Re: Comment on New York Court of Appeals Task Force on Experiential Learning & Admission to the Bar’s Proposal Regarding a Skills Competency Requirement (“Proposal”)

The comments below represent the views of the Committee on Legal Education and Admission to the Bar and have not been reviewed or adopted by the New York State Bar Association

Dear Judge Rivera, Members of Task Force on Experiential Learning and Admission to the Bar and Ms. Wood:

The New York State Bar Association Committee on Legal Education and Admission to the Bar (CLEAB) benefited greatly from the presentation by, and discussion with, Judge Rivera on Wednesday, November 4, 2015, about the Proposal. We share her view that the Bar has an important role to play with law schools to ensure that all applicants for admission are better prepared for effective, ethical and responsible practice of law. We want to preface our comments about the specifics of the Proposal by reiterating that as a Committee (i) we think that adding to the requirements for admission to the New York Bar a “skills competency” component is a very important and positive step for the legal profession, (ii) we agree that this is an area where the New York Bar can and should take a leading role, and (iii) we appreciate the strengths of focusing on licensure (making these requirements a condition of admission to the Bar rather than a requirement to sit for the Bar Examination (“Exam”).

While most candidates for the Bar will meet this requirement in law school, and law schools will need to respond to these changes, we agree that (i) this should not be framed as a law school requirement and (ii) the Proposal’s plan for a variety of “pathways” is both
necessary and wise. The law schools have greatly strengthened their skills curricula and we think most law students would be able to qualify under Pathway 2 (and those students’ programs would warrant law school certification under Pathway 1). The law schools deserve great credit for the steps already taken to develop and make available to all their students numerous “experiential learning” options and other courses directed toward practice skills. The next step, and the issue the Task Force very properly addresses (as did the CLEAB’s Report mentioned below), is assuring that candidates for the New York Bar have made sufficient use of these options to have prepared themselves for admission to our Bar.

It is precisely because we see the Proposal as a major step forward for the profession and see in the Proposal’s details such effort to “get it right” that our Committee members were eager to express to Judge Rivera their various (and by no means invariably consistent) views about how the Proposal might be improved: we want to see this done well because we think that what is adopted now by the Court of Appeals will set a standard for other states and, though not “set in stone,” is not likely to be adjusted or changed for some time.

As comments are due on November 9, CLEAB can only offer in this letter an abbreviated review of some of the major questions and concerns that were discussed at that lively and very useful meeting. A more expansive discussion of the Committee’s views can be found in our 2014 Information Report to the State Bar on a possible skills competency requirement for bar admission (Appendix A).

Specificity and Compliance

We recognize that “Pathway 1” (certification by the A.B.A. approved law school of its graduate) is likely to be a very common path – and we suspect for J.D.s it will quickly become the predominant path – to satisfying this component. We share the view that law schools and law students should be allowed great flexibility in designing programs that will satisfy this path. But we are deeply concerned that a path which captures an aspiration many of us share but lacks (a) specific requirements beyond those already being added by the A.B.A. Standards (which has its own skills list and which also requires and is committed to monitoring student progress toward those outcomes), and (b) monitoring or enforcement provisions, will not achieve the goals of the Proposal. Law schools as a group are well-intentioned and serious about pedagogy and preparation for practice. But if those intentions and the A.B.A. Standards were enough, there would be little reason for the Proposal.

We deeply appreciated the Judge’s comment that she would be “looking carefully at” the programs presented by the law schools on their websites, but there are many, many law schools sending candidates to the New York Bar. Scrutiny from our highest court, even if feasible and even if strict, does not come with any apparent enforcement powers. CLEAB is concerned that insofar as Pathway 1 is used, for many candidates (and law schools certifying them) nothing of substance will have changed in circumstances where change was called for. While endorsing flexibility of programs, many Committee members were of the view that certification under Pathway 1 should contain additional, though open-ended, requirements about the student’s program, e.g., additional credits in “practice-readiness” courses, some
minimum number of credits in a “clinical” client-centered program, or some other easily measured, bright line test.

From CLEAB’s perspective, there is so much in the Proposal that addresses issues about which we have long been concerned, that we hesitate to talk about “squandering” an opportunity. Many Committee members are quite concerned that unless additional content is added to Pathway 1, too little will be accomplished. And whether or not something more is added to Pathway 1, there is evident need for greater guidance to schools, students and the Bar about how this structure fits with the new accreditation process, the nature of the certification and whether or how there might be review and approval of programs adopted by law schools.

We note, for example, that the Request for Comment does not say whether, as seems to have been assumed at our meeting, Pathway 1 certification from law schools for “graduates” is intended only for those completing a J.D. or is also a potential path for graduates of qualified LLM programs. This is among the basic features of the Proposal about which there seem to differing interpretations. If Pathway 1 applies to both populations, our concerns about specifying requirements and content are exacerbated - especially since LLM programs are not subject to the A.B.A. Standards and most or all current programs do not meet the new Standards. On the other hand, some members of the Committee feel that the Task Force should allow Pathway 1 to serve LLMs.

Six deans, who are ex officio members of the committee, and one voting member dean of the committee dissented from the discussion of Pathway 1, and adhere to the position set forth in the separate comments that the committee understands the Task Force will be receiving from the Deans.

Compensated Part-Time Legal Work

Deans and others raised questions about the treatment of compensated part-time work during the school year. A significant group of students gain very valuable legal experience through paid legal or business employment for which they do not receive credit. Although there are some knotty details to be considered, a number of CLEAB members are concerned about ensuring we support people who are working so hard to gain access to our profession. It seems likely their work should qualify as “experiential learning” both for purposes of Pathway 2 and, perhaps, as part of what qualifies a candidate for certification under pathway 1, even though law school “credit” is not available.

The Distinctive Place of Foreign Trained Lawyers in New York

Distinctive to New York is the admixture of 10,000 or more graduates of A.B.A.-approved J.D. programs who sit for the NY Exam each year with approximately 4750 graduates of foreign law schools who have also qualified to take the Exam. Notably, more than half of the LLMs graduated from a non-NY school, with about 100 different LLM programs having at least one candidate sitting for the Exam in a typical year. CLEAB has studied the question of a skills
requirement for licensure of foreign law degree holders who have earned a qualifying LLM. We have also considered the significant number of Exam candidates who are qualified to sit for the Exam based on their “foreign” training alone (i.e., without a LLM or, indeed, any training in a U.S. law school) (collectively, “FT candidates”; see discussion in Appendix A). Careful study did not cut the knot of our concern for equity and ensuring effective and ethical practice, and our recognition of how diverse the paths into and from LLMs are and what very significant challenges these students already face.

Although many committee members do not agree with this proposition, we accept for now the commitment of the Court’s Task Force to applying the same licensure standards for admission to the New York Bar for FT candidates as will apply to JD candidates. Accepting that constraint for purposes of discussion, we are concerned that despite the best efforts of the Task Force the several additional Pathways are not yet sufficient to allow those FT candidates who pass the Exam to satisfy this additional requirement (there being insufficient time within an LLM program that otherwise qualifies under the Court’s rules for FT candidates to provide skills programs to the extent required under the various Pathways).

We would suggest that the Task Force consider (i) whether LLM programs should be able to certify their graduates under Pathway 1 and if so what content should be required for such certification (recognizing that LLM programs are not subject to the A.B.A. Standards), (ii) making explicit provisions for post-LLM coursework (or, in the case of the roughly 300 FT candidates each year who did not need an LLM to sit for the Exam and who passed the Exam, non-LLM coursework) that can be counted toward satisfying Pathway 2 and/or be combined with some time in an “apprentice” program, (iii) reconsidering whether “apprenticeship” programs in the candidate’s original country of study that precede U.S. study might, with appropriate certification, be counted under one pathway or another (while we appreciate the instinct that the apprenticeship should occur after U.S. training, if “post-graduate” apprenticeships can be completed in a foreign country, and we join the Task Force in believing that they should be, there is certainly an argument for allowing properly-certified “pre-graduate” apprenticeships to qualify), (iv) consider how to specify more clearly what non-U.S. apprenticeships would be acceptable for those FT candidates who passed the Exam without an LLM (300-plus such candidates being a significant number) -- can they, for example, be apprenticeships that preceded passing the Exam? In a more technical but still very important vein, it was noted that Pathway 5 uses language that does not travel well. In a number of jurisdictions, including much of South America, France and Japan, bar membership is either not a part of how legal practice is structured or the practice is so different that the language of Pathway 5 would be much more limiting than seems intended.

More broadly, some questions were raised about whether the distinctive problem of LLMs and other FT candidates can or should be the subject of final rulemaking at this time or, put differently, if final rules are adopted now, how the effective date of August 2016 (for “commencement of legal study”) will work with respect to LLM programs and foreign legal study. We find the various permutations of this effective date somewhat confusing as to FT candidates, and acknowledge that many LLM programs will have to make substantial curricular changes in order to assist their graduates with qualifying for admission to the New York Bar. It might make things clearer to set the effective date in terms of when candidates will first sit for the Exam and to use a date like July 2019.
CLEAB recognizes and salutes the careful and extensive work that has already gone into this process. This rule addresses a set of concerns we share and about which we have had much discussion. We hope our questions are of use to the Task Force as it continues this important work. We look forward to continued and productive participation in this very important process and would, of course, be very pleased if we can provide additional information or answer questions.

Very truly yours,
Co-Chairs

Eileen D. Millett

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