C of Final Report II at 1.

The training shall consist of six hours of basic skills training and four hours of ethics training.

- “The legal ethics hours must contain training on best practices in ethical situations lawyers face in their daily practice. For purposes of fulfilling the four hour first-year legal ethics requirement, courses that meet this requirement might include, but are not limited to, the following:
  - Ethical issues in pro bono representation
  - Conflicts of interest in law practice
  - Ethics for commercial litigators
  - Ethics for corporate lawyers
  - Ethics for discovery
  - Ethics for financial industry lawyers
  - Ethics for in-house lawyers
  - Ethics for litigators
  - Ethics for the negotiation and mediation
  - Maintaining Good Standing with the State Bar
  - Social media ethics
  - Attorney-client privilege and work product; maintaining client confidences
  - Attorney advertisement and solicitation
  - Ethical issues in fee agreements, billing and collection
  - Ethical issues relating to candor
  - Ethical issues relating to relationships with clients, including communication
  - Starting and terminating attorney client relationships.” Attachment C of Final Report II at 2.

- The six hours of skills training is in addition to the 15 units of experiential education that will be required to take the bar exam.
- The ten hours of continuing legal education for newly admitted members does not count towards the annual requirement of 25 hours of continuing legal education for members of the bar.
- New members who have been admitted to the bar of other states for at least four years must complete the four hours of applied ethics training, but are not required to take six hour basic skills training.
- The first-year continuing legal education cannot be satisfied by courses earlier than the four months preceding admission and must be completed no later than one year following the date of admission with extensions available to lawyers who establish a claim of hardship. The Task Force wanted to allow applicants who had taken the bar exam to engage in continuing legal education prior to their admission.
• None of the required hours may be self-study.
• Mentoring can be used to satisfy this requirement only in bar-certified pilot programs.
• Elected officials if California, full-time law professors at schools accredited by ABA, and attorneys or judges employed by the State of California or the federal government, who do not otherwise practice law, are not subject to the requirement.

Conclusion

The proposed new requirements pose challenges to law schools. Nevertheless, I believe these proposals can be a springboard to enrich law schools and improve the legal profession.