

**Commission to Expand Civil Legal Services  
Minutes of January 25, 2016 Meeting  
Houston, Texas**

In attendance: Chief Justice Nathan L. Hecht; S. Jack Balagia, Jr.; Hon. Jane Bland; Faye M. Bracey; Darby Dickerson; William Royal Furgeson, Jr.; Eden Harrington; Angelica Maria Hernandez; Wallace B. Jefferson; Joseph C. Matta; Chris Nickelson; Harry M. Reasoner; Hon. Lee H. Rosenthal; Frank E. Stevenson, II; Kennon L. Wooten; Nina Hess Hsu; Martha Newton; Osler McCarthy

By phone: F. Scott McCown; Samuel Estreicher; Hon. Ann McClure

**Introductions**

Commission chair Wallace Jefferson called the meeting to order and asked each person in attendance to introduce him- or herself. Some members expressed their tentative thoughts about potential reform initiatives.

Frank Stevenson mentioned that law schools around the country are experimenting with incubator programs to provide a training ground for newly licensed attorneys and a means of providing civil legal services to low- and middle-income clients. A planned State Bar of Texas initiative will provide \$200,000 to start a law school incubator in Texas.

Darby Dickerson explained that Texas Tech has a pro bono requirement for graduation and an externship program through which third-year students spend a semester in a governmental agency in exchange for academic credit.

Royal Furgeson described UNT Dallas College of Law's efforts at law school reform. Tuition is currently \$14,500 per year for all students, regardless of LSAT score. The school's goal is to keep the number of full-time faculty members to a minimum. The school's printed library is less extensive than a typical law school library, which helps to control costs. UNT takes a holistic approach to admissions and admits a higher percentage of older and minority students than most schools. Fifty percent of the law school's student body is diverse.

Dean Furgeson also expressed interest in examining whether changes to the bar exam are needed to promote the goals of the Commission. He specifically noted that the multistate portion of the exam tests information learned during the first year of law school and questioned whether that portion should be taken after the first or second year when the information is fresh in students' minds.

Dean Furgeson reported that in the last few years, the number of entering law students nationwide has dropped from 55,000 to 35,000, and that according to available statistics, one-half to one-third of graduating law students do not have a job at graduation. He mentioned the book *Glass Half Full: The Decline and Rebirth of the Legal Profession* by Benjamin H. Barton.

Dean Furgeson expressed an interest in expanding the availability of free, electronic forms to help pro se litigants. He stated that forms are available in 26 states and that the National Center for State Courts has taken an active role in expanding the availability of forms.

### **Remarks from Chief Justice Hecht**

Chief Justice Hecht noted that to qualify for legal aid, a person must make no more than about \$14,000 a year. But middle-income people who are nowhere near the poverty line are also unable to pay for legal services. The charge of the Commission is to focus reform efforts on this group. The Supreme Court is 100% on board. Court staff and the Office of Court Administration will support the Commission's work.

### **Remarks from Judge Rosenthal**

Judge Lee Rosenthal noted that about 50% of a federal district court's civil docket involves an unrepresented litigant. This number includes prisoner claims, but even omitting prisoner cases, there are still many cases involving unrepresented litigants. The main kinds of cases that federal courts hear involving unrepresented persons are mortgage foreclosure and employment cases.

There are efforts underway in the federal system to tailor procedural rules to support unrepresented and under-represented litigants. Judge Rosenthal specifically mentioned the practice of holding an in-person, pretrial conference at the outset of a case to see if there is a way to cut through the formal procedures and to get the parties the information they need more quickly. She also mentioned a new set of pleading forms that are designed to support pro se and under-represented litigants. The forms cover the most frequently filed types of civil disputes—employment claims, civil rights claims, and debt claims. They are available online and in paper at the courthouse.

### **Remarks from Professor Samuel Estreicher (NYU School of Law)**

Professor Estreicher explained three reform proposals.

*Proposal #1: The Roosevelt-Cardozo Way.* Under this plan, there would be no change in the requirements for receiving a J.D., but students would have another route to licensure. The alternative route would require a student to attend law school classes for two years and take certain mandatory classes during that period. The student's third year would be a public-service fellowship or apprenticeship under the direction of a lawyer. The student would have to work at least 1500 hours during that year, he or she would earn at least a minimum wage, and public service would be defined broadly. At the end of the fellowship, if the student's supervising attorney certifies to the state supreme court that the student has met performance expectations and has the requisite moral character to practice law, and the supreme court is satisfied that the student has met all requirements, then the student would be permitted to sit for the bar. (This would require a change to existing court rules.) If the student passes the exam, he or she would be licensed to practice law—perhaps only provisionally—but would not have a J.D. The state could target these fellowships to locations in the state where lawyers are needed.

According to Prof. Estreicher, one advantage of this program is that it would put pressure on law schools to earn the third year tuition because students would have the option to leave after the second year. The fellowship program would also create additional opportunities for law schools to form relationships with graduates. He noted that, currently, to receive donations, schools must take the “New Haven approach” and focus on increasing the ranking and academic reputation of the law school.

A state could start this program on an experimental basis with only 25-30 fellows at first.

A variation of the proposal would make the law license provisional at first—perhaps for a period of 7-10 years—and then it would ripen to a full license after the time period expires.

Prof. Estreicher contrasted his proposal with the accelerated J.D. programs that some law schools have experimented with. He noted that under his proposal, the student would not necessarily receive a J.D., and he commented that it is not practical to complete three years of law school in two.

The Commission members commented on Prof. Estreicher’s proposal.

One member noted that the proposal could create two tiers of lawyers. Prof. Estreicher responded that this already exists in the current system.

Eden Harrington expressed three reservations. First, she commented that taking away the third year of law school would do away with clinics and other experiential educational opportunities for students. Second, she noted that the proposal assumes that there are lawyers willing to supervise and pay minimum wage to a student with no experience. Third, she questioned whether a brand new lawyer can provide meaningful legal services to middle-income people and commented that the impact on the justice gap may be difficult to quantify.

Prof. Estreicher responded that the proposal would not change the third year of law school for most students but would instead give students the opportunity to do something else. He commented that current clinical programs may not adequately address access-to-justice issues because some programs are not directed to the needs of poor and middle-income persons. Prof. Estreicher opined that companies and law firms will want to participate so they can say they are contributing to help solve the problem. He suggested that the program could start on an experimental basis, which would be low risk for the employer. He noted that the fellowship would train the student on how to deal with clients and to find a solution to their legal problems.

Judge Rosenthal questioned why initial efforts by law schools to make a two-year program have failed. She noted a new book by Judge Richard Posner, *Divergent Paths: The Academy and the Judiciary*, that explores the divide between the bench and the academy. In the book, Judge Posner observes that some of the top law schools are moving to a Yale-like approach to teaching students. Judge Rosenthal questioned whether the lack of success of the two-year programs can be explained by the type of law schools that have tried it (Northwestern).

Prof. Estreicher responded that the Northwestern program differs from his proposal in that Northwestern tried to pack three years of law school and tuition into two years. That is very difficult to do because under the current model of law firm hiring, students clerk at firms during the summer. He also noted that even at elite law schools, graduating students do not have jobs, and that other law schools, such as New York Law School, have experimented with a two-year program but have not been successful. Prof. Estreicher commented that to move higher in the pecking order, schools must become more like Yale, which does not teach core competency.

Dean Dickerson noted another problem with the accelerated two-year plan: students are exhausted and miss out on valuable components of law school such as journal participation and advocacy clinics.

Dean Dickerson noted that the University of New Hampshire School of Law has a bar-exam-alternative program called the Daniel Webster Scholarship Program that is targeted to students who do not do well on standardized tests. Students in the program must do an apprenticeship before becoming licensed to practice law in New Hampshire.

Dean Dickerson commented that she worries whether schools can guarantee a job market for students of an alternative program, whether these students' law licenses will be portable to other states, and how alternative programs would affect bar-passage rates. She also predicted that law schools may change their tuition structure to make all of their money in the first two years.

Dean Dickerson also noted that the timing of bar exam grading affects the timeline for hiring new graduates. She questioned why it takes so long for the results to be released. She noted that because firms typically do not hire over the holiday period, the November release date results in a March hiring date for new graduates because many firms will not hire a lawyer until they have passed the bar.

Harry Reasoner noted that the Texas Access to Justice Commission has financed internships for new lawyers with legal-aid providers. His impression is that the new lawyers do not provide much value to the organizations.

Dean Furgeson noted that one assumption of accelerated or alternative law-school programs is that students with less debt are more inclined to go into public service, and that assumption may not be correct.

*Proposal #2: Reform the third year of law school and law school clinical programs to restore an attitude of service to everyday Americans.* Under Prof. Estreicher's second proposal, law schools would require some clinical or practical experience to graduate. As an alternative to a law school clinic, students could work in the poorest part of the city in which the school is located. The school would communicate with residents of the neighborhood, "If you have a legal problem and make less than \$50,000, come here."

*Proposal #3: Reform law firm pro bono programs.* Prof. Estreicher noted his impressions that transactional lawyers are afraid to get involved in pro bono work because they do not want to litigate and that many litigators also avoid pro bono work because they are afraid of getting drawn

into something that is very time consuming. Prof. Estreicher also stated that many associates do not get any practical experience until their sixth or seventh year and that there must be some way to align firms' desire to train young lawyers, helping people who cannot afford legal services, and lawyers' desire to do some pro bono work without getting drawn into a time-intensive case. Instead of one or two lawyers working on a time-intensive case, how do we get more people to do less time-intensive work that meets the needs of low- and middle-income people?

Jack Balagia noted that Exxon has a pro bono program in which its lawyers partner with law firm lawyers. Forty to fifty percent of Exxon's attorneys participate.

Kennon Wooten noted that SBOT has a Pro Bono College program. Lawyers commit to a certain number of pro bono hours per year. In exchange, they get to count themselves as part of the select group and access to free legal resources as well as SBOT's CLE library.

Referring to Prof. Estreicher's first proposal, Faye Bracey questioned whether two years of law school is sufficient for success on the bar exam.

Harry Reasoner stated that we need a fundamental change in how courts work so that they are more friendly to self-represented litigants. He noted that litigants are not just proceeding pro se in uncontested divorces but also in contested jury trials. That creates a problem because judges take the position that they cannot help a self-represented litigant in a contested jury trial. He pointed out that Illinois courts have rules that govern the treatment of self-represented litigants, and he sees no reason for Texas not to modify its rules.

Prof. Estreicher commented that it is not feasible to make one reform that will have a big impact. He suggested that the Commission look at several different options.

Dean Dickerson noted that in Washington state, only eight people graduated from the State's limited license legal technician program in its first year. She pointed to the expense and onerous requirements of the program as reasons why it has not been more popular.

Dean Harrington noted that unlike federally funded legal-aid organizations, law school clinics do not have income restrictions for their clients.

### **Further Discussion**

The discussion resumed after a lunch break.

Judge Ann McClure expressed interest in proposals to revamp law school and rule changes directed to self-represented litigants. She noted that online forms can be problematic and can do more harm than good.

Dean Harrington phrased the overarching question as how do we induce young lawyers in private practice to serve the poor and middle class. She expressed interest in legal incubator programs. These programs are designed to help lawyers develop a business model that works long term. They often involve sliding-fee scales and flat fees. She stated that there is no shortage of law-school

graduates who want to do public service; rather, there is a shortage of jobs for them. Dean Harrington also noted that law schools can play a role in maintaining self-help centers.

Jack Balagia commented that the Commission should focus on finding a market, economic-driven solution to the justice gap rather than focus on public service. He suggested that we need to reduce barriers to practice and have some formal structure for this type of practice—such as an office in the courthouse—rather than ask new graduates to hang out a shingle.

Joseph Matta expressed interest in Prof. Estreicher’s second and third proposals. He likes the idea of law firms and law schools partnering together. He cautioned the Commission that pro se litigants may often misuse and misunderstand forms.

Angelica Maria Hernandez cautioned that an experimental program with only a few participants will not have the statewide impact that the Court and Commission is seeking.

Justice Bland commented that obtaining data will help the Commission make recommendations to the Court and make the case for those recommendations to the public. She suggested that we can minimize the controversy over forms by eliciting the assistance of more people in the process and creating a sustainable architecture to update them. She gave the example of Pattern Jury Charge committees. The PJs are updated every other year. Justice Bland also expressed interest in a voluntary program in which lawyers would provide services at published rates on a sliding scale. These programs make the cost of legal services transparent and perhaps less intimidating.

Harry Reasoner opined that the Commission should not try to reform law school. The reform efforts should provide incentives for lawyers to work in rural areas and for modest-means clients. For example, a lawyer gets paid a subsidy to serve certain types of clientele in certain areas. Medical schools have similar programs to induce new doctors to serve rural areas. He also noted the promise of limited-scope representation and self-help centers. Judges need guidelines about what they can do to help pro se litigants.

Judge Rosenthal suggested that the Commission try to get a sense for how many people leave the legal field rather than hang out a shingle and what the failure rate is among those who do hang out a shingle. She questioned whether a model could be developed that would help turn that around.

Regarding forms, Judge Rosenthal noted that there are a lot of forms that do not threaten lawyers but that lawyers welcome. An example is litigation-support forms. They provide a template to aid lawyers but do not displace lawyers. Judge Rosenthal noted that federal courts have developed a set of forms to aid discovery requests in employment cases. Lawyers are not afraid of them; they like them. The federal courts are currently working on forms for use in Fair Labor Standards cases. This approach could be expanded. She noted that courts are in a better position than commercial services are to approve forms. Finally, Judge Rosenthal noted that there are daunting institutional barriers to law school reform.

Dean Furgeson expressed interest in experimenting with law school innovation. He echoed that the Commission should try and gather more data so that it knows the extent of the problem.

Nina Hess Hsu agreed with the comments of others that law school reform may not be the best answer. She also noted that having data to support any reform proposals would help with the Legislature.

Martha Newton stated that the answer may not be just one thing. To make a real dent, the Court will have to take a multi-faceted approach. The Commission should think about these proposals as different pieces of the puzzle. Martha also expressed interest in helping with any necessary rules changes.

Chris Nickelson expressed interest in law school reform efforts. He is interested in finding a market-based way to match people with lawyers, like Uber for lawyers. He cautioned that forms can cause more harm than good.

Frank Stevenson expressed interest in measures that involve collaboration between corporate clients like Exxon and the law firms that represent them. He also stated that the Commission's message should be that people are better off with a lawyer and that reform measures should show people how to find a lawyer and what a lawyer will cost.

Faye Bracey pointed to the positive effect that public-service-loan-forgiveness programs have had on the market for legal-aid jobs. But these programs do not exist for lawyers serving the middle class. She also proposed a kind of referral service where lawyers would be required to tell SBOT whether they are willing to take certain matters for a fixed fee. SBOT would promulgate the fee schedule and make it public.

Dean Dickerson pointed out that AVVO is a commercial referral site that is similar to Uber for lawyers. A potential client can pay a small amount for a conference call with a lawyer, and there are fixed fee options. She noted that she has a PowerPoint for a presentation on this issue that she made recently.

Dean Dickerson stated that mandatory pro bono for licensed lawyers should be on the table. We cannot put this problem entirely on the backs of law students and new lawyers. She questioned what the bar exam is testing and noted that students spend a lot of money on bar-review courses. She suggested that the state consider some form of diploma privilege—e.g., if you make certain grades and take certain courses, then you are entitled to a law license. Wisconsin has a form of this.

Dean Dickerson is concerned about the quality of apprenticeships under Prof. Estreicher's proposal and whether it is appropriate for a single person to decide whether another person is ready to practice. She also noted that law schools are charging more because states are not adequately supporting higher education.

Kennon Wooten agreed that more data is needed and suggested that the Commission look to the Texas Legal Services Center as a potential resource. She also expressed interest in referral services that make fees public and in posting information from referral services at courthouses or other public locations for increased access. She stated that the Commission should not reject forms out of hand and that Justice Bland's comments about the PJC process resonated with her.

Kennon opined that the Commission should consider the potential role of nonlawyer specialists in addressing the justice gap, even though this approach would be controversial in the legal community. She noted that paralegals are doing some legal work already. The definition of “practice of law” in the ethics rules is broad and needs to be reconsidered if nonlawyer specialists are to play a bigger role in addressing the justice gap. Finally, Kennon suggested that the Commission should hold public forums to get feedback from lawyers and the public on various reform proposals.

Wallace Jefferson noted that the Court did have several public forums when the divorce forms were being promulgated and during the (2011) bar referendum on proposed changes to the disciplinary rules. He commented that the Commission and Court would face opposition no matter what.

Chief Justice Hecht stated that the Commission can start with some easy projects like gathering data and speeding up the grading of the bar exam.

### **Assignments for Commission Members**

Wallace Jefferson assigned members the following tasks.

#### *Data Collection*

Dean Harrington will gather data on the effect of law school clinics. Who participates and what kind of clients do they reach?

Harry Reasoner will survey law firms about their pro bono programs. What kind of pro bono work are firms doing and for what kind of clients?

Martha Newton and Nina Hess Hsu will ask the Office of Court Administration and TAJC whether they have statistics on pro se litigants in state court. What percentage of cases involve a pro se litigant? In what percentage of cases does a pro se litigant file an affidavit of indigency? Martha and Nina may have to reach out to individual courts.

Jack Balagia will gather information on the pro bono efforts of corporate clients. What do you do in-house, and what do you ask your outside law firms to do? One member noted that a recent article on the pro bono efforts of AT&T may provide guidance.

Chief Justice Hecht will talk to the Conference of Chief Justices to get a sense generally for what other states are doing. He will also talk to the state law library to learn more about what is being done there and what impact its efforts have made.

#### *Limited Scope Representation*

Kennon Wooten and Martha Newton will examine what ethical rules apply to or constrain limited scope representation and whether any rule changes are needed to promote this practice.

#### *Other Ideas*

Wallace Jefferson is interested in learning more about the New Hampshire program and ways to make an alternative law school program elite, like Teach for America. He is also interested in exploring the idea of an annual legal checkup, similar to an annual medical checkup. The ABA is looking at this, and it may have reports available before the next meeting.

Wallace Jefferson asked the members who received assignments to report back to him by Friday, February 12.

### **Adjournment and Future Meetings**

The meeting adjourned at approximately 2 p.m. The next meeting will be in late February or early March, potentially in Dallas or Austin.