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To: Members of the Authority

From: Adam Roberts, Deputy Commissioner of Licensing AR

Subject: Full Board Review of Attorney Self-Certification Program
Memo 3 of 3: Licensing Bureau Recommendation

Date: 11/4/21

In the last few months, along with the rest of the SLA's senior staff, I became aware of a Declaratory Ruling request filed by a non-attorney representative which challenges the SLA's authority to institute the "Self-Certification By Attorneys" program (the "Program"). The Program apparently was first authorized by the Full Board in 2009 and is a Program currently being utilized by the Licensing Bureau in processing licensing applications. From the time I started my job duties, I found the Program to be problematic for multiple reasons. With challenges being brought about the SLA's authority to have the Program, after conferring with SLA senior staff, I thought it would be an appropriate time for the current Full Board's Members to consider whether the Program should continue on its merits. Accordingly, at the beginning of the September 29, 2021 Full Board meeting, I requested that the Members consider whether the Program should be reaffirmed, revised, or discontinued.

While I expected to give my own recommendation to the Members on the Program, I also thought it appropriate for the Board to consider input from the industry. At the September 29, 2021 meeting, we advised the industry that they would have four weeks to make written submissions on the issue, and that the matter would be addressed in six weeks at the November 10, 2021 Full Board meeting. It is my understanding that only two written submissions were received from industry participants by the deadline. Another submission (from Frank Palillo, Esq.) had already been received in connection with the Declaratory Ruling request when the September 29, 2021 announcement was made. In addition to other portions of the record being presented to the Members, I have reviewed those submissions and offer the following observations and recommendations.

My Concerns About The Program

When I became Deputy Commissioner of the Licensing Bureau in June of 2019, I was surprised to learn about the way in which the Program was being utilized. The first concern I had was about the fairness of a Program that creates a two-tier application process. Applicants who pay an attorney to self-certify their application get consideration on the timing in which the

application is reviewed, a type of expedited review; the SLA was favoring those with greater financial resources -- the means to pay an attorney to prepare a self-certified application. Apparently, prior to my arrival, the SLA had believed that the benefits of the Program outweighed these issues.

A second concern I had (and have) concerns the SLA's decision to transfer one of its main responsibilities in the licensing process. We review each license application carefully to ensure it contains no legal or other deficiencies before it can be considered for approval. In conversations with staff who have worked in Licensing longer than I have, I learned that prior Licensing Bureau leadership had instructed Licensing Examiners not only to avoid reviewing the matters that had been self-certified, but to also avoid sending out deficiency letters. This was to be done even if an examiner became aware of mistakes in the application or in the attorney certification. In other words, examiners in the Licensing Bureau were instructed to ignore known deficiencies in self-certified applications – missing documents, statements that contradict other statements, etc. -- and pass them through.

The Program's central presumption is that experienced attorneys, required to swear under penalty of perjury to the completeness and accuracy of an application, would get it right. The Program is supposed to address the possibility of deficiencies in self-certified applications by removing attorneys from the Program who failed to accurately self-certify. However, since examiners were instructed not to review a self-certified application for mistakes, the mistakes could only be identified through an after-the-fact audit, or when disciplinary issues arose with respect to a licensee (which sometimes would lead to a review of the application record). But by the time I arrived at the SLA, no post auditing was being done on self-certified applications. The only way the SLA was learning about mistakes in self-certified applications is when examiners were informally finding deficiencies – outside their review process and out of a duty to ensure bad applications did not slip by. That would lead us to, from time to time, to remove particular applications from the Program and, less often, to revoke an attorney's privileges to use the Program.

I was also advised, and have come to learn through my own experience, that the majority of self-certified applications have deficiencies. When I learned about these facts, I did not see how the Licensing Bureau could, in good conscience, ignore known defects in an application and allow it to be approved. Accordingly, I made it clear to my team that if deficiencies in a self-certified application were observed, a deficiency letter would be sent. If the deficiencies were significant enough where the application could not be processed without material changes, the application would be removed from the Program. I also expanded the review of self-certified applications to include, for example, a review of financial records, a place in which we often find discrepancies that suggest that an applicant may be a front for the true owner of a business seeking to be licensed. I did not believe we could count on attorneys to catch these issues for their own clients.

I also considered whether post-auditing already-approved licenses would help us gain comfort that self-certified applications did not have to be reviewed. However, based on the operational demands and staffing levels within my Bureau, we did not have the capacity to run an effective audit program of applications that had already been approved; to do that, I would have had to remove personnel from reviewing pending applications, causing further delays to our

processing times. Investing resources to help improve an already failing Program, which impacts less than 10% of our applications, made little sense. Devoting resources to the applications that were not self-certified was a necessity and required our attention.

A third concern I have is that many applicants are paying attorneys to self-certify their applications. Attorneys who utilize the Program likely communicate to their clients that their applications "will be expedited." However, this is not always the case. Self-certified applications, on average, are being considered one month earlier than non-certified applications, but that savings of one month is only realized if the self-certified application has no deficiencies. When deficiencies are identified, even if the application is not removed from the Program, the time it takes for a deficiency letter to be sent and the deficiencies cured will almost always delay the application more than one month. As a result, a significant percentage of the applicants paying additional fees to have their applications self-certified are unfairly paying for an expedited license approval that they will not get. Based on my experience, most of the attorneys who present applications make careless mistakes, whether the application is self-certified or not. That is not to say that attorneys are incapable of presenting a properly self-certified application. Some do, but many cannot be counted on to do so consistently.

That leads me to a fourth concern: the SLA is not really getting the relief in its review process that the Program was designed to create. Based on historical records, it seems that the Program as initially approved allowed the SLA to eliminate a 9-month backlog of license applications in less than a year. But apparently over time, a combination of factors that allowed the Program to be that effective have changed. For example, the SLA's appetite for allowing bad applications through has changed. Although this is just an educated guess, given that 50 lawyers were removed from the Program within 2 years, I suspect that hundreds (if not thousands) of self-certified applications that would not have passed an SLA review were approved during that initial time period.

As time has gone by, the SLA had informally – and under my leadership, formally -- expanded the review process for self-certified applications to catch errors, and we now routinely identify deficiencies. While actual time savings is hard to calculate as each application has its own facts, I have to conclude that the overall time saved through the Program, which constitutes less than 10% of the applications filed with the Authority, cannot meaningfully reduce the SLA's overall processing times even if applications are submitted as intended – without deficiency. And our goal in setting policy should be to focus on the big picture, not just the few who are paying for expedited treatment. This two-tier system comes as a detriment to the applicants who do not have the financial means to pay an attorney to certify their application.

Reaction To The Industry Submissions

Palillo Affirmation. Mr. Palillo is, indeed, one of our longest-serving industry lawyers and I do not dispute that he was on the scene when the current version of the Program began, but his contentions about the intention behind self-certification is hard to credit. He states:

> [T]he Agency was trying to get honest and truthful applications filed. At no time was self certification designed to produce the

> "perfect application"; it was designed to provide a truthful application. . . .
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> Over the years, self certification has morphed from being a truthful application to a "perfect" application. Perfect applications are very rare, as each case presents its own unique issues based upon questions of financing, physical elements and applicant history.

See Palillo Affirmation of 10/7/21.

I was not at the SLA when the Program was initiated, but this interpretation cannot be reconciled with the Program's design. The Program anticipated substituting attorney review for Licensing Examiner review. The attorneys were warned that they could be *prosecuted for perjury* if they provided inaccurate information in the self-certification for a reason. The SLA was counting on lawyers to make sure the applications were complete and ready to be acted upon. Secretary to the Authority Tom Donohue, who was involved in the establishment of the Program, has confirmed that his recollection was that self-certified applications were anticipated to have no deficiencies. Indeed, if that were not the case, how could the Licensing Bureau abandon its review of the self-certified portions of the application?

Mr. Palillo generalizes something that is not that general. Attorneys self-certify, for example, that all documents required for an application have been delivered to the SLA. Either all the documents have actually been included, or the application is deficient. The SLA cannot eliminate checking that item without relying on the accuracy of the certification.

If attorneys believe they only have to be "honest," and not careful and diligent enough to ensure accuracy, the Program cannot work. Dishonesty is one of several reasons an attorney gets it wrong. Application errors are more likely due to negligence, carelessness, laziness, or even incompetence. Indeed, we have examples of applications, self-certified by experienced and knowledgeable attorneys like Mr. Palillo, that we have had to remove from the Program because important documents have not been included in the application, or other blatant deficiencies have been "certified."[1]

In any event, the reasons why self-certified applications may have deficiencies are not material to whether the Program can operate successfully. Either the self-certified applications are accurate enough to not have to be reviewed by the Licensing Bureau, or they do have to be reviewed. If there tend to be too many errors in self-certified applications, the SLA cannot rely on them without conducting its own review, regardless of the reason the errors arise, and the Program fails.

NYC Hospitality Alliance Comments. Attorneys Robert and Max Bookman have presented a lengthy submission on behalf of the NYC Hospitality Alliance. They state that the Alliance "strongly supports the program and urges the Members to continue it." Their submission is largely an argument about lengthy processing times and the need to address them.

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[1] While I am not an attorney, it is hard for me to understand why the SLA would need to create a Program to ensure that attorneys filed "truthful" or "honest" applications. I would think that is already an ethical requirement for attorneys who are retained by applicants to file *any* application.

No one disputes that lengthy processing times are an issue. The question before the Members is whether the Program, which provides some level of expediting for a small portion of the applications the SLA receives, is effective in addressing that issue.

The Alliance's submission, however, fails to address the Program's effectiveness or its fairness to Alliance members who do not use it. The submission acknowledges the existence of the problem of bad self-certified applications (page 5 of 6), but does not address the unfairness to Alliance members who pay attorneys to self-certify, but do not get an expedited approval because the application is presented with deficiencies. Given the percentage of applications that are in the Program (~10%) versus those that are not, and the percentage of self-certified applications that are delayed by deficiencies, I would have to think that the Alliance's membership is overwhelmingly in the group that is either not helped by, or actually hurt by, the Program.[2]

The Alliance acknowledges that the Program has problems and concludes that they can be fixed by auditing and stricter enforcement of problematic applications with "major deficiencies." That suggestion fails to address the Program's impact on the industry as a whole. It says nothing about the fairness of a two-tier system, nor about the resources that would be required to create this stricter enforcement. Nor does it explain why such resources should be taken away from the review of new, non-certified applications.

Respectfully, auditing and removal of attorneys from the program is not a real solution to the problem of the increasing wait times for applicants. Dedicating personnel to making sure that there are fewer errors in less than 10% of the SLA's license applications and taking them away from reviewing the other 90% makes little sense. Furthermore, this recommendation does not contemplate the other functions the Licensing Bureau is responsible for and is assuming the Licensing Bureau has unlimited resources to dedicate to such a process.

Conclusion/Recommendation

The Program appears to have begun as a compromise to deal with an emergency – pass through self-certified applications without looking at them closely to get rid of a backlog. The thought at that time appears to have been that the creation of two tiers of applicants was worth the inherent unfairness of such a program to solve a then-existing problem. The hope was that the issues created by passing through a lot of unreviewed applications could be minimized by having talented and careful lawyers do this work in place of SLA examiners.

It is unclear to me, from the records we have, whether anyone ever considered the long-term implications of institutionalizing this kind of compromise as a permanent one. Also, having spent years reviewing the work of the SLA industry lawyers and representatives, based on what I have seen, the Program overestimated the capability of the large group of lawyers who regularly practice before the SLA. Perhaps some can be trusted to consistently meet the

[2] The Alliance's submission is presented solely by attorney representatives who profit from the Program's existence. In fairness to the Bookmans specifically, they are amongst the attorneys who regularly submit self-certified applications without deficiencies. They also may be unaware of how many deficiencies we see in other certified applications. But their inherent bias, and the absence of a discussion of how the Program's problems affect Alliance members, undermines their support for the Program.

obligation of replacing the review function of our Licensing Examiners. But few are careful or knowledgeable enough to consistently meet the requirements of presenting applications without deficiencies. That is why we have so many deficiencies in self-certified applications: per the comparison Amy Male just performed, two-thirds of self-certified applications are not ready for a licensing determination.

I do not believe there is a sensible way to fix the Program either. I cannot see how the Licensing Bureau could ever reach a comfort level that self-certified applications are accurate enough to substitute for the SLA's duty to prevent incomplete and/or inaccurate applications from being approved. And the percentage of self-certified applications is too small to warrant devoting the resources necessary to institute an effective audit and administrative process to weed out bad attorneys. The only people that benefit from the Program are (a) a very small percentage of applicants who get their applications approved one month earlier (at best), because they have the means to pay an attorney, and (b) the industry attorneys who collect additional fees for their work.

In summary, the Program facilitates a two-tier system that creates a disadvantage for applicants that cannot afford to pay an attorney to self-certify their application. Furthermore, from my experience, there are not enough applications submitted through the self-certification Program that lack deficiencies that could allow the Licensing Bureau to avoid reviewing applications in the manner we review non-certified applications. Based on the above, I recommend to the Members that the Program be eliminated. The minor benefits of the Program are only recognized by a small percentage of our applicants and come at the expense of the larger population.